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OF THE

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OF

N A T U R E

AND

N A T I O N S.

Eight BOOKS. 25

Written in **L A T I N** by the Baron **P U F E N D O R F**,
Counsellor of State to his late *Swedish* Maje-
sty, and to the late King of *Prussia*.

Done into **E N G L I S H** by *BASIL KENNETT*, D. D.
late President of *Corpus Christi* College in *Oxford*.

To which are added

All the large **N O T E S** of Mr. **BARBEYRAC**,
Translated from the best **E D I T I O N**;
Together with Large **T A B L E S** to the Whole.

The **F O U R T H E D I T I O N**, carefully Corrected.

To which is now prefixed

Mr. BARBEYRAC's Prefatory **D I S C O U R S E**,
C O N T A I N I N G
An Historical and Critical Account of the **S C I E N C E** of
M O R A L I T Y, and the Progress it has made in the World, from the
earliest Times down to the Publication of this Work.

Done into **E N G L I S H** by Mr. *CAREW* of *Lincoln's-Inn*.

L O N D O N: 25-1

Printed for **J. WALTHOE**, **R. WILKIN**, **J. and J. BONWICKE**, **S. BIRT**,
T. WARD, and **T. OSBORNE**.

M D C C X X I X.

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To the Right Honourable

Sir Nathan Wright, Knight,

L O R D - K E E P E R

O F T H E

G R E A T S E A L o f *ENGLAND*,

One of the L O R D S of Her M A J E S T Y ' s m o s t
Honourable P R I V Y - C O U N C I L , & c .

MY LORD,



H E Author and Subject, here presented to your Lordship, have in themselves, the best of Claims to so great a Protection : For, neither can he, whose known Capacity, Industry, and Integrity, rendered him the Ornament of his own Profession, and of his Prince's Council, apply himself with more Success, than to one, who has risen, by the same Steps, to a nobler Eminence of Honour and

The Epistle Dedicatory.

Employment; nor ought any other, than the Guardian and Dispenser of publick Equity, to be acknowledged as the Patron of the *Law of Nature and Nations*. But the Ambition of this Address was alike needful, in Respect of all the Translators; as an Occasion of acknowledging the Influence which they feel from your Lordship's Authority, with Regard both to their Function and their Studies: Your Lordship esteeming it no less worthy a Part of your Character and Office, to support the most primitive Church, and the most regular Universities; than to preside over the Justice of the wisest State, or to direct the Policy of the happiest Reign.

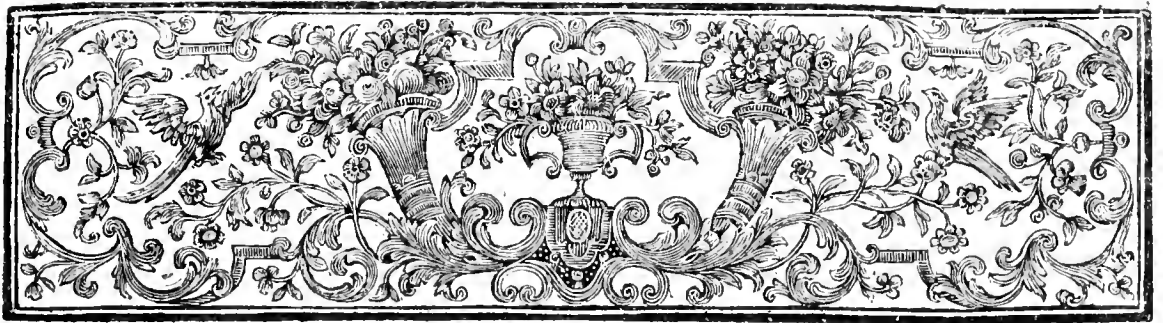
I am,

With all Duty and Respect,

Your Lordship's most obliged

Humble Servant,

BASIL KENNETT.



T H E
P R E F A C E.



*I*t is a Dilemma frequently urged against Versions of this Kind, that when a Subject lies remote from vulgar Consideration, Persons of Learning will pursue the Knowledge of it in the learned Languages, whilst others must remain equally Strangers to it in all, which yet abates proportionably of its Force, according as either the original Performance has been less fortunate in Stile; or as the Improvements of a modern Tongue have been able to extend themselves to the abstrusest Reasonings, and to speak even of Philosophy with the Advantages of Eloquence. As there is a Concurrence of these two Conditions, to justify the present Attempt; so the second of them, which, through personal Inability, may have been impaired, seems yet to be recompensed, by a peculiar Weight and Prevalency in the first. For the Commendation of our Author's Judgment hath scarce been more universal, than the Censure of his Composition; which though, by all, acknowledged to be expressive, yet to most appears so difficult and discouraging, that they sometimes fancy the Sense to have broken its Way through the Phrase, and to have left these Irregularities, as the Tokens of its Violence. It is true, he has not failed in the very Entrance of his Work, to apologize for this Defect of Ornament; but the Plea he offers is, what may better excuse the necessary Roughness of a Subject, than the particular Unhappiness of a Writer. Another visible Disadvantage there was, which called for Relief. Our Author having published the first Draught of this great Undertaking in the Year MDCLX, with the Title of *Elementa Jurisprudentiæ*, having also employed the Labour and Collections of twelve Years, in bringing it to its present Method and Name, was not content to have drawn together all Assistances, which were of direct and immediate Use, from the Stores of Morality, Politicks, and Law; but engaged himself in a longer and wider Search, running through the whole Circle of philological Authors, antient and mo-

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modern, and disposing, under the Heads of his Work, the most remote Examples, and Illustrations. Hence every Page came to be loaded, not only with numerous Citations at large, but with disorderly Marks of Addition, Reference, Comparison, and the like: As if the Confusion of a swelling Margin had run over, and discharged it self upon the Text. Thus the Periods were frequently disjointed, the Argument interrupted, or obscured, and the greatest Part of the main Body thrown into the disagreeable Figure of a Common-place.

Some Endeavours have been here applied towards the lessening of both these Imperfections. In Respect of Stile, it is hoped, that the Metal, how rude soever and incapable of being polished to exact Beauty, yet after a second melting, may appear less deformed, and may pass into more general Use: But it is beyond Doubt, that the other Inequality has been farther rectified, by our casting under the Page the needless and misshapen Mass of foreign Supplies; which it might have been no unpardonable Boldness utterly to have pared away; but that we ought to be cautious of practising upon an Author, and to take Care, lest by cutting off an Excreescency, we should endanger the Life of a Design.

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

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An Historical and Critical

A C C O U N T

O F T H E

SCIENCE of MORALITY,

And the PROGRESS it has made in the World, from the
earliest Times down to the Publication of

P U F E N D O R F

O F T H E

Law of Nature and Nations:

In a PREFATORY DISCOURSE to the said Work, by

Mr. *BARBEYRAC*, Professor in Law, &c.

Now done into English from the French of the AUTHOR;
Together with the Authorities and Notes in the Margin,

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The Reader is desir'd to make the Corrections following.

PAG. 5, Col. 2, Lin. 31, Precepts of Morality, *r.* the Precepts of &c.

P. 6, col. 1, l. 1, difficult to be rightly constituted; *r.* hard to fettle,

Ibid. col. 2, l. 52, 53, sometimes interfere; and Charity and Justice be often found &c. *r.* often interfere; and Charity and Justice be found &c.

P. 7, col. 2, l. 4, *à fine*, or great Inconvenience, *r.* or Inconvenience

Ibid. col. 2, l. 46, permitted, *r.* allowable

P. 8, col. 1, l. 21, do not proceed, *r.* proceed not

Ibid. col. 1, l. 47, Services, not hurtful to himself, that he can do him, *r.* Services, that he can without prejudice do him.

Ibid. col. 2, l. 8, are not yet born, *r.* are yet unborn?

Ibid. l. 16, not perhaps be very difficult, *r.* perhaps be not very &c.

P. 10, col. 1, l. 43, 44, purpose to answer &c. *r.* propos'd to answer briefly,

Ibid. col. 2, l. 14, *à fine*, Reason. *r.* Reason?

P. 11, col. 1, l. 13, them. *r.* them?

Ibid. col. 1, l. 17, carry'd on beyond, *r.* carry'd far beyond

Ibid. col. 2, l. 5, philosophizing, *r.* philosophizing;

Ibid. col. 2, l. 12, &c. Reasons which he alledges, — a little — cannot refuse to — them. *r.* Reasons he alledges, — the least — cannot but — their cogency.

Ibid. col. 2, l. 19, to confirm themselves, *r.* to be confirm'd
Ibid. l. 9, 10, *à fine*, chiefly maintain &c. *r.* pertinaciously insist upon &c.

P. 12, col. 2, l. 4, Profit, *r.* Benefit

P. 13, col. 1, l. 44, whereas, *r.* nay

Ibid. col. 2, l. 41, confus'd, *r.* confus'd,

P. 14, col. 1, l. 1, writing, *r.* writings

Ibid. col. 1, l. 9, 10, *à fine*, as well — as &c. *r.* both — and &c.

Ibid. col. 2, l. 10, *à fine*, *r.* Obligation, and Right,

P. 15, col. 2, l. 8, *à fine*, abuse; *r.* abuse, &c.

P. 16, col. 1, l. 6, worship; *r.* worship,

P. 17, Not. k, Idolatry, *r.* Idolatry, c. 10, S. 1, 2.

P. 19, col. 2, l. 30, guilty; *r.* guilty:

P. 20, l. 16, *à fine*, come short *r.* fail

P. 25, col. 2, l. 44, some time, *r.* sometimes

P. 26, col. 1, l. 3, *r.* Accounts, cou'd *Ibid.* col. 2, l. 10, *r.* Opinion

P. 27, col. 1, l. 8, it self. In vain, *r.* it self: in vain

Ibid. l. 11, Reflections. In vain *r.* Reflections: in vain

Ibid. l. 29, to such, as have no better to make use of; having &c. *r.* to such, as have no better; having &c.

P. 39, col. 2, l. 37, 38, to do with a Whore, *r.* Commerce with a Courtezan,

P. 46, col. 1, Sect. 17, l. 7, Lacedemon, *r.* Lacedemon.

P. 50, col. 2, l. 3, which proceeded no farther than, *r.* which proceeded not beyond

Ibid. col. 2, l. 7, 8, a Spirit of Diffidence, *r.* a Spirit of Scepticism and Suspence

Ibid. col. 2, l. 11, 12, was good, *r.* was a real Good, and *dele*, or.

P. 52, col. 1, l. 13, does, I may say, *r.* does, as I may say,

P. 53, col. 2, l. 15, always shunn'd it, *r.* ever shunn'd it,

P. 55, col. 1, l. 25, Right; *r.* Law,

P. 57, col. 1, l. 1, Scholar, *r.* Disciple

Ibid. l. 13, *r.* a spice of &c.

P. 58, col. 1, l. 9, *à fine*, Cases always *r.* Cases wou'd always

P. 66, col. 2, l. 30, incertainty. *r.* uncertainty,

P. 68, col. 2, l. 8, 9, 10, will still nevertheless be &c. *r.* will still be never a jot the less an Atheist for all that; as long as it appears, that &c.

Ibid. col. 2, l. 27, Character, *r.* Name

P. 69, col. 2, l. 27, 28, his Reason he us'd; *r.* the Reason he us'd,

Ibid. col. 2, l. 35, *dele* too

P. 72, col. 1, l. 13, defac'd; *r.* disfigur'd

Ibid. col. 2, l. *à fine* 4, Profit, *r.* Interest

P. 74, col. 1, l. 1, devested of *r.* Itripp'd of

Ibid. col. 2, l. 34, examine, *r.* examine at present,

P. 75, col. 1, l. 9, concise and rough Stile; *r.* concise and difficult Stile,

Ibid. col. 1, l. from the bottom 5, form'd; *r.* cull'd

Ibid. col. 2, l. ult. We there also find some Decisions; *r.* We find also some of his Decisions &c.

P. 76, col. 1, l. 15, the Usefulness of Religion in Civil Societies; *r.* the Importance of Religion to Civil Society.

Ibid. l. 24, approve of them; *r.* concur with him;

Ibid. l. 47, that are most useful to my design; *r.* that best fit my turn,

Ibid. col. 2, l. 13, begin first with that; *r.* begin with that first,

Ibid. l. 20, Argumentation, *r.* Argumentations

Ibid. l. 22, Heart of doubt; *r.* Heart of the Doubt;

Ibid. l. 24, 25, Schools, the Bar, or the Pulpit; *r.* Schools and the Bar: or for the Pulpit, where &c.

Ibid. col. 2, l. 27, It is; *r.* It may be

P. 86, col. 1, l. 7, 8, *a fine* &c. Attention, that we ought to have for, *r.* Attention, we are to bestow &c.

P. 87, col. 1, l. 12, faculty of &c. *r.* Faculty too of &c.

Ibid. l. 8, *à fine*, Habits and Customs &c. *r.* Habit and Custom



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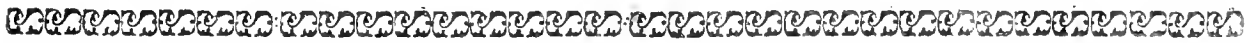
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An Historical and Critical
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S E C T. I.



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

And really, none can reasonably doubt, but that every Man, who will be happy, must needs, in order to make himself so, regulate his Conduct after some certain manner; and that God, as Author and Parent of all human Race, does pre-

scribe to all Men, without exception, the Duties, which tend to procure them that Happiness, which they so passionately seek after. Now from hence it necessarily follows, that the natural Principles of this Science, are such as may be easily discover'd; and such too, as are proportionate to the Capacities of all sort of Persons: So that to be instructed in this Science, there will be no occasion to mount up to Heaven; or to have from thence any extraordinary Revelation for that purpose. An antient Doctor of the Church has made use ^d of this Reason, to shew the Injustice and Vanity of the greatest Part of the Heathen Philosophers; who pretended that Philosophy, without excepting the noblest Part of it, even that which concerns Morality; was not but for the small Number of those, who were the initiated, and profess'd Disciples thereof: And it must be own'd, to the Eternal Glory of the Supreme Legislator of Mankind; as well as to the utter Confusion of themselves; that none can com-

^a See *The Art of Thinking*, Discourse I, p. 2-. Edit. *Amsterd.* 1685, and 1697.
^b I mean by this, and the Term *Morality*, not only what is commonly so call'd; but also *The Law of Nature, and Politicks*: In a word, all that it is necessary for the Conduct of a Man's Self, according to his Estate and Condition.
^c *Hoc opus, hoc studium parvi properemus, & ampli, Si patrie volumus, si nobis vivere cari.* Hor. lib. 1. Epist. 3, 28, 29.
 ---- *Id, quod æquè pauperibus prodest, locupletibus æquè; Æquè neglectum pueris senibusque nocebit.* Idem ibid. Epist. 1, 24, & seq.
^d *Non est ergo sapientia, si ab hominum cætu abhorret: quoniam, si sapientia homini data est, sine ullo discrimine omnibus data est; ut nemo sit profusus, qui eam capere non possit. At illi [Philosophi] virtutem humano generi data sic amplexantur, ut sibi omnium publico bono frui velle videantur; tam invidi, quam si velint deligare oculos, aut effodere cæteris, ut solem videant --- Quod si natura hominis sapientie capax est; oportuit opifices, & rusticos, & mulieres, & omnes denique qui humanam formam gerunt doceri, ut sapiant; populumque ex omni lingua, & conditione, & sexu, & ætate constari. Maximam itaque argumentari et, Philosophiam neque ad sapientiam tendere, neque ipsam esse sapientiam; quod mysterium ejus larva tantum celebratur & palis Lactant. Instit. Divin. Lib. 3, c. 25, Num. 2—6. Edit. Cellar.*

plain, without Injustice, that God has given him Laws, either impracticable; or environ'd with such Obscurity, as cannot be penetrated by one who really has his Duty at heart; notwithstanding all his Pains and Application. This the wisest Heathens have acknowledg'd; nor will it be improper here to produce their Testimonies; to confound those, who, under Christianity itself, seem to call in question so incontestable a Truth. The *Stoicks*, who made Morality their principal Study, maintain'd, that their Philosophy was not above the Reach of ° Women and Slaves; and that, as the way to Virtue lies open to all Men without Distinction; † so there is no Estate or Condition with peculiar Privileges exclusive of others, as to the Faculty of knowing the Principles and Rules, as well of those Duties which are common to all; as of those which belong to each Particular. *Is it so*, (said an Emperour and Philosopher of the same Sect) *that you cannot recommend yourself, and raise a Character by the Delicacy of your Wit, and the Fineness of your Understanding? Very well. But there are many other Things, as to any of which you cannot say, I am not fit for it. Put in practice them, and shew forth what does entirely depend on yourself; Sincerity, Gravity, Humanity, Laboriousness and Industry, Contempt of Voluptuousness. Be content with thy Condition; stand in need but of a little; avoid Luxury, trifling Amusements, and vain Discourses. Have a Soul judicious, free, and great. Don't you see, that, being able to raise yourself by so many Virtues, without having any pretence on the Account of natural Incapacity; you still continue in the Mire, only because you will? Ever bear in mind, that all the Happiness of this Life depends on but very few Things. Because you despair of being eminent in Logic, or Natural Philosophy; will you give over all Thoughts of being free, sociable, and submissive to the Orders of God?* Another Roman Philosopher, most illustriously eminent on account of his Eloquence and Employ in the Government, had said long before, (being to confirm this Proposition; That a good Man will never think that useful or profitable, that is not honest; and that he will never do, or even think of doing any thing, that he dares not boldly discover to all the World:) *Is it not*

*a shame for Philosophers to doubt of a Truth, of which even Peasants make no doubt? Witness that Saying, which is commonly made use of, when we describe a Man of Integrity; That he is a Man, with whom one may play * at Mora in the dark: For 'twas the Peasants who invented that old Proverb.*

But tho' none had ever yet discover'd in the Principles and Rules of Morality, so high a Degree of Evidence, and that they are so duly adjusted to all Capacities; one might still appeal in this Matter to the very Nature of the Thing itself; and in some measure to Experience. We have here no Business to dive down into the impenetrable Secrets of Nature, to discover those imperceptible Springs, that produce in the World so many Phænomena, and such variety of wonderful Events; to measure the Magnitude and Distance of the Stars; to rake up the Entrails of the Earth, and dig down to its very Center; † no more have we here any occasion to bury ourselves in metaphysical Speculations; to turn over a vast Number of Volumes; to learn several Languages; to pierce thro' the Darkness of remote Antiquity; in a word, to be very learned: We shall scarce have occasion to carry our Thoughts beyond ourselves, or consult any other Master besides our own Heart. The most common † Experience of Life; and a little Reflection on ourselves, and the Objects that surround us on every Side; are sufficient to furnish even the most ordinary Capacities with general Ideas of the Law of Nature; and the true Grounds of all our moral Duties. Who does but ever so little examine his own Nature; and contemplate that wonderful Order of the Universe, which on all sides presents itself to the View of every one capable of any Degree of Reflection; will immediately be rais'd to the Knowledge of that Almighty, All-wise, and All-good Creator, in whom we ^k live, and move, and have our Being; to whom too, he will find he owes Homage with all the rest of the Universe. Whence it is easy to conclude, that we ought to have the highest Idea of this Supreme Being, that our Minds are capable of receiving; and to obey his Laws, as far as we can attain to the Knowledge of them. After this, there will be no great need of much Penetration, to perceive how

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

† *Non omnes curia admittit: castra quoque, quos ad laborem & periculum recipiunt, fastidiose legunt: Bona mens omnibus patet: omnes ad hoc sumus nobiles. Nec rejicit quemquam Philosophia, nec eligit: omnibus licet. Senec. Epist. 44. Nulli præclusa virtus est; omnibus patet, omnes admittit, omnes incitat, ingenios, libertinos, servos, reges, & exules. Non eligit domum, nec censuram; nudo homine contenta est. Idem, de Benefic. l. 3, c. 18. Cicero also says, that there is not any Person, of what Nation soever he be, but may arrive at Virtue, provided he will take Nature for his Guide. *Nec est quisquam gentis ullius, qui, ducem naturam natius, ad virtutem pervenire non possit. De Leg. l. 1, c. 10.**

‡ *Δειμύπτητά σε ἐκ ἔχρησι δουμάσαι; ἔσω ἀλλὰ ἔπειρα πολλά, ἐφ' ὧν οὐκ ἔχεις εἰπεῖν, ἐγὼ πέφυκα. Ἐκείνα ἐν παρέχεσθαι, ἀπὲρ ὅλα ἐστὶ ἐν σοι, τὸ ἀκρίβειον, τὸ σμυδνὸν, τὸ σερέπνον, τὸ ἀφιλόδιον, τὸ ἀμυψίμοισον, τὸ ὀλιγοδέες, τὸ εὐμενές, τὸ ἐγὼδεον, τὸ ἀπείροισι, τὸ ἀρλί'αρον, τὸ μεγαλείον. Οὐκ αἰδανίει, πῶσα ἡδὴ παρέχεσθαι δυνάμει, ἐφ' ὧν οὐδὲ μία ἀφούται, καὶ ἀνεπιδοσιπτήτ' ἀφ' ὅρασι, ἕως ἐπ' ἅπαντα μένεις ἰκλῶν, Marc. Antonin. l. 5, c. 5. Καὶ ἐπ' ἐκείναι (μὲνισσὸ ἀεί), ὅτι ἐν ἐλιγίσταις καὶ τῶν ἐν δυνάμει σιωπῶν καὶ μὴ ὅτι ἀπὴλποισ Διαιλεπκὸς καὶ Φυσικὸς ἔσεται, διὰ τοῦτο ἀπογνώστ' καὶ ἐλθ' ἔσεται, καὶ αἰδύμων, καὶ κενανικὸς, καὶ εὐπειθὲς Θεῶ. Idem, Lib. 7, Sect. 67. Edit. Gataker.*

§ *Hæc nonne est turpe dubitare Philosophos, quæ ne rustici quidem dubitent? A quibus natum est id, quod jam tritum est vetustate procerbum. cum enim fidem alicujus bonitatemque laudant; dignum esse dicunt, quicum in tenebris micet. Hoc quam habet vim, nisi illam, nihil expedire, quod non deceat; etiam si id possis, nullo resellente, obtinere? Cicero de Offic. l. 3, c. 19. See also Grotius, De J. B. ac Pacis, Prolegom. §. 39.*

* *Digitis Micare; to play at Mora; i. e. to guess on a sudden, how many Fingers the Person against whom one plays, holds up or down; by which Play the Antients bought and sold many Things; as we may by drawing Cuts; and Cross or Pile.*

† See *Lactant. Instit. l. 3, c. 25, Num. 9. & seq.*

‡ *Est profecto animi medicina, Philosophia; cujus auxilium non, ut in corporis morbis, petendum est foris. Cicero. Tuscul. Quest. l. 3, c. 3.*

§ *In illa priori parte [Philosophia naturali] ut periculi minus, [si quid fuerit erratum] ita plus difficultatis est; quod obicura rerum ratio cogit diversa, & varia sentire; hic [in philosophia morali] ut periculi plus, ita minus difficultatis; quod ipsi ipsius rerum, & quotidiana experimenta possunt docere, quid sit verius, & melius. Lactant. Instit. Divin. l. 2, c. 7, Num. 4. Edit. Cellar.*

^k *A. 77, xvii, 28.*

God has, by a natural Result from the Constitution of Human Affairs, put us under a Necessity of practising, one towards another, certain Duties, without which Society cou'd not be maintain'd; and how he has thereby laid upon us an indispensable Obligation to observe those Duties; every one according to his State and Vocation. This is certain at least, that no sooner are those Principles propos'd, but that every one becomes sensible of their Goodness, and finds himself clearly convinc'd of their Truth; provided he be not the Slave of some violent Passion, that darkens and clouds his Judgment; or that there be not some other Obstacle to hinder and divert his Attention. Let us here add the Testimony of a Heathen Philosopher; 'tis the celebrated *Confucius* of *China*¹. *The Rule of Reason*, says he, *which comprehends the reciprocal Duties of a King and his Subjects; a Father and Mother, and their Children; of Husband and Wife; of the young Folks, and the Aged; of Friends, and all who have any Correspondence or Intercourse with one another, is not above the reach of the Vulgar. Whereas the Maxims which certain People have themselves invented, or which they wou'd have pass for sublime, and above our Comprehension; such as are certain strange and abstruse Principles, and which have no Relation to those five sorts of Persons before-mention'd; cannot be at all reckon'd among the Rules of Reason.* Thus this wise *Chinêsé* expresses himself, being to explain a Maxim, which he is endeavouring to set in its full Light, in order to prove, that 'tis easy for all the World to be virtuous; 'tis the same Maxim which the Gospel so much inculcates: *Do not that to others, which you wou'd not have done to yourself.* And in very deed, there needs no more, to be convinc'd that the most ignorant are by Reason persuaded of the Necessity of the general Duties of the Law of Nature; than^m either to ask 'em if they wou'd be willing any one shou'd do themselves the Hurt which they do others; or to actually do it: For they will then immediately make it appear, either by their Answer; or by their Complaints and

Actions, that they look on such Practices to be evil*; and that they understand very well, that they are forbid them, not purely thro' Caprice, or a mistaken Notion of Justice and publick Good; but for most strong and equitable Reasons. Every one will complain, if he is slander'd, or robb'd, or ill treated in his own, or in the Person of those who are dear to him; or in any other manner whatsoever: The most stupid have then understanding enough to represent lively in their way, the Greatness of the Injustice; and the Punishment due to the Offender. Therefore, when they themselves commit any thing of the like Nature against others, it is doing them no wrong to condemn them by their own Judgment; and to look on their Ignorance, in which they may pretend to have been on that Head, as altogether inexcusable. But what is much more considerable, they can, not only comprehend and discover with little trouble the Fundamental Principles of Morality; but besides, wou'd they but use their utmost Endeavours to augment their small Stock of Knowledge; they might, without much Difficulty, draw from thence certain Consequences, and extend their Knowledge to a Competency considerable enough; at least sufficient for their Condition. Instances too of this kind we often meet with in some of this sort of People; who plainly shew, both by their Discourse and by their Conduct; that they are neither short, nor wrong in their Ideas concerning Morality; altho' they may not be always able to explain fully, or to express clearly the Whole of what they think. *The Conduct and Intentions of Peasants*,ⁿ says *Montagne*, *I have generally observ'd to be more agreeable to the Prescription of true Philosophy, than those of our Philosophers themselves.* *Vulgus interdum*^o *plus sapit; quia tantum, quantum opus est, sapit.* This was probably the Sentiment of an antient Philosopher,^p when he said; That many People without having their Reason improv'd by Study, live nevertheless in a manner conformable to the Dictates of right Reason.

¹ *Biblioth. Univers.* Tom. VII. p. 426., 427. In the Extract of Father Couplet's *Confucius*.

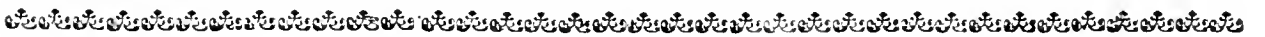
^m See the *Parrhasiana*, Tom. II. p. 89. *Ép. seq.*

* In the *Euthyphro* of *Plato*, *Socrates* says, That no one so much as questions whether he, who has kill'd another wrongfully, or committed any other Injustice, deserves to be punish'd for it; but what they dispute upon, is the particular Circumstances; when the Question is, for example, to know who it is that has committed the Injustice, and what he has done, and when he became guilty of it, *Ἐπεὶ Ἀνθρώπων --- ἢ δὴ πῶς ἢ πῶς ἀμείβεσθαι τῷ ὄντι ὡς τὸν ἀδίκον ἀποκτείναντα, ἢ ἄλλο ἀδίκως ποιοῦντα ὄντων, ἐν δὲ εἰς εἰδόμενα δίκην --- ἀλλ' ἐκείνο ἴσως ἀμείβεσθαι, τὸ τίς ἐστὶν ὁ ἀδικῶν, καὶ πῶς ὄντι, καὶ πότε,* p. 8. B., C., D., Tom. I, *Edit. Serran.* And p. 50. F., G., *Edit. Læmar.*

ⁿ *Essays*, Lib. 2. c. 17, towards the End, p. 115., *Ed. 1727.*

^o *Lactant. Inst. Divin. Lib. 3. c. 5. Num. 4. Edit. Cellar.*

^p Π.λλ.αι λ.δ.ρ.ον μὴ μα.δ.όν.τες, ζ.ώ.σι κ.ε.π.ά. λ.δ.ρ.ον, *Democrates*, in *Opusc. Mytholog. Ἑ. c.* Amst. 1688. p. 627.



S E C T. II.

IF Persons of the lowest Rank can arrive at such a Pitch of Knowledge in Morality; it is much more to be expected that those, who have greater Talents, and more Penetration, with greater external Helps, and more especially Men of Learning; should be able to acquire to themselves in this Science, and that too in a much more distinct manner, all the Light and Knowledge any way requisite for the Conduct of Life: Nay I dare even venture to affirm, were the natural

Principles of Morality, with due Application, closely purſu'd, Step by Step as far as they wou'd carry us; that all the moral Duties of Man, in every Station of Life, might from thence be easily deduc'd, by a Train of Consequences connected one with the other, in a Method strictly demonstrative: It appears to me very improbable, * that our Creator, having given us Faculties sufficient to discover and demonstrate with entire Certainty abundance of speculative

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

Things, of which we may without a Fault be ignorant; principally, that vast Number of mathematical Truths, which have been acknowledged to be incontestable, by all who have been able to comprehend their Proofs and Principles: It is I say improbable and incongruous to suppose, that the same Creator has not also made us capable of knowing, and establishing with the same Evidence, the Maxims of Morality; in which are contain'd those Duties he indispensably requires of us; and on the Practice whereof all our Happiness depends. But, besides this Reason, which the Goodness of God will not permit us to doubt of; there is still another drawn from the Nature of the Thing itself; and which alone wou'd be of Force enough to convince any reasonable Person, of the Possibility of reducing the Science of Morality to a System, as well connected, as those of *Geometry*, for example, or *Mechanicks*; and founded on as certain Principles. It is no Part of the Business in Morality to know the *real Essence* of *Substances*; which is what has been hitherto attempted without Success, and in all probability will never be brought about; as a great † Philosopher of this Age has made appear: All that is requir'd here, is only to examine and compare with Care and Diligence certain *Relations*, which we conceive between *human Actions* and a certain *Rule*. Let us hear what Mr. *Locke* himself says on this Occasion^a, “I doubt not, says he, but from self-evident Propositions, by necessary Consequences, as incontestable as those in Mathematicks, the Measures of Right and Wrong might be made out, to any one who will apply himself with the same Indifferency and Attention to the one, as he does to the other, of these Sciences. The *Relation* of other *Modes* may certainly be perceived, as well as those of Number and Extension: And I cannot see; why they shou'd not also be capable of Demonstration, if due Methods were thought on to examine, or pursue their Agreement or Disagreement. *Where there is no^b Property, there is no Injustice*, is a Proposition as certain as any Demonstration in *Euclid*: for the *Idea* of *Property* being a Right to any thing; and the *Idea* to which the Name *Injustice* is given, being the Invasion or Violation of that Right; it is evident, that these *Ideas* being thus establish'd, and these Names annex'd to them, I can as certainly know this Proposition to be true, as that a Triangle has three Angles equal to two right ones. Again, *No Government allows absolute Liberty*: The *Idea* of Government being the Establishment of Society upon certain Rules or Laws, which require Conformity to them; and the *Idea* of absolute Liberty being for any one to do whatever he pleases; I am as capable of being certain of the Truth of this Proposition, as of any in Mathematicks. — The precise real Essence of the Things, moral Words

stand for, may (says the same Author^c elsewhere) be perfectly known; and so the Congruity, or Incongruity of the Things themselves, be certainly discover'd, in which consists perfect Knowledge. Nor let any one object, that the Names of Substances are often to be made use of in Morality, as well as those of Modes, from which will arise Obscurity. For as to Substances, when concern'd in moral Discourses, their divers Natures are not so much enquired into, as supposed; *v. g.* When we say, *That Man is subject to Law*: we mean nothing by *Man*, but a corporeal rational Creature: what the real Essence or other Qualities of that Creature are in this Case, is no way consider'd. And therefore, whether a Child or a Changeling be a *Man* in a physical Sense, may amongst the Naturalists be as disputable as it will, it concerns not at all the *moral Man*, as I may call him, which is this immoveable unchangeable *Idea*, of a corporeal rational Being: For were there a Monkey, or any other Creature to be found, that had the Use of Reason, to such a degree, as to be able to understand general Signs, and to deduce Consequences about general *Ideas*, he wou'd, no doubt, be subject to Law, and, in that Sense, be a *Man*, how much soever he differ'd in shape from others of that Name. The Names of Substances, if they be used in them, as they should, can no more disturb moral, than they do mathematical Discourses: where, if the Mathematician speaks of a *Cube* or *Globe* of *Gold*, or any other Body, he has his clear settled *Idea*, which varies not, altho' it may, by mistake, be apply'd to a particular Body, to which it belongs not. || The Negligence or Perverseness of Mankind, cannot be excused, if their Discourses in Morality be not much more clear, than those in natural Philosophy: since they are about *Ideas* in the Mind, which are none of them false or disproportionate; they having no external *Beings* for *Archetypes* which they are refer'd to, and must correspond with. It is far easier for Men to frame in their Minds an *Idea*, which shall be the Standard to which they will give the Name *Justice*, with which Pattern so made, all Actions that agree shall pass under that Denomination, than, having seen *Arifides*, to frame an *Idea*, that shall in all things be exactly like him, who is as he is, let Men make what *Idea* they please of him. For the one, they need but know the Combination of *Ideas*, that are put together within their own Minds; for the other, they must enquire into the whole Nature, and abstruse hidden Constitution, and various Qualities of a Thing existing without them. ---^d The Truth and Certainty of *moral* Discourses abstracts from the Lives of Men, and the Existence of those Virtues in the World, whereof they treat: Nor are *Tully's* Offices less true, because there

† Mr. *Locke*.

^a Essay on Human Understanding, by Mr. *Locke*, Book IV, Chap. 3, Sect. 18, p. 477, 478. Edit. Lond. 1706.

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

^c Book III. Chap. 11, Sect. 16, 17, p. 434, 435. Edit. 1706.

|| Pag. 435-

^d Lib. 4, Chap. 4, Sect. 8, 9, 10, p. 490, 491.

“ is no body in the World that exactly practises
 “ his Rules, and lives up to that Pattern of a
 “ virtuous Man, which he has given us, and
 “ which existed no where, when he writ, but in
 “ *Idea*. If it be true in Speculation, *i.e.* in *Idea*,
 “ That *Murder deserves Death*, it will also be
 “ true in reality of any Action that exists con-
 “ formable to that *Idea* of Murder. As for
 “ other Actions, the Truth of that Proposition
 “ concerns them not. --- * But it will be here
 “ said, that if *moral Knowledge* be placed in the
 “ Contemplation of our own *moral Ideas*, and
 “ those, as other Modes, be of our own making,
 “ what strange Notions will there be of *Justice*
 “ and *Temperance*? What Confusion of Virtues
 “ and Vices, if every one may make what *Ideas*
 “ of them he pleases? (To this Mr. *Locke* answers,)
 “ There will be no Confusion nor Disorder in
 “ the Things themselves, nor the Reasonings a-
 “ bout them; no more than (in Mathematicks)
 “ there wou’d be a Disturbance in the Demon-
 “ stration, or a Change in the Properties of Fi-
 “ gures, and their Relations one to another, if a
 “ Man should make a Triangle with four Cor-
 “ ners, or a *Trapezium* † with four Right Angles:
 “ that is, in plain *English*, change the Names of
 “ the Figures, and call that by one Name, which
 “ Mathematicians call ordinarily by another. --- I
 “ confess, the Change of the Name by the Im-
 “ propriety of Speech, will at first disturb him,
 “ who knows not what *Idea* it stands for: But
 “ as soon as the Figure is drawn, the Conse-
 “ quences, and Demonstrations are plain and clear.
 “ Just the same it is in *moral Knowledge*, let a
 “ Man have the *Idea* of taking from others, with-
 “ out their Consent, what their honest Industry
 “ has possess’d them of, and call this *Justice*, if
 “ he please. --- He that takes the Name here with-
 “ out the *Idea* put to it, will be mistaken, by
 “ joining another *Idea* of his own to that Name:

“ but strip the *Idea* of that Name, or take it
 “ such as it is in the Speaker’s Mind, and the
 “ same Things will agree to it, as if you call’d it
 “ *Injustice*. --- || Where God, or any other Law-
 “ maker, hath defined any moral Names, there
 “ they have made the Essence of that Species to
 “ which that Name belongs; and there it is not
 “ safe to apply or use them otherwise: but in
 “ other Cases ’tis bare Impropriety of Speech
 “ to apply them contrary to the common Usage
 “ of the Country. But yet even this too disturbs
 “ not the Certainty of that Knowledge, which
 “ is still to be had by a due Contemplation and
 “ comparing of those even nick-nam’d *Ideas*.”
 See how this great Philosopher reasons. Let us
 add here, that the Demonstrations of speculative
 Truths are much more compounded, and depend
 on a much greater Number of Principles, than
 the Demonstrations of the Rules of Morality. To
 be convinc’d of this, we need only compare the
Elements of Geometry, with a little methodical
 System of the Duties, which the Law of Nature
 prescribes to Men; and, at the same time, that
 we shall find what I have just now said, to be
 true; we shall also, in my opinion, be forc’d to
 acknowledge; that it is incomparably more easy
 to comprehend the Principles and Reasonings of
 the last mention’d Book; than the Theorems, Pro-
 blems, and Demonstrations of the former. In
 fact, as an antient Philosopher very justly remarks;
 ‘ *It is false to say, that Precepts of Morality are of
 so vast an Extent, as to make us despair of ever see-
 ing the end of them; those that concern the most ne-
 cessary and considerable Things, may be reduc’d to a
 certain Number: It is true, that the Circumstances
 of Time, Place, and Persons, create therein some
 Diversity; but that signifies but little, for we have
 even in those Cases general Maxims which are suffi-
 cient to direct our Judgments therein.*

* See. IX.

† *Trapezium*, or *Trapezoides* rather, is a Quadrilateral Figure, whose Sides and Angles both are unequal. See *Euclid. Element. Græc. & Lat. Edit. Paris 1573, Definit. 34, l. 1, p. 43.* & *Diction. Acad. Franc.*

|| See. X.

Such as is (for example) the little Treatise of *Pufendorf*, entitled, *The Duty of a Man, and of a Subject*; which is an Abridgment of the Work here translated.

Infinita, inquit, præcepta sunt. Falsum est. Nam de maximis ac necessariis rebus non sunt infinita: tenues autem differentias habent, quas exigunt tempora, loca, personæ. Sed his quoque dantur præcepta generalia. Seneca, *Epist. 94, p. 335.* Edit. Amst. 1658.

S E C T. III.

Notwithstanding all these Reflections, which it is very obvious to make; some have^a for a long time believ’d, and even at this day many do maintain, that Morality is a Science very uncertain; and wherein scarce any thing beyond Probabilities is to be found or expected: But it is not altogether for want of due Examination into the Nature of Things, that this false Notion has prevail’d. There has ever been an uninterrupted Succession of Men, who, seduc’d by a secret Desire to shake off the troublesome and importunate Yoke of Duty; and to indulge themselves securely in the Gratification, if not of their sensual and gross Desires, yet at least of their more delicate and refin’d Inclinations; have employ’d all

the Faculties of their Souls in extinguishing the Evidence of those Truths, which were the most clear, and the most generally acknowledg’d; in order to involve in their Ruin all certainty of the Rules of Virtue. My Design is not to dispute with these Men in form; and to refute Step by Step all their vain Subtilties. I shall content myself with saying here, in a few words, something to two Objections; on which they chiefly rely, and which seem most apt to amuse and deceive.

The first Objection is drawn from the Difficulty there is to decide some certain Questions in Morality; and reconcile too even some of its Principles. *Since the moral Law* (says^b a celebrated Author) *that concern the particular Duty of each*

^a See Mr. *Pufendorf*, *Lib. 1, Cap. 2, Sect. 1.*

^b *Montagne’s Essays, Book III, p. 398, in English. And p. 797. in the Paris Edit. in Fol. And Edit. 1727, lib. 3, c. 13, p. 478, 479.* Tom. IV.

Person singly, are so difficult to be rightly constituted, as we see they are; 'tis no wonder, if those, which are to direct so many Particulars, are much more so. Do but consider the Form of that Justice which governs us, 'tis the very Emblem of human Infirmity; so full is it of Error and Contradiction.

But 1st, Whosoever will but bestow some small Attention upon this Matter, will, I am confident, readily agree, that the Thing which generally causes these Perplexities, is Interest; which join'd with the Prejudices of Infancy, Education, or Custom, obscure the clearest Dictates of right Reason: of this we every day see numberless Instances. The greatest Part of Mankind are so much blinded with an excessive and mistaken Self-love, that all their Penetration and Discernment of Mind, seem entirely to forsake 'em, as soon as ever any one Matter comes in debate, the Decision whereof is attended with Loss or Gain. And yet they shall with ease, and without one false Step, go thro' with many other Things, a thousand times more difficult, which they examine coolly, and with a Mind wholly disinterested. This is very well express'd by the Philosopher *Hierocles*. *One sure Mark,** says he, *that right Reason is natural to Men, is, that the unjust Man, when he is acting in an Affair, that does no way touch his own Interest, judges exactly according to the Rules of Justice; and the Intemperate, according to those of Moderation and Temperance. In a word, vicious Persons of every sort, have just Ideas in Things, where they don't suffer themselves to be prepossess'd by Passion. And here we have the true Reason, why it is in the Power of a wicked Man to reform, and become virtuous; for he has no more to do, but to open his Eyes, and to condemn the Irregularity of his past Conduct; which he can't but be sensible of, if he acts with any Degree of Attention.* Thus this Greek Commentator on the *Golden Verses* of *Pythagoras* judiciously observes the Case to be. But yet it but too often happens, that, when there is even no violent Passion, or personal Interest, able to misguide the Judgment; Precipitation and Prepossession fail not to produce the very same Effects. A Man oftentimes becomes tenaciously fond of false or doubtful Principles, taken up without Examination or Reflection; and then 'tis no wonder, if he finds himself unable to reconcile these with the true; or to draw from 'em just and regular Consequences. How few do we find, who so much as think of ever calling in question certain Principles which they have early imbib'd; especially if they see 'em authoriz'd by the Opinions in vogue; or establish'd by the Law and Custom of the Country they live in? You will find several Authors, who push'd on either openly and avowedly, or unawares and insensibly, by meer Party-Animosity; have made it their sole Aim, while they were composing Treatises on certain Questions in ^c Morality or Politicks; to endeavour to find out, not what was most conformable to the invariable Rules of right Reason and Equity; but only what to them seem'd

most proper to justify the receiv'd Party-Notions; or the Pretensions and Maxims of the Sovereign, under whose Dominion they liv'd.

2^{dly}, Those who make such Objections as these, I am now examining; are generally such Persons, as, whatever Abilities and Penetration they may otherwise have, seem not to have study'd these Matters with sufficient Care, or with a sincere Affection for Truth; or else such, as maliciously take Advantage of even the smallest Errors or Mistakes, which they can find out in the Discourses or Works of such Authors, as have not, with just Attention and Care follow'd the natural Principles of this Science of Morality. And, in truth, 'tis but too often seen, that Authors build on Foundations not altogether solid enough; and produce weak and pitiful Arguments, to establish the most clear and incontestable Truths. Whoever shall examine the vain Subtilties, impertinent Questions, ridiculous Decisions, and detestable Maxims, with which the Books of many Casuists are fill'd; will, no doubt, find ample Matter, to furnish out a prodigious Parade of Contradictions and Absurdities; but when all's done, this can no way affect the Certainty of the Principles and Rules of true Morality; but wholly redounds to the Confusion of those blind, shall I say, or sham Doctors; certainly most wretched Subtilizers and Refiners, in whose Hands the purest Gold turns to muck and dross. Wherefore, before they triumph too much, on pretence of some Inconsistency, which they may imagine to have observ'd between some certain Duties; or on account of some weak Proofs, that such and such Writers have made use of; they ought first seriously to consider, whether they have not unhappily mis'd the right way; and whether, if they wou'd but trace Things back to their true Sources; they might not from thence furnish themselves sufficiently, for the Resolution of those Difficulties, with which they have been hitherto perplex'd. *Charron*, for example, maintains, that ^d *very often the Precepts of a single Virtue cannot be put in Practice, without prejudice either to that same Virtue, or to some other; by reason of their clashing and interfering one with the other: so that you cannot answer the Demands of the one, but at the Expence of the other. This is at least,* adds he, *uncovering one Altar to cover another; so defective and weak is all human Sufficiency, that it is neither able to give or receive one certain, universal, and consistent Plan of Duty, sufficient for the forming a good Man by; nor can it so well advise and provide, but that the means of doing good shall sometimes interfere; and Charity and Justice be often found repugnant to each other: If in War, I fight on my Relation or Friend engag'd on the Enemy's side, Justice requires me to kill him; but Charity to save and spare him: If a Man be mortally wounded, so that, it being impossible for him to recover, he can only linger on in the Extremity of Pain; 'tis then a Work of ^e Charity to dispatch him: but yet 'tis what ^f Justice will punish. Nay, to be found near such an one in a By-place, where it is*

* *Τεκμήριον δὲ τῆ ἐντέλειαι πὺν ὀρθὸν λόγον πῆς ἀνθρώποις, τὸ, καὶ πὺν ὀ δίκον, ἐν οἷς μὲν δὲν αὐτῷ διατέλει, καὶ αὐτὸς δίκαιος καὶ πὺν ἀκόλαστον, σαφενικῶς καὶ ὀλοῖς, πὺν κακὸν ὀρθαῖς ἐπιθεοῖ αἷς γρηῖθαι. ἐν οἷς ἀπρεσποβῆς ὀθῶ. Διὸ καὶ μετῆσθαι δὲ οἷσται ὀ φ. ἔν (ὀ εἰς ἀεστῆ) κατὰ γῶσι τῆς πρεστέρεσ κακίαι. Hierocles in Pythag. p. 82. Edit. Needh. 1709. & p. 106 - Edit. Lond. 1673.*

^c See Mr. *Buddens*, in his *Hist. of Natural Right*, which is the first Dissertation among the *Selesta*, *J N & Cont. Sect. sc. & seq.*

^d Of *Wiflow*, *Book I, Chap. 4, Num. 5*, of the first Edition. And *Chap. 37, Num. 5, p. 187*, of the Editions form'd upon that which he reviv'd. As the Disposition of these two Editions is different, especially in the first Book, I have always mark'd the Difference of the Chapters in citing this Book, whether it be my own, or my Author's Citation.

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

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

doubtful who is the Murderer; altho' it was with design to do him Offices of Humanity, is extremely dangerous; and can end in nothing less to the Person so found, with all his Innocency, than the undergoing a criminal Prosecution on account of this Accident: But these Words, if well consider'd, prove only this; that there are some Cases, where several Virtues cannot be put in practice at the same time, and with regard to the same Object; not that there is any Inconsistency between the Virtues themselves, their Functions, or Effects. It is no more than a seeming Conflict between certain Duties, of which some for the time being are to take place of others; so that what, out of such Circumstances, wou'd have been an indispensable Act of Virtue, does then become unlawful, or at least indifferent. Thus the Virtue, which at that Juncture is, if I may so say, oblig'd to give place; receives no Prejudice, nor loses any of its Rights or Privileges. *Charron* seems to have been willing to soften and rectify his Notions in the second Edition of his Book; where he adds the following Words: *Nor ought Virtue to be esteem'd answerable for all this, or the several Virtues charg'd with repugnancy to one another; for they are in perfect Concord; but the Weakness of the human Condition; since with all its Sufficiency and Industry, it is still so defective and feeble, that it is not able to find out a certain Plan, &c.* That is to say, (if I mistake not; and to give these Words the most reasonable Construction they are capable of:) that the several Virtues consider'd as they are in themselves, and in the Idea of the Divine Understanding, or of some celestial Intelligent Being, agree perfectly well one with the other; but that our Ideas and Faculties are not sufficient to reconcile them in such manner, as to satisfy our Minds, and to determine our Judgments with certainty in those Cases where they seem to interfere; which in effect is the same thing to us, as to suppose a real and absolute Inconsistency in the Virtues themselves. This calls to my Mind another Author, whom *Charron* very often copies, and who says on the Subject of natural Laws; ^a *That it is credible, that there are natural Laws, as is seen in other Animals: but they are lost in us; this same fine human Reason of ours every where taking upon itself to domineer and bear sway; shuffling and confounding the Face of Things, according to its own Vanity and Inconstancy.* But what we have said before, does not allow us to admit of a Supposition so injurious to the Divine Goodness; nor are the Examples, produc'd by *Charron*, sufficient to make it out. It is very rare, that a Soldier is oblig'd to kill with his own Hands, knowing and seeing him, his Relation or Friend, who may happen to be in the opposite Party. There are few Princes or Generals of an Army, who wou'd require this of a Soldier, or subaltern Officer; or who wou'd not, out of regard to the Tyes of Consanguinity or Friendship, easily forgive his having spar'd the Life of a Person so dear to him. But suppose it shou'd happen, that in a just War, (for that must be suppos'd in the present Case) I shou'd, by the precise Order of my General, or of my Sovereign himself, having sufficient Reasons for giving me such Orders; be reduc'd to the fatal Necessity

of killing, with my own Hands, my Relation or Friend; I don't see, in this Case, how Charity can any ways interpose in favour of that Relation or Friend of mine, who is suppos'd to have born Arms in a bad Cause; especially, if my refusal to obey be capital. I must own, this wou'd be a very sad and most ungrateful Office; but after all, 'tis in me no other than the Performance of what I am indispensably oblig'd to do: And my Relation or Friend ought to look on me as acting no otherwise than as the simple Instrument, and that too with great Regret, of those just Acts of Hostility, to which he has voluntarily expos'd himself. The other Case that *Charron* mentions, is as easy to decide; nor is there in it any Opposition betwixt *Publick Justice* and *Private Charity*, as this Author himself has made appear in the second Edition of his Work^b. Suppose I think a Man mortally wounded, beyond all Hope or Possibility of a Cure, (in which I, who am neither Physician or Surgeon, may very easily be mistaken; since we very often see People recover after they have been given over, even by Men of those Professions;) altho' Compassion may seem to move and sollicit all who pass by, to abridge the Sufferings of one, who is thought in a Condition altogether desperate; yet Charity cannot require me to dispatch for him those miserable Remains of Life; unless his Case be attended with such Circumstances, as makes it lawful for himself to do it: Nor are there wanting in this Case^c Principles sufficient to determine us. But shou'd it prove to be so in this Case, that the Man had, according to the Principles of the Law of Nature, full Liberty to dispose of his own Life; and that he shou'd intreat me to hasten the inevitable Moment of a Term, which wou'd otherwise soon expire, and the Prolongation whereof cou'd serve to no other Purpose, but to continue him in needless Pain and Misery; yet, if the Laws of my Country absolutely forbid me to contribute in any manner towards hastening the Death of another, under any pretence whatsoever; as is the Case almost every where, and that upon very good Grounds; the Laws of Charity in such Case cou'd in no wise oblige or authorize me, to render to this unfortunate Man the Service he demands; and it is no more permitted to grant him this Request, than to force a Criminal out of the Hands of Justice, with an Intent to save his Life. As for the Danger he is expos'd to, of being taken for the Murderer, or put to the Rack, who stays by the wounded Person, in order to succour and relieve him; there is not always Reason to fear such fatal Consequences from a good Office on this pressing Occasion: But suppose there was all the Reason in the World to apprehend them; the Care of our own Preservation, which is strongly^d recommended to every particular Man, by the same Law of Nature; wou'd, no doubt in this Case, be found to outweigh the Laws of Humanity; which are then only obligatory, when we can put them in Practice, without bringing on ourselves any considerable Damage, or great Inconvenience; to which we are not otherwise oblig'd to expose ourselves in favour of him, who has need of our Assistance. The Inference therefore, which *Charron* draws from these

^a Montagne's *Essays*, Book II, Chap. 12, p. 381. And p. 427, in the Paris Edition. And Ed. 1727, Tom II, p. 544., 545.

^b See above in the Margin, Letter (f).

^c See *Pufendorf*, Book II, Chap. 4, Sect. 19.

^d See what is said, on Book II, of *Pufendorf*, Chap. 3, Sect. 15, Note 5.

Examples, that *Justice not only offends against Charity, but that it is a Clog and Impediment to itself*; is altogether wrong and unjust. And wou'd we but examine, as we ought, the other Reasons produc'd by this Author; or those who, before and after him, have been desirous to signalize themselves by their Endeavours to establish a Pyrrhonism, which spares not the most necessary Truths; we shou'd, I am fatisfy'd, find that none of their other Reasons, do a whit better make out those pretended Contradictions, they fancy to themselves, between the Principles of Morality; and that the Weakness of all those Objections, which they have hitherto been able to invent, will only serve on the contrary to prepossess us in favour of that entire Certainty, and perfect Consistency, to be found in all Decisions and Determinations, grounded on the true Principles of our moral Duties.

3dly, The Difficulties that sometimes cause Perplexity in Matters of Morality, or natural Right, do not proceed so much from the Obscurity we find in the Rule itself; as from certain particular Circumstances, which render the Application thereof difficult, but not impossible; and consequently are no more Proofs of the Uncertainty of the Rule, than the Trouble we are at, to apply a Demonstration in Mathematicks, diminishes the Evidence or Infallibility thereof. Besides, these Difficulties do not concern the general Principles, nor the Maxims which mediately or immediately flow from them, even to a considerable Distance; but only certain remote Consequences, * and of little Importance, in comparison with the others. If we will but suffer ourselves to make never so little Use of that Faculty of reasoning which Nature has endow'd us all with; we cannot in the least doubt of the Truth of these following Rules: *That we ought to render to the Deity a Worship worthy of him; and to obey his Laws, as far as they are known to us: that every one is oblig'd to avoid the Excesses of Intemperance; which, by ruining his Health, make him incapable of attending those Things, to which he is call'd by his Condition; and of making himself useful to humane Society: that he is not permitted to injure his Neighbour; and that, if he has done him any Damage, he ought to repair it as soon as may be: that he ought not to deny any one all friendly Services, not hurtful to himself, that he can do him: that he ought inviolably to keep his Word: that all Fraud and Tricking is criminal: that Children are under an indispensable Obligation to honour their Parents: that it is just to obey the Orders and Laws of a lawful Sovereign, as long as he prescribes nothing contrary to the invariable Principles of the Law of Nature; or to any Divine Law clearly reveal'd. &c.* All these Fundamental Truths, and many more of the like Nature, are so evident, that it is impossible to bring any Objection against them, that is even but plausible; or whose Weakness will not appear at first Sight. But it may be disputed with some shew of Reason, *Whether a Man, for example, who has committed Adultery with a married Woman, is oblig'd to make Satisfaction to the legitimate Children; for the loss they sustain by the Concurrence of an illegitimate Share in the Succession?*

*Whether that Promise be binding, which I authorize another to make in my Name, where the Person to whom it was to be made, dies before Notice or Acceptance? Whether when a Thing, sold and not deliver'd, happens to perish by some Accident, without any Fault of the Seller; he, or the Buyer, ought to stand to the loss of it? Whether a Prescription shall cure to the Prejudice of those who are not yet born? Whether a Possessor, bona fide, ought to make good the Fruits which he hath consum'd? Whether Polygamy or Divorce are absolutely contrary to the Law of Nature? Whether such or such degrees of Consanguinity or Affinity are forbid by the same Law? Whether Sons or Daughters may marry without their Parents Consent? Altho' even these, and other the like Questions may not perhaps be very difficult to decide, if examin'd attentively, and without Prepossession; yet there is besides almost always, as to the Practical Part, another infallible way to determine ourselves thereupon; and that by clear and self-evident Principles: without at all entering into the Foundation of the Question. You doubt, for example, whether Polygamy or Divorce are in their Natures absolutely unlawful; but, to say nothing of the Laws of the Gospel, you find these Things forbidden by the Civil Laws of your Country; and you cannot reasonably doubt, but that it is a Crime to disobey the Laws of the Sovereign Power; even when they take from you the Liberty of doing that, which otherwise would be permitted, or indifferent. Shou'd the Question be about Things not settled by the Civil Laws; you have then these two incontestable Principles to regulate your Conduct by: *First, that in difficult Cases you ought always to take the surest Side of the Question. Secondly, that the surest Side, is always the opposite to that your Passions incline to.* And from hence I draw a Consequence, that serves equally to confound as well those who seek excuse for their Faults from a pretended invincible Ignorance, or from the Difficulties of their particular Cases; as those, who alledge these Difficulties, in order to destroy the Certainty of all the Principles of Morality: The Consequence, I wou'd infer, is this; that a Man before he can arrive at this State of Doubt and Perplexity, so as to be at a loss which side of the Question to take, in Points relating to his own Conduct; must first have negligently over-look'd Maxims, so clear, as to be self-evident; and so easy, as to be obvious in every Case of Practical Duty. Thus it is plain, that the Fault lies at our own Door, and not at our Creator's; who, as he has given us his Laws, so has he given us Light, sufficient to direct, and keep us from tumbling from one unfathomable Difficulty to another, into a perpetual State of Doubtfulness and Uncertainty. The Case is much the same here with that of the Master of a Family; who, upon taking a long Journey, had left with his Domesticks Orders sufficiently clear; and easy to be executed: and in this Case shou'd the Domesticks, for want of having follow'd their Master's Orders, find themselves reduc'd to such a Nonplus, as not to be able, with their utmost Application, and most hearty Endeavours, to determine what to do,*

¹ See Pufendorf, Lib. 1, Cap. 2, Sect. 5, Note 2.

* This with respect to these only that we can admit what Marriotte says, (*Essay upon Logic*, p. 154, whose Words are cited and adopted by the late Mr. Bayle, Ansv. to the Quest. of a Provinc. Tom. I, p. 352.) *That it is often necessary to consider a great Number of Things, to judge well what we ought to follow or avoid.* But they are much in the wrong, both the one and the other, to infer from thence the Uncertainty of all Morality in general; and to maintain, that *the Conclusions thereof are more uncertain than those of natural Philosophy.*

^m See Pufendorf, Book I, Chap. 3, Sect. 7. And Mr. Bernard in his *Nouvelles de la R. pub. des Lettres*, March 1705, p. 294.

with respect to certain Affairs, that should afterwards fall out, relating to his Service; they could have no Grounds to complain of their Master's Severity, when at his Return he punish'd them for having taken wrong Measures, and ill manag'd his Concerns.

4thly, Unless we will doubt merely for the sake of doubting, or have the Assurance to deny that 'tis Light at Mid-day; we cannot refuse to acknowledge, that there are a great Number of Principles and Maxims of Morality, which are attended with the highest degree of Evidence; and which are entirely consistent one with another. There are some of these Truths, the Belief whereof, we are oblig'd to acknowledge to be as ancient as the World; and so extensive, as to be diffus'd in a manner quite throughout it; as shall be hereafter shewn. Now if there be any certain Proof, any sure Mark of the Clearness of our Ideas and Opinions; such an universal Consent as this, must undeniably be such. As for those Things, whose Evidence does not shew it self without some Reflection, be it more or less profound; and about which there is likewise great diversity of Opinions; if we take an account of all such as really have some Difficulties at first, even to those who examine them with some degree of Attention; it will be found that their Number is but small; that for the most part they entirely depend upon extraordinary Conjunctions; and that they are often, by Dint of Thought, fairly vanquish'd; so that the Difficulty, which at first was look'd on as insuperable, at length vanishes, and turns to the most clear and satisfactory Solution. But however, supposing there were Cases, and those too not uncommon; where it was absolutely impossible to come to any fix'd Resolution, upon Principles clear and self-evident; God doubtless would not, in such Cases, make Men responsible for those Errours, which, after their best Endeavours us'd to find out the Truth, they shou'd unhappily fall into. So that this would not at all make either against the Goodness or Justice of the Creator and sovereign Lord of Men; or against the Certainty and Evidence of those Principles, which we have always ready at hand, as sure Guides to conduct us safely in an infinite number of Cases: But we ought rather, in such Case, to say, that even this Degree of Light, seeing God has not thought fit to give us a greater, is sufficiently adapted to the State and Interests of Mankind: Tho' 'tis my fix'd Opinion, that it cannot without Rashness be positively affirm'd; that those incontestable Principles of Morality we have, are not, if duly pursu'd thro' all their Consequences, fully sufficient to furnish us with infallible Maxims in all imaginable Cases, that can be suppos'd to occur in human Life. And my Reason is this; That these Principles have prov'd so fruitful, that even to this Day, they have not been explain'd entirely; and drawn out into all their Consequences: But on the contrary, during the Space of near six thousand

Years, that is, of the whole Duration of Mankind; there has hardly been any one Science so much neglected, or so superficially cultivated, as this Science of Morality; as will appear by the Sequel of this Discourse.

5thly, After all, supposing now that Means cannot be found out, entirely to resolve some Difficulties objected to certain remote Consequences, that follow from some of the evident Principles of Morality; will this be sufficient, in the Judgment of any reasonable Man, to shake the Certainty of all those Principles; and of that vast Number of Consequences, which may be most manifestly deduc'd from thence? Permit me, on this Occasion, to make a general and very important Remark; which, tho' made use of by several Authors, it is yet worth while here to repeat, and place in all its several Lights; to prevent the Effects of those dangerous Impressions, which they who endeavour directly or indirectly to introduce into the World an extravagant, and, as I may venture to say, most ridiculous Scepticism, might otherwise make. You shall see these Men, with great Earnestness and Application, collecting from all Parts, and exposing to the utmost, all, even the most minute Difficulties, which they think can be urg'd against the most certain and generally receiv'd Truths; and then concluding, with an Air of Triumph; *That poor Reason, alas! knows not where to fix its *Foot: that it is an uncertain, fluttering, and supple Tool, to be turn'd about like any Weather-cock: that the great Secret it has found out to prevent its losing its way, is not to stir one single Step forwards; so that, wherever it finds two Ways, it stands stock still:* with much more to the like Effect. Now all such Reasonings are grounded upon this single Principle; that, whatever is a certain Truth, must be adequately known by us; and remov'd from all manner of Difficulty. But this is a Proposition too considerable to be taken for granted; and ought to have been first fully prov'd, as the Ground on which all their Reasoning stands; unless they mean to beg the Question, by assuming for an unquestionable Truth, what is really false; which does but ill become Men, who wou'd seem resolv'd to admit of nothing for Truth, but what they comprehend as fully and clearly, as they do, that *two and two make four.* May it not very well be so, that our Faculties are precisely adapted to our present State and Occasions here; and consequently circumscrib'd within their proper Bounds? (For bounded they must then be; since it can never be prov'd, that to this end they ought to be commensurate with the Nature and Properties of all those Things whereof we have Ideas.) This then being suppos'd, which no way implies any thing contrary to the Goodness or Wisdom of the Creator; is not the having clear and direct Proofs of any Principle, enough to warrant the admitting it as certain; notwithstanding there still remain some Difficulties, the Solution whereof we do not yet see? To go about to make such

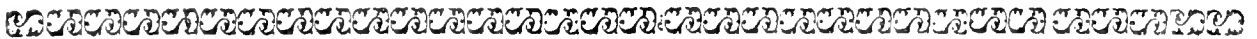
* Ὅρα ὅς πῶς ὀλίγα ἐστὶν, ὧν κρατήσας τις, δύναται ἔυρον καὶ θεοῦδ' ἰσῶσαι βίον; καὶ γὰρ οἱ θεοὶ πλέον οὐδὲν ἀπαιτήσουσι παρά τ' αὐτοῦ σολάσσοντος. That is to say, You see how few Things we have to practise, in order to lead a happy and divine Life; for the Gods will require nothing more of him, who shall follow these Rules. *Marcus Antonin.* lib. 2, sect. 5.

* See Bayle's Dictionary, p. 1565, Col. 1.

Difficulties serve for Proofs of the Negative of that very Principle, would be vain and frivolous; 'twould be no more than an idle evasive Fallacy, that wou'd be still bottom'd upon that precarious Supposition I just now mention'd; and one single Instance will be sufficient to make it out. Let the Question be, say they, whether *Matter is to be divided infinitely**, and let the usual Proofs be produc'd on the affirmative side of the Question; you will find 'em at first sight so clearly demonstrative, that all the great Difficulties of the Atomists on the other side, won't in the least affect your Assent to the Affirmative: But then take the Negative, and let the Objections against the Affirmative be set forth and urg'd as Proofs; and they will not fail to make as great an Impression on your Mind, as the Proofs for the Affirmative had done just before; so that you will find these a sufficient bar to the others. For my part, I think the Difference, according to the Rules of right Reasoning, to be very considerable; for the Arguments for the infinite Divisibility of Matter, flow directly from the Idea of the very Nature of Matter, as an extended solid Substance; whereof the Parts, tho' never so small, cannot be otherwise conceiv'd than as endu'd with Figure, and as having Sides, by which they are contiguous; not to say any thing of the Demonstrations Geometry affords us in this Case: Whereas the Objections of the Atomists, which contain their strongest Proofs for the Negative; being entirely grounded on the Difficulty of conceiving a Number of Parts really infinite, wherein the Imagination is at a loss; are altogether inconclusive: unless upon Supposition that nothing ought to be admitted as certain, but what we have an Idea of, exempt from all Difficulty; tho' a thing otherwise attended with never so much Credibility, grounded on Reasons most evident; and such as are drawn directly from the Nature of the thing it self. Now 'till such Supposition shall be demonstrated, (and how can that be ever done, espe-

cially by one under the Character of a Sceptick?) there will not be so much as a Possibility of stirring the Certainty of many Truths, as well speculative as practical; which are manifestly held forth by Reason to all, who consult her with Dispositions proper for that purpose. The sincere Lovers of Truth will ever find a just *Medium*, between the foolish Presumption of the peremptory *Dogmatist*; who holds for Demonstrations, all his ill-grounded Fancies, concerning even the most doubtful Matters: and the false Modesty of the rigid *Pyrrhonist*; who, sinking under the Weight of the smallest Difficulties, boldly rejects all Certainty; on pretence, that he cannot attain to a Knowledge entirely perfect, and exempt from all Mixture of Obscurity. In vain do they heap Difficulty upon Difficulty concerning the Nature and Attributes of *God*; this will never, in the Judgment of any reasonable Man, either overthrow the Existence of that Infinite Being; or the certain, tho' imperfect Knowledge we have of some of his Perfections; particularly those, which have relation to our Interests and Occasions. In vain do they seek to exaggerate, with all the Cunning of subtle Philosophers, those ill-grounded Doubts; which, on the Subject of moral Obligations, the Mind, either not attentive enough in discerning Truth; or else ingeniously industrious in inventing Fallacy; can form to it self. The Idea of a Creator, boundless in Power, Wisdom, and Goodness; and the Idea of our selves, as intelligent, reasonable, and sociable Creatures: These two Ideas, I say, if well look'd into, and compar'd together in their whole Extent, will always furnish us with steady Grounds of Duty, and sure Rules of Conduct; notwithstanding it may sometimes so fall out, that, for want of Care or Attention, we may, in some uncommon Cases, not know how to apply them; or cannot methodically demonstrate the necessary Connexion of some remote Consequences, with the first Principles of Morality.

* See Mr. *Bayle's* Continuation des *Pensées* diverses à l'occasion de la Comete, &c. p. 367.



S E C T. IV.

THE other Objection, which I purpose to answer in a few Words, is taken from the great Diversity of Opinions there is in the World concerning Virtue and Vice; inso-much that not only some particular Men, but even whole Nations, have openly derided all Morality; or at least some of its Principles. With this View the *Pyrrhonists* heretofore^a made their long Enumeration of the Contrarieties they had observ'd thereupon; as well those which are found between the Customs of particular Nations; as between the Notions even of Philosophers themselves. But what will all this serve to prove? That Men do not always make a right Use of

their Reason*. I readily grant it; and seeing there are, even amongst the Men of Wit and Understanding, some who so strangely misuse their Leisure and Parts; as to employ their utmost Efforts in utterly destroying, or in rendring at least very dubious, the most manifest Truths; on pretence that there are Difficulties, beyond the Reach and narrow Limits of our bounded Understandings; I am not at all surpriz'd, to find some rude and unpolish'd Nations, who being either extremely corrupted; or enslav'd to Opinions, consecrated and establish'd by long Usage and Custom; to have continu'd, either wholly or in part, immers'd in the grossest Ignorance of those moral Truths,

^a See *Sextus Empiric. Pyrrhon. Hypoth. Lib. 3. Cap. 24. p. 151. D.* & Edit. *Fabric. p. 176.* Numb. 198, &c.

* See the Passage in *Dion. Laert. cited hereafter, Sect. 27. Letter q.*

which are indeed in themselves evident enough; but not to such, as either wilfully shut their Eyes against the Light of Nature; or who will not give themselves the trouble of explicitly considering, and pursuing those Ideas, which continually, I may say, every Moment, and from all sides, present themselves openly to their view. Or shall we hence infer, that those sure and incontestable Principles of Conduct, if any such there are, ought to have been actually impress'd, even from the Cradle, on the Minds of all Men; so that none could be either ignorant of, or under any mistaken or different Notions about them. *Montagne* indeed reasons after this manner; An Author, who, amongst a vast number of fine judicious Thoughts, has but too visibly discover'd a Spirit of *Pyrhonism*, carry'd on beyond its due Bounds^b. They are pleasant, says he, when to give some Certainty to Laws, they say, that there are some of 'em firm, perpetual, and immutable, which they call natural; and say, they are essentially impress'd on the Minds of all Mankind: and of these some make the Number to be Three, some Four, some more, some less; which shows, that even this Impression is a thing as doubtful as any of the rest. Now they are so unfortunate, (for what can I call it else, but Misfortune, that of so infinite a number of Laws, there should not be found one at least, that Fortune and the Temerity of Chance has suffer'd to be universally receiv'd by the Consent of all Nations?) They are, I say, so unhappy, that of those three or four select Laws, there is not so much as one, but is contradicted and disorder'd, not by one Nation only, but by many. And yet this same universal Approbation is the only probable Mark, from which they can argue, or infer, any Laws at all to be natural; for we shou'd without all doubt unanimously follow, whatsoever Nature had really enjoind us; and not only every Nation, but every particular Man would be extremely sensible of the Force and Violence offer'd him, should any attempt to push him on to a Transgression of such Laws. But this is a Supposition not to be admitted without Proof; it being contrary to Experience: and long since own'd to be false in Fact, by the most able Philosophers. ^c Nature alone, (says one of them), cannot furnish us with the knowledge of moral Rectitude and Virtue; she has indeed implanted in us the Seeds of the Science of Virtue, but not the Science it self. This is the Result of those Reflections and Comparisons which the Mind, by parity of Rea-

son, makes between the Things it has often review'd and consider'd. A celebrated^d Philosopher of the last Age, one to whom the World will be eternally oblig'd, for having introduc'd the right manner of philosophising; not that he was infallible neither; nor did he always follow his own Rules; *Des Cartes*, I say, had made the Opinion of innate Ideas very common among his Followers. But there arose another Philosopher, ^e not long since deceas'd, who has re-establish'd, and put in a new Light the antient Opinion. The Reasons which he alledges, seem so very strong, that whoever examines them with a little Attention, and without Prejudice, cannot refuse to submit to them. Dr. *Sherlock*, who has taken upon him lately to refute them, has, in my Opinion, with all his Penetration and all his Efforts; only given those who deny innate Ideas, all the reason in the world to confirm themselves in an Opinion, which they see attack'd with so little Success^f. All the Doctor says, is either grounded on abstracted, and scarce intelligible Principles; or on such, as are advanc'd without Proof; or whose just Consequences terminate in the Proof of that, which at the bottom amounts to no more than the very Opinion he opposes. But what is most of all surprizing, he very preptorily affirms, That ^g the Doctrine of Mr. Locke, about the Origine of innate Ideas, may very much serve the Cause of Atheism; for, says he, if none of our Ideas are innate, neither those we have of the Deity, nor those we have of Virtue and Vice; what shall hinder the Atheist from saying, that all those Ideas are the Effects of a wrong Education; and that they were first imprinted on the Minds of Children, for the good of Society; and to restrain and keep them in awe? For my part, I think on the contrary, (nor am I the only one of this Opinion,) that the Clergy themselves give great Advantage to the Atheist; when, not satisfy'd with those incontestable Proofs, we have of the great Truths of Religion and Morality; they chiefly maintain and urge, through an imprudent Zeal, certain Reasons for Proofs; which are really none, or at least very doubtful ones; and then cry out, that all's lost, if these are not allow'd of as well as the former. For after all, I would fain know how Dr. *Sherlock*, without entering into metaphysical Reasonings, which are generally very uncertain, and do not properly belong to a Dispute about Matter of Fact; will be ever able to

^b *Montagne's* Essays, Book II, Chap. 12, p. 380, *English*; *French*, 426. And Edit. 1727, p. 542-543, tom. 2.

^c *Desideras dici: Quomodo ad nos prima Boni Honestique notitia pervenerit. Hoc nos docere Natura non potuit: semina nobis scientiæ dedit, scientiam non dedit.--Nobis videtur observatio collegisse, & rerum sæpe factarum inter se collatio, per analogiam nostro intellectu & Honestum & bonum judicante.* Senec. *Epist.* 120-, pag. 457-. Edit. Gronov. See *Lipius, Manud. ad Philos. Stoic. lib. 2, cap. 11, per totum.*

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

^e Mr. *Locke*, in his *Essay on Human Understanding*, Book I.

^f This was my Judgment six Years ago, form'd on the Extract in *Bernard's Nouv. de la Repub. des Lett.* May 1705. I had reason to believe, that that ingenious Journalist had neither weaken'd, or misrepresented in the main, the Reasons of this *English* Doctor. I have since found it to be fact, having read the Book it self, well translated into *French* in 1708. But as to my Judgment of the Doctor's Reasonings, I am so far from altering it, that I find my self more and more confirm'd in it by reading that long Digression, where he pretends to establish innate Ideas; and to confute those who deny 'em. The judicious and disinterested will discern, who are most likely to clear the Matter; whether those who go upon Experience, the only way we have to know the Truth; and upon the proper and certain Character of Ideas; which is to make them selves be perceiv'd, where ever they happen to be; or whatever at bottom their Nature may be: or those, who being oblig'd to acknowledge Experience to be against them, do yet advance nothing but Reasons of Congruity; and yet charge others with want of Penetration to see the Difficulties.

^g *Ibid.* pag. 545. and in the Book it self of Dr. *Sherlock*, pag. 146, 147, in the *French* Version.

prove to an Atheist, that notwithstanding the manifest Ignorance in which whole Nations have been and still are, of some fundamental Duties of the Law of Nature; and the odious and prodigious diversity of Opinions, which have at all times been in the World on the Subject of Morality and Religion; that, notwithstanding all this, I say, every particular Person has *innate Ideas* of the Deity, and of Virtue? Nor do I see how this Difficulty can be answer'd otherwise, than by saying; that as Men are naturally provided with * Faculties sufficient to acquire the knowledge, of the Author of their Existence, and of the Duties he expects from them; and to form to themselves thereupon right Ideas: so they may remain in Ignorance, or even run into Mistakes about these Points, if they will not make good use of their Understanding: and this Answer hath nothing in it, but what is most solid. God ^h having endued Man with those Faculties of knowing which he hath, was no more oblig'd by his Goodness, to implant those innate Notions in his Mind, than that having given him Reason, Hands, and Materials, he should build him Bridges, or Houses. To alledge therefore the Abuse, which Men make of the Light of Nature in Matters of Morality, as a Proof that there is no Certainty in it; is as poor Reasoning as that of the *Epicureans*: who think to subvert true Religion, by setting forth all the Evils, Crimes, and Extravagancies that false Zeal, Bigotry, and Hypocrisy, under the specious Pretence of Piety, have occasion'd in the World. ⁱ *Tantum Religio potuit suadere Malorum!* But let us only consider this Matter in a different Light, and we shall find this Objection it self furnish us with a considerable Proof, or at least a Prepossession in favour of the natural Evidence of the Principles of Morality; and of that Impression, which there is reason to believe these Truths wou'd make on the Minds of all Men, did they but hearken to Reason. In effect, it appears by History, that those Nations, which seem to have had no sense at all of Virtue, are very few in Number. By the Confession of Mr. Bayle, ^k *The most general Rules of Morality have been preserv'd almost every where, and have at least obtain'd in all Communities, where Reason and Knowledge have been at all cultivated. Is there any Nation, ^l (says a very great Orator, and heathen Philosopher,) where Civility, good Nature, and Gratitude are not thought amiable, and had in esteem? And where the proud, the mischievous, the cruel, and ungrateful are not had in Contempt and Abhorrence?* It has too been very judiciously observ'd, that ^m *No Legislator cou'd ever yet procure Laws, that were entirely bad, to pass: The Managers concern'd in passing such Laws, have either dexterously tack'd 'em to others that were good; or else have had recourse to violent Measures, either to e-*

stablish, or to maintain 'em; so that the very submission to unjust Constitutions, is even a Proof of the necessity of equitable and good ones. It will perhaps be reply'd, that it is the Profit, which accrues from the Practice of the Rules of Morality, that causes 'em to be generally approv'd and receiv'd into the World. But, tho' this cannot be deny'd to contribute much towards it; yet is it not the only, nor the principal Reason thereof. For 'tis very hard to conceive, that in so many different places, and in all Ages, such Multitudes of every Rank, Condition, and Character, should have given their Consent to these sort of Maxims, merely for the Advantage each Person for himself found therein; so as at the same time to think themselves exempt from all Obligation to observe them, whenever they cou'd Transgress with Impunity. Indeed there has been, and still are too many, without any other Regard for them, than upon that foot; whether it be, because they have accusom'd themselves to do so, in order to satisfy quietly their Passions; or whether because they have suffer'd themselves to be impos'd upon by some ill-grounded Subtilties: but then we see, that the wisest and most sensible part of the World have, at all times, judg'd of 'em quite otherwise. Nay all, whether learned or unlearned, have found in 'em a certain Agreement with, and Conformity to right Reason; and that too more or less distinct, as they have been endow'd with more or less good natural Sense: and in proportion to the Progress each Man has made in Reasoning and Knowledge, he still finds this Agreement become more and more sensible. Men have always distinguish'd the Idea of Duty, from that of Profit; even in those Maxims, where these two Ideas have been most inseparably blended together: the first of these, even when they scarce, or not at all perceiv'd the true Foundations thereof; has still made an Impression, sufficient to form in them such a Conception of it self, as carries with it a peculiar Force and Efficacy; plainly distinct from, and independent of that of the other. Men have scarce ever been able to forbear secretly reproaching themselves, as oft as they had sacrific'd to their Interest the practice of that, which they look'd upon to be their Duty. And it has even been observ'd, that * wicked Men would choose, (were it possible) to enjoy the Fruits of a criminal Action, without committing the Crime it self. If we reflect rightly upon the Matter, it must be own'd, that the gross of Mankind are not so much as capable of comprehending, or seeing to the end of all those prospects of Utility, which a skilful Lawgiver, or profound Philosopher, might have had in view: so that it often happens here, that the Notion of Duty alone makes the Impression; and it is likewise the Intention of the Law-maker, that it should

* See *Silvæ Philologicæ* of Mr. Le Clerc, publish'd in 1711, at the end of his *Eschines*; Cap. 2, towards the end.

^h Locke's Essay, lib. 1, cap. 4, §. 12, p. 75, French; and p. 42. - Edit. Lond. 1706.

ⁱ Lucret. Lib. 1, ver. 102.

^k Continuation of divers Thoughts, &c. p. 762.

^l *Quæ autem Natio non Comitatem, non Benignitatem, non gratum animum & Beneficii memorem diligit? Quæ superbos, quæ maleficos, quæ crudeles, quæ ingratos non aspernatur, non odit?* Cicero de Legib. lib. 1, cap. 11.

^m Biblioth. Univers. Tom. 8, p. 527.

* See the Passages cited in *Puffend. lib. 3, chap. 1, §. 1, Note 5*; and add there the following Words, which come after that of Seneca: *Maximum hoc habemus Naturæ meritum, quod Virtus in omnium animos lumen suum permittit: etiam qui non sequuntur illam, vident.* De Benefic. 4, 17.

do so; for they well know the great power that this Notion of Duty has over the Minds of Men, and that it in many cases lies level to the Capacity of Multitudes, who have no Idea of the expediency of the thing; which often mounts higher than their pitch of thinking can reach. Hence it has sometimes happen'd, that Religion has been call'd in as an Auxiliary; and the Law-givers have given out, that their Laws were of divine Extraction. After all, this Reply supposes that, which will alone furnish one good Argument, towards

the establishing the Solidity of the Maxims of Morality; and that will at the same time show, that they are adapted to all Capacities. For, since the Creator, who no doubt designs that all Men should be happy, has so manifestly and inseparably connected human Virtue and human Felicity; it is clear, that he indelibly requires of every one an exact Observation of the Law of Nature; and consequently, that the Principles and Rules thereof ought to be such, as may be easily known and demonstrated.

S E C T. V.

I Conclude then, with the saying of *Strato* in the *New Dialogues of the Dead*^a, whatever the other Party may say of it; that *Reason*; in all Cases where human Conduct is concern'd, affords Resolutions most clearly decisive. But the Misfortune is, that we don't consult her. And it must be own'd, to the shame of Mankind, that this very Science, which ought to have been the great Business of Men, and the chief Object of all their Search and Enquiry; has in all times been treated with the greatest Neglect and Indifference. * *Socrates* was astonish'd to see, That when there was occasion to have any one taught the Trade of a Shoemaker, a Carpenter, a Smith, or the Art of Riding; proper Places were never wanting, whither he might be sent, to be made a Master in these sorts of Things: and that, there was every where plenty of such, as knew how to break, and manage Horses and Oxen; whereas, if any one had a mind to be instructed himself in the Rules of Justice, or have 'em taught to his Children or Slaves; there was no place to be found to go to for that Purpose. A considerable time after this Philosopher's Days^b, we find *Cicero* making the same Complaint: What can be the reason, (says he,) that, since we consist of a Soul as well as a Body, the Art of curing, and preserving the Body in Health, has been so early sought out; and found so useful, as to have its Invention ascrib'd to the Gods themselves: Whereas the Art of curing the Diseases of the Mind, has neither been near so much sought after before, or cultivated and improv'd after, it was invented; nor has it been had in Esteem and Admiration, but by few; whereas on the contrary, it has been even hated and suspected by many? It is, however, no very difficult Matter to discover the Reasons hereof; and 'tis withal highly useful, to

give 'em their due Consideration. It is but too certain, that the several Necessities of Life, real or imaginary; the false and mistaken Interests; the Impressions of Example, and receiv'd Customs; the Prevalency of Fashions, and the Torrent of Opinions in Vogue, with the early Prejudices of Education; but, above all, the predominant Passions and Vices; do generally draw off the Minds of Men from a serious Study of Morality; and won't let them apply their Faculties to those Things, which really are their most proper Objects; and on which too really depends their true Felicity. ^c *Philosophy* (says the Author of the *Dialogues*, a little before cited, very pleasantly) has no Business but with Men, and not at all with the rest of the universe. The Astronomer fixes his Thoughts upon the Stars; the Naturalist on Nature; and the Philosopher on himself. — But because Men find it troublesome, to have her meddling with their Affairs, and perpetually at their Elbows, checking and regulating their Passions; they have therefore sent her away to the Heavens, there to take an account of the Order and Motions of the Planets; or else they travel her over the terrestrial Globe, and make her examine with the utmost Exactness all that is there to be seen. In a word, they take care always to employ her at as great a distance from themselves as is possible. The few, who have apply'd themselves to the Study of Morality, have done it for the most part in a manner confus'd, and superficial enough; and often so, as even to build upon Principles either entirely false, or obscure and uncertain; either foreign to its proper Business, or mixt up with gross Errors and Absurdities. From whence it comes to pass, that in all Languages, the Terms of Morality, both in

^a *Dialogues of the dead Ancients with the dead Moderns*, by Mr. Fontenelle, Dialog. 5, p. m. 208. Oeuvr. de Font. to. 1, p. 102. Ed. Lond.

* Παρεγέρσετο [ὁ Ἰππίας] τῷ Σωκράτῃ λέγων ἡ πρὸς τινὰς, ὡς θαυμαστὸν εἶναι τὸ, εἰ μὴ τις βούλοιο σκοπεῖν διδάξασθαι πνεῦμα ἢ τέκνονα, ἢ χαλκῆα, ἢ ἰππῆα, μὴ δύνασθαι ὅποιον ἀνέμψας τότε τύχει (ρασί δὲ πνεῦμα καὶ ἰππον καὶ βῆν τὸ βελουδιῶν δίκαιος ποιησάσθαι, πᾶσι δὲ μετὰ εἶναι ἧστ' διδάσκόντων) ἐάν τις βέληται ἢ ὡπὸς μαθεῖν τὸ δίκαιον, ἢ ὑίδον ἢ οὐδέπιν διδάξασθαι, μὴ εἶναι, ὅποιον ἀνέμψας τότε τύχει τέτε. Xenoph. Memorab. l. 4, c. 4, f. 5; Ed. Oxon. & Ed. Paris, p. 804, B.

^b Quidam esse, Brute, causæ putem, cur, quum constemus ex animo & Corpore, Corporis curandi tuendique causâ quæsitâ sit Ars ejus, atque utilitas Deorum immortalium inventioni consecrata; Animi autem medicina, nec tam desiderata sit, antequam inventa; nec tam culta, postea quam cognita est; nec tam multis grata & probata; pluribus etiam suspecta & invidiosa? Tuic. Quest. lib. 3, cap. 1.

^c Parvulus nobis dedit [Natura] igniculos, quos eceleriter malis moribus, opinionibusque depravati, sic restringimus; ut nusquam Naturæ lumen appareat: Simul atque editi in lucem, & suscepti sumus, in omni concinno pravitate, & in summa opinionum perversitate versamur. — Accedunt etiam Poetæ: qui, cum magnam speciem doctrinæ, sapientiæque præ se tulerunt; audiuntur, leguntur, ediscuntur, & inhaerescunt penitus in mentibus. Cum vero eodem quasi maximus quidam Magister Populari accessit, atque omnis undiq; ad vitia consentiens Multitudo; tunc plane inficimur opinionum pravitate, à Naturâque desciscimus.

Quid, qui pecuniæ cupiditate, qui voluptatum libidine ferantur? &c. Idem ibid. cap. 1. & 2.

^d Dial. des Morts Anciens, in the first Part, Dialog. 4, p. 30. Oeuvr. de Font. Lond. 1707, to. 1, p. 19, 18.

common Discourse, and in the Writing of the learned; are such, as have the most obscure, confus'd, indetermin'd, and unfix'd Ideas, of any other Terms whatever. And this might make it be suspected, that the Principles too of Morality are likewise very abstruse; were it not known by the common Experience of all Ages, that Men generally despise the Things which are plain and ordinary, to run after such as are extraordinary and mysterious; and that they either will not know, or will reject even Truth it self, unless she brings some Charm with her to raise their Curiosity; and gratify their Passion for what is marvelous and uncommon. This is what has been judiciously observ'd, and upon the same Subject too, by the famous ^c Confucius, the Chinese Philosopher: *I know very well, says he, why the greatest part of Mankind do not follow the great Road of Mediocrity, altho' so easy to find; 'tis because the learned despise it; and because, imagining their Penetration to reach far beyond that Medium, they neglect it as below 'em; love to advance unheard of Principles; and engage themselves in Ways more difficult and dangerous.* But it must be acknowledg'd, that it is not so much the Prejudices of the Understanding; as the Illusions of the Heart, and the Tyranny establish'd in the World with relation to Opinions; which form the grand Obstacles to the serious study of Morality: and to the Attainment of a more exact Knowledge of our Duty. Mr. Locke ^f has very well express'd it: *It is not to be expected, (viz. that any will very much apply themselves to make Discoveries in Matters of Morality,) whilst the desire of Esteem, Riches, or Power, makes Men espouse the well endowed Opinions in Fashion, and then seek Arguments either to make good their Beauty, or varnish over, and cover their*

Deformity. --- Whilst the Parties of Men, cram their Tenets down all Mens Throats, whom they can get into their Power, without permitting them to examine their Truth or Falshood; and will not let Truth have fair play in the World, nor Men the Liberty to search after it; What Improvements can be expected of this kind? What greater Light-can be hoped for in the moral Sciences? The subject part of Mankind, in most Places, might, instead thereof, with Egyptian Bondage, expect Egyptian Darkeness, were not the Candle of the Lord set up by himself in Mens Minds, which it is impossible for the Breath or Power of Man wholly to extinguish. After all this, is it to be wonder'd at, that such, whose Occupations and Distractions of Life, or want of Genius and outward Helps, do not allow 'em to engage in long and profound Meditations; (that is in a Word, the greatest part of Mankind): are found to have generally Understandings so short and narrow, and Ideas so false or so confus'd in Matters of Morality? Altho', as we have already said, every one be by Nature capable to instruct himself therein, as far as his particular Station requires; it has no doubt been always God's Will, that they, who had the greatest Light, and whom his Providence had furnish'd with the greatest Helps; should communicate their Knowledge to such, as were not able of themselves to acquire it so easily; or in so great a degree. But, in order to set in its full Light, this inexcusable Negligence of Mankind, in a thing of such vast Importance; I shall here present the Reader with a short History of the Progress of Morality; and of the manner how it has been cultivated through all the past Ages of the World.

^c In the Extract from the Book of P. Couplet, *Bibl. Univ.* Tom. 7, p. 422.-

^f Essay of Human Understanding, Book IV, chap. 3, §. 20, p. 479, &c. See the *Parrhasiana*, Tom. 2, p. 66, & seq.



S E C T. VI.

TH E R E are two sorts of Men, who ought to apply themselves in a more particular manner to Morality; (*viz.*) *The publick Ministers of Religion; and the Men of Learning; or those who make it their Profession or Business, to cultivate and improve their Understandings by the study of the Sciences.* Both the one and the other are equally oblig'd, as much as in them lies, as well to be instructed therein themselves; as to teach the ignorant: but the Obligation of the former, is more strict and indispensable; than that of the latter.

It is certain, that ^a *Morality is the Daughter of Religion, that they go hand in hand together; and that the Perfection of the latter, is the Standard of Perfection in the former.* This has been acknowledg'd by a great Emperour and heathen Philosopher. *Thou wilt never, said ^b he, do any*

thing, tho' purely human, well, if thou art ignorant of the relation it bears to Things divine; nor any thing divine, if thou knowest not what Affinity and Connexion it has with Things humane. In Fact, the fundamental Principles of Natural Religion, which must be the Basis of all other Religion; are also the most firm, or rather only, Foundation of this Science of Morality. Without a Deity, *Duty, Obligation, Right,* are no more, * to say the Truth, than fine Ideas; which may please the Mind, but can scarce touch the Heart; and which of themselves, cannot impose an indispensable Necessity to act or not to act, in such or such a certain manner. The Ideas of Order, Decency, and Conformity with Reason, have in 'em without doubt something real; they are founded on the Nature of Things; on certain Re-

^a Preface of Mr. and Madam Dacier to the Moral Reflections of *Marcus Antoninus*, p. 2.- or * A 2, p. 2.-

^b Ουτε γδ ανθρωπινου η ανδρ ε επι τα θεια συνναρορας ευ πραξεις, ετε εμπαλι. *Marcus Antonin. lib. 3, §. 13.* Edit. Gataker; & §. 12., in the Translation of Mr. and Madam Dacier.

* See what is said, *Pufend. lib. 2, chap. 3, §. 19, not. 2. and chap. 4, §. 3, not 4.*

lations most true: and even those who cannot explain 'em distinctly and fully, have still a Sense, a Feeling of 'em, tho' perhaps not altogether so distinct: Our Minds are so fram'd, that they necessarily rest satisfy'd with 'em, as soon as propos'd; and thus it is, that moral Honesty or Virtue has thro' all Ages influenc'd Mankind, in all civiliz'd Nations. But to give these Ideas their full Force and due Measure of Efficacy; to make 'em strong enough to maintain their Ground against Passion and Self-interest; they will require a superiour Being; a Being superiour to us in Power and Might, who has subjected us to a strict Conformity therewith in our Conduct; who has so bound us thereto, that it is out of our Power to disengage our selves, or at pleasure dispense with the Obligation; in a word, who has put us under an *Obligation*, properly so call'd; to follow each of us the Light of his own proper Reason. This Fear of a Deity, who punishes Vice and rewards Virtue, has so great an Efficacy; that, altho' the fundamental Principles of Religion be much darken'd, by the Intermixture of Errour and Superstition; yet if they are not entirely corrupted and destroy'd, it will still continue to actuate, and have a considerable Influence. The purer these Principles are, and the better they are supported, the more they contribute to the strengthening the Foundations of Morality; and to the clear setting forth its Rules in all their Consequences. But shou'd you make the finest System in the World, if Religion has not its part in it, it will be little more than (as I may say) a speculative Morality; and you will be found to build on a sandy Foundation. This being so, it was natural to expect, that the publick Ministers of Religion, should have made Morality their principal Study; in order to conform themselves to it in all their Proceedings; and to give the People such just Ideas thereof, as might be capable of producing solid Virtue. But they have been far short, in this respect, of acting up to either their Duty, or Abilities. In the Times of Paganism, the *Theologers*, *Disciners*, and *Priests*, who gave out the celestial Oracles, and call'd themselves the Interpreters of the Will of the Gods; took little or no Care to teach Men the Rules of Virtue. And I must needs confess, that Lectures of good sound Morality, in their Mouths, wou'd have but ill suited the monstrous Ideas they gave of the Deity; or those Failings, Imperfections, and even Vices, which they, by an unaccountable Perversion of all natural Knowledge, ascrib'd to the Deity it self. We see therefore the ancient Doctors of Christianity, vigorously reproaching the *Pagans* with this illegal Divorce between Religion and Morality. *They who teach and instruct others in the Worship of*

the Gods, (says ^c *Lactantius*), *speak not a word of any thing that tends to the Regulation of Manners, and Conduct of Life: They do not so much as make Enquiry of any sort after Truth; but confine themselves wholly to the Knowledge of the Ceremonies of Divine Service; which require only the Ministry of the Body, and in which the Sentiments of the Mind have really no part.*---- ^d *The Philosophy and the Religion of the Heathens, are two Things entirely separate one from the other. Wisdom or Philosophy has its peculiar Professors, who teach not the way of approaching the Gods: And Religion also has its Ministers, who teach not the Rules of Wisdom. Whence this is apparent, that theirs is neither true Wisdom, nor true Religion.* And indeed, as Mr. *Bayle* has observ'd, "It would be very difficult to ^e prove, that the Priests of *Paganism* requir'd any thing, besides the exterior or outward Shew of Piety; or that they press'd Amendment of Life upon the People; and denounc'd, that, without a sincere and persevering Repentance and Reformation of all corrupt Inclinations; Vows, Offerings, Processions, Sacrifices, Ceremonies, ordinary or extraordinary, could not appease the Anger of the Gods. It is much easier to prove, that they suffer'd the World to rest under this common Illusion; *That it was sufficient to be liberal towards the Gods; and to follow the Formula of Church-Ceremonies.* The Satyr of *Perseus* will serve to convince us of this; where having first thunder'd out against those who make a Bank or Fund of Religion; he immediately calls upon and challenges the Priests, to shew what Gold has to do with holy Things: "Tell me, you who are our Priests, of what Use is Gold in our holy Places? Even just as much, as the little Babies which bridal Virgins offer to Venus. Why do we not offer to the Gods something, which neither the Cotta's, nor the Messala's can present to them, with all their magnificent Chargers pil'd up with the Flesh of their most exquisite Victims? Why do we not offer to them a just, sincere, and generous Heart, deeply imbud with the most lively Sentiments of Justice and Honour? Let me but have this Present to make 'em, and the meanest Sacrifice shall not fail to draw down upon me the choicest Blessings. Does not this insinuate, that that it was the Priests who cherish'd that mercenary Spirit, that Traffick and Trade of Devotion, that reigning Abuse; which made Men so lavish towards the Gods, as to spare nothing in Victims and Offerings; imagining that the Gods, being pleas'd as much as Men, with Presents of Gold and Silver, cou'd not then but grant 'em whatsoever they ask'd?—We cannot tell whether these Priests were learned or not; and whether they had philosophiz'd on the

^c *Nilibi [in Deorum cultu] differitur, quod proficiat ad mores excolendos, vitamque formandam; nec habet inquisitionem aliquam veritatis, sed tantummodo ritum colendi; quod non officio mentis, sed ministerio corporis consistat.* Instit. divin. lib. 4, cap. 3, num. 1, Edit. Cellar.

^d *Quoniam igitur, ut dixi, Philosophia & religio deorum disjuncta sunt, longeque discreta; siquidem alii sunt professores sapientiae, per quos utique ad deos non aditur; alii religionis antistites, per quos sapere non discitur: apparet, nec illam esse veram sapientiam, nec hanc religionem.* Idem. ibid. num. 4. See St. *Austin* de Civit. Dei, lib. 2, cap. 4, 6.

^e *Continuation des Persecutions diverses*, Artic. 49, p. 223. See Mr. *Locke's* Reasonableness of Christianity, &c. p. 267. Edit. Lond. 1696.

^f *Dicite, Pontifices, in sancto quid facit aurum? Nempe hoc, quod Veneri donatae a virgine puppae. Quin damus id superis, de magna quod dare lance Non possit magni Messalae lippa propago; compositum jus, susque animo, sanctisque recessus mentis, & incostum generoso peccus honesto? Haec cedo, ut admoveam templis, & farre litabo.* Sat. 2, vers. 69, & seqq

“ Nature of the Gods: But this we have Reason
 “ to believe; that they had neither Virtue nor
 “ Probity enough, to persuade Men to place a
 “ much greater Confidence, in the Purity of the
 “ Heart; than in the exterior Practices of divine
 “ Worship; and Disbursements made on account
 “ of Religion.” The Profit of the Priests wou’d
 have been too much diminish’d, if Men had fol-
 low’d the Maxims of the Philosophers. I shall
 add to this a gentle Wipe that *Socrates* gives ’em,
 in that Dialogue of *Plato*, which bears the Name
 of *Euthyphro*; that is, of him with whom *Socrates*
 is introduc’d discoursing; (whose *Greek* Name an-
 swers exactly to another *Greek* Name more in use
 with us, called Orthodox; *i. e.* one that is in the
 right). He was a Soothsayer, and *Socrates* seems
 to reproach in his Person the Priests in general,
 as well as others of that Stamp; ^e with *being too*
reserved in communicating themselves; and that they
did not willingly impart to others their Wisdom;
 that is to say, their Knowledge, or what they
 themselves had discover’d. By which in all Like-
 lihood he intends chiefly what relates to Mora-
 lity; as is intimated by the Opposition he makes
 between their Conduct, and the Conduct himself
 observ’d in his Conversations; which ran gene-
 rally upon that Science: and which tended solely
 to correct the Errors of Mankind, and inspire ’em
 with the Love of Virtue. Besides, the very Sub-
 ject of the Dialogue gives us clearly to under-

stand the false Ideas the Priests had, upon the
 Subject of Morality; for we there see *Euthyphro*,
 who thinks he is doing the finest Action in the
 World, offering himself as a voluntary Accuser
 against his own Father; in a Matter too, where
 he pretends to convict him of no less than Mur-
 ther. Some perhaps will object to me here,
 what I have elsewhere shewn in ^b one of my
 Notes; that, amongst the Heathens, even the
 common People were not ignorant, that as Vir-
 tue was well pleasing; so Vice was odious to the
 Deity: From whence one might be apt to infer,
 that the People were beholden to the publick
 Ministers of Religion for this Knowledge at least.
 But it is very probable, that Principles of this
 sort were preserv’d among the People, either by
 ancient Tradition; or by some Remains of the
 Light of natural Religion; or by both these to-
 gether: And that, if the Priests did not directly
 teach the contrary, but did sometimes even re-
 commend Virtue; it was only in general loose
 Terms, without ever entering into the Particulars
 requisite for Instruction; which without doubt
 they were not very capable of doing. But this is
 sufficient for my Design; which is to shew, that,
 in the Time of *Paganism*, the publick Ministers
 of Religion, who ought to have made it their
 principal Study, busied themselves about nothing
 less than this Science of Morality.

^e ἵστας γὰρ σὺ μὲν δοκεῖς σπάνιον σεαυτὸν παρέχειν, καὶ διαδάσκειν οὐκ ἐθέλειν τὴν σεαυτῷ σοφίαν. Tom. 1, p. 3, D,
 Ed. Steph. Ed. Laemar. p. 48, E.

^b *Pufend.* lib. 2, chap. 4, Sect. 3, Note 4.

S E C T. VII.

AMongst the *Jews*, it does not appear that
 the Priests apply’d themselves to this Sci-
 ence: And from the Time that Prophets
 ceas’d from among that chosen People of *God*;
 that is to say, a little after their Return from the
Babylonish Captivity; the Doctors and publick
 Interpreters of the Law began insensibly to cor-
 rupt Morality; so far were they from unfolding
 the true Principles thereof, and drawing out those
 Principles into all their Consequences; as they
 might easily have done, with the Help and As-
 sistance of that Revelation, of which they were
 the Depositories: But being entirely busy’d about
 their Civil Law, or the Study of Ceremonies;
 and besides fill’d with carnal Prejudices, and scrup-
 ulously attach’d to the Letter of the Law; they
 either did not at all penetrate into, or else did en-
 tirely frustrate and confound the Spirit and De-
 sign of the Legislatour. They, on pretence that
God, to sute himself to the Weakness of the *Jew-
 ish* Nation, had prescrib’d to ’em a great Num-
 ber of Rites and Ceremonies; insisted much more
 upon the Performance of the exterior Worship,
 and the practical Punctilio’s of Devotion; than
 the Purity of the Heart and Inclinations, with an

exact Conformity, and steady Adherence to the
 Rules of Virtue; and what was still worse, by
 their false Glosses, and by their human ^a Tra-
 ditions, they came at last to destroy entirely se-
 veral of the most incontestable Principles of the
 Law of Nature. They invented, for example,
 a thousand ridiculous Subtilties, to furnish Men
 with Expedients for eluding the Obligation of
 the most solemn Oaths, and Promises. *Hypocrite*,
 (say the *Scribes* and *Pharisees*, whom *Jesus*
 for that Reason treats as *Hypocrites* and *blind Guides*)
Hypocrite shall swear by the Temple, it is nothing;
 but whosoever shall swear by the Gold of the Temple,
 he is a Debter: or, oblig’d to keep his Oath. *Hypo-
 crite* shall swear by the ^{*}Altar, it is nothing; but
 whosoever sweareth by the Gift (or Offering) that
 is upon it, he is guilty: or oblig’d to keep his Oath.
 — *Whilst they paid † Tithe of Mint, and Anise,
 and Cummin, they omitted the weightier Matters of
 the Law, † Justice, Mercy, and Faith.* ’Tis one
 of the clearest Maxims of right Reason, that
 every Vow ^c contrary to any divine Law, is in
 it self entirely void. Yet the Priests, and the
 Doctors who were their Dependants, finding
 their Account in Vows which Men made for

^a See *Matth.* xv. 3, &c.

^b *Matth.* xxiii. 16, 18, 23.

^{*} *Verf.* 18.

† *Verf.* 23.

‡ See *Grotius* on the Place.

^c See *Pufend.* de *Jur. Nat. & Gent.* lib. 3, cap. 6, sect. 15. & lib. 4, cap. 2, sect. 8.

the Benefit of the Church; had the face to maintain, that if any one had made a Vow to God of all that he should be able to give to his Father or Mother; such a Vow was good in Law, and irrevocable; so that after such Vow made, this unnatural, or rather impious Child was, according to them, not only discharg'd from giving any Succour or Relief to his Parents in their Necessities; but even bound in point of Conscience not to do it; on account of the Obligation of this same Vow: Their Decision runs thus: ^d *Who-so-ever shall say to his Father or his Mother, what I could have succour'd you withal, be it consecrated to God; he must not succour, that is, honour his Father or his Mother, according to the Commandment.* And whereas God, for Reasons founded on the Constitution of the *Israelitish* Government; had forbidden the *Jews* to have much Commerce with other Nations; and had even expressly commanded them to exterminate some of 'em. They hereupon entertain'd Sentiments of implacable Hatred and Animosity against all the rest of Mankind: So that the *Jew* believ'd himself wholly discharg'd from all the common Offices of Humanity^e or Civility^f, with respect to all Foreigners, unless they embrac'd the *Jewish* Religion; he insisted likewise, that he was warranted by Law to treat 'em in a hostile manner; and that he was not only permitted, but positively commanded to take Vengeance of 'em, whenever it could be safely put in practice; and so far was he from any Possibility of being undeceiv'd in these barbarous and inhuman Opinions of his, by any Instruction he might receive from his Teachers; that all their Discourses tended to nothing so much

as to confirm him in 'em. The *Pharisees*, besotted with the Notions of *Judas* the *Gaulonite*; vainly imagin'd, that there could be no Magistrate, unless of their own Nation, and establish'd by the immediate Appointment of God, to whom Obedience was due for Conscience sake; and upon this they founded their particular Doctrine, ^g that it was unlawful to pay Tribute to the *Roman* Emperour; tho' in peaceable Possession of their Country. ^h *And many such-like Things did they*, as our Lord *Jesus Christ* lays to their Charge, in many Places of the Gospel. As for those Doctors, the *Jews* have had during all the following Ages down to the present Time; these seem to have made it their sole Aim to surpass their Predecessors in this Particular; witness the Extravagancies, detestable Maxims, and impious Notions, with which they have stuff'd their *Talmud*; and wherewith the Books of their *Rabbins* do so abound. You may find there, for instance, ⁱ that 'tis the most innocent Thing in the World, to utter all manner of Curses and Execrations against Christians: that it is not so much as a Thing tolerated, for any one to presume to save ^k an Idolater, that's a drowning; or in danger of perishing, by any other Accident: or to do the Office of a Physician to him, tho' he's sure to be well paid for it; unless he have just Cause to fear some hurt to himself, from the Resentment of the Patient, on account of his refusal: In this particular Case, say they, he may assist him, but always upon condition that he be very well paid for his Pains; for it is by no means lawful to do it gratis. Thus you ^l see how these False-Teachers have corrupted the pure Morals of their Legislatour *Moses*.

^d *Matt.* xv, 5. See *Grotius* i, l.

^e See *Juvenal*, Sat. 14, 103, 104. *Tacit. Hist.* lib. 5, cap. 5^m. And the Parable of the Samaritan, *Luke* x, 30, &c.

^f *Matt.* v, 47.

^g See *Matt.* xxii, 17. and *Joseph. Antiq. Jud.* lib. 18, cap. 17. and *De Bell. Jud.* lib. 2, cap. 12^m, *Ed. Genev. And Est. Havercam.* c. 8^m. ^h *Mark* vii, 13.

ⁱ See *Grotius's Letters*, Part I, Epist. 122.

^k *Maimonides*, of *Idolatry*, translated by, and with the Notes of, *Dion. Voss.* at the end of *Tom. V. Oper. Gerb. Jo. Voss.* *Amsterd.* 1700. Note, This Rabbin is one of the most esteem'd, and judicious. See *Nouv. de la Rep. des Lett.* Jan. 1707, Art. 4. and *Bainage, Hist. of the Jews*, lib. 4, cap. 15. where these Authors relate several Maxims of the corrupt Morality of the *Jewish* Doctors.

^l Mr. *Bernard*, in his *News of Oe.* 1702. p. 46; where he reports these loose Decisions of the *Jewish* Casuist.

S E C T. VIII.

JESUS Christ did, thro' the whole Course of his Ministry, incessantly oppose, and utterly destroy the erroneous Maxims, and pernicious Glosses of these *Jewish* Doctors. He re-establish'd Morality in its utmost Purity; he fully laid open the true Sources thereof; and he gave forth Rules touching the whole Duty both of Mankind in general, and of each Person in particular; they were general indeed, but perfect; entirely conformable to right Reason, and the true Interests of Mankind. His Disciples every where preach'd up this most holy Doctrine; by the Light of which, if well understood and unfolded, a Man may securely direct his Judgment in the Decision of all imaginable Cases. Nevertheless, even in the Time of the Apostles themselves, certain false Doctors, not a few, had crept into the Church; who began to corrupt the Christian Morality, by pre-

tending ^a it was necessary to add thereunto, the Observation of the *Mosaic* Ceremonies; altho' the Son of God had manifestly discharg'd Men from the Obligation of submitting themselves to that Yoke; a Thing in its own Nature much more proper to draw Men off from the Practice of true Virtue; than either to preserve, or promote it. There were likewise some ^b, who teaching another Doctrine than that of *Jesus Christ*, gave heed to Fables, and endless Genealogies, which caus'd Questions and Disputes, rather than godly edifying in that Faith, which GOD demands; and in that Charity, which is the end of the Commandments, both of the Law, and of the Gospel; knavish and ignorant Doctors, who understood neither what they said, nor whereof they affirm'd, and who turn'd aside unto vain jangling. Others there were, who ^c despis'd Government; who being audacious and insolent, were not afraid to speak

^a See the Epistles of St. *Paul* to the *Romans*, and *Galatians*; and *Coloss.* ii, 20, & seq.

^b *1 Timothy* i, 3, 4, 5, 6, 7.

^c *2 Peter* ii, 10, 18.

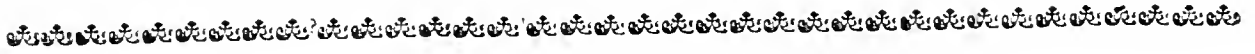
evil of Dignities; who speaking big Words full of Vanity and Folly, allur'd thro' the Lusts of the Flesh, and thro' much Wantonness, those who had truly escap'd from them who liv'd in Errour; who^d turn'd the Grace of our God into Lasciviousness: And last

of all, such, ^e as held the Doctrine of Balaam, who ^f taught Balac to cast a Stumbling-block before the Children of Israel, so that they ate Things offer'd to Idols, and committed Fornication.

^d Jude, ver. 4.

^e Revelations, Chap. ii, ver. 14.

^f See Numbers xxii, & seq.



S E C T. IX.

NO marvel then, if after the Death of the Apostles, and their Primitive Disciples, the Evil grew every day worse and worse. The extreme Fondness and Conceit, which the following Ages grew into, of Fables^a, and Allegories; of a^b false Eloquence, and of the groundless Imaginations of the Heathen^c Philosophers; the profound Ignorance they were in, of the Art of Reasoning justly^d, and of the right Method of expounding the Holy Scripture; the Precipitation with which they acted, in pursuance of the rash Dictates of an over-heated Imagination; the Ambition^e and bad Morals of the greatest Part of the Clergy; more jealous of their own Rights, and more intent upon discussing Points of Discipline, or abstracted Notions of Metaphysics; than diligent in studying themselves, or teaching the People, the Rules of Morality; the dreadful Disorders, and scandalous Divisions, which did so often rend the Church; the gross Frauds and Abuses which from time to time stole into Practice; and which at last oblig'd them to come to a publick Reformation thereof; a Thing always found very difficult even but to undertake, tho' much more so in the Execution; add to these the little Solidity, which we find in the greatest Part of those Works, which are the Remains of Ecclesiastical Antiquity: all this, I say, gives us reason to believe, that the Study of Morality, during all this Interval, notwithstanding the Light of the Gospel; made but little Progress in the World. But, to put this Matter clearly beyond all possibility of doubt, we shall now descend to Particulars.

Who knows not, (says a Minister^f of the Reform'd Religion) that most of the Fathers have not wrote at all upon Matters of Conscience; and that those who have touch'd thereupon, have said nothing to the greatest Part of those Questions, the Determination whereof was of the greatest Importance? In fact, it appears, both by those Books we have transmitted down to us; and by the Catalogues of those that are lost; that the greatest Part of those, we call Fathers of the Church, scarce ever took Pen in hand on any other Subject, besides Matters purely

speculative; or concerning the Discipline of the Church. It was but very rarely, if at all, that they handled Points of Morality; and that too only occasionally; and ever in a manner by no means accurate, or methodical. The Sermons, which they sometimes made on this Subject, were so stuff'd with the vain Ornaments of a false Rhetorick; that the Truth did, as it were, ly smother'd under heaps of Figures, and pompous Declamations. And the greatest Part of those moral Reflections, which they scatter'd here and there in their Works, were extracted, by forc'd and far-fetch'd Allegories, from a thousand different Places of Scripture, where the true literal Sense itself made nothing to their Purpose. To be convinc'd of this, we need only read those Collections, which some of the most extravagant^g Admirers of Ecclesiastical Antiquity, have given us of the Thoughts, which appear'd to them, the most beautiful in these Works of the Fathers. Besides, these ancient Doctors, even in their very best Treatises of Morality, perpetually^h confound the Duties of Mankind in general, with the particular Duties of a Christian, precisely consider'd as such; as well as the Principles of Morality purely natural, with those of Christian Morality: on the other hand you shall often find 'em putting too great a Difference between the Man and the Christian; and by pushing this Distinction too far, run themselves into the Absurdity, of laying down Rules that are impracticable. To conclude then with what is a most apparent Proof, of the little Care they had to improve Morality; there is scarce one of them, who has not been guilty of very gross Errors thereupon. Let us but run over the most celebrated of them, and they will furnish us with manifest Examples of what I am saying.

Athenagorasⁱ seems to establish the^k Worship of Angels; and says, they were created Superintendants over the Things here below. He extols Celibacy, and condemns second Marriages, which he terms^l a specious sort of Adultery.

The Work of Clement of Alexandria, entitled The Pedagogue, is a Book wherein^m he undertakes to form the Manners of Youth; and gives 'em Rules of

^a See *Bibl. Univers.* Tom. X, p. 233, & seq. and *Du Pin*, *Bibl. des Auth. Eccles.* Tom. I, p. 7, Col. 1^r. Edit. Hol. And *Bajn. Hist. of the Jews*, Lib. 3, cap. 22 throughout.

^b See the *Art Critica de Le Clerc*, Tom. I, Part 2, Sect. 1, Cap. 16, n. 13^r, & seq. p. 347, & seq. 4th Edit. and p. 386^r, 2d Edit. and *Bibl. Univ.* Tom. XII, p. 144, & seq. and 263, & seq.

^c See *Bibl. Univ.* Tom. X, p. 181.

^d See *La Defense des Sentiments de quelques Theol. Sc. Let.* 14, p. 360^r, &c. and *Wotton on the Antients and Moderns*, Chap. 28. and the *Epistolæ Crit. & Eccles.* of *Le Clerc*, Ep. 4.

^e *Bibl. Univ.* Tom. XVIII, p. 57, 92, 110, 119. taken from several Places of *Gregory Nazianzen*, where he sets forth the Corruption of the Clergy.

^f *La Placette*, *Treatise of Conscience*, Lib. 2, Chap. 16, p. 190, of the first Edition.

^g See the Notes of *Mr. De Sacy* on the Scripture, which are full of them; and the *Penses Ingenieuses des Peres d'Eglise*, by *P. Bouhours*. See *Mr. Bernard*, in his *Nouvelles of September* 1704, p. 282, 283, 284, 285.

^h See *Mr. Buddeus*, in his *Hist. du Droit Naturel*, Sect. 10, at the beginning of the *Selecta J. N. & Gantium*.

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

^k *Du Pin*, *Bibl. des Auth. Eccles.* Tom. I, p. 65, a - Edit. Holland.

^l *Δευτερος* [γάρ] *εὐπρεπὴς ὅτι μοιχία*, p. 298. And p. 37, B^r, Ed. Colon. 1683.

^m *Bibl. Univ.* Tom. X, p. 218^r.

Christian Conduct; but such as abound with Maxims excessively rigid, and far remote from any thing now in practice. It is in truth a confus'd Heap of Precepts without Order, without Connexion, full of Declamation, and dark mystical Allusion; in a word, such as one would expect from an Author, who "writes almost always without either Method or Coherence; and who himself, in another Work, professes to have wrote with design to hide and to confound, as I may say, Things; to the intent, that none but those, who were Men of Ability and Understanding, and willing to undergo the Fatigue of a laborious Application, might be able to comprehend them. There are some Passages in this Pedagogue, which, in the Opinion of Mr. ^p Du Pin, ought not to be read by every body. And as Clement of Alexandria did in the main give Preference to the Philosophy of the Stoicks; so we find, in this Work of his, several of their Paradoxes: For example^q, he maintains, ^r That the Christian, and he alone, is a rich Man; a Paradox very like that of the Stoicks, who said the same Thing of their wise Man. Those Philosophers express'd themselves thus^s: That the wise Man, and he alone, is rich; so that Clement has only chang'd the word *Wise*, for that of *Christian*. The Reasons likewise which he makes use of to prove his Thesis, are much the same with those of the Stoicks; as any one may see, by comparing what he says, with the Explication, which Cicero gives of that same Stoick Maxim, in his Paradoxes^t. And when he explains that * Precept in the Gospel, † When they persecute you in this City, flee ye into another; he still reasons upon the Principles of the Stoicks, who deny'd that Pain was an Evil; The Lord, says he, does not enjoin us to fly, as if 'twas an Evil to be persecuted; nor does he command us to avoid Death by flight, as a Thing to be fear'd. And then our Doctor, proceeding to shew the Reason, on which this Permission or Commandment of flying from Persecution is grounded, suggests this; that otherwise we should give occasion to Persecutors to commit Murther: For, says he, the Will of Christ here is, that we should not be any ways aiding or assisting to others in the doing what is evil, &c. It was the Chimerical Idea of a wise Man, according to the Stoicks, to be entirely without Passions: And thus Clement in another place, makes his true^u Christian exempt from all Passions or Affections, even the most innocent; * Excepting those only, which regard the Preservation of the Body; such as Hunger, and Thirst, with others of the like Nature. Upon this Principle, he maintains, That Jesus Christ and his Apostles^v had not any Passions at all;

and that Jesus Christ himself had never any, even the least Impulse of either Pleasure or Pain; That he never had any occasion to Eat; and that, if he did Eat, 'twas for fear of passing for a Ghost. He with equal Prudence too justifies the Idolatry of the Pagans, by saying, ^z That God had given them the Sun, the Moon, and the Stars, to the intent, that they should adore 'em; and by that Worship lift up their Minds to God himself. A Professor in Divinity, (A) of the Lutheran Communion, has endeavour'd to vindicate Clement with regard to some of the before-mention'd Errours. But, whoever examines what he has said, will find, that he succeeds no better here, than when he maintains, that the Pedagogue and Stromata are excellent Works, both for their Morality; as well as for their Style and Method. The very Analysis, he himself gives of them, does well nigh furnish out full Proof of the contrary; and shew the little Foundation there is, for those magnificent Encomiums, he is pleas'd to bestow on the Presbyter of Alexandria.

Tertullian, to say nothing here of the Enthusiasm, and overstrain'd Austerities, of the Montanists, by whom he suffer'd himself to be impos'd upon; ^{aa} seems on some Occasions to have stretch'd a little too far, this most true Principle; (viz.) That all, who countenance or assist wicked Men in their vicious Practices, or contribute in any manner to what is sinful, become thereby guilty; and to have put too rigorous an Interpretation on things, that were in themselves justifiable; such as, for instance, ^{bb} the bearing Arms in defence of the Government; the illuminating one's House, and bedecking it with Laurels in honour of one's Prince; the making use of common Expressions, which may chance to have some reference to Idolatry. And this seems to have been the Case, when defending, in his Book of the Garland, the Action of a certain Soldier, who had refus'd to put a Garland on his Head; he maintains, that Christians are absolutely forbid to wear Garlands; as also to bear Arms. He goes so far as to call these Chaplets or Coronets, which Soldiers us'd to put on their Heads, the Poms of the Devil; and a Sin against Nature. When he is declaiming against Plays, he suffers himself to be transported beyond all Bounds, and gives into false Notions; as when he says, That * 'tis the Devil that mounts the Actors on their Buskins, in order to make Jesus Christ a Lyar; who has said, that no one can add one Cubit to his Stature. He will have it, That a Christian cannot in Conscience ^{cc} exercise the Office of a Judge; nor serve as an Executioner of Justice. He seems to maintain, that † one cannot

ⁿ Du Pin, ubi supra, p. 86, Col. 2. Ed. Hol.

^o Stromata, or Tapestry. See lib. 1, p. 278, B. lib. 4, p. 475, D. lib. 7, p. 767, at the end of the Book. See too Du Pin, ubi supra, p. 81, Col. 2. — whose Words these are.

^p Ubi supra, p. 81, Col. 2.

^q Life of Clement of Alexandria, by Mr. Le Clerc, Bibl. Univ. Tom. X, p. 194.

^r Lib 3, Cap. 6, Pædag. p. 233, & seq.

^s Ὅτι μὴ ᾖ ὁ πρὸς ἀλάστοι. Cic. Paradox. 6.

^t Paradox 6.

* Stromata, Lib. 4, p. 504, B.

† Matth. x, 23.

^u Whom he calls Gnostick, [γνῶστικός] i. e. who perfectly knows the Christian Religion.

^v Τελεῖται δὲ ὁ Γνωστικός, ὡς μόνος τις διὰ τὴν μονὴν τῆ σώματι χρησόμενος πάντοι περιπέσει, διὸν πείνη, δίδει, καὶ τὴν ἰσχύος. Stromat. Lib. 6, p. 649, D.

^w Ibid. p. 649.- 650. See Mr. Le Clerc's Lett. Critic. and Eccles. Epist. 1, p. 18, 19, 4th Edit. And 2d Ed. p. 21, 22.

^z Ἐθάρκεν δὲ [ὁ Θεὸς] τὸν Ἥλιον, καὶ τὸν Σελήνην, καὶ τὰ ἄστρα εἰς διηκρίαν --- ὁ δὲ δὲ ἦν αὐτῇ δόξεια τὴν ἰσχύος, ἀναλόγως πρὸς Θεὸν διὰ τῆς τῶν ἀστρον θεσμοκείας. Stromat. Lib. 6, p. 669, B. C.

(A) Mich. Fortsebius, Comm. in Offic. Ambros. Diff. 2, Sect. 6, & seq.

^{aa} Du Pin, Bibl. des Aut. Eccles. Tom. I, p. 102, Col. 1, 2.

^{bb} De Idololatria.

* De Spectaculis, cap. 23, p. 155, H. Sie & Tragedos [Diabolus] cotburnis extulit,

quia nemo potest adjicere cubitum unum ad staturam suam. Mandatum facere vult Christum.

^{cc} De Idololatr. cap. 17, 19. & seq. & De Corona Militis, cap. 11. See Dallæus de usu Patrum, Lib. 2, cap. 4, p. 262.

† Sed & Cæsares credidissent super Christo, si aut Cæsares non essent seculo necessarii, aut si & Christiani potuissent esse Cæsares. Apologet. e. 21. See Rigaltius thereupon.

be an Emperour and a Christian at the same time. In his Books of Monogamy, ^{da} and Exhortation to Chastity; he absolutely condemns second Marriages, as a sort of Adultery. He maintains, ^{ca} in his Book of flying from Persecution; that we are absolutely forbidden to fly in Times of Persecution; or to give Money, to avoid being tortur'd. After this, it is not to be wonder'd at, that he condemns Self-defence against an unjust Aggressor, as a Thing contrary to Christian Patience. His Reasons for the Purpose are as remarkably weak; as his Maxim is rigorous, and overstrain'd. He says, ^{**} that the Gospel without reserve forbids us, to render Evil for Evil: That it is inroaching on the Prerogative of God, and the Homage due to him; to arrogate to ourselves the Power of Self-Defence, as oft as we shall judge it necessary: That when *Jesus Christ* says, *Judge not, that ye be not judged*; he demands and expects a Patience carry'd even to this Point; for *who else can be said not to judge another, but he who is so patient, as not to defend himself?* Behold, in what a manner *Tertullian* explains the Scripture; and on what Principles he founds those Maxims of Morality, he is pleas'd to advance.

ORIGEN, in his Homilies, is full of moral Instructions: But they are scarce any thing more than moral Reflections, or the Morals of Scripture Stories, extracted out of the Facts by dint of Allegory; and propos'd in a manner, not very proper to stir up the Affections; or produce in the Mind any rational well grounded Conviction. 'Tis known, that this famous Doctor, by a Mistake gross enough, hastily giving into the literal Sense of these Words of our Saviour ^{ff}; *There be Eunuchs, which have made themselves Eunuchs for the Kingdom of Heaven's sake*; executed on himself this mistaken Precept, or Advice: and *Demetrius*, Bishop of *Alexandria*, did, before he became his Capital Enemy, admire this Action of his, as an Act of heroic Virtue.

St. *Cyprian*, "Was in the Marriage-State when he was converted; ^{es} but from that time, even before he was baptiz'd, he confin'd himself to the strict Rule of Continence; as his Deacon *Pontius* has it: Which shews, that it was look'd upon to be a kind of Holiness to live a single Life. A Notion agreeable enough to the Ideas of Virtue, Men had at that time; which, in many Cases, were as remote from the common Usage of Life, as was the Rhetorick of the same Age; which was then so much the more had in esteem; as the Turn it gave Things was more strange and uncommon: The one being as little fitted to procure the Good of our Neighbour, and of Society; as the other was to promote Perspicuity of Discourse, and furnish the Mind with just Ideas. *Cyprian*, not content with separating himself from his Wife, did moreover give all he had to the Poor. — The great Conflicts and Struggles he had to go thro' with, on account of this ri-

gid Abstinence from his Wife; were doubtless no small Mortification to him. That the Christian Religion does not enjoin needless or useless Mortifications, is pretty certain: So that the only Thing that remains to be known is, whether we are in any better Condition to serve God, by altogether abstaining from a Thing, the Use of which has in itself nothing criminal, and which we cannot but be still desiring; than when we continue to enjoy the moderate Use of it. But be that as it will; from the Time of St. *Cyprian*, this new sort of Continency began to be look'd upon as a great Virtue; tho' a thing altogether unknown to former Ages. — ^{hb} There is scarce any thing that St. *Cyprian* treats of, but in the declamatory Style; and he often expresses the most common Things in such a figurative and affected manner; that, if the Reader be not very much upon his guard, he will be easily led to imagine, that every thing he says is of the utmost Importance. And I may add, that had not this been the true Bent and Cast of his Genius, he could never have taken so much pleasure in the reading of *Tertullian*; who every where makes this his constant Practice. — ⁱ Amongst the Arguments he makes use of, to persuade young Women to renounce the Vanities of ^{sk} Dress; he says, 'tis running counter to the Will of God, to make use of Paint, as also to black one's Hair; because our Lord has said: ^{††} *Thou canst not make one Hair white, or black*; and yet, adds *Cyprian*, ye attempt to surmount a Difficulty, which God has judg'd insurmountable." — An Argument that either proves nothing; or else proves, that 'tis not lawful for us to trim our Hair, or Beards: for the whole Reasoning of St. *Cyprian* turns on this Maxim ^l: "That every thing that grows naturally, is the Work of God; but whatever receives change, is the Work of the Devil." In his Notions too with respect to Martyrdom, he seems to come very little, if at all, short of the false Ideas, Men had in those days form'd to themselves about that Matter. For he is careful to comfort ^{mm} beforehand such, as having confess'd *Jesus Christ*, might perhaps come short of the Honour of being Martyrs; because it might possibly happen, that before their Turns came to suffer, the Persecution might cease. — Which shews a Disposition very different from the Sentiments of him, who, when just upon the Point of suffering the Pain of the Cross, ^{||} said: *O my Father, if it be possible, let this Cup pass from me.*" St. *Cyprian*, in his Tract of the Usefulness of Patience [†], commends *Abel* very much, for suffering himself to be murder'd by his Brother, without making any Resistance; as it were on purpose to be a Prelude to the Constancy of the Martyrs: Whereby, as on the one hand, he guesses at a Circumstance, of which there is not the least Footstep in the History of *Genesis*; so on the other

^{da} Du Pin, ubi supra, p. 103, Col. 27.

^{**} Absolute præcipitur, Malum malo non rependendum. Par factum, par habet meritum. Quomodo id observabimus, si fastiditi ante in fastidio ultionis non erimus? quem autem honorem litabimus Domino Deo, si nobis arbitrium defensionis arrogaverimus? — Nolite judicare, quum dicit, ne judicemini, nonne patientiam flagitat? Quis enim non judicabit alium, nisi qui patientis erit non defensionis? De Patientia, p. 165, Ed. Rigalt. and p. 144, A. B., Ed. Pamel. cap. 10.

^{ff} Matt. xix, 12.

^{hb} Ibid. p. 212, 213.

^{sk} De habitu virginum, p. 99, and 100, Edit. Oxon.

^l Opus Dei est, omne quod nascitur; & Diaboli, quodcumque mutatur. Ibid. p. 99.

^{mm} Bibl. Univ. ubi supra, p. 248, 249. ex Epist. 10, p. 22, Ed. Oxon. See the rest of Mr. Le Clerc's Reflection upon this Matter, on to the end of Page 250.

[†] Abel, originem martyrii & passionem justi hominis inivians primus & dedicans, adversus fratrem parricidam non resistit, nec reluctatur; sed humilis & mitis patienter occiditur. — De bono Patientie, p. 214. Ed. Brem. & Oxon.

hand, he utterly destroys both here, as well as in other Places, the natural Right, that all Men have to a just Self-defence. When ^m he designs to rebuke those who rebel against Bishops, he makes use of an Argument, "Which either proves nothing at all; or else that we ought to pay a blind Obedience to all Bishops, who are but duly elected according to the common Form." In his Answer ^o to a Letter of Florence Pupian, an African Bishop, ^p "He equals Bishops to the Apostles; and maintains, that 'tis an insupportable Piece of Pride, to pretend to judge of them; That Pupian in particular was an insolent Fellow, to refuse to acknowledge Cyprian for a Lawful Bishop, until he should be convinc'd thereof in his own Mind; because then it would follow, that for the six Years that he had been a Bishop, he had been incapable of administering the Sacraments; or of giving Absolution to those he had absolv'd. Thus the Salvation of the People depended on the Validity of a Bishop's Election; and the Validity of that Election depended on his Integrity. — A strange Principle, that render'd the Salvation of Christians so precarious and uncertain; and which annihilated and destroy'd the Effects of all the Virtue and Piety of the People; notwithstanding which they were to be damn'd, if the Bishop prov'd not to be a good Man; or to have been unduly elected.

LACTANTIUS maintains, that ^q a truly good Man can neither bear Arms; nor have any Dealings or Traffick in Foreign Countries. He also absolutely ^r condemns the putting out Money to Interest; and looks on it as a kind of Thievery. ^s He carries beyond all Bounds the Duty of Christian Patience. And establishes this Rule, that † one ought never to accuse any Person whatever, where the Crime is capital; insists too upon its being Homicide, and that without the Exception of so much as any one single Case.

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

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

Gregory Nazianzene ^z is no very methodical Writer. — His Style is excessively figurative, not very correct, and even sometimes hard and uncouth. — "He very much ^{aaa} exaggerates the Boldness of the Arians and Macedonians; who were then as numerous at least as the Orthodox, and did presume to assemble themselves together, and form Churches; outrageous Attempt! and that too, after the Determination of so well regulated a Council, ^{bbb} as had been held but just before!" Gregory too did not comprehend, how his Holiness and his Gravity (for this was the Style in which they accosted their Bishops, and he was then addressing himself to Nestorius) cou'd tolerate the ||| Apollinarian Meetings. — "He conceiv'd, for

^m *Bibl. Univ.* Tom. XII, p. 309, ex Epist. 59, p. 129. Ed. Oxon.

^o *Epist.* 66, p. 166, 167.

^p *Bibl. Univ.* ubi supra, p. 332, 333. See also what is said Page 334.

^q *Nego ullo modo fieri posse, ut homini, qui quidem vere justus sit, ejusmodi casus eveniat. — Cur enim naviget, aut quid petat ex aliena terra, cui sufficit sua? cur autem belligeret, ac se alienis furoribus misceat, in cujus animo pax cum hominibus perpetua versetur?* Inst. Divin. Lib. 5, cap. 17, Num. 11, 12. Ed. Cellar. Ita neque militare justo licebit, &c. Lib. 6, cap. 20, Num. 16, 17.

^r *Non accipiat usuram, ut — abstineat se prorsus alieno.* Ibid. Lib. 6, cap. 18, Num. 7.

^s See what my Author says, Lib. 2, Cap. 5, Sect. 14.

† *Neque vero accusare quemquam [justo licebit] crimine capitali, &c.* Lib. 6, cap. 20, Num. 16.

^t *Du Pin's Library of Ecclesiastical Authors, Tom. II, p. 54, Col. 2.*

^u *Ibid.* 143, Col. 1.

^{xx} *Idem, ibid.* p. 179, Col. 1. Ex Epist. 2, ad Amphilocho. Canon 43, Tom. II, p. 772, B. Oper. Basil. Paris. 1618.

^{yy} *Du Pin, Canon 26, ibid.* p. 178, Col. 1. Basil. Op. Tom. II, p. 769, D. Ed. Paris. 1618.

^z *Bibl. Univ.* Tom. XXV, p. 412, 413, in the Extract of the third Tome of the Ecclesiastical History of Mr. Fleury.

† *Oper. Basil.* Tom. II, p. 786, A. Edit. Paris. 1618.

¹ *Οἷς τὸ μὴ διελέγεσθαι, νόμῳ περὶ παραγμένον ἔστι.* Homil. de Legend. Græc. Sect. 7, Edit. Oxon. 1694. Oper. Basil. Tom. I, p. 573, C, Paris. 1618.

² *Ibid.* Sect. 13. Oper. Tom. I, p. 577, B.

|| *Matt.* v, 39.

³ *Ἀλέου, ἐμοὶ δὲκέν, τὸ περὶ γματῶ, τὸν ὄρον ἡμῶν ἀπαπέουσθ.* Ibid. & Op. Tom. I, p. 573.

^{zz} See the Life of Gregory Nazianzene, by Mr. Le Clerc, *Bibl. Univ.* Tom. XVIII, p. 23.

^{aaa} *Ibid.* p. 114, 115, ex Orat. 46, Tom. I, p. 721, A, &c. Oper. Gregor.

^{bbb} That of Constantinople, held in 381.

||| Antient Hereticks, whose Head was Apollinarius of Laodicea. They pretended that Jesus Christ had not an humane Soul, but that the Word of God, or Logos, animated his Body. That the Flesh of Jesus Christ was not form'd out of the Holy Virgin, but that it came down from Heaven. They also reviv'd the Error of the Millenarians, to which the Simplicity of Papias, a Disciple of St. John the Evangelist, gave Birth. They were in the fourth Century.

“ what reason I know not; that to suffer those
 “ People to have their Assemblies, was to agree
 “ with them, that theirs was the true Doctrine;
 “ even truer than that of the Council; seeing that
 “ both of them could not be true: as if granting a
 “ Toleration to any one, was in fact an avowing
 “ that we believe his Opinion to be true! In short,
 “ he exhorts *Nectarius* to remonstrate to the Em-
 “ perour, that all he had done in favour of the
 “ Church, would signify just nothing; if the He-
 “ reticks were still allow’d the Liberty of assem-
 “ bling. Thus the good *St. Gregory*, who was not
 “ in the least willing, while the *Arians* were the
 “ strongest, having the then Emperour on their
 “ side; that the Orthodox shou’d attempt to do,
 “ what they then censur’d in the *Arians*: was for
 “ exhorting his Successor to forget that good Les-
 “ son. — And whereas † the Emperour *Julian*,
 “ adding Insult to Persecution; was us’d, when
 “ he stripp’d the Christians of their Goods, by way
 “ of raillery, to say; that what he did was in aid
 “ of the Gospel, which commanded ’em to de-
 “ spite all those Things; so *Gregory*, being to an-
 “ swer this, amongst other Things says, that *Ju-
 “ lian*, acting in this manner, must needs have ima-
 “ gin’d, that the *Pagan* Gods were well pleas’d to
 “ see innocent Men despoil’d of their Goods; and
 “ consequently that they approv’d of Injustice. This
 “ Answer might have suffic’d: but he adds, that as
 “ there are some things which *Jesus Christ* has strict-
 “ ly enjoin’d; so there were others, which he barely
 “ proposeth to such as shall be inclin’d to do them;
 “ without obliging any Person whatever to an
 “ indispensable Performance. Such, according to
 “ *Gregory*, is the Commandment to abandon the
 “ Things of this Life:” Whereby ’tis plain, he
 “ supposes here a pretended Matter of Advice, to
 “ voluntarily renounce and abandon our Goods;
 “ and that without any other Motive, but our own
 “ Free-will and Pleasure: whereas it is a real obligato-
 “ ry Command; but such as then, and then only takes
 “ place, when the retaining our Goods is incompati-
 “ ble with our Duty; or becomes impracticable, with-
 “ out the Violation of some Precept of the Gospel.

ST. AMBROSE^{ccc} does so run himself beyond all
 Bounds in his Encomiums on Virginity and Cele-
 bacy; that he seems to make it his Business to cry
 down Marriage: and represent it as a Thing scarce
 reputable. He says plainly enough, ^{ddd} *That before
 the Law of Moses, and that of the Gospel, Adul-
 tery was not forbidden.* And loose as he is upon this
 Article, he appears rigid enough on another; I
 mean, that of putting out Money to Interest: which
 he absolutely condemns, in all Cases whatever,
 * without Distinction. His Treatise of *Offices*, is
 a Book which he compos’d to teach Ecclesiasticks
 their respective Duties. ^{eee} *And tho’ the Name of
 Ministers be omitted in the Roman, and following
 Editions; yet it is to be found in all the Manuscripts:*

and ’tis plain by the Work itself, that *St. Ambrose*
 compos’d it for the Use of his Clergy. But tho’ he
 addresses himself particularly to them, yet he treats of
 the Duties of Christians in general; which he lays
 in a more particular manner upon the Clergy. It ap-
 pears both by the Title, and by the Manner in
 which he treats his Subject, that his Design was
 to imitate the Offices of *Cicero*. But, after all that
 a certain || Lutheran Divine, who publish’d this
 Work in *Wirtemburgh* in 1698, with some Differ-
 tations of his own composing, has said; if the par-
 ticular Principles of the Gospel be but excepted,
 which *St. Ambrose* has inserted in this Work of his;
 with the Examples and Passages of Holy Scrip-
 ture, which he perpetually quotes, tho’ for the
 most part ill enough apply’d; I shall not flick to
 affirm, that the Copy comes infinitely short of the
 Original; both for Purity and Easiness of Style, the
 Oeconomy of the Whole, and the Disposition of
 Particulars: as well as for Solidity of Sense, and
 Justness of Reasoning. For instance, see here the
 Contents of his first Book. After some Prefatory
 Discourse upon the Question, when, and in what
 manner, it is proper either to speak, or be silent;
 he, at *Chap. viii*, enters upon his Subject-Matter
 with some Grammatical Remarks; which are not
 very^{fff} well grounded. In the *Tenth Chapter* he
 treats of *Decency*; the chief Duty whereof he
 makes to consist in *The Art of Governing the Tongue*.
 In the *Eleventh Chapter* he divides all Duties in
 general into two sorts: the *Mean*; and the *Perfect*.
 Amongst the latter, he ranks the Love of our
 Enemies; Prayers for those who calumniate, or
 in any other manner injure us; Works of Mercy
 and Compassion. The *xiith*, and following *Chap-
 ters*, on to the *xviiith*, run wholly upon the Sub-
 ject of a Providence; which he endeavours to esta-
 blish and defend in the best manner he can; both
 against the Murmurs of those, who are in this Life
 expos’d to great Afflictions; and against the Ob-
 jections of Libertines and Atheists. In the *xviiith*,
 and following *Chapters*, he treats of the Duties of
 Youth. Having at the end of the *xxivith Chap-
 ter*, spoken occasionally of the four Cardinal Vir-
 tues, *viz. Prudence, Justice, Fortitude, and Tempe-
 rance*; he in the *xxvith* begins to treat of them;
 but in a manner superficial enough; where he him-
 self taking notice of the want of Order in his Dis-
 course, endeavours to excuse, or rather justify it
 in these Words: ||| *Some will perhaps say, that, be-
 cause from these four Virtues spring all the several
 sorts of Duties; we ought therefore to have begun
 with them first. But this wou’d have been conform-
 ing myself to the Rules of Art; according to which
 Duty ought to have been first defin’d; and afterwards
 divided into its several kinds: Now we purposely a-
 void subjecting ourselves to these Rules: It is enough
 for us to propose Examples drawn from the Conduct
 of our Ancestors, which are neither obscure or difficult*

† *Bibl. Univ. ubi supra*, p. 45, 46.

^{ccc} *De Institutione virginum, & passim alibi.* See *Dall. de usu patrum*, p. 272.

^{ddd} *Consideremus primum, quia Abraham ante legem Moysi, & ante Evangelium fuit, cum nondum interdictum adulterium vide-
 retur. Paena criminis ex tempore legis est, &c.* Lib. 1, De Patriarch. Abrah. cap. 4. See *Dall. de usu Patr. ubi supra*,
 p. 271, 272, and *Mr. Bayle’s Dict. Tom. 3, p. 2670, in the Notes, Col. 1.*

* *De Tobia*, cap. 3. & 15. See the *Treatise of Mr. Noodt, De Usuris & Fænore*, lib. 1, cap. 4, & cap. 10, p. 64, & seq.
 As also *Mr. Du Pin, Tom. II, p. 256, Col. 1.*

^{eee} *Du Pin, Tom. II, p. 257, 258.*

|| *Mich. Fortschius, Professor at Tubingen.*

^{fff} *Mr. Du Pin owns it, ubi supra, p. 258, Col. 2.*

||| *Hæc forsitan aliquis dicat primo loco poni oportuisse, quoniam ab his quatuor virtutibus nascuntur officiorum genera. Sed hoc
 artis est, ut primo officium definiatur, postea certa in genera dividatur. Nos autem artem fugimus, exempla majorum proponi-
 mus: quæ neque obscuritatem adferunt ad intelligendum; neque ad tractandum versutias.* Lib. 1, cap. 25, init.

to comprehend; and require not the Niceties of a methodical Writer. In the xxviiith Chapter, he without all reason attempts to shew, the Falsity of two of the Functions, which Cicero ascribes to Justice; nor is this the only Place, where he unjustly censures the Heathen Philosophers; by either mistaking their Meaning; or undertaking to confute Things most apparently true. About the end of the first Book, he returns to the Clergy; whose principal Virtues he there gives a Description of: and then concludes with a Discourse, of the inviolable Fidelity requir'd, in the case of Things deposited in trust. Nor does he come to treat of Happiness, till the beginning of the second Book. The same want of Order and Accuracy reigns throughout the whole Work. He there maintains, That^{xxx} a Christian ought not to engage or fight the Robber who attacks him; and lays it down for a General Rule: That it can never be lawful to preserve one's own Life at the Expence of another's. He lays down this General Maxim also; That we cannot lawfully do * a Thing, which we do not find in express Terms permitted and authoriz'd by Scripture: And upon this Principle he absolutely forbids the Clergy all sort of Rallery. It ought not to be wonder'd at, that he condemns (Book I, Chap. 50,) second Marriages: 'tis but what had been done by many before him, as we have already seen.

St. Chrysostome, with the rest of the Fathers, runs into Notions excessively rigid on the Subject of Usury. This same Doctor, speaking of the Expedient, that Abraham made use of, the † first^{hhh} time, for fear of being put to Death, in case he had been known to be Sarah's Husband; sticks not thus to address himself to his Audience: "Youⁱⁱⁱ know, you well know, that nothing is more insupportable to a Husband, than to see his Wife but suspected of having been in the Power of another Man; and^{kkk} yet this just and good Man, you see here, employs his utmost Efforts, that the very Act of Adultery may be consummated.—Thereupon, he bestows very great Encomiums on his Courage and Prudence.—Then he excuses him for having consented to the Adultery of his Wife, upon this Consideration; that Death, not being as yet de- vested of his Tyranny over Mankind, could not but be very formidable at that time.—After this Encomium on the Husband, he proceeds to the Commendation of the Wife; and says, that she very courageously accepted the Proposal; and that she did all that was requisite on her

part, to make the Plot of theⁱⁱⁱ Play succeed. Whereupon, he exhorts all Wives to follow her Example; and then emphatically cries out: † Who is he that can forbear admiring this wonderful Readiness to obey? Who can ever sufficiently celebrate the Praises of Sarah, who after so much Continency, and at her Years, was willing to expose herself to^{mm} Adultery; and deliver up her Body to be enjoy'd by Barbarians, that she might save the Life of her Husband?—Nor is the Elogy, St. Ambrose bestows on theⁿⁿ Charity of Sarah on this Occasion, less remarkable. St. Austin too, reasoning upon another Instance of the same Nature,^{ooo} seems to have been under the like Illusion. Is it not a very strange Thing, that such bright Ornaments of the Church as these, with all their Virtue and Zeal, should be ignorant; That it is not lawful either to save one's own, or another's Life, by any any Action that is criminal?

St. Jerome^{ppp} every where inveighs against Matrimony in general, and more especially against second Marriages; and his Invectives are to bitter and violent, that notwithstanding all the Savings and Softnings he has thrown in, quite thro' his Epistle to Pammachius, wrote for that Purpose; one cannot but discover, in every Thing he says^{qqq} on that Subject, an entire Conformity with the Opinion of Tertullian: which has been condemn'd by the Church, as injurious to the Honour of Marriage; and contrary to Holy Writ. ^{rrr} He condemns all Oaths^{sss} without Distinction. He forbids^{ttt} Christians to pay Tribute to Infidel Princes. He advises^{uuu} and approves of the Action of those, who murder themselves, for fear of having their Chastity violated. He often talks of Virginitie, and the monastick State, in such a manner, as to make one almost believe it absolutely necessary to Salvation. Labours, Fastings, Austerities, and other Mortifications, with Solitude, and Pilgrimages, are the Subject-Matter of almost all his Counsels, and Exhortations." He^{xxx} plainly enough gives us to understand, that^{yyy} Jesus Christ has abolish'd the Permission of eating the Flesh of Animals; in the same manner as he abolish'd Divorce and Circumcision. Every body knows, with how much Fury, and with how little Honesty he inveigh'd against Vigilantius; who had wrote against the Worship, which at that time began to be paid to the Reliques of Saints and Martyrs; as also against divers other Practices, the dangerous Consequences

^{xxx} Du Pin, p. 262, Col. 1.— See the Place: *Tamen non videtur, quod vir Christianus, & justus, & sapiens, querere sibi vitam aliena morte debeat: utpote qui, etiam si in latronem armatum incidat, ferientem referire non possit; ne, dum salutem defendit, pietatem contaminet.* Lib. 3, cap. 4.

* Lib. 1, cap. 23. See what I have said thereupon in my Tract of Play, Lib. 1, Chap. 3, Sect. 3.

† See Mr. Noad, *De Usuris & Fœnore*, lib. 1, cap. 4. & 6.

^{hhh} Gen. xii, 11, 12. N. B. Barbeyrac says the second, by mistake.

ⁱⁱⁱ I make use here of the Words of Mr. Boyle, in his Dictionary, Article Abimelech, Note (A).

^{kkk} Ὁ μὲν τὴν δίκην, καὶ σπυδαῖς καὶ πάντα ποιῶν, ὡς εἰς ἔργον τὴν μοιχείαν ἐκένων. Hom. 33, in Genesin. Oper. Tom. I, p. 258, Edit. Eton.

^{lll} Πάντα ποιῶν, ὡς τὸ δροῦμα λαθεῖν, ibid. Chrysost. Tom. I, p. 260, lin. 5, Edit. Eton. Vid. p. 258, lin. 35; & p. 259, lin. 12. † Ibid. p. 260, lin. 28.

^{mm} Καὶ εἰς μαρτυρίαν ἐντυπὴν ἐξέδωκε, καὶ συνασίως ἠνέχετο βασιλευσίν. Ibid. p. 260, lin. 30.

ⁿⁿ De Abraham, Lib. 1, cap. 2.

^{ooo} See the Article of Acintynus Septimius, in Bayle's Dictionary, and Notes (A), (B), (C).

^{ppp} These are the Terms of Daillé, *De Usu Patrum*, p. 276.

^{qqq} Epist. ad Pammach. Hier. Op. Tom. II, p. 101, A-, & d. Ed. Basil, & alibi passim.

^{rrr} Du Pin, Tom. III, p. 136, Col. 1-, 2.

^{sss} Comm. on Matth. Chap. v, 34, and Zachar. c. 8, Oper. Tom. VI, p. 313, B.

^{ttt} On Matth. Chap. xvii, ver. 25.

^{uuu} Comm. on Jonah, Chap. i, ver. 12, Tom. VI, p. 150, D-, Oper. Hieron.

^{xxx} Datt. de usu Patrum, p. 277.

^{yyy} Lib. 1, adv. Jooin. Tom. II, p. 30. This Passage is cited in the Canon Law, Diss. 35, Canon 2.

whereof, process of Time has since but too plainly shewn us. The little Tract of St. Jerome's against this Presbyter is stuff'd quite full of gross Abuses, and false Reasonings²²²; contriv'd to raise popular Odium against his Adversary, whom he wanted good Arguments to confute.

St. Austin, endeavouring to make an ' Apology for the Complaisance, which Abraham shew'd his Wife, on account of Hagar; pretends, that the Wife can convey to another Woman, the Property which she has in the Body of her Husband; and that the Husband also can transfer to another Man, the Power which he has over the Body of his Wife: and, what is still more surprising, he finds this Paradox on a Passage of St. Paul,² the Meaning of which he for that purpose most wretchedly mistakes. This Father is so bold as to maintain, that every Thing by Divine Right belongs to the Just, or Faithful³; and that Unbelievers have no right to possess any thing: abominable Principle, that entirely destroys at once all humane Society! but behold another of 'em, every whit as detestable; and which alone⁴ is enough to cast an eternal Blemish on the Memory of the Bishop of Hippo: 'tis this, that, after having declar'd it as his Opinion, that Lenity and Charity ought to be the Measure of our Conduct towards Hereticks; he became so beaten with the Contests he had with the Donatists, as to change at once from white to black; and openly maintain, that Hereticks ought to be persecuted, and by Force compell'd to embrace the Orthodox Faith; or else to be utterly destroy'd and extirpated: which certainly is, as a famous Minister amongst the Reform'd observes, a most terrible and inhumane Opinion. There are two of this ' Father's Epistles, that any one may read in French; which were made use of to justify the last Persecution in France: so that St. Austin may justly be said to be, in a manner, the Grand Patriarch of Christian Persecutors. This Instance of Persecution ought to be well taken Notice of; for it will be found not to confine itself to the Bishop of Hippo: and it does alone afford us a most manifest Proof of the gross manner, in which the Christian Doctors have neglected, or rather disfigur'd and corrupted Morality. If ever there was a Position contrary to all the Dictates of right Reason, and natural Equity; to Charity, good Policy, and the Spirit of the Gospel; 'tis, without doubt, this detestable Doctrine of Compulsion, and Persecution for the sake of Religion. And yet, ever since the Church began to enjoy any Quiet or Repose, this has been the common Opinion; which accordingly has been, for the most part, all along actually put in Practice, ⁶ by the stronger Party against the weaker. The Codes are full of Penal Laws against all Sects, but the Predominant; ⁷ and they are the Councils, Bishops, and most eminent Doctors, who have ever been the Solicitors of these Laws; and have honour'd with large Encomiums,

Acclamations, Benedictions, and with the most humble Thanks and Acknowledgments; those Sovereigns, who have either made such Laws; or vigorously put them in execution.

St. Leo, in the Opinion of Mr. Du Pin,⁸ is not very fertile in Points of Morality: handles 'em but drily; and in a manner which diverts, rather than affects or moves his Readers.

In the Time of Theodosius the Younger, the Bishop of Susa, the Royal City of Persia, whose Name was Abdas, (or rather Abdaa);⁹ took the Liberty to burn one of the Temples where they worship'd Fire¹⁰. The King, ('twas Isdegerde) inform'd thereof by the Magi, sent for Abdaa; and after a very gentle Reprimand, order'd him to get the Temple, he had destroy'd, rebuilt. But the Bishop could not be brought to do any thing in the Matter; tho' the King threaten'd, by way of Reprisals, to use the Churches of the Christians in the same manner; which he accordingly executed afterwards, on the obstinate Refusal of Abdaa: who chose rather to lose his Life, and expose the Christians to a furious Persecution, than to obey an Order every way just and reasonable. Theodoret, who reports this Story, does * not deny, but that the Zeal, which transported Abdaa to burn the Temple of the Persians, was unseasonable and ill tim'd; but he maintains, that his refusal to rebuild such another Temple, shew'd a Constancy worthy of all Admiration; and of the Reward of the Persian Empire: for, adds he, it is as great an Impiety to build a Temple to Fire, as to adore it. But "there is no one Person whatever, whether Metropolitan, or Patriarch, who can dispense with "this Law of natural Religion; That every one is "bound to make amends by Restitution, or other ways, "for the Damage he has done to his Neighbour. Now "Abdas here, a private Man, and Subject of the "King of Persia, had destroy'd what was the Goods "and Property of another; and in a Case, where "the Thing destroy'd had the extraordinary Privilege of belonging to the Establish'd or Predominant Religion. — And to say, that the Temple which he should have rebuilt, wou'd have "been apply'd to the Service of Idolatry, was but "a lame Excuse; for he himself wou'd not have "employ'd it to that Purpose: neither was he to "have been answerable for the ill Use, which they, "to whom it belong'd, should have made of it. "Is it a valid Reason, for the not returning a Purse "one has stolen, to say, that the Person, from whom "he took it, is a Man that employs his Money in "Debauchery? But besides all this, what Proportion was there betwixt the rebuilding one Temple, without which the Persians wou'd have remain'd as great Idolators as before; and the Destruction of a great many Christian Churches? " — In short, was there any thing more capable "of rendring the Christian Religion odious to all

²²² See the Dissert. of Mr. Le Clerc, entitled, *De Argumento Theolog. ab invidia ducto*, which is just after his *Latin Logick*, Tom. I, Op. Philosoph. p. 250, &c.

¹ *De Civit. Dei*, Lib. 16, Cap. 25.

² 1 Cor. vii. 4.

³ *Epist.* 153, Tom. II, Ed. Benedicte. & Col. 250, D, Ep. 54, Ed. Basil. See *Le Comm. Philosoph. sur, Contrain-les d'entrer*, Part III, p. 130, & suiv.

⁴ *John Claud. Epist.* how to read the Fathers, &c. at the end of the first Edition of his *Ouverture de l'Ep. aux Rom.* p. 129.

⁵ See Part III, of the *Philosoph. Comment.* and Vol. III, of *Ars Critica* of Mr. Le Clerc, p. 353, Edit. 2.

⁶ See *Biblioth. Univ.* Tom. XXIII, p. 366, & seq. and Mr. Bernard, in his News of May 1699, p. 574, 575; and April 1702, p. 409. And the *Comm. Philosoph.* in the Supplement, cap. 29, 30, 31.

⁷ *Comm. Philosoph. ubi supra*, p. 355, 356. See the Book of P. Thomassin, *De l'unité de l'Eglise*.

⁸ Tom. IV, p. 164, Col. 1.

⁹ See *Bill. Choisie de Mr. Le Clerc*, Tom. VIII, p. 321, & seq.

¹⁰ *Theodoret. Hist. Eccles.* Lib. 5, cap. 39.

* *Ibid.* p. 245, B, C.

¹¹ Mr. Bayle, in the Article of *Abdas*, *Rem. (C)*, p. 8, in the second Edition of his Dictionary.

“ the World; than to see Christians, after they
 “ had work'd themselves in, on the Foot of Peo-
 “ ple who desir'd nothing else, but liberty to
 “ propose their Doctrine; have the Confidence to
 “ demolish the Temples of the National Religion:
 “ and then refuse to rebuild them, tho' enjoin'd
 “ so to do by their Lawful Sovereign?” But these
 Bishops went on Principles equally contrary both
 to the Gospel, and to the Law of Nature. In
 which however, they did but imitate the * Maxims
 and Conduct of St. *Ambrose* on a like Occasion.

Gregory the Great, according to Mr. *Du Pin*
¹² is *prolix*, and sometimes too tedious in his *Explica-*
tions of Morality; and too subtle in his *Allegories*.
 — His *Morals*, or Commentaries on *Job*, are
 one of the greatest *Repertories* ¹³ of *Morality extant*.
 But he seldom or never ¹⁴ insists on the *Explication* of
 the *Letter*: They are only certain *Allegories* and *moral*
Reflections, which he accommodates to the *Text* of
Job; the greatest Part whereof are full as applicable
 to any other Part of *Scripture*.

* See the Fact related with its Circumstances, and necessary Reflections, in the *Critical Dissertation on the History of Calvin*,
 by *Maimbourg*, Tom. II, *Lett.* 30, p. 275, &c.
¹² Tom. V, of his *Biblioth.* p. 144, Col. 2-.
¹³ *Ibid.* p. 134, Col. 1-.
¹⁴ *Ibid.* p. 133, Col. 2-.

S E C T. X.

WHAT has been said, is, I think, more
 than enough to demonstrate clearly; that the most celebrated Doctors of the
 Church, for the six first Centuries, were but bad
 Masters, and very poor Guides in Matters of Mora-
 lity. As I saw reason for this Assertion six Years ago,
 when this Prefatory Discourse came first abroad;
 so now, in this new Edition, after a second Review,
 I find no Cause to alter my Opinion. Concern for
 Truth; which must needs over-rule every other
 Consideration, but that of raising Obstacles to its
 Establishment; the Readiness that most People
 shew to be misled by great Names, and Prejudice
 in favour of Antiquity, more especially Ecclesiasti-
 cal Antiquity; the inexpressible Injury, that such
 a blind Respect does to the Knowledge of true
 Religion, and sound Morality; the Honour, due
 to the Age we live in, which has, above all others,
 shaken off the Yoke of ill grounded Authority;
 the Candor and Sincerity we profess: do all re-
 quire, and oblige us frankly to speak of Things,
 as they really are; and to judge of these Doctors,
 who have been dead so many Ages, with the same
 Disinterestedness and Freedom, as we wou'd of an
 Author of the last Age; whose Reputation we are
 under no concern about. As good Protestants, we
 may and ought boldly thus to act; without dis-
 quieting ourselves with what those Men may say
 or think, who shall esteem it their Concern, to
 declare themselves jealous of the Honour of the
 Fathers; and such profound Admirers of all their
 Productions, as to sacrifice to 'em even the most
 common Rules of Reason and good Sense: which
 they themselves wou'd be very loth to have dis-
 pens'd with on other Occasions. So unhappy are
 they as to be reduc'd to this wretched Necessity,
 of judging differently of the same Things, accord-
 ing as they happen to proceed either from the Pen
 of a Profane, or an Ecclesiastical; of an Antient,
 or a Modern Author. Nay, we doubt not, but
 there are many among 'em, who do themselves
 some Violence on this Account; and tho' they talk
 like others, yet do not, from the bottom of their
 Hearts, think so advantageously, as one would be
 apt to imagine, of the Personal Qualities and Wri-
 tings, of even the most renown'd of the antient
 Doctors of the Church. As it would be inhumane
 to insult Men, who live thus under perpetual Con-
 straint; so we pity them with all our Heart: pro-
 vided they do not voluntarily seek after, and wan-

only embrace all Opportunities, of thus betraying
 their own Consciences. But, it is very hard to
 keep one's Temper, when one sees Men, who have
 here full Liberty to think and speak as they please;
 and whose Grand Principle is, or ought to be, that
 the Holy Scripture is the only Rule of our Faith
 and Manners: when one sees such Men, I say,
 zealously espousing the Cause of the Fathers; and,
 not content with being themselves furiously en-
 gag'd in Maintenance of this visible Relique of
 Popery; endeavouring also, at any rate, to impose
 the same Servitude on others; not being able to
 bear, that any one shou'd declare his Opinion of
 the Fathers, to be any thing short of theirs; and
 bitterly inveighing against the living, in order to
 vindicate the Dead; to whose Memory no other
 Injury is offer'd, but the not paying a blind Ve-
 neration to their mistaken Notions; and wrong
 Conduct.

Certainly Protestants, whether such by Educa-
 tion or Conversion; who venture to declare them-
 selves such mighty Zealots, and idolizing Partizans
 for Ecclesiastical Antiquity; were far from consi-
 dering well of the Matter, when they engag'd in
 the Maintenance of so bad a Cause: wou'd they
 but reflect a little, they must soon see, that 'tis
 what they can never acquit themselves of with Ho-
 nour. This is evident enough by the Strights
 which they chuse to be reduced to, rather than
 quit their Hold; being forc'd perpetually to change
 the State of the Question; and contradict them-
 selves every Moment: They dare not in so many
 Words say, that the Fathers were infallible, or
 that they have not some time fallen into great Er-
 rors; but yet still arguing as if they both believ'd
 it themselves, and expected that others shou'd do
 so too, they almost perpetually build upon that
 tacit Supposition; so what they deny in one place,
 they grant in another; and even sometimes more
 than is requir'd. In a word, they manage so as to
 make one believe; that they had, by continually
 reading, and admiring the Fathers, contracted the
 same Turn of Thought with them, and entirely
 form'd themselves upon their Model. By which
 they themselves furnish us with a new Argument,
 a *viva voce* Evidence, for the Judgment I have
 given of these antient Authors; the Reading where-
 of does still continue to produce such visibly ill
 Effects; so that by endeavouring to reinstate them
 in that too high Esteem, in which Ignorance and
 Superstition

Superstition had plac'd them; they in the main discredit 'em more, than those, who think they may be justly censur'd on many Accounts; cou'd or wou'd do.

But this is not all; they imitate those Passions also; which are but too plainly visible, both in the Writings and Lives of the Fathers; as far as they are transmitted to us. To come short of their Masters in nothing; they do to Declamation, false Reasoning, apparent Ignorance in Criticism and Morality, and Contempt of Order and Method; add angry Transport, and Invective. They copy after their Originals so well, that they are themselves become great Models: Ill Language is so fluent and natural, that we must do 'em the Justice to own, that in this Particular they perform like Men of great Genius and Ability. Mortify'd at the Sight of a considerable Number of Instances of false Reasonings, and gross Errors in the Writings of the Fathers, collected by several Authors, and that too without much Search or Pains; they, instead of applying themselves, calmly, and by solid Reasons to make it appear, that the Passages cited contain nothing but what is agreeable to Truth and good Sense; which wou'd be a solid fair way of defending these antient Doctors, they so much espouse: instead of this, I say, they think it enough to cry out with disdain; *That it is now-a-days the Fashion to attack the Fathers; that Ignorance thinks to make itself considerable this way; That those mighty Antagonists of the Fathers, by their Performances, shew themselves to be Men of but little Judgment and Knowledge.* By which They indeed discover themselves to have but a very small Portion of the former; because in this Case, there is no manner of Occasion for that vast Erudition, which they so much pretend to. There is no Necessity of knowing all the Languages both antient and modern; or having read all the Fathers quite through: There is scarce any thing more requir'd, to judge of their Merit, than to dip into the Fathers you have a mind to examine; whether it be the Originals, or any of the vast Number of Translations, which have been publish'd. There are even entire Works, which are nothing but a perpetual Contexture of Impertinencies heap'd upon one another; such, for instance, is the Commentary of St. *Austin** on the *Psalms*. Besides, there is in Collections of Sermons, in Books of Devotion, in Commentaries on the Scripture publish'd in the Vulgar Tongues; an infinite Number of large Fragments and Passages out of the Fathers; which their most zealous Admirers display and set forth, as the very Flower and Choice of those fine and judicious Thoughts, they have remark'd in the reading of their Works. So that any one now may be sufficiently qualify'd to judge, whether the Fathers do justly merit all that Encomium and Zeal, with which they have been extoll'd and defended: a reasonable Share of common Reason and good Sense is here sufficient; and perhaps the Charge of Ignorance was never more impertinent, or worse apply'd than in the present Case; to be sure Men, who bring so loose and rude an Accusation as this; must needs think themselves the sole Proprietors of all the good Sense, as well as Learning in the World: It should

seem they are not willing to allow the least Spark of either to any, who do not run into all their Notions, or rather Prejudices, Passions, and Cabals. And what may very well lead one to imagine so, is, to see some of 'em so extremely civil and modest, as to publicly brand with the Name of downright *Impudence*, the Liberty we take of thinking and speaking otherwise, than they and the Fathers do; on Matters too, where we do no more than follow the common Opinions of Protestants; as upon the Lawfulness of putting out Money to Interest: to see 'em, I say, look down from the Heights of their Self-Sufficiency, with an Air of Pity, on all such, as shall presume to declare, tho' in never so modest Terms; that they have not so high an Opinion of St. *Austin*, and St. *Jerome*, as themselves have; as People who, without the least Tincture of Learning, set up for a Character, by running down almost all the celebrated Authors of Antiquity: and then to see 'em, at the same time, tacitly and at the rebound take to themselves the Character of great Authors; which the confus'd hasty reading of a great Number of Books, some good, some bad, must needs have justly entitl'd 'em to; and which we shall never be inclin'd to envy 'em.

But, what is the very Height of Blindness and Passion; our zealous Defenders of the Fathers, not content with the Charge of Ignorance, proceed to call in question, either directly or indirectly, the Probity and Religion of those; who freely set forth both the Good and the Bad in the Lives and Writings of the Ecclesiasticks and Divines of the first Ages: and who believe that they were no more infallible, either in their Morals or their Doctrines, than the Ecclesiasticks and Divines of the present Age. One of 'em scruples not roundly to affirm; *That a Man could not fail of having a Veneration for the Fathers, if he had any true Zeal for Christianity:* Another of 'em, the very Echo of the former, says; *That Contempt of the Fathers, if carry'd to excess,* (thus they term the Liberty of speaking one's Sentiments of the Fathers without concern for their Reputation, other than what Truth and Equity permit) *that this Contempt, I say, redounds upon the Christian Religion. If the Christian Religion, adds he, has not had for its Propagators, Men of true Piety and Knowledge; what Opinion must Mankind have of it?* I confess, were Reasons, which have no other Tendency, but to render the Opinion and Person of an Adversary odious, good Arguments; that this wou'd be one of the best that ever was invented. All that cou'd be said, is, that it might easily be retorted: The Fathers, say you, whom you regard as Propagators of the Christian Religion, must necessarily have been Men of true Piety and Knowledge. But it has been maintain'd and prov'd to you, by a great Number of Instances, that the Fathers have not only fallen into very gross Errors, and been most profoundly ignorant of many Things, which they ought to have known; but further, that most of 'em have, more or less, suffer'd themselves to be led by Passion; so that their Conduct has been found frequently to be such, as is neither regular or justifiable. You make no answer to all this, you do not attempt to refute the Examples and Facts which are produc'd to you, you fairly own the Charge: You do there-

* See the Opinion of Mr. *Du Pin*, in his *Biblioth. of Ecclesiastical Authors*, &c. *Torr. III, p. 218, Col. 2.*

fore by Implication confels, that the Christian Religion is of no value: You are at bottom some disguis'd Atheist or Deist, who, under the false Appearance of maintaining the Interest of Christianity, by vindicating the Honour of those, whom you regard as the *Propagators* thereof; are endeavouring secretly to undermine and destroy Religion itself. In vain do you play the Zealot for Orthodoxy, or the Opinions in fashion; which you defend by nothing but odious Parallels, and malign Reflections. In vain do you search into the hidden Secrets of Providence, employ all your Dexterity and Parts in the Explication of 'em; and flatter yourself to have found out new Solutions, which clear those great Difficulties, which have at all times been objected, on account of the Origin of Evil: All this will never hinder one, if he be allow'd to reason in the manner you do against those, whose esteem of the Fathers comes not up to your Liking; from inferring from this same Reasoning of yours, some ill Design on your Part, against that very Religion, you pretend to engage in this Dispute. *Heic aliquis latet Error: Equo ne Credite Teucris.* I leave it to the Judicious and Disinterested to judge, whether the Consequence is not at least as well drawn on the one side, as on the other. Tho' at the same time we are far from intending to make use of any such Weapons: We freely leave 'em to such, as have no better to make use of; having Charity enough to believe, that this Proceeding of theirs is meer want of Prudence: whilst blinded with Prejudice and Passion, they perceive not the Advantage they give both against themselves, and against the Christian Religion, by what appear'd to them a thundering decisive Argument; proper both to save themselves the Trouble of examining into the bottom of Things; and to throw Dust in the Eyes of the People. But to undeceive 'em, if possible; at least to prevent the Honest and Well-meaning, or such as will not take the Pains to inform themselves, how to distinguish between good and bad Reasonings; from being impos'd upon by this; let us stop a Moment or two, to make its Weakness more fully appear.

First then I observe, that the Apostles alone can properly be call'd *The Propagators of the Christian Religion*; whom the Holy Spirit did invest with the Gift of working Miracles; ^a and guide into all Truth, concerning *Jesus Christ* and his Doctrine. Those holy Men did ^b make Disciples among all Nations, according to the Order they had receiv'd from their Master. *St. Paul*, who strove ^c not to preach the Gospel but in those Places, where *Jesus Christ* had never been nam'd, lest he should build on another Man's Foundation; declares expressly, That ^d he had fully preach'd the Gospel of Christ, from Jerusalem, and round about unto Illyricum; ^e that is to say, throughout a great Part of the Roman Empire. Tradition has preserv'd ^f in *India*, and among other barbarous Nations, the Remembrance of the Travels and Miracles of *St. Thomas*, *St. Andrew*, and other Apostles. Thus did the immediate Disciples of our Saviour, fill'd with his Spirit and arm'd with his Power, plant almost thro' the whole World the Christian Faith; it was they

who laid the unshaken Foundations of that great Work, either by themselves in Person; or thro' the Means of some Apostolical Men, to whom they had communicated the Gift of working Miracles: And the ordinary Ministers of the Gospel, who succeeded them, but without any extraordinary Power, and with Authority infinitely less than theirs; have had nothing else to do, but to cultivate those deep-rooted Seeds, which the Apostles had spread abroad in all Parts, for the Propagation of Christianity; and which, by their own proper Virtue, assisted with the Care of Providence, will always bring forth Fruit even to the end of the World; notwithstanding all, that the Negligence or Malice of Men may, or can do to the contrary.

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

These Propagators of the Christian Religion must needs, say they, have been Men of true Piety and Knowledge. But must all, who have, after the Apostles, contributed any thing to the Propagation of Christianity, have been such; or only some of 'em? The first is what they will not venture to say: and if they betake themselves to the latter; I ask, by what shall we be able to know, that this Privilege was reserv'd to such or such, for instance; rather than to others? Shall it be by the Age in which they liv'd? But why must the Fathers of the three or six first Centuries have been *Men of true Piety and Knowledge*; rather than those of the tenth or eleventh? On the contrary, to argue on the Principle here laid down, it shou'd seem, that, in proportion, as we become more remote from the first Establishment of Christianity; so its Propagators ought to be Men of greater Eminence for Piety and Knowledge; that they may be able still to augment more and more the Progress of this Holy Religion; and supply, what the Proofs of Matter of Fact, which are the very

^a *Job.* xvi, 13.

^b *Matth.* xxviii, 19.

^c *Rom.* xv, 20.

^d *Ibid.* ver. 19.

^e See a Dissertation of the late Mr. Cellarius, entitled, *Itinerarium Apostolicum, &c.* printed a third Time at Hall in Saxony 1700.

^f See *Grægius, De Ver. Rel. Christ. Lib. 2, Sect. 13, Note 33, 34.*

Basis of its Truth; lose of their Force, thro' Distance of Time, in the Judgment of a vast Number of Persons, who are not capable of examining them, as they ought. Will they say that these Propagators of the Christian Religion, who must have been *Men of true Piety and Knowledge*, are those very Doctors, whose Writings have been transmitted to us? But why these, rather than an infinite Number of others; who have either wrote nothing; or whose Writings have not come to our Hands? Besides, what do they mean here by *Men of true Piety and Knowledge*? Will they say, that all the Propagators of the Christian Religion, since the Apostles, must necessarily have had as great a Measure of Piety and Knowledge, in Matters of Religion and Morality, as cou'd at all possibly be? What? must the Fathers have been liable to no Failings, no Passions, no Errours, no Ignorance at all? Was it necessary that GOD should miraculously interpose, to hinder them from being Men as well as others; and subject to the Imperfections of the Age; as well as to the Temptations incident to the Circumstances they liv'd in? If we have not so exalted an Opinion of them, as their extravagant Admirers have; do we pretend to say, that they were all a pack of profligate Wretches; or that there were not some among them, who were, in some measure, Men of Piety and Knowledge? If we maintain, that they were not Men of the most accurate Judgments; that they often made use of bad Arguments; that they were but little vers'd in the true Method of expounding the Holy Scriptures, and explaining the Principles of Morality, which they contain: Do we therefore deny that they retain'd the Fundamentals of Religion, and Morality? If we say, that thro' an Effect of humane Frailty, they have given way, some more, some less, to Passions, and Actions, contrary to the Rules of the Gospel; Do we therefore take upon us to penetrate either into their Hearts; or into the Counsels of GOD? Do we deny, that many of them might, notwithstanding all this, have been *truly pious and good Men*; that the Divine Mercy might have regarded their good Intentions; and the Sincerity of a general Repentance? Certainly, we leave it to God to judge of that, which we neither can or ought to decide: We reserve to ourselves only the Right of charitable Judgments; to which we shall always rather incline, than to rash Condemnations. But we are not for all that oblig'd to call evil, good: and shall always take the liberty of blaming what is blame-worthy; without paying respect to the Fault, out of favour to the Person: and as we praise and heartily recommend to the Imitation of every body, the good Actions, and Virtues which appear in the Lives of the Fathers of the Church; so we shall never go about to dissemble their ill Actions and Vices; which we cannot but see, when we examine them without Prejudice or Prepossession.

But to come to the very bottom of the Argument in hand; besides, what I have already inti-

mated, and shall hereafter declare, that the Fathers were neither the only, nor the principal Propagators of the Christian Religion, after the Apostles; this Argument contains at most but a Reason of Congruity. Now Reasons of Congruity, which are generally very inconsiderable, and never amount to more than a slight Probability; are altogether ridiculous in a Matter of the Nature with this we are now upon. Have the Fathers argu'd well or ill? Have they fall'n into gross Errours? Have they run into vicious Actions, and Passions? Have they handled Morality with Accuracy, and in its just Extent? These are Matters of Fact, and there is nothing more to be done, but to see whether they are true or not. We have at hand the Tracts and Writings of the Fathers; the History of their Lives: let us read, examine, and then judge. The Question to be discuss'd, is not, in what manner we conceive the Thing shou'd have been; but in what manner it actually has been. For, if the Facts be true, instead of concluding, as they would have us, that the Fathers must, for the Good of the Christian Religion, have been such, as they have represented 'em to us; I shall from thence infer, on the contrary, that there was no Necessity at all for it. To argue otherwise, is to imitate those of the *Romish* Communion; who, to prove that *Transubstantiation* is not a new Tenent, unknown to the first Ages; tell us gravely, that this Doctrine could not possibly have been ever introduc'd into the Church at all, had it not been receiv'd from the Beginning. If, with a profound Study of all the Subtilties of the Mathematicks, and the Affectation of being able to talk on all sorts of Subjects, they form no better Judgments of Things; I fear they will give us but a very mean Opinion of *Algebra*, and that vast * *Encyclopedia*, which they pretend to value themselves so much upon. Is it not true, for example, that, as early, as the second Century, *Victor*,² Bishop of *Rome*, caus'd many Broils, to support his Opinion on this important Question; *On what day the Passover ought to be celebrated?* And that he excommunicated all the Churches of *Asia*, because they celebrated that Festival on the fourteenth Day of the Month of *March*; and not on the *Sunday* following, as he would have had it? The unshaken Fidelity, with which he adher'd to the Christian Religion; for which he suffer'd, even Martyrdom; had not made him incapable of being transported with Passion about meer Trifles; and of sinning against that Spirit of Peace and Charity, which the Gospel so earnestly recommends. So that *St. Irenæus* thought fit to write to him about it; and sharply censure his Proceedings. Have you a mind for another Example of a Father of the Church, a Martyr too? Read then the scandalous Contest, which happen'd in the third Century, between *St. Cyprian*, Bishop of *Carthage*, and *Stephen*, Bishop of *Rome*. The first had got it determin'd in a Council, that all who had been baptiz'd by Hereticks, ought to be re-baptiz'd.³ " *Stephen*, on the contrary, perhaps incens'd that they had

* The whole Circle of Arts and Sciences, or universal Knowledge.

² See *Euseb. Hist. Eccles. Lib. 5, Cap. 24, Edit. Vales.*

³ See the Life of *St. Cyprian*, by *Mr. Le Clerc, Bibl. Univ. Tom. XII, p. 351, &c.*

“ come to a Decision therein, without first consulting him; was of a quite different Opinion. He wrote a Letter to St. Cyprian, which is since lost; wherein he rejected and condemn'd the Decisions of the Council of Carthage; communicated all those who had assisted at it; and declar'd, that all, who came over to the Church, ought to be receiv'd without being re-baptiz'd, from what Heresy soever they came: This gave Birth to a sad and grievous Schism between the Churches of Africa, and that of Rome. At that time Pompey, Bishop of Sabrata, a City of Africa, desir'd the Bishop of Carthage to let him know, what was the Opinion of Stephen; whereupon St. Cyprian sent him Stephen's Letter together with his own Refutation; wherein he no more observes the Rules of Patience, which he had laid down in a Book, wherein he treats of that Virtue, than Stephen; who, for his part, had violated them in a most unworthy manner. By which one may see, that the Praises which our Martyr gives to Christians on that Account, in the || beginning of the same Book; where he says, that they never at all extol their own Virtues, at the same time that he is extolling 'em to the Skies; were Praises, which rather inform us what those Men, to whom they are given, ought to have been; than what they really were. He accuses Stephen of having wrote in a haughty disdainful manner; and of many other Things, which were nothing to the Purpose; that he had contradicted himself; and talk'd like an ignorant Fellow, without Parts or Learning. — That he took the Part of Hereticks against the Church, and betray'd it. All this too, with more than ordinary Heat and Passion. And thus in truth does he demean himself in all his Controversies; where he talks of nothing but Discipline and Episcopal Authority, without much shew of Gentleness and Moderation; nor was it indeed the Custom in those days, to manage their Disputes with Temper and Calmness; any more than it is now.”

In the beginning of the fourth Century, ⁱ “ Eleven or twelve Bishops assembl'd together at Cirra, in 305; where they reproach'd one another with enormous Crimes. The greatest Part of them had deliver'd up their Bibles to the Pagans, to avoid Persecution; which a great Number of the honest Lay-Christians had born with Constancy. Others of them had, with their own Hands, thrown them into the Fire. One Purpurinus of Limate, was accus'd, for having murder'd the two Children of his Sister; who, instead of clearing him-

self of the Charge, sturdily answer'd: *For my part, I have kill'd, and I do kill those who are against me. Trouble me no more about the Matter: You know that I value no Man.* ^k As soon as ever there were Christian Emperours, worldly Pleasures began to introduce themselves a-pace into the Church; and there was in a little time nothing to be seen, among the Clergy, but Enmities and Divisions. And because the Bishops were become rich and in great Esteem, they † stuck at nothing to compass Bishopricks; which when they had obtain'd, they assum'd to themselves a Tyrannical Authority. These Disorders daily increas'd, till they came to that Height, they have been since seen to rise too; as the Learned Irish Archbishop Usher, shews in the Book, I have quoted in the Margin; by a great Number of Passages out of Authors of Note, who have left us most lively Descriptions of the horrible Corruption of the respective Ages they liv'd in. I have already ^l quoted Gregory Nazianzeme on this Head. Let us join to him Sulpicius Severus, who liv'd in the same Century. He in the first Book of his History, ^m speaking of the Morals of the Clergy of his Time; and having first ⁿ observ'd, that the Tribe of Levi had no share in the Division of the Land of Canaan, as the other Tribes had; that they might be more at liberty to devote themselves to the Service of God: says, *That he was not willing silently to pass by that Example; but chose purposely to mention it, as a fit Lesson for the Clergy: For it seems to me,* adds he, *that they have not only quite forgot that * Precept, but that they never had any Knowledge at all of it; so great is now-a-days their Thirst after Riches; a Disease which has invaded their Minds, and infected their Spirits, like a common Pestilence! They gape after Possessions; They beautify and adorn their Country-Seats, improve their Lands, and ‡ sit brooding over their Gold: They buy, they sell, and in all things seek after Gain. If there are any among them, who seem to have better Things in view; who are not possess'd of Estates, or engag'd in Traffick; Yet they do that, which is much more shameful and scandalous: They expect Presents without doing any thing for 'em; and dishonour themselves by taking recompences; their Holiness being as it were expos'd to sale.* Towards the ||| End of the second Book of his Sacred History, you may also see the impartial manner, in which Sulpicius Severus relates the Persecution, ^o which was carry'd on against the Priscillianists; where he sharply reprimands the Pride and Cruelty of some

|| *Op. Cypr. Tract. p. 211.*

ⁱ Extract from the *Hist. Eccles.* of Mr. Fleury, Tom. II, p. 580; & *scilicet* in the *Bibl. Univ.* Tom. XXIV, p. 341.

^k Usserius, *De Ecclesiarum Christianarum, in occidente praesertim, continua successu, &c.* In the Extract of the *Bibl. Univ.*

Tom. IX, p. 5, & *seq.* See also Tom. XXIII, p. 366, & *seq.*

† See what is related of Damascus, in *Ann. Marcel. Lib. 27, Cap. 6, per tot.*

^l In *Scit. IX, Lett. (c)* in the Margin.

^m The Article added to the Months of March and April 1701. In the *Journal of Trecoux, Edit. Amsterd.* That Article is Mr. Le Clerc's.

ⁿ *Cap. 23, Ed. Lips. 1709. And p. 30., Ed. Elzev.* See also *Repub. des Lettres*, of Mr. Bayle, May 1684, p. 244, & *c.*

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

‡ *Auro incubant.* Perhaps this means, that they love Gold very much, that they seek after it, and guard it with great Care; brooding, if I may say so, with their Eyes, over their Treasures. See *Virg. Georg. 2, 507. Æneid. 6, 610.*

||| *P. 114., & d. Edit. Elzevir.*

^o See Pacatus in his *Panegyrick on Theodosius*, cap. 29, Num. 3, p. 404, *Edit. Cellar.*

“ of the || *Spanish* Bishops; who then began to
 “ employ the Secular Arm against those Peo-
 “ ple : and at length caus'd many of them to
 “ be put to Death. In his first Dialogue, ^p he
 “ gives a clear Account of the Violences, which
 “ *Theophilus*, Bishop of *Alexandria*, employ'd a-
 “ gainst Hereticks; and also of the Pride of the
 “ Clergy of *France*.” One of the most famous
 Doctors of that Century, is *St. Jerom*, a Man
 full of Choler and Passion, if ever Man was so.
 He had always been a great Extoller of *Ori-
 gen*, ^q without any the least mention of his Er-
 rours; whether it was that he thought 'em in-
 considerable; or that he judg'd 'em pardonable,
 on account of the many good and useful Things
 he had written. But when once the *Arians*
 began to take Advantage of *Origen's* Autho-
 rity; more especially when *John*, Bishop of
Jerusalem, who favour'd the Opinions of the Ca-
 techist of *Alexandria*, had drawn upon himself
 the Indignation of *St. Jerom*; he then fell a
 railing most unmercifully against *Origen*; whom
 he had formerly cry'd up to the very Skies;
 and set himself * violently to persecute the *Ori-
 genists*. *Ruffinus*, who had been *St. Jerom's* great
 Friend, having declar'd himself for *Origen*; and
 having alledg'd for his Defence, the Praises which
St. Jerom had given him; what does our hum-
 ble and pacifick Priest do, but immediately write
 a Book, full of the bitterest Gall and Passion a-
 gainst *Ruffinus*. The same Spirit reigns in his
 other Works, where he had to do with People
 he did not affect. *St. Cyril*, Patriarch of *Alexan-
 dria*, was, in the ||| Opinion of *Mr. the Abbot
 Du Pin*, “ a Man ambitious and violent; who,
 “ seeking nothing but to augment his own Au-
 “ thority, no sooner saw himself rais'd to the
 “ Episcopal Seat, but he expell'd the *Novatians*,
 “ by his own Authority; and plunder'd their
 “ Bishop of all the Goods he was possess'd of.
 “ He attack'd the *Jews* in their Synagogues,
 “ at the Head of his People; took away their
 “ Synagogues from 'em, drove them out of *A-
 “ lexandria*; and gave their Goods for plunder
 “ to the Christians; grounding himself, no doubt,
 “ upon that pious and holy Maxim of the Bi-
 “ shop of *Hippo*; that every Thing belongs to
 “ the Faithful, and that the Wicked can have
 “ no just Title to possess any thing. Another
 “ time *St. Cyril* fell out with *Orestes*, Gover-
 “ nour of *Alexandria*, on whose Authority he
 “ was perpetually encroaching: five † hundred
 “ Monks, in support of their Bishop, one day
 “ surrounded the Governour, wounded him by
 “ a Blow with a Stone, and had kill'd him, if
 “ the Guards and People had not put a Stop
 “ to their Fury. This cost one of the Monks,

“ who was taken, and put to the Rack, his
 “ Life; but *St. Cyril* trait canoniz'd him. A
 “ famous Heathen Philosophers, call'd *Hypa-
 “ tia*, was the Victim, which the Partizans of
 “ the Bishop, immolated to the Manes of their
 “ Martyr. She was cruelly tore to pieces, be-
 “ cause she was said to have irritated the Go-
 “ vernour against the Prelate.” Wou'd you
 know what were the Clergy of the fifth, and
 following Centuries? An Author, who cannot
 be suspected of designing any Ill to the Fa-
 thers, † will inform us. “ The Sects, says he,
 “ (meaning those of the *Nestorians* and *Euty-
 “ chians*) which sprung up, partly thro' the La-
 “ ziness and Superstition; and partly thro' the
 “ particular Grudges, Envy, and Malignity of
 “ the Clergy; gave the finishing Stroke to the
 “ Spirit of Persecution on account of Religion.
 “ 'Tis † true, this same Spirit of Persecution had
 “ already appear'd in the World; but had not
 “ as yet exercis'd its Tyranny, with all those
 “ Circumstances of Cruelty, with which it has
 “ been attended since that unhappy Century;
 “ when Divisions arose about Opinions, in which
 “ there may have been something of reality;
 “ but what however might have easily been a-
 “ greed and settl'd, had but the Spirit of *Chri-
 “ stianity* presid'd in Ecclesiastical Assemblies. Af-
 “ ter that time nothing was to be seen in the
 “ East, but Proscriptions, Massacres, Fury, and
 “ Rage. See what a Bishop of the fifth Cen-
 “ tury, who was persecuted for *Nestorianism*,
 “ says thereupon: *I pass by † in silence*, says he,
 “ *the Chains, the Dungeons, the Confiscations, the
 “ Notes of Infamy, those lamentable Massacres, the
 “ Heinousness of which is such, that even they who
 “ have had the Misfortune to be Eye-Witnesses
 “ thereof, do with pain believe 'em to be true: All
 “ these Tragedies too are acted by Bishops.—
 “ Amongst whom down-right Impudence passes for
 “ Courage; they call their Cruelty Zeal, and
 “ their Knavery is honour'd with the Name
 “ of Wisdom*. But it still went on increa-
 “ sing, and grew still worse and worse. The
 “ Emperour *Justinian* wou'd not be thought
 “ to have less Zeal, than the Prelates of the
 “ fifth and sixth Centuries: *He thought it no
 “ Murther*, says *Procopius*, “ to condemn to Death,
 “ such as made Profession of a Religion different
 “ from his own. All the World saw the dread-
 “ ful Cruelties that were committed in these un-
 “ happy Centuries. They maintain'd Sieges in-
 “ in their Monasteries; they battled it in their
 “ Councils; They enter'd the Churches Sword
 “ in hand; * They treated with the utmost
 “ Cruelty, all whom they but suspected to fa-
 “ vour Opinions, which too often prov'd to be

|| See *Sulpic. p. 118-, &c. Edit. Elzev.*

^p Cap. 21, and *Ed. Elzev. cap. 3.*

* See the *Quæst. Hieron. of Mr. Le Clerc, Quæst. 8, Sect. 12.*

† He himself brags of it in his Apology against *Ruffin*: *Imperatorum quoque scripta, says he, quæ de Alexandria & Ægypto origenistas pelli jubent, me suggerente, dictata sunt: ut Romanæ urbis Pontifex miro eos odio detestetur, meum consilium fuit: ut totus orbis, post translationem tuam, in Origenis odia exarserit, quem antea simpliciter læsitabat; meus operatus est stykus.* *Hieron Oper. Tom. II, p. 201, lib. 1, adv. Ruffin. Edit. Basil.*

||| The Report here given of it, is in the Terms of the Extract thereof, by *M. Bernard, Bibl. Univ. Tom. XXI, Part 2, p. 19.*

† *Socrat. Hist. Lib. 7, c. 14, 15.*

† *Dissert. Historie. &c. printed at Rotterdam in 1707, p. 8, 9.* See, for the fifth Century, the Passages of *Isidorus of Damietta*, quoted in the *Epist. Eccles. and Crit. of Mr. Le Clerc, p. 167, & seq. and p. 203, & seq. Edit. secunda.*

* See *Amm. Marcell. Lib. 22, cap. 5, p. 233. And p. 559, Edit. Gruteri.*

† *Euthérius, Tyanorum Episcopus, inter opera Theodoriti, Tom. V, p. 688, and 689. Et inter Opera Athanasii, Tom. II, p. 292, A, C, Edit. Colon. 1686. Et apud Du Pin, Bibl. des Aut. Eccles. Tom. IV, p. 67, Col. 2. Ed. Holland.*

† *Anecd. p. 60, Edit. Alemanni.*

† See *Eutychii Annales, p. 155.*

“such as no body understood; not even those who defended them with the greatest Zeal and Obstinacy.” These are the great Lights of the Church; these are the Holy Fathers, which we must take for Men of true Piety, and Knowledge.

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

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

Which may be *English'd* thus.

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

The Examples, which I have already produc'd, of the gross Errors, and wrong Notions of the Fathers; what I have said of Books, where may be found an infinite Number of mean trifling Thoughts, quoted with great Applause, by the over-sfond Admirers of those antient Doctors of the Church; the great Number of Passages of the same kind, which y divers Authors have occasionally remark'd and criticiz'd: All this might very well serve to excuse me the Trouble of producing any more at present. I shall nevertheless here give the Reader a small Sample, by which he may be able readily to judge of the Turn of Spirit, and manner of thinking, which, in those Times, grew most prevalent.

* Boileau, Sat. 9. v. 213.

† See especially the Remarks which Phépeponus, or Mr. Le Clerc, has made *ex professo* on St. Austin, in the *Appendix Augustin.*

‡ P. 55, D-, Edit. Colon.

§ See the *Bibl. Choïse* of Mr. Le Clerc, Tom. II, p. 335, 336.

¶ Ernest. Grab. in *spicilegio patrum*, &c. Tom. I, p. 347, and 359, 360. Petavii *Dogm. Theol.* Tom. III, in Tract. *De Angelis*, lib. 3, cap. 2, Sect. 1, &c.

Ⓛ See his first *Apology*, cap. 72, p. 90, C-, Ed. Colon. See *Bibl. Choïse*, Tom. III, Article 8, p. 390. Where one finds many other Examples: as also *Bibl. Univ.* Tom. VI, p. 22, & seq.

Ⓜ Cod. 120.

Ⓨ *Repub. des Lett.* of Mr. Bernard, Decemb. 1703, p. 635.

Ⓩ *Epist.* 27, *Bibl. Univ.* Tom. XII, p. 264, & seq.

Justin Martyr, in the fifth † Chapter of his first *Apology*, says, ^z that bad Demons did formerly appear, that they committed Adultery with Women, and corrupted Boys, &c. And all this founded solely upon the sixth Chapter of *Genesis*, Ver. 4. misunderstood. The most antient Fathers, have also one after another, given out this Opinion, for certain Truth; as a Learned Editor ^{aa} of this Father has observ'd. Justin ^{bb} finds the Sign of the Cross in Sail-Yards, Masts of Ships, Ploughs, Mattocks, &c.

St. Irenæus, in the Judgment of Photius, has ^{cc} corrupted, by foreign and weak Arguments, the Simplicity, and exact Verity of the Doctrines of the Church. “Can any thing, ^{dd} for example, be more insipid, than the Reasons, he makes use of to prove that there are four Gospels, viz. because there are four principal Regions of the World, East, West, North, and South; or because the Edifice of the Church is founded on the Gospel, and there must be four Columns to support an Edifice? Theophylact does not succeed much better, when he says, that it must be so, because the Gospel teaches us the four Cardinal Virtues; or because these Gospels contain Doctrines, Precepts, Promises, and Threats. And don't the five Books of *Moses* contain the same Things? St. Maximus and Theophanes seem to have succeeded still worse, when they said, that there are but four Gospels, because there are but four Elements. It was justly observ'd by Mr. Fabricius, that had there been five, three, or an hundred Gospels, they cou'd not have wanted as good Reasons to prove, why they were neither more or less. Such wretched trifling Stuff as this, is a Disgrace to humane Reason: It might perhaps pass in Conversation, where one does not always maturely weigh and reflect upon every thing that is said; but when one finds it seriously wrote; in Works too compos'd for the publick View, and to be left to Posterity; the least one can do, in my Opinion, by way of resentment, to Authors, who have oblig'd us to read such Things; is freely to disapprove and censure 'em.

St. Cyprian ^{ee} quotes at every turn, when he is upon the Matter of Ecclesiastical Discipline; the Passages out of the Old as well as New Testament, where-ever there is the Latin word *Disciplina*, without having any regard to Circumstances. See the Reasoning he makes use of against Lucian, (Presbyter and Martyr of Carthage, who was willing that those shou'd be receiv'd into the Peace of the Church, who had sunk under Persecu-

tion, without obliging them to pass thro' all the several Degrees of Penance:) *The * Lord having said, that they should baptize all Nations in the Name of the Father, Son, and Holy Ghost, and that their past Sins are forgiven 'em in Baptism; he (meaning Lucian) not knowing either the Commandments, or the Laws, ordains Peace and Pardon of Sins to be given in the Name of Paul.* But how easy is it to see the infinite Difference, between the Pardon which God grants to Sins committed before Baptism receiv'd in his Name; and the remitting of some Ecclesiastical Punishments by the Authority of a Martyr, who gives order for so doing? — In his *Treatise of the Unity of the Church,* he maintains, that the Indivisibility of the Church was typify'd by our Saviour's Garment without Seam. — He says, ^{es} that we ought to be liberal to the Poor, because as by Baptism we obtain Pardon for all the Sins, that were committed before Baptism, in virtue of the Blood of *Jesus Christ*; so by giving Alms we expiate those that are committed after. — Endeavouring to destroy the frivolous Pretences, which are sometimes alledg'd by way of excuse, for not giving of Alms; he mentions, among others, the Excuse of those, who say that the Multitude of their Children will not suffer them to be so liberal, as they cou'd wish to be: To which he replies thus; that the more Children we have, the more we ought to give; because we have the more Sins to purchase Redemption for, more Consciences to purify, and are to deliver the Souls of a greater Number of Persons.

St. *Jerom,* ^h “Who recommends Celibacy, as much as he possibly can; and who, according to the Custom of Orators, wou'd make any thing pass for a Reason; makes use of this fine Argument against *Jovinian*: *Celibes, says he, quod celo digni sunt, inditum nomen; They have given 'em that Name, because they are worthy of Heaven.*” If you wou'd see an Heap of Sophisms, and poor wretched Arguments, which prove nothing, or else prove that Marriage is in itself criminal; you need only read the Remainder of that Book against *Jovinian*, and that which he wrote against *Helvidius*; ⁱ where he strenuously opposes second Marriages: In this last Book, he prides himself, in having play'd the Rhetorician and Declaimer: *Rhetoricati sumus, & in morem Declamatorum paululum lusimus.*

In another Place, ^{kk} he makes it his Boast, that he wrote with great Precipitation, and

without giving himself the Trouble to bestow much thought upon his Commentaries: and is accordingly found frequently contradicting himself. He has the Assurance to own in plain Terms, ^l that in his Polemick Works, he had no other Aim, but to get the better of his Adversaries; without the least Concern, whether what he advanced were true, or false. He supports himself by the Examples of *Origen, Meibodius, Eusebius, Apollinaris,* and other Apologists for the Christian Religion; who, as he says, us'd the same Method against the Heathens; making use of very doubtful and precarious Reasons; and maintaining, not what they thought, but what the Interest of the Dispute requir'd. Nay further, he pretends, that in so doing, he did but imitate *Jesus Christ,* and ^m *St. Paul,* who maintain'd, as he wou'd have us believe, the *Pro* and *Con,* just as it suited their Purpose.

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

* *Epist. 27, p. 53, Ed. Oxon.*

^{ff} *Bibl. Univ. Tom. XII, p. 283, ex libro de Unitat. Eccles. p. 109.*

^{gg} *Bibl. Univ. Tom. XII, p. 338, 339, ex libro De Opere & Eleemosynis, p. 197, 205.*

^{hh} *Repub. des Lett. May 1702, p. 502.*

ⁱⁱ See the 8th *Hieronym. Quæst.* of Mr. *Le Clerc.*

^{kk} *Comment. in Abdiam, sub fin. & præfat. lib. 2, in Epist. ad Ephes.*

^{ll} The whole Passage may be found at full Length, in the *Sentimens de quelques Theolog. de Holl. p. 368, 369. Et Hieron. Oper. Tom. II, p. 105, 106, Ed. Basil.*

^{mm} *Nonne nobis loquitur cum servatore, aliter foris, aliter domi loquimur? Ibid. p. 106.*

ⁿⁿ *Lib. 2, De Genesi contra Manich. c. 17, 18. See Lvs Observat. Hall. Tom. IV, Observat. 5.*

^{oo} *Sentimens de quelques Theol. de Holl. p. 362.*

† *Augustin. Oper. Tom. VIII, Col. 10, C, Ed. Bas.*

had he put a Title before this Psalm; for if it had been call'd the first, that might have been understood to mean, preferable to the rest. And therefore, concludes he, to the end that we may manifestly see, how much this Psalm is distinguish'd above the rest, it is the only one that has no Title. "Reconcile, if you please, the Conclusion with the Premises.

As I am quite tired with copying so much of this tedious, and injudicious Stuff; so there is more than enough of it, to set in their true Light the Characters of the Authors in question, and to let the Reader see *ex ungue Leonem*. I have design'dly pitch'd upon Examples, which had been already remark'd and produc'd by others; and are extant in Books most common and easy to be had. By this we may see, with what an ill Grace it is, that our zealous Defenders of the *Fathers*, require us to take it upon their Word, that they were *Men of true Piety, and Knowledge*; against so many and so notorious Proofs, which demonstrate, even to Eye-sight, that their Virtues were for the Generality, far from being any way considerable; and at the same time accompany'd with very great Imperfections; and some of 'em much to be suspected of Hypocrisy: and for their Knowledge, that it was commonly false and confus'd; that they had a much greater share of Imagination, than of good Sense; that they were destitute of many Helps, which were necessary to the augmenting and perfecting that Knowledge, they were Masters of; and that they even neglected * those Helps, which they actually had, or might have procur'd; and that consequently their ^{pp} Knowledge must needs have been very narrow and confin'd: in a word, that the most able amongst them, are in nothing comparable to the good Authors of ours, or the last Age; for either Solidity, Style, Order, or Method. And now, after all that has been said of their Writings, is it possible that any one can seriously look upon the *Fathers*, as Men of great Knowledge and Judgment? A Man of the greatest Knowledge and Judgment in the World, I must own, may be mistaken, and may give into some false Notion; but then it must be a Notion, that has at least some Plausibility, and this too is what will not often happen: but I shall venture to affirm, that a Man of tolerable good Sense will never be guilty of those Extravagancies, which we see the *Fathers*, almost all of 'em, have run into. None but those, who are capable of saying as silly Things themselves, or who are strangely blinded by a Spirit of Party; cou'd so much preach up the Authors of such arrant Trifles. But to their great Mortification, we do not now live in an Age, that will passively submit to such Treatment: The Publick is no longer to be impos'd upon by such sort of grave Affirmations as these, void of all Proof; and at the same time contradicted by an infinite Number of decisive Reasons, fairly expos'd to the publick View of the World. 'Tis a most ridiculous fond Conceit, to imagine, that, without having so much as attempted to disprove Facts, Facts so clear and certain as those which have been alledg'd; it is enough to salve all, to produce such a pitiful Reason of Congruity as this; (*viz.*) *If the Christian Religion had not for*

its Propagators Men of true Piety and Learning, what opinion must we have of it? As we are under no Obligation to account for the Conduct of God, either for what he does, or what he does not do; for what he permits, or what he directs, according to the secret Methods of his Providence: so, instead of saying; *such or such a Thing is contrary to the Designs of God, or to his Attributes; therefore God could not have done or permitted it; I think,* (and I have all the Reason in the World to think so) that we shou'd rather argue thus: *God has done or permitted such or such a Thing; therefore there is nothing in it contrary to his Designs, or to his Attributes: altho' it may not always, in our weak and narrow Understandings, be clearly reconcilable with the Views, and infinite Perfections of that Sovereign Being.* But however, as he has not forbidden us to enquire after, and with due Reverence to propose, the Reasons he might have had, not to interpose in an extraordinary manner, to prevent certain Things; so, if we wou'd a little exert the Faculties of our Souls upon the Subject-matter of the Fact in question; we might easily discover enough, both to satisfy ourselves, and to stop the Mouths of those, who wou'd have God always to act according to their Caprice. If "after the Apostles themselves, we find nothing, "but what is very mean and confus'd in that first "Rise of Christianity; it was probably, as Mr. ⁹³ *Le Clerc* has very well remark'd, "so order'd, to "the end that it might not be said in future Ages, "that there were in those days Men able enough "to form such a Religion as Christianity, and to "forge supposititious Books for its first Authors; "since there is nothing to be seen after them, "that comes up to their genuine Writings: Not "only none of the Heads of the several Sects, "which sprung up at that time; but none even "of those who profess'd to follow the Apostles, "as their sole Guides, have produc'd any thing, "that comes near that manner of writing, which "is seen in the Works of those holy Men. There is "too withal in that manner of writing of theirs, so "much unaffected Plainness, and native Sincerity, "if I may so say; that we may from thence most "clearly discern, that what they tell us, is not "of their own Invention; but the real Dictates "of *Jesus Christ*; and of that Spirit, which he "had confer'd upon 'em." Certain it is, that, considering the Books of the New Testament with respect to the reasoning Part; not one of the *Fathers*, take 'em as they really were, wou'd ever have been able to compose Works, full of that good Sense, which so visibly reigns throughout the Gospels and Epistles of the Apostles. It may also be said, that God, in permitting the *Fathers* of the Church to be so unaccurate in their Writings; and oftentimes so irregular in their Conduct; was willing to shew, that the Christian Religion, which was to continue to the end of the World; both can and will maintain itself by its own Efficacy; maugre all the Ignorance and Wickedness of those, who ought to have been its chief Supporters. And shou'd this be deem'd to imply any thing; that is really contrary to the Wisdom of God, or injurious to the Christian Religion; it may be prov'd, by the same Principle, that there ought not to have been, under Chri-

* See Mr. *Le Clerc's Crit. and Eccles. Lett. Epist. 4, p. 107, & seq. and Edit. 2, p. 128, & seq.* And the *Bibl. Choise Tom. XI, p. 102, & seq.*

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

⁹³ *Bibl. Choise, Tom. IV, p. 356, 357.*

stianity, Ages of universal Ignorance and Corruption, especially amongst the Clergy; and such too, as in fact those Ages were, which preceded the Reformation: and thus our zealous Defenders of the Fathers will have every whit as good a Foundation to maintain, contrary to the Faith of all History; that those Ages were not such, as they are generally believ'd to have been. But entirely to put to silence such, as are not asham'd to urge this wretched Argument; which, whatever Light 'tis view'd in, affords not the least Colour of Reason; I shall take occasion to add in a few Words three or four Reflections. The first is; that neither *Jesus Christ*, nor his Apostles have any where said, or in any wise given us to understand; that those, who next after them might be look'd upon as the *Propagators of the Christian Religion*, were to be Men of true Piety, and Knowledge. So very far from that were they, as to prepare us for the Expectation of just the contrary. The Parable of the Tares sow'd by the^r Enemy; and that of the^s Net that gather'd of every kind; do plainly enough shew us, that in the Christian Church, the Wicked were to be very much intermix'd with the Good; insomuch that these latter were not to have the Ascendant, or make a better Figure in it than the others. Our Lord hath foretold the Divisions, which the Ignorance, the vain Subtilties, the Temerity, the Presumption, and Passions of these *Propagators* of his Religion would produce in the Church. And *St. Paul* assures us, "that there must be Sects, to the end that those who should be worthy of Approbation, might be made manifest;" (that is to say) that a Mind free from Prejudice, and which judges not of things by Appearances; might be able to distinguish who were the Men, that did in good earnest devote themselves to Truth and Virtue. When the Apostles are telling us what was to happen in the Church, they^m express themselves in such a manner, as gives us all the Reason in the World to believe, that the Clergy were not for the Generality to be Men of the greatest Piety, and Understanding: In the very Days of the Apostles, there were Men of turbulent Spirits, and false Teachers; against whose Temerity and Seduction those holy Men were oblig'd to oppose themselves. There was even at that time to be seen a *Diotrephes*,^{xx} a Man both vain and ambitious; who presum'd to prate against *St. John*, with malicious Words; who treated as Hereticks, and excommunicated, those whom the Apostle held for Brethren.

The second Observation I have to make is; that, in the first Ages of Christianity, as well as in those that follow'd after; the Men most applauded, and who bore the greatest Character in the Church, were not always those, who had the greatest share of good Sense; or were the most eminent for Learning and Virtue. It was not for the most part^{yy} then, any more than it is now, Merit, which serv'd to raise Men to the highest Dignities of the Church. Thus, notwithstanding that Corruption both of Judgment and Manners, which reign'd, more or less, thro' every Age; it

is not to be doubted, but that there were, both amongst the People, and Clergy too, Men of more Sense, Knowledge, Moderation, Justice and Piety; than these, whose Names and Writings have been transmitted down to us with so much Pomp and Ostentation. Let the Reader judge, to which of the two, the Name and Title of *Propagators of the Christian Religion*, does most properly belong; whether to these we do, or to those which we do not know; the others having made it their Business both to prevent their making any Figure while they liv'd; and to hinder their Memory from being handed down with advantage to Posterity. Amongst these latter, some out of Fearfulness; others thro' Prudence, or the Impossibility which they saw there was of succeeding; declin'd the entering into Contests, with Men more powerful than themselves: and if any one prov'd so hardy as to make head against those Doctors, who had gain'd the Admiration of the Populace; he soon found there was no good to be got by it: Witness the Affair of *Vigilantius* with *St. Jerom*.

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

My fourth and last Observation is; that, notwithstanding the great Inaccuracy of the Fathers, which has often caus'd 'em to commit considerable Errours; notwithstanding that strange Fancy they had for vain Subtilties, which made 'em neglect Things of much greater Importance; notwithstanding all this, I say, the Fundamental Doctrines of Religion and Morality have still been preserv'd amongst Christians; even in^{aaa} the most dismal Ages of Darkness and Vice. And tho' several Falsities have been added to, and mix'd with these Fundamentals; tho' they have not been fully explain'd, and drawn out into all their just Consequences; this is no way the fault of the Gospel. But Providence has at length highly justify'd itself, if I may so say, in the Eyes of all those, who wou'd otherwise have preposterously laid to its Charge, the Neglects and erroneous

^{xx} *Matth. xiii. 24, & seq.* See the *Epist. Crit. & Eccl.* of Mr. Le Clerc, p. 121, 122. Et p. 146^r, & seq. Edit. 2. And his Treatise of *Incredulity*, p. 189, & seq. Et p. 199^r, Edit. 2.

^{yy} See *Matth. xiii. 47.*

^{zz} *1 Cor. xi. 19.*

^{aaa} See *2 Theff. ii. 3, & seq.* *1 Tim. iv. 1, & seq.* *2 Pet. iii. 3, & seq.* *Jude 18, & seq.* ^{xxx} *3 Job. 9, 10.*

^{yyy} See what *Gregory Nazianzene*, says of the Times he liv'd in, in his Life publish'd by Mr. Le Clerc, *Bibl. Univ. Tom. xviii.* p. 56^r, 89^r, 92^r, 119^r.

^{zzz} *Diff. Historiques, &c. p. 217.*

^{aaa} See Mr. Le Clerc's Treatise, *De eligenda inter Christianos dissentientes sententia*, (which is at the end of the last Edition of *Grotius, De Ver. Rel. Chris.*) Sect. 7.

Judgments of Men. God has rais'd up a Set of Men, who have introduc'd a better manner of studying and reasoning. We improve daily in rightly expounding the Holy Scriptures; and in solidly handling Morality. A true Relish for found Knowledge and wholesom Literature begins to appear; and gives us reason to hope, that they will both in due time make a considerable Progress; notwithstanding the Efforts of those, who are labouring to bring us back to the Primitive Food of Husks and Acorns. And an Age may perhaps come, wherein the Fathers of the Church, together with their fond Admirers; shall be generally had in no greater Esteem, than they can fairly merit.

But it is time to put an end to this long Digression. I thought it necessary once for all, utterly to destroy the only Subterfuge which these boasted Defenders of the Fathers had left. We shall now pursue the Thread of our History of Morality. After what has been said of the little care taken by the Doctors of the Church of the six first Centuries, to cultivate it; it wou'd be superfluous to run over the following Ages; where-

¹⁵ See the 4th Lateran Council held at Rome in 1215, Canon the third. You may find the Canon translated, *Tom. IX, of the Bibl. Univ. p. 39*. See also *Tom. XI, p. 387*. And the Treatise by Mr. Du Pin, *De la Puissance Eccles. & Temporelle*, printed in 1707. See *Caranza's summa Concil. p. 603*., printed 1659.

¹⁶ See *Seckendorff, Comm. Hist. & Apolog. de Lutheranism. &c. Lib. 1.*

¹⁷ See *Warton's Anglia Sacra, Supplem. ad Hist. Eccles. Vigorn.*

S E C T. XI.

THE Light of the Reformation, 'tis true, did in a great Measure restore, amongst Protestants, Purity both of Doctrine and Practice. But yet it cannot be truly said, that even the Reformers themselves, and their Successors, have always exactly pursu'd the true Spirit of Christianity; and of the Reformation. Was not that horrible Tenent of Intoleracion, or Persecucion on account of Religion, maintain'd by two Treatises, written for that very purpose; the one by Calvin, ^a and the other by ^b Beza? and did not Calvin actually put these his Principles in practice, in the Case of Servetus? are there not at this day Numbers, who, after having for many Years, and in divers Manners, themselves felt the dire Effects of Intoleracion; cannot yet be brought to make this explicit Declaration; that all Persecucion, or Vexation whatever, whether great or small; direct or indirect; on account of Religion, is in truth no better than downright Tyranny? Have we not seen some of 'em, bold enough to ascribe the Progress, Christianity has made in the World, to this way of converting Men; by expressly maintaining, that ^c Paganism wou'd have subsisted to this day; and that three Fourths of Europe wou'd have been still Pagans; had not Constantine and his Successors employ'd their Authority to abolish it. Are not ^d others for reviving that pernicious Maxim of St. Austin; that

in Ignorance and Corruption, augmenting still more and more, did at length rise to such a Pitch, as that there was hardly to be seen, especially among the Clergy, the least Spark of good Sense or Virtue left. Not to mention that vast Number of ridiculous Superstitions, that prodigious and amazing Idolatry, which had entirely defac'd Christianity; there were besides a thousand detestable Maxims establish'd, worthy only of the gross Darknes of those unhappy Centuries. The Bishop ¹⁵ of Rome made himself to be regarded, as one invest'd with Power to depose all such Kings, as he shou'd judge to be Hereticks; and to absolve their Subjects from their Oaths of Allegiance. Every one knows to what excess *Indulgencies* ¹⁶ were carry'd. An Italian call'd ¹⁷ John Giglis, or *Des Lis*, (*De Liliis*), who was made Bishop of Worcester by the Authority of the Pope; receiv'd from him at the same time the Power to pardon all sorts of Crimes; and to permit any one to retain the Goods of another, howsoever acquir'd; provided part thereof was given to the Commissaries of the Pope, or to their Substitutes.

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

^b *De Hæreticis à magistratu puniendis.* Note, That the Friends of *Justus Lipsius*, to answer some Protestants, who cry'd out against the Opinion of punishing Hereticks which he maintains in his *Politicks*, and in his Tract *De una Religione*; return'd upon 'em the same Charge, by alledging the Affair of *Servetus*; and citing a Passage out of *Beza*, where he lays in express Terms, *That it is more absurd, to say that one ought not to punish Hereticks, than it wou'd be to hold, that Men guilty of Sacrilege, and Parricides ought to go unpunish'd: Hereticks, adds he, being infinitely worse Villains than all those.* See the *Life of Lipsius*, by *Aubert le Mire*, *Tom. I, of the Works of that great Critick, p. 16, Edit. Vegal. Et Edit. Lugd. p. 10, Col. 2.*

^c *Droits de deux souverains, &c. p. 286.* See *Bayle's Dict. Tom. I, p. 424, 425. Edit. 2. Lett. (H).*

^d See *P. Molin. Anatom. Arminianismi, cap. 32, Dist. 18. Macov. Distinct. cap. 3, Sect. 18. Theol. Quæst. Loc. 25, Quæst. 19. Voetius, &c.*

^e N. B. What our Author here says, is by him apply'd to Sermons and Books in French; how far 'tis applicable or not applicable to those in other Modern Languages, he leaves to his Reader to judge; but seems to except the *English* and *Dutch*.

^f *Pag. 51, 52.* See also *p. 147.*

“ here we find ourselves for ever lost and undone, for the neglect of a Duty, which we cou’d never hear the least Word from you about. You have suffer’d us to approach the Holy Table, without forewarning us, that we came thither unworthily, and there receiv’d our own Damnation; if we did not first entirely empty both our Hands and Coffers of all our unjust Gains. You have indeed preach’d up to us the Mercy of God: You have also press’d us to implore it with the most affectionate Devotion, and the most lively Hope; but without saying one Word of the Impossibility of obtaining the Effects thereof, if we obstinately continu’d in our Injustice, and consequently in Impenitency; which all most certainly do, who restore not that which they have unjustly acquir’d. In a word, ’tis you who have let us remain ignorant of these capital Truths, whilst we might have profited by them; ’tis you who are the Cause, that we learn’d ’em not till now, when they will only serve to render us inexcusable; and convince us that we now most justly are, and for ever ought to be most miserable.” Mr. *Ostervald*, Minister of *Neuchâtel* in *Switzerland*, makes the like Declaration: take it as reported, by a third ^s Minister, which is Mr. *Bernard*, the learned and judicious Continuator of the *Novelles de la Republique des Lettres*. The Ignorance, says he, of the Duties of Christianity, is both very general, and very great. There are some of them which vast Numbers have never thought on. The Author here instances in the Duty of *Restitution*; and tells us, that Mr. *La Placette* having some time ago publish’d a Treatise on that Subject, the Book was look’d upon as very singular, and for its Subject new and curious; and that some there were, who treated this Doctrine of *Restitution*, as a Doctrine entirely novel, and withal too rigid. — There are some too, who pretend, that Points of Morality ought not to be urg’d too far; that some Indulgencies ought to be made to humane Nature; and at the same time rigidly insist upon Points of Doctrine; and on such too oftentimes, as are of very little Importance. Some also have proceeded so far, as to say, that it is even dangerous to insist so much upon Morality; and that it is a Mark of Heresy so to do. Divines have likewise had the Assurance to publish Books, wherein they seem to have made it their Business, to decry good Works. Is it to be wonder’d at then, if the People, who are committed to the Care of such Guides, do not give themselves much Trouble about the Practice of them? — The Doctors appointed to instruct the People in Religion,

“ fall out with^l one another about unprofitable Questions; so that while the Pastor is taken up in his Closet or in the Pulpit in confuting an Adversary, that perhaps he has never seen; or in combating an Errour utterly unknown to his Flock; his Sheep go astray, his Auditors become confirm’d, as to their Morals, in the most capital Errours; and deeply engag’d in vicious Habits and evil Courses.” Here you have the Depositions of unexceptionable Witnesses. And I wish it cou’d be said, to the Honour of those, against whom these Imputations have been but too justly brought; that they begin now to open their Eyes, and alter their Course. But, alas! it is much to be fear’d, that the greatest part of ’em will for some time continue still prepossess’d with this Notion, so contrary to the Engagements of their Ministerial Function; that a flaming Zeal for speculative Doctrines, which cost ’em not much Pains to acquire; and in maintaining of which they find their Account; will exclude ’em the Labour of entring deep into the serious Study of Morality: which will require much profoundⁱ Meditation; and Knowledge, beyond the rate of Common-Place-Book Learning. It would be a good Point gain’d, if they would but let them alone, who are to the utmost of their Power striving to do that, which they themselves were oblig’d to do. But their Predecessors have set ’em an Example; and they will by no means degenerate. Who was it, I pray, that introduc’d in the last Age, the methodical Study of the Law of Nature; that first attempted to give the World a System of this so vast, and necessary a Science? Was it any of the Ecclesiasticks, or Professors of Divinity? No: ’twas the illustrious *Grotius*; whose Memory wou’d on this very Account, be for ever bless’d amongst all sincere Lovers of Truth and Virtue; tho’ he had not otherwise gain’d an immortal Reputation, by the many Pieces he has wrote of another Nature; all excellent in their kind. — Yet no sooner did that admirable Treatise, of the *Right of War and Peace*, appear in the World; but the Ecclesiasticks, instead of returning thanks to the Author for it; every where declar’d against him: And his Book was not only put into the *Expurgatory Index* of the ^k *Roman Catholick* Inquisitors, (which is not so much to be wonder’d at;) but many, even Protestant Divines, labour’d to cry it down. And thus it far’d too with Mr. *Pufendorf*’s Book of, *The Law of Nature and Nations*. The *Jesuites* of *Vienna* caus’d it to be prohibited^l; and many Protestant Divines, both of *Sweden* and *Germany*, did their best, to make this excellent Work share every where else the same Fate.

^s Mr. *Bernard*, Pastor of the *Walloon* Church at *Leyden*, and Professor of Philosophy and Mathematicks in the University of that Town.

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

ⁱ See the Reflections Mr. *Bernard* makes, in his *Repub. des Lettres*, April 1706, Art. 1. And which drew upon him an insipid Libel by a petty *French* Minister.

^k Ann. 1627. See *Boecler*’s Preface to *Grotius*.

^l See an Account of all these Disturbances in the *Eris Scandica*, printed at *Frankfort* on the *Main* 1686.

S E C T. XII.

MORALITY, being thus slighted, and almost banish’d out of the World by the publick Ministers of Religion; took Sanctua’y amongst the Laicks, or undignify’d

Men of Letters; who gave it a much better Reception. Let us now see in what manner these latter have treated it; and what has been the Progress it hath made in their Hands. It may very reasonably

reasonably be suppos'd, that, notwithstanding the Simplicity and Ignorance of the first Ages of the World, as to what concern'd Arts and Sciences purely speculative; those Fathers of Families, who were Men of good Senſe and Probity; did not fail to ^a teach their Children betimes, together with the Principles of Religion, those Maxims too, that were the most important in Morality; as far as they had been made known to them, either by their own proper Meditation; or by ^b Tradition, deriv'd to 'em from the first Parents of Mankind. These Instructions, however imperfect, and immethodical they may possibly have been; might well enough suffice for those Times; especially before Corruption had come to that Height, at which it afterwards arriv'd. But when Depravity of Manners had defac'd the true Ideas of Religion and Morality; and the Fathers were become as negligent in instructing their Families, as their Children prov'd stubborn and unteachable; then had the clearest and most common Principles of Virtue been in a manner, entirely extinguish'd in the World; had there not been a Set of Men, who apply'd themselves, in a very particular manner, to the Improvement of their natural Reason, by the Study of the Sciences: and it was out of their Schools that ^c the most celebrated Legislators have proceeded; to whom Communities have been beholden for all the Order and Decency they have ever had amongst them; and for all the Tranquillity they ever enjoy'd: ^d Men more worthy of Admiration, and immortal Praise, than the greatest Conquerours.

As the Eastern Countries were the first peopled; so 'tis from thence that the most general Notions of Morality, and the other Sciences spread themselves thro' the World. The Greeks, with all their Vanity, were forc'd to own themselves ^e Debtors for these Notices to those, they call'd Barbarians; chiefly to the Chaldeans, Egyptians, and Persians. But all that we know of the Sen-

timents of these ancient Eastern Nations, we have from the Greeks themselves; who have sometimes mix'd their own Opinions with those they reported; and give us at best but a slender Account, of what the Sages of the East taught, in the Subject of Morality. This more particularly appears by the Works of two Learned ^f Philosophers; who have collected with great Care, all that is to be found thereupon, in the Writings of the Ancients. — The System, we have given us of the Doctrine of the Chaldeans; is nothing but a heap of Notions in Physicks, or Astrology, Metaphysicks and Pneumatology; mix'd up with abundance of superstitious, mystical Allusions; and ridiculous Fancies. I have here set down All I have been able to remark, which can any way be refer'd to the Science of Morality; which is as follows: *You ought to make haste*, (these are Maxims, taken from a Collection entituled, *The Oracles of the Chaldeans*; and that they were actually couch'd in the Style of Oracles, will instantly appear, by the Sample I am about to give,) *You ought to make haste to ^h approach the Light and Rays ⁱ of the Father, from whence your Soul was sent you. — Lift up entirely all your Eyes on high, and do not abase yourself towards this gloomy World, under which there lies an Abyss, never to be trusted, and an ^k Hell, surrounded on all sides with Mists and Clouds, &c. — Seek ^l Paradise. — Seek the Channel ^m of your Soul, and from whence, and from what ⁿ Rank, you are become a Slave to the Body, that you may be able to return to that Rank, from whence you are descended, by joining Practice to Holy Discourse. — Do not aggravate your Destiny. — Preserve your frail Body for the Practice of Piety. — Nourish yourself with the Hope of that Fire, ^o which is in the Country of Angels. — Do not defile your Soul, do not debase it, do not yourself make it depart from you, lest in departing from you, it find nothing: The Souls of those who are separated from the Body ^p by Force, are the most pure. — O Man, who art a Creature*

^a See the *Hist. du Droit Naturel*, by Mr. Budeus, *Seç. 2.*
^b See *Bibl. Univ. Tom. III, p. 322.*
^c *Hi [Zaleucus, Charondas] non in foro, nec in consultorum atrio, sed in Pythagoræ tacito illo sanctoque secessu didicerunt jura, quæ florenti tunc Sicilia; & per Italiam Græciæ ponerent.* Senec. *Epist. 90, p. 301, Edit. Gronov.*
^d Mr. Bayle's *Dict. Tom. III, p. 2442, Rem. (G⁷).*
^e Τὸ τῆς αἰλοσοφίας ἔργον ἐνίοι φασι ἀπὸ Βαβυλῶν ἀρξῆαι. Diog. Laert. *Lib. 1, Seç. 17.* See thereupon the Commentators, *Edit. Amstelæd. 1692.*
^f John Marsham, in his *Canon Chronicus, Ægyptiacus, &c.* printed at London 1672, and at *Leipsick 1676.* And Thomas Stanly, in his *Englisch Hist. of Philosophy*, (which, as I am inform'd, has been lately translated and publish'd at *Leipsick 1711,*) *Parts 14, 15, 16, 17, 18, 19.* These six last Parts have long since been translated by Mr. Le Clerc; which Translation was a 4th time reprinted in the 2d *Tom* of his *Philosophy* in 1710.
^g See *Le Clerc's Philosophy, Tom. II, p. 338, &c. Ver. 215, 216, 238, & seq. Ver. 247, & seq. Ver. 254, 259, 268, 274, & seq. Ver. 280, & seq.* Κοὶ σὺ σπένδεις πρὸς τὸ οὐρανὸν καὶ πατρίδα ἀγάς, Ἐνθεν ἐπιμῆθαι σοὶ ψυχῆ, *Ver. 215, 216.* Edit. Cleric. Ὁμμηται δ' ἀρδν πάντα ἐκπέτασαν ἀνω. Μῆτε κρῖτω νέμσεις εἰς τὸν μελανογῆα κόσμον ὡς βροτῆς αἰὲν ἀπτες ὑπόσρωπι τε καὶ ἄδης Ἀμοικιεῖης, *Ver. 238, & seq.* Ζήψον παράδεισον. Δίλειο σὺ ψυχῆς ὄχρον, ὅδε, ἢ πῦρ τιζει σώματι πένουας, ἐπὶ τῶν ἀν' ἡς ἔρρῳς Ἄδης ἀ ασήσει, ἱερῶ λόγῳ ἔργον ἐνώσας, *Ver. 247, & seq.* Μὴ σὺ αὐσανε τὴν ἐμιαρμένην, *Ver. 254.* Ἐργον ἐπ' ἐυσέβης βένου καὶ σώμα σωσεις, *Ver. 259.* Ἐλπις τρεῖβτα σε πνέλοχος ἀγγελικῶ ἐπὶ χόρω, *Ver. 268.* Μὴ πνεῦμα μολύνεις, μῆτε Βαδδῖνς τὸ ἐπίπεδον, Μὴ ἐξέξῃς, ἵνα μὴ ἐξῆσῃ ἔχρη τὶ. Βῆρ ὅπ σῶμα λιπῶντων ψυχῆ καθαρῶταται, *Ver. 274, & seq.* Ὡ πλιμοστανης εὔσας ἀνδρωπε τέχνασμα! Μὴ τὰ πειλῶεια μέτρα βάλεις ὑπὸ σὴν ὀρένα βαλλε, Ὁυ γδ ἀληθῆς φυτόν ἐν χδοῖ. Μι τέ μετρε μέτρα ἡνέι, κανόνα αναδρόσις, Αἰδίω βυλῆ φέρεται, ἐχ ἕνεκα σῖο. Μνηαῖον μὲν δρῶμα, κασῆνειον πεσπόρισμα, Μῆνς ρῖζον ἕασον, αἰ τρέχει ἔργῳ ἀνάγκης. Ἀθεῖθ ὀρίδων τῆρος πλαπῆς ἐπὶ ἀληθῆς. Ὁ θυπῶν, σπλάγχων τ' ὄδομαι τὰ δ' ἀθυρματα πάντα. Ἐμποικῆς ἀπάης σνέγματα. Φεῖρε σὺ τῶτα. Μέλλον ἐυσεβῆς ἱεῖν παράδεισον ἀνάγειν, Ἐυθ' ἀρετῆ, σῶσαι τε καὶ εὐνοῖα συνάροται. *ver. 280, & seq.*
^h That is to say, to do all you can, to return to the Place from whence your Soul is descended down here below; for they believ'd the Pre-existence of Souls.
ⁱ They meant by that, the Spaces that are above the Moon, which they conceiv'd to be all shining with bright Light. This Light was, in their Opinion, an Emanation from the Father, or Sovereign Divinity. See hereupon Stanly, and the Notes of Mr. Le Clerc, on the *Chaldean Oracles.*
^k Ἄδης. They, as well as the *Greeks*, believ'd, that the Place to which the Souls of the Wicked went, was underneath the Earth.
^l That is to say, the Place of Bliss, or of that Light above the World, (Φῶς ὑπερκόσμον) which was the Abode, and Residence of pure Spirits. See Mr. Le Clerc's Note on that Verse.
^m Thro' which it pass'd, to come down here below.
ⁿ They conceiv'd, that there were several Ranks or Orders of Beings, and several Classes of pure Spirits.
^o That is to say, of returning into the luminous Space, already mention'd.
^p That is to say, by the Effect of an exterior Force. They thought, as did the Disciples of *Plato*, that they ought not to depart out of this Life without the Permission of *God*. See Mr. Le Clerc, on this Verse.

of a most daring Nature, take not into thy Mind the vast Dimensions of the Earth; for the Plant of Truth is not upon the Earth. Do not measure the Sun by the help of collected Rules: He moves by virtue of an eternal Decree, and not for thy sake. Trouble not thyself about the Course of the Moon, and the Motions of the Stars, nor about the Noise of the Moon: She holds her Course by an Effect of Necessity. — The expanded Wing of Birds that fly in the Air, never tells Truth. I do not trouble myself at all about Sacrifices, or Entrails; they are all Mockeries, and the vain Supports of Fraud and filthy Lucre. Fly these Things, you who are to open the sacred Paradise of Piety, where Virtue, Wisdom, and Equity dwell in conjunction. The two last Sentences do plainly enough condemn judicial Astrology, and^a Sacrifices too, if not absolutely, at least the Prefages, which were drawn from the Entrails of the Victim; as well as those from the Flight of Birds: and yet these Things were highly in vogue amongst the Eastern Nations; and chiefly amongst the Babylonians and Assyrians. In the other Oracles, which would have been unintelligible to an ordinary Reader, without the short marginal Notes; which I have been oblig'd to add as a Key to some Places; they condemn Self-Murder; and recommend continual Meditation on the Rewards

and Punishments of another Life. It remains to be consider'd, wherein they made those Duties to consist, which were to be practis'd in order to propitiate the sovereign Deity; and to assure to themselves a State of Bliss after this Life ended. In what has been hitherto collected of the Doctrine of the Chaldeans, there is no mention of any thing besides an exact Observation of certain Rites and Ceremonies, whereof Sacrifice is the most considerable; by means whereof they fancied themselves capable, of maintaining Correspondence with the Celestial Beings; of raising the Soul above the Power of the Passions; and even healing the Diseases of the Body; as well as those of the Mind. These Ceremonies they call'd the *Works of Piety*. They, who perform these as they ought, say they, *cease to be troubled with any Evil whatever; they acquire thereby all sorts of Virtues; they become good and virtuous Men; they are set free from their Passions, and unruly Inclinations; they are purify'd from all Impiety and Prophaneness. On the contrary, those who neglect, or do not rightly perform them; are deliver'd up as a Prey to their Passions, depriv'd of all Commerce with the pure spiritual Beings, and become like to those evil Genii, with whom they converse; and who push 'em on to the Practice of all manner of Vice.*

^a Mr. Le Clerc believes, we ought to read with *Pfellus*, *σπλάγγων τιμαί*: So that these Words shou'd not condemn Sacrifices, but only Divinations by the Entrails of Victims.

^r *Ἐργα ἑυσεβείας*. See *Stanley, Hist. Phil. Oriental*, translated by Mr. Le Clerc, *Lib. 1, Sect. 2, Cap. 28*.

^s *Iamblich, de Myster*, *Sect. 3, Cap. 31*, p. 102, *Lin. 25, & d. Edit. Oxon.*

S E C T. XIII.

NOR are we much better inform'd as to the Morality of the Egyptians; nor tho' we should even admit for genuine, those visibly spurious Writings, which pass under the Name of their ^a *Hermes*, or *Mercurius Trismegistus*. 'Tis well known, that the Learned of that Country were ^b very much addicted to Enigma's, Symbols, and Hieroglyphicks; which render'd their Doctrine obscure and impenetrable to all, who were without a particular Key to it. So that it was almost impossible, for it ever to be transmitted to us; especially if we consider, with what care they conceal'd their Mysteries from all, who had not been initiated therein. However there is a certain Fragment still remaining, by which we may form some Judgment of the principal Heads of the Morality of the Egyptians; 'tis the Form of a kind of Funeral Sermon, pronounc'd by some Funeral Officer; wherein he thus delivers himself in the Name of the Deceas'd^c: *I have religiously serv'd, during my Abode in this World, the Gods which my Forefathers had made known unto me. I have ever honour'd those who procreated my Body. I have never committed Murther. I have never been guilty of*

*Breach of Trust. Nor have I ever committed any other Crime that is inexpiable. Those Remains we have preserv'd to us by ancient Writers, of the^d Laws of the Egyptians; the Establishment whereof is ascrib'd to their famous *Hermes*, or *Mercurius Trismegistus*, Counsellor of State to *Osiris*, one of their first Kings; do likewise give us reason to conclude, that the Sages of Egypt apply'd themselves as well to Morality and Politicks; as to the Study of the speculative Sciences. There are notwithstanding certain of those Laws, which do not rightly quadrate with some of the most evident Maxims of the Law of Nature. The Daughters alone, for example, were oblig'd to nourish and support their Parents; whilst the^e Sons were entirely excus'd. They also made a Difference to the Prejudice of the Mother, between the respect due to her from the Children, and that which they ow'd to their Father; which they founded on this false Notion^f in natural Philosophy: that the Mother contributes nothing to the Production of the Child, besides the furnishing it with a Lodging, as I may say, and Nourishment during the Time of her Pregnancy. Whereupon a very ingenious*

^a See the *Bibliotheca Græca* of Mr. *Fabricius*, *Lib. 1, Cap. 7, & seq.* *Hecateus of Abdera* had wrote the History of their Philosophy; *Diog. Laert. Lib. 1, Sect. 10, 11*: But this Book is lost. See *Menag. i. l.*

^b See *Marsham*, p. 38, *Edit. Lips.*

^c *Ἐγὼ δὲ τὸς Θεῶς, ὅς ἐι γονῆς καὶ παρέδειξαν, εὐσεβῶν διετελεῖν, ὅσην χεῖρον ἐν τῷ ἐκείνῳ αἰῶνι πῶν φίλον εἶχον. τὸς τε τὸ σῶμα μὲν γεννήσαντας ἐτίμων αἰεὶ πῶν τε ἄλλων ἀνθρώπων ἕτε [πνὰ] ἀπεικτενα: οὐτε παρακαταθήκην ἀπεδέξατο: οὐτε ἄλλο οὐδὲν ἀνήκεστον διεπραξάμην.* *Porphyrt. de Abfinentiæ, Lib. 4, Sect. 10*, juxta versionem *Euphanti ex lingua Egyptiaca*. See *Marsham*, p. 156.

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

^e *Γέρεται τὸς τιμας πῶς μὲν πῶσι ἄμερῖν ἀνάγκη, μὴ βυλομένεισι. Τῶσι δὲ θυρατερεῖσι πῶσα ἀνάγκη, καὶ μὴ βυλομένησι.* *Herodot. Lib. 2, c. 35*, p. 64, 65, *Edit. Steph.* Et p. 102, *Ed. Gronov.*

^f *Ἐπιλείουσι πῶν πατέρι μόνον αἰτιον εἶναι τῆς γενέσεως, τὴν δὲ μητέρα τερεφὴν καὶ χῶρον παρέχεσθαι τῷ ἐρέσει.* *Diodor. Sic. Lib. 1, p. 51, A.*

Commentator ^g has judiciously remark'd, that in that Law of the Decalogue, *Honour thy Father and thy Mother*; there is, as in many other Pla-

ces of the Pentateuch, a tacit Opposition to the wrong Notions and Customs of the *Egyptians*.

^g Cleric. in Exod. xx, 12.

S E C T. XIV.

THE Doctrine of the *Persians*, was much the same with that of the *Chaldeans*, their Masters, as some pretend, from whom they receiv'd it. The manner, in which they educated in *Persia*, the Children ^a of their Kings, and their young Noblemen; gives us all the reason in the World to believe, that they diligently apply'd themselves to Morality and Politicks. At ^b the Age of fourteen, the young Prince was put into the Hands of those, who were call'd the Royal Preceptors. *Who were four of the most Eminent for Birth, and Character, that cou'd be found in all Persia; they were chosen in the Vigour of their Age; the first past for the most wise, the next for the most just, the third for the most temperate, and the fourth for the most valiant. The first taught him the Magick of Zoroaster, Son of Oromazus; in which was comprehended all the Worship of the Gods: He also taught him the Laws of the Realm, and all the particular Duties of a good King. The second taught him to speak the Truth always, tho' it made against himself; The third taught him never to suffer himself to be overcome by his Passions; to the end that he might continue always free, and always a King; by ever maintaining as absolute a Sway over himself, as over his Subjects. The fourth taught him to fear neither Dangers, nor Death; for, by subjecting himself to fear, from a King he becomes a Slave.* A Learned *English* Author ^c, who was Master of almost all the Oriental Languages, and even of the Dead Language of the *Zend*; (for so it was the *Persians* call'd the Books of their famous *Zoroaster*, or *Zerdusht*;) publish'd, some Years since, a *Latin* Translation of a Piece in Verse; which is itself but a Version, into the Modern *Persian*, of part of the Books of that antient Legislatour. They who have read that Abridgment, call'd *Sad-der*, will, I'm persuaded, readily subscribe to the Judgment of a Learned Journalist ^d; who says, that there are, amongst several good Precepts of Morality, many superstitious, and trifling Things; I have in my Notes ^e on Mr. *Puffendorf* reported part of these Maxims; which are indeed highly conformable to Reason. And here the Reader has the most considerable of the rest. (*viz.*) *If you^f will be holy, and save yourself, you have two Rules to practise: The one is, that if in this World, you love Paradise better than any other Thing whatever, do not possess yourself of the Goods of another; for Paradise is worth more than all the Things of this*

*World; because this World is only as it were the Space of five days; whereas Paradise is as it were an infinite Duration. And if the Possession of Paradise be most agreeable to you, set not your Heart on these poor Things: Remember to do good to every one, for Acts of Goodness are excellent Works in this Life. Do then unto Men the same things, that you wou'd they shou'd do to you. The other Rule is, to offend no body with your Tongue; but to promote, by your Humanity and good Nature, Society amongst Men.—Do^g your Endeavour to follow Truth, without any Adulteration; seek it with care, for it will make your Soul perfect: Of all the Things which God hath created, there is none better than Truth.—Have^h no Commerce with a Prostitute: do not seduce the Wife of another, tho' she tickle your Heart, and tho' she lay Snares for you. --- Do not offend your Father; ⁱ who hath brought you up; nor your Mother, who hath carry'd you nine Months in her Womb; nor the Priest, who hath taught you the Maxims of Goodness and Virtue. --- When your Parents command you to do anything, rise up cheerfully to obey them. ^k Instruct your Children; and then be it known unto you, that all the good Actions, which they shall do, it shall be as if their Parents had done 'em themselves. --- He that lives in Ignorance, knoweth neither God nor Religion. The Reasons, with which these excellent Maxims are accompany'd, are not always very solid; and there are some of 'em even ridiculous. They say, for example, that a Man ought not to debauch his Neighbour's Wife, because, ^l if after it the Husband approaches his Wife, he committeth a Sin, as much as if he had to do with an Harlot. They say farther, that ^m who's ever hath had to do with a Whore, shall lose for forty days, his Understanding, Knowledge, and Discernment; nor shall be able to conduct himself, &c. In another Place ⁿ, they advise to marry betimes; because, say they, Children are as a Bridge at the last Judgment; so that they who have no Children at that day, cannot pass over into the Mansion of Immortality; But must remain on this side the Abyss, which separates it from this World. It must nevertheless be acknowledg'd, that they do not fail frequently to alledge the general Motive of the Rewards and Punishments of another Life; which *Zoroaster* taught, with a kind of Resurrection; tho' he has upon that occasion vented a thousand gross and absurd Conceits; as may appear by reading Mr. *Hyde's* Book.*

^a Πάντες γὰρ οἱ τῶν αἰείων Περσῶν παῖδες ἐν ταῖς βασιλείαις δούροις παιδευόνται. Xenoph. de Cyri Min. expedit. p. 158. Ed. H. Steph. Lib. 1, c. 9, f. 2, Ed. Oxon. Et p. 266, D^r. Ed. Paris.
^b Δις ἐπὶ τὴν δὲ γνομένων ἐπὶ τῶν, τὴν παῖδα περιστομῶσαν οὐς ἐκεῖνοι βασιλείαις παιδαγωγὰς ὀνομαζέσκειν· εἰσὶ δὲ ἑξαιρέτων ἄλλων οὐκ ἐπιτρέψαντες ἐν ἡλικίᾳ τέταρτος ὁ, τε σωφροσύνη, καὶ ὁ δικαιοσύνη, καὶ ὁ σωφροσύνη, καὶ ὁ ἀνδρείοτητα. Ὁ δὲ μὲν μαγείᾳ τε διδάσκει τὴν Ζωροάστρου τὸ Ὀρμαζδῆς (ἐστὶ δὲ τῶν Θεῶν Διερπία) διδάσκει δὲ καὶ τὰ βασιλικὰ ὁ δὲ δικαιοσύνη, ἀληθεύειν δὲ πάντως τῶν βίαι· ὁ δὲ σωφροσύνη, μὴ δ' ὑπὸ μίας ἀρχῆς τῶν ἡδονῶν (ἵνα ἐλευθεροῦνται εἶναι ἐθιζέσκειν καὶ ὅτιες βασιλεὺς, ἀρχὸν πρῶτα τῶν ἐν αὐτῷ, ἀλλὰ μὴ δαλεῦσαι) ὁ δὲ ἀνδρείοτητα, ἀφοβὸν καὶ ἀδραῖα παρεσκευάζει, ὅτιν δέσση δέλον ὄντω. Plat. in Alcib. 1, p. 121, 122, Tom. II, Ed. Serran. Et p. 32, F^r, Ed. Læmar. N. B. As the Author follows the Translation of Mr. *Dacier*, so does his Translator him, unless where he sees just Cause to do otherwise: and thus he observes too in all Translations from Originals, quite thro' this Prefatory Discourse.
^c The late Mr. *Hyde*, in his *History of the Religion of the antient Persians*, printed at Oxford, in 1700.
^d Mr. *Bernard*, in his *Novelles*, of March, 1701, p. 250.
^e On Lib. 1, Cap. 3, Sect. 8, Not. 3. Cap. 7, Sect. 4, Not. 3, and Lib. 2, Cap. 3, Sect. 14, Not. 10. and Lib. 3, Cap. 3, Sect. 16, Not. 1. Cap. 4, Sect. 2, Not. 3.
^f Port. 64.
^g Port. 55.
^h Port. 68.
ⁱ Port. 69.
^k Port. 69.
^l Ibid.
^m Ibid.
ⁿ Ibid.

SECTION XV.

AFTER having spoke of the *Chaldeans*, the *Egyptians*, and the *Persians*; I must, before I pass on to the Western Nations, say something of the *Indians*, and *Chinese*. What some Authors have related concerning the manner of living us'd by the *Indian Philosophers*, whether they are call'd *Brachmans*, or *Germans*, or *Gymnosophists*; (for there were several Sects of them, which are not sufficiently distinguish'd by the antient Authors, who speak of them:) What, I say, is related concerning their (A) sad and solitary Way of living; and of their superstitious Austerities, in which the Modern *Bramius* (B) have but outdone 'em; plainly shew, that there was a great deal of Caprice and Folly in their Principles and Maxims. However, as *Strabo* reports, they believ'd the Immortality of the Soul, and a future Judgment; (C) as far, says he, as it has any relation to Piety and Holiness. And it appears, by a Conversation, related (D) by *Philostratus*, which *Apolonius* had with one of the *Gymnosophists* of *Ethiopia*; that their Notions of Justice were right enough. As for the *Chinese*, whose Opinions and Customs were unknown to us till these latter Ages; the celebrated Mr. *Leibnitz* assures us, * that, in Matters of Morality and Politicks, the Learned of that Country far exceed ours here in *Europe*. Perhaps this Encomium may be some what over strain'd; but however this at least is certain, tho' * Mr. *De St. Evremond* be never so much of the contrary Opinion; that there are a great many most excellent Things to be met with in the Books of *Confucius*, (or *Cum Fu Cu*): who, not to mention the Divine Honours which have been long since paid him in that Country; is so much esteem'd for his Philosophy, that there are in every City publick Schools, where his Works are expounded; and where one must study some time, before he can be admitted into any Post in the Government. I will now give my Reader a Taste of his Principles. " All that, which is the Celestial Part of Man, we call the Rational Nature; what is conform to Nature and Reason, we call the Rule: as we do Morality, or the Institution of Virtue, the Re-establishment of that Rule, by the Application thereof to ourselves, in the Government of our Passions. This Rule, being essential to the Rational Nature, neither can, nor ought to be separated one single Moment from Man; for if it cou'd be separated from him at any time, it wou'd not then be the Rule, nor the Reason, which Heaven has given us. (*Confucius*, or *Cu Su*, no doubt meant by this, that to cease to be rational, is to cease to be a Man; since they add:) This is the reason why the Man of Integrity keeps so diligent a Guard upon himself; and is so watchful even in Things, which do not appear to the Eye; such as are the first and most minute Motions of the Heart: and that he governs himself with so much Precaution also in Things, which are not to be distinguish'd by the Ear; to the end, that whatever he does, he may never swerve from the Rule of right Reason; which he always carries imprinted on his Soul. The Passions being essential to Nature, or rather being Nature itself; the Man of Integrity applies himself to govern, and keep 'em under the Restraint of right Reason; (but not to suppress or extinguish 'em:) For Joy, the Attendant on Good, and Grief, on bad Successes; Sorrow for the Loss, and Pleasure in the Enjoyment of any good; before they come to be reduc'd into Act, are term'd *Medium*, or reputed to be in a State of Mediocrity; being as yet indifferent with respect to either Redundancy, or Deficiency. But when they have pro-

duc'd their Effect, and that Effect agrees with the Light of right Reason; 'tis then call'd Union or Agreement between Reason and the Passions; whilst the Passions still keep the Medium, they are look'd upon as the main Spring of the Universe, and the Foundation of all good Actions; and, when they are conformable to Reason, they are call'd the Rule of the Universe, and the Royal Way of Mankind. --- " There are four Rules, which a Man of Integrity endeavours to observe: Scarce one which have I observ'd as I ought: 1st, To pay the same Obedience to my Father, which I require from my own Children. 2^{dly}, To have the same Fidelity to my Prince, that I expect from my own Servants. 3^{dly}, To have the same respect for my Seniors, that I look for from those, who are my Juniors. 4^{thly}, To have the same Zeal for the Interest of my Friends, as I myself expect at their Hands; and to endeavour as much to be beforehand with 'em in all manner of good Offices, as I wou'd desire they shou'd do on my Account. A Man of Integrity puts these Virtues in practice every Day, and every Hour; without Artifice, and without Disguise. He is prudent and circumspect in all his Discourse; and if he has in any thing come short of his Duty, he never rests, till he has supply'd what was wanting. If he finds a Torrent of Words come upon him, he is very careful how he gives 'em utterance; because he will be always seen to sute his Actions exactly to his Words; and his Words to his Actions. A Man of Integrity is always content with his Lot, he always lives in a manner suitable to his present Condition; and never wishes for any thing, that is not proper for him. As he seeks only to make himself perfect, and demands nothing of other Men, he is never displeas'd or angry with them; and never murmurs either against Heaven or Earth. When he is unfortunate, he complains not of the Injustice of Providence; he imputes not to other Men, his own Defects; nor does he accuse them of being the Authors of his Misery. He is like an Archer, who lays all the fault upon his own Hand, when he has mis'd his aim. --- " I do not see of what use a Man can be in the World, who is without faith; unsincere in his Words, and unsteady in his Promises. Of what use is a Chariot without a Beam; or a Wheel without an Axle-tree?" One may judge by this Sample, of the Accuracy of Thought, and profound Meditation of this *Chinese Sage*. The Instructions which he gave to *Ngai-cum King of Lu*, concerning the Art of Government, " contain most admirable moral Reflections; which do not merely consist of indetermin'd general Notions; but of particular Instructions, adapted to all the several Occasions, and Junctures of Affairs, which can befall a Prince: insomuch, that it may very well be said without Exaggeration, that there is more to be learn'd from this small Book of *Confucius*, than from the vast and numerous Volumes of some of the Fathers of the Church. But there arose since his Time another *Philosopher*, whose impious Notions at length prevail'd; and have continu'd to this day to be the Opinions most commonly receiv'd. His * Disciples have an exterior *Doctrine*, which they preach to the People, to retain them, say they, in their Duty; and which consists in teaching, that there is a real Difference between Good, and Evil; just, and Unjust: and that there is another Life, where every one shall be punish'd or rewarded, according to that which he hath done in this. But their interior *Doctrine*, which is only for the initiated; is upon the upshot a kind of *Spinozism*; which at once entirely expunges both Religion, and Morality.

(A) See chiefly *Strabo*, *Geogr. lib. 15, p. 712, A, &c.* and *Philostratus, De Vita Apoll. Tyan. passim*: and particularly p. 119, &c. *Edit. Paris. 1608.* (B) See the Letter of Mr. *Bernier*, entitled, *Qu'il n'y a opinions si ridicules, ni si extravagantes, dont l'Esprit humain ne soit capable, &c.* inserted in his *Voyages*.

C Παιροπλεκευθ δε η μνθες ωσπερ η ιλλατων, περ πεαρσαρσιας λυθης, η των καθ' οδου κεισων, η αλλα τοιαυτη --- ο παρ σου παρ ευσβειαν η οσιπτητα. *Strabo, Lib. 15, p. 1040, A, C, Ed. Almelov. Et p. 713, C, & p. 714, A, Edit. Paris. Anno 1620.* (D) *De Vita Apoll. Tyan, Lib. 6, cap. 21, Edit. Olear. Et cap. 11, Edit. Morell. Pufendorf*

has cited a Passage out of it, *lib. 1, c. 9, f. 5, n. 4.* * *Profat. ad Novissima Sinica.*

* He calls him (*Tom. 5, p. 69.*) the most tedious Moralists he ever read. His Sentences, adds he, where he is intelligible, are below the Stanzas of *Pibrac*; where he is obscure, he is above the *Apocalypse*. But a Man of the Character of *St. Evremond*, might be tired with the reading a Book of Morality; and yet that be no Prejudice to the Merit of the Book. Not that there are not as well bad, as good Things, in what has been publish'd of *Confucius's* Works; and we may very well subscribe, or come pretty near the Judgment of Mr. *Gundling*, Professor at *Hall* in *Saxony*, in his Book call'd *Hist. Phil. Moral. Part 1, cap. 5, Sect. 5*; of which the first Part only has been yet publish'd, as I think, which treats of the Oriental Philosophy; printed in 1706.

† 'Tis pretended, that he liv'd 551 Years before *Christ*. *Biblioth. Univ. Tom. 7, p. 420, &c.* in the Extract out of *Confucius*, by *P. Couplet*, printed at *Paris*, in 1687, in *Folio*. *Ibid. p. 427, & seq.* *Ibid. p. 443.*

‡ *Bibl. Univ. ubi supra, p. 436.* § *Foc, or Xe Kia, or Xaca. See Bibl. Univ. ubi supra, p. 402, & seq.* * *Ibid. p. 404,*

S E C T. XVI.

WE come now to the *Grecians*, whose Opinions we are much better acquainted with than those of the *Eastern Nations*, whose Disciples they had first been; though they afterwards became Masters to all the other Nations of *Europe*. They set themselves to extend, and, in Process of Time, did in Fact considerably improve that Stock of Knowledge, they had imported from abroad: And hence it is, that the farther we look back into Antiquity, the more we trace amongst the *Greeks*, the Notions and Manner of teaching of the Eastern Nations. Thus it comes to pass, that the Morality of the most ancient *Grecians* consisted in *Enigma's*, *Apologues*, and *Sentences*, not much unlike the *Proverbs* of *Solomon*. There had been, before *Æsop*, whose Fables are so much celebrated, many other Authors in that Sort of ingenious and instructive Fictions. *Plutarch*, speaking of *Pittheus*, Grandfather, on the Mother's Side, to *Theseus*, who liv'd about the Time of the first Judges of *Israel*; says, That the Science then in Use consisted chiefly of *Sentences*, and moral Sayings; such as those which gain'd *Hesiod* so much Esteem, in his Work entitled, *Works and Days*. Amongst the *Sentences* of that Poet, adds he, this is one; which is ascrib'd to *Pittheus*: Let the Reward thou promisest to thy Friend, be a competent Reward. These Sentences were generally put into Verse after the *Eastern Manner*; which serv'd to help the Memory, and give the Precepts a more lively Turn. There

is now extant an Elegiack Poem of *Theognis* of *Megara*, under the Title of *Sentences*; where you have abundance of good moral Reflections. *Homer* too we find, with the other less ancient Poets, but more especially the Tragedians, full of Precepts; sometimes direct, sometimes indirect; scatter'd too all over Works, which were principally design'd for Diversion, rather than Instruction. But they must be read with Judgment and Caution; for the good and the bad lie there both blended together: For which Reason *Plato* banish'd them his Republick; and *Plutarch* wrote a Treatise purposely to inform Youth, with what Precautions they were to be read. But to say nothing of the absurd Ideas they give of the Deity; we find there, amongst some few Instances of Virtue, many Characters extremely vicious; which they are so far from exposing as they ought, to the Horrour and Detestation of their Readers; that on the contrary, they are frequently set forth as the very Patterns of Virtue. AS there are some moral Sentences, which are most true; and some most noble Sentiments: so likewise there are some Thoughts mean enough; and moral Reflections too, which are false and ill-grounded. Let any one read what *Theognis* says concerning Poverty, and the great Care we ought to take to avoid it; and he will be forc'd to own, that no Miser could have said more. *Hesiod* says: For my Part, I would neither myself be just amongst Men, nor would I

* See *Plato*, *Epinomid.* p. 937, E.— *Tom. 2, Edit. H. Steph.* & p. 703, D.— *Ed. Lamar.*

† See *J. Alb. Fabricii, Bibliothec. Græc. lib. 2, c. 9, Sect. 5.*— *tom. 1, p. 394.*—

‡ Ην τῆς σοφίας ἐκείνης ποιᾶσθαι τῆς ἰδέας ἢ δόξαις, δια χρησάμενοι Ἡσιόδου ἐπιδοκίματι μάλιστα περὶ τὰς ἐν τῶν ἔργοις γνωμολογίας, ἢ μίαν γε τῶν ἐκείνων λέγειαι Πίτθεος εἶναι, Μισθὸς δ' ἀνδρὶ φίλῳ εἰρήμενοι ἄρκει ἔστω. In *vita Thef. init.* p. 4.— *tom. 1, H. Steph. Edit. & p. 2, A.*— *tom. 1, Edit. Francofurti, 1620.*

§ *Oper. & Dier.* Lib. 1, vers. 370, *Edit. Cleric. cuius vide Not.*

¶ He liv'd about the fifty eighth Olympiad, about five hundred and fifty Years before *Jesus Christ*. See the *Bibl. Græc.* of *Mr. Fabricius*, Lib. 2, c. 11, Sect. 1.—

⊕ See the *Parrhasiana*, *Tom. 1, Article 1, p. 1, — 2.*— and the fine *Discourse* of *Hondart de la Motte* upon Poetry, *Œc.* p. 21, & seq. *Edit. Holl.* An ancient Philosopher, nam'd *Eratosthenes*, did long ago advance this Proposition, which does at present do much scandalize the Grammarians and extravagant Admirers of Antiquity: Ποιητῶν γὰρ ἔφη πάντα σοχέσθαι ψυχρογῶνας, οὐ διδασκαλίας, which are the very Words of *Strabo*, who vainly endeavours to refute them, p. 28, & seq. *Ed. Amst. 1707.* & p. 15, D.— *Ed. Casaub.* Nor is it likely, that what *Madam Dacier* says thereupon, in her Preface upon *Homer's Iliad*, p. 67, & seq. *Edic. Paris*, will make Men quit this Opinion of theirs, who have not devoted themselves to the idolizing of Antiquity. Perhaps too this new Version, done by so able a Hand, will not a little prejudice the Original, in the Judgment of those who have not toil'd much in studying it, notwithstanding the Care *Madam Dacier* takes at every Remark to cry out, *This is admirable!* this is divine! as if she had some Distrust, that without some such Advertisement, the great Beauties of *Homer* would not be perceiv'd. Perhaps too it were to be wish'd, for the better understanding this Poet, that his learned Interpreter had made use of the Remarks of other learned Moderns; and that she had not sometimes so faithfully adher'd to the ancient and common *Latin* Version. For Instance, lib. 1, vers. 76, she turns, εὖ δὲ σύνθεο, *Assurez moi*, &c. for *prenez y garde, Consider well what you engage me in:* as it is well expounded by *Mr. Bos*, *Obser. Crit.* c. 29, p. 125 — Vers. 132, ἐπεὶ δὲ παρελεύσεαι, *Vous ne pourrez me surprendre;* instead of, *Vous n'échapperez pas, You shall not avoid what I have resolv'd to do;* as *Mr. Grævius* has corrected the common Version, in his Notes upon *Hesiod*, *Theogon.* vers. 613. and this Correction has been followed in the small Edition of *Weslein*, published in 1707; and which might have been very serviceable to *Madam Dacier*. Vers. 410, ἵνα πάντες ἐπαύρωνται βασιλεῖσι, the *Latin* Translator has ridiculously put, *Ut omnes fruantur rege:* *Madam Dacier* translates, *Afin qu'ils jouissent tous de la sagesse de leur roi;* and thereupon she makes a very subtle Remark, which she might have spar'd, had she translated *Afin qu'ils soient tous punis pour leur roi,* according to the true Exposition of *Mr. Grævius*, upon *Hesiod*, *Erg.* vers. 240; follow'd by the last *Latin* Translator, in the Edition of *Weslein*. I shall mark but one Place more, Vers. 178; where *Agamemnon* says to *Achilles*, Ἐὶ μάλ' αὖ κερτέρος ἔσσι θεός; πῦρ ἐστὶ τῶν ἰδίων. *Sic tu es, tantum lant, d'où te vient ta valeur? n'est-ce pas Dieu, quite l'a donnée?* It should be turn'd, *N'est-ce pas une Divinité;* that is to say, *The is your Mother*, as appears by Vers. 280. But our Admirers of *Homer*, and other Pagan Authors, will, whatever it costs, find in them those Ideas, which are peculiar to the sacred Writers.

⊖ I apply to the Poets in general, what *Mr. Le Clerc* says of *Hesiod*, in the Extract inserted amongst the Additions of the *Journal de Trevoux*, *Edit. Holl.* *Tom. 1, p. 262.*

⊗ *Parrhas.* *Tom. 1, p. 45.*—

⊘ *Oper. & Dier.* Lib. 1, Vers. 270, al. 268, & seq. I use the Words of the Journal above-cited. See here the *Greek* Verses of the Poet: Νῦν δὲ ἐγὼ μὲν αὐτὸς ἐν ἀνθρώποισι δίκαιος ἔειπα, μὲν ἔμας; οὐδὲ; ἔπειτα κἀκεῖν ἐβόηε ἄνθρωπον ἔργασται, εἰ μάλ' αὖ γὰρ ἰδέω κερτέρος ἔσσι. Ἄλλὰ τὸς; ἔστω ἕλοιο τελεῖν Δία περὶ τικέροντων.

" I have my Son so, if we were to be Sufferers
 " by it; or if Wrong-doers were to pre-
 "vail over the Just. But this is what I do
 " not believe Jupiter will ever suffer to come
 " to pass. He must have liv'd but a very little
 " while, or taken but very little Notice of what
 " pass'es amongst Men; who imagines, that the
 " most virtuous are generally the most esteem'd:
 " And the Man who expects to see any such
 " Thing, will find himself wretchedly mista-
 " ken. Let him but consult Seneca's Book of
 " Providence; the excellent Preface to it by
 " Mark Anthony Muret; and the Notes of se-
 "veral learned Commentators on that Book;
 " and he will plainly see, that the Misery
 " which attends Virtue; and the Prosperity of
 " Vice, if we consider this Life only; have
 " always been the constant Subject of Lamen-
 "tation and Complaint. Yet Hesiod, more
 " than once, makes the Adherence we owe to
 " Virtue, * depend on the Riches and Pro-
 "sperity which accompany it. Such Discourses
 " were very proper to persuade Men, that Virtue

is but a mere Piece of Cunning, to be made
 " use of whilst successful; but to be thrown
 " aside, whenever there is any Probability of
 " its being hurtful; that is to say, for the most
 " part. -- Can any Thing be more flat and low,
 " than to say, as ' Hesiod does; that if we make
 " a Feast, we should invite none but our Friends,
 " and not our Enemies; and that we ought to
 " love them only, that love us; and not to visit
 " any, but those from whom we receive Visits?"
 Much of this kind is to be found in all the
 Poets; with whom 'tis the commonest Thing in
 the World to hold pro and con, without afford-
 ing the Means of distinguishing between the good
 and the bad. This may be seen in the Collection
 of Stobæus; where you may be stor'd with Pas-
 sages out of the Poets, that will serve to main-
 tain both Sides of the Question, upon several mo-
 ral Subjects. But our proper Business here is
 with those, who make it their Profession to in-
 struct, and not to divert. Let us run over the
 most celebrated of these, as they lie in order
 of Time.

* See Vers. 281, al. 278, 279. & 284. al. 283.

† Τὸν φιλέοντα ἐπὶ δαῖτα κολαίει, τὸν δ' ἐχθρὸν ἐάσει. Vers. 342. al. 340. Τὸν φιλέοντα φιλεῖν, ἢ τῷ προσίτι προσεῖναι. Vers. 353. al. 351. [¶] Parrhaf. Tom. 1, p. 46.



S E C T. XVII.

THE first that occur, are those seven
 famous Cotemporaries, call'd the *Wise
 Men of Greece*; viz. * *Thales* of * *Mi-
 letus*, *Pittacus* of *Mytilene*, *Byas* of *Priene*,
Solon the *Athenian*, *Cleobulus* of *Lindus*, *Myso*
 of *Cben*, a Town of *Laconia*, and *Chilo* of *La-
 cedæmon*. All these, except *Thales*, * govern'd
 the States where they liv'd; and every one
 knows, that *Solon* was one of the greatest *Leg-
 islatours* of Antiquity. Their Knowledge * con-
 sist'd in certain notable Sayings or Sentences, ex-
 press'd in a lively and concise Manner. Being
 one Day all together, they consecrated to *Apollo*,
 as the first Fruits of their Wisdom, these two
 Sentences, which are now become common
Proverbs; and caus'd them to be written in
Letters of Gold, over the Door of the Temple of
Apollo at *Delphos*: KNOW THYSELF: And,

TOO MUCH OF NOTHING. The Antients have
 preserv'd, and transmitted down to us, several
 Apothegms of these seven wise Men *. I shall
 content myself with reciting here those of *
Thales, the Founder of the *Ionick Sect*. God,
 said he, is the most † antient of all Things; for
 he is uncreate. The World is the most beautiful
 of all Things; for it is the Work of God. ----
 God ‡ is what hath neither Beginning nor End.
 They who commit any wicked Action, are so far
 from being able to hide it from his Eyes, that
 they cannot even conceal their Thoughts from his
 Knowledge. --- Perjury is worse than Adultery.
 --- The most difficult Thing in the World is, to
 know one's self: The most easy, to preach it to
 others. That's the happy Man, who enjoys good
 Health, finds Fortune favourable, and has well
 cultivat'd his Soul with sound Learning; -- which
 we

* Thus they are named and placed by *Plato*, in *Protagor*. Tom. 1, p. 343, A. — Ed. *Serr*. And p. 206, G. — Ed. *Lamar*. Others instead of *Myso*, put *Periander* of *Cornith*. Some make the Number greater. See *Diog. Laert*. Lib. 1, Sect. 13, — ibique Interpr. & p. 9. — Ed. *Coloz*.

† But a Native of *Phœnicia*. See *Ménage* on *Diog. Laert*. Lib. 1, Sect. 22. But Ed. *Coloz*. p. 13. —

‡ Septem fuisse dicuntur uno tempore, qui sapientes & haberentur, & uocarentur. Hi omnes, prater Milesum Thalem, civitatis suis præfuerunt. *Cicero*. de *Orat*. Lib. 3, c. 34. —

§ Καὶ καταμάθησιν ἅντι, ἀπὸ τὴν σοφίαν τοιαύτην ἔσαν, ῥήματα βραχέα ἀξιωμακρόντα ἐκείῳ εἰρημένα. Ὅσοι κ' κοινῆ ἐνελε-
 ρόντες ἀπαρχὴν τῆς σοφίας ἀπέθεσαν τῷ Ἀπόλλωνι εἰς τὸν ναὸν τὸν ἐν Λαλφείοις, γράψαντες, ταῦτα ἃ δὴ πάντες ἔμαθον, ἸΝΩΘΙ
 ΣΑΥΤΟΝ, ἢ ΜΗΔΕΝ ἄΓΑΝ. *Plat*. ubi supra, tom. 1, p. 343, A. — Edit. *Serr*.

* See a Treatise of *Mr. Baulden*, entitled, *Sapientia veterum; hoc est, dicta illustriora septem Græcia sapientum, dissertationibus ali-
 quot Academicis explicata*, &c. at *Hall* in *Saxony*, 1699.

† He was born in the first Year of the thirty fifth Olympiad, 640 Years before *Jesús Christ*, and died aged ninety two Years. See *Petav*. D. *Temp*. tom. 2, p. 303. —

‡ Περεσβότατον τῶν ὄντων, Θεός; ἀγέννητον γὰρ. Κάλιστον κόσμου; πόσιμα γὰρ Θεοῦ. *Diog. Laert*. Lib. 1, Sect. 35. — & p. 23. — Edit. *Coloz*.

§ Τὸ τὸ βεῖν; τὸ μήτε ἀρχὴν ἔχειν, μήτε τελευτὴν. *ibid*. p. 24. — Ed. *Coloz*. & Sect. 36. — Ἡρώτις τις αὐτοῦ, εἰ γάρτι Θεός; ἀίρωται αἰκῶν ἄλκῶν ἄλλ' ἔδδ' διανοομένη; ἔφη... Χείρον μοιχείαι, ἐπιουσία... Τί δόσκειον;... τὸ εἰ αὐτὸν γνῶναι. Τί δὲ ἐπιουσία τὸ ἄλλῳ ὑποτίθεσθαι. *ibid*. Ἴτε εὐδαιμον; ὁ τὸ μὲν σῶμα ὑγιές, τὴν τύχην ἔσπορ; τὴν ψυχὴν εὐπαίδευτ;. . . . μὴ τὸν ὄψιν καλῶς ἰδέσθαι, ἀλλὰ τοῖς ἐπιτιμώματι εἶναι καλῶν. *ibid*. Sect. 36. — 37. — & p. 24. — Πῶς ἂν ἀρίστη ἢ δικαιοτάτα βιώσασμεν; εἰν ἃ τοῖς ἄλλοις ἐπιτιμώμεν. ἀπὸ τῆ μη ὄραμεν. *ibid*. Sect. 36. — & p. 24. — Φίλων παρόντων κ' ἀπόντων μεμνηθῆναι φησί. . . . Μὴ πάντες κακοῖς. . . . Ὅσοι ἂν ἐρίων ἐπιτελέωσι τοῖς τοῖσιν, τῶς αὐτῶς προσδέξαι ἢ παρὰ τῶν τέκνων. *ibid*. Sect. 37. — & p. 25. — Edit. *Coloz*. *Allied*. See the *Bibl. Choise* of *Mr. Le Clerc*, Tom. 2, p. 49, & seq. where *Thales* is clear'd from *Atheism*.

we ought to value ourselves more upon, than the adorning and setting off our Persons. --- The best Way to live up to the Rules of Justice, is, to avoid doing that, we blame in others. --- We ought to be mindful of our absent, as well as present Friends. --- Do not enrich thyself by evil and base Practices. --- Expect the same Treatment from your Children, that your Parents have receiv'd from you. --- ^b Nothing is more useful than Virtue: for it makes all other Things useful, by teaching us to make a right Use of them. --- Nothing is more pernicious than Vice:

for it makes almost every Thing else noisom and offensive. --- ^c Love Learning, Temperance, Prudence, Truth, and Fidelity. Make thyself skilful by Experience: Labour to acquire Dexterity and Address: Cherish Friendship, Obedience, Arts, and Piety. I know not whether a favourable Construction can be put upon another Sentence, which is amongst those already mentioned: ^d What best enables to bear Misfortunes, is to see one's Enemy more unfortunate than one's self;

^a Τι θειοτατου ἀρετῆς ἢ γὰρ τ' ἄλλης πειραχθῆαι καλῶς, ἰδέσθαι ποιεῖ. Τι βλαβερωτάτου κακίᾳ ἢ γὰρ τῶν κατὰ βλάβην προσηγορευμένων. Plutarch. in conviv. 1ap. p. 260. --- Oruic. Tom. 1, Edit. H. Steph. & Tom. 2, p. 153, D. --- Edit. Francofurt.

^b Φίλει τὴν παρθεῖαν, καθ' ἑστένην φιλίαν, ἀμείνων πίνω, ἐμπερίαν, ἐπίεσιβότητα, ἐπιεικείαν, ἐκονομίαν, τέχνην, ἀσκήσιαν. Stob. Serm. 3, p. 40, lin. 25. Edit. Geneva. 1709.

^c Πῶς ἂν τις ἀτυχεῖαν βῆσα φέροι; εἰ τὴν ἑχθρῶν χεῖρον πρῶτοντα βλέποι. Diog. Laert. Lib. 1, Sect. 36. --- & p. 24. --- Edit. Colon. Allibr.



S E C T. XVIII.

PYTHAGORAS, ^a the Disciple of *Thales*, and of *Pherecydes* of *Seyros*, and Founder of the *Italick Sect*; considerably ^b advanced the Science of *Morality*; yet it still continu'd to be but a Collection of particular Precepts, under Covert and Obscurity; unattended with either Reasoning, or Proof. *Aristotle* speaks of him as ^c the first who attempted to treat of *Virtue*; and *Horace* says, ^d That he was no mean Author on the Subjects of natural *Philosophy*, and *Morality*.

Before his Time, those who excell'd in the speculative and practical Sciences, and were distinguish'd by an exemplary Life; were call'd *Sages*, or wise Men: which, according to the Style of the *Greeks*, ^e meant the same with what we now-a-days term *learned*, or *literate Men*. *Pythagoras* however, finding something too assuming ^f in this Title, took another instead of it; by which he signified, that he did not think fit to arrogate to himself the actual Possession of *Wisdom*, being only an humble Enquirer after it; and therefore he gave himself the Appellation of *Philosopher*, or *Lover of Wisdom*: a Name which has been ever since given to those, who make it their Business to study Natural Science and *Morality*. ^g *Pythagoras* bent his useful Labours to reform, and instruct the World. His Eloquence could

not but be very powerful, when his Instructions had so great Effect, as to make the Inhabitants of a very large Town, deeply plung'd in Debauchery, entirely quit their luxurious Way of living; and betake themselves to a Life of strict Sobriety and Virtue. He prevail'd even with the Ladies to part with all their fine Cloaths and Ornaments; and to present 'em as an Offering to the principal Deity of the Place. --- It was his special Care to correct the Abuses committed in the ^h Marriage State; without which he thought neither publick Peace, Liberty, a good Form of Government, or any the like Things, for which he labour'd with very great Zeal, could make the People happy. --- ⁱ His Affection for the publick Good of Mankind, made him resolve to carry his Instructions to the Palaces of the Great. --- He had the good Fortune and Glory of having form'd Disciples, who prov'd some of the most excellent Legislatours; such as *Zaleucus*, ^k *Charondas*, and others. He had travell'd ^l very much in the *East*; more especially among the *Egyptians*, the *Persians*, and the *Chaldeans*; from whence he brought many of his Notions, with his Method of Teaching; for he deliver'd his most excellent Precepts under the Vail of Symbols and Enigma's; and there is but

^a He flourish'd about the sixtieth Olympiad, five hundred and forty Years before Jesus Christ. Authors are not agreed as to the Time of his Birth and Death. See *J. Alb. Fabricii Bibl. Græc. Lib. 2, Cap. 12, Sect. 1.* --- and *Bayle's Dct. Not. (B)*

^b Our Author should have said *Syros*. See *Menag. Observat. ou Diog. Laert. p. 69, Col. 1.* --- & *Cellar. Geogr. Tom. 1, p. 854.* --- & *Strab. Geogr. p. 487, B.*

^c *Dacier's Life of Plato, p. 68.* --- Edit. Paris. You may also consult the *Life of Pythagoras* by this learned Person, published in 1706, before his Translation of *Hierocles's* Comment on the Golden Verses; and of those Golden Verses, as well as of the Symbols attributed to *Pythagoras*.

^d Πυθαγόρας μὲν δὲν ἐλεγε, μὴς Πυθαγόρας; περὶ ἀρετῆς εἰρη. Magn. Moral. Lib. 1, c. 1, p. 147, c. Edit. Paris, 1619. & p. 192. A. --- An. 1654.

^e Non sordidus auctor Natura, & civique. Horat. Lib. 1, Ode 28, 14, 15. See thereupon Messis. *Le Fevre*, and *Quicher.*

^f See *Scheffer. de Nat. & constit. Phil. Italice, Cap. 6.* So that the critical Censure of *Lactantius, Inst. divm. Lib. 4, cap. 1, Num. 10.* is not over-well grounded.

^g *Cicer. Tusc. Quæst. Lib. 5, cap 3.* --- *Diog. Laert. Lib. 1, Num. 12.* --- & p. 8. --- Ed. Colon. Allibr.

^h Mr. Bayle's Dictionary, p. 2141. --- Second Edition.

ⁱ *Cratona, in Italy.* See *Justin. Lib. 20, Cap. 4, per totum.*

^k See Rem. (F) in *Bayle's Dictionary, p. 2442, Col. 1.* --- * *Ibid. Rem. (G)* ---

^l See *Jamblich. in vita Pythag. Lib. 1, cap. 30, Sect. 172.* --- and *Diog. Laert. Lib. 8, Sect. 16.* --- & p. 577. ---

^m See *Diog. Laert. ubi sup a, Sect. 2, 3.* --- ibique Interpret. And p. 563. --- Ed. Col. Allibr.

but too much of the Mystical in the greatest Part of his Principles of Morality; even those of 'em which are the most clear. He had two Ways of Teaching; the one for Strangers, which was obscure und enigmatical * : the other for Initiates, which was open and instructive. It is not certainly known whether he ever publish'd ° any Thing in Writing; but certain it is, that we have now nothing of his extant. The little Poem, call'd, the *Golden Verses* of Pythagoras, was compos'd by one of his Disciples; which some affirm to be *Lyfis*; others * *Empedocles*. I shall here give the Reader a general Account of his Notions, as far as they relate to Morality. He believ'd the Unity of a supreme God; whom he conceiv'd to be of a ° *Nature impassible; and which falls not under the Cognisance of the Senses, but is Invisibile, Incorruptible, and solely Intelligible*. As he made great Use of Arithmetick, or the Science of Numbers, to expreis his Thoughts by; he said that *Virtue, Health, Friendship, every Thing that is good, and even God himself, were nothing but Harmony*. 'Tis well known, * that he had his Opinion concerning the *Transmigration of Souls*, from the *Egyptians*. Notwithstanding which h. speaks of *Hell*, and the Pains of another Life; in which ° he is not very consistent with himself. " Nothing in the World can be " more admirable, and Christian-like, than what " he says of the main Design and Aim of our " Actions and Studies: For he held, that the " Study of Philosophy ° tends to bring Men " to a Resemblance with God. --- His Doc- " trines contain'd * two Parts; which may very " well be compar'd to the *Purgative*, and *Uni- " tice Ways*; about which our Quietists * have

said so many fine Things. --- The Acqui- " sition of Truth was, in his Opinion, the " only Way to become like God: But the " Way to discover Truth, is to search after " it with a Soul that is purify'd; and has sub- " du'd the Passions of the Body. The Fol- " lowers of ° this Philosopher taught, that a " Man perfects himself three Ways: First, by " conversing with the Gods; because, during " such Commerce, he abstains from every evil " Action; and thereby makes himself like the " Gods, as far as such a Thing is possible. " Secondly, by doing ° good to others; for " this in God, is one of his Properties; in " Man, the Imitation of him. Thirdly, by " departing out of this Life. The most ex- " cellent Endowments Heaven ever conferr'd " on Men, are, according to *Pythagoras* °, " those of speaking Truth; and doing good " Offices: These two Things, say the *Pytha- " goreans*, nearly resemble the Works of God." This ° Philosopher very earnestly recommended Sobriety, and Moderation in all Sorts of Pleasures. *He forbids* ° " the leaving this World with- out express Order from our General, that is, God; who has given each Man his Post here. But, when we are call'd upon to quit this Life, he would have us do it with a good Grace, and without any Concern for the Loss of the Pleasures of this World; all which he signi- fies to us by this symbolical Sentence: " ° Not to return back again, when we are once enter'd upon our Journey. " Another of his Symbols or- dains, not to pass the Equilibrium of the Ba- lance; intimating, that the Rules of Equity and Justice ought exactly to be follow'd.

* See *Scheffer. de Nat. & Const. Philos. Ital. Cap. 13.*
 ° See *Diog. Laert. ubi supra, Sect. 7.*— ibique Interpr. & Ed. *All. p. 370, & seq.* and the *Bibl. Græc.* of Mr. *Fabricius*, Lib. 2; cap. 12, Sect. 4.—
 ° See Mr. *Fabricius* ubi supra, Sect. 6,— p. 469.—
 * Οτι τε γαρ εστιν ἀσθητόν ἢ παθητόν, ἀσφατον δὲ ἢ ἀκράτον κ' νόητον ὑπολαμβάνειν εἶναι τὸ πρῶτον. *Plutarch. in Numa*, p. 65, B.— Ed. *Francof.* & p. 118,— Ed. *H. Steph.* See *Bayle's Dict. Not. (N) p. 2446, Col. 1.*—
 ° Τὸν τε ἀετὸν ἀρκεῖν εἶναι, ἢ τὸν ὄρειον, ἢ τὸ ἀγρὸν ἕταν. κ' τὸν Θεόν. . . Φίλων τε εἶναι ἐναρμόνιον ἰσότητα. *Diog. Laert. Lib. 8. Sect. 33.*— & Ed. *Col. p. 587.*— See *Aristot. Mag. Moral. Lib. 1, c. 1, p. 192, A.*—
 ° See *Diog. Laert. ubi supra, Sect. 14.*— ibique Interpr. & p. 569 — Edit. *Colon. Herodot. Lib. 2, cap. 123.*— *Diod. Sic. Lib. 1, p. 88, B.*— towards the End. Mr. *Dacier* pretends to explain in a figurative Sense, this Opinion of the Transmigration of Souls, but see what Mr. *Le Clerc* says to it, *Bibl. Chrest. Tom. 10, p. 185.*— & seq.
 ° See Mr. *Bayle's* Dict. Rem. (F) towards the End, p. 2445, Col. 2.— & Rem. (M) p. 2445, Col. 2.—
 * Πρὸς τὴν θέαν ἐμύσων ἀναίει, ἢ τῆς Πυθαγορικῆς φιλοσοφίας τὸν τελειότατον σκοπον ἐκκελεύεται, *Heracles in. Pref. ad Carm. Aurea, circa finem*, p. 13, Ed. *Neub.* & p. 9 — Edit. *Lond. Σωκράτης, Πλάτων ταυτὲ τῷ Πυθαγόρῃ, τίς ἐστιν ἐμύσων Θεῶ. Stob. Eclog. Lib. 2, c. 3, p. 163, lin. 44.* I have here all along taken the Words of *Bayle*, Rem. (N), Artic. *Pythagoras*, p. 2446, Col. 2.—
 ° See *Scheffer. de Nat. & Const. Phil. Ital. cap. 10, p. 78.*
 ° See the Words (*Mystique* and *Quiétisme*) in *Dictionnaire Universel, à Trevoux*, 1721. ° *Scheffer. ibid. cap. 7.*
 ° Apud *Phot. Cod. 249, p. 1313, lin. 55, Ed. Roth.*
 ° Δεύτερον, ἐν τῷ εὐ τριτῷ. Οὐδ' γὰρ τὸ τὸ ἢ θέας μιμήσεως. *Ibid. lin. 58.*
 ° Πηλαγία ἔχει, δὴ πάντα ἐκ τοῦ Θεοῦ τοῖς ἀνθρώποις δίδεσθαι κάλλιπα, τὸ, τε ἀληθείαν, ἢ τὸ ἐνεργητικὴν ἢ προσοτικὴν, ὅτι κ' ἡμεῖς τοῖς Θεοῦ ἔργου ἐκείνου. *Asian. Var. Hist. Lib. 12, c. 59, Ed. Perizon. & Tornes.*
 ° See *Diog. Laert. ubi supra, Sect. 9.*— & Ed. *Col. p. 573.*— & *Famblich. Sect. 41, 42.*— Ed. *Kuster.*
 ° *Veratque Pythagoras injussu imperatoris, ul est, De, de profilio & statione tunc decedere. Cicero. de senectute, cap. 20.*— *Plato*, (in his *Phædo*, p. 61.— And p. 377, P.— C.— D.— Ed. *Lamar.*) ascribes this Precept to *Phidolais*, a *Pythagorean*, who doubtless had it from the Doctrine of *Pythagoras*.
 ° Διὸ δὲ τὸ εἰς ἀπ' ἀμάου βαδίζοντα μὴ ἐπιστρέφουσαι, παύσει τῆς ἀπαλλαγόμενος; τὸ δὲ μὴ ἐπιθυμητικῶς ἔχειν τὸ εἶναι, μὴ δὲ εἶναι τὸν ἐπιθυμῶν κἀποῦν ἐπ' ἀρετῆν. *Diog. Laert. ubi supra, Sect. 18* — And p. 579.— Ed. *Colon. Allob.*
 ° Τὸ δὲ, Ζεῦσι μὴ ὑπερβαίνειν, οὐτέστι τὸ ἴσον ἢ διακοινὴ μὴ ὑπερβαίνειν. *Ibid. Sect. 18.*— And Ed. *Colon. p. 578.*—



S E C T. XIX.

ANAXAGORAS, *the first of the Ionick Sect, (if we except Thales,) who acknowledged for the original Cause of the Universe, an infinite Spirit; was nevertheless generally look'd upon as an Atheist: because he said, that the Sun was nothing else but a Globe of Fire, and the Moon but an Earth; that is to say, because he denied, that there were spiritual Substances join'd to these Planets; and consequently that they were Deities.* "Before ever the Gospel had taught Men, to renounce the World and its Riches, in order to travel the more expeditely the Way to Perfection; there had been Philosophers, who saw, and were so fully perswaded of it, as to have actually put it in Practice; by the ridding themselves of their Estates, that they might have nothing left to incumber, or divert them from the Study of Wisdom; and a serious Enquiry after Truth." Thus says Mr. Bayle: But as he seems here to attribute to the Gospel, according to his wonted Custom, overstrain'd Notions of Morality; so he extols a little too much the Conduct of these ancient Philosophers; in which there was more of Ostentation, and a mistaken Notion of Disinterestedness, than of true Wisdom: for we may make a good Use of our Riches; nor is the entire relinquishing of 'em necessary, to a more close Application to the Study of Truth and Virtue. But, be that as it will, *Anaxagoras*, after having convey'd all his Patrimony to his Relations; applied himself wholly to the Study of Nature, without in the least meddling or concerning himself with the Publick; which occasion'd his being ask'd, whether he had no Concern for his Country: His Answer was admirable; the Christian Philosophers could not have made a better: Yes, said he, pointing to the Heavens, *I have an extraordinary Care for my Country.* Another Time one ask'd him, To what End he was born? *To contemplate,* replies he, *the Sun, the Moon, and the Heavens.* And

accordingly he plac'd the Sovereign Good, or the chief End of humane Life, in Contemplation; and in that free State of Mind, which Contemplation produces. --- He thought the Conditions of Life, which appear'd least happy, to be the most so; and that those, who taste the Sweets of true Happiness, were not to be look'd for amongst the Men surrounded with Riches and Honours; but amongst those, who till a small Spot of Ground; or who, void of all ambitious Cares, apply themselves to the Study of the Sciences. --- He was the first, who suppos'd the Poems of *Homer* to be Books of Morality; where Virtue and Justice are explain'd by allegorical Stories.

Archelaus, the Scholar of *Anaxagoras*, apply'd himself chiefly to the Study of Natural Philosophy, as his Predecessors had done; but withal engag'd something farther in the Business of Morality; though he prov'd not over-orthodox on that Subject: for he held, that humane Laws were the Origin of all moral Rectitude; that is to say, that he own'd no such Law as the Law of Nature; but admitted of positive Laws only; and consequently believ'd, that all Sorts of Actions are in their own Nature indifferent; and that they become good or bad, according as it shall please Men to establish such or such Laws." I cannot say, whether what has been alledg'd be exactly conform to the Sentiments of *Archelaus*: But certain it is, that *Socrates*, his Scholar and Successor, had quite different Ideas of the Nature and Foundation of the moral Part of humane Actions. Perhaps it may be in this Case, as it is with respect to the Imputation of another Opinion to this same Philosopher; which, in the Judgment of a most able Person, appears not to be well verify'd: But be this as it will; let us now pass on to his Scholar, who, in every Respect, much excell'd his Master; and under whom Philosophy took a quite different Turn.

S E C T.

* He was born at *Clazomenæ* in *Ionis*, about the seventieth Olympiad, five hundred Years before Jesus Christ. He died aged about seventy two Years.

† *Ralph Cudworth*, in the *Extract of the Bibl. Chois.* by Mr. *Le Clerc*, Tom. 2, p. 56. — See also Tom. 1, p. 83. —

‡ See *Diog. Laert.* Lib. 2, Sect. 6. — & *Ed. Colon.* p. 91. —

§ *Ibid.* Sect. 8. — & p. 93. — *Edit. Colon. Allob.*

¶ *Ibid.* in the Text, p. 214. —

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

† *Diog. Laert.* ubi supra, Sect. 7 — & p. 92. — *Edit. Colon. Allob.*

‡ *Ὅτι οὐκ ἔστι τὸν αἰθέρα, ἀλλ' ἐστὶν αἰθήρ παρὰ τὸν οὐρανόν; ἐμφανὲς ἔστι, καὶ ἡ ἀρχὴ ἐφ' ἧς μένει τὰ πάντα, δέξται τὸν οὐρανόν.* *Ibid.* p. 92. — *Edit. Colon. Allob.* And *Ed. Amstel.* Sect. 7. —

§ *Ἐπισημαίνει τὸν αἰθέρα, ὡς τὴν ἀσπίδα τοῦ οὐρανοῦ, ἢ ὡς τὸν οὐρανόν.* *Ibid.* p. 97. — *Ed. Allob. Amstel.* Sect. 10. —

¶ *Clem. Alex. Strom.* Lib. 2, p. 416. — This Thought is criticis'd very impertinently by *Lactantius*, (*Lib. 3. Cap. 9. Num. 5.* & seq. *Edit. Cith.*) who grossly makes *Anaxagoras* mean it of the Eyes of the Body. See the *Observ. Selectæ*, &c. printed at *Hall* in *Saxony*, Tom. 2. *Observ.* 14.

† *Bayle's* Dict. ubi supra, Rem. (N) p. 226, Col. 1. —

‡ *Nec parum prudenter Anaxagoras interroganti cuidam, quisquam esse beatus: Nemo, inquit, ex iis, quos tu felices existimas: sed eum in eo numero reperies, qui a se esse miseris (vel miseris) constare creditur. Non erit ille divinus, aut honoribus abundans: sed aut exigui vivit, aut non ambitiosa doctrinae faulus, ac pertinax cultor; in recessu, quam in fronte beator. Val. Maxim. Lib. 7, cap. 2, in extern. Sect. 9. — And p. 362 — *Ed. S. Gryph.**

§ *Diog. Laert.* ubi supra, Sect. 11. — Lib. 2, & p. 95. — *Edit. Colon. Allobrogum.*

¶ Some say he was born at *Athens*, others at *Miletus*: His Age is not certainly known. See *Bayle's* Dict. Rem. (A), Tom. 1, p. 309, Col. 2. — The Words of Mr. *Bayle*, *ibid.* in the Text, p. 310. —

† *Ἐπειδὴ τὸν οὐρανὸν ἀπέχεσθαι πᾶσι ἡμέραις.* *Diog. Laert.* Lib. 2, Sect. 16. — And p. 99. — *Ed. Col.*

‡ *Ὅτι τὸ αἶμα ἐστὶν τὸ ἀσπίδον ἐφ' ἧσιν ἀλλοτὶ νόμοι.* *Ibid.* Sect. 16. —

§ See Mr. *Le Clerc*, in his *Bibl. Chois.*, Tom. 1, p. 86. —

" *thyphro* of Plato *, that all the Impiety laid to his Charge was; that he had openly condemn'd all the Fables concerning their Gods, in which wicked and impious Actions were attributed to them; although he had at the same Time own'd inferior Deities; as may be seen by several of his Discourses. --- The People indeed concluded, that those Fables could not be rejected, without denying, at the same Time, the Deity of those, to whom they related; in which they reason'd better than *Socrates*: for, in fine, the only Knowledge they had of *Jupiter*, and the rest of their Gods, was no other than what they had received by Fable, or oral Tradition; and if that Tradition was to be look'd upon as impious or false; then it must necessarily follow, that the whole of what was said, concerning the Gods of *Athens*, ought to have been rejected. That there is a God, might then as well as now be believed, without admitting those Fables: but how could it have been ever imagined without them, that there was a *Jupiter*, a *Saturn*? &c. The natural Idea of a Deity, which is absolutely incompatible with Vice; made *Socrates* overlook this Inconsequence in his Principles. Nothing can be finer than what he says of " divine Providence; and his Maxim upon Prayer, is worthy the Light of the Gospel. " *When he pray'd to the Gods, he only ask'd them in general Terms, that they would give him good Things; because they knew better than we do, what Things are truly good; and he said, that they who ask'd either Gold or Silver, or sovereign Power; made as absurd Requests, as if they had ask'd to game, or to fight, or desir'd any Thing else, that might easily turn to their Prejudice.* Let us now see what his Sentiments were concerning the Law of Nature. There are °, said he, certain Laws which are not written; these are the Laws which are universally receiv'd throughout the World: But nevertheless Men did not make them; for all Men could not assemble themselves together in any one Place; neither could they all speak the same Language. They ♯ were therefore made by the Gods: for in the first Place, it is ordain'd for all Men to worship and adore the Gods. It is also commanded every where, and to every Man, to honour his Father and Mother: and that Fathers and Mothers should not marry with their

Children. No one ever violates with Impunity, adds he, any one Law establish'd by the Gods. There are Punishments which inseparably adhere to the Crimes committed against these Laws, which Punishments it is impossible to escape; whereas a Man may easily ward against the Severity of humane Laws, after he has transgress'd 'em; either by concealing, or defending himself by open Force. --- To do good to them, who have done good to us, is also an universal Law. If any sin against this Law, they are sufficiently punish'd for it; since their best Friends will thereupon abandon them: and then they will be oblig'd to betake themselves to those, who have an Aversion to them. For are not those, the best Friends, who do us good Offices, when we make use of 'em? But if he, who has receiv'd Favours from them, proves unthankful, does he not draw upon himself their Hatred by such his Ingratitude? And yet, as he finds it to his Advantage to keep himself in their good Graces, will he not still continue constantly to court and sue to them with the greatest Application? --- When I consider, that each Law carries with it the Punishment of him, who transgresses it; I easily perceive it to be the Work of a Legislatour more excellent than Man. The Gods never make any Laws which are unjust: on the contrary, other Legislatours, beside the Gods, can scarce make any that are just. It may easily from hence be judg'd, what were the Principles of *Socrates*. Many of the particular Consequences, he drew from them, may be seen in the *Memoirs* of *Xenophon*; who seems to have mix'd nothing of his own, with the Discourses of his Master, which he there reports. This great Philosopher makes use of a very poor Argument, to shew that Incest with a Father or Mother is contrary to the natural, or divine Law: " For they, says he, who give themselves up to these unlawful Embraces, must needs have but very pitiful Children.

Besides the Works of *Xenophon*, we have still extant some * Dialogues by *Eschines* the Philosopher; and a little Piece of another of *Socrates's* Scholars, call'd † *Cebes*. This last is a most ingenious Picture of human Life, wherein the Method and Genius of the Master may be seen, as well as in the Dialogues I just now mention'd. All the several Sects of Philosophers, who have appear'd in the World since *Socrates* †, have been desirous to have him for their

* P. 6, A, — B, — Tom. 1, Ed. Serranij. And p. 49, E, — F, — d. & Edit. Lemar.

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

‡ *Xenoph. Apomnem.* Lib. 1, p. 422, & seq. Ed. H. Steph. And cap. 4, Ed. Oxon. And p. 47, & seq. in *Charpentier's* Version. And p 726, E, — & seq. Ed. Paris.

* Καὶ εὐχεσθὲς δὲ πρὸς τοὺς θεοὺς ἄ-λόγως τ' ἀγαθὰ δίδόναι, ὡς τὰς θεοὺς κἀλλιστα ἐδόξας ὅτι αὐτὰ ἀγαθὰ ἐστὶ τὰς δὲ εὐχομένους χάρισται ἢ ἀργύρου, ἢ τιμαρνήσια, ἢ ἄλλο τι τῶν τοιούτων, οὐδὲν διαφέρει ἐννομεῖν εὐχεσθαι, ἢ εἰ κελεύειν, ἢ μάλιστα, ἢ ἄλλο τι εὐχαιολογῶν φησὶν ἀλλήλων. Σπασ ἀποδείξαι. Ibid. p. 420, in fine, Ed. Steph. cap. 2, Sect. 2, Ed. Oxon. Et p 722, C, — Ed. Paris.

† Ἀγαθὸς δὲ πῶς διατα νόμος; ἢ τίς γ' ἐστὶ πάτη --- ἡ ἀρετὴ κατὰ ταυτὰ νομιζομένης --- ἐστὶ γὰρ [ἄνθρωποι] εἴτε συνασθῆναι ἄπαντες; ἢ συνήσειν, ἢ εἰ ἐμψυχοῦναι εἴη. Ibid. p. 807, B, — Ed. Paris. And p. 470, Ed. Steph. And cap. 4, Sect. 19, Ed. Oxon.

‡ θεοὺς οὐκ αἰσθῶνται, τὰς τοὺς ἀνθρώπων; βεβαίαι ἢ γὰρ παρὰ πᾶσι ἀνθρώποις πρὸς τοὺς θεοὺς εἰδέναι --- ἢ γὰρ οὐκ αἰσθῶνται ταυτὰ κατὰ νόμους --- ἢ κατὰ νόμους; κατὰ νόμους αἰσθῶνται, κατὰ νόμους αἰσθῶνται, κατὰ νόμους αἰσθῶνται --- Δίκην γὰρ τοὺς θεοὺς εἰ παραβάνοις; τὰς ὑπὸ τῶν θεῶν κελεύουσιν νόμους, ἢν ἔδειλ' ἄνθρωποι ἀνθρώπων διαφεύγειν. ὅτι τὰς ὑπὸ ἀνθρώπων κελεύουσιν νόμους, εἴτε παραβάνοις διαφεύγειν τὸ δίκην δίδουσι εἰ μὲν λαθάνοις, εἰ δὲ βιάζοις --- τὰς εἰς ταυτὰ ἀνθρώποις, κατὰ νόμους εἰ --- ἢ τὰς παραβάνοις εἰ δίκην δίδουσι. φίλων μὲν ἀγαθὸν ἐρημιε γινώσκουσιν, τὰς δὲ μισθῶν; ἐπινοοῦσι; ἀγαθὰ δὲ νομίζουσιν; ἢ ἀγαθὸν εἰ μὲν εἰ τοιούτους τὰς χάρισται οὐς ἐπινοοῦσι, ἀγαθὸν φίλων εἰ μὲν ἢ δὲ μὴ ἀνθρώπων τὰς ταυτὰς, δια μὲν τὴν ἀχαριστίαν μισοῦσι ὑπὸ ἀγαθῶν, δια τὸ μάλιστα νομιζοῦναι τὰς ταυτὰς; χάρισται, τὰς μάλιστα δίκης --- τὸ γὰρ τὰς νόμους αὐτοὺς τοὺς παραβάνοις τὰς τιμαρνήσια ἔχειν, βεβαίον ἢ κατ' ἀνθρώπων νομιζοῦσι δίκης κατ' ἄνθρωποι --- Ὅχι ἄλλα [τῶν δικαίων νομιζοῦσι εἴη εἰς] σχολῆ γὰρ ἂν ἄλλοι γὰρ τὰς δίκας νομιζοῦσιν, εἰ μὴ θεοὺς. Ibid. p. 807, — 808, A, — Ed. Paris.

§ Τί γὰρ ἂν μετὸν πάθειον ἄνθρωποι τεκνοποιήσασθαι, τὸ κακὸς τεκνοποιήσασθαι. Ibid. p. 807, D, — Ed. Paris.

* Mr. Le Clerc has lately published them, with his Notes, in 1711.

† It was publish'd entire, and of a very fine Edition, at *Amsterdam*, 1689. See the *Bibl. Græc.* of Mr. *Fabricius*, Lib. 2, cap. 23, Sect. 24.

‡ Cum tamen omnes se Philosophi Socraticos, se dici vellent, se esse arbitrantur. *Cicer. de Oratore*, Lib. 3, cap. 15 —

their Chief; and have endeavour'd to bring their Sentiments and Notions to those of this great Man. We shall now say something of the most celebrated Founders of Sects, who

came out of his School; and we shall begin with him, who was the most celebrated, and the only one, except *Eschines*, whose Writings we have now left.



S E C T. XXI.

PLATO, as well as *Eschines*, “the better to keep up the Appearance and Air of their Master’s, that grand Restorer of Morality; prefer’d that of teaching by Dialogue, to any other Method. For as it is the most diverting, in that it does, as it were, set before the Reader the very Scene of Affairs; where he sees all the Parties concern’d in Action: so it does, I may say, better carry on the main Design, which is to persuade and instruct; for it is more animated, and has all the Force of a judicial Proceeding, where the Parties on each Side of the Question are fairly admitted to make their Defence, as fully as they are either willing, or able to do; so as that the Victory, which the one gains over the other, can be no farther disputed; at least when the Dialogue is compos’d by an able Hand; and one who is sincerely engaged in the Search after Truth.” This is the Sentiment of Mr. *Dacier*; who has undertaken to translate our Philosopher into the French Tongue. But since all Capacities have not either the Attention, or Penetration requisite to discern, amidst the Jumble of Arguments *pro* and *con*, what is the real Opinion of the Author; *Plato*, in my Judgment, would have done well to have modestly declar’d himself at last; and have let the Reader see, what upon the Upshot appear’d to him the most probable.--- Thus the ingenious Dialogist of our Days, who has given us the new Dialogues of the *Dead*; never fails to put into the Mouth of the last Interlocutor that speaks, such Sentiments as contain the Design and Result of the whole Dialogue; the Want of which Precaution has drawn this Reflection upon *Plato*; that in his Books the Reader, who finds nothing there laid down as certain, is always left in Suspence. But *Cicero*, whose Reflection this is, does him Justice in another Place; where he exempts him from the Number of those, who maintain’d,

that nothing could be certainly known. And it appears, by a beautiful Passage in his *Phaedo*, that this Philosopher was, as well as his Master, in many Things well fix’d and determin’d in his Opinions; and that, “if he seems not positively to affirm any Thing in his Writings, ’tis because he entirely follows *Socrates*’s Manner of Disputing; and is in every Thing careful to avoid the magisterial Air of the Sophists, and Dogmatists; who asserted every Thing in a peremptory Manner; taking almost always simple and bare Appearances, for indisputable Truths.” He accordingly there introduces *Socrates* speaking in this Manner: *Is it not a most deplorable Misfortune, that though there are Reasons true, certain, and most obvious to the Apprehension; there should nevertheless be found a Set of Men, who, after having refus’d to lay hold of them; and having been present at some of those frivolous Disputes, where every Thing appears, sometimes true, sometimes false; come at length to doubt whether it be so or no: and instead of laying the Blame of those Doubts on themselves, or their own Want of Skill and Application, they at last throw it on the Reasons themselves; and then peevishly pass the rest of their Lives in vilifying and setting at naught all Reason whatever; and thereby utterly deprive themselves of all Truth, and Knowledge.* It has been observ’d, that there are four particular Persons, in whose Mouths *Plato* generally puts his real Sentiments; *viz.* *Socrates*, *Timæus*, the *Athenian Host*, and the *Stranger of Elea*.

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

The

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

† *Dacier*, *ibid.* p. 68. — 69. —

‡ *Cujus* [Platonis] in libris nihil affirmatur, & in utramque partem multa differuntur, de omnibus queritur, nihil certi dicitur. *Academ. Quæst. Lib. 1, cap. 12* —

§ *Quorum* è numero tollendus est Plato: --- quia reliquit perfectissimam disciplinam, Peripatericos, & Academicos, &c. *Ibid. Lib. 4, cap. 5* — *Dacier*, ubi supra, p. 74. — 75. —

¶ Οὐδὲν ἢ Φαίδων, (ὉΨη) ἄκρὸν ἂν ἔη τὸ πλεῖστον, εἰ δὲ οὐδὲ δὴ τινὲς ἀληθῆς ἢ βεβαίαι λόγους, ἢ δυνατὰ καὶ ἀνεπηρέαστα, ἢ τεταρτὰ πάντες ἐκπεριεργάζονται διὰ τὸ παραγιγνεσθαι τοιαύταις λόγοις, τοῖς αὐτοῖς; τοῖς μὲν δοῦναι ἀληθεῖν εἶναι, τοῖς δὲ μὴ, μὴ εὐαίῳ τινὶ εἰδέναι, μηδὲ τὴν ἐκείνου ἀτεχνίαν, ἀλλὰ τελευτῶν, ἐπὶ τὸ ἀληθεῖν, ἀγνοεῖσθαι ἐπὶ τοῖς λόγοις ἀφ’ ἐνῶν τὴν ἀλίαν ἀπόπειράν, ἢ ἢν τὸν λιπαρὸν βίον μισῶν τε καὶ λοιδορῶν τῆς πόλεως; διὰ ταῦτα πᾶσι δὲ (thus I read, instead of τῶν, with *H. Steph.*) ὄντων τῆς ἀληθείας τε καὶ ἐπιτηδεύσεως γενεῆς. p. 300, C. — D. — *Ed. Lezard.* And Tom. I, p. 90, C. — D. — *Ed. Serran.* *Sextus Empiricus* (*Phy. Hypot. Lib. 1, cap. 33, — p. 45, B.*) acknowledges *Plato* to have had fix’d Opinions about some certain Things. (*Edit. Fabricii*, p. 57, — Num. 221, & d.)

‡ Καὶ τὸ πλεῖστον ἔν τῶν ἀποφαινεταῖς διὰ τετελειωτων προτάτων, Σωκράτους, Τιμῶν, τῶν Ἀθηναίων ἑόντων, τῶν Ἑλλήνων ἑόντων. *Diag. Laert. Lib. 3, Sect. 52.* — & p. 217. — *Ed. Col.*

‡ As, for Instance, his two *Alcibiades*, *Socrates’s Apology*, *Crito*, *Phaedo*, *Gorgias*, *Philebus*, the ten Books *de Repub.* and the twelve *de Legibus*, &c.

‡ *Fleury’s Discourse on Plato*, p. 252, the *Brussels Edition*,

The End and Aim of all humane * Actions is some Good; and there is ' a sovereign Good, a Good by way of Excellence; which every Soul parts after. This sovereign Good must needs be " perfect, self sufficient by itself; and such, that whoever comes to know it, cannot but most ardently seek the Possession of that alone; without the least Concern for any other Things, but such as are made perfect by these Goods, which have some Relation thereto. But this can only be found in " that infinite Being, who is the Parent and ° Cause of all other Beings; who not only gives to ° Things knowable, whatever they contain of Truth; and to intelligent Beings, the Faculty of knowing them: but is also the Author of their Existence and Essence; being himself alone all Essence, both in respect of Time, and Power. Without the Knowledge, and Possession of this Good, all other Things are unprofitable. And ho' all Men desire it', and have some Sense of it; yet do they not sufficiently know what it is: nor can they arrive at a thorough Knowledge of it, either by their own Meditation; or by any certain and invariable Information from others. For which Reason there are but very few Men', who arrive at Happiness in this World; and none who can obtain it in Perfection. All the Happiness we can possibly attain to here, amounts to no more, than the Enjoyment of a Good, which is only ' the Production of, and Emanation

from that sovereign Good; or bears the nearest Resemblance to it: This Good, which may be compar'd to the other, as Light and ° Eyesight to the Sun, which may be truly said to resemble the Sun, but not to be the Sun itself; this Good, I say, is Knowledge and Truth; which * produce Holiness and Justice, by which we are, as far as 'tis possible, united, and made like, to = God: and also the Love " of that superlatively excellent Being; from whence results a Pleasure that is pure "b, virtuous, and without Remorse. If the Soul retires pure, unshilly'd by any Contagion of the Body; as not having willingly had any Commerce with it, but on the contrary, having, as it were, always shunn'd it, and been always recollected within itself, by continual Meditation; that is to say, by truly philosophizing, and effectually learning how to die; (for Philosophy is a Preparation for Death :) if the Soul, I say, retires in this Disposition, it goes to a Being like itself; to a Being divine, immortal, and replete with Wisdom; where it lives in the Enjoyment of marvellous Felicity; exempt from all its Errors, Ignorance, and Fears; from all those Passions, and Affections, which once tyranniz'd over it; and from all the other Evils attending humane Life: and leads a truly celestial Life with the Gods " to all Eternity "d. So that, besides the most glorious and most certain Rewards, that good Men receive in this World "e, both from God,

* Τὸ ἄριστον εἶναι ἀπὸ πάντων πράξεων τὸ ἀγαθόν; ἢ ἐκείνου ἕνεκα δεῖν πάντα πᾶντα πράττειν; ἀλλ' ἐκ ἐκείνου, τῶν ἄλλων, p. 302, H.— Ed. Lamar. & Ed. Sirrall. Tom. 1, p. 499.— 500, Gorg.

' Ὁ δὲ θεὸς δίδωκε μὲν ἀπάσης ψυχῆς, ἢ τῶν ἕνεκα πάντα πράττειν, De Repub. Lib. 6, Tom. 2, p. 505, E.— & p. 477, G.— Edit. Lugdun. Lamar.

" Πάντων δὲ πᾶν κελύπτειν [ἀνάγκη εἶναι] --- ἰκανόν τ' Ἀγαθόν --- τὸ δὲ γε μὴν, ὡς εἶμαι, περὶ αὐτῶ ἀναγκαστικόν ἐστι λέγειν, ὡς πᾶν τὸ γινώσκον αὐτῶ, θηροῦναι ἢ ἐπιθεῖναι θυρομένον ἐκεῖν, ἢ περὶ αὐτῶ κήρυττα, ἢ τῶν ἄλλων ἕδον φρονέειν, πλὴν τῶν ἀποστασιμῶν ἕνεκα ἀγαθῶν. In Phileb. Tom. 2, p. 20, D.— & p. 76, C.— Ed. Lugd.

° Πρῶτον μὲν τούτων ἀπειρον γένηται, Phileb. p. 78, — Ed. Lugd. & Tom. 2, p. 27, B.— For Plato acknowledg'd, besides the supreme Being, interior Deities. See Bibl. Univ. Tom. 10, p. 387, — & seq. and the Bibl. Clouf. of Mr. Le Clerc, Tom. 3, p. 72, — 73, —

° Του πάντων Ἀδύ. Phileb. p. 30, E.— & p. 80, D.— Edit. Lugdun.

p Τὸ ἴδιον τὸ τὸν ἀλήθειαν παρέχον τοῦ γινώσκοντος, ἢ τὸ γινώσκοντος τὴν δύναμιν ἀποδοῦν, πᾶν τὸ ἀγαθὸν ἴδιον φῶς εἶναι, ἀλλ' ἂν ἐπισημῶν ἕνεκα ἢ ἀληθείας --- ἀλλὰ ἢ τὸ εἶναι τε ἢ τὴν δύναμιν ὅτ' ἐκείνου ἀπὸ τῶν προσεῖται ἐκ τοῦ ἀγαθῶ ὅτ' τὸ ἀγαθὸν, ἀλλ' εἰ ἐπισημῶν τῶν ἕνεκα, τρεῖς αἰετὶς ἢ δύναμις ὑπερέχουσα, De Repub. lib. 6, Tom. 2, p. 508, E.— & p. 479, A.— Ed. Lugdun.

° Εἰ δὲ μὴ ἴσμεν [τῆς τῶ Ἀγαθῶ ἴδεναι] ἀνευ δε ταύτης εἰ ὅτι μάλιστα πᾶν ἐπισημῶν, δεῖ ὅτι ἕδον ἡμῖν ἐφεῖται ὡς περὶ ἕδ' εἰ κενὸν ἐκεῖν, ἀνευ τῶ ἀγαθῶ. De Rep. 6, p. 505, A.— Tom. 2, & p. 477, E.— Ed. Lugdun.

° Ἀποκαταστασὶς τὸ εἶναι [τῶν ψυχῶν] ἀπορροα δὲ ἢ ἐκ ἕνεκα λαβεῖν ἰκανῶς τί ποτ' εἶναι, ἕδον πίσει χρήσασθαι ἰκανῶς, εἰα ἢ περὶ πᾶν. De Rep. p. 505, E.— Tom. 2, & p. 477, G.— Ed. Lugdun.

" Οὐ φημι εἶναι δυνάδον ἀνθρώποις μακαρίους τε ἢ ἐδιδάσκοντες γενέσθαι, πλὴν ὁλίγων μὲν τε ἂν εἴμεν, τῶ δὲ διορίζομαι. Epimoid. init. p. 973, C.— Tom. 2, & p. 697, F.— Ed. Lugd. "Οἱ ἀδύων [τῶ Ἀγαθῶ ἴδεναι] ἢ ἰκανῶς ἴσμεν. De Repub. lib. 6, p. 505, A.— & p. 477, E.—

° Οὐ δ' ἐκείνους τε τῶ Ἀγαθῶ φάνηται ἢ διορίζομαι ἐκείν. Ibid. p. 506, E.— & p. 478, C.— Ed. Lugd. "Οὐτ' Ἀγαθῶ ἐπισημῶν ἀνάγκη εἶναι ὡ. Ibid. p. 508, B.— & p. 478, G.— Ed. Lugd.

* Ἐπισημῶν δὲ ἀλήθειαν, ὡς περὶ ἐκεῖν φῶς τε ἢ εἶναι, ἡλικιστὸν μὲν νομίζον ὄρθον, ἕδον δὲ ἡγεῖσθαι ἐκ ἐκεῖν ἕξει. p. 509.— Et p. 479, A.—

° Ἡμετέρας δὲ ἀληθείας, ἢ ἂν πῶς, ὅμαι, φῶμεν αὐτῶ χρεῖν κενῶ ἀκαταστάσθαι. De Rep. lib. 6, p. 490, C.— & p. 471, F.— Ed. Lugd.

1 See Phaedo, Tom. 1, p. 79, D.— & p. 385, C.— Ed. Lugdun.

2 Δὲ ἢ περὶ τῶν χρεῖν ἕνεκα δὲ ἐκεῖν φῶμεν ἢ τῶ χρεῖν. Φησὶ δὲ, ὁμοίως θεῶ κατὰ τὸ δυνάδον ἐπισημῶν; δὲ, δίκαιον ἢ ἴσμεν μετὰ φρονέσας γενέσθαι. Theatet. Tom. 1, p. 176, A.— B.— & p. 128, F.— See also de Legibus, lib. 4, p. 716, C.— Tom. 2, & p. 601, A.— Ed. Lugdun.

° "Ορῶντι ὡ ὅτ' ἂν τὸ καλόν, [γενέσθαι] τίθειν --- ἀληθῆ [ἀρετῶν] ἄτε τῶ ἀληθῶς ἐφαπτομένω; τενδῶ δὲ ἀρετῶν ἀληθῶ, ἢ βρεφασμῶν, ὡ ἀρετῶν θεοφιλῶ γενέσθαι, ἢ, ἕτερον τῶ ἄλλων ἀνθρώπων, ἀκατάσθαι ἢ ἐκεῖν --- τῶ τῶ πᾶν τῶ ἀνθρώπων φύσει συνεργῶν ἐκείν. De Rep. ἢ ἂν τῶ βλάπτον λέγειν. In Cornu. Tom. 3, p. 212, A.— B.— & p. 321, E.— Ed. Lugd.

° Ἐδον ἕδον ἕδον, ἀπὸ τῶ ὄρθου μὲν ἀπὸ τῶ ὄρθου, ἢ φῶμεν αὐτῶ ἐπισημῶν, τῶ δὲ ἀπὸ τῶ ὄρθου ἐπισημῶν. Phileb. Tom. 2, p. 66, C.— & p. 94, G.— Ed. Lugdun.

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

° Ἐάν μὲν καθάπερ ἀταλαστῆσαι [ἢ ψυχῆς] μηδὲν τῶ εὐμαρῶ συνεφέλικτα, ἄτε ἕδον κινῶνται αὐτῶ ἐν τῶ βίω ἐκεῖν εἶναι, ἀλλὰ φένηται αὐτῶ, ἢ συνήθισμα αὐτῶ ἐκ ἐκεῖν, ἄτε μετὰ αὐτῶ ἀπὸ τῶ, τῶ δὲ ἕδον ἄλλο εἶναι ἢ ὄρθου φιλοσοφῶν, ἢ τῶ δὲ τῶ πᾶν μετὰ βλάπτον --- τῶ ἂν εἶναι μετὰ βλάπτον --- ὅτ' μὲν ἕδον, εἰς τὸ βλάπτον αὐτῶ τὸ θεῶν ἀπὸ τῶ, τῶ βλάπτον τε ἢ ἀνάγκη ἢ φρονέσαι. "Οἱ ἀπὸ τῶ ὄρθου ἀπὸ τῶ εὐδαιμονίας εἶναι, τῶ ὄρθου ἢ ἀνάγκη ἢ φῶμεν ἢ ἀνάγκη ἐκεῖν ἢ τῶ ἄλλων κενῶ τῶ ἀνθρώπων ἀπὸ τῶ ὄρθου --- ὡς ἀπὸ τῶ, τῶ ὄρθου μὲν ἀπὸ τῶ ὄρθου. Phaedo. p. 80, E.— 81, — Tom. 1, & p. 385, 386, Ed. Lugd.

° Ἄ μὲν τῶν --- τῶ τῶ δίκαιον, παρὰ θεῶν τε ἢ ἀνθρώπων, ἀλλὰ τε ἢ μετὰ ἢ δάρα γίνεσθαι, πρὸς ἐκεῖν τῶ ἀγαθῶ δὲ αὐτῶ περὶ τῶ ἢ δικαιοσύνη, τῶ ἂν εἶναι. Καὶ μαλ', ἐφῆ κατὰ τῶ βλάπτον. Τῶ τῶ τῶ --- ἕδον εἶναι πᾶν ἕδον μετὰ πρὸς ἐκεῖν ἢ τῶ ὄρθου ἐκεῖν περὶ τῶ. De Rep. lib. 10, p. 613, — 614, — Tom. 2, & p. 318, F.— Ed. Lugdun. See the Description that follows on quite to the End of the Book, [of the Rewards and Punishments of another Life; as also in Phædo, and Gorgias, Tom. 1, p. 523, — & seq.

and Governours of a State are no more, than
fff Ministers of the Law; that wherever the
 Law bears Sway, and the Magistrates are its
 Slaves; there we see flourishing Towns, and the
 greatest Plenty of all those good Things, we ex-
 pect from the Bounty of the Gods: but, on the
 other hand, where the Magistrate is Master,
 and the Law his Servant and Slave; there no-
 thing can be expected or hop'd for, but Ruin
 and Desolation. He maintains, that those
 Laws *sss*, which tend only to the particular
 Interest of the Legislatour, and not to the
 publick Good, are not really Laws; but the
 Dictates of Faction, Tyranny, and Injustice.
 In a word, 'tis his fix'd Opinion *bbb*, that
 all Politicks, which tend to make the go-
 verning Part powerful at the Expence of
 the Subjects; and which make all the Virtue
 of a Sovereign to consist in securing, and
 increasing his own Power; leaving Justice,
 Patience, Goodness, Fidelity, and Human-
 ity, as Virtues fit only for Slaves, to be
 practis'd by the Subjects; are no better
 than downright Tyranny: and that the
 End and Design of true Politicks, is to
 make the whole Body of the Subjects live
 sociably together, like Brethren, in the hap-
 piest Manner possible; without Poverty,
 without Riches; according to the Rules of
 Justice and Sanctity." *Plato*, having laid
 down these general Principles, enters upon
 particular Expedients; of which he gives us
 a considerable Number, for the regulating of
 the publick religious Worship, the Choice of
 Magistrates, Marriages Divorces, the Edu-
 cation of Children, Wills, Guardianships,
 War, and Peace; with the other principal
 Affairs of Civil Life. But "there is, in his
 Politicks, a very considerable Defect *ccc*;
 for in order to banish, out of the Govern-

ment he is forming, all Manner of Propri-
 ty; he ordains Community, not only of
 Goods, but also of Wives and Children.
 -- This Community is so far from conducing
 to the End its Legislatour proposes; that
 on the contrary it effectually prevents the
 Attainment of it; and intirely frustrates
 the Design of his whole Establishment. For
 instead of uniting the Minds of his Sub-
 jects, it sets 'em at Variance; dissolving at
 once all the Relations, and most sacred Ties
 of Nature; and trampling under Foot all
 Law, Religion, Honesty, and Decency. --
Aristotle has strenuously oppos'd this Maxim,
 in his second Book of *Politicks*; and *Plato*
 himself abandons it in his sixth Book of
Laws; where he restores to the Marriage
 State, all that he had before taken from it.
 Besides this, there is another Defect, con-
 cerning the Education of Women; whom
 he destins to the same Employments as the
 Men; and calls 'em to the Command of
 Armies, and the Government of States." Let us add, that, by his Manner of speaking
 of those, whom the *Greeks* call'd *Barbarians* *ccc*; he seems to have retain'd the false
 and presumptuous Ideas of that Nation;
 who, forgetting the natural Equality of all
 Men; pretended to have a Right, to treat
 all other Nations, as their Enemies by Na-
 ture, against whom they might securely ex-
 ercise all Manner of Hostilities. Another very
 considerable Blemish, is his Pretence; that
 nothing ought ever to be chang'd in the Religion
 we find establish'd; and that but to think of any
 such Thing, was the highest Pitch of Extrava-
 gance and Folly. A Maxim which can have
 no other Effect, but to keep up Superstition
 and Ignorance in the World; and for ever
 exclude Truth.

fff Τὰς δ' ἀρχαίας λεγόμενας νόν ὑπερέτας τοῖς νόμοις ἐνάλασσε. *De Leg.* lib. 4, Tom. 2, p. 715, C. — *Serran.* & p. 600, E. — *Ed. Lugd.* Ἐν ἣ μὲν γὰρ αἱ (πόλει) ἀρχαίαι εἰσὶν ἢ ἢ ἀκρίβειαν ἢ νόμον. Φηρὸν ὅρδ' ἢ τὴν τιμωρίαν ἐποίησαν ἕταν' ἐν ἣ τὸ ἐν δεσπότις τῶν ἀρχαίων, εἰ δὲ ἀρχαίαι ὄντων τῶ νόμοι, σὺν ἢ ἢ, καὶ τὰν ὄσα θεοὶ ποιεῖ. Ἔστιαν αὖ ἀθετησόμενα κείσασθαι. *ibid.* D. — *Serran.* & F. — *Ed. Lugd.*
sss Τὰς δὲ ἀρχαίας λεγόμενας νόν ἢ ἢ ἐν αἱ πολιτείας ἢ ὄσας νόμοι, ὄσα μὴ ἐπιπέσης τῆς πόλεως ἕνεκα τῶ νόμοις ἐπέθεσαν εἰ δ' ἕνεκα τῶν παλαιῶν, ἀλλ' ἢ πολιτείας τέρας; φαμέν ἢ τὰ τῶν δίκαια ἢ φαίνεσθαι εἶναι, μᾶλλον ἐπιθεσθαι. *Ibid.* B. — *Serran.* & *Ed. Lugd.* D. —

bbb *Dacier's Life of Plato*, p. 90, — 91. —

ccc *Ibid.*, p. 92 — ὅ' ἔσ.

ccc See *Menexenus*, Tom. 2, p. 242, D. — and the fifth of his *Repub.* p. 470, C. — *Serran.* & p. 406, C. — & p. 464, G. — *Ed. Lugd.*

ccc Ὅ. δὲ: ἐπιχειρήσει κινεῖν νόν ἔχων --- τῶν νόμων ἐπιπέσης τὸ ἀμικρότατον ἀπάντων ἔδδον κινητέον. *Leg.* lib. 5, p. 738, B. — C. — *Serran.* & p. 609, B. — *Ed. Lugd.* See *Mr. De Meaux's Discours sur l'Hist. Univ.* p. 217, *Ed. Holl.*



S E C T. XXII.

ANTISTHENESE, another Scholar of Socrates, founded the Sect of the Cynicks; and had, amongst others, the famous Diogenes, for his Scholar. What an ingenious modern Writer has said of Diogenes, may be generally apply'd to the Philosophers of that Sect. "That they were of the Number of those extraordinary Persons, who run every Thing in to Extremes, without excepting even Reason itself; and who verify the Maxim, * That there is no great Wit without a Spice of Madness." They had learn'd from Socrates, that Morality was the most useful of all the Sciences; and what deserv'd our greatest Care and Application. From this most true Principle, they absurdly concluded; that Logick, Natural Philosophy, Geometry, Musick, the liberal Arts and Sciences; in a word, every Thing that did not immediately relate to the Science of Morality, was to be despis'd, and intirely thrown aside. The fundamental Maxim of their Doctrine was, to live in Conformity to the Rules of Virtue; which is sufficient to make Men happy. But the Consequences, they drew from thence, were in some Things too rigid; and in others too remiss. *The Gods, said they, have need of nothing; this is their proper and natural Condition: Those then who stand in need but of a few Things, do the best resemble them.* To procure to themselves then this happy Independancy; and to shew with what an utter Indifferency they look'd upon Riches, Pleasures, Honours, and the Approbation of Men; they pretended, that we ought intirely to renounce all the Conveniences of Life; and voluntarily reduce our selves to the most extreme Poverty: And they accordingly pursu'd this Maxim of theirs in their Manner of living: A

long Beard, a Cloak, a Staff, and a Wallet, made up the whole of their Attire, Equipage, Goods and Chattels. Diogenes, for his Part, would have no other Habitation but a Tub; his Wooden Cup too; when he came to find he could drink out of the Hollow of his Hand, was thrown away. *Antisthenes said, he had rather lose his Senses, than be sensible of Pleasure.* They thought themselves entitied freely to make use of any Thing that came in their Way, without troubling themselves whether they had the Owners Consent, or not; which Practice of theirs they justify'd in this Manner. *All Things, said they, belong to the Gods: But the Sages are Friends to the Gods, and all Things are common among Friends: Therefore all Things belong to the Sages.* They laugh'd at all humane Establishments, believing themselves bound by no other Law, than the Law of Nature; of which they had very false and imperfect Notions. Upon this Principle Diogenes made no Scruple of coining false Money. He maintain'd that all Women ought to be in common; and that the Laws of Marriage were but a vain Subjection. According to the Opinion of these same Philosophers, there was nothing that a Man ought to be asham'd of: They publickly, and without Reserve, trod under Foot all the Laws of Decency, and Modesty. A learned German not long since, maintain'd; That they had never advanc'd this Paradox, had it not been to remove from themselves the Abuse of those, who, making the Whole of Virtue to consist in external Decency, did under this beautiful Vail conceal the most enormous Practices. "If this be so, (says an ingenious Journalist in his Remarks thereupon) their Design was good; but their Means stark nought: For, as a certain Lady, who did not always fol-

low

* See Diog. Laert. lib. 6, Sect. 1.— *Op sequen.* And p. 365, 366. Ed. Colon. Allob.
 † Mr. Bayle. Diction. Art. Diogenes. p. 1049.—
 ‡ *Nulum rragam ingenium sine mixtura dementiae fuit. Senec. de Tranq. Anim. cap. ult. p. 229.— Tom. 1, Ed. Gronov.*
 § *Ἀρσέναι δὲ ἀπὸ τῶν (Κυνικῶν) τῶν Λογικῶν τὸν Φυσικὸν πότον περιωρῶν --- μόνον δὲ προσέχειν τὸ ἑλικῶν ἢ ἕπερ τι δὲ ἐπὶ Σαυρίστῳ, τῶν δὲ κῆρ ἐπὶ Λογικῶν. Ἰσὺν πάλιν τὸ πῶν Φύσικον λέγειν. Δὲ ἕπειν δὲ, ὅτι τῶν ἐν μετὰ τῶν κῆρ τ' ἀπὸν τε τῶν κῆρ δὲ ἢ τὰ ἐκείνην καθήκοντα. Γράμματα γὰρ μὴ καθήκοντα ἔφασκεν ὁ Ἀντισθένης; τῶν δὲ Φύσικων γενουένων, ἵνα μὴ διατρέφοντο τῶν δὲ γένηται. Περιωρῶν δὲ ἢ Γνωστικῶν, ἢ Μυσικῶν, ἢ πᾶσι τὰ τοιαῦτα. Diog. Laert. Lib. 6, Sect. 103, — 104 — Et p. 431 — 432. Ed. Colon.*
 ¶ *Ἀρσέναι δὲ ἀπὸ τῶν κῆρ τῶν ἐπὶ τῶν ἀπὸν τῶν κῆρ. Ibid. Sect. 104.*
 † *Ἀπὸ τῶν γὰρ τῶν ἀπὸν εἶναι τῶν, ἑδαμῶν. Ibid. Sect. 11. — & p. 371. — Ed. Colon.*
 ‡ *Ὅς (Διηγῶν) ἔφασκε, Θεῶν μὲν εἶναι εἶναι, μηδὲν δὲ δεῖσθαι τῶν δὲ Θεῶν ἔμῳν, τὸ δὲ ἴσῳν χρῆσθαι. Ibid. Sect. 105. — & Ed. Col. p. 433. Socrates had said this before. See Xenoph. Apomn. Lib. 1, circa fin. p. 731, A, — Ed. Paris.*
 § See Diog. Laert. ubi supra Sect. 12. — ibique Interpr. Vid. p. 373, Ed. Colonia Allob. & p. 378, 379.
 ¶ See Remark (G) of Mr. Bayle's Dictionary, in the Article of Diogenes, p. 1051, Col. 2.—
 † See Diog. Laert. ubi supra, Sect. 37. — And p. 379. — Ed. Colon. And Senec. Epist. 90, p. 302. — Ed. Gronov.
 ‡ *Μακρὸν μὲν ἢ, ἑλικῶν. Diog. Laert. lib. Sect. 3. — & p. 366 — Ed. Col.*
 § *Τῶν Θεῶν ἐπὶ πᾶσι τῶν δὲ ἐπὶ τῶν Θεῶν κῆρ τῶν πᾶσι τῶν Φύσικων. πάντα ἑραεῖν τῶν σοφῶν. Ibid. Sect. 27. — & Ed. Col. p. 388 — See also Sect. 11. — & Sect. 72. — & p. 371 — And p. 410. — Edit. Colon. They excepted not even Things sacred. See Sect. 73. — & Ed. Colon. p. 411. —
 ¶ *Μῶν δὲ τῶν κῆρ κατὰ νόμον, ὅς τῶν κατὰ φύσιν διδῶν. Ibid. Sect. 71. — & p. 410. — Ed. Col.*
 † *Τοιαῦτα διδῶν ἢ πᾶσι ἔφασκεν, ὅτι τῶν νόμου παρακαρῶν. Ibid. Sect. 71. — & Ed. Col. p. 410. — See Sect. 20. — & Ed. Col. 277, 378.*
 ‡ *Ἐλεγε δὲ ἢ κῆρ εἶναι δεῖν τῶν κῆρ, γὰρ μὲν μὲν ἑπὶ τῶν, ἀλλὰ τὸν πᾶσι τῶν κῆρ τῶν κῆρ. Ibid. Sect. 72. — & p. 411. — Edit. Colon.*
 § See Eudæi Elem. Philos. Instrument. Hist. Philosoph. Cap. 4, Sect. 57.
 ¶ Mr. Bernard's Nouvelles de Juif, 1703, p. 95.
 † Madam De Villiedieu.*

“ lew her own Maxim, has handsomely ex-
“ press’d it,

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

It is but a bad Way of teaching Virtue, to illustrate it by vicious Images. But let us see how they argu'd the Matter: ‘There is not, say they, any Harm in dining: Therefore there is none in dining in the Middle of the Market-Place. It is just and lawful to carefs one’s own Wife: Therefore ’tis just and lawful to carefs her before all the World. But, as Mr. Bayle has very well observ’d “, “ this is but the poor Fallacy, “ a dicto simpliciter ad dictum secundum quid. “ ’Tis as if one should say: It is good to drink “ Wine; therefore it is good to drink it in a “ Fever. These Men knew not, that many “ Actions are not good but in certain Circum- “ stances; so that the Absence of those Cir- “ cumstances may make that a bad Action, “ which otherwise might have been a very “ good one. To lend a Friend Money to pay his Creditors, is a very laudable Action: “ But to lend it him, to be drunk, or to game “ with, is a bad one. Some Actions are essen- “ tially bad, and can never become good, how- “ ever circumstantiated; but there are others, “ which are sometimes good; and sometimes “ bad, according to the Time, Place, and other “ Circumstances, in which they are perform’d. “ --- The Difficulty then may be reduc’d to “ this single Question: *Whether a Man ought “ to be oblig’d, to perform conjugal Duty in “ publick View?*” I am surpris’d to find this celebrated Author, whose Words I have borrow’d, making the *Cynicks* to triumph; as if Reason alone was not sufficient to demonstrate, that their Impudence is vicious, and contrary to the Maxims of the Law of Nature. “ It “ may be objected, says he, to *Diogenes*, that “ the Sense of Shame, in Cases of this Nature, “ is a natural Sentiment; so that to be without “ Shame on these Occasions, is to do Violence “ to Nature itself. But, to this he will an- “ swer; that was this Sense of Shame a real “ Dictate of Nature, the other Animals too, “ who so faithfully follow the Impulse of Na- “ ture, would seek for dark Holes and secret “ Recesses, to perform this Work of Genera- “ tion in: The contrary of which is most ap- “ parent. At least, this would be universally “ true as to Men, that they in such Cases al- “ ways seek out the darkest and most obscure “ Retreat; which is also * false. --- It will “ here be reply’d to *Diogenes*, that it is suffi- “ cient, that all civiliz’d Nations are subject to “ this Sense of Shame. --- To which he again “ will make this Return; that the Nations we “ are pleas’d to call barbarous, have much less “ deviated from the Rules of Nature; than

“ those, who have, with their refining, and
“ Subtily of Thought, so vastly multiply’d
“ the Modes and Forms of Decency and Ci-
“ vility; and in short, since the Law of Na-
“ ture is not subject to Prescription, it is both
“ right and lawful, at all Times, and in all
“ Places to return back to the Observation of
“ it; without having any Regard to the arbi-
“ trary Yoke of Customs and Opinions, how-
“ ever, or wheresoever establish’d.” These are
the Reasons which Mr. Bayle puts into the
Mouth of *Diogenes*. I have no Design to en-
gage myself in the Dispute; this being no pro-
per Place for it. I shall content myself with
shewing in a few Words, that all these puzzling
Subtilties of *Diogenes*, are capable of a very
easy and obvious Answer. First, he assumes
a false Principle; to wit, that the Maxims of
the Law of Nature are founded on an Instinct,
common to all Animals; every Impulse where-
of is irresistible: And yet Mr. Bayle has him-
self justly set at nought those moral Reflec-
tions, which are drawn from the Conduct of
brute Beasts. Secondly, Neither is it necessary,
that all Men should have innate Ideas of Vir-
tue; and still less, that they should universally
follow them in their Conduct. What I have
already said, is sufficient, in my Opinion, to
make *Diogenes* change his Battery. So that, third-
ly, I shall now grant, as much as he pleases, that
the Sense of Shame, with regard to Actions in them-
selves lawful or indifferent, is not a natural Sen-
timent: But I shall maintain, that humane Insti-
tution may have Force enough, to make such kind
of Actions vicious and criminal; when attended
with proper Circumstances. My Reason is, be-
cause Men are born to live together in Society,
and consequently to be complaisant one to-
wards another; not unreasonably affecting Sin-
gularity, but avoiding to give Offence to any
Person whatever; as far as it can be done with-
out Breach of their Duty, or bringing on them-
selves some considerable Detriment: in a word,
to have all the Respect imaginable for one an-
other, and more especially with Relation to
those Things, that are authoriz’d by an estab-
lish’d Custom. Fourthly, There are three Sorts
of Modes or Customs, in the Practice of which,
Civility and Decency are made to consist: Some,
which are exceeding troublesome, and without
any Foundation: Others, which are but little
or not at all inconvenient; and which may be
dispens’d with, as well as the former; without
giving Offence or Scandal to any one; or occa-
sion to fear any ill Consequence thereupon:
And lastly such, the Violation whereof is liable
to very great Inconveniences, and, on this Ac-
count, have the Character of Impudence af-
fix’d to the Contempt of ’em. I conceive, that
no Man can be oblig’d to subject himself to the
first Sort, any farther than his own Interest,
or Condition of Life do necessarily require it.
As

* Έπιχει δὲ πάντα ποιῆσαι τὴν αἰσῶν, ἢ τὴν δόξαν τῶν ἢ τὴν ἀρετῆς ἢ τὴν πείρας; πῶς δὲ πάντα λέγει; ἔτι τὸ δὲ πᾶσι μὲν τὴν ἔπιπυον ἔδ’ ἐν ἀρετῇ ἔστιν ἄποπύον· οὐκ ἔστι δὲ ἄποπύον τὸ ἀρετῆς ἔδ’ ἄρα ἐν ἀρετῇ ἔστιν ἄποπύον. *Diog. Laert.* ubi supra, Sect. 69. — & p. 408. — Ed. Colan.

* See *August. de Civ. Dei*, Lib. 14, Cap. 20. — & *L. Viv.* i. l.

* *D.H. Hist. Crit.* in the Article of *Hipparchia*, Wife of *Crates*, a *Cynick* Philosopher, Remark (D), p. 1564, Col. 2. —

* Several Nations in *India* do the contrary. See also *Sexi. Empiric. Pyrrhon. Epot.* Lib. 3, Cap. 24, p. 152, l. 4. — Ed. *Steph.* p. 177. — Ed. *F. brie.* And *La Mothe le Vayer, D. al. D’Orasias Tubero*, p. 156.

† See the Translation of *Pufend. de Jur. Gen. & Nat.* by Mr. *Barbeyrac*, lib. 2, cap. 3, Sect. 2, Note 7.

open Profession of downright Atheism; and in consequence thereof maintain'd, that *a Sage might steal, commit Adulteries, and Sacrileges, whenever he had convenient Opportunities so to do; those Things being evil only, said they, in the Opinion of the Vulgar; which was invented to keep Fools in Awe.* Hegeſias, Chief of that Branch, which bears his Name; made ſuch

eloquent, and pathetick Deſcriptions of the Miſeries of humane Life; that ſeveral of his Auditors, upon hearing theſe Lectures, went home and diſpatch'd themſelves; ſo that Pto- lomy, King of Egypt, where he taught, was forc'd to prohibit him from touching any more upon that Subject.

† ΚΛΕΨΕΙΝ τε, ἢ μοιχεύειν, ἢ ἱεροσυλῆσαι [τὸν σπαρδαῖον] ἐν καιρῷ· μηδὲν γὰρ εἶναι τῶν ἀσχηρῶν φύσει, τῆς ἐπ' ἀνθρώποις δόξης ἀπο- μένης, ἢ οὐκ εἶναι ἕνεκα τῆς τῶν ἀφρόνων συνοχῆς. Ibid. Sect. 99.— & p. 153.— Ed. Col.
‡ For this Reason he was furnam'd ὁ Παισελεύων. See Diog. Laert. ubi supra, Sect. 86.— & Ed. Col. p. 144.— 145.— Cicero. Tusc. Quest. lib. 1, cap. 34.— & Val. Maxim. lib. 8, cap. 9.— I know not on what Grounds Mr. Buddeus, to justify the Cyrenaicks, as to the Opinions they are charg'd with, ſays, (in his Abridgment of his History of Philosophy, Inst. Phil. Electic. Tom. 1, c. 4, Sect. 13.) that Hegeſias wrote very elegantly about the Immortality of the Soul, and its Happiness after Death. The Authors I cite, ſay nothing of this; Cicero mentions him, where he is proving Death to be no Evil, in caſe the Soul does not ſurvive;— becauſe 'tis then deliver'd from the Miſeries of Life. Mr. Daſier is guilty of the ſame Fault, in his Argument to Plato's Phædo, Tom. 2, p. 150.— Ed. Par.



S E C T. XXIV.

ARISTOTLE^a, the moſt celebrated of all Plato's Scholars, founded the Sect of the Peripateticks. He was the firſt of the antient Philoſophers, who gave us a methodical System of Morality; at leaſt of thoſe, whoſe Writings we have left. Father Rapin^b, ground- ing himſelf upon a Paſſage of Cicero; inſiſts, that the Morality of Ariſtotle, has the ſame Foundations, the ſame Principles, and the ſame OEconomy, with that of Plato; and that, if the latter is leſs ſimple, and has more of Splendour and Ornament^c; the other will be found to be more ſolid, and better connect'd. But I know not how to reconcile this, with what he him- ſelf owns, in another Place; where he ſays^e, That Ariſtotle's Morality is too humane, and too much confin'd within the Bounds of this Life; that he ſcarce propoſes any other Happineſs to Man, than that of civil Life: Whereas the Morality of Plato, is more noble and ſublime; is a Preparative to a Life more pure and perfeſt. And indeed, Religion has no Share in the System of Ariſtotle^f. Beſides that 'tis not yet a ſettled Point^g, whether he believ'd the Immortality of the Soul; he makes no Men- tion of Providence but by the By; and in ſuch a Manner too, as ſhews him not to be tho-

roughly perſuaded of it. If *the Gods*, ſays he, at all concern themſelves with human Af- fairs, as 'tis probable they may; 'tis juſt and reaſonable to believe, that they are pleas'd with that in Man, which is the beſt, and the moſt like to themſelves; (and ſuch is the Underſtand- ing:) That they reward them, who love and cultivate this Part of themſelves; as taking care of that, which is dear to the Gods: and moreover, as leading good and honeſt Lives. This Philoſopher makes frequent Mention of a Plurality of Gods; and when he talks of Demons, which he does more ſparingly; he ſpeaks of 'em as intelligent Beings, united to the Stars. However, he acknowledges, as well as Plato, his Maſter; but one only Principle, which he calls *the Immovable Spirit*, which moves all Things. In his Sys- tem of Divinity, there are four principal Articles: The firſt is, that, tho' every Thing is not eternal, yet ſomething there muſt be that is incorruptible: otherwiſe all Things might return to their primitive Nothing. The ſecond is, that the Deity is an immate- rial Subſtance. The third, that his Under- ſtanding comprehends in itſelf every Thing that is intelligible. The fourth, that God be-

^a He was born in the firſt Year of the ninety ninth Olympiad, 384 Years before Jeſus Chriſt; and died aged ſixty three Years.
^b Tom. 2, de ſes Oeuvres diverſes, &c. And in his Reflex. ſur la Morale. Art. 4, p. 390. Ed. de Holl.
^c Idem ſons erat utriſque, [Peripateticis, & Veteri Academia,] & eadem rerum expetendarum, fugiendarumque partitio. -- Con- tinuis hac ratio, & utriſque hic bonorum ſuis videbatur. -- Omnis illa antiqui Philoſophia ſenſit in una virtute eſſe poſitam beatam vitam. Acad. Quell. Lib. 1, Cap. 4.— & C.— Beſides, that Cicero there ſpeaks rather of the Scholars of Plato, than of Plato him- ſelf. What he ſays may be true in ſome Senſe, and yet the Principles of Plato be very different from Ariſtotle's; as the Caſe ap- pears to be in my Abridgment of 'em.
^d Tom. 1, p. 342. ^e Ibid. p. 346.
^f Ariſtotle was the leaſt of any made uſe of by the Greek Fathers. They ſound, that he ſpoke ſlightly of Providence, and of the Na- ture of the Soul; that his Logick was too intricate, and his Morality too humane: For this is the Judgment St. Gregory of Nazianze makes of him, (Orat. 33, p. 535, D.) Fleury, des Etudes, &c. p. 18. Ed. Bruffels. See alſo the Abridgment of the Hiſtory of Phi- loſophy, by Mr. Buddeus, Cap. 4, Sect. 13.
^g See Bayle's Dict. p. 351. Col. 1.— Rem. (O), Artic. Ariſtot. in c. 11, lib. 1, of his Ethicks to Nicomachus, towards the End, p. 17, B.— Edit. Paris. Ariſtotle ſays, that 'tis a Problematical Queſtion, Whether the Dead can partake of any good Good or Evil? Τὸ διαπορεῖσθαι περὶ τῆς κεννημότας, ἢ τι ἴσ' ἀγνοῦσ' κινηθῆσιν, ἢ τῶν ἀντικειμένων. Ariſtot. Tom. 3, p. 17, B.— Ed. Paris.
^h Ἐι γὰρ τι; ἐπιμέλεια τῶν ἀνθρώπων ὑπὸ Θεῶν γίνεαι, ὡς περ' οὐκ, ἢ ἕν' ἂν ἔυλογον χάριεν τε ἂν ἔς τῷ ἀρίστῳ, ἢ τῷ συγγενεστάτῳ πῶς ὁ ἂν ἐπ' ὀνεί; ἢ πῶς ἀγαπῶνται μάλιστα πῶς τὸ ἢ τιμωρῶν; ἀνευποῖν' ὅς τῶν φίλων ἄνθρωποις ἐπιμελουμένοι; ἢ ὀρθῶ; τε ἢ καὶ τῶ πρῶτ- λοντα; Ethic. Nicom. lib. 10, c. 9, p. 185, C.— Ed. Durval. This Paſſage is ill tranſlated in Le Clerc's Bibl. Choif. Tom. 1, p. 129.— but I did the Juſtice to charge the Fault on Mr. Cudworth, who cited not the Place where it was to be found; and beſides, has omitted a material Word of the Original. See Bibl. Choif. Tom. 9, p. 395.—
ⁱ Extract from Mr. Cudworth, in Bibl. Choif. Tom. 3, p. 73.— 74.—
^k Τὸν δὲ Θεὸν ἀειδαῖον ἀπέφαινε, καθὼς ἢ ὁ Πλάτων. -- ἢ εἶναι ἀκίνητον αὐτόν. Diog. Laert. lib. 5, Sect. 32.— & Ed. Colom. p. 321 — εὐαρέθῳ, ὅτι ἀδύνατον τὸ πρῶτον κινεῖν, ἢ ἀκίνητον ἔχειν τι μὲν ἑῶ; --- ἀδιάμερόν ἐστι ἢ ἀμερές. Ariſtot. Phys. Auſcult. lib. 8, in fine, Tom. 1, p. 609, B.—

“ being * inmoveable, all his Action is included
 “ within his own Effence, (or is the same with
 “ it).-- So the Religion of *Aristotle*, may be re-
 “ duce'd to thesetwo Heads: That there is a Deity,
 “ which includes all Nature; and that there are
 “ besides inferiour Gods'. As for all the rest, he
 “ look'd upon it as fabulous, and the additional
 “ Inventions of Men; fram'd and establish'd up-
 “ on politrick Views. --- He * introduces Na-
 “ ture, acting as an Instrument of the supreme
 “ Cause; not as a Machine set a-going by the
 “ necessary Effect of Mechanism; but as car-
 “ rying on certain * Ends, tho' to her un-
 “ known.” In his *Ethicks*, this Philosopher
 explains well enough the Principles of humane
 Actions; treats too of the particular Vir-
 tues, in a Manner much more distinct, ex-
 tensive, and methodical; than his Master had
 done. But not enough to make us say, with
 one of his extravagant Admirers; that ° it is
the most exact, regular, and compleat System of
Morality in the World. The Jesuit too, whose
 Words these are, does himself confess else-
 where †, that *there is something of Order want-*
ing in Aristotle's Ethicks; as well as in his Log-
ick. The Reader will be able to form some
 Judgment thereupon, by the short Analysis,
 which I am now going to give him of that
 Treatise of *Morality*, which pass'es for *Aristotle's*
 Masterpiece; I mean that which he has enti-
 tled, by the Name of his Son, *Nicomachus*.
 After the Introduction, where our Philosopher
 says, amongst other Things; that † the So-
 vereign Good, which is the ultimate Scope of
 † Morality, and of all humane Actions; is no
 other than *Beatitude, or Felicity*: he shews, that
 this sovereign Good does not consist † either in
Pleasures, or Honours, or Riches, or even in
Virtue; or in † that *Idea of Good*, of which his
 Master *Plato* speaks; and which the Scholar
 seems not rightly to have understood. The
Beatitude then in Question, according to his
 Definition is †; *the Action of the rational Soul,*
perform'd according to the most excellent and
most accomplish'd Virtue, in a perfect Life; that
 is to say, throughout the Course of a long Life:
 For, adds he, *as one Swallow, or one Day,*
makes no Summer; so neither will one Day, or a
short Space of Time suffice, to make a Man happy.
 He then goes on to * explain this Definition in

a very verbose and confus'd Manner; and after
 some incident Questions, begins to † treat of
Virtue in general; which he thus defines; * *A*
laudable Habit, which perfects both the Subject
in which it resides, and its proper Action, or
Business. He † divides it into *intellectual,*
 and *moral Virtue*: The *intellectual*, which re-
 sides in the *Understanding*; and the *moral*,
 which has its Seat in the *rational Appetite, or*
Will. The first † is acquir'd and corroborated
 chiefly by Study; so that it requires both Time
 and Experience: The other is produc'd by
 Custom, or Practice; from whence it has its
 Name. Here, according to Order, our Au-
 thor should have enter'd upon his particular
 Account of *intellectual Virtue*; which, as *Aris-*
totle himself owns, is the † principal Source
 of all *moral Virtue*: This Philosopher however
 has thought fit to begin with the latter. After
 having prov'd, that it is † neither a *Passion*,
 nor a *Faculty of the Soul*; he defines it to be:
 “ an *Habit of Acting with Choice*; which con-
 “ sists in a certain *Mediocrity with regard to us,*
 “ determin'd by Reason, according to the *Judg-*
 “ ment of a prudent Man. So that, according
 to him, what constitutes the Essence of *moral*
Virtue, is a *Medium equally distant from two op-*
posite Vices; whereof the one errs through Ex-
 “ cess; and the other through Deficiency. And
 this as well with regard to the *Actions*; as
Passions. Let us stop a little at this Principle,
 which is the Basis of *Aristotle's* System, in his
 Explication of the *Virtues.* “ It is certain,
 “ there are some *Virtues*, whose Office it is
 “ to moderate the *Passions*: but this (as † *Gr-*
 “ *tius* observes) arises not from any essential
 “ Property belonging to all Sorts of *Virtues*;
 “ but 'tis because right Reason, whose Max-
 “ ims *Virtue* constantly pursues; teaches us,
 “ that there are some Things wherein a *Me-*
 “ diocrity ought to be observ'd; whilst in o-
 “ thers, it encourages us to push forward to
 “ the utmost of our Ability. We cannot wor-
 “ ship God too much; for Superstition con-
 “ sists not in exceeding the just Bounds of di-
 “ vine Worship; but in the perverse Man-
 “ ner of Worshipping. A Man cannot have
 “ too earnest a Desire for eternal Happiness;
 “ nor too great an Apprehension of eternal
 “ Misery; or exceed to a Fault in his Aversion
 “ to

* See *Cudworth* himself, *Intel. Syst.* p. 417.—
 † See his *Metaphysics*, Lib. 14. cap. 6, 7, 8.— See particularly Tom. 4, p. 483, B.—
 † *Bibl. Chosie*, Tom. 1, p. 132.—
 † *Αποτον δε το μη διεσθαι ενεκα τς γινεσθαι, εαν μη ηδωσι το κινεν βυλευσαμενον ---* *Οτι μιν εν λητια η φυσικη η εστο; ως ενεκα*
τς φανερν. Phys. Auzult. Lib. 2, c. 8, in fine. Tom. 1, p. 477, C.—
 † *Karst*, Tom. 2, p. 390. † Tom. 1, p. 361.
 † Lib. 1. cap. 2.— Tom. 3, p. 3, E.—
 † *Πολιτικη*. For as he always has in View Man, as a Member of Civil Society; so he understands by *Politics*, Morality in general
 of which *Politicks* properly fo call'd, is but one Part.
 † *Ibid.* Cap. 3.— *per totum.* † Cap. 4, *totum.*
 † Το μεγαλυτον αγαθη, ψυχης (λογικης) ενεργεια γινεσθαι, και ἀρετην η δε παλαις δε ἀρετην και την ἀρετην η τελειοτατην ητα
 η εν βρα τελειω. μιν γο χειρων εαρ η ποιει, εδε μια ημερα ετω δε εδε μακροτιον η ευδαμονα μια ημερα, εδε ολιγο χρονον. c. 6.—
 Tom. 3, p. 10, B.— Ed. Paris.
 † Cap. 7.— *per seq.*
 † *Τεν εινεν δε τις εβαινετας, ἀρετας λεγουεν. Ibid.* in fine, p. 20, D.— *Πασα ἀρετη, εδ αν η ἀρετη, αυτο τε εδ εχον αποταμει, η*
το εργον αυ η εδ αποδεσασ, Lib. 2, c. 5, in it. p. 27, A.—
 † *Λεγομεν γαρ αυτον, τις μιν διακομιδας τις δε θλας. Lib. 1, c. 13, in fine.* p. 20, C.—
 † *Η μιν βαινετικη, το πασιον εν δι. παλαις εχει η την γνεσιν η την αυτην διαπο εμπειριες δειται η χρονη η δ' ητικη ε*
εδου περιελαμει εδεν η τσυμα εσχηκε, μινον παρεκαλινον απο τς εδου. Lib. 2, c. 1, in it. p. 20, E.— 21.—
 † *Προαιεσις δε (αρχη) ἀρετης η ληθη εδ ενεκα τινος διδ --- ανεν νε η διανοιας, --- εν εστιν η προαιεσις, Lib. 6, c. 2, — p. 98, A.—*
 † Lib. 2, Cap. 4, p. 24.
 † *Εστιν αυ η ἀρετη (ητικη) ειν προαιετικη, εν μεσοτιτη εσα τη προς ημας, ωριμενη ληθη, η ως αν ο φρονιμος ορισει. Μεσοτις*
εδ εδω και αν τς μιν, αν υπερθετου τς δε, και ελασιψιν --- εν τε τς παθεσι, η εν ται; πρασει. Ibid. c. 6, — p. 28, C.— D.—
 † *De Jure Belli ac Pacis Prolegom.* Sect. 45.—

“ to Sin “. --- One cannot, says a more modern Author *ff*, love his Country too well; tho’, to save that, he loseth his Life. A Man may be resolutely patient unto Death; so that it is not the Mediocrity of Resolution, which makes the Virtue; nor the Extremity which makes the Vice; but the one being with, the other without, Reason. Saving a Man’s self, or suffering, if with Reason, is Virtue: If without it, is either Softness; or Obstinacy. ’Tis true, Virtue stands, for the most Part, between two Vices; yet is it hereby no more defin’d, than an honest Man, by living between two Thieves. Therefore the Nature of Virtue is better express’d by *Proportion*; as it also is, elsewhere, by *Aristotle* himself. For they are both of them founded in Truth. And as in *Proportion*, there is the Equality of a double *Ratio*; so also in Virtue, *viz.* between the Acts, and the Objects of the Mind. For as Perception is to the End; so is Resolution to the Means. This Proportion is seen, even in *penal Justice*; whose Acts ought to be proportion’d to the Crimes punish’d. --- *gg* We need only consider what *Aristotle* says, with respect to *Justice*; and the Falsity of his Principle of *Mediocrity*, so universally taken, will be apparent. For not being able to find, in the Passions, and their subsequent Actions, a Pair of Vices in the two opposite Extremes of Excess and Deficiency; he was forc’d to seek for both in the very Things themselves; about which Justice is conversant. Which is *blifting the Genus*; a Fallacy which *Aristotle* justly censures in others. Besides, tho’ in some Circumstances, where a Man, either with regard to himself, or those who depend upon him, is oblig’d to make the most of what belongs to him; it may indeed be a Fault to take less than his Due: Yet there can be nothing in it contrary to Justice, properly so call’d; for that consists only in the not invading the Property of another. Much such another Mistake as this, is his denying, that Adultery and Murder, when the mere Effects of Lust and Anger; are, properly speaking, Acts of Injustice. And yet nothing is more certain, than that the very Essence of Injustice consists in violating the Rights of another. Nor is it of any Moment upon what Motive this is done; whether out of Avarice, Sensuality, sudden Passion, mistaken Pity, or Ambition; the usual Sources of all Manner of Injustice. Nay, ’tis the proper Business of Justice, to arm it-

self against all the Charms, and Efforts of the Passions; in order to prevent those Breaches they would otherwise make in the Laws, which are to support human Society. --- And again, ’tis *hh* in Consequence of this false Principle, that he found himself oblig’d to make *Liberality* and *Fragility* to be but one single Virtue; whereas they are in Fact two different Virtues: that he opposes two Extremes to *Truth*, which are not equally contrary to it; that is to say, *Boasting*, and *false Modesty*; and at length is reduc’d to the Necessity of imposing the Name of Vice upon Things, which either have no Existence at all; or have nothing in ’em, that is any way vicious; such as the Contempt of Pleasure and Preferment; and Insensibility of the Passion of Ang.r.” Let us now return to the Analysis, we have undertaken, of his System of Morality.

In explaining the distinguishing Character of the *Habit*, or Disposition, belonging to moral Virtue; I mean the Property of *acting* with Choice and Deliberation; *Aristotle* takes Occasion to treat of *voluntary* and *involuntary Acts* in general; and what he says on that Head, is for the most Part well enough digested. He after that enters upon a particular Account of the *moral Virtues*; and begins with *Fortitude*, which he defines to be: *“ a Mediocrity between Fear and Boldness, but chiefly in regard to the first of these two Extremes: So that, according to him, a Man of Courage, is properly one, who is not afraid to expose himself to an honourable Death; or to any of the Dangers that lead to it. He had before, in the ⁱⁱ general Enumeration of all these Virtues he specifies in, oppos’d to this Virtue, on the one hand, Stupidity; or the Security of those, who are apprehensive of nothing; a Disposition, says he, which has no proper Appellation; and Audacity or Foolhardiness: And, on the other hand, Timorousness or Cowardice. Here he warns ^{mm}, against the confounding true Fortitude, not only with the senseless Fury of those, who kill themselves to be deliver’d from Poverty, or some Misery, which they are not able to bear; and which rather deserves the Name of Weakness and shameful Cowardice; but also with five other Things, which seem to have some Resemblance with this Virtue. Such is, First, Civil Valour, or that of Subjects; who expose themselves to Danger in View of the Honours and Rewards promis’d by the Laws: or to avoid the Penalties they threaten. Secondly, The forc’d Bravery of Soldiers, and all such as are compelled to meet Blows and Dangers, at the Command of superior Officers; who threaten to punish them if they*

^{ff} See *Aul. Gell.* Lib. 4. cap. 9, at the End. And *Laëtant. Inst. divin.* Lib. 6, Cap. 16. Num. 7, Ed. *Cellar.*

^{gg} *Green, Censology. Sacr.* Lib. 2. c. 7, Sect. 21, 22, 23, p. 73. See Mr. *Le Clerc’s Eibl. Clouf.* Tom. 2, p. 326.— 327.

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

ⁱⁱ *Ibid.* Sect. 43.— ⁱⁱⁱ *Lib. 3. cap. 1, et seq.*

^{mm} *“ Η Ανδρεία μεσότης ἐστὶ τῆς φόβου καὶ τῆς ἀλγῆς. (c. 9.) ἀλλὰ μάλλον πρὸς τὰ φοβερά. *ibid.* c. 12.— init. Κρίσις δὲ λέγεται ἀνδρείου, ὅτι τὸ πρὸς τὸν κίνδυνον ἐκείνου ἀδραγῆ, καὶ ὅσα κίνδυνον ἐπιφέρει ὑπόβριμα ὄλησι. c. 9, p. 45, E.—*

ⁿⁿ *“ Τὸν δὲ ὅπου καταδύονται, ὁ μὲν πρὸς ἀφ’ ἑαυτοῦ ἀνάνυμτος --- ὁ δὲ ἐν τῷ βαλῆται ὑπερβάλλον, κρατὺς ὁ δὲ τῷ μὲν φοβερισθαι ὑπερβάλλον, τῷ δὲ τῷ βαλῆται ἐκείνου δειλός. *Lib. 2. c. 7.— p. 29, C.—**

^{oo} *Lib. 3, cap. 11,— p. 47, C,— & d.*

they disobey their Orders. Thirdly, *The Heat of Anger* ⁸⁸; which, by a sudden Motion and Impulse, common both to Man and Beast, pushes on the offended Person to make an Assault upon those, from whom he has receiv'd Blows, or any other Injury. Fourthly, the Presumption of those, who confide in their own Strength; which they have often made Proof of with Success. Fifthly, The Security of those, who fear nothing, because they know no Danger.

Temperance is, according to Aristotle ⁸⁹; a *Mediocrity in respect of the sensual Pleasures of Taste and Feeling; and in some measure, in respect of Grief too*: in as much as the temperate Man grieves not to see himself depriv'd of Pleasures; whereas it causes great Trouble and Vexation to the Intemperate. He owns that an utter *Insensibility as to Pleasure*, which he makes one of the opposite Extremes of Temperance; is a ⁹⁰ *Thing scarce ever known in fact; as being contrary to the very Frame, and Constitution of humane Nature*. There are two Virtues which concern the Use of worldly Goods or Riches; that is to say, ⁹¹ of Money; and whatever else is capable of being priz'd by Money. The first, which he calls *Liberality*, has for its Object moderate Wealth; and it consists in preserving a just Medium ⁹², as to giving or receiving; but more especially as to giving. The Vices opposite to it, are *Avarice*, and *Predigality*. The other Virtue, which he calls *Magnificence*, regulates the Use of great Riches; but it consists only ⁹³ in giving, or expending. Its vicious Extremes, are, on the one hand, a *sordid Parsimony*; and on the other, a *ridiculous and mistaken Profuseness*.

Aristotle then particularizes a Couple of Virtues, which concern the just Medium to be observ'd, with relation to Honours; the one is ⁹⁴ *Magnanimity*, or *Greatness of Soul*; which

consists in believing ourselves worthy of great Honours; and in pursuing 'em, when we really deserve 'em. He opposes to this Virtue, on the one hand, an *unbounded Ambition*, or *Vain-gloriousness*; which makes us believe ourselves worthy of, and aspire to, great Honours, although we do not in any wise deserve them: On the other hand, a *Meanness of Soul*, that hinders us from knowing our own Merit; and makes us deprive ourselves, either wholly, or in Part, of those Honours, whether great or small, of which we are worthy. Thus this Philosopher makes that Disposition of Mind a Vice, which is, if not the same with Christian Humility; at least a Thing in itself very innocent. He goes still farther; and maintains, that this ⁹⁵ *Indifference for Honours*, which he imagines to be more common, than excessive Ambition; is also worse, and more opposite to *Magnanimity*. The other ⁹⁶ *Virtue*, which has for its Object small Preferments or Honours; has ⁹⁷ no fix'd Appellation.

He afterwards treats of the Virtue, that preserves a just Medium, with respect to *Anger*; viz. ⁹⁸ *Mansuetude* or *Mildness*; which consists in being never angry, but where there is sufficient Cause; and with such only as deserve it; and in a Degree too proportionable to the Nature of the Fact; on proper Occasions only; and no longer than is reasonable. The vicious Extremes are, on the one hand, *unreasonable Transport of Passion*; on the other, *an Indolence, that takes every Thing without the least Resentment*. So that, according to our Philosopher ⁹⁹, the Contempt of Injuries is a Vice; and Revenge a Virtue: The first, the Property of a servile Spirit; the other, that of a noble and generous Soul. There are three Virtues, which take Place in Conversation, or in the common Business of Life. The first, which may be call'd *Affability*, or a *reasonable Complaisance*

⁸⁸ Καὶ τὸν θυμὸν ἐξ ἐπὶ τῶν ἀνδρῶν ἐπιφέρουσαν --- ὅτι καὶ εἰ ἀνδρῶν ἡμμοσεῖς; ibid. p. 48. E. — I find by the Extract in the *Bibl. Clois.* Tom. 3. p. 334, — that Mr. Grew, reading Aristotle too hastily, charges him with a Contradiction, from which 'tis no difficult Matter to clear the Philosopher. I doubt not but he had in View this Chapter, tho' he cites the Tenth, where is nothing to his Purpose, either in mine, or any of the former Editions. It appears by the Extract here given, that Aristotle is far from pretending, that Courage belongs to the Faculties, destitute of Reason. Neither is the other Passage more exactly cited: For Aristotle does not speak of Courage in particular, but of Virtue in general: Ἡ δὲ ἀρετὴ πάσης τέχνης ἀκριβοῦς καὶ ἀμείνων ἐστίν. Lib. 2, c. 5, p. 27, E. — Virtue is more exact, and more excellent than all Sorts of Arts.

⁸⁹ Μεσότης ἐστὶν περὶ ἡδονῶν ἢ Σωφροσύνη. --- περὶ τῶν τιμῶν --- ἄν καὶ τὰ λοιπὰ εἴσα κοινῶς --- αὐτὸν δ' εἶπον ἀφ' ἧ καὶ γούσι; --- ἵπτον γὰρ καὶ ἐκ ἡμῶν ἐστὶν περὶ τῶν λυτῶν; --- ἀλλ' ὁ μὲν ἀνδραγαθῶν, τῶν λυπεῖσθαι μᾶλλον ἢ δεῖ, ὅτι τῶν ἡδονῶν οὐ τυγχάνει --- ὁ δὲ σφόδρην, τῶν μὴ λυπεῖσθαι τῇ ἀπουσίᾳ, καὶ τῶ ἀπέχεσθαι τῆ ἡδονῆς. Lib. 3, c. 13, p. 51, B, — 52, A, — B, — 53, A, — B. —

⁹⁰ Ἐλλείποντες δὲ περὶ τῶν ἡδονῶν, καὶ ἡπτόν ἢ δεῖ χαίροντες, εἰ πάνυ γίνονται; εἰ γὰρ ἀνθρώπινη ἐστὶν ἡ τοιαύτη ἀναστροφή. Ibid. c. 14, — p. 52, C. —

⁹¹ Χρήματα δὲ λέγμεν πάντα ὅσων ἢ ἀξία νομίζονται μετρεῖται. Lib. 4, c. 1, p. 55, C. —

⁹² Ἐλευθεριότης δοκεῖ εἶναι περὶ χρήματα μεσότης. Ἐπανεῖται γὰρ ὁ ἐλευθεριότης --- περὶ εἶδον χρημάτων καὶ ἀφ' ἧν μᾶλλον δ' ἐν τῇ ἀρετῇ. Ibid. init. p. 55, B. —

⁹³ Ἀνελευθερία. Ἀσούα. c. 3. — Ibid. p. 58, A. —

⁹⁴ Ἡ Μεγαλοψυχία οὐχ ἄσπερ ὁ ἐλευθεριότης, διαφέρει περὶ πάσης τῶν ἐν χρήμασι πράξεων, ἀλλὰ περὶ τῶν δαπανηρῶν μόνον. ἐν τοῖσι δ' ὑπερέχει τῆ ἐλευθεριότητος μεγαλείῳ --- τῆς τοιαύτης δ' ἕξεως, ἢ μὲν ἔλλειψις, Μικροψυχία καλεῖται; ἢ δ' ὑπερβολή, Πενουσία καὶ ἀπειροκαλία. Ibid. c. 4, — p. 60, A. — B, — C. —

⁹⁵ Ἡ δὲ Μεγαλοψυχία περὶ μεγάλα μὲν καὶ ἐκ τῆ ὀνόματι ἔοικεν εἶναι --- δοκεῖ δὲ ὁ μεγαλοψυχῶς εἶναι ὁ μέγιστος αὐτὸν λέγων, ἀπὸ ὧν ὁ γὰρ μὴ καὶ ἀξίαν αὐτὸ ποιῶν, ἡλιθίως --- χαῖνον ὁ δ' ἐλαττόνων, ἢ ἀπὸ, μικροψυχῶς, ἐκ τῶν μεγάλων, ἐκ τῶν μετρίων, ἐκ τῶν καὶ μικρῶν ἀπὸ ὧν, ἐκ ἐλαττόνων ἐκ τῶν ἀξίων, καὶ μάλιστα ἀνδοξίαν ὁ μεγάλων ἀπὸ. Ibid. c. 7, — p. 62, E. — 63, A. — B. —

⁹⁶ Ἀντιπίθησι δὲ τῆ μεγαλοψυχίας ἢ μικροψυχίας μᾶλλον τῆς χαυνότητος. καὶ γὰρ γίνονται μᾶλλον, καὶ χείρον ἐστίν. Ibid. c. 9. — in fine. p. 67, A. —

⁹⁷ Ibid. c. p. 10 per tot.

⁹⁸ Ibid. See the Greek Summary of cap. 9, and p. 67, D, — E. —

⁹⁹ Πρώτη δ' ἐστὶ μὲν μεσότης περὶ ὀργῆς --- ὁ μὲν ἐν εἴῳ οἷς δεῖ, καὶ οἷς δεῖ, ὀργιζόμενος, ἔτι δὲ καὶ ὡς δεῖ, καὶ ὅτε, καὶ ὅσον χρόνον, ἐπανεῖται --- ἢ δ' ὑπερβολή, ὀργιότης τις λέγεται αὐτῷ --- ἢ δ' ἔλλειψις, ἔτι ἄοργισία τις ἐστίν, εἰθ' ὅ, τε δὴ ποτε, ψήγεται. Ibid. c. 11, — p. 68, A — B, — C. —

¹⁰⁰ Οἱ γὰρ μὴ ὀργιζόμενοι εἴῳ οἷς δεῖ, ἡλιθίως δοκῶσιν εἶναι, καὶ οἱ μὴ ὡς δεῖ, μὴδ' ὅτε, μὴδ' οἷς δεῖ, δοκεῖ γὰρ εἰς ἀσθένειαν, εἰς λυπεῖσθαι, καὶ ὀργιζόμενός τε, εἰς εἶναι ἀμυντικός. Τὸ δὲ προσηλακίζόμενον ἀπέχεσθαι, καὶ τὸς οἰκίους περιοχεῖ, ἀνδραγαθία. Ibid. p. 68, C. —

declare *, in his *Politicks*; all those Nations, that have not enter'd into Treaties of Alliance, to be in a State of War with one another. And if we may take *Plutarch's* Word † for it, he advis'd *Alexander* to behave himself as a legal Prince towards the *Greeks*; and as a despotick Master towards the *Barbarians*; to regard the former, as his Friends, and Domesticks; but to treat the latter as so many Beasts or Vegetables. *Aristotle* after this pass'es on to intellectual Virtue, whose Function has for its Object *** *Truth*: he divides it into five Kinds; to wit, *Science, Art, Prudence, Intelligence, and Wisdom*. By *Science*, he understands **** *demonstrative Knowledge*; that is to say, a distinct Perception of necessary Consequences, flowing from Principles certainly true; or from Truths eternally such. *Art*, **** is an habitual Knowledge of the Rules, which right Reason prescribes, for the performing of any Operation; or for the accomplishing any Work, which the Agent was at Liberty to do, or leave undone. *Prudence*, is the Habit of discerning *** what is, or is not conducive towards the governing ourselves according to right Reason, in all the Affairs of Life. *Intelligence* ***, is the Knowledge of those first Principles, which want not Demonstration; because they are self-evident. *Wisdom* ****, which is compounded of *Intelligence, and Science*; consists in the Knowledge of the Principles and Demonstrations of those Things, which are most excellent. I might here make several Observations on these Divisions; and the Method, in which *Aristotle* explains those Virtues, which he treats of under distinct Heads. But this will require a larger Discourse; they who will give themselves the Trouble to examine into the Matter, will easily discover the Defects of this Work. The Author proceeds to treat, *** in a more particular Manner, of the Characteristicks, and several Functions of *Prudence*. After which he speaks of those moral Habits, which are imperfect; that is, of Dispositions *** towards Virtue, or Vice: and to these he

refers, on the one hand ***, *Continency and Patience*; on the other, *Incontinency, and Impatience*. On this Occasion he enters upon the Subject of **** *Pleasure, and Pain*; which are the two grand Springs of the whole Movement of the Soul. From thence he pass'es on to *Friendship* ***; which is, says he, either a *Virtue* ***, or a *Concomitant of Virtue*; and is besides, a very necessary Ingredient to the *Happiness of Life*. He defines it ***, a mutual *Benevolence, whereby Persons desire the Prosperity and Happiness of each other; and on all Occasions give reciprocal Demonstrations thereof*. It is founded, continues he, either † upon *Profit, or Pleasure, or Virtue*: but 'tis the last only that forms solid and perfect Friendship, which is only to be met with among good and virtuous Men; while Interest and Pleasure can at best but produce some slight Sort of Union amongst the Bad and Vicious. *Aristotle* 2 divides *Friendship*, as to its Subjects, into that which is *between Equals*, and that which subsists between those, whose Condition is unequal; or, where there is some sort of Superiority in the one over the other; as, between a *Father, and a Son*; the *Aged, and the Young*; a *Man and his Wife*; a *Sovereign, and his Subjects*, &c. He then proceeds to the Resolution of divers Questions relating to *Friendship*; and prescribes Rules for the better Cultivation and Improvement of it.

In the tenth and last Book, he returns 3 to his Subject of *Pleasure and Pain*; which he handles a little more at large, than he had done before. He concludes with that of *Beatitude*; which he divides into *Contemplative*, * and *Practical*. The latter, which he makes to consist in the Exercise of those moral Virtues, he had been treating of; is, in his Opinion, less excellent than the other: which he grounds, amongst other Reasons, upon this; that † Contemplation, as it is accompanied with a purer, and more solid Pleasure; so has it but little Need of the borrow'd Aid of external Things; which are much more requisite

* Διὸ καὶ ἡ Πολιτικὴ φύσει κτηνικὴ πως ἔσται ἢ γὰρ θηρευτικὴ, μέρῳ ἀνθρώπων ἢ δὲ χρησθῆναι πρὸς τὰ θηρία. ἢ τῶν ἀνθρώπων περὶ φύσιν ἀρχεσθῆναι, μὴ θέλουσιν. ὡς φύσει δίκαιον τοῦτον εἶναι τὸν πολέμον. Lib. 1, c. 2, p. 405, C. — See Mr. Noodt, de *Uris* c. 7. *Esopore*, lib. 1, c. 10, p. 66.

† Οὐ γὰρ Ἰσχυρὸς ὡς Ἀριστοτέλης συνέβουλευν ἀνθρώπων τοῖς μὲν Ἕλλησιν ἠγεμονικῶς, τοῖς δὲ Βαρβάραις διαποτικῶς γράμμεν (παρέσχε) κ. τῶν μὲν, ὡς φίλων ἢ ἐκείνων ἐπιμερόμενον, τοῖς δὲ, ὡς ἄλλοις ἢ φίλοις προσφερόμενον, &c. De *Fortit. vel cōst. ut Alexander*, p. 586, — *Orific. Tom. 1, Edit. H. Steph. Et Tom. 2, p. 329, B.* — Ed. *Wicob.* See also *Strab. Geogr. Lib. 1, in fin. p. 63, C.* — D. — Edit. Paris.

*** Ἐσο δὲ δὲ ἀληθῆς ἢ ψευδῆ τῶν κατὰ φύσιν ἢ ἀποφάναι, πεντὲ τὸν ἀριθμὸν τῶν δ' ἐξ ἐξ, τέχνη ἐπισημῆν, φρόνησι, σοφίαν, νοῦς. lib 6, c. 3, p. 98, D.

IIII Ἐξ ἀνάγκης ἄρα ἐστὶ τὸ ἐπισημῆν, αἰδίον ἄρα --- ἢ μὲν ἄρα ἐπισημῆν ἐστὶν ἕως ἀποδεικτικῆ. Ibid. E, — 99, A.

**** Τούτων ἂν εἴη τέχνη ἢ ἕως μὲν λόγῳ ἀληθῆς ποιητικῆ, ἔστι δὲ τέχνη πᾶσα περὶ γένεσιν, ἢ τὸ τεχνάειν, κ. θεωρεῖν ὅσα ἀγαθὰ τὰ τι τῶν ἐνδεχομένων ἢ εἶναι, ἢ μὴ εἶναι, ἢ εἶναι ἢ ἀρχὴ ἐν τῷ ποιεῖν, ἀλλὰ μὴ ἐν τῷ ποιημένῳ. Ibid. c. 4, — p. 99, C.

*** See Mr. *Puffendorf*, Lib. 1, Cap. 2, Sect. 4, Not. 1.

*** Λεῖπέσθαι, νοῦν εἶναι τῶν ἀρχῶν. Ibid. c. 6, — p. 101, D.

**** Ἡ σοφία ἐστὶν ἢ ἐπισημῆν, ἢ νοῦς τῶν τιμωτάτων τῆ φύσει. Ibid. c. 7, — p. 102, C.

**** Ibid. Cap. 8, — c. 7, — p. 111, B, — c. 2, — p. 111, C.

**** Ἐγκράτεια, κ. καρτεία. Ibid. c. 1, — p. 111, B, — c. 2, — p. 111, C.

**** Ἀκρασία, ἢ μαλακία, ἢ τρυφή. Ibid. c. 1, — p. 111, B, — c. 2, — p. 111, C.

**** Ubi supra, Cap. 12, — c. 7, — p. 111, B, — c. 2, — p. 111, C.

**** Ἐσο γὰρ γὰρ (ἢ φίλια) ἀρετὴ τῆς, ἢ μὲν ἀρετῆς, ἔστι δ' ἀναγκαστικῶν εἰς τὸν βίον. Lib. 8, c. 1, init. p. 131, E.

**** Δεῖ ἄρα (φίλις) εἰσοεῖν ἀλλήλους, ἢ βουλεύεσθαι τὰ ἀλλήλων, ἀλλὰ μὴ γινώσκοντας. Ibid. c. 2, in fin. p. 134, A.

1 Τρία γὰρ εἶναι εἶδη τῆς Φιλίας, ἰσότηρα, τοῖς φίλοις --- οἱ μὲν εἶναι διὰ τὸ χρῆσθαι φίλων ἀλλήλους, οὐ κατὰ ἑαυτοὺς φιλοῦσιν, --- εἰ δὲ ἰσότηρ, --- τρεῖς δ' εἶδη ἢ τῶν ἀγαθῶν Φιλία ἢ κατ' ἀρετὴν ἐκείνων --- διακρίνεται οὕτως ἢ τούτων Φιλία, ἕως ἂν ἀγαθὸν εἶναι ἢ δ' ἀρετὴν μόνον. Ibid. c. 3, — p. 134, B, — C, — p. 135, B, — C.

2 Εἶτα δὲ οὐκ εἰ ἀγαθὸν Φιλία ἐν ἰσότητι. --- Ἐτερον δὲ ἐστὶ Φιλία ἐξ ἑαυτοῦ, τὸ κατ' ἑαυτοῦ ἂν παρὰ πρὸς ἑαυτὸν, ἢ ἄλλοις προσεῖται πρὸς νεότερον, ἀντὶ τὸ πρὸς γυναικα, ἢ παντὶ ἀρχοντι πρὸς ἀρχόμενον. Ibid. c. 8, — p. 139, D, — E.

3 Cap. 1 — 5. 4 Cap. 7. 8.

5 Οὐ μὲν γὰρ τὸ δεῖν ἑαυτὸν περιμεμεῖσθαι τῆ ἑυδαιμονία, ἢ δὲ τῶν κατ' ἀρετὴν ἐπισημῆν, ἢ κατὰ τὴν σοφίαν ἐπισημῆν, εἶναι. δεῖ γὰρ ἢ σοφίαν ἢ ἀρετὴν ἢ κατὰ ἑαυτὸν ἔχειν κ. τῶν βέλων. Ibid. c. 7, — p. 131, B. — Ἀλλοῖς δ' ἂν ἢ τῆς ἐκ δ, χορηγίας ἐπισημῆν ἢ ἐπ' ἐλάττω δεικνῆται, τῆς, ἢ κατὰ, c. 8, — p. 133, B.

requisite for the obtaining the other sort of Beatitude: and for that the Practice of moral Virtues, does not at all comport with the Condition of the Gods; who yet enjoy perfect Felicity.

This is the Summary of his ten Books of *Ethicks* to *Nicomachus*. *Aristotle* does little more than repeat, and extend the same Principles, in his two Books of *grand Morals*; and in his seven Books address'd to *Eudemius*. His *Politicks* are founded upon very near the same Principles with those of *Plato*; but apparently more ample, methodical, accurate, and, in general, better proportion'd and adapted to the Constitution of humane Affairs: Not that they are compleat neither; for these too have their Defects. There are several Matters handled in a very superficial and confus'd Manner. This Philosopher, as well as his Master, seems to have had too much in View, the *Grecian* Forms of Government. Nor

does he seem to have just Ideas of the natural Equality of Mankind; and by some of his Expressions, he gives Occasion to believe, that he thought some Men to be by Nature design'd for Slaves. He is against bringing up Children that happen to be born with any bodily Infirmity; and thinks, should the Laws forbid the exposing Infants; Women should be made to miscarry, when they find themselves with Child, after having had a certain Number of Children, answerable to what the Interest of the State requires; for, adds he, when we say that such a Thing is lawful, or unlawful, it ought to be understood with respect to Beings, that have Life and Sense. Thus this vast Genius of Nature, this Philosopher, for whom such Numbers have so great a Veneration; proves to be grossly ignorant of, and without any Scruple treads under Foot, one of the most evident Principles of the Law of Nature.

⁶ Ἡ δὲ περὶ τῶν ἀπολαύσεων, ὅτι θεωρητικὴ τις ἐστὶν ἐνέργεια, καὶ ἐλευθερὰ ἀπὸ φωνῆς τῶν θεῶν γὰρ μέγιστα ἐπακρόφαται μακαρίους, καὶ ἐπὶ ἀπολαύσει δὲ καὶ πράξει. ὅτι πλείους ἀπολαύσαντες ἡσυχίαν ἔχουσιν. Pag. 183. E.—
⁷ Polit. c. Lib. 1. Cap. 5.
⁸ Περὶ δὲ ἀπολαύσεων καὶ πράξεως τῶν γιννομένων, ἔγω γράφω, μὴδὲν πεπερασμένον πρέφω. διὰ δὲ πρῶτον τίνων, εἴαν ἢ τάς τῶν ἐθνῶν κοινῶν, καὶ δὲ ἀπολαύσει τῶν γιννομένων ἀπολαύσει γὰρ δὲ τῆς περὶ τῆς τοῦ πρῶτου. εἴαν δὲ τίς γίγνηται παρὰ τὸν ἀπολαύσει τῶν ἀπολαύσεων, ἔγω γὰρ ἀπολαύσει δὲ τῆς ἀπολαύσεως τὴν γὰρ ἀπολαύσει τὴν γὰρ ἀπολαύσει τὴν γὰρ ἀπολαύσει. Polit. Lib. 7. c. 16, p. 597. E.— The last Words are so read in the Paris Edition, form'd upon that of Casaubon: And this reading is, in my Opinion, much better than that, which Mr. Perizonius follows, in his Notes on *Eliam*, Var. Hist. 8. 1, p. 481, Col. 1. τὸ γὰρ ἐστὶν, καὶ τὸ μὴ διακριμένον ἐν τῇ ἀπολαύσει, καὶ τῇ ἀπολαύσει, ἔγω. I could, were it now proper, easily prove this.



SECTION XXV.

ARCESILAS, one of the Successors of *Plato*, founded a new Sect, call'd the *Second*, or *Middle Academy*, to distinguish it from that of *Plato*. His Doctrine consisted in making a Doubt of every Thing; in arguing both for, and against all Manner of Questions, without ever coming to any Determination; and in maintaining, that there was no one Thing whatever that could be certainly known, or comprehended. So that, this Sort of Philosophy, apparently tends, to the utter Subversion of all the Precepts of Morality: For, whoever affirms, that there is nothing certain, and that all Things are incomprehensible; does at the same Time declare it to be uncertain, whether there be any such Things as Virtue and Vice. *Cicero*, who was an Academick, but a moderate one; has acknowledg'd the Justness of this

Consequence, speaking of *Pyrrho*, a Contemporary of *Arcefilas*; and whose Scepticism, at the Bottom, was the same with the *Incomprehensibility* of the new *Academicks*. *Carneades* founded the *Third Academy*; which, in Reality, did not at all differ from the *Second*: For, bating a few Softnings, which serv'd only to amuse; he was, in the main, as zealous a Defender of Incertainty, as *Arcefilas* himself: He pretended to discover it, even in the most evident Notions; infomuch, as that we find him muttering up all his Subtilties against this Maxim: That Things equal to, or the same with any one third Thing; are equal to, or the same with one another. --- He retain'd, in the main, the whole Doctrine of *Arcefilas*: But thro' Policy, and to disarm his Adversaries of their most plausible Topics

* He flourish'd about the hundred and twentieth Olympiad, three hundred Years before *Jesus Christ*. See *Diog. Laert.* Lib. 4. Num. 28. — See seq. particularly p. 284. — Ed. *Colon. Allob.*
* *Arcefilas* negabat esse quidquam, quod sibi sciret; ne illud quidem ipsum, quod Socrates sibi reliquisset. Sic omnia latere confitebitur in oculis, neque esse quidquam, quod cerni, aut intelligi possit: quibus de causis nihil oportere neque profiteri, neque affirmare quemquam, neque ad probationem apprehendere. *Cic. Academ. Quæst.* Lib. 1, cap. 12. —
* Mr. Bayle's Dict. in the Text, and Remark (K.) p. 307. — & col. 2. —
* *Aristoteli*, *Pyrrhonis*, *Hirtilis*, jampridem explosa sententia est: qui tamen haberent jus suum disputandi de officio, si verum aliquem delectum reliquissent, ut ad officii mentionem aditus esset. *De Offic.* Lib. 1, cap. 2. — See also the same Argument made use of against the *Academicks*. *Acad. Quæst.* Lib. 4, c. 8. —
* *Pyrrhonizans*. See the Article of *Pyrrho*, Rem. (A.) in Mr. Bayle's Dict. p. 2429. col. 2. — & 2430, Col. 1. —
* This Philosopher was of *Cyrene*; he came to *Rome* in the Year 599. from the Building of that City; a hundred and fifty Years before *Jesus Christ*. See *Petar. D. Temp.* Tom. 2, 354. See *Diog. Laert.* Lib. 4, Sect. 62. — See seq. And Ed. *Colon.* p. 296. — & *Diog. Laert.* *Quæst.* Lib. 4, cap. 45. — Et Bayle Dict. p. 810, — 811, — Artic. *Carneade*, the whole Article and Notes, & p. 812 — & 813, Col. 1. —
* See Bayle's Dict. See the Rem. (A.) & (B.) Artic. *Carneade*.
* *Ed.* Rem. (C.) p. 811, col. 2. — See *Galen*, in *Lib. de optimo dicendi genere*, printed at the End of the *Pyrrhon. Hypot.* of *Sext. Empiric.* F. H. Steph. *Ann.* 1562, p. 220, 221. Et p. 499, D. — Ed. *Genev.* 1621.
* *Ibid.* p. 811, Col. 1. —

“ Topicks for Declamation, and Raillery; he
 “ admitted such a Degree of Probability, as
 “ might serve to determine a prudent Man,
 “ which Side of the Question to take, in all
 “ such Matters as concern’d the Actions of
 “ Civil Life. He plainly saw, that without
 “ this, he could never answer the most odious
 “ Objections; nor clear his Principles from the
 “ scandalous Charge, of bringing Men to a
 “ most shameful State of Inaction, and Quiet-
 “ tism. All Things consider’d, it amounts to
 “ the same Thing, to say, *That there is not*
 “ *any such Thing as Truth; or, That there is,*
 “ *but that we have no Rule to distinguish it from*
 “ *Falshood.*” Thus it is that Mr. Bayle is
 pleas’d to express himself. I shall not give
 myself the Trouble to examine; whether there
 ever has in Fact been such a Person in the
 World, as one seriously perswaded, that it is
 impossible for a Man certainly to distinguish,
 for Instance, whether he be asleep, or awake;
 or to discern a real Difference between Madness
 and sound Sense; or to be positively assur’d,
 that there is a Sun, Moon, Earth, Men, and
 Animals; that the Whole is greater than any
 of its Parts: And whether we may not say,
 with the Author of the *Art of Thinking*;¹ that
 the Pyrrhonists are a Set of Liars. But one
 Thing there is, which to me appears *incontestable*;
viz. that this Spirit of universal Scepticism,
 utterly destroys, and overturns the very Founda-
 tions of all Religion, and Morality. Nor
 do I know any Books more dangerous, for
 Men to read, who have not accustom’d them-
 selves to an accurate Way of Thinking, and
 discerning between Truth and Falshood; than
 those, whose Authors make it their whole Busi-
 ness, to accumulate Difficulties against the most
 evident Truths; without ever resolving them,
 or preventing the fatal Impressions thereof,
 by a clear and rational Account, of what may
 and ought to be held as certain, notwithstanding
 such Difficulties; which, however conside-
 rable, yet can no way lessen, or hinder the Co-
 gency of such direct Proofs, as are really con-
 vincing. ’Tis true, the ancient Scepticks *did*
not indeed deny, but that a Man ought to con-
form to the Customs of his Country; to practise
the Duties of Morality; and in all such Cases
to be determin’d upon ² *probable Grounds; with-*
out insisting upon, or expecting, absolute Certainty.
 But then, as Mr. Bayle himself owns,

they ³ *did, under Pretence of only opposing the*
Reasons which the Dogmatists urg’d for the Ex-
istence of a Deity; in Effect, undermine the Doc-
trine itself. Their Way was, first to promiſe,
that as for themselves, they pretended not to be
singular in any Thing; but that following the
common Course of Life, they, without being ad-
mitted to any particular Sect, held that there
were Gods, worshipp’d ’em, and ascrib’d to ’em a
Providence; but for the rash Reasonings of the
Dogmatists about these Matters, ’twas what
they could not submit to: Whereupon they promiſ’d
their Objections; which were usually such, as
did, by disproving a divine Providence, at the
same Time destroy the Existence of a Deity. As
 to Morality, there is no doubt to be made, but
 Pyrrho ⁴ taught, “ that the Honesty and Fur-
 “ pitude, Justice and Injustice of humane Ac-
 “ tions, were intirely dependent upon humane
 “ Laws, and Custom.” Carneades ⁵, after ha-
 ving one Day made an admirable Harangue in
 Praise of Justice; did the very next shew, that
 it was only a mere empty Name; opposing it
 at the same Time more strenuously, than he
 had before defended it. Thus however excel-
 lent, those Maxims of Morality, which the
 Academick and Pyrrhonist give out for Pre-
 cepts, may be in themselves; yet in their
 Mouths, they can amount to no more, than
 empty Sounds, unprofitable Rules, Propositions
 advanc’d without any Foundation, and in flat
 Contradiction to their own proper Principles;
 this too, notwithstanding their Conduct and
 Demeanour be otherwise never so regular, and
 unblameable. According to Carneades, the
 chief End, or supreme Good, of Man, consist-
 ed in the *Enjoyment of*, what he call’d ⁶; the
natural Principles; that is to say, in satisfying
 the Desires of Nature; without giving one’s
 self any Trouble or Concern about Honour and
 Virtue. The Pyrrhonists propos’d to them-
 selves, by Means of their ⁷ *Suspension of Af-*
sent; to keep the Mind in such a State of
 Tranquillity, as should effectually prevent their
 receiving any Uneasiness, on account of esta-
 blish’d Opinions; and likewise in such a State
 of absolute Indifferency for all Manner of
 Things, as should keep them from setting their
 Hearts too much upon any one Object; or
 troubling themselves too much about any Con-
 tingencies whatsoever.

¹ The first Discourse, p. 6.— See also the sixth Chapter of Part 4, p. 419.— *Éc.* Ed. *Amst.* 1685.

² Mr. Bayle Dict. Art. *Pyrrho*, Rem. (B.) p. 2430, Col. 1.—

³ See *Diog. Laert.* lib. 9, Sect. 108.—

⁴ Mr. Bayle’s Dict. Art. *Rufin*, Rem. (C.) p. 2625, Col. 2.—

⁵ *Sextus Empiric. Pyrrhon. Hypot.* Lib. 3, cap. 1.— *Init.* & Ed. *Fabric.* p. 128.—

⁶ Bayle, Dict. Art. *Pyrrho*, in the Text, p. 2433.—

⁷ Ουδεν γάρ εφρακτεν ετε κικλιν, ετε αισχρον, ετε δικαιον, ετε αδιον. η ομοιω; επι παντων μηδεν ειναι τη αληθεια, νομοσ δε, η ετε
 παντα τοις ανθρωποις πραττειν. *Diog. Laert.* lib. 9, Sect. 61.— Et Ed. *Col.* p. 669.—

⁸ *Laert.* *Inst. Divin.* Lib. 5, cap. 14, n. 3, 4. See the Substance of his Reasons against Virtue, reported, and confuted by
 Mr. *Pufend.* Lib. 2, cap. 3, Sect. 10.— 11.—

⁹ See *Cicer.* *de Finib.* Lib. 2, cap. 18.—

¹⁰ *Carneadi, frui principis naturalibus, esset extremum.* *Ibid.* cap. 11, — in fine. See Mr. Bayle’s Dict. p. 814, col. 2, — & 815;
 col. 1.— * Εποχα.

¹¹ See *Diog. Laert.* Lib. 9, Sect. 67, — 63, — 108.— Et Ed. *Col.* p. 672, — 674, — 695. — *Stob.* *Serm.* 1183, & 120, p. 601 —
 609. — *Sext. Empiric. Pyrrhon. Hypothef.* Lib. 1, cap. 12, — & Edit. *Fabric.* p. 8.—



S E C T. XXVI.

EPICURUS*, Cotemporary of *Arcefilas*, and chief of the Sect that bears his own Name;^b admitted these two Principles of the ancient Atheists: "That there is no other Substance besides ^c Body; and, that Body hath nothing else belonging to it but ^d Magnitude, Figure, Site, and Motion, without Qualities.---" However he profess'd the Belief of a vast Number of Gods.--- He plac'd them in certain Spaces which he call'd ^e *Intermundane*; which he believ'd to be void, and to lie between the several Worlds, of which, according to him, the Universe was made up. He held ^f, that the Sovereign Felicity of the Gods, consisted in having nothing to do; and in being free from all Manner of Care.--- And tho' they did not, in his Opinion, any way intermeddle in the Concerns of Mankind; and tho' Men had nothing either to hope or fear from them; yet, said he, they ought to have some Worship paid 'em, on Account of the Excellency of their ^g Nature, and Felicity. There needs not much Penetration to discern, that all this Divinity of *Epicurus* was but mere Chimera; since 'twas directly contrary to the Principles he himself had laid down; by which he acknowledg'd no other Beings, but such as were made of Atoms; and consequently corruptible. But Gods he gave out there were^h; out of pure Policy, and to avoid the Odium which an avow'd and open Atheism would otherwise have drawn upon him. For which Reason *Pofidonius*, the *Stoick*, said ⁱ, that *Epicurus believ'd no Gods at all; and that it was to avoid Odium, that he said what he did of the immortal Gods.--- He introduces,*

"says ^k *Cicero*, by way of Ridicule, transparent Gods; Gods which might be dissipate with a Puff of Wind; dwelling as it were between two Worlds, for Fear of being some Time or other buried in their Ruins. But let us suppose *Epicurus* to have been never so ferocious in these Matters; yet, with ^l *Gassendus's* good Leave, he will still nevertheless be an Atheist for all that; as long as it shall appear, that he held the World to be form'd without the Disposition of any^m Agent; or the Concurrence of a blessed and immortal Being; and that the Universe, with all the intelligent Beings therein, ow'd their Original to the fortuitous Concourse of Atoms.---" The God of this Philosopher is, in his System, like a Piece of Building without the Clear; and which may as well be suppos'd not to be at all, without making any Alteration therein." Yet, with all these his impious Principles; *Epicurus* has nevertheless given us a System of Morality, in many Things, just and beautiful enough. "His Doctrineⁿ touching the Sovereign Good, or Happiness, was very liable to be misunderstood, which prov'd of ill Consequence; and in effect brought an ill Character upon his Sect: But the Doctrine was in the main a very rational Doctrine; nor can it be denied, taking the Word *Happiness* in the Sense he us'd it; but that the true Happiness of Man consists in Pleasure.---" Almost all the ancient Philosophers, who have treated of humane Happiness, fix'd their Notions upon something external; which is what has occasion'd amongst 'em so great^o a Variety of Opinions: Some placing the true Happiness of Man in Riches, some

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

^b Extract from Mr. *Cudworth*, in the *Bibl. Chosie*, Tom. 2, p. 14 — & seq. See *Cudw.* p. 59. — 60. — & c.

^c See *Diog. Laert.* Lib. 10, Sect. 39. — 40. Et *Ed. Col.* p. 732. — & *Lucret.* Lib. 1, Vers. 430, & seq.

^d *Diog. Laert.* ibid. Sect. 44. — Et *Ed. Col.* p. 735. —

^e *Intermundia*. See *Cicero, de Nat. Deor.* Lib. 1, cap. 8. — & *Dax.* i. l. & *Lucret.* Lib. 5, vers. 147, & seq. & Lib. 3, vers. 18, & seq. In the first Book of *Cicero*, of the Nature of the Gods, cap. 25, — & c. this ridiculous Notion of *Epicurus's* Gods is turn'd into Ridicule.

^f *Nos autem beatam vitam in animi securitate, & in omnium vacatione munerum ponimus.* These are the Terms of *Velleius* the *Epicurean*, whom *Cicero* introduces; Lib. 1, cap. 20. — *de Nat. Deor.* See too cap. 30. — *Omnis enim per se Divinum natura necesse est Immortalis exo summa cum pace fruatur. Semota ab nostris rebus, si junctaque longe; Nam privata dolore omni, privata periculis, Ipsa suis solvens opibus, nihil vulgæ nostræ, Nec bene pro meritis capitur, nec cogitur irâ.* *Lucret.* Lib. 1, vers. 57. & seq. *Edit. Creech.*

^g *Habet enim reverentiam justam quicquid excellit, Velleius apud Cicero, de Nat. Deor.* Lib. 1, cap. 17. —

^h This was the Opinion of several of the Antients. *Quamquam video nonnullis videri, Epicurum, ne in offensionem Atheniensium cadret, verbis reliquis Deos, re sustulisse.* *Cicero, ibid.* cap. 30. —

ⁱ *Apud Cicero, de Nat. Deor.* Lib. 1, cap. 44. — *sive ultim.*

^k In the Extract of the *Bibl. Chosie*, Tom. 1, p. 17, — these Words are ascrib'd to *Pofidonius*; but they are *Cicero's*, Lib. 2, *de Divinor.* cap. 17: — *Deos enim ipse jocandi causâ induxit Epicurus perlucidos, & perslabiles, & habitantes, tanquam inter duos lucos, sic inter duos mundos, proster ætærum vinarum.*

^l *De vita Epicuri*, lib. 1, c. p. 1. & seq. Mr. *St. Evremond*, who is not suspected to bear any ill Will towards *Epicurus*; judges more sincerely and justly of this Matter, in his Essay upon the Morality of *Epicurus*; (before the fifth Volume of his *Miscellinies*, *Ed. Amsterd.* 1706.) where you may see too his Opinion about *Epicurus's* Pleasures.

^m *Docuit enim nos idem, qui cetera, [Epicurus] naturâ effectum esse mundum; nihil opus fuisse fabricas: — quod — — quemadmodum natura officere sine aliqua mente possit, non videtis. — Velleius apud Cicero, de Nat. Deor.* lib. 1, Cap. 20. — *Ex his [corpulculis] esse sicut esse calum, atque terram, nullâ cogente naturâ, sed concursu quodam fortuito.* *ibid.* cap. 24. —

ⁿ The Words of Mr. *Le Clerc.* in his *Libl. Univ.* Tom. 10, p. 531. —

^o Mr. *Baile's* *Di&.* in the Text of Article, *Epicure*, p. 1133. —

^p *Ibid.* Rem. (G. —) p. 1133, Col. 2. —

^q See *Augustin.* *de Civ. Dei.* Lib. 19, cap. 1. — Tom. 5, col. 1137, C. — & c. Here Mr. *Baile* cautions us not to believe what so many tell us, viz. that, according to *Varro*, there were 288 different Opinions about the Nature of the Sovereign Good. 'Tis only a Piece of Pleasantry of that learned *Roman*.

“ some in Science, some in Honours, and others
 “ in Virtue, &c. It is plain, they fix'd the
 “ Idea of Happiness to --- that, which they
 “ thought capable of producing in us a State
 “ of Felicity; without ever telling us what that
 “ State of the Soul is, in which its Happiness
 “ consists. *Epicurus* has not run into this Mistake. --- He said, that Man's Happiness consists in his being at Ease, and under the actual Sensation of Pleasure; in a word, in Contentedness: This no way proves, the Placing of the Happiness of Man in good Cheer and Venery; for these can at most be but efficient Causes; which make no Part of the Matter in Question. When an Enquiry into the efficient Causes of Contentedness, comes to be the Matter in hand; you will then find the very best of 'em mark'd out to you: On the one hand, you will find such Objects as are best fitted for the Preservation of a good Constitution; on the other, such Occupations as are most proper to prevent Uneasiness of Mind: You will then find preferib'd to you Sobriety, Temperance, and a resolute Opposition to all those tumultuous and unruly Passions, which out the Soul of its State of Happiness; that is to say, of that sweet Composure and Acquiescence it has in its present Condition. These were the Pleasures in which *Epicurus* made the Happiness of the Soul to consist. An Outcry however was rais'd against the Word *Pleasure*; these who had been before debauch'd and corrupted, made an ill Use of it; and the Enemies of the Sect took Advantage of all this; thus the Name of an *Epicurean* became extremely odious. All which is nevertheless merely accidental; and may as well betay any other Doctrine.” Thus it is that Mr. *Bayle* justifies the fundamental Principle of *Epicurus*. It must however be acknowledg'd, that, (tho' *Epicurus* in the main might reason well, in keeping to the general Idea of Tranquility, or Contentment of Mind,) yet he neither taught true Happiness; which is the End of Morality, and the Object of all humane Desire; nor solid Virtue: And that 'twas even impossible for him, in pursuance of his own Principles, so to do. It is certain, that the Soul of Man thirsts after perfect Happiness; which, 'tis evident, beyond Contradiction, can never be attain'd to in such a Life, as this we Mortals lead on Earth*. All the Happiness we can reasonably aspire to here below, is an agreeable Tranquility of Mind; produc'd by the View of that perfectly happy State, which we hope to enjoy after this Life ended. “ If Men (I make use of Mr. *Lock*'s own Words) in this Life only have Hope; if in this Life they can only enjoy; 'tis not strange, nor unreasonable, that they should seek their Happiness by avoiding all Things that dis-

“ ease them here; and by pursuing all that de-
 “ light them; wherein it will be no Wonder
 “ to find Variety and Difference. For if there
 “ be no Prospect beyond the Grave, the Infe-
 “ rence is certainly right, *Let us eat and drink,*
 “ *let us enjoy what we delight in, for we know*
 “ *we shall die.*” Thus most of the antient
 Philosophers, not grounding their Morality upon the Supposition of the Immortality of the Soul; and looking for their *Summum Bonum* in this Life; did vainly enquire, “ Whether it
 “ consisted in Riches, or bodily Delights, or
 “ Virtue, or Contemplation? And they might
 “ have as reasonably disputed, whether the best
 “ Relish were to be found in Apples, Plumbs,
 “ or Nuts; and have divided themselves into
 “ Sects upon it. For as pleasant Tastes de-
 “ pend not on the Things themselves, but their
 “ Agreeableness to this or that particular Pa-
 “ late, wherein there is great Variety; so the
 “ greatest Happiness consists in the having those
 “ Things which produce the greatest Pleasure;
 “ and in the Absence of those which cause any
 “ Disturbance, or any Pain. Now, these to dif-
 “ ferent Men, are very different Things” Since
 therefore *Ep. curus* expressly maintain'd, that the Soul dies with the Body; and made this too his Reason he us'd, to “ recover Men from the Fear of Death; he could not promise more than a Happiness of short Duration; and his Morality must in the Nature of it be the Concern of this Life only. In this he no way contradicts his Principles; and Mr. *Le Clerc* has very justly observ'd, that his * Morality has two enormous Defects; Defects too, which make the laudable Precepts it contains, of little or no Effect; whatever may be said by those, who have undertaken his Apology, to the contrary. The first is, that its End propos'd being only the Attainment of an easy and quiet Life; it can engage us to pursue its Maxims upon no other View, but the present Advantage, that accrues from that Manner of Life it prescribes. We ought not to be covetous, for Example, according to *Epicurus*, and *Hirace*, (a Sectary of his,) because Covetousness cannot make us happy in this Life; as the latter has in many Places made appear. This being then an establish'd Principle, put the Case a Man should find himself under a Government, where Vice was rewarded, and Virtue punish'd; what must he do? Suppose a Man liv'd in *Japan*, and that a considerable Party there treated the Superstitions of that Country, as ridiculous, and pernicious to Society; and that himself also was of their Opinion: If the Emperour of *Japan* should raise a Persecution against all of that Persuasion, ought he too with the rest voluntarily to suffer Persecution? No certainly, according to *Epicurus*; for, in his
 “ Opinion,

* See *Diog. Laert.* Lib. 10, Sect. 127. — 128, — & seq. Et Ed. *Colon.* p. 790. & seq. Notwithstanding this favourable Interpretation of the fundamental Principle of the Morals of *Epicurus*; this Principle is nevertheless dangerous to Civil Society. See what Mr. *Perizonius* says, concerning the Reasons why the *Epicureans* were driven from several Places; in his Notes on *E. u. Var. Hist.* Lib. 9, cap. 12. Not. 2. See also Not. 4. of the same Commentator, on Lib. 4, c. 13.

* See the *Bibl. Chrest.* of Mr. *Le Clerc*, Tom. 11, p. 307. — 308.

* *Essay on humane Understanding*, Book 2, chap. 21, Sect. 55, p. 171, — Ed. *Lond.* 1706.

* Mr. *Lock*, ubi supra, p. 171. —

* *Diog. Laert.* lib. 10, Sect. 124, — 125. — Et Ed. *Colon. Allobr.* p. 786, — & d.

* *Bibl. Univ.ers.* Tom. 10, p. 288, — & seq.

“Opinion, Virtue is of no Estimation but for the present Advantage it brings with it. As to the Supposition, that Vice may be rewarded, and Virtue punish’d; ’tis by no Means the Supposition of an Impossibility; ’tis what is actually practis’d throughout the greatest Part of the World. Thus all the Arguments drawn from the present Advantage, which is found in the Exercise of Virtue, are very weak, especially if they stand alone; and it is highly probable, that had the *Athenians* offer’d to have treated *Epicurus*, as they did *Socrates*; the first would not have thought it an Honour to die a Year for his Philosophy, as the second did; who, when they would have hinder’d him from Philosophizing, answer’d, *That it was better to obey God, than Man.*” We have even at this Day some of the Maxims of *Epicurus*; among which there is one, wherein that Philosopher expressly says, *That ’ Injustice is not evil in itself; and if we ought to refrain from doing wrong to another, and from violating the Laws which forbid it; ’tis purely thro’ Fear of being discover’d, and expos’d to Punishment; for, adds he, tho’ we may have escap’d a thou-*

sand Times, we cannot always be assur’d, that what has been committed in the darkeſt Corners, and with the greateſt Privacy, will not, before we die, come to the Knowledge of the Miſters of Juſtice. “ The second Defect in the Morality of *Epicurus* is, that, in what Manner soever that Philosopher liv’d towards the latter End of his Days; he did not prohibit certain Pleasures, which most certainly do disturb humane Society; and would cause infinite Disorders, if all Men were of his Opinion. *Horace* may, in Mr. *Dacier’s* Judgment, be esteem’d a “ rigid Epicurean; and yet his Writings are full of the Marks of a Licentiousness, which one would not care to call by its true Name: And if he exclaim’d against Adultery, for Example, as he does in his second Satyr; ’twas only on account of the Danger there was “ in being surpriz’d with a married Woman. This is likewise conformable to the Maxims of his Master; who was against the Enjoyment of that Pleasure “, which brought with it more Harm than Good; as he also would have deprecis’d the Virtue, which would have brought upon him too much Trouble and Vexation.”

¹ Ἡ ἀδικία, ἐν καθ’ ἑαυτὴν κακόν, ἀλλ’ ἐν τῷ κατὰ τὴν ὑποφίαν φέσθαι, εἰ μὴ κήρει ὑπὲρ τῶν τοιούτων ἐδεσφικόταται κακοίαι. οὐ γὰρ τὸ κατὰ τὴν ἀδικίαν αἰσιν ἐπινοεῖται πρὸς ἀλλότρου, εἰ; τὸ μὴ βλάβησιν κινεῖ βλαπτοῦσα. πικρὸν ἵτι κήρει καὶ κινεῖται; εἰ τῷ παρόντι τῶν ἀνδρῶν μὴ γὰρ κατασφραγί; ἀδίκων εἰς κήρει. *Diog. Laert.* Lib. 10, Sect. 151. — Et Ed. *Colan. Alboer* p. 502 —

² *biō. Universi ubi supra.* p. 289 —
³ *Remarks on Horace, Tom. 7, p. 340, & seq.* in the last Edition, printed at Paris. Et p. 371. — Edit. de Paris, 1709.
⁴ This also was the Reason why *Epicurus* said, *that we ought to abstain from our Neighbour’s Wife*: At least if we may give Credit to *Origen* against *Celsus*. Lib. 7, p. 374. — cited by Mr. *Ménage*, p. 469, Col. 2. — on *Diog. Laert.* Lib. 10, Sect. 112. — Et p. 782. — Edit. *Colan. Allobrogum.*
⁵ Οὐδέποτε ἴδονη καθ’ ἑαυτὴν κακόν ἀλλὰ τὰ πρὸν ἴδονεν τοιαῦτα, πολλοπραγίας ἐπιφέρει τὰς ἀρχαίαι; τῶν ἡδονῶν. *Diog. Laert.* Lib. 10, Sect. 141. — Et. Ed. *Col.* p. 797. —



S E C T. XXVII.

ZENO the Cypriot, of *Citium*, Cotemporary of *Epicurus*, founded the Sect of the *Stoicks*; a Sect directly opposite to that of the Disciples of *Epicurus*, his Cotemporary *. The *Stoicks* imagin’d the World to be an Animal; whereof the supreme God, they said, was the Soul, or the active Principle; and Matter, the passive Principle. That eternal intelligent Being, which produc’d all Things, and directs them by his Providence; was, in their Opinion, “ nothing but a fiery Substance; or, as it were, an operative mechanic Fire; whereof some Parts animated Plants, Beasts, and Men; whilst

“ other Parts, more subtil and elastic, made the Gods in the Sun, and Stars.” They paid religious Worship to these inferior Deities; but they believ’d, that the Gods themselves, the supreme God only excepted, would one Day be destroy’d by Fire, with the rest of the World; which, in their Opinion, was to undergo several Conflagrations; each whereof would happen after a certain Period or Revolution of a fix’d Number of Years. They held, that the Souls of Men were, after Death, reunited to that subtil Air, from whence they had been taken; but they believ’d ‘em

* He died eight Years after *Epicurus*.
¹ Ζῆνων ἢ α ὁ Κίτιος. *Diog. Laert.* Lib. 7, Sect. 143. — Et p. 525. — Ed. *Col.* See *Cicer. de Nat. Deor.* Lib. 2, — cap. 12, — & seq.
² Δοκεῖ δὲ ἀνοετῆ, ἀρχαί, εἶναι τῶν ὄντων θεός, τὸ ποιεῖν ἢ τὸ πάσχειν. τὸ μὲν οὖν πάσχειν, εἶναι κηράτοιον εἶσαν τῶν ὄντων τὸ δὲ ποιεῖν, τὸν ἐν αὐτῇ κήρει, τὸν θεόν. *Diog. Laert.* Lib. 7, Sect. 134. — Et Ed. *Col.* p. 519. —
³ Τοῦτον γὰρ οὐκ αἰδίων, διὰ πάσης αἰῶνος (ὄλης) δημιουργεῖν ἐκαστα. — *Diog. Laert.* Sect. 124. — ubi supra. Θεὸν δὲ, εἶναι κήρει ἀβίαντον, κοινόν, τέλειον, ἢ νοεόν ἐν ἐυδαμονία, κινήσει πάντος ἀνεπίδουτου, προνοητικὸν νόσει τε ἢ τῶν ἐν κόσμῳ μὴ εἶναι μὲν τῶν ἀπὸ νοσφῶν, *Ibid.* Sect. 147. — Et p. 525, — 526. — Ed. *Col.* See *Cic. de Nat. Deor.* Lib. 2, c. 6, &c. where this whole Matter is treated of at large.
⁴ The Words of Mr. *Bayle*, in his *Continuation des Pensées diverses*, cap. 67. See what he says there, and also p. 120, & seq. on the Absurdity of that Hypothesis of the Soul of the World
⁵ Δοκεῖ δὲ ἀνοετῆ, τῶν μὲν φῶν εἶναι πῦρ κοινόν, ὅθεν βλάσκον εἰς γένεσιν ὑπὲρ ἐστὶ πνεῦμα πυρροῦς ἢ τοιαῦτα. *Diog. Laert.* ubi supra, Sect. 156. — Et Ed. *Col.* p. 534 — *Zeno igitur ita naturam definit, ut eam dicat, ignem esse artem, eorum ad quos eundem progredientem via.* *Cic. Nat. Deor.* Lib. 2, c. 22. — *Atque hac mundi duritate per se, triuenda est fidentius eadem dicuntur.* *Quo ex mobilissima purissimaque Aetheris parte generantur.* *Ibid.* c. 15 — v. *Davis.* i. l.
⁶ Οὐ (θεός) δὲ ἄφροσύνη; ἐστὶ ἢ ἀγέννητος, δημιουργός ἐν τῷ διακρούσει; καὶ ἡ γένεσιν ποῦς παρόντων, ἐυδαμον ἢ τῶν ἀπασαν ὄντων ἢ πάντων ἐξ ἑαυτοῦ γενέσθαι. *Diog. Laert.* Sect. 137. — Et Ed. *Col.* v. 521. — See *Cic. de Nat. Deor.* Lib. 2, c. 22. — *Senec. de Consolat. ad Marc.* c. 26 — in fine. And the Remark (1) on *Artic. Chry. p. Bayle’s Dict.* As also the Dissertation *de Stoica mundi exustione.* by *J. Thoaninus*, *Lip.* 1676. And Dissert. the tenth of the same Volume, with the fifth.
⁷ Or Air. See *Ualerius on Marcus Antonius*, Lib. 4, Sect. 21, p. 139, Col. 2. — See Et Lib. 7, Sect. 50, p. 279, Col. 2, lin. 24. In the latter of these Passages, the Emperor expresses his Thoughts by some Verses of *Euripides*, taken out of a Tragedy, now

em 'corruptible; and made 'em to subsist no longer, at farthest, than the Conflagration of the World; nay, some of 'em did not allow even this Privilege, but to the Souls of their Sages. They * acknowledg'd an inevitable Destiny or Fate; to which they subjected the Gods themselves, without excepting even their supreme Deity. "Nor has there ever been, "amongst all the Philosophers', yet extant, "any who have spoke in stronger Terms of the "fatal Necessity of Things; or who have more "magnify'd " the Liberty of Man, than the "Stoicks." These Principles, I must own, are monstrous; and the several Philosophers of that Sect have, each in particular, added thereto some new Absurdities. However, bating some certain Things, nothing can be more beautiful than their Morality, consider'd in itself; which, by only correcting a few of its Maxims, with some small Difference in their Explanation; might be easily reduc'd to a System of Morality, very near approaching to that of the Gospel; to that, I say, which alone is entirely conformable to the Dictates of right Reason.

The great and fundamental Principle of the Morality of the Stoicks is, *That we ought to live * conformable to Nature*; and that the sovereign Good of Man consists in Virtue; which is nothing else, according to them, but ° a Life conformable to Nature; for, say they, *Nature leads us to Virtue*. By this *Nature* °, some of 'em meant directly the Constitution of the humane

Nature; or that Light of Reason, by the Help of which we discern what is truly suitable to our State and Condition; others meant, universal Reason, or the Will of God; which forbids us every Thing, that is contrary to our natural Constitution; and prescribes to us every Thing that is agreeable thereto; and others again, meant both these join'd together. They said, *That a Justice, as such, is not from the Institution of Men, but from its own Nature; as is also Law and right Reason; and that the Difference of Opinions, that prevail among Philosophers, ought not to discourage us from the Study of Philosophy; for, if that Reason was of Weight enough to divert or dissuade us from any Thing, we ought to leave the World; there being nothing in it, about which Men are not divided in their Opinions.* They consider'd the World as ° a Kingdom, of which God is the King; and as a Total, to the Interest and Utility of which, every Person, as a Part thereof, ought to concur, and direct all his Actions; without ever preferring his own private Advantage to the common Concern. They believ'd, they were ° born, not every one for himself alone; but for the Good of humane Society: this was the distinguishing ° Character of their Sect; this the Idea they ° gave of the Nature of Justice and Honesty. There was never any Sect of Philosophers, who so well understood, and so strongly press'd those indispenfable Duties of Humanity, which Men, precisely consider'd as such,

now lost, call'd *Chrystippus*; where he says, that *what was born of the Earth, returns to Earth; and that which had an atherial Origin, returns to the Celestial Poles.* But, as Mr. Le Clerc has very well observ'd, *Eibl. Choj.* Tom. 6, p. 244.— *Et seq.* that Poet had other Ideas, than those of the *Stoicks*; and believ'd the Immortality of the Soul. *Euripides* repeated the first Words of those Verses, in another Tragedy, which is now lost; whereof *Cicero* has given us a Translation; *Reddenda est terra terra.*— *Trif. Quæst.* Lib. 3, Cap. 25.— Edit. *Græc.* and not *Trif.* *Quæst.* Lib. 2, as Mr. Bayle has cited it, in his *Dict. Art. Amphiarvus*, p. 208, Col. 2.— Rem. (K.) There is another Fault too, in this Article, but chargeable upon the Printers of the Edition, he made use of. He criticises, p. 208, col. 2.— upon *Anax.* as if, in turning the Passage of *Euripides*, reported by *Plutarch*, (*Conol. ad Apoll.* p. 110.— 111.— Ed. *Wich.* Et 192.— *Steph.*) he had render'd the Words, 'Ο παρὰ τῷ ποιητῇ Ἀνακρέωνος, by *Amphiarvus en un poëte*: but in the fine Edition of *Genev.* in Folio, 1604, by *J. Stoer*, I saw it was, as it should be, *en un poëte*, p. 251, A.— And 'tis likely that the other correct Editions read so too. 'Tis so Edit. *ibid.* An. 1627, p. 251, A.—

Δὲ γὰρ πάντα εἶναι (τῶν ψυχῶν) ἢ μετὰ θάλασσαν ἐπιπέσειν, φερατὴν δὲ εἶναι. τὴν δὲ τῶν ὄλων, ἀφῆρατον, ἢ; μέρη εἶναι τὰς ἐν τοῖς κείνοις --- Κλειάνθης μὲν ἐν πλάσις ἐπιδιαμαρτυρεῖ μέχρι τῆς ἐκπυρρῆσεως; Χρύσιππος δὲ τὴν τῶν σοφῶν μόνων. *Diog. Laert.* lib. 7, Sect. 156.— 157.— Et Ed. *Colon.* p. 534.—

* See the thirteenth of the Dissertations I quoted last; and Rem. (H) on the Artic. of *Chrystippus*, in Mr. Bayle's *Dict.* p. 925, Col. 1.— *Étc.*

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

° Those Books which remain of the *Stoicks*, are full of Sentences on that Subject, carried sometimes even to a very high Degree of Piefumption.

° Πῶς εἶσι καὶ ἀείων ἔχον --- τέλει εἶπε, τὸ ἐμολογουμένως τῆ φύσει ἔχον. *Diog. Laert.* ubi supra, Sect. 87.— Et p. 490.— Ed. *Col.* *Cicero ergo hoc sit extremum, congruenter natura convenienterque utere*, &c. *Cicero*, under the Name of *Cato*, the *Stoick*, *de Fin. bon. & mal.* Lib. 3, Cap. 7.—

° Ὅπερ ἐστὶ καὶ ἀείων ἔχον. ἄγει γὰρ πρὸς τὴν φύσιν ἡμεῖς ἢ φύσις. *Diog. Laert.* *ibid.* Sect. 87.—

° Πάλιν δ' ἔσον ἐστὶ τὸ καὶ ἀρετὴν ἔχον τῷ καὶ ἐμπερίαν τῶν φύσει συμβαινόντων ἔχον ὡς φησι Χρύσιππος ἐν τῷ πρώτῳ περὶ τελευτῶν. μέγα γὰρ εἶσιν αἱ ἡμετέριαι φύσεις τῆς τῶν ὄλων. διότερ τέλει γίνεσθαι τὸ ἀκολούθως τῆ φύσει ἔχον. ὅπερ ἐστὶ καὶ ἀρετὴν αὐτοῦ ἢ καὶ τὴν τῶν ὄλων, οὐδὲν ἐπιβλήσας αὐτὸν ἀπαγορεύσειν ἔωθεν νομῶν ὁ κενός, ὅπερ ἐστὶν ὁ ἐρῶς; τῶς δὲ διὰ πάντων ἐρχόμενον, ὁ αὐτὸς ἐν τῷ αἰετῶ κατὰ φύσιν ἐστὶ τῆς τῶν ὄλων ἀεικίσεως ὄντι. εἶναι δ' αὐτὸ τῶν τῆς εὐδαιμονίας ἀρετῆς, ἢ εὐροίαν βίω, ὅταν πάντα πρέτῃται καὶ τῆς συμφωνίας τῆς τῶν ἐκείνων ἀεικίσεως πρὸς τὴν τῶν ὄλων ἀεικίσεως βίωσιν. ὁ μὲν ἔν Διογένης τέλει φησὶ γίνεσθαι, τὸ εὐλογιεῖσθαι ἐν τῷ τῶν καὶ φύσει ἔχον. Ἀρχαῖοι δὲ τὸ πάντα τὰ κατὰ φύσιν ἐπιτελεῖσθαι ἔχον. φύσει δὲ Χρύσιππος μὲν εἰσάγει, ἢ ἀκολούθως δεῖ ἔχον, τὴν τε κενὴν, ἢ ἔδωκε τὴν ἀθροῦσιν. ὁ δὲ Κλειάνθης τὴν κενὴν μόνον ἐκδέχεται φύσει, ἢ ἀκολουθεῖν δεῖ, εἰσάγει δὲ ἢ τὴν ἐπὶ μέρου. *Diog. Laert.* ubi supra, Sect. 87.— 88.— 89. p. 490,— 491. Edit. *Col.*

° φύσει τε τὸ δεικνύειν εἶναι, ἢ μὴ θέσει, ὡς ἢ νόμον ἢ τὸν ὁρθόν λόγον, κατὰ φησι Χρύσιππος ἐν τῷ περὶ κατὰ. διὰ δὲ αὐτῶν μικρὸ τῶν διαφωρίαν ἀδίσταστοι φιλοσοφίαι; ἐτεὶ τῶν λόγων τῶν προλεγεινῶν ὄλων τὸν βίω, ὡς ἢ Ἡοσιδῶντος φησὶν ἐν τοῖς προτραπικαῖς. *Diog. Laert.* ubi supra, Sect. 128.— 129. Et Ed. *Colon.* p. 515.— 516.

° *Mundum autem [Stoici] co-sent regi numme Deorum, eumque esse quasi communem urbem & civitatem Hominum, & Decurum; & unquamque nostrum opus mundi esse partem: ex quo illud naturæ co-sequi, ut communem utilitatem nostræ anteponamus.* *Cato apud Cicero. de Fin. bon. & mal.* Lib. 3, cap. 19.—

° *Kavvudis γὰρ φύσει ἢ πρακτικῶς.* *Diog. Laert.* ubi supra, Sect. 123.— Et Ed. *Col.* p. 512.— Ὅτι γὰρ πρὸς πᾶσι τοῖς ἀνθρώποις ἡμεῖς ἀεικίσεως, πάλαι δὲ δεικνύειν. *Marc. Antonius.* Lib. 5, Sect. 19.— There are on this Head many beautiful Passages in the Reflections of that Emperor. See *Cicero. de Fin.* Lib. 3, Cap. 20.— *Et seq.*

° Thus *Lucan* characterizes it, in speaking of *Cato*: *Hi mores, hæc auri immota Catonis sæcra fuit, servare modam, suæque tenere, Naturamque sequi, patriæque impendere vitam; Nec sibi, sed toti genitum se credere mundo,* Lib. 2, v. 380, *Et seq.*

° *Αἰκίσεως δὲ, ὅτι νόμος ἐστὶν ἀεικίσεως, ἢ καὶ νόμος πρακτικῶν.* *Diog. Laert.* ubi supra, Sect. 99.— p. 497.— 498, Ed. *Col.* *Quicquid æquum, justumque esset, id etiam honestum [consent Stoici]: vicissimque, quicquid esset honestum, id justum etiam, atque æquum fore.* *Cicero. de Fin. bon. & mal.* Lib. 3, cap. 21.—

“ the ⁱⁱⁱ Soul our first and principal Care; “ to honour it, as the most excellent Part of us; “ to have nothing so much at Heart ^{kkk}, or in “ so great Esteem, as Virtue and Honesty; ne- “ ver to suffer our selves to swerve from our Du- “ ty ^{lll}, as far as we can attain to the Know- “ ledge of it; either through the Desire of Life, “ much less of any other Thing; ^{mm} or through “ the Fear and Dread of Torments or Death, “ much less of any Damage or Loss whatsoever.”

This is the beautiful Side of the Morality of the Stoicks; and it must be further acknow- ledg'd, to their Praise, that they stopp'd not at general Notions; and indeterminate unapply'd Maxims: But on the contrary, to judge of the Matter only by those few Writings, we have left us by the three Persons above mention'd, with the Fragments of others, and the Writings of those who have reason'd upon their Principles; it may be truly affirm'd, that of all the Philosophers of Antiquity, they are the Men, who have gone the farthest into the Particulars of Morality; and have the best apply'd its general Precepts to the several States of Life; and the different Exigences of humane Affairs. *Aristo* of *Chios*, who thought it sufficient to estab- lish ⁿⁿ in general the Nature of true Wis- dom; and to shew wherein the sovereign Hap- piness of Man consists; without entering into any particular Explication of the Duties be- tween Husbands and Wives; Parents and Chil- dren; Masters and Servants: This Philosopher, I say, who departed a little from the Sentiments of his Master *Zeno*, form'd indeed a kind of Sect, but it did not last long: And *Seneca* has prov'd against him, that particular Precepts, as well as Maxims, or moral Reflections couch'd in short lively Sentences; are extremely useful. *Aristo* said, it was the proper Business of Peda- gogues, and ^{ooo} Nurses, and therefore ought to be left wholly to them. *A fine Reason indeed*, answers ^{ppp} *Seneca*: as if the Sage was not the *Pedagogue* of Mankind! “ *Chryssippus* even con- “ descend'd to give short ^{qqq} Precepts about “ the Education of Children: which as it is a “ Thing in itself of no small Importance to “ Mankind; so this Condescension of *Chryssippus* “ cannot but deserve Commendation.” But ha- ving done Justice to the *Stoicks*, as to what we find laudable; let us now see what there is to be found in that Sect which may be justly es- teem'd blameable. I have nothing to say, as to the Vanity, Hypocrisy, and bad Lives, that

several particular Philosophers of that Sect have been charg'd with; These are personal Faults, and extend not to their Doctrines: and I shall here, as I do every where else, only consider the Opinions, as they are purely and simply in themselves. The Idea then, which the *Stoicks* form'd of Virtue, how magnificent soever it may at first appear; is, in some Respects, if rightly consider'd, not altogether just, or com- plet; not intirely founded on its true Prin- ciples; nor exempt from Errour. Virtue, say they, is the sovereign Good; nor is there any other Good besides Virtue: The Sage is still ^{rrr} happy, tho' in the Midst of the most cruel Torments. But, besides that Virtue is only the “ efficient Cause of Happiness, and not Hap- piness itself; they laid no Foundation, in the Hopes of another Life, for the Recompence and Consolation of Virtue: nor indeed could they, as not properly acknowledging the Im- mortality of the Soul; or at least ^{sss} speaking of it but in a very confus'd and ambiguous Manner. Inasmuch, that *Brutus*, who was a *Stoick*, seems ^{ttt} not to have been so much out, as some would imagine, in those dying Words of his ^{uuu}: *Wretched Virtue, how have I been deluded in thy Service! I thought thee a real Good, and as such have I always devoted myself to thee; but thou, alas! art only an empty Name, a Phantom, an abject Slave expos'd to the Insults of Fortune.* And in truth, if the Idea of Rewards and Punishments in another Life, be not join'd to the Practice of Virtue; “ both “ Virtue and Innocence may be rank'd ^{vvv} in “ the Number of those Things, on which *So- lon* has pronounc'd his definitive Sentence: “ *Vanity of Vanities, all is Vanity!* To rely “ upon Innocence, would be to lean on a bro- “ ken Reed; which will not fail to pierce the “ Hand, that rests upon it. *God*, as he is “ the Disposer of Events, the grand Almoner “ both of good and bad Success; has here on “ Earth, made Virtue and Innocence no less “ subject to his general Laws; than Health and “ Riches.” Besides, to say that a Man who suffers for a good Cause, is really happy, altho' he hath no Reward to expect after Death; is to advance a Proposition equally contrary to right Reason, and to every Sentiment of Nature. But this is not the only Thing on which the *Stoicks* form'd extravagant and chimerical Ideas. Every one knows, what ^{zzz} a Jest the World has made of their Sage;

ⁱⁱⁱ Τὸν ἐν οὐ τὸ ἐπιτεταμένον. Idem. Lib. 5, Sect. 21.— See Lib. 2, Sect. 13.—

^{kkk} Idem, Lib. 3, Sect. 6.— Lib. 6, Sect. 16.— ^{lll} Idem, Lib. 6, Sect. 22.— Lib. 7, Sect. 15.— Lib. 8, Sect. 5.—

^{mm} Idem, Lib. 7, Sect. 44. ex *Platon. Apol.* See above, Lect. (mm.)

ⁿⁿ *Aristo Chius --- Moralem, quam solum reliquerat, circumtulit. Nam cum locum, qui monitiones continet, sustulit; & Pala- gogi esse dixit, non Philosophi: tanquam quidquam aliud sit sapiens, quam humani generis Paedagogus! Senec. Epist. 89, p. 296.— E. J. Gronov. Eam partem Philosophia, qua dat propriis cuique persona precepta, nec in universum componit hominem, sed merito suadet, au- modo e gerat adversus uxorem: patri, quomodo educet uberos; domino, quomodo servos regat; --- *Aristo Stoicus, --- levem existimavit, & que non devent in p. us usque: at illam, non habentem precepta, parvum aut proficere; ipsique decreta Philosophia, constitu- tionem esse summi boni, qu. in qui bene intellexit & didicit, quid in quaque re faciendum sit, sibi ipse precepit.* Idem, Epist. 94, — at the Beginning, p. 327.— Ed. Gronov.*

^{ooo} See *sexius Empiricus, adv. Mathem.* Lib. 7, apud *Menag. ad Diog. Laert.* Sect. 160, p. 331, Col. 1.—

^{ppp} Ubi supra, Epist. 89, p. 296, — Ed. Gronov.

^{qqq} See *Mr. Bayle's Dictionary, Artic. Chrysi.* p. Rem. (R, —) p. 929, Col. 2.— & *Quintil. Inst. Orat.* lib. 1, c. 1, p. 6.— c. 3, v. o. — c. 10, p. 61.— c. 11, p. 66, — Edit. Oxon.

^{rrr} See *Cicero. Paradox.* 1, 2. *Diog. Laert.* Sect. 128.— and the Books of *Cicero, de Fin. bon. & mal.* or *Quaest. Vulcul.*

^{sss} See what has been said before, concerning the Principles of the Morality of *Epicurus*, Sect. 26, p. 67, col. 1.—

^{ttt} See *Cataker* on *Marc. Antonin.* Lib. 4, Sect. 21, — p. 129, col. 2, lin. 22, & seq.

^{uuu} Dict. of *Mr. Bayle*, Artic. *Brutus*, Rem. (B), p. 716, col. 1.—

^{zzz} *Ibid.* Rem. (B) — See *Plutarch*, in his *Life of Brutus*. And *de Superstitione*, init. And *Diog.* lib. 47, sub fin. *Plutarch.* Tom. 2, 1008, B. — & d. Tom. 2, p. 167, A. — Edit. *Francos.* *Diog. Caj.* p. 406, B. — Ed. *H. Steph.*

^{aaa} *Mr. Bayle*, ubi supra, Rem. (C), p. 716, Col. 2.—

^{bbb} See *Horace*, Lib. 1, Sat. 3, Vers. 117, & seq. *Cicero. Orat. pro Murena*, cap. 29. — & seq.

Sage; ¹ whom, on the one hand, they de-
 ed of even the most innocent and mode-
 rate Passions, nay, in a Manner, of Hu-
 manity itself; whilst on the other, they
 made him to vie Happiness with the very Gods
 themselves. They held all Sins to be ² equal.
 They said, that, Virtue excepted, all other
 Things were indifferent ³; that is to say, nei-
 ther good nor bad; but of these *indifferent*
Things, some were *eligible*, and others *rejectable*.
Mr. and Madam Dacier have undertaken the
 Apology of the true *Stoicks*, on all these
 Heads. ⁴ “If these Philosophers, say they,
 “have mix’d something of Austerity with the
 “Sentiments of their Master *Socrates*; ’twas
 “not so much the Effect of a Savage and mo-
 “rose Disposition; but rather an Expedient,
 “which Prudence suggested to them: for be-
 “ing well acquainted with the natural Imbe-
 “cillity, and Supineness of Mankind; they
 “have thought fit, in prescribing Rules of
 “Duty, to press them to a greater Degree of
 “Perfection, than they are capable of; that so
 “by exerting their utmost Endeavours to come
 “up to their Precepts, they might at least
 “come to fix in a State of Mediocrity; as
 “Trees which stand bent one Way are set
 “right by a contrary Flexure. Thus when
 “*Zeno*, for Example, said, that all Crimes were
 “equal; his Intent was to reclaim Men from
 “an unhappy Opinion, which they are but too
 “apt to give into; that provided they keep
 “clear of Crimes of the first Magnitude, they
 “are not oblig’d to be so much upon their
 “Guard against the lesser or more venal Trans-
 “gressions; now his Design was to persuade ’em,
 “that the least Sin, if neglected, becomes in-
 “curable; and that in the Eye of *God*, who is
 “the very Essence of Purity; there can be no-
 “thing found in us, that is sinful, but what de-
 “serves Death; unless we disarm his Justice by
 “a due Atonement and Repentance: But then
 “comes a *Chrysisippus*, who grossly mistaking this
 “Precept; maintains, that there is no Diffe-
 “rence between the Stealing of Cabbages out
 “of a Garden, and the committing of Sacri-
 “lege; between the cutting one’s Father’s
 “Throat, and the killing of a Capon; which
 “two Actions he will have to deserve one and
 “the same Punishment: This indeed is so far
 “from restraining; that it rather encourages
 “and prompts Men to the Commission of the
 “greatest Enormities. When *Zeno* said, that
 “the Sage ought to be void of Compassion;
 “his Aim was to shew, that the Sage does not
 “confine his Beneficence to those Succours alone,
 “which Pity and Compassion extort from him;

“but thinks himself oblig’d to aid and assist
 “his Neighbour, though he be under no such
 “Emotion: Though a *Chrysisippus* shall take
 “Occasion from hence, to break asunder all
 “the Bands of Society; and trample under
 “Foot that merciful Disposition, which is one
 “of the most essential Characters of the Deity.
 “When *Zeno* said, that the Sage relies on him-
 “self alone for all Things; he only meant to
 “shew, that our true and real Happiness could
 “not depend on the Actions of other Men;
 “and to encounter the supine Laziness of those,
 “who, on Pretence of committing themselves
 “to Providence, expect every Thing imme-
 “diately from *God*; without ever seeking to
 “obtain his Favour, by their own honest En-
 “deavours and Industry. Besides, as he taught,
 “that the Soul was a Part of *God*, nay, *God*
 “himself; so this Precept, that Men ought to
 “rely on themselves for all Things, was in Ef-
 “fect the same as to say; that we ought in all
 “Things to rely on the Providence of *God*,
 “that governs us. But then comes a Disciple
 “of his, full of Ignorance and Pride; and in-
 “tensely perverts this Precept, by drawing from
 “it this pernicious Consequence; That the
 “Sage is above even *God* himself; and is, in-
 “dependently of that sovereign Being who
 “created him, the sole Author of his own Hap-
 “piness. Of almost the same Nature are all
 “those other Passages, which have at any Time
 “been made Use of to bring the Doctrine of
 “the *Stoicks* under Odium and Discredit.”
 Not to examine, whether these Expositions are
 as well grounded, ⁵ as they are ingenious; or
 whether they do not rather favour of a Com-
 mentator, extremely prepossess’d in Favour of
 his Author, and in general of all Antiquity;
 and whether too they are not worthy of those,
 who, to enhance the Merit of the antients,
 and keep up their Characters; make ’em to be
 as enlighten’d as the Prophets and Apostles;
 find out very great Beauties in the most insipid
 and ridiculous Passages; and wreat the Sense of
 the clearest Expressions, even to the expound-
 ing figuratively the *Metempsychosis* of *Pythago-
 ras*: I shall content my self with taking Notice
 of two Things, which to me seem incontestable:
 The one is, that rigid and over-strain’d
 Maxims are not at all proper to inspire true
 Notions of Virtue; and so far is the demanding
 more of Men than their just Duties, from being
 the proper Method to induce ’em to a due Per-
 formance thereof; that Experience plainly shews
 us, that to require too much, is the ready Way
 to obtain nothing at all. The other is, that
 ’tis the Part of a true Philosopher to reject, es-
 pecially

¹ *Cumque perturbaticnem animi illi [superiores Philosophi] ex homine non tollerent, naturaque & condolere, et conatiferi, et ex-
 tinguere, et esseri latere dicent; sed ea contraherent, in angustiam que deciderent: hic [Zeno] omnibus his, quasi morbis, coluit ca-
 vere Sapientem. Cicero. Academ. Quæst. Lib. 1, Cap. 10.— See Diog. Laert. Lib. 7. Sect. 122, 123.— Et p. 512, — & seq.
 Ed. Colon.*

² *Αφρονει τε αυτοις, τα ηγενηα τα εμαρτυροια. Diog. Laert. ibid. Sect. 120.— Et Ed. Colon. p. 510. — See Cicero. Acad.
 Quæst. Lib. 4, Cap. 43, — 44.— & de Finib. Lib. 3, Cap. 14.—*

³ *Media illa, inquit, inter que nihil interest, tamen ejusmodi sunt, ut eorum alia eligenda sint, alia rejectanda, alia omnino negli-
 genda. --- Ista --- valere, locupletem esse, non dolore, bona non dico, sed dicam Græce, προσημια, Latine autem producta: sed præ-
 posita aut principia malo. --- Illa autem, egestatem, mortuum, dolorem, non appello maia, sed, si liber, rejectanea. --- Iaque illi non
 dico me extitero, sed legere; non optare, sed sumere: contraria autem non fugere, sed quasi fecerere. Cicero. de Fin. Lib. 4. Cap. 25.—
 26.— See also, Lib. 3. Cap. 17.— & Diog. Laert. ibi supra, Sect. 102, — & seq.*

⁴ Preface to the Translation of the Reflections of *Marc. Antonin*, * A 3, p. 2.—

⁵ The Reasons, for Example, that *Cicero* brings to establish the Equality of criminal, as well as of good Actions, Paradox 3,
 leave

pecially when he is treating of Morality, all such Maxims as are ambiguous, or subject to Misconstruction. So that, even supposing that these Maxims in Question are capable of the Mitigations contended for by those, who are so bent upon justifying the Antients, what 'ere it cost; yet we cannot fairly avoid censuring the Paradoxes of the *Stoicks*; together with their vain Subtleties, ⁶ their concise and rough Stile, their Affectation of new coin'd Words, their frequent Logomachies, the Contradictions ⁷ charg'd upon 'em, and their Opinion as to obscene Terms; which ⁸ they insist, may be made use of without any Manner of Scruple. Nor is this last Particular to be much wonder'd at in Men who contend, as the *Stoicks* do, that

all Women ⁹ ought to be had in common among the Sages. There were also some among them, who maintain'd, that ¹⁰ the *Cynicks* Way of living was the *shortest Cut to Virtue*. *Chrysisippus* ¹¹ taught, that there was no Harm in committing Lucess with one's Father, Mother, Son, Daughter, ¹² Brother, or Sister; or in feeding upon human Carcasses. What the ¹³ *Stoicks* said about the Love of beautiful Boys; is at least liable to very odd Constructions. In fine, these Philosophers believ'd, that their Sage might absolutely dispose ¹⁴ of his own Life, and put an End to it whenever he thought fit; and this Opinion, as false and dangerous as it is, was, as is universally agreed, the Sense of the whole Sect.

leave us little Room to doubt, but that the *Stoicks* understood this according to the Letter. See the Reason given by *Diog. Laert.* lib. 7. c. 120.— And p. 510.— Edit. Col. and reported by Mr. *Pufendorf*, Lib. 1, Cap 8, Sect. 1. n. 1.

⁶ *Stoicorum adstrictior est oratio, aliquandoque contractior, quam aures populi requirunt. Cicer. in Bruto, Cap. 3.*— *Quamquam ex omnibus Philosophis Stoici plurima novaverunt. Zeno quoque eorum princeps, non tam rerum inventor fuit, quam nos iam verborum. Idem, de Emib. Lib. 3. Cap. 2.*— *Nova verba fugiunt, deserunt usitata: --- pungunt, quasi aculeis, interrogantibus angustis: quibus etiam qui adveniuntur, nihil commutantur animo, et idem abeunt, qui venerant: res enim fortasse vera, conté graves, non ita tractantur, ut debent, sed aliquanto minutius.* Ibid. Lib. 4, Cap. 3.—

⁷ See *Plutarch*, in his Treatises, *de repugnantiis Stoicorum*, and, *de communibus notitiis contra Stoicos*.

⁸ 'Ο σφδς εὐθυβήμων ἔση. *Cicer. Ep. ad Famil. lib. 9, Ep. 22.*— See the whole Letter.

⁹ Ἀρέσκει δὲ ἀ τοῖς, καὶ κοινὰ: εἶναι τῷ γυναικας εἶναι παρὶ τοῖς σοφοῖς. *Diog. Laert. §. 131.*— lib. 7. p. 517.— Ed. Colon.

¹⁰ Ἔναι γὰρ τὸν Κυνισμὸν εὐνοτομον ἐπ' ἀρετῆν ἔδδν. *I. id. §. 121.*— p. 511.— Ed. Colon.

¹¹ Ἐν δὲ τῷ περὶ πολιτείας, καὶ μητρὰς λέγει συνέρχεσθαι, καὶ θυγατρὰς, καὶ υἱοῖς; --- καὶ τὸς ἀποθανόντας κατεσθῆναι κελύουσι. *Diog. Laert. ibid. §. 188.*— p. 556.— Ed. Colon.

¹² See *Sex. Empir. Pyrrh. hypoth. Lib. 3. c. 24, p. 153, A* — Et Ed. Fabric. p. 178.—

¹³ See *Diog. Laert. §. 129.*— p. 516.— Ed. Colon. & *Cic. Tusc. Quest. Lib. 4. c. 33.*— 34.—

¹⁴ Ἐυλόγως τὲ φασὶν ἐξάξειν ἑαυτὸν τῷ θῆς τὸν σφδν, καὶ ὑπὲρ πατρῶος; καὶ ὑπὲρ φίλων. κὸν δὲ σιλοροπέρα γέννηται ἀγαθόν, ἢ τῆ-
ράσειν, ἢ νόσοις ἀνάτοις. *Diog. Laert. ubi supra, §. 130.*— Ed. Colon. p. 517.— See *Cic. de Finib. Lib. 3. c. 18.*— & *M. Antoc. n. n. Lib. 3. §. 1.*— *Idemque Gataker, p. 83, col. 1, lin. 55, & d.*



S E C T. XXVIII.

AFTER *Epicurus* and *Zeno*, we find not, among the succeeding Philosophers, any, who set up new Schemes of Morality. Each Man betook himself to that Sect, where he found what most suited his own private Sentiments. The *Romans*, who had their Philosophy, as well as the rest of the Sciences, from the *Greeks*; took this Course. In the Reign of *Augustus*, a Philosopher of *Alexandria*, called *Potamo*, introduc'd a Manner of Philosophizing, which they called *Eclectic*; because it consisted in collecting from all the Tenents of the preceding Philosophers, such as appear'd most reasonable; out of which they form'd, each Man his own System of Philosophy. *Cicero*, who, as I said before, was a moderate *Academick*; does for the most Part pursue this Method in his Book of *Offices*; ^a where he is

sometimes a *Stoick*; sometimes a *Peripatetick*. That excellent Work, so well known to the World, is without Dispute the best Treatise of Morality, that all Antiquity has furnish'd us with; the most regular, the most methodical; and what does the nearest of any come up to a full and exact System of Morality. I say, *what comes the nearest*: For he would be much out, who should imagine it to contain a *Compleat Body of Morality*; such as descends to the utmost Degree of Particularity; and where every Thing is digested into the very best Order, and Method possible. Many Things are there wanting, which naturally come within the Plan of that Science; and, for the Generality, the Topicks he there goes upon, are but very superficially handled; as might be easily made appear. We there also find some ^a Decisions too

^a Ἐπι δὲ πρὸ ὀλίγῃ καὶ ἐκλεκτικῇ τι: ἄριστοι: ἐσθήχη ὑπὸ Ποτάμωνος; τῷ Ἀλεξανδρέως, ἐκλεξαμένους τὰ ἀρίστα ταῖς ἐκείνη; τῶν ἀρετῶν. *Diog. Laert. Proem. Sect. 21.*— p. 14 — See *Monage* thereupon p. 11, col. 2.—

^b Sed tamen nostra leges, non multum a Peripateticis differunt; quo nam utrumque, et Stoici, et Peripatetici, esse volumus. *De Offic. Lib. 1. Cap. 1.*— v. Grav. i. l. p. 4. col. 1.— & d. 'Tis thus we ought to read that Passage, partly according to the Conjecture of *Gravus* the Father, and *Gravus*; and partly according to Mr. *Le Clerc*; See *Ars Critica*, Part. 3, Sect. 1, Cap. 16, Num. 22, Tom. 2, p. 286 — Edit. 2d.

^c This is what his last Translator into *French*, in his Preface, pretends to assert.

^d You may see Examples enough, both in the Text, and Notes of Mr. *Barbœyrac*'s Translation of *Pufendorf*. See there the Index of Authors.

too rigid; or such as plainly shew, that Cicero was not thoroughly acquainted with the true Principles, on which the Resolution of some certain Cases depends. 'Tis great Pity his Treatise of Government is lost; of which the few Fragments remaining give us a very noble Idea. His Discourse of *Laws*, which we yet have, though imperfect; contains many excellent Things. Cicero there particularly applies himself to prove at large, that there is a natural Law, independent of any humane Institution; and which derives its obligatory Force from the Will of God. This he proves to be the Foundation of all just and reasonable Laws. He shews the Usefulness of Religion in civil Societies. He follows the grand Principle of the *Stoicks*, that Man is born for Society; and from thence deduces all the reciprocal Duties of Mankind. And though he acknowledges it necessary to admit all this, for one who intends to build upon well-chosen and well-connected Principles; yet he expects not that all the World will approve of them; he promises himself only the Approbation of the antient *Platonists*; and that of the *Peripateticks* and *Stoicks*. As to the *Epicureans*, he is under no Concern about them; they professedly retir'd from all political Affairs; he therefore leaves them to philosophize, in this their Retreat, as they should think fit: But for *Arcefilas* and *Carneades*, he asks a Quarter of them; and fears, that, should they come to point their Batteries upon him, they would soon make practicable Breaches in this his suppos'd impregnable Fortress: He perceives not in himself Courage enough to repulse 'em, with therefore not to be expos'd to their Indignation; is desirous to appease 'em, and prevent all Acts of Hostility." He has been, and not without Reason too, charg'd with not adhering stedfastly enough to his Principles; and with being too much an occasional Reasoner. I cannot forbear adding here *Montagne's* Opinion of this great Orator's Way of Writing. As to Cicero, says he, "Those of his Works that are most useful to my Design, are his philosophical Tracts; particularly the moral: But, to speak my Mind freely --- his particular Way of Writing, with all others of the same kind, is to me very tedious. For his Prefaces, Definitions, Discussions, and Etymologies take up the greatest Part of his Work. Whatever there is of Life and

Marrow, 'tis smother'd and lost in the Tediousness of the Preparation. When I have spent an Hour in reading him, --- and come to recollect what I have thence extracted of Juice and Substance; for the most Part I find nothing but Wind: For he is not yet come to his main Arguments; or yet ready to produce the strong Reasons, which are to do the Business, and clear the Point, I want to be resolv'd in. To me, who only desire to become more discreet, not more learned or eloquent; these Logical and Aristotelian Rules and Ordinances are of no Use at all. I would have a Man begin first with that, which is of the last Consequence. I know well enough what Death and Pleasure are, there is no Occasion to stand anatomizing of 'em to me. I look for good and solid Reasons at first Dash; such as will instruct me how to stand the Shock of 'em, and make a brave Defence. Your grammatical Niceties, fine-spun Argumentation, and delicate Turns, are nothing to this Purpose: I am for Discourses that give their first Charge into the very Heart of Doubt; his only heat about the Bush. They are proper enough for the Schools, the Bar, or the Pulpit; where we have Leisure to nod, and may awake a Quarter of an Hour after, Time enough to find again the Thread of the Discourse. It is very requisite to talk after this Manner to Judges, we have a Mind to gain, right or wrong, to favour our Cause; to Children and common People, where every Thing is to be urg'd, in order to see what will take with them. I want not any one to make it his Business to stir up my Attention, and cry out to me fifty Times, O yes, as our Clergy, and Heralds do. The Romans in their religious Exercises began with, Hoc age: as we in ours do with, Sursum Corda; which are so many Words lost to me. I come thither already fully prepar'd from my Chamber; --- instead of wetting my Appetite by these Preparatives and Preludes, they quite spoil my Stomach. Would but the Licentiousness of the Times excuse the sacrilegious Boldness; I should even censure the Dialogisms of Plato himself, as languid, and cumbersome to his Matter; and regret the great Loss of Time, spent upon long and needless Preliminaries and Interlocutions; by one who had so many, and so much better Things to say. My Subject now naturally engages me to give the Reader here, what *Montagne* says immediately before the last-cited Passage. "Plutarch, says he, and *Seneca* have both this great Accommodation for one of my Humour; that the Knowledge, I search for, is there deliver'd

* Nec, si rogante Tarquinio nulla erat Rome scripta lex de stupris; idcirco non contra illam Legem sempiternam Sextus Tarquinius cum Lucretia, Tricipiti plura, aditit. Erat enim ratio perfecta a rerum natura, & ad recte faciendum impellens; & a delicto avocans: que non tam denique incipit Lex esse, cum scripta est; sed tum, cum orta est. Orta autem simul est cum mente anima. Quam ob rem Lex vera, atque princeps, opta ad subendum; & ad retinendum, Ratio est recta summi Foris, Lib. 2, cap. 4.

† Ergo est Lex, inferiorumque distinctio, ad illam antiquissimam, & rerum omnium principem expressa naturam, ad quam Leges Hominum dirigitur, quæ applicatio improbos assuevit, defendunt ac tuerentur bonos. Ibid. cap. 5.

‡ Ibid. Cap. 7. See the Passage cited by Mr. Barletrac, Pufend. Lib. 2, Cap. 4, Sect. 3, Note 4, p. 222, Col. 1.

§ Atqui, si natura confirmatura jus non erit, virtutes omnes tollantur. Ubi enim Libertas, ubi Patrie Caritas, ubi Pietas; ubi aut bene merendi de altero, aut referende gratie voluntas poterit existere? nam hæc nascuntur ex eo, quod natura profusi sumus ad delinendo homines: quod fundamentum juris est, Ibid. Lib. 1, Cap. 15.

¶ D. C. of M. Baye, Artic. Carneade, Rem. (H.)

‡ Perturbatricem autem harum omnium rerum Academiam, hæc ab Arcefila & Carneade recentem; exoremus, ut flect. Nam si in opere in hæc, quæ satis sent nobis instructa, & composita videntur; nimis cadet ruinas: quam quidem ego placere cupo; submovere non audio. Lib. 1, Cap. 13.

§ See the *Quest. Hæret. im.* of Mr. Le Clerc, p. 252. & seq.

¶ Essays, Lib. 2, Cap. 10, p. 295, 296. And p. 164. Ed. ultim. * Pag 162. — &c.

“ deliver'd out in Parcels. --- Such are the *Opuscula* of *Plutarch*, and the Epistles of *Seneca*; which are the most beautiful Part of their Writings. -- These Authors, as they do for the most Part concur, in all their useful and true Notions; so they both happen'd to flourish about the same Age; were both Tutors to two *Roman* Emperours; both Foreigners, both rich, both great Men: Their Doctrine is the very Cream of Philosophy; and deliver'd after a plain and pertinent Manner. *Plutarch* is more uniform and constant: *Seneca* more various and wavering. The last toils, sets himself, and bends his whole Force, to fortify Virtue against Frailty, Fear, and vicious Inclinations: The other seems more to slight their Power; disdainng either to mend his Pace, or stand upon his Guard. *Plutarch's* Sentiments are *Platonick*, gentle, mild, and accommodated to civil Society: The other's are *Stoical* and *Epicurean*, more remote from common Practice; but, in my Opinion, better fitted for private Use, and more determin'd. *Seneca* seems to lean a little to the Tyranny of the Emperours of his Time. --- *Plutarch* every where shews a Spirit of Freedom. *Seneca* abounds with surprizing Turns, and Flashes of Wit; *Plutarch* with Things. The first warms and animates; the latter gives more Content, and fuller Satisfaction. The one guides us, the other pushes us on. -- There are, (says the same Author in another Place ¹) in *Plutarch*, abundance of Discourses, well worth our Perusal, where he is even prolix: --- but then there are a thousand others, where he but glances upon Matters: Where he only points with his Finger to direct us which Way we may go if we will; and contents himself sometimes with barely touching upon what is most material. These then are to be remov'd out of their Obscurity into a clearer Light.” Mr. and Madam *Dacier* confess, *That in the Morals of Plutarch, there is scarce any Thing that is thoroughly discuss'd, and fully made out; and that all the Matters there treated, a few only excepted, are but very superficially handled.* As for *Seneca*, his *Treatise de Beneficiis* is, in my Opinion, the very best Piece he has; but there too he observes as little Order, and Method, as in the rest of his Writings: a Defect, which is, more or less, to be found in almost all the Authors of Antiquity. 'Tis own'd, *That he has join'd to the Virtues of the first*

Stoicks, all the Pride and Haughtiness of their Followers: And indeed, we may easily discover, that this haughty Stoick never speaks of Virtue without Vanity. Notwithstanding all which, he may be read with infinite Advantage; if we do but join to his Precepts two Things, which are there wanting: The one is, that God has commanded us to apply ourselves to Virtue; the other is, that he will reward with eternal Happiness all such as shall have faithfully adher'd thereto. The same is to be said too of *Epicletus*, and *Marcus Antoninus*. We have of the first, besides his *Manual*, so well known to the World; some Discourses that have been preserv'd by *Arrian*. That Philosopher, in the Opinion of Monsieur and Madam *Dacier*, is more unaffected, solid, and pure than *Seneca*: But is without any great and noble Views, is wanting in Extent of Genius, and Elevation of Thought. *Antoninus* has all these Qualifications, with a Soul more vast and capacious than his Empire. He contents not himself with the bare receiving, and solidly explaining the Precepts of his Masters; but frequently corrects, and gives 'em new Strength, either by the ingenious and natural Manner in which he has propos'd 'em; or by the new Discoveries with which he has improv'd 'em. But however, it must be own'd, that he retains so much of the ill Principles, and Maxims of the *Stoicks*; as to require a Reader of no small Caution and Judgment. Besides, the Obscurity and Hardness of Style, common to all of that Set; is still greater in the Reflections of that Emperour; who often explains himself but by *Hikes*; because he wrote only for himself. Nor would any Thing less, than the Ability of his last Translators, have serv'd to make that Work be read with Pleasure in our Language.

The *Roman Lawyers*, of whom the greatest Part were *Stoicks*, contributed very much to the perfecting that Part of Morality, which may be call'd *Natural Jurisprudence*. The Study of the Law having under the Emperours, become a principal Step to Preferment; the Men of the greatest Genius, and Parts among the *Romans*, continu'd to apply themselves to this Study, for near the Space of two Centuries. It were to be wish'd, that we had had the Writings of those famous Lawyers intire; they would no doubt have afforded us very great Light. But the Emperour *Justinian*, having been pleas'd to a-

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* It is believ'd (say Mr. and Madam *Dacier*, in their Preface to the Translation of some of *Plutarch's* Lives,) that he was Tutor to *Trajan*, but this is founded only on a Latin Letter, which manifestly appears to have been forg'd: *Trajan* was as old as he. See *Vies de Plutarque Traduit, par Dacier*, Tom. 8, p. 260. — Edit. Par.

¹ He had studied under the Philosopher *Ammonius*, at *Delfos*.

² Lib. 1. Cap. 25, pag. 98. And Ed. ult. p. 267. —

³ In their Preface. See *Vies de Plutar. Dac.* Tom. 1, Pref. p. 41. —

⁴ The same, in their Preface to *Marc. Antonin.* * A 7, pag. 2. — Edit. Hays, 1691. See what *Gataker* says in his;

*** 3. p. 2. —

⁵ Reflections on good and bad Fortune in Lotteries, by Mr. *Le Clerc*, p. 229.

⁶ Ibid.

⁷ *Ubi supra*, Pref. to *Marc. Antonin.* * A 7, p. 10. —

* Ibid.

⁸ See what *Pufendorf* says in his *Specimen Controuers.* &c. Chap. 1, Sect. 3.

bridge the *Roman* Laws; of which the Decisions of these Lawyers, were the most considerable Part; their Works hereupon grew out of Use; so that we have now left of 'em, only some Fragments in the *Digest*. *Tribonian* the Lawyer, to whose Care the Emperor had committed this Work; has left us a very Chaos^z, full of Obscurity and Contradictions; which afford a vast Field for Chicanery; and which have, in the latter Centuries, produc'd that prodigious Number of senseless, and confus'd Commentaries. It appears by this Collection, and some Historical Remains, that there were, in the *Roman* Empire, Sects among the Lawyers^{aa}; who, upon several Points, follow'd different Opinions; in the Manner we see practis'd among Philosophers, and Divines. However, notwithstanding all those Divisions, and the vain^{bb} Subtleties, that were the common Source from whence they sprung; we may find among those few Fragments, several considerable Principles of natural Equity, that may serve to decide many difficult Cases; but they lie intermix'd with a far greater Number of Laws, purely positive.

The *Platonists*, who became famous in the third and fourth Centuries; such as *Plotinus*, *Amelius*, *Porphyrius*, *Jamblichus*, *Proclus*, &c. apply'd themselves much more to explain the Speculations, or rather chimerical Conceits of the Founder of their Sect; than to cultivate his Morals. *Aristotle* had hitherto, had but very few Followers: He was

scarce known in the Western Parts of the World, till towards the Beginning of the sixth Century. The celebrated *Boetius*, by translating some of that Philosopher's Writings, laid the first Foundations of that prodigious, and truly despotick Authority, which the Peripatetick Philosophy became afterwards possess'd of; and which, even to this Day, in many Places, it still maintains. The *Arabians*, in the eleventh Century, grew fond of it; and introduc'd it into *Spain*. From thence sprung the *Scholastick Philosophy*; which spread itself all over *Europe*, and with its barbarous Cant became even more prejudicial to Religion and Morality, than to the speculative Sciences. The *Ethicks* of the *Schoolmen*^{cc}, is a Piece of Patchwork; a confus'd Collection, without any Order, or fix'd Principles; a Medley of divers Thoughts and Sentences out of *Aristotle*, Civil and Canon Law, Scripture, and the Fathers. Both good and bad lie there jumbled together; but so as that there is much more of the latter, than the former. The *Cassists* of the succeeding Centuries, made it their sole Business to out-do their Predecessours, in broaching of vain Subtleties; nay, what is worse, monstrous and abominable Errors; as all the World knows. But let us pass by these unhappy Times; that we may at length come to that Age, wherein the Science of Morality was, if I may so say, rais'd again from the Dead.

^z See the *Anti-Tribonian* of *Francis Hotman*; the *Latin* Version of which was reprinted at *Hall* in *Saxony*; and at *Leipsick*, in 1704, with a Preface by *Mr. Thomastius*.

^{aa} You will find the History thereof in a few Words, in the *Principia Juris Civilis* of *Mr. Van Eck*, Professor at *Utrecht*; where that Book was reprinted in 1694. See pag. 55, & seq. of this second Edition.

^{bb} See *Barbeyrac's Table of Authors*, to his Translation of *Pufendorf*; where you will find many Examples of this Kind.

^{cc} See *Mr. Buddens*, in his Abridgment of the History of Philosophy, Cap. 5, Sect. 9.





S E C T. XXIX.

TH E famous Chancellour of *England*, *Francis Bacon*, who liv'd in the End of the Sixteenth, and the Beginning of the Seventeenth Century; was one of those, who most learnedly discover'd the Imperfection of the present State of *Philosophy*; which he labour'd vigorously to redress; and laid down most excellent Plans for its Reformation. Posterity will be eternally obliged to him, for the great Light and noble Projects he has furnish'd the World with; towards the general Restauration and Advancement of the Sciences. We have Reason to believe, that 'twas the reading of the Works of this great Man, that inspir'd *Hugo Grotius*, with the Thoughts of attempting the first to compose a System of the Law of Nature; which he afterwards undertook, at the Sollicitation of the celebrated *Nicholas de Pietsse*, Judge of the High Court of Parliament for *Provence*. 'Tis pretended, that *Melancthon* had already given a Sketch of something of this kind, in his *Ethicks*; and they tell us too of one *Benedict Winkler*, who publish'd in 1613 a Book intitled, *Principia Juris*; wherein he intirely departs from the Method of the Schoolmen; and maintains against them, amongst other Things^a; that the Will of *God* is the very Fountain and Foundation of all Justice. But 'tis acknowledg'd, that the latter of these two often confounds the Law of Nature with that which is positive: And that neither the one, nor the other has afforded any more than a small Gleam of Light; not sufficient to dissipate those thick Clouds of Darknes, in which the World had been so long envelop'd. Besides, *Melancthon* was too much prepossess'd in favour of the Peripatetick *Philosophy*, ever to make any great Progress in the Knowledge of the true fundamental Principles of the Law of Nature, and the right Method of explaining that Science. *Grotius* therefore ought to be regarded, as the first who broke the Ice; and most certain it is, that no Man could be better qualify'd, for such an Enterprize. Extraordinary Clearness of Understanding; exquisite Judgment; profound Meditation; universal Knowledge; prodigious Reading; continual Application to

Study, in the Midst of a great many vexatious Obstacles, and the necessary Duties of several considerable Employments; with a sincere Love for Truth; are Qualifications, which no one can deny properly to belong to that great Man, without wronging his own Judgment; and bringing his Character in Danger of the Imputation either of hate Envy; or gross Ignorance. "If (as has been very rightly observ'd) he was not thoroughly acquainted with the Art of Thinking justly; the *Philosophy* of his Time, being still very dark and obscure; he has supply'd, in a great measure, that Defect, by the Force of his good Sense. If, without the Help of Art, he has shewn so much Delicacy of Taste, and true Discernment; what would he not have done, had he been intire Master of that Art of reasoning justly, and of rightly methodizing his Thoughts, which is now, and has been for some Time, to be had?" His Book was first published at *Paris* in 1625, and dedicated to *Louis XIII.* 'Tis said he at first design'd to have intitled it, *The Law of Nature and Nations*; but he chose afterwards to give it the Title it now bears. of, *the Law of War and Peace*. What he had chiefly in View was, to set forth those Duties, which the several Nations of the World, or their sovereign Powers, that govern them, owe one to another; and how the Differences arising between 'em might be justly terminated. For which Purpose, he takes into his Work the principal Subject Matters of natural Jurisprudence, and Politicks; and lays down also Principles sufficient to establish the most considerable Duties of private Men. He himself owns, that he is far from having exhausted so copious a Subject; and wishes that others may supply what's wanting; to the End that Mankind may one Day be furnish'd with a compleat System of this Science. Never had Book a more universal Approbation. Numbers of the Learned have wrote Comments upon it: It has been publickly read and expounded in the Universities: And the Author, but fifty Years after his Death, had an Honour done him, which was not paid to any of the Ancients, till after a long Succession of Ages:

^a See Mr. Bayle's Dict. p. 447.— See also the *Specimen controvers. of Pufendorf*, Cap. 1, Sect. 5.

^b Lib. 1, Cap. 3, 4.

^c See *Gronovii Biblioth. Jur. Gent.* Lib. 3, cap. 4, Sect. 9. And *J. Frid. Ludovic. Delineatio Reg. J. Nat.* Sect. Sect. 24.

^d Mr. Budeus, in his *History of the Law of Nature*, Sect. 23.

^e See his Article, in Mr. Bayle's Dict. Rem. (K).

^f *Parrhasiana*, Tom. 1, p. 346.— See his Preface, Num. 1.—

^g *Ibid.* Num. 31.— & seq.

^h See the Names of the chief of them, and a very just Account of their Performance, in the *Hist. de Droit Nat.* by Mr. Budeus.

ⁱ Mr. Bayle Dict. Rem. (O), p. 1407, Col. 2.— See the rest of this Remark.

Ages: I mean, his being publish'd cum Commentariis Variorum, at Francfort on the Oder, in 1691.

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

Not long before the Death of *Grotius*, another English Author appear'd, of a Character quite different from that of *Selden*, I mean *Thomas Hobbes*; a great Mathematician, and one of the most penetrating Genius's of his Age. It is great Pity he suffer'd himself to be misled by the Indignation he had conceiv'd against those, whom he look'd upon as the seditious Disturbers of the Peace of his Country: Had he philosophiz'd without Prejudice, and with a sincere Regard to Truth only; he would doubtless have done her very signal Service. He publish'd at *Paris* 1642, his Treatise *de Cive*; wherein, amongst other dangerous Errors, he endeavours to establish, and that too in the Geometrical Method, the Hypothesis of *Epicurus*; which makes Self-Preservation and Self-Interest, to be the original Causes of Civil Society. He builds upon this Supposition; That all Men have the Will, as

well as the Strength and Power to Mischief one another; and that the State of Nature is a State of War, between each particular Person, and the rest of Mankind. He gives an unlimited Authority to Kings; not only in Affairs of State, but even in Matters of Religion. *Hobbes* created himself by this Work many Enemies; but, as Mr. Bayle says, the more discerning and judicious Part of Mankind were forc'd to acknowledge, that no one had ever yet penetrated so far into the Foundations of Civil Policy. *Lambert Veltbuisen*, a famous Philosopher of the united Provinces, boldly undertook the Defence of this Treatise *De Cive*, as far as related to *Hobbes's* Manner of demonstrating the Laws of Nature. The same Year this Defence appear'd, *Hobbes* publish'd his *Leviathan*; the Sum whereof is: "That, without Peace, there is no Safety in a State; and Peace cannot subsist, without Authority; nor Authority, without Arms; and Arms avail not, unless put into the Hands of one Person: and that the Fear of Arms cannot incline those to Peace, who are push'd on to Hostilities by an Evil, more to be dreaded than Death itself; that is to say, by Dissentions about Things necessary to Salvation." In this Piece he lays himself much more open; for he here roundly maintains, That the Will of the Sovereign alone constitutes, not only what we call just and unjust; but even Religion also; and that no divine Revelation can bind the Conscience, till the Authority, or rather Caprice, of his *Leviathan*; that is, of the supreme arbitrary Power, to which he attributes the Government of every Civil Society; has given it the Force of a Law. If thereupon we sometimes find in his Works, some seeming Contradictions; 'tis probably, because he durst not trust the Reader with the whole of his Notions; and was willing to provide for a Retreat, in case he should not be able to stand the Shock of his Adversaries. He had several of 'em; but they did not all succeed alike. He pass'd for an Atheist; and perhaps they were not very much out in their Judgments, who thought him so; for he admitted none but Corporeal Substances.

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

⁵ See the *Ars Critica* of Mr. *Le Clerc*, Tom. 1, Part 1, Sect. 3, Cap 5, & Num. 5, p. 115,— 116, Edit. 2. & *Bib. Clois.* Tom. 1, p. 355.—

⁶ See the *Specimen Controvers.* of Mr. *Pufendorf*, Cap. 1, Sect. 1.

⁷ He was born at *Malmesbury*, and Son of a Clergyman. See his Life printed at *Carolepoli*, in 1681, in 12^o; and abridg'd by Mr. *Bayle*, in his Dictionary, p. 1571.

⁸ See the Judgment *Grotius* passes upon it, in the Appendix to his Epistles; Epist. 648,— p. 951, col. 2.—

⁹ Mr. *Bayle's* Dict. Rem. (D), p. 1572, col. 1.— And *Pufendorf's* Preface to his first Edition, * 3, p. 2,— Ed. *Amst.* 1698, of his *De Jure Naturæ & Gentium*.

¹⁰ In an anonymous Dissertation, intitled, *Epistolica Dissertatio, de principiis justitiae & decori, continens Axiomata pro crastino clarissimi Hobbes, de Cive.* *Amst.* 1651. It was afterwards reprinted among his Works, at *Rotterdam*, 1680, Tom. 2.

¹¹ *Bayle*, Dict. Rem. (E), p. 1573, Col. 1.— ex *Auctore vita Hobbesii*, p. 45.

¹² See the *Epist. au droit Naturel*, by Mr. *Eudæus*, Sect. 26. A List of them may be seen at the End of his Life.



S E C T. XXX.

THE Number of Commentators upon *Grotius* daily increasing, insomuch that there was now scarce any Thing else mnded, besides Disputes about the Sense of his Words; and the barbarous Terms, and ridiculous Subtleties of the Schoolmen, of which *Grotius* had purg'd his Work, being again brought upon the Stage; a *German* had the Courage to shake off the tyrannical and pernicious Yoke of Custom; and bravely follow the Footsteps of that great Man: I mean the illustrious *Samuel Pufendorf*^a; who has thereby acquir'd an immortal Reputation: a Reputation, whose Lustre not all the Efforts of his envious Competitours will be ever able to efface. He pursu'd the Genius and Method of *Grotius*: He examin'd and weigh'd Things in their Originals; and making the best Use he could, of the Discoveries of those who had gone before him, he then added his own; which soon gave very great Hopes of his accomplishing that Work, which as yet was but in Embryo. The Principles of the new Philosophy, which he exceedingly relish'd, but without blindly adopting all the Opinions of the *Cartesians*; together with the Mathematicks, which he study'd under^b a celebrated Professor in the University of *Jena*; did not a little contribute towards the perfecting his natural Qualifications; and rendering him more capable of so vast a Work. We are beholden, for the first Sketch he drew of it, to the Leisure an unhappy Accident, he had the Misfortune to meet with, gave him. He had been sent for into *Denmark*, to be Governour to the Children of a certain Lord, who was then Ambassadour of *Sweden* to the other Northern Crown. A little after his Arrival at *Copenhagen*, the War suddenly breaking out again with the *Swedes*, (who attack'd that City, but were after some Time oblig'd to raise the Siege;) Mr. *Pufendorf* was made

Prisoner^c, with the rest of the Retinue of the Ambassadour; who was himself but a few Days before, gone to take a Trip to *Sweden*. During this Confinement, which lasted eight Months; as he had no Books, neither was permitted to see any Body; he took a Resolution^d to meditate on what he had read in *Grotius* and *Hobbes*; and having collected his Meditations together, he compos'd a short System out of what he lik'd best, which he turn'd and explain'd his own Way; handling such Matters as those Authors had omitted; and adding to the whole some new Thoughts of his own, as they occur'd. Not that he intended, at that Time, any Thing more, than to divert himself in his Solitude: But about two Years after his being set at Liberty, he went into *Holland*; where a Friend of his getting a Sight of this Essay, advis'd him to review, and publish it. He did so; and the Work was printed at the *Hague*, in 1660; under the Title of *Elements of Universal Jurisprudence*. He owns in his^e Preface, that, besides *Grotius* and *Hobbes*, the Professor in Mathematicks mention'd before, had afforded him some Light. His Method is, in some measure, that of the *Geometricians*: For he first lays down his Definitions and Axioms; afterwards he explains 'em; and then draws out the Consequences they contain. And though he himself prov'd afterwards dissatisfied with this Work of his, and publicly own'd it to be the imperfect and premature Fruit of his more juvenile Studies; yet as the Publick gave it a very favourable Reception; so it serv'd to make our Author known to the World, in a very advantageous Manner. The Elector Palatine, *Charles Lewis*, to whom it was dedicated; was not satisfi'd with returning him his immediate Thanks for it, in a very obliging Letter^f; but sent for him the Year following to his University of *Heidelberg*;

^a He was originally of the *Marquisate of Misnia*, in *Saxony*, and a Lay Man, tho' sprung from the Clergy; for his Father, Grandfather, &c. were both on the Father's and Mother's Side, were Ministers of the Lutheran Communion. I learn'd this from one of the Pieces, which compose that Collection, intitled, *Eris Scandinica*, p. 149, 150. The Village, whereof his Father was Minister, is call'd *Flebs*, near *Chömnitz*; and in all Probability he was born there. His Brother at least, *Isaiab Pufendorf*, is a Native of that Place; as Mr. *Gundling* testifies, in his *Hist. Philos. Moralis*, Part 1, cap. 6, Sect. 5, Note 10. See also the *Acta Eruditiorum* of *Leipfic*, An. 1703, p. 185.

^b *Erhard Weighel*. He was with that Professor in 1657, during the whole Year. See *Eris Scandinica*, p. 126.

^c Mr. *Coyel*: This happen'd in 1658. *Eris Scandinica*, p. 126.

^d One of his Letters, to the *Baron de Boineburg*, is publish'd; wherein he says, that the Pretence for detaining him was; that his Brother was settled in *Sweden*. See *J. Graevii Bibliothec. Jur. Gent.* Lib. 3, cap. 9, p. 281. 'Twas that Brother, to whom he dedicated, in 1655, his *Dissertationes Academice Selectiores*. He calls him *Isaiab de Pufendorf*, Knight, (*Eques Auratus*.) and Chancellor to the King of *Sweden*, in the Dutchies of *Bremen* and *Verden*. He says he had been sent to the chief Courts of *Europe*, about the Affairs of that Prince. See the Place before quoted, Lett. (1), in Mr. *Gundling's* Book.

^e 'Tis what he says himself, in the Letter above cited; but which, as well as the others which follow, is full of Errata; which in many Places so spoil the Sense, as to make 'em unintelligible.

^f Pref. * p. 3, — & c.

^g The Dedication is dated the First of *September*, 1660, and the Elector's Letter the 29th of the same Month. The Letter is printed in the *Bibl. Jur. & Gent. of Grotius*, Lib. 3, Cap. 10, Sect. 1. And in the *Delimitio Hist. Jur. Arini*, &c. of *J. Frid. Lubovic*, published at *Hall* in *Saxony*, 1701, Sect. 45.

Heidelberg; where, on his Behalf, he founded a *Professorship in the Law of Nature and Nations*. Thus, that great Prince, at the same Time that he conferr'd on Mr. *Pufendorf* so high a Mark of Distinction and Favour; secur'd to himself the immortal Glory, of having first set the Example to all, who should hereafter publicly cause to be taught, this noble Science; a Science so necessary for Youth, and indeed for all Mankind; but which no one had as yet bethought himself of introducing into the publick Universities. As our new Professor constantly made it his Business to explain the *Treatise of Grotius*; so this gave him the Opportunity of observing, more and more every Day, the Necessity there was of composing something in that Kind, that should be more complete. The Solicitations too of the *Baron de Binebourg*, then Chancellour to the Elector of *Mentz*; might also contribute very much to engage him therein. That Minister was extremely desirous, to have some Body set about the compiling a methodical Body of natural Jurisprudence; and had in vain endeavour'd to persuade several learned Men to undertake it; and amongst the rest, *Beecler*, *Conringius*, and *Rachelius*. We may easily imagine that, after having read Mr. *Pufendorf's Elements of Universal Jurisprudence*, he could not fail to apply to him for that excellent Purpose, judging him more capable, than any other, of executing that noble Design. He found him accordingly intirely dispos'd to satisfy so laudable a Desire. Mr. *Pufendorf* laid before him a Plan of the System he design'd: He represented to the *Baron*, that the due Execution thereof would require (these are his own proper Terms) *great Penetration of Mind; an exquisite Judgment; and free from all Manner of Prejudice; a numerous Library; great Leisure; a settled Correspondence with several learned Men; who would, upon all Occasions, freely communicate their Thoughts to him: All which Things, adds he, I want.* However, he promis'd to do all that lay in

his Power; but without hurrying himself; neither would he engage to publish his Work, till he had brought it in some Degree to answer his Expectation. These Particulars I have from a Letter, he wrote in Answer to the *Baron de Binebourg*, &c, publish'd about four or five Years ago, with two Letters of *Beecler*, and one of *Herman Conringius*; to whom that Minister had sent Mr. *Pufendorf's*, to have their Opinions upon the Matter. *Conringius* and *Beecler* were too much prepossess'd in favour of Antiquity; and too un-experienc'd in the Business of clear Reasoning, to weigh and examine rightly the Project and Ideas of our Author. This plainly appears by their Answers: *Conringius's* is indeed a very civil and obliging Letter; but 'tis remarkable, that *Beecler* in his discovers an extraordinary Uneasiness at the growing Fame of Mr. *Pufendorf*; and an extreme Desire to lessen that Esteem, the World had conceiv'd of him. This happen'd in the Year 1663. About the Year 1667, *Charles XI*, King of *Sweden*, designing to establish an University at *Lunden*, in the Province of *Schonen*; resolv'd to invite thither our *Heidelberg* Professor. The Elector Palatine was very loth to part with him; but did not however think fit to lay his Commands upon him; and at length consented to his accepting the more profitable and advantageous Post, offer'd him in *Sweden*. But oblig'd him that same Year to bestow some Hours extraordinary on the Elector Prince his Son; who had his appointed Preceptors besides. Mr. *Pufendorf* went into *Sweden*; and was, in 1670, there establish'd in the new University at *Lunden*, in Quality of chief Professor in the Faculty of Law; and with a Salary more considerable than any of the other Professours. Two Years after, he publish'd his *Law of Nature and Nations*: And in 1684 he reprinted it at *Francfort* on the *Main*, augmented above a Fourth Part.

^c See *Groningius*, ubi supra. Lib. 3, Cap. 9.

^b Some learned Men, of *Beecler's* own Country, say, that his Notes on *Grotius* are very perplex'd; and that he promises throughout more than he performs; besides, in the greatest Part of his Writings, he is very politick as to his Sentiments; which he always manifestly accommodates to the Interests of those, he desires to please. See Mr. *Budden's Hist. Jur. Nat.* Sect. 28.

^d *Eris Scandinica*, p. 127, 128.

^e See the Preface of the *Eris Scandinica*, and p. 128, of that Collection. Some Years after his having executed that Charge, the King of *Sweden* made him his Historiographer; and one of his Privy-Council. About the Year 1686, he was sent for by the late Elector of *Brandenburgh*, *Frederick William*; who gave him the same Employ of Councillour and Historiographer. He was created a *Baron*, (*Liber Baro*;) a little before his Death, which happen'd at *Berlin*, on the Sixth of *October*, 1694.

S E C T. XXXI.

I Shall not here enlarge in setting forth, in a pompous Manner, all the particular Excellencies of this Work. Nor do I think myself under any Obligation to follow the establish'd Mode; which will have ^a every Translator to pay his Original the Tribute of Preference; neither does the Office of an Interpreter necessarily oblige me so to do: I shall content myself with speaking here historically; with the same Indifference and Impartiality, as will, I dare say, every where shew itself in my Notes upon this * Author. There is no such Thing as absolute Perfection in Books, any more than in any other humane Productions; And Mankind has, without any more ado, a Right to treat as Mountebanks, all those panegyric Writers; who, to let off the Authors they translate or comment upon, or rather themselves and their own Performances; begin with assuring the Reader, that it is an intirely accomplish'd Work in its Kind; a compleat Model, the utmost Effort of human Ingenuity: Always ready to say as much, in four Days Time, of any other Author, who shall first have the good Fortune to fall into their Hands.

First then, I shall observe, that this Work has had a very general Approbation. The vast Number of Editions it has had in Sweden, Germany, and Holland, within the four and thirty Years since it was first publish'd; do sufficiently declare, in what an advantageous Manner, it has been receiv'd by the Publick. At the same Time that I was translating it into French, I was inform'd, by the *Nouvelles* of Mr. Bernard, ^b That Dr. Kennet of Corpus Christi in Oxford, with some † others, had translated it into English: I should have been very glad to have met with that Translation; to have consulted the Introduction, and the † ample Notes, with which it was said to be accompany'd; and at the same Time to have seen, if those several Hands have been able to carry on such a Work in Concert, as that the necessary Uniformity thereof has receiv'd no Prejudice: But, for our Author himself, as there are certain single Suffrages,

which alone weigh more than Multitudes of the common Sort; I shall here produce two of that Kind, which are of very great Weight; and to which all Men of Judgment will, I am persuaded, pay a very great Regard. The first is that of the illustrious Mr. Locke, that great Philosopher; whose Loss the Republick of Letters still laments; and whose exquisite Judgment, profound Penetration, and extraordinary Abilities, especially as to what concern'd Matters of Reasoning; all the World is sufficiently acquainted with. Let us see what he says, in his excellent Treatise of Education: *When* ^c [a young Lad] has pretty well digested Tully's Offices, and added to it Putendorf de Officio hominis & civis, it may be seasonable to set him upon Grotius de Jure Belli & Pacis, or, which perhaps is the better of the two, Putendorf de Jure Naturali & Gentium; wherein he will be instructed in the natural Rights of Men, and the Original and Foundations of Society, and the Duties resulting from thence. The other Suffrage, is that of Mr. Le Clerc; concerning whom I shall, though with Regret, forbear saying what I think; for fear I should offend his Modesty by Encomiums, which no reasonable Person refuses to give him; and which, in my Mouth, would be of no great Weight. His Approbation falls not directly on my Original; but is not therefore of less Force; seeing it regards the Abridgment of it, which the Author himself made, a Year after he had publish'd his principal Work. Let us see then what he says, in the ^d *Parabasia*; when he is treating of the general Knowledge, which one ought to have of the Principles of Civil Policy: *The Books of Hugo Grotius de Jure Belli ac Pacis; and that of Samuel Putendorf, intitled, De Officio Hominis & Civis; are admirable for their general Principles. More especially the Second; which, as it is more concise, establishes with great Clearness and Order, the Fundamentals of Morality, Politics, and Jurisprudence. Whoever reads it carefully, will there find Principles sufficient, to solve most of the principal Questions in these Sciences;*

* See in his Preface to the Translation of the Letters of *Pliny the Younger*.

^a Mr. Putendorf, de *Ju. Ge. & Nat.* ^b April, 1703, p. 467.

^c The principal Translator, in his Preface, names Mr. Peteran, and Mr. Iselin, who translated the fifth and eighth Books.

^d These Notes are only the Quotations of the Author himself.

^e Sect. 186, of the fifth and sixth Editions, in 8vo, printed in 1705, and 1709, p. 334.— &c.

^f Tom. 2, p. 117, 118.

ences; which can admit of any Debate. Since then the Abridgment is, in Mr. Le Clerc's Opinion, so useful; what must he think of the Book itself? But that I may give a more particular Idea of the Work itself, and that every one may know the just Value thereof; I will in a few Words draw the Parallel of it with that of *Grotius*.

To begin then with the Style; if the Question be about Purity of Language, and Accuracy of Expression, I readily give the Preference to *Grotius*; who had an Erudition incomparably more vast; and who, from his Cradle, if I may so say, wrote with marvellous Facility and Elegance. But then even his Style is too concise; he very often speaks out but half his Meaning; and supposes his Reader to know many Things, which require very great Study and Application; so that his Work is of little Use but to the Learned: Whereas Mr. *Pufendorf*'s is much more within the Reach of common Capacities. As to what concerns Order, and the Disposition of Particulars; the general OEconomy of the Work of Mr. *Pufendorf* is by far the best: But, in the particular Ranging of the * Materials, that compose each Chapter, he has sometimes let slip some Inaccuracies, which are not to be found in *Grotius*; from which I have endeavour'd, as much as possible to disengage my Translation: As to the Subject Matter, I have already taken Notice, that *Grotius* pretended not to give a compleat System; which might be easily seen, though he himself had not declar'd it. 'Tis only occasionally that he touches upon even the greatest Part of the principal Subject Matters of natural Right: So that, though his Views had been more extensive, and less imperfect, than they seem in many Things to have been; his Plan did not lead him to a full Discussion of them; it was enough for him to handle 'em so far, as might be sufficient to decide the Questions, which concern'd the principal Subject of his Book. In a System of the Law of Nature, an Author ought, without Dispute, to begin with instructing his Reader in the Nature of moral Entities or Beings; in the Principles and different Qualities of humane Actions; and what it is that makes 'em imputable either as good or evil; in the Nature of Laws in general; and their different Kinds, &c. But we meet with scarce any Thing in *Grotius*, relating to all these Matters; which compose the first Book of my Original. *Grotius* saw what was the fundamental Principle of the Law of Nature: But he does no more than just point

it out in his * Preface; and that in such a Manner too, as gives us Reason to conclude, that his Ideas on that Head were not altogether clear; nor enough disengag'd from the Prejudices of the Schools: And when he handles any Matter particularly, he does not always shew the Connection it has with its first Principles. On the contrary, my Author establishes, and distinctly explains the fundamental Maxims of the Law of Nature; and from thence deduces, by a regular Train of Consequences, the principal Duties of Men and Subjects; in whatsoever State and Condition they are. As *Grotius* omits some important Matters; so he touches upon others that might have been very well spar'd; as when he examines Questions relating rather to Divinity, than to the Science of natural Right; or else enlarges on some certain Subjects, more than is requisite in a general System; as, for Instance, on the Subject of War. On all these Accounts, his Work is very much inferior to that of Mr. *Pufendorf*; who besides scarce ever borrows any Thoughts from *Grotius* †, but what he improves, and explains more distinctly; and draws from 'em a greater Number of Consequences. In fine, Mr. *Pufendorf* often refutes *Grotius*, and that too with Reason; as may be seen at one View by running over my *Index of Authors*: and, to be convinc'd, that *Grotius* had, as to several Matters, even false, or at least very confus'd Ideas; there needs no more, than to examine one single Notion of his, which runs through his whole System; I mean that pretended Distinction of his, between the *Law of Nature*, and a certain *Law of Nations*; which he conceives to be founded on the tacit Consent of the People of those several Nations.

From all this, I think, I may boldly, and without any Fear of being suspected to have too great a Tendernefs and Affection for my Author; infer, that his Work, take it all together, is far more useful than that of *Grotius*. I have no Design to derogate in the least from the Glory of that great Man, who is far above all my Encomiums. We should not, perhaps even at this Day, have had any tolerable System of the Science of the Law of Nature, had it not been for the Light he has given us: And had Mr. *Pufendorf* been in the Place of *Grotius*, and *Grotius* in the Place of Mr. *Pufendorf*; the Work *de Jure Belli ac Pacis* would, in my Opinion, have been much more imperfect than it is; and the other, *De Jure Gentium & Naturæ*, much more perfect. I say it once again, that

* The learned Journalists of *Leipsick*, in that most obliging Extract they gave of the first Edition of this Work, *Jun. 1707*, p. 35.— make me say quite the contrary: *In speculioribus pertinetudinis accuratorem esse Grotio preat.* Perhaps this is only an Error of the Press. (*Grotio* for *Grotium*;) though I do not find it mark'd in the Errata of that Year.

† *Prolgom.* Num. 7. & seq. particularly, Num. 11, 12, 13, 14.

‡ For which Reason I have taken care to cite in the Margin that learned Man, in a great many Places, where Mr. *Pufendorf* had forgot to do it; so that by Means of my Translation, one may perpetually confront *Grotius* with my Author.

that I never entertain'd a Thought of diverting any one from reading the Book of *Grotius*: But very far from it, I am heartily sorry, out of the Good-will I bear to the Republick of Letters; that this excellent Work is so wretchedly translated into our Language. If the Truth may be spoken, *Mr. de Courtin*, who is the Author of this Translation, undertook more than he was able to perform; and it is surprizing that a Man, whose Employments particularly engag'd him in the Study of the Subject Matter of this Book; should succeed no better in a Design of this Nature. I shall say nothing of the Barbarousness, Harshness, and Obscurity of his Style: This is obvious to every Reader upon the first Opening of the Book. But there are too a great Number of essential Faults, which make *Grotius* speak quite beside his Meaning; and the Translator sometimes trips in Places so plain and easy, that he discovers a great deal of Ignorance, both in the Subject Matter; and in the *Latin* Tongue. The Notes too, which he has inserted in his *Index*, in order to explain the Terms, and sometimes the Thoughts of *Grotius*; make the Thing yet more apparent. His Explanations are for the most Part either false, imperfect, or so confus'd; that instead of clearing up Matters, they serve only to render 'em still more obscure. I have here advanc'd nothing, but what I can very easily make appear. And though I have not confronted this Translation with the Original quite through; yet I have noted down, as I have at several Times consult-ed it, so great a Number of such Sort of Blunders; that I may, without the Imputation of Rashness, pass this Judgment upon it. When the first Edition of my Preface appear'd, I immediately sent a small List of them to one, who had taken Offence at this Judgment of mine on the Performance of *Mr. de Courtin*; but the Par-

ty had nothing to reply to me as to those enormous Faults, of which I had taken my Instances almost at the very first Opening of the Book. But the best Way to convince all Mankind of a Thing, of which I think no judicious and impartial Person can have a Moment's Doubt; would be to publish a new Translation of *Grotius's* Book: which I may * perhaps some Time or other do, should I find Leisure enough for it. I should follow the same Plan as in my Translation of *Pufendorf*; in such Manner as to refer from one to the other, both in the Text, and Notes; and to make the two Works join'd together serve as perpetual Supplements to each other. There would then appear so great a Difference between the two Translations, that every one at first Sight would conclude, that one or other of the Translators must have been strangely out of the Way. I am not ignorant that a learned *German* Professor commends this Version of *Mr. de Courtin*; as an elegant, clear Version, that may serve instead of a Comment; he adds too, that the Translator has in an accurate *Index*, given his Reader an Abridgment of the whole Work. But, in all Probability, this learned Man has rely'd upon some Body else's Judgment in this Matter; or perhaps, being better acquainted with the *Latin*, than our Language; he has concluded this Translation to be a good one, because the Author speaks *Latin* in *French*. It has perhaps ^b, been reprinted thrice, or it may be oftner; but this only shews what Credit the Original itself of *Grotius* has in the World; and the great Want there is of Books of this Nature. So that, admitting there was, in the main, no great Difference between my Original, and the Work of *Grotius*; this Translation at least of the latter, could afford no just Cause, why I should have desisted from translating the former.

* This he has since perform'd, and his Translation printed at *Amsterdam*, An. 1724.

[‡] *Mr. Buddeus*. heretofore Professor of the Law of Nature and Morality at *Hall* in *Saxony*; and at present Professor in Divinity at *Jena*. See his *History du droit Naturel*, Sect. 4.

[‡] The last Edition I know of, is that of the *Hague*, in 1703.





S E C T. XXXII.

MY Design in this Translation, has been to do Service to two Sorts of Persons. The first, are such young Men, as are destin'd for publick Employments, as well Ecclesiastical, as Civil. We see 'em every Day aspire to, and actually obtain those Employs; without having the least Tincture of the most general Principles of a Science, so universally necessary, as is the Science taught in this Book: In so much that, even though the Passions should not otherwise intrude themselves; we need not wonder to see Affairs succeed so ill in the Hands of Men, who sit down contented under so gross an Ignorance of their Duties. It may perhaps be said, that they can read this Book in *Latin*, and therefore have no need of my Translation. But, not to mention at present the Regulations and Amendments I have made in the Text of my Author, and the Notes I have added to it; an exact Knowledge of the most necessary Languages is besides a Thing generally very much neglected; and there are vast Numbers in Offices, who either do not understand *Latin* at all; or else so little, that they cannot, with Pleasure and Improvement, read a Book in a Style like that of my Author. Besides 'tis my Notion (if I may be allow'd to venture a Thought, which is perhaps peculiar to myself; but I believe well enough grounded;) that we ought, as much as possibly we can, to begin our Studies of the Sciences with Books written in that Language, which is most familiar to us. However able we may be to read with great Ease, and Readiness, Books wrote in a dead Language; yet our Mother Tongue is always best understood: neither is it good to divide the Mind by sharing our Thoughts between the Attention, that we ought to have for the Things themselves; and that, which we are oblig'd to give to the Understanding of the Terms, in which they are express'd.

The other Sort of Men, I intended to serve by this Translation, are the illiterate or common People; among whom,

it is not at all to be wonder'd at, if we find the grossest Ignorance of the Things, contain'd in this Book; seeing those, whom I have just now mentioned, have but very false and confus'd Ideas thereof. I know by Experience, that even the Term, *Law of Nature*, is as-much unknown to them, as is the *Terra Australis incognita*; for which Reason, I thought myself oblig'd to explain it in the Title Page. The People of this Rank, when they heard talk of the Translation I was then upon; imagin'd at first, that it was a Book thick-set with the Querks and Subtilties of the Bar; and therefore to be left to the Lawyers. I own 'tis not within the Reach of a Peasant or a Day-Labourer. But how many Men are there, who without making Learning their Profession, might with Proficiency read such a Book as this; if they would but give the same Attention thereto, as they do to their common Affairs; or to the Reading of other Books far less useful; nay, sometimes pernicious. I shall not stop here to shew 'em the Necessity they are under of being instructed, at least to a certain Degree, in the several Points of Morality, Jurisprudence, and Politicks, treated of in this Work. If they will take the Pains to read carefully the * *Paraphrasana*, they will no longer doubt thereof; and, if they have their true Interest at Heart, they will speedily apply themselves to the making a proper Use of those excellent Lessons, the Author there gives. I did intend to have said something in this Place of the † Defects, and Imperfections in the Generality of Books and Discourses of Morality; of the Method to be observ'd in treating of, and studying this important Science; of the Conformity of the Duties, right Reason teaches us ‡, with the Maxims of the Gospel; and of some other Things of the like Nature. But, besides that this Preface is already spun out to a very great Length, the Matters I have handled having led me further than I imagin'd; the Printers allow me not Time enough, to digest thoroughly what I had

to

* Tom. 2, pag 54, c. 63.

† See what I have said in a few Words about one of these Defects, in my Preface to the *Traité du Jeu*, printed in 1709, pag. 17.

‡ I have also handled this at large in my *Traité du Jeu*, Lib. 1, Cap. 3. I have no more Leisure at present to undertake the rest, tho' I had, when the first Edition of this preliminary Discourse was printed; which is besides now considerably enlarged, by several Additions in this new Edition.

to say on those Heads. I shall therefore content myself with observing, in a few Words, one Thing, which we seem not enough to reflect on. And that is, that Revelation was not given to Men, to reach them absolutely and fully all that they ought to know. On the contrary, it supposes in 'em the Knowledge of some certain Things; which Knowledge they either actually have, or which 'tis intirely in their Power to acquire: And the Faculty of drawing Consequences from Principles known, either by the sole Light of Reason; or by Holy Scripture. The Existence, for Instance, of a Deity infinite in Power, Wisdom, and Goodness, the sovereign Legislator, and Author of humane Society; is a Principle evident by its own Light: Therefore we find that the Sacred Writers do not so earnestly apply themselves to the establishing of it; if they sometimes speak of it, 'tis as of a Thing manifest to all Mankind. They even expressly tell us, that *that which may be known of God, was manifest among the Heathens, God having shewn it to them (by the Light of Reason); for that the invisible Things of him, his eternal Power and Godhead, were from the Creation of the World, clearly seen, being understood by his Works; so that the Heathens were inexcusable:* Because they did not give that Attention to 'em, they ought to have done. Thus too it is with respect to the true Principles of Morality, which are founded on the general Notions of Religion. The Sacred Writers assure us, that, *'when the Nations, which have not the Law, (written, like that of Moses;) do by Nature (that is to say, without Revelation;) the Things contained in the Law; these having not the Law, are a Law unto themselves: And shew, that the Commandments of the Law are written in their Hearts; their Consciences also bearing Witness, and their Thoughts the mean while accusing or excusing them.* The Manner, in which the Sacred Writers propose the Maxims of Morality, does also manifestly shew, that they did suppose, in the Minds of Men, certain Notions, which, though imperfect, are nevertheless most true; and that they were satisfy'd with supplying what was therein defective; or with retrenching what ill Habits and Customs had perversely added thereto. They have not left us a methodical System; they do not exactly define all the Virtues; they enter not into Particularities; they only give, as Occasion requir'd, general Precepts; from whence we must draw many Consequences, in order to apply them to the several

States and Circumstances of particular Persons, and Cases; as it would be easy to shew by many Instances, if the Thing was not evident to all who read, with ever so little Care, the Holy Scriptures. And from thence it appears, to mention it only by the By; how far we ought to rely upon the Expedient of those, who, after having made it their Business to ruin and destroy the Certainty of the Light of Reason; refer us to the *Light of Faith*, for the resolving of our Doubts: As if the Light of Faith did not necessarily suppose that of Reason; and as if the Proofs we have of the Truth of those Facts, on which Revelation is founded; or of the Sense and Meaning of a great many Passages in Scripture; were more evident, than the Maxims of right Reason are, with relation to our Duties, and their true Foundations: not to mention how far these Gentlemen carry *Hypocritical Pyrrhonism*. On the contrary, 'tis certain, that the intire Conformity of the Christian Morality with the clearest Dictates of right Reason; is one of the most convincing Proofs of the Divinity of the Christian Religion: as has been acknowledg'd by all, who have wrote with any Solidity on that Subject. *We are assur'd, says a famous English Divine, that God can never reveal any Thing contradictory to the true Dictates of our Reason. Nay, what ought chiefly to persuade us, that the Holy Scriptures are the Work of God, or of the Author of Nature; is, that that Holy Book illustrates, confirms, and every where lets in new Light upon the Laws of Nature.* And if we duly weigh and consider it, we shall find, that this is the Proof, which of all others is the most affecting; and the best proportion'd to the common Capacities of the Bulk of Mankind. I have no Design, in any Respect, to diminish the Certainty of those Facts, that are the Foundation of Faith: There is no one Fact to be found, in all ancient History, so well prov'd, as these are found to be; and it has been very justly observ'd, that they afford when well consider'd, a Demonstration as incontestable, as those of the Mathematics; though of another Nature. But it must be own'd, that the Generality of Mankind are, by their State and Condition of Life, reduc'd to an Impossibility of sufficiently instructing themselves, in all that is necessary, for the apprehending the Force of this Demonstration. They must understand several Languages, and read with Application a great many Volumes; which we well know, they have neither Leisure nor Means to do. They are therefore ob-

lig'd

^b Rom. i. 19, 20. See also Acts xvii. 27, 28.

^c Rom. ii. 14, 15.

^d Richard Cumberland, de Leg. Natur. Proleg. Sect. 27.—

lig'd to refer themselves therein to those, who are in a Condition to make such Enquiries: And, though they may be able to draw a very strong Proof, in Favour of the Gospel, from the Unanimity which they observe, as to this fundamental Point, among all Christians, though otherwise so very much divided about particular Opinions: Yet after all it must be own'd, that there is still something wanting to produce in 'em an intire Conviction. But when they come at length to consider the Evangelical Morality, and find it intirely con-

formable both to their true Interests; and to all those Principles, of which every Man has by Nature the Seeds in his own Heart; they cannot then help concluding, that the Author of it must necessarily be, that very Being, who has given 'em Life, and brought 'em into this World only to make 'em happy; provided they will not be wanting to themselves, but contribute on their Part, all that lies in their own Power, towards the Attainment of their own Felicity.

N. B. The Thirty third, or last Section, relating wholly to the Text, Notes, and Indexes of Mr. Barbeyrac's French Translation of Pufendorf; is here purposely omitted, as of no Use to the English Reader.



T H E

OF THE

LAW of NATURE

AND

NATIONS.

BOOK I.


Containing the preliminary Parts of that Knowledge.

CHAP. I.

Of the Origin and Variety of MORAL ENTITIES.

The CONTENTS of every Paragraph of the first Chapter.

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| <p>I. <i>The Introduction.</i></p> <p>II. <i>Man's Life is govern'd by moral Entities.</i></p> <p>III. <i>What are moral Entities, what is their Cause and End.</i></p> <p>IV. <i>The Way of producing them. Their Institution. Their Operation, and from whence.</i></p> <p>V. <i>Their Division.</i></p> <p>VI. <i>Their State what.</i></p> <p>VII. <i>Their natural and adventitious State.</i></p> <p>VIII. <i>Peace and War, and how manifold?</i></p> <p>IX. <i>Determinate States.</i></p> <p>X. <i>States having respect to Time.</i></p> <p>XI. <i>Certain Precepts concerning States.</i></p> | <p>XII. <i>The Divisions of single Persons.</i></p> <p>XIII. <i>And Compound.</i></p> <p>XIV. <i>Some Precepts about moral Persons.</i></p> <p>XV. <i>Feign'd Persons.</i></p> <p>XVI. <i>Moral Things.</i></p> <p>XVII. <i>The Division of moral Modes.</i></p> <p>XVIII. <i>Titles.</i></p> <p>XIX. <i>Power.</i></p> <p>XX. <i>Right.</i></p> <p>XXI. <i>The remaining moral Qualities.</i></p> <p>XXII. <i>Moral Quantities.</i></p> <p>XXIII. <i>How moral Entities perish.</i></p> |
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I.  T was the Business of the first and highest Philosophy¹, and that by which alone it could fully answer the Design of its Name, and Institution, to deliver the most comprehensive Definitions of Things, and to rank them agreeably under their proper Classes, subjoining the general Nature and Condition of every Sort of Beings. Now as the Series of natural Things² hath been fairly enough regulated by those, who have hitherto apply'd themselves to

the adorning of that Science, so it is evident, that Men have not been equally solicitous about constituting the *Entia moralia*, or moral Entities, nor treated them with that Respect which their Dignity requir'd. Many Authors seem never so much as to have thought on them; others only touch them lightly over, as idle Fictions, of no use or moment in the World. When, at the same time, it was highly expedient, that they should be fully understood by Mankind, who are endu'd with the Power of producing them³, and through whose whole Lives and Conducts their Force and Activity is diffus'd. This Reflection obligeth us to premise somewhat on a Part of Knowledge generally neglected; so far as shall seem requisite to il-

Mr. BARBEYRAC'S NOTES on Chap. I. §. I.

¹ *Metaphysics* are most probably meant by our Author's *Philosophia prima*, because it comprehends (as some Philosophers hold) not only the Science of Essences in general, their chief Properties, and most eminent Species; but also Natural Theology, and an Account of the Nature of Spirits.

² Our Author reserving the Distinction of physical and moral Entities to the next Paragraph, passes it over here in the beginning of the Chapter.

³ How this is done, see §. 3. and 4. following.

lustrate our principal Undertaking: Especially lest our Definitions of moral Things should, either upon account of their Obscurity, or of their Novelty, prove a Stop to the Reader, who perhaps in common Treatises hath rarely met with the like Terms. And here, if those who have been bred up in the nicer Delicacies of Letters, shall disdain our Endeavours of this kind, and cast a censorious Frown on Words unknown to antient Eloquence; we only petition them for this Favour, that as we often pardon the Impertinencies of their over-scrupulous Exactness, so they would be pleas'd to grant us the Toleration not to be Polite¹, whilst we profess a closer Regard to the strict Severity of Things, than to the exterior Ornaments of Speech. For how to express ourselves with more Advantage about these Matters, we are yet to seek; unless by tedious Circumlocutions we would leave them more obscure and more perplex'd than we found them. Against the Charge of Novelty *Tully* himself will be our Advocate: *New Names* (says² he) *are to be apply'd to new Things; nor is this to be wonder'd at by any Man of ordinary Knowledge, when he considers, that in every Art and Craft, not vulgarly understood, there is a Variety of Terms coin'd for that particular Subject.* And then giving Examples in the liberal and mechanic Arts, he concludes; *A Philosopher of all Men hath an especial Right to this Privilege; for Philosophy is the Art of Life, and he that would undertake to explain its Rules, cannot, from the common Currency of Words, find Stock enough to answer his Occasions*³. But he that can upon no account digest such Harshness of Stile, is left at his Liberty to turn out of these rougher Tracts, and to pass immediately to a Field of more Smoothness and Pleasure.

II. All the Beings⁴ which compose this Universe, as they consist of such Principles as were by the most wise Creator temper'd and fitted for the producing of each particular Essence; so they have every one of them their particular *Properties*, arising from the Disposition and Aptitude of their Substance, and exerting themselves in agreeable Actions, according to that Portion of Strength which their Divine Author and Founder hath im-

printed on them. These *Properties* we now usually call *natural*, since the Term *Nature* hath been extended so far, as to denote not only the general Mass of Things, but also the Modes and Acts flowing from the internal Force of their Constitution, by which is produc'd that infinite Variety of Motions which turns and manages all the Business of our World. Those Things which exercise their Operations, either without any Sense at all, or with pure down-right Sense, or with such as is assisted by very imperfect Reflection, are guided by the sole Instinct of Nature, and are unable to govern their Actions by any Rules or Modes of their own Invention. But Man, who besides his excellent Form and most accurate Contexture of Body, fitting him for the noblest and the quickest Offices of Life and Motion, is endu'd with a singular Light of Understanding, by the Help of which he is able most exactly to comprehend and to compare Things, to gather the Knowledge of Obscurities from Points already settled, and to judge of the Agreement which Matters bear to each other; and hath also the Liberty of exerting, suspending, or moderating his Actions, without being confin'd to any necessary Course and Method: Man, we say, is farther invest'd with the Privilege of inventing and applying new Helps to each Faculty, for the more easy Regulation of its Proceedings. To consider what numberless Modes and Notions have been introduc'd for the Assistance of the *Understanding*, and for preventing the Confusion which might arise from the undistinguish'd Vastness of its Objects, is the Province of another Sort of Enquirers. Our Business is, to declare, how, chiefly for the Direction of the *Will*, a certain Kind of Attributes have been impos'd on⁵ Things, and their natural Motions; whence there springs up a peculiar Agreement and Conveniency in the Actions of Mankind, a grateful Order and Comeliness for the Ornament of human Life. And these Attributes are call'd *moral Entities*, because the *Manners* and the *Actions* of Men are judg'd and temper'd with relation to them; and do hence assume a Face and Habit different from the horrid Stupidity of the dumb Creation.

The Author in his last Editions adds these Quotations here.

¹ We find *Manilius* using the like Excuse: Lib. iii. v. 39. &c.

*Ornari res ista negat, contenta doceri.
Et si qua externa referantur nomina lingua,
Hoc operis, non ratis erit: non omnia secuti
Possunt, & propria melius sub voce notantur.*

And though some Words of foreign Stamp appear,
Seem harsh, untun'd, uneasy to thy Ear,
This is the Subject's, not the Writer's, Fault:
Some things are stiff, and will not yield to Thought.
I must be plain: and if our Art hath found
Expressions proper, it neglects the Sound.

Mr. CREECH.

Nor hope sweet Verse and curious Turns to find:
I'll leave thy Passions, and instruct thy Mind.

To the same purpose, V. LUCRET. Lib. i. v. 137. HORAT. Art. Poet. v. 48. which last speaks thus:

----- Si forte necesse est
Indiciis monstrare recentibus abdita rerum,
Fingere cinctutis non exaudita Cethegis
Continget: dabiturque licentia sumpta prudenter.

None may to us that Liberty refuse,
Supposing that it prudently be none.

Thus in English:
If to express Things new found out, we use
New Words, unto the Antients never known,

----- Licuit, semperque licabit
Signatum presente nota producere nomen.
It ever was, and e'er will lawful be
To use the Words forg'd by Necessity.

Mr. BARB. NOTES on §. I, II.

¹ Cicero maintains it to be a childish Thing to speak elegantly of Matters philosophical: In such Cases to speak plain is sufficient, and learned Men have no other Intent, but to express themselves clearly. Cic. de fin. l. iii. c. 5.

² De fin. l. iii. c. 1. The following Part of this Discourse plainly shews us, that he speaks expressly of such Philosophers as treat of moral Knowledge, because he distinguishes them from Logicians, Natural Philosophers, Geometricians, &c.

³ Our Author infers from these Quotations, that 'tis as lawful for him, as these antient Poets, to borrow some Terms from other Languages, to express himself in this Work, since he can find none proper in his own, and he has no other Way to render himself intelligible. And this might have been a good Excuse for the antient Schoolmen, if they had not carry'd this Liberty too far, and made use of Terms wholly barbarous.

⁴ By *Beings* our Author means the Substances of Things, with all their *Properties* and *Qualities*, internal and external, as appears by what follows.

⁵ See Note 2. upon §. 5. of this Chapter.

⁶ Men and their Actions are here understood, as §. 16. shews.

III. We may define our *moral Entities* to be *certain Modes superadded to natural Things and Motions by understanding Beings, chiefly for the guiding and tempering the Freedom of voluntary Actions, and for the procuring of a decent Regularity in the Method of Life.* We call them *Modes*, because we conceive *Ens*, or *Being*, in general, to be more conveniently divided at large into *Substance* and *Mode*, than into *Substance* and *Accident*. And as *Mode* is contradictorily distinguish'd to *Substance*, so it is manifest, that *moral Entities* have no Self-subsistence, but are founded in *Substances* and in their *Motions*, and do only affect them after a certain manner. Of *Modes*, some flow, as it were, naturally from the *Things* themselves; others are superadded by the Intervention of an intelligent Power. For whatever is endu'd with *Understanding*, can, from the reflex Knowledge of *Things*, and from comparing them with one another, form such *Notions* as may prove very serviceable in the *Direction* of an agreeable and consistent Faculty. *Moral Entities* are of this kind; the Original of which is justly to be refer'd to Almighty *God*, who would not that Men should pass their *Life* like *Beasts*, without *Culture* and without *Rule*; but that they and their *Actions* should be moderated by settled *Maxims* and *Principles*, which could not be effected without the Application of such *Terms* and *Notions*. But the greatest Part of them were afterwards added at the Pleasure of Men, as they found it expedient to bring them in, for the polishing and the methodizing of common *Life*. And from hence the End of them is plainly to be discover'd, which is not, like that of natural *Beings*, the Perfection of the *Universe*, but the particular Perfection of

human Conduct, as superior to brutal, in being capable of regular Beauty and Grace; that thus in so inconstant a Subject, as the *Motions* of *Mens Minds*, an agreeable Elegance and Harmony might be produc'd.

IV. As the original Way of producing natural Entities is ⁴ by *Creation*, so the Manner of framing moral Entities cannot be better expressed than by the Term of ⁵ *Imposition*. For these do not proceed from Principles ingrafted in the Substance of *Things*, but are added, at the Pleasure of intelligent Creatures, to ⁶ *Beings* already perfect in their Nature, and to the real Productions of those *Beings*; and consequently obtain their ⁷ whole Existence from the Determination of their Authors. The same Power assigns them such ⁸ such Effects, which, when it sees convenient, it can destroy, without causing any natural Alteration in the Subject to which they were apply'd. Hence their Force and Ability of Operation doth not consist in this, that they can by their internal Efficacy produce any natural Motion or Change in *Things*, without the Intervention of other Causes; but partly in shewing Men how they ought to govern their Freedom of Actions, and chiefly in making them capable of receiving Benefit or Injury, and of exercising several Works towards other Persons, with some peculiar Effect. And the Efficacy of moral Entities, produc'd by Almighty *God*, flows from this Principle, That he, by his Right of Creation, hath the Power of circumscribing, within proper Limits, that Liberty of Will with which he indulg'd Mankind, and when it grows refractory, of turning it which way soever he pleaseth, by the Force

Mr. BARB. NOTES on §. III, IV.

¹ Our Author, without doubt, intends by this Distinction to make a Difference between *Modes* properly so call'd, which are not to be separated from their Substance, and have no Existence by themselves; and such, as being real Substances of themselves, can have an independent Existence from the Subject to which they are joyn'd. For the Term *Mode*, in its true Signification, is oppos'd to *Substance*, and imports only the Modification, or Manner of Being. It is not the same with *Accident*.

² For Instance, The Figure of a Body, which is really inherent in it; and therefore called an *Internal Mode*.

³ Such are *moral Entities*, which are not in the *Things* themselves, but depend upon the Operation of the Mind; and are therefore called *External Modes*, because they are nothing else but certain Relations of Objects or Ideas one to another. See *The Art of Thinking*, l. i. c. ii. and Mr. LOCKE'S *Human Understanding*, l. ii. c. xxviii.

⁴ This Word is sometimes used in Latin, to signify the Establishment of a Man in an Office, as *Consul creatus est*, He was made Consul.

⁵ The *French* renders it *Institution*, which being used in *English* for every Thing that proceeds from mere human Invention and Appointment, in Opposition to what proceeds from Nature, may be better used here.

⁶ We must not imagine, that the Existence of moral Entities is always posterior to the Existence of the *Things* they are annexed to. 'Tis true, in respect of such as are of human Institution only, but not of such as are of divine, because they are appropriated to Man from the Moment of his Creation, of which Sort are all natural Obligations, of which our Author treats, l. iii. c. iv. §. 4. and the State of compleat Nature, of which he speaks §. 7. So that there is no Moment, in which a Man may be conceived free from all moral Entities. Nevertheless, as moral Entities, which are born with a Man, are not less true Modes than the other, though they do not proceed from the Substance and physical Qualities of the Man, but from the Determination and Will of the Creator, in such Manner as shall be explained in the following Note; yet these may be conceived abstractly, as the Properties, and physical Qualities of Man, by Virtue of Divine Institution. This Exposition is taken out of a Work of this Author's, call'd *A Specimen of the Controversies with Pufendorf about his Right of Nature*, &c. c. iii. §. 10.

⁷ To obviate all Objections against this Expression of our Author, we ought to observe, that he makes two sorts of Institution: 1. Purely arbitrary. 2. Another, which has a Foundation in the Thing itself, and which is a necessary Consequent of what is before freely resolv'd, and can't be oppos'd or contradict'd: As for Example, an Architect may or may not build a Palace; but when he has resolv'd to do it, he must necessarily order the Materials in a clear different Manner than if he were to build a Cottage; and he'd pass for a Fool, if, after he had built a Cottage, he should affirm it to be a Palace: Yet this hinders not, but the ordering of the Materials proceeds from the Contrivance and Will of the Architect. In like manner it was altogether free for *God* either to create Man, or not; but after he had resolv'd to send him into the World, it was necessary that he should lay such Obligations on him, as became a rational and sociable Creature; so that if the Laws of Nature depend originally on the Divine Institution, they are not a pure arbitrary Constitution, as the ceremonial Laws given to the *Jews* were; but an Institution founded upon the very Nature of Man, and the Wisdom of *God*, who can't will the End, but he must at the same time will the Means to the End. Nevertheless, though the Will of *God* can't be separated from his Goodness and Wisdom, yet we impute the Establishment of the Laws of Nature chiefly to the Divine Will, because it is not only the Principle of all Divine Actions, but because *God*'s Wisdom and Goodness are Attributes intirely free, and so can't be conceived without the Will. These Expositions are taken from this Author's Works, viz. *Specim. Controvers.* cap. v. §. 9. *Dissert. Acad.* p. 743. *Spicil. Controv.* cap. iii. §. 9.

⁸ See the last Paragraph of this Chapter.

⁹ By virtue of moral Entities we have a Right to do ourselves, or require of others, certain Things; or rather we are oblig'd to do them, or suffer others to do them. See Note 2. in the next Paragraph.

of some threaten'd Evil: Men likewise were empowered to give a Force to their Inventions of the same kind, by threaten'g some Inconvenience, which their Strength was able to make good against those who should not act conformably to them.

V. Since then *moral Entities* were instituted for the Regulation of Mens Lives; to which End it is necessary, that those who are to observe this Rule should bear some settled Relations to one another, should govern their Actions by a fixed Method; and, lastly, should act with determinate Respects and Titles about such Goods and Possessions as the Occasions of Life require; we may hence conceive them to be principally inherent, *first*, in Men; *secondly*, in the Actions of Men; and, *thirdly*, after a sort, likewise, in Things, which Nature, either by her own Strength, or with the Assistance of human Industry, may produce. But though it would be no Absurdity to state their Division according to these three Heads or Subjects, yet it seems a more exact Method to make the Classes of natural Entities our Patterns in digesting the moral; not only because the former have more engag'd the Studies of philosophical Men, and being compar'd with the latter, cast a considerable Share of their own Light and Evidence upon them; but likewise because our Understandings are so immers'd in corporeal Images, as to be hardly capable of apprehending such moral Beings any otherwise than by their Analogy to those of Nature.

VI. Now though *moral Entities* do not subsist of themselves, and for that Reason ought not, in general, to be rank'd under the Class of *Substances*, but of *Modes*; yet we find many of them to be conceiv'd in the Manner of Substances, because other moral Things seem to be immediately founded in them, just as Quantities and Qualities inhere in the real Substance of Bodies. Farther, as natural Substances suppose some Kind of *Space*, in which they fix their Existence, and exercise their Motions; so in Allusion to these, *moral Persons* are especially said to be in some *State*, which in like manner contains them, and in which they perform their Operations. Hence a *State* may not improperly be defin'd a *moral Entity fram'd and taken up on account of the Analogy it bears to Space*. And as *Space* seems no principal and original Being, but is devis'd, to be, as it were, *spread under* other Things, to hold and to sustain them in some particular manner; so the several *States* were not introduc'd for their own Sakes, but to make a Field for *moral Persons* to exist in. Yet there is indeed this Difference between *State* and *Space*, that

the latter is a kind of immoveable Substance, extended primarily, and of it self, and which might still subsist, if all the natural Things, which now fill it, were remov'd: But *States* (and all other *moral Beings*, consider'd *formally* as such) obtain no higher Condition than that of *Modes* or Attributes; so that upon taking away the Persons suppos'd to be in such a *State*, the *State* it self is in manifest Danger of losing its own Existence.

VII. There are two Sorts of *Spaces*; one according to which Things are said to be in a *Place*, which the Logicians call *Ubi*, as *here*, *there*, &c. and another according to which they are pronounc'd to be in *Time*, which they call *Quando*, as *Yesterday*, to *Day*, to *Morrow*, &c. In the same manner we may conceive a double Notion of *State*; one which denotes a *moral Ubi*, and bears an Analogy to *Place*; another which includes a Respect to *Time*, signifying the Application of some moral Effect to Persons existing in such a *Time*. The former *State*, which hath a Relation to *Place*, may be consider'd either undeterminately, as it results only from ⁴ moral Qualities; or determinately, as it supposeth a Dependence on moral Quantities, and on Comparifon. The *State* of Man consider'd undeterminately, is either *natural* or ⁵ *adventitious*. We use the Word *natural*, not because such a *State* flows from the internal Principles of human Essence, antecedent to the Power of Imposition; but because it was impos'd by GOD himself, not by Man, and affects us immediately upon our Nativity. We are wont to consider the natural State of Man, either *absolutely*, or *with relation* to other Men: The former Notion, till we can find a more convenient Term, we may express by the Word *Humanity*, importing that Condition in which Man is plac'd by his Creator, who hath been pleas'd to endue him with Excellencies and Advantages in a high Degree above all other animate Beings¹. Of which State this Principle is a direct Consequence, That Man ought to be a Creature acknowledging and worshipping the Divine Author, and admiring his Works; and that 'tis expected he should maintain a Course of Life far different from that of Brutes. To this *State* is oppos'd the Life and the Condition of irrational Animals.

Since then the very being a Man is a *State* obliging to certain Duties, and giving a Title to certain Rights, it cannot be out of the way to consider the precise Point of Time at which particular Persons may be said to enter on such a *State*: And this we conceive ought to be fix'd on the very first Moment when any one may be truly call'd

¹ CICERO Off. i. c. 28. *Nature hath given us a Person and Character to sustain, in a Degree of Excellence far above any other Creatures.*

Mr. BARB. NOTES on §. V, VI, VII.

² See what the Author says §. 16.

³ All moral Entities may be reduced to two Heads: 1. Right. 2. Obligation. These are the Foundation of all Morality, which consists either in Actions, or Persons, which have Right to act in such a Manner, or are under an Obligation to do it. This Right and Obligation are Relatives, which always reciprocally suppose each other, as they refer to different Persons. See *Lib. iii. cap. v. §. 1.* In fine, as all Right, and every Obligation depends on the Authority of a Superior, who regulates by Laws the Actions of all that are subject to him, natural Order requires, that we treat first of human Actions, their Principles, and different Kinds; and then of a Law in general; after which the Explication of moral Entities, which are founded on Laws, will properly follow.

⁴ As for Example, When a Prince, in favour to, or to reward any of his Subjects, establishes an Office or Dignity, which he would not else have done, nor was otherwise necessary, but purely to advance the Honour of him for whom it was established: Such are all honorary Employments.

⁵ From the 17 to the 23 §. of this Chapter, the Author shews what he means by *moral Qualities* and *Quantities*.

⁶ *Adventitious* is a sort of moral State, which is added by way of Overplus to the State of Nature, in Consequence of some human Action.

a Man, though he as yet want those Perfections which will follow his Nature in a longer Course: that is, whensoever he begins to enjoy Life and Sense, though his Mother hath not yet delivered him into the World. Now because the *Obligations* cannot be fulfilled by him, without he understand his own Nature and the Ways of working, they for that Reason do not actually exert their Force, 'till he is able to square his Actions by some Rule, and to distinguish them by their proper Differences. But the *Rights*, on the contrary, date their Validity from the very Beginning of our Being, in as much as they engage other Persons, already arrived at the full Use of Reason, to such and such Performances towards us, and may turn to our Benefit, even whilst we are incapable of apprehending the Favour. Hence, it being a general Right and Privilege of all Men not to be hurt by others, if the Body of a *Fœtus* in the Womb should suffer any unlawful Violence, the Injury is not only done to the Parents, but to the Child; who, we suppose, may in his own Name demand Justice on that score, when he is grown up to a Knowledge of the Action¹. But before the imperfect Materials² have acquired an human *Form* in the Womb, if any one should dissipate or destroy them, he cannot properly be termed injurious with regard to that senseless Mass; though he hath indeed broken the Law of Nature, by intercepting a Member of human Society, and hath done an Injury to the Commonwealth, and to the Parents, by depriving them of their promis'd Citizen and Off-spring.

The *Natural State* of Man, considered *with relation to other Men*, is that which effects us upon the bare account of an universal Kindred, resulting from the Similitude of our Nature, antecedent to any human Act or Covenant, by which one Man is rendered peculiarly obnoxious to the Power of another. According to which Sense, those Persons are said to live in a *State of Nature*, who neither obey one common Master, nor are at all subject one

to the other, nor have any Acquaintance by the means of Benefits, or of Injuries. To which may be added a third Notion of a *natural State*, as it abstracts from all Inventions and Institutions brought in, either by human Industry, or by divine Revelation, for the Grace and the Convenience of Life.

The *Adventitious State* is that which obligeth Men at, or after their Birth, by the Authority of some human Constitution; the Divisions of which will be better settled hereafter³.

But we ought to observe, by the way, that there's no Reason why People should imagine a State of Nature, in the Sense but now delivered, to be a Thing that never was, or can be in the World; because there was never any Set of Men joyned together barely by that Similitude of Nature, as it abstracts from Consanguinity; *Eve* being knit to *Adam* in the conjugal Tie, and all their numerous Descendants being closely united and ally'd by the Communion of Blood and Affinity of Race. For we must know, that the Bond arising from Nearness of Birth, doth by Degrees wear out amongst Persons remov'd at a great distance from the common Stock; nor is esteem'd of any farther force, when once got beyond the reach of those several Appellations and⁴ Terms which Mankind have invented to express it by. And therefore such a *State*, though it did not appear at the Commencement of human Race, arose afterwards in a longer Tract of Time, when the Memory of the universal Root, and the Sense of the Relation springing from it, were sunk out of the Thoughts and Minds of Men.

VIII. But although every State supposeth, in the Person whom it affects, a Respect and Disposition towards others, in as much as it is attended with some Right, or some Obligation, neither of which we can conceive without an Object to employ their Force upon; yet some Kinds of States do more expressly include and denote a Relation towards other Men, whilst they signify the Manner and Process by which the mutual Business of Mortals is on both

¹ Another Example may be; If a Thing be given to an Infant before he comes into the World by Will, or by any other Title, when he is in Conception, the Infant has a certain Right to it; so that if it be taken from him, he may legally require it, when he comes to an Age of Discretion: For it is sufficient, that he declares, that his Goods were taken away without his Consent. This Comparison will clear the Matter. When any Person in our Absence robs us, or does us any Manner of Damage, he does us a real Injury, though we may not know it till a long time after. We have taken this out of our Author's Work, call'd *The Elements of the Civil Law*, p. 11, 12. We may add, that by the *Roman Law*, an Infant in the Mother's Womb is supposed to be come into the World at all times, when any thing may be done for its Advantage, as the Words of the *Digest*, *Lib. i. Tit. iii. De Statu hominum. Leg. vii. import. Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quotiens de commodo ipsius partus queritur.* See *Leg. xxvi.* of the same Title. Yet the *Roman Lawyers* are not well agreed upon this Point; for some of them hold, that the *Fœtus* is a Part of the Mother, or of her Entrails, and that it can't be called a Man, till it is born into the World. *Partus enim, antequam edatur, mulieris portio est, vel viscerum. Digest. Lib. xxv. Tit. iv. Leg. i. §. 1.* They borrow'd this Motion of the *Stoicks*, who in this agreed with divers others of the ancient Philosophers. See *Julius Paulus*, written by Mr. *Noodt.* c. ii. and xi.

² The Explication, which *Philo* gives upon *Exod. xxi. 22.* is so very pertinent here, that 'tis a wonder our Author did not apply it. The Text is, If Men, in striving together, hurt a Woman great with Child, so that she miscarry, tho' no other Mischiefs follow, they shall pay the Husband of that Woman such a Fine, or Mulct, as he shall lay on them, and give it him before the Judges; but if Death follow, ye shall give Life for Life. These Words may be understood of the Death of the Mother only, as *Jesephus* thinks, or of both the Mother and Child, as *Philo* supposes, according to the Opinion of this Author. *Εάν τις ἀρδασοι, &c.* If the *Fœtus* be not formed, he that strikes the Mother, ought to make Satisfaction, as well for the Harm done her, as because he hath hindred Nature from perfecting her Work, and giving Life to so noble a Creature as Man; but if the *Fœtus* be already formed, every Member being in its natural Place, and having its proper Qualities, the Person ought to be put to Death; *Philo De Leg. special.* See *Selden de Jure Nat. & Gent. secundum Hebr.* l. iv. c. i. Further, if before the *Fœtus* be completely formed, a Man by hurting the Woman on purpose, causes a bodily Deformity, or other Infirmary in the Child; he may, when he is grown up, prosecute the Author of such a Damage, and shall obtain Satisfaction according to his Damage, as our Author speaks in a Place cited hereafter, where he treats also of another Question, which deserves our Notice, *lib. iv. c. xii. §. 10.*

³ Yet our Author does no where do it formally, but he treats, in their proper Place, of the four principal adventitious States, to which all the rest may be reduced, *viz.* Marriage, the Relation of Parents and Children, Master and Servant, and Citizen, or Member of a Society. To this we may add the Divisions of moral Persons, which our Author lays down in the same Chapter, §. 12, &c.

⁴ *Viz.* When we have pass'd the Degrees of Father, Mother, Grandfather, Grandmother, Brother, Sister, Uncle, Aunt, Nephew, Niece, Cousins, he and she, and some others depending on them; for as we have no other Names proper for such Descendants, so the Line of Kindred produces no such strong Ties between them, who are in such distant Degrees of Relation.

Sides manag'd and transacted. Of this sort the most signal and material are *Peace* and *War*, which two *States*, ¹ *Libanius* says, comprehend all the Affairs, and all the Conduct of Life. *Peace* is that *State* by which Men live quietly together, without the Disturbance of Violence or Injuries, and voluntarily discharge their mutual Duties, as Matters of necessary Obligation. *War*, on the other hand, is a *State* of Men mutually engag'd in offering and repelling Injuries, or endeavouring forcibly to recover their Dues. *Peace* may be divided into *common* and *particular*; the former, such as is maintain'd amongst Men by Duties flowing purely from the Law of Nature; ² the latter, such as derives its Force from express Covenants and Leagues, binding both Sides to agreeable Performances: This again is branched into *internal* and *external*, the one ³ between Members of the same Commonwealth, the other regarding Persons of different Countries and Governments, whether as common Friends, or as special Confederates and Allies. A common or universal War engaging all Mankind at the same time, is an impossible Supposition; this being a direct Consequence of the *State* of Beasts. *Particular War* is either *internal* and *civil*, or *external*; that, between Members of the same ⁴; this, between those of different Communities. When the Acts of War are suspended, though the *State* still continue, such a Cessation is call'd a *Truce* ⁵.

IX. *States* are said to be consider'd *determinately*, when we measure them according to the high or low Degree of Esteem which attends them; or accounting as they are reckon'd more or less honourable. ⁶ For since peculiar *Rights* and Obligations accompany each *State*, every one obtains a larger Share of Splendor and Credit, either as its *Rights* are more numerous and ⁶ more forcible; or as its *Obligations* are directed towards the Performance of such Works as require a singular Ability of Parts and Wit. On the other hand, those which demand only dull Pains and Labour of Body, are in very little Value and Repute.

X. The latter sort of *State*, which, in our general Division, we settled with relation to Time,

in conjunction with some moral Effect, may be divided, *first*, into *Seniority* and *Juniority*; both which are consider'd, either with respect to the Duration of human Existence, and are then call'd *Age*; the Degrees of which are *Infancy*, *Childhood*, *Puberty*, *Youth*, *Manhood*, *fix'd Age*, *declining*, *old*, and *decrepit Age*: or, with regard to some adventitious *State*, ⁷ according as a Man hath continued a longer or a shorter Time in it. *Secondly*, into *Plen-age* ⁸, when one is presum'd able by his own Strength and Discretion to manage his Affairs; and *Non-age*, when a Person hath need of a *Tutor*, or *Guardian*, because he is suppos'd, upon the account of Weakness of Judgment, incapable of dexterously prosecuting his own Business. The Limits of this *State* are different, according to the various Constitutions and Customs of Nations.

Different from *Non-age* is what we may call an *Age capable of meditated Guile*; the Bounds of which it is likewise impossible to assign. *Aelian* in his *Various History* relates a very remarkable Way of discovering such an early Deceit. A Boy, having taken up a golden Plate ^b dropt out of *Diana's* Crown, was indicted in Court: The Judges order'd a Pack of trifling Play-things to be laid upon the Board, and amongst these a Plate of Gold, and bid the Boy choose which he lik'd best; who again laying hands on the Gold, was condemn'd as guilty of the former Sacrilege.

XI. Before we proceed to other Matters, it seems necessary for us to observe, that through Scarcity of Words we are frequently compell'd to express by the same Term, the *State* it self, and the *Attribute* proper to such a *State*; though they are really distinct, and form different Conceptions in our Minds ^c. Thus, to give an Instance, *Liberty* is us'd as well for a *State* with analogy to *Space*, as for a *Faculty of working*, with resemblance to an *active Quality* ¹⁰. And so *Nobility* sometimes expresseth a *State*, sometimes an *Attribute*, or *Affection* of the Person in such a *State*, in the manner of a *passive Quality*. So likewise the word *Truce* denotes both the *State* of Peace, and the Manner of settling it.

^a Vide *Grot. de Jur. B. & P.* l. iii. c. xvi. ^b *Lib. v. Cap. xvi.*

^c *Senec. de Benef.* l. ii. c. xxxiv. There is a vast multitude of Things which have no peculiar Words fix'd upon them; and these we express not by proper, but by foreign and borrow'd Names.

MR. BARRÉ'S NOTES on §. VIII, IX, X, XI.

¹ *Progymnasm.* p. v. c. Edit. *Parisi.* *Morali.* *Aristotle*, as Mr. *Hertius* observes, had before spoken to the same effect: *Ἀγοραὶ δὲ καὶ τὰς οὐ βίας, &c.* The whole Life of Man is divided into Labour and Idleness, War and Peace. *Polit.* l. vii. c. xiv. Edit. *Parisi.* 1629.

² See *Book the viii. Chap. ix. Sect. 2, 3. &c.*

³ *Viz.* So far as they execute the fundamental Agreement punctually, for the sake of which the Society was established, and do not oppose, by open Fact, the lawful Power which is exercised over them; and so that Peace is not disturbed by any sort of Violence, but only that which we are engaged not to use, when we are entred into a Society. As for Example, The internal Peace of a State suffers no Interruption, when the Magistrate uses the Power entrusted to him to curb and punish the Breakers of the Laws. But when the Subjects will by Force deliver a Criminal from Punishment, and endeavour to oppose the Magistrate in the Exercise of his legal Authority, this is called a Civil War. *Element. Jurisprud. Univers.* p. 17. The War also which breaks out among Confederates, united together by a perpetual Alliance, may also be looked upon as an intestine War, as Mr. *Hertius* there observes.

⁴ When this sort of War is extinguished at its first Rise, *viz.* without any regular Preparations on either Side, it is a Sedition; when Subjects take up Arms unjustly against their Sovereign, it is a Rebellion. In *Democracies* and *Aristocracies*, when the People and the Magistrates make two Parties, and use Acts of Hostility one against the other, this is properly call'd a Civil War. *Element. Jurisprud. Univers.* p. 18.

⁵ See Mr. *DAUMAT'S Publick Right*, *Lib. i. Tit. ix. Sect. 1.* and what our Author says, *l. viii. c. iv.*

⁶ *More forcible.*] The *French* Translator renders the Words, *validiora jura*, more considerable, *i. e.* of greater Validity and Certainty; for the Honour of an Employ does not depend upon the Manner of obtaining it, but upon the Dignity and Privileges which it confers on such as are invest'd with it. And so this seems the better Translation.

⁸ And so we say for Example, an Old General, an Old Soldier, a Young Apprentice, &c.

⁹ See *Lib. iii. Ch. vi. §. 4.* and *Lib. iv. Ch. iv. §. 15.*

The *Roman* Law declares such as are in their *Non-age*, or not far from it, capable of Deceit. *igitur doli non capaces, ut admodum impuberes----- excusati sunt. Digest. Lib. xlvii. Tit. xii. De Sepulchro violato, Leg. iii. §. 1.* See *CUJAS'S* Observations, *Lib. vi. Ch. xxii. & Digest. Lib. xlvii. Tit. viii. De vi bonorum raptorum, Leg. ii. §. 19.*

¹⁰ The Author will explain a little lower, *viz.* §. 19. what he means by Qualities *active* and *passive*.

Nor must we forget to hint, that as one Person may be at the same time engag'd in several *States*, provided that the Obligations of those *States* do not interfere with one another; so the Obligations adhering to one particular *State*, may, according to different Parts, be deriv'd from different Principles. And therefore he that only collects the Obligations flowing from a single Principle, and omits the rest, doth not presently form a distinct *State* incapable of other Obligations besides those which he hath taken notice of. Thus he that gathers several Parts of the Office of Priests purely from the Holy Scriptures, doth not in the least deny, but that they are likewise bound to such Performances as the Constitutions of particular Governments shall farther enjoyn. So we that profess in this Work to treat only of those Duties of Men, which ¹ the Light of Reason shews to be necessary, do not at all pretend that there ever was, or now is, or ought to be, such a *State* in which those *Obligations* only should prevail, exclusive of all others. Nay, it would be almost a needless Disquisition to search, whether such a *State* of Men was once so much as likely to have been in the World. For the Assertion, which some so confidently lay down, could never yet be clearly made out; That if *Man had continued in his primitive Holiness, the Law of Nature alone, as it govern'd him at first, so should have continued its Sway, except that one or two ² positive Commands might probably have been added to it.* We may justly question, whether Mankind, although untainted with Sin, should have always pass'd their Time in the Compass of a single Garden, sustaining themselves with the Fruits of spontaneous Growth, and not have cultivated and adorn'd their Ways of living, by industrious Management, and by Variety of Arts and Inventions. For what Prejudice could it have been to their original Innocence and Integrity, if, upon the Multiplication of human Race, they had divided into separate Societies in the Forms of Commonwealths? And what Notion can we frame of such Societies, without

the Addition of *positive* Laws and Constitutions?

XII. *Moral Entities*, fram'd with Analogy to Substances, are call'd *moral Persons* ³; which are either particular Men, or several join'd in one Body by some moral Tie, consider'd with the State and Office which they maintain in common Life. *Moral Persons* are either *Simple*, or *Compound*. The *Simple*, according to the Difference of their Posts and Employments, are either *Publick*, or *Private*; as their Duty is immediately apply'd, either to the Benefit of civil Society, or to the particular Advantage of ³ every private Member. *Publick Persons*, by the general Custom of the Christian World, are divided into *Civil* and *Ecclesiastical*. The former ⁴ are either *Principal*, or *Inferior*. Of *principal* Persons, some administer Affairs with a *supreme Power*; others either execute some Part of the Administration by Commission from the supreme Power, who are properly call'd *Magistrates*, or else assist with their Advice and Counsel in the Management of the Commonwealth. The *Inferior* perform a less noble Service to the Community, and act under the *Magistrates*, with respect to their publick Capacity. In War the Officers, whether of higher or lower Commissions, answer to Magistrates, and are assisted, in Subordination, by the common Soldiers. We reckon Men of that Profession amongst publick Persons, in as much as they are authoriz'd by the supreme Power, either immediately or mediately, to bear Arms in the Service of the Commonwealth.

There is likewise a peculiar Species of *politick Persons*, which we may stile *Representatives*, because they sustain the Character of other Persons: such as, being invest'd with the Power and Authority of acting by another, do in his room transact Business with the same Force and Validity, as if he himself had managed it. Of this Kind are *Legates, Vicars, Burgesses, &c.*

A new Distinction hath been brought in of late, between Ministers ⁵ of a representative Character, who are *Embassadors* properly so call'd; and

³ The Roman Lawyers ordinarily restrain the word *Person* to those that are Free: and rank their Slaves amongst the Goods they possess'd.

MR. BARB. NOTES on §. XII.

¹ In Opposition to Revelation, and particular Rules of the Civil Laws of every Country, from whence arise three distinct Sciences, viz. Natural Right, which is common to all Men without Exception; Civil Right, which is or may be different according to the Interest of every State; and Moral Theology. See the Author's Abridgment of the Duties of a Man and Citizen. *Prof. §. 2.*

² It is not known, whose Words these are, which our Author censures. As to the Question itself, 'tis one of the most impertinent; for our Author elsewhere acknowledges, that it is very hard to imagine, how a Propriety of Goods and Government, on which our whole Lives now are spent, could have Place in our State of Integrity. See his *Spicil. Jur. Nat. c. 2. §. 9.* and his *Comment. super. inven. Vener. Lips. pullo. p. 386.* Nevertheless some others have treated feriously upon this frivolous Question; as Mr. *Thomasius Inst. Jurispr. Divin. Lib. i. c. 2. §. 37, 38.* and Mr. *Hirtius* in his *Elem. prud. Civil. l. i. Sect. 3. §. 5.*

³ There is another Reason, why they are call'd so, and that is, that they are settled in publick Employments by the Authority of a civil Society, or of them that govern it. Whereas private Employments depend upon the Will and Choice of every Man, unless the State will interpose and confer them.

⁴ Why does he not define what is meant by Persons political, or civil? They are such, as (for so our Author himself speaks, *Elem. Jurisprud. Univers. p. 23.*) administer by publick Authority those Affairs which have a particular regard to civil Society, considered as such; whereas Ecclesiasticks are to take care of Matters of Religion only. These last, though they ought to be subject to their Sovereigns in temporal and civil Matters at all times, yet may and ought also to be independent, as to Spiritualls, provided they keep within their Bounds, and do not set up any other Religion besides the established: And the Reason of it is, that as Religion is a Thing in its own Nature free, at least, directly, and can't be supposed to be admitted into civil Society for no End, every ecclesiastical Society may do what it judges for the Interest of Religion, provided it encroach not upon any Prerogative of the Civil Power. See what shall be said hereafter, *Lib. vii. ch. 4. §. 11. Note 2.* Nevertheless, I do not assert any Thing here, which may be a Foundation for any Principles contrary to the *English* Author, *Of the Rights of the Christian Church.*

⁵ The Author here quotes the Work of Mr. *Wicquefort*, entituled, *The Ambassador, and his Office*, printed in his Time without a Name, and under a different Title, viz. *Memoirs concerning Embassadors*; but lately published, with many Additions, as above.

Ministers of the second Order, as *Envoys* or *Residents*, who do not, like the former, express the full Power and Grandeur of their Masters¹.

With resemblance to these publick Representatives, Tutors and Guardians are concern'd for private Persons, as they manage Affairs in behalf of Pupils or Minors given them in Charge.

On this Point Mr. *Hobbs*² is mistaken, when he will have it frequently to happen in Communities, *that a Man shall bear the Person of an inanimate Thing, which therefore is it self not properly a Person; as suppose of a Church, an Hospital, a Bridge, &c.* For there appears no Necessity of introducing a *Fiction of Law*, to constitute Persons by whom any of these should be represented. It being more natural to say in plain Terms, that particular Men are empower'd by the Community, to collect the Revenue, settled for the preserving of such Places, or Things, and to carry on and sustain any *Suits* that shall arise on those Accounts.

The Variety and Division of *ecclesiastical Persons* is obvious to every Man, according to the particular Religion in which he hath been bred up. Nor can any Man of Letters be at a loss to apprehend what Kinds of *Persons* are founded in the Management of Schools.

Private Persons are of a vast Latitude and Extent; yet their principal Differences may be taken, *first*, from their Business, Craft, or Trade, which employs their Pains, and exhibits their Livelihood: and these are, either creditable and genteel, or such as seem to carry in them more Baseness, or Drudgery. *Secondly*, from the Condition, or, as we may say, the *moral Situation* which any one obtains in a Community; in which respect one is a Citizen, with more or fewer Privileges; another a Sojourner, and a third a Stranger. *Thirdly*, from the Place in a Family, upon which account one is said to be a Householder, which may comprehend the Person of a Husband, a Father, and a Master; another is call'd a Wife, another a Son, another a Servant: These may pass for the ordinary Members of a Family; the extraordinary are Guests and Lodgers. *Fourthly*, upon account of Race and Birth; whence arise *Nobles* (divided into different Degrees in different Countries) and *Plebeians*. *Fifthly*, from Sex and Age, whence come the Differences of Man and Woman, and the Distinctions founded in Childhood, Youth, Manhood, and Old-Age³. For though the Diversity of Sex, and Number of Years, are not of external Imposition, yet in the Method of a social Life, they involve some kind of moral Notion; in as much as different Actions are becoming in different Sexes,

and Persons of various³ Ages require a various Treatment and Application.

XIII. A *Compound moral Person* is then constituted, when several individual Men are so united together, that what they *will* or *act* by virtue of that Union, is esteem'd a single Will, and a single Act, and no more. And this is supposed to be done, when the particular Members submit their Wills to the Will of one Man, or of one Council, in such a manner as to acknowledge, and to desire others to acknowledge, for the common Act and Determination of them all, whatever that Man, or that Council shall decree or perform, in Matters which properly concern such an Union, and are agreeable to the End and the Intention of it. Hence it comes to pass, that whereas in other Cases, when many Men *will* or *act* any Thing, we conceive so many distinct Wills and Acts as there are in number *natural Persons*, or *human Individuals*; yet when they close, and form a *compound Person*, they are supposed to have but a single Will, and every Action which they perform is construed as one only, although a Number of natural Individuals concurs in its Production. And hence such a *compound Person* doth and ought to obtain some particular Goods and Rights, which none of the Members, in their private and separate Quality, can claim or arrogate to themselves⁴.

Here also we must remark, that as natural Bodies continue *the same*, although in length of Time, by slow and silent degrees they receive a considerable Alteration from the various Accessions and Deserctions of their Particles; so by the particular Succession of Individuals, the Identity of the *compound Person* is not injur'd; unless at one and the same time such a Change should arrive, as would entirely take away the Nature and Constitution of that united Body. On which Point we shall be more large in⁵ another Part of our Work.

Compound moral Persons, or Societies, may, after the manner of *single Persons*, be divided into *Publick* and *Private*. And the former again are subdivided into *Sacred* and *Civil*. Of the *Sacred*, some we may call *general*, as is the *Catholic Church*, and likewise any particular Church, whether comprehended within the Bounds of such a Nation, or distinguish'd from others by publick Forms of Confession. Others *Peculiar*, as are Councils, Synods, Consistories, Presbyteries, &c. *Civil Societies* are also either *general*, as a *Commonwealth*, of which there are many Species, as simple, compound, regular, and irregular; or *particular*, as a Senate, an Order of Knights, a Tribe, a Parliament, &c. Armies may be called *military Societies*, and consist

¹ *Leviath.* cap. 16.

MR. BARB. NOTES on §. XII, XIII.

² This is a visible Mistake in our Author, who has asserted the contrary elsewhere, and ought to have been corrected by Mr. *Hirtius*, who put out the *Frankfort* Edition in 1706; for there is great reason to reject the Sentiments of such Men (as *Charles Pascal*, *Richard Zouchaus*, &c.) who affirm that Embassadors, properly so called, are as their Master himself, who sends them; inasmuch, that the Prince or State, to whom they are sent, ought to give them the same Honour they would to their Master. The Character of an Ambassador certainly gives neither the Dignity nor Title of a Sovereign, and such a Minister may not pretend, because his Master has a Superiority above another Prince, that he must personally be preferred before him. See what our Author says, *Lib. iii. ch. 4. §. 20.*

³ In the Civil Law some other Distinctions are made among Persons from their Age and Sex. See Mr. *DAUMAT'S* *Civil Laws in their natural Order*, *Lib. i. Tit. II. Sect. I. of the Preliminaries; and the Interpreters upon the Digest. Lib. i. Tit. V. De statu Hominum.*

⁴ *Ages* is not in the Original, but the Manner of Reasoning, and Beginning of the Sentence require the Addition of it, as our Author himself does in his *Elements Jurispr. Univers.* p. 28.

⁵ As for Example, No private Person hath a Right to punish Criminals, although the Right to do it proceeds originally from private Persons; the Sovereign only has that Power.

⁶ See *Lib. viii. Ch. XII.*

of ' Regiments, Troops, Cohorts, Companies, &c.

Amongst *private Societies* we do not only reckon *Families*, but all the ' Colleges, or Corporations in a Kingdom, or a City, as those of the Merchants, of the Artificers, and the like. To make a minute Catalogue of every Species we think unnecessary to our present Design.

XIV. Concerning the Nature of *simple moral Persons*, we have this farther to observe; that as one and the same Man may be in several *States* together, ' provided they do not clash with each other, so he may sustain several *Persons* together, upon Supposition that the Duties attending those *Persons* may be perform'd together by him. For, though upon a natural Account one cannot be both a Husband and a Wife, both a Son and a Daughter; nor in a moral Consideration, at the same Time, a Master and a Servant, a Judge and a Prisoner, a Party and Witness; yet nothing hinders why the same Man may not be (for Example) at home a Householder, a Senator in Parliament, an Advocate in the Halls of Justice, and a Counsellor at Court. In as much as those particular Offices do not require and engage the whole Man; but may, at different Times, be all conveniently administr'd ' . And upon this Principle the wiser Heathens undertook to defend *Polytheism*^b, which they knew well enough was contrary to Reason: For, their Excuse was, they only conceiv'd such a Number of Persons in the same supreme Being, as might answer the Variety of Operations which proceeded from his Essence and Nature^c ' 4.

It's very plain from the Name and the Notion of *Imposition*, that when a Man enters on the Capacity of a new *Person*, there is no natural Change produc'd in him, no Generation of new natural Qualities, no Augmentation of old ones; but whatever accrues to him from this Relation, is comprehended within the Sphere of *moral Things*. So when a Man is declar'd Consul, he is made ne'er the wiser, nor when he lays down his Office, doth he lay down any of his Parts with it. Though some

have observ'd, that the Splendor of Mens Dignity hath frequently a strong Influence on their Actions, and that many Men have made very different Figures in a publick, and in a private Station. But we may reckon these Fancies amongst the common Deceptions of Sight, occasion'd by gaudy Pomp and Shew. The Case being much the same, as when Country People imagine the Name and Title of *Doctor* to have some Share in the Force and the Success of a Prescription^d. Except indeed, that some kinds of Parts and Dispositions are rouz'd and enliven'd by Business; and on the contrary, lie dormant in a State of Ease^e. Yet there is no Question to be made, but that when God Almighty imposeth a peculiar Charge and *Person* on any Man, he can, and often doth indue him with extraordinary Qualities, beyond the Measure of moral Acquirements; as is evident from the holy Scriptures^f.

From what hath been offer'd on this Subject it appears, that the *Jews* heretofore attributed too large Effects to their *Regeneration*, by which the new *Person* of a *Profelyte of Justice* was impos'd on a Gentile; as, when they affirm'd, that there was no Force remaining in his former Kindred; that he ought not to esteem, or use as Relations, his Brethren, Sisters, or Parents; nor his Children begotten in his first Condition^g. The Cause of this Error was their absurd Belief, that a new Soul was infus'd into the *Profelyte*.

XV. It may not be amiss, in the last Place, to observe, that Men sometimes frame a kind of Shadows, or Images of *moral Persons*, for the representing of them in Sport and Jest. Whence it came to pass, that the Term of *Person* hath been peculiarly challeng'd by the Stage. The Essence of a *feigned Person* consists in this, that the Habit, Gesture, and Speech of another *real Person* be handsomely express'd: Thus the whole Procedure bears only a Countenance of Mirth, and whatever such a fictitious Actor says or does, leaves no *moral Effect* behind it, and is valu'd only according to the Dexterity and Artifice of the Performance: For which Reason we may, by the way, justly wonder, why

^a CICERO Off. Lib. i. Ch. xxx. We must understand, that we are by Nature invested, as it were, with two Persons; or Capacities; one common to Mankind, on account of our being Partakers of Reason, and of that Excellence by which we surpass the Beasts; the other proper to particular Men. A third is cast upon us by Time or Chance: A fourth we undertake and accommodate to our selves by our own Judgment.

Idem de Oratore. Lib. ii. Ch. xxiv. I sustain three Persons at the same Time; mine own, the Adversary's, and the Judge's.

^b SENECA de Benef. Lib. iv. Ch. vii. There may be so many Appellations of GOD, as there are Employments.

^c MAXIM. TYRIUS, Dissert. xxiii. The Gods are one in Nature, though many in Name. But we, such is our Ignorance, assign them different Titles, according to the different Helps and Favours which they afford Mankind.

^d ----- Purpura vendit
Caussidicum, vendunt amethystina; convenit illis,
Et strepitum & facie majoris vivere census. Juv. Sat. vii. V. 135, &c.

^e Vide Corn. Nep. Alcibiad. Ch. i.

^f Vide Exod. iii, iv. Deut. xxxiv. 9. 1 Sam. x. 6, 9. Matt. x. 1. 19, 20.

^g Vide Selden de J. N. & G. Lib. ii. Ch. iv.

Mr. BARB. NOTES.

¹ Our Author expresses these Parts of an Army according to the Manner of the Romans, as *Legio, Turma, Cohors, Manipulus*, &c. to which we have no Terms that will exactly answer, and therefore we are forced to translate them thus. See the Treatises of *Justus Lipsius* upon this Matter.

² *Collegia* is a Name given to the Assemblies of some particular Society of Men of one Trade or Calling in a City or Corporation, and such were the *Collegia*, or Societies of Coachmen, Augurs, *Aesculapius*, or Health, *Dendrophori*, or Timber-Merchants, &c. as we have at London, Companies, or *Collegia* of Mercers, Drapers, &c. Vide Mr. DAUMAT, Of publick Right, Lib. i. Tit. xv.

³ Mr. *Hertius* has treated at large of this, and cleared it by a great Number of Examples, in his Discourse, *De uno homine plures sustinente personas*, which makes up a Part of the third Tome of his Commentaries, and small Tracts. Printed at Frankfort on the Mein, A. D. 1700.

⁴ See Mr. LE CLERC's *Bibliothèque Choise*; i. e. Choice Library, Tom. iii. Art. i.

Peter^a, Bishop of *Alexandria*, approv'd of the *Baptism* which *Athanasius*, when a little Boy, had administred to one of his Play-fellows^a.

But the *Imposition* which produceth true *moral Persons*, is allow'd no such Liberty; but ought always to presuppose such Qualities, as may contribute to the solid Use and real Benefit of human Life: And he that in constituting Persons hath not a Regard to these Endowments, is to be esteem'd an extravagant Buffoon, and a vain Insulter over Mankind^b. Thus *Caligula* might have made a *Consul* of the most wicked, or of the most senseless Wretch in *Rome*, provided the Man had been a free Citizen, and could at least have perform'd the common and formal Part of that Office: But to design his Horse *Incitatus* the same Honour, was a Pitch of Madness, and of insipid Raillery: nor a less Impudence than when he set him up for a Master of a Family, and gave him a House and Furniture; where there was good Entertainment provided for Guests invited in the Name of the Beast^b. An equal Madness was it, as well as a horrid Impiety, that many of the Antients, to flatter their Princes, their Founders of States, and other Worthies, rank'd them after their Death in the Number of the Gods^c. And what to think of the Canonization amongst the modern Papists, no Man of Sense is at a Loss.

XVI. As to *Things* consider'd as they are the Object of Law^d, there seems to be no Occasion of ranking them under the Head of *moral Entities*. For, though *Men* are conceiv'd as different *Persons*, upon account of their different State or Office, yet *Things* do not raise such distinct Notions in us, with reference to their Owners, whether ourselves or others, or whether the *Propriety* be yet uncertain. When at first some *Things* fell under particular Right and Dominion, and others were left exempt, we must not fancy, that they themselves acquir'd any new Qualities; it seems rather, that upon introducing this *Propriety* of *Things*, a moral Quality arose amongst Men, of which the *Men* were the *Subjects*, and the *Things* only the *Terms*: For, as during the primitive Communion of Goods, any Man had a *Right* of applying to his proper Use, what equally belong'd to all; so, when once Masters or Owners were constituted, there sprung up a *Right* in each particular Master of disposing how he pleas'd of his own, and an *Obligation* in all other Masters to abstain from his Possessions. But

the *Things* themselves obtain'd nothing hence, but an extrinsecal Denomination, as they make the Object of such a Right, and of such an Obligation. So when certain *Things* are said to be holy, or sacred, no moral Quality of Holiness inheres in the *Things*; only, an Obligation is laid upon Men to treat them in such a particular Manner: and when that Obligation ceaseth, they are suppos'd to fall again into promiscuous and ordinary Use. Yet if, still, any Man will positively maintain, that there are some *Things*, as well as *Persons*, which should be call'd *moral*, he must take care so to explain himself, that he may be understood to attribute this *Morality* to the *Things*, not *formally*, as if it were *inherent*, but only *objectively*, as it is *terminated* in them^e.

XVII. Thus much of those *moral Entities* which are conceiv'd with Analogy to *Substance*. We are now to enquire about those that are really and formally *Modes*, and pass in our Notion as such. *Modes* may be conveniently enough divided into^f *Modes of Affection*, and *Modes of Estimation*: According to the former, we suppose *Persons* to be affected in such and such a Manner; according to the latter, both *Things* and *Persons* may be rated and valu'd. The former fall under the Name of *Quality*, the latter of *Quantity*; if we take both those Terms in the most extended Sense. *Qualities*, so far as concerns our Business, may be divided into *formal* and *operative*. *Formal Qualities* are such as do not tend, nor are directed towards any Act or Work, but agree and are join'd with the Subject, in the Manner of pure and naked *Forms*: whence we may likewise call them *simple Attributes*. *Operative Qualities* are either *primitive*, or *derivative*. By the *primitive*, a Thing is conceiv'd fit and able for such an Act: They are divided into internal^g, and external^h, and may be term'd *moral passive Qualities*. The *derivative* are those which proceed from the *primitive*, and are theⁱ *Acts* themselves, as the former were the *Powers*.

XVIII. Among *moral Attributes*, *Titles* have a considerable Place, which are apply'd for the Distinction of Persons in civil Life, with Reference to their *State* and their Esteem. They are chiefly of two Sorts: Some directly signify the Degree of the Rate and Value, which Persons bear in common Account, together with the Qualities peculiar to Men of that Rank; but the *State* itself they only denote indirectly, and by the Bye, and

^a Sozom. Lib. ii. Ch. xvi. Add the Argument of the Bishop of Minorca in the Council of Trent, by Father Paul, B. ii. concerning the Intention of the Minister in the Celebration of the Sacrament. ^b Sueton. Calig. Ch. Iv. ^c See Tiberius's Speech in Tacitus, An. iv. Ch. xxxvii, xxxviii. ^d The different Distinctions of Things with Reference to Law, will be explain'd in the 4th and 5th Books.

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[†] The greatest Number of learned Men reject this Story, because (as they prove) *S. Athanasius* was eighteen Years old, when this pretended *Baptism* was administred. See the Life of this Father written by the *Benedictines*; but it is sufficient for our Author's Design, that the Fact was possible.

² A witty Speech of *Antisthenes* deserves our Notice in this Place. He advis'd the *Athenians*, upon a certain Time, to decree, That hereafter *Asses* should be call'd *Horses*. Some present replied in Banter, That can't be. But, Gentlemen, (says he) you can choose for your Generals Men that know nothing of warlike Affairs, and whose Qualifications consist only in having a greater Number of Voices, Diog. Laert. Lib. vi. §. 5. Edit. Amst.

³ The different Distinctions of Things in relation to Right, shall be explain'd in Lib. iv. and v. See the *Instit. Lib. ii. Tit. i. & Digest. Lib. i. Tit. viii. De rerum Divisione*, as also Mr. DAUMAR's *Civil Laws*, in their natural Order in the *Preliminaries, Tit. iii.*

⁴ *Modi affectivi*: Words hard to be translated. The *French* renders them, *simple Modes*; because, as our Author explains them, they only modify; i. e. dispose moral Persons.

⁵ Internal Qualities are such, as are really inherent in a Person, as Power, Right, Obligation; as also, such passive Qualities, of which our Author treats in §. 20. following. It were to be wish'd, that our Author had been clearer in his Divisions, which are not very Scholar-like.

⁶ External Qualities are such, as are not annexed to the Person, but being fixed to external Objects, make an Impression upon the Person. See §. 21. following.

⁷ *Viz.* These derivative Qualities are nothing but the Effect and actual Operation of the primitive Qualities. In a Word, our Author ought to have avoided all this Jargon and unprofitable Distinctions of the Schools.

that either more clearly, or more obscurely, according as such a Title is usually attributed to fewer, or to more States. Of this kind are those honorary Epithets, commonly prefixed to the Names of great Persons, as Marks of general Respect: As, *The most Serene, The most Eminent, The most Illustrious*: the Signification of which rises higher, or falls lower, according to the Condition of the Substantive to which they are join'd. Other Titles directly signify some particular State, or some peculiar Seat and Place in a State, but indirectly denote that Degree of Value and Repute, which usually accompanies such a State: as are the Names of moral Persons, of those especially who fill any Post of Honour. Now these Titles are not consider'd, as they are only Notions representing to one Man's Understanding the State and Office of another, but as, by Virtue of human Imposition, they declare the Power and Authority of the Person that enjoys them. So that 'tis not a vain Contention about empty Ceremonies, when Men frequently have such hot Disputes and Quarrels about Titles: because, upon the Denial of a Title, we are suppos'd at the same time to deny the State, the Office, the Power and the Rights, which such a Title generally expresses, or includes. But here we must be sure to observe, that the Imposition of most Titles is not perpetual and uniform; but in different Countries, and in the same Country at different Times, admits of very large Alterations. Thus the Titles of the first Kind which we mention'd (or the honorary Epithets) made use of by our Ancestors, how mean and little do they sound to the Ears of our own Age: while what was heretofore thought a worthy Mark for the greatest of mortal Men, shall now be despis'd by an inferior Scribler? For which reason the Increase of such Titles does not always argue the increase of Dignity; but when the Titles swell higher, while the Thing itself maintains its first Condition, their Value and Price is suppos'd to be considerably debas'd. Sometimes also a certain Title is affix'd by way of Elogy and Complement to some particular Order, because the Quality or Thing meant by that Title, is, or ought to be conspicuous in the Generality of the Members belonging to such an Order. And hence those Members, who are not really possess'd of the Thing, do however enjoy the Title¹. Thus in the Order of Men of Letters, many Persons are saluted with the Appellation of *most famous, and most learned*, who are as much any thing else in the World as what those Terms signify. And so too, an idle unactive Nobleman must have *Industry, and Strength, and Valour* applied to him in our Addresses. It happens likewise very commonly, that private Men, or others, either advance or diminish the Titles of

Persons, as they judge it convenient for the present Condition of their Affairs to flatter and caress, or to despise and vilify them. And even in the latter Sort of Titles, as we above divided them, it frequently falls out, that the Title may continue, tho' the Thing itself, or the Dignity and Right be in a high manner either better'd or impair'd. And farther, 'tis very usual, that in different Countries the same Word shall express very different Degrees of Honour. And therefore it would argue a very unskillful Head, to place in the same Clais all those who bear the same Title all over the World². It must not be forgot, that sometimes a bare Title is attributed to a Man without the Thing, or without the Offices and the Profits which used to attend such a Title; only to this Intent, that he may hence obtain the external Ensigns and Badges of the Honour, and may acquire a more creditable Place and Seat in the Community of which he is a Member. Lastly, It is worth remarking, that chiefly in the Titles of the principal Houses of Europe, the same Title sometimes imports both the Family, and the Possession of the mention'd Territory; sometimes the Family only, without the Possession, yet with the Right of succeeding to it, according to the due Courte and Order of Inheritance.

XIX. *Moral operative Qualities*³ are either active or passive. Of the former the most noble Species are *Power, Right, and Obligation*. *Power* is that by which a Man is enabled to do a thing lawfully and with a moral Effect: which Effect is, That the Person exercising this Power, shall lay an Obligation on others to perform some certain Business, which he requires, or to admit some Action of his as valid, or not to stop and hinder it; or that he shall confer on others a License of doing or possessing something, which License they did not before enjoy. Whence it appears how wide this Quality runs, and how very diffusive it is of itself. *Power*, with respect to its Efficacy, is divided into *perfect* and *imperfect*. The former is that, the Exercise of which may be asserted even by Force, against those who endeavour unlawfully to let and oppose it. Now Force is chiefly applied, within the Bounds of the same Community, by an *Action at Law*, and without these Bounds by a *War*. The latter, or *imperfect Power*, is that, the Exercise of which if any Man is unlawfully prohibited, he may be said indeed to be inhumanly dealt with, yet he has no Right to defend it, either by Process of a Court, or by the Force of Arms, unless this Inefficacy or Imperfection is supplied with absolute Necessity. With respect to its Subject, *Power* is further divided into *personal* and *communicable*. The former is such as one Man cannot lawfully transfer to another. But then this must be consider'd under several Differences. For some Powers are

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¹ Hence it is that Cicero calls Titles of Honour no certain Marks of Dignity. *Lib. x. Epist. ad Famil. Ep. vi.* and observes a little after, that during the Troubles of the Commonwealth, several Persons were honoured with the Titles of *Consuls*, who were altogether unfit for that Dignity, *Consules dicti, sed nemo in Rempublicam consularis.* See *The Art of Thinking, Part ii. Ch. vii. §. 2.* and *The New Letters of Mr. BAYLE*, on the Occasion of his general critical Remarks on MAIMBOURG'S History of Calvinism. *Let. iv. §. 3, 4, 8.*

² Vide Mr. LE CLERC'S *Ars Crit. Tom. i. Part ii. Sect. i. Cap. 13.*

³ We must understand by these Qualities, such as our Author calls Original and Primitive; and, in that Number, those that he calls internal. See §. 17. above.

⁴ As for Example, If a Man refuse to let us pass through his Ground, though we do him no Injury, and we can pass no other way, without great and manifest Danger, he is guilty of an inhuman Action towards us; which nevertheless does not license us to offer him any manner of Force; but if a Man finds himself attacked, and can't otherwise save his Life; as, when an Enemy prosecutes us furiously, then we may force a Passage. *Pufend. Elem. Jurispr. Univers. p. 91.* See also what he says, *l. ii. c. 6.*

so closely united with the *Person*, that the Acts belonging to them cannot rightly be exercised by another. Such is the *Power* of the Husband over the Body of his Wife, which no Laws allow him to discharge by a Deputy. In some again, tho' we cannot transfer the Possession, yet we may by Delegacy commit the Acts to the Administration of others; but in such a manner, that the whole Strength of their Authority must be deriv'd from him, in whom those Powers are originally seated. Of this kind is the power of such Kings as are constituted by the Will of the People: For they cannot transfer the Right of Reigning to another, and yet they may use the Service of Ministers for the Performance of the Acts belonging to that Right. *Communicable Power* is such as may be lawfully devolv'd upon others; and that either at the Pleasure of the Person so devolving it, or by the Authority or the Consent of a Superior ¹.

Lastly, In respect of the Objects, the Generality of Powers may be reduced to four Heads: For they regard either *Persons* or *Things*; and both these as they are either *our own*, or *other Mens*. A Power over *our own* Persons and Actions is called *Liberty*; ² the different Acceptations of which Word shall be hereafter discuss'd. This must not be conceiv'd as a distinct Principle from him who enjoys it, or as an Authority ³ of obliging himself to anything which is oppos'd by his Inclinations ⁴; but as a Licence to dispose of himself and of his Actions, according to his free Pleasure; which at the same time includes a Negation of any Impediment, proceeding from a superior Power. A Power over our own Things or Goods, is called ⁵ *Property*. A Power over the Persons of other Men, is properly *Empire* or *Command* ⁶. A Power over other Mens Things, is what the *Civilians* term *Service*.

XX. *Right is that moral Quality by which we justly obtain either the Government of Persons, or the Possession of Things, or by the Force of which we may claim somewhat as due to us.* The Latin Word *Jus* is a very wide and ambiguous Term: besides the Signification here used, it is taken for *Law*, and for ⁷ a System or Body of municipal Laws or Constitutions, and likewise for a ⁸ Sentence pronounc'd by a Judge. There seems to be this Difference between the Terms of *Power* and *Right*, that the first does more expressly import the Presence of the said Quality, and does but obscurely

denote the Manner how any one acquir'd it. Whereas the Word *Right* does properly and clearly shew, that the Quality was fairly got, and is now fairly possess'd. Yet because the several kinds of *Power* have for the most part a peculiar Name, which * that Quality, by which we conceive something to be due to us, wants, we have thought it convenient to give it the name of *Right* in a peculiar manner, tho' we do not in other places abstain from its more common Signification, as may be observed in the following Parts of this Discourse. We place *Right* in the Class of *active Qualities*, as by virtue of it any thing may be requir'd of others. It may likewise be rank'd in the number of *passive Qualities*, as it impowers us lawfully to receive any thing from others. For *moral passive Qualities* are those by which we are said to do or suffer somewhat, or to admit and receive it. Of these there be three kinds: One according to which we *rightly* indeed admit something, but in such manner, that neither we our selves have any Power of exacting it, nor others any Obligation to give it: Such is the Ability of receiving a Gift purely under the Notion of a Gratuity. And that this *Quality* is not a mere Fandy and Fiction, is evident from this one Consideration, that it may be restrain'd by a Law. A Judge, for Example, may be debarr'd the Liberty of taking a Gift from Parties engag'd in a Suit, under what Colour or Pretence soever. A second Species is such as puts us in a Capacity of receiving something from another, not so, that we can force it from him against his Will, unless in Cases of Necessity; yet so, that he is oblig'd by some moral Virtue to pay or perform it. This ^b *Grotius* calls ⁸ *Aptitude*, or *Desert*. The third Species is that by which we are enabled to compel another to some Performance even against his Will, to which Performance he is likewise fully oblig'd by the Force of some Law ordaining a Penalty upon his Default. Here 'tis worth our remembring, that many Things in common reckoning pass under the Notion of *Rights*, which if we would speak accurately, we should rather call Compositions, made up of Power and Right, in the strict Sense of those Words: At the same Time involving, or supposing, some Obligation, some Honour, or the like. Thus the *Right* or Privilege of being a Citizen, contains both the Power of exercising with full Virtue all Acts peculiar to the

¹ Vide *Lib. li. D. de Recept. Lib. xiii. D. ad L. Aquil.*

^b *De Jure B. & P. Lib. i. Ch. i. §. 7.*

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¹ Such was, among the *Romans*, the paternal Power, which a Father had obtained by adopting a Son; for there must also be besides, a transferring of the paternal Authority, confirmed by the People, Magistrate, or Prince. See *Aul. Ge. l. l. v. Ch. xiv.* and the Titles *De Adoptionibus*, in the *Digests* and *Institutes*.

² See *Chap. iv.* of this Book, §. 2, 3. and *Lib. ii. Ch. i.*

³ *Neque autem imperare sibi, neque se prohibere quisquam potest; i. e.* No Man can command or forbid himself. *Digest. Lib. iv. Tit. viii. D. Receptis, qui arduum, &c. Leg. li.* See also *Lib. ix. Tit. ii. ad Leg. Aquil. Leg. xiii.*

⁴ See *Lib. iv. Ch. iv.*

⁵ This Command or Authority is divided into, 1. Absolute, 2. Limited, see *Lib. vii. Ch. vi.* As also into, 1. Private, 2. Publick. The first is that with which private Persons are invested for the Management of their private Concerns, as such, to which may be referred the Authority of Parents over their Children; of Masters over their Slaves, or Servants; of an Husband over his Wife; of a Schoolmaster over his Scholars; of a Tutor over his Pupils, &c. The other is that which publick Persons are endowed with as such, for the Advantage of the civil Society. *Puffend. Elem. Jur. Gr. Univ. p. 93, 94.*

⁶ Thus the Collection made by the Command of *Justinian*, is called the *Civil*, or *Roman Law*; and in the same Sense this Book is entitled, *The Right of Nature and Nations*.

⁷ This is only proper in *Latin*. See *Digest. Lib. i. Tit. i. De Justitia & Jure, Leg. xi.*

⁸ This relates to what the Interpreters of the *Roman Law* call, *Jus ad Rem*, or, a *Right to a Thing*. See what is said *Lib. iv. Ch. ix. §. 8. Note 2.* *Ulpian* the Lawyer, as Mr. *Fortius* thinks, calls it, *Jus crediti*; i. e. a sort of active Debt. *Digest. Lib. iv. Tit. ii. Quod metus causa, &c. Leg. xii. §. 1.* See *Lib. i. Tit. xvi. De verborum significat. Leg. x.*

⁹ And what is said *Lib. v. Ch. xi. §. 1. Note 4.*

¹⁰ See *Ch. viii. §. 7.* where we shall explain the Distinction of perfect and imperfect Right.

Members of that City, and also a Right of enjoying the Benefits proper to it, supposing in the Person an Obligation toward the Corporation. So, for Example, the Honours and Degrees of learned Men include both the Power of performing certain Actions proper to such a Dignity, and the Right of sharing in the Profits of their Order; to which Notion there is further added the height of Esteem and Respect, which accompanies their Place and Title.

XXI. An *Obligation* is that by which a Man is bound under a moral Necessity to perform, or admit, or undergo any thing. The several Kinds of Obligations † will be hereafter insisted on at large ^a.

There are also a sort of ^a *moral patible Qualities*, which are conceiv'd to affect the Understandings of Men in some certain manner: as in natural Qualities, those have obtain'd the Name of *patible*, which affect the Faculty of *Sensation*. Of this Order are Honour, Ignominy, Authority, Gravity, Fame, Obscurity, and the like.

XXII. It remains that we subjoin something about the *Modes of Estimation*, or the *moral Quantities*: For 'tis evident in common Life, that Persons and Things are rated, not only according to the Extension of their natural Substance, or according to the Intensity of their Motion, and their other natural Qualities, considered as they flow from the Principles of their Essence; but likewise according to another kind of Quantity, different both from physical and mathematical: And this *Quantity* arises from the Imposition and Determination of a rational Power. Now *moral Quantity* is met with first in *Things*, where it is called *Price*; secondly in *Persons*, where we term it *Esteem*; both which were included in the Notion of *Value*; and thirdly, in *Actions*, where it

has not yet acquired ^a a peculiar Name. Of each Species we shall treat in its proper Place. What we have hitherto insisted on, about the Variety and Distinction of *moral Entities*, may seem sufficient to our present Design.

XXIII. We will only add this general Remark, That as *moral Entities* owe their Original to *Imposition*, so they draw their Continuance and their Changes from the same Cause; and when that once ceases, they immediately vanish, just as when we put out the Light, the shadow instantly disappears. Those which are made by *divine Imposition*, are not dissolv'd but by the divine Pleasure. Those which are fram'd at the Will of Men, are destroy'd by the same Power, without the least Alteration in the Persons or Things, as to their natural Substance. For tho' it implies a Contradiction in the Nature of Things, that what has been done already, should be made not to have been done; as that a Man, who has been Consul, should not have been Consul; yet we find every Day how easy 'tis to cause a Man not to be for the future what he has already been: and we see at the same time all the *moral Entities* that inher'd in such a Man, entirely defac'd, and leaving no real Footsteps behind. For 'tis impossible that a *moral Entity* should ever grow up to the Strength and Force of a natural Quality. Whence 'tis a very weak thing to believe, that when a Man is constituted such or such a Person, an indelible Character is imprinted on him barely by virtue of that moral Imposition: For thus, when a Commoner is created a Nobleman, he only acquires new Right, but does not at all change his Substance, or the Qualities founded in it: And if a Nobleman be degraded, he only forfeits the Rights of his Order; but the Benefits he holds from Nature, remain perfect and unimpair'd ^b.

^a Vide *Lib. iii. Ch. iv.*

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† See *Ch. vi. §. 5.* of this Book, and *Lib. iii. Ch. iv.*

¹ Our Author calls these *external operative Qualities*, §. 17. above; and the *French* translates them, *moral sensible Qualities*.

² Vide, for the first, *Lib. v. Ch. i.* For the second, *Lib. viii. Ch. iv.* For the third, *Lib. i. Ch. viii.*

³ The proper and real Foundations of Honour lose nothing of their Value, although Men are stript of their Titles, *Demetrius Phalereus* lively expresses this Matter, as he is quoted by Mr. *Hertius*; when it was told that Philosopher, That the *Athenians* had thrown down his Statues: Well, said he, *but they cannot overturn that Virtue, for the sake of which they were erected.* *Diog. Laert. Lib. v. §. 82.* See other Examples concerning the Manner how moral Entities are destroyed, in the last Chapter of this Book, §. 6.



C H A P. II.

Of the Certainty of MORAL SCIENCE.

The CONTENTS of every Paragraph of the second Chapter.

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| <p>i. Most Mendeny that there is a demonstrative Certainty in moral Sciences.</p> <p>ii. What is a Demonstration.</p> <p>iii. The Principles of a Demonstration.</p> <p>iv. Demonstration agrees to that moral Science only, that treats of the Goodness or Evil of Man's Actions.</p> <p>v. The Uncertainty of moral Things is objected.</p> | <p>vi. Whether any Thing be good or bad before any Institution.</p> <p>vii. Whether Shame be a Proof of it.</p> <p>viii. Of the Extent of moral Actions as to the Quality.</p> <p>ix. Grotius's Opinion consider'd.</p> <p>x. In moral Quantities there is a Latitude.</p> <p>xi. What is called Morally Certain.</p> |
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IT has been an establish'd Persuasion among the Generality of learned Men, that moral Knowledge is destitute of that Certainty which is so famous in other Parts of Philosophy, and especially in the *Mathematicks*¹. The Foundation of their Notion is this: They take Mortality to be incapable of Demonstration, from whence only true Science, and free from the fear of Error, can proceed; but imagine that all its Evidence rises no higher than a probable Opinion. An Unhappiness that has been prodigiously injurious to the most noble Disciplines, and the most necessary to human Life. For, hence it came to pass, that Men of Wisdom and Parts were afraid of spending too much Labour in cultivating Notions which depended on so weak a Bottom: And the same Principle furnish'd those who were intirely idle and negligent about these Studies, with a fair Excuse; while they might alledge, that there was no firm and demonstrative Assurance to be had in such Disquisitions, but that they could only be prosecuted in a rude and unaccurate Manner. To which *Aristotle* contributed not a little, who in the common Judgment of the World, has arriv'd at the highest Pitch of moral Attainments, and left no farther Field for the succeeding Industry and Wit of Men. *Aristotle* then, as to the Truth of Ethicks, in his Treatise on that Subject, address'd to *Nicomachus*², delivers himself in the following Propositions: *It must not be expected, that all Kinds of Things shall be explain'd with the same Accuracy. Honesty and Justice, which fall under the Consideration of³ civil Knowledge, have so many different Faces, and are liable to so many Mistakes, that they seem to be only instituted by Law, and not originally decreed by Nature. We shall therefore think it sufficient, when we discourse on such Heads, or when we argue from them, to shew the Truth in a*

ruder Manner, and under a kind of Shadow and Figure. It becomes a Man well instituted to require such Proof and such Explication of any Matter, as the Nature of the Thing will bear. For, it seems equally absurd, to demand Demonstrations from an Orator, and to let a Mathematician satisfy us with Probabilities³. We, for our Part, as we are not at all influenc'd by the Name of a single Philosopher; so we intend to enquire what Answers are to be return'd to the principal Arguments urg'd by him, and others, so soon as we shall have premis'd a Word or two concerning the Nature of *Demonstration* in general.

II. To demonstrate then, as we apprehend it, is syllogistically to deduce the necessary Certainty of any Matter propos'd from such Principles, as being its Causes, must needs make it known beyond Doubt and Dispute. Now, tho' 'tis manifest that there is such a Thing as we here define, and we see Instances of it every Day in mathematical Operations, to which no Man in his Wits ever denied the Art and Power of Demonstrating; yet from the false Exposition of two or three Words, it has happen'd that the greatest Number of Philosophers have committed a wretched Oversight in the Point, and have rashly excluded this noble Way of Proof from many Parts of Knowledge, which had a just Title to its Possession. The chief Occasion of the Error was this: They found it laid down for a Rule, That the Subject of a Demonstration ought to be necessary, which they interpreted, as if in a demonstrative Syllogism the Subject of the Conclusion, to which the Predicate was applied, ought always to be a Thing necessarily existent; as for Example, in that thread-bare Instance, *Man is rational, therefore visible*; the Subject of the Demonstration is *Man*, who must be own'd for a necessary Being⁴. But in Reality the Subject of Demonstration is not any

¹ Vid. Lib. i. Cap. i.

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² If we would know the Reasons, why it is falsely believed, that all demonstrative Knowledge borders upon mathematical Quantity, we need read nothing but Mr. LOCKE's excellent Work of Human Understanding, Lib. iv. Ch. ii. §. 9, 10, &c. and Chap. iii. §. 19, 20.

³ *Aristotle* understands not by this, the Art of Government simply, but the Knowledge of Morality, and the Condition of a Citizen, of whatever Degree he is. This very Word among the *Greeks* includes sometimes all practical Sciences, as, Oeconomicks, Rhetorick, &c. See Mr. Hertius's *Introduct. Element. Prud. Civil.* §. 8.

⁴ These Words appeared so plain to Mr. *Buldcus*, that he was wholly of Opinion, that *Aristotle's* Judgment about the Original of Justice and Honesty was the same as *Epicurus's*. See his Discourse of moral Scepticism, printed with his *Analecta of Hist. Philos.* in 1706. §. 12. However, Mr. Hertius in his Notes upon that Place, pretends to excuse *Aristotle*, by saying, That he wrote for such of his Scholars, as, according to the Custom of those Times, applied themselves close to *Mathematicks*, and on that Account fancied that they had found geometrical Demonstrations every where. Hereupon he quotes a Passage in his *Metaphysics*, where he says, That we must not expect a mathematical Exactness in all sorts of Subjects, τῶν ἀκριβοῦσιν μαθηματικῶν, Lib. ii. Ch. ult. and refers us to *Rachelius's* Introduction to the Philosophy of *Aristotle*, Ch. xii.

⁵ He does not mean, that Man has such an Existence that he can't but exist; for that's the Property of God only. The Existence of Man then is no otherwise necessary, than as God has determined to send him into the World, and that being supposed, he must exist till God destroys him.

one single Term, but some entire Proposition, the necessary Truth of which is from settled Principles syllogistically inferr'd. Where it signifies little, whether or no the *Subject* of this demonstrable Proposition necessarily exist; but 'tis sufficient, if granting its Existence such certain Affections necessarily agree to it, and if it can be made out, that they do thus agree to it, by undoubted Principles. Thus, a Mathematician never troubles himself to enquire, whether a *Triangle* be *necessary* or *contingent*, so long as he can demonstrate all the *Angles* of it to be equal to two *Right* ones. And therefore the *Subject* of Demonstration is only call'd *necessary* upon account of the *necessary Connexion* by which the *Predicate* cleaves to it in Conclusions of that Nature ¹.

III. But what kind of Propositions those ought to be, which we are to use in Demonstration, will appear from the Consideration of its End and Effect. That then, which we require by Demonstration, is *Science*, or a *clear and certain Knowledge*, every *Way*, and at all times constant to itself, and plac'd beyond the Fear of Mistake. What

we have Science of (says * *Aristotle*) *we imagine under an Impossibility of being otherwise.*

Therefore 'tis necessary the Propositions should be *true* ² really and absolutely, and not upon *Concession* or *Supposition*. For, tho' from a Supposition laid down, a long Chain of Conclusions may be drawn; yet 'tis impossible that, being deriv'd from a precarious Principle, the Streams should not relish of the Fountain. And tho' we should make the two most contradictory Suppositions in Nature, one of which must of Necessity be true; yet we can by this Means only prove for certain *τὸ ὄντι*, as the Logicians call it, or that the Matter is really so: for *τὸ διὰ τι*, or the Reason why it is so, requires, as an indispensable Condition, the Firmness of the precedent Hypothesis. The Propositions of Demonstration must likewise be the *first* and the highest that can be, so as to want no further Proof, but to deserve Credit upon their own Evidence; or, however, so as at last to be reducible to some *first* Truth. For as some Propositions are plac'd at a less, and some at a greater Distance from the first Principles; so we must not imagine that every Demonstration can be finish'd in a single Syllogism, but we must carry on the Argu-

ment from the Proposition to be demonstrated, till we arrive at the first Principle, on which it depends. For, *they* are not the only Masters of Reasoning, who are so very quick and expert at their *quicquid*, their *atqui*, and their *ergo*; but those also, who beginning at evident Principles, understand how to frame an Argument by a just Train of necessary Consequences. Another Requisite in such Propositions is, that they be *immediate* ³; that is, that they flow immediately from one another, without any Gap or Interruption. For, a demonstrative Argument should be work'd up in the manner of a Chain, the Propositions being knit within one another, like so many Links; so that if any one Link breaks, or proves deficient, the whole Frame must dissolve and fall in Pieces. Lastly, 'tis necessary that the Propositions in Demonstration be the *Causes of the Conclusion*, as containing the Reason why in such a Conclusion the *Predicate* necessarily agrees to the *Subject* ⁴.

IV. This being premis'd, it is farther observable, that tho' 'tis a Thing common to all moral Discipline not to take up with a bare Theory, but to pass into Use and Practice, yet there is a vast Difference to be discover'd between the two Principal of them; of which one is concern'd about the Rectitude of human Actions, in order to Laws; the other about the dextrous Government of our own, and of other Mens Actions, for the Security and the Benefit of ourselves, and more especially of the Publick. For this latter Part of *Ethicks* ought to be rank'd under the Name of *Prudence*, which *Aristotle* defines; *A Habit, active according to Reason, about the Good and Evil that can happen to a Man*. Whence he thus settles the Duty of a prudent Person: *It seems to me to be the Property of a Man of Prudence, to take right Consultations about those Things which are good for him, and of universal Use in well living*. And these Opinions he builds upon Axioms drawn from the accurate Observation and Comparison of human Manners and Events. But those Axioms do not appear so very firm and evident, as to be the Ground of infallible Demonstration, as well upon account of the wonderful Frailness and Inconstancy that occurs in the Wits and Tempers of Men, as because the Events of Affairs are frequently turn'd in a little Moment, and driven to a Result quite contrary to our Intentions

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¹ So that though the *Actions* of Men, and all other *moral Entities*, do not necessarily exist, but depend upon the free Determination of our Understanding; yet if we suppose certain Relations between Deeds which are actually produced, or may exist, and a Rule with which we may compare them, some Right and Obligation will as necessarily follow from thence, as supposing a Triangle, it follows, that its three Angles are equal to two Right ones.

² Our Author argues here upon the Principles of *Aristotle*, whose Words are, *Ἀπὸ δὲ τῶν δὲ λεγόντων, &c.* "I call that a Demonstration, which by Reasoning produceth Knowledge, as soon as we apprehend it. And if this be the Way to know, it is a necessary Consequence, that all demonstrative Knowledge must be deduced from Maxims so evidently true, that they enforce a Conclusion immediately, and so are the proper Principles of the Thing to be demonstrated. *Arist. Analyt. Post. Lib. i. Ch. ii. D.* "If demonstrative Knowledge be from necessary Principles, 'tis plain, that all demonstrative Reasoning must be from such. *ib. Ch. vi.*

³ Every Step or Degree of Inference ought to be known intuitively, *i. e.* at the first View, and of itself: *viz.* we must see the Agreement or Disagreement of the Medium which unites the Terms together; and which intervenes to shew the Agreement of the two Extremes at one single View. See *Mr. Lock's Essay of the human Understanding, Lib. iv. Ch. ii. §. 7.*

⁴ Our Author might have observed here, that all that he was about to say of the Nature of a Demonstration, is explained more at large in a Latin Book entitled, *Analysis, &c. An Analysis of Aristotle's Philosophy, according to the Principles of EUCLID*, by *Erhard Weigel*, Professor of Mathematicks at *Jena*. This Person first encouraged *Mr. Pufendorf* to undertake this Work, and furnished him with some Materials for it; as our Author owns in his Preface to his *Elemens de Jurispr. Univers.* He adds there also, That no Man of his Nation has so well taught the Art of Demonstration as that Professor.

⁵ *Arist. Ethic. ad Nicom. Lib. vi. Ch. v.* Cicero also calls Politicks, *Prudentia civilis. Partit. Orat. Ch. xxii.*

and Expectations^a. Nor is human Subtily in the Applications of these Rules and Maxims baffled only by such unlook'd for Accidents and Occurrences; but the divine Wisdom is pleas'd often to interpose, and to elude the craftiest Stratagems, and the best contriv'd Plots of mortal Designs. And therefore the ablest Managers of Affairs aspire not to act always with strict Demonstration of Success^b, but when they have apply'd the most sage Circumspection, and the most piercing Forecast, they commit the Issue to Providence and Fate. For tho' generally we may know what can possibly happen, tho' we may compare these possible Events together, tho' we may determine for certain, not only which of two Possibilities is of greater, and which of lesser Value, supposing them now to exist; but also what Effect can proceed from more, what from fewer Causes, either now in being, or hereafter to be: and tho' we may conclude that Effect, which can be produc'd by most Causes and Ways, to have the highest Degree of Probability, and therefore best to deserve our Hopes and Expectations^c; yet all Possibilities do not occur to the Mind at all Times and Places; or, if they do, are not always rightly weigh'd and consider'd: and by reason of strange and sudden Accidents, which could scarcely have been foreseen, many Things, which we at first thought to be most possible, or the most likely to fall out, when we come to the Point, appear quite otherwise than we before imagin'd them. Hence, in prudential Managements most Men think it sufficient to follow that Rule of Aristotle^d: *We ought no less to hearken to the undemonstrated Declarations and Opinions of skilful, of antient, or of wise Men, than to Demonstration itself: for such Persons found their sight of Things on Experience, and so look into the very Principles of Action.* But let others fight out this Prize^e. As for the former and more noble Species, which we assign'd to moral Discipline, that which considers what is Right, and what Wrong in human Actions, the best Share of which^f will be illustrated in our present Attempt; this is built altogether on so sure Grounds, that we thence draw genuine Demon-

strations, able to produce true and solid Science: Or, in other Words, its Decrees may be in such a Manner deriv'd from certain Principles, as to leave no Room, no Excuse for Doubt^g. Whatever contributes to the improving of our Virtue, or of our Happiness, Nature hath taken Care to lay either directly before us, or at a very easy Distance for our Search. This Assertion will be more clearly made out, if we in the first Place consider and examine the Arguments usually alledg'd to the contrary. But, by the way, we acknowledge Mr. Hobbes^f to have been extremely mistaken, when he contends, that '*Ethicks and Politicks are therefore capable of a Demonstration à priori, i. e. by Reasons drawn from the Nature of the Thing; because we ourselves are the Authors of the Principles of Justice and Injustice, of Right and Wrong, by making those Laws and Compacts whence the Measures of Justice are to be taken: since before any such Laws or Compacts were instituted, there was no such Thing as Justice or Injustice, publick Good or Evil, among Men, any more than among Beasts*'^g. The absolute Falseness of which Position we shall hereafter^h have Occasion to demonstrate; as there is also a Fallacy lurking under the word *Publick*.

V. To proceed therefore to the Objections: Some affirm moral Things in general to be uncertain and unstable; and no Science can be of a more firm and settled Nature than the Object about which it is employ'd. To which it may be answer'd, That tho' moral Entities owe their Original to Imposition, and therefore cannot be call'd *Necessary* in an absolute Sense; yet they do not proceed from such loose and wandering Principles, as that on this Account all Knowledge about them should be weak and uncertain. For, the very Nature of Man, assign'd him by the Wisdom and Goodness of the Almighty Creator, requir'd the Institution of the chief Part of them; and these at least cannot be said to be unsettled and uncertain. This will appear beyond Dispute, when we come to enquire into the Origin of the *Law of Nature*. Besides, human Actions are chiefly on this account call'd *Moral*, because they are not *necessary*, but *free*;

^a 'Tis not barely the Event of Things (says Fabius in Livy, Lib. xxii. Ch. xxxix.) which communicates this Knowledge, for that is only as the Instructor of Fools: but it is the same immutable Reason which was, and will be so as long as the World continues in its present Condition. ^b Vide 2 Sam. x. 12. ^c Vide D. Cumberland De. L. Nat. Ch. iv. §. 4. n. 4. ^d Ethic. Lib. vi. Ch. xii. ^e Senec. De Benef. Lib. vii. Ch. vii. ^f De Homine, Ch. x. ^g Ch. vii. §. 13. and Lib. viii. Ch. i. §. 5.

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^f See Montagne's Essays, Lib. i. Ch. xxiii. P. 76. in fol. And Charron, Of Wisdom, Lib. iii. Ch. i. Here also we may observe, that some Events are not probable sometimes, according to the Sense of an antient Poet, cited by Aristotle, Rhetor. Lib. ii. Ch. xxiv. Τὰς δὲ τῶν εὐχῶν, &c. Any Man may assert it as a Probability, That many unlikely Things befall Men. See Mr. Bayle's Histor. and Critical Diction. Tom. i. P. 94.

^g In the ordinary Course of Life we must not expect a clear Evidence, but are obliged, for the most part, to act by Probabilities. It is a judicious Maxim of Descartes's, and, long before him, laid down by Seneca: *We must not expect a certain Knowledge of the Truth, which is hard to find out; but we must follow Probabilities. All our Actions are grounded on this. So we sow, sail, marry, &c. tho' we know the Event uncertain. We go, where Reason, not Truth leads: If we tarry till we can know what will happen well, and what is certain Truth, we may sit still for ever. I will not fear to follow Probabilities.* Sen. de Benef. Lib. iv. Ch. xxxiii. Arnobius has a like Passage, in the Place where he answers the Pagans Objections against the Faith of Christians.

^h It is certain, that Politicks, as well as Physick, is a conjectural Science, as Mr. Bayle expresses himself, in his Reply to the Question of a Province, Tom. i. P. 570. But whatever that famous Philosopher says, who, according to his Custom, pretends to gather from thence some Arguments for Scepticism, P. 565. yet if he would seriously examine true Politicks, he would find that most of its Principles and Maxims have a Certainty in them, which comes very near a Demonstration; and as to those Things which look like Problems, their Obscurity proceeds rather from the Difficulty of Application, Ignorance of some Circumstances, or Want of Attention, than any absolute Impossibility to establish a Rule of Certainty concerning them. See what Mr. Hertius speaks here, and the Discourse of Mr. Buddeus, De Scepticismo Morali, §. 26. The Boasting of the Scepticks proceeds from the Observation of the Behaviour of bad Politicians, and ambitious Sovereigns, and not from the Principles and Maxims which arise from the natural Design of civil Government, and the publick Good, separate from the private Interest of some Persons.

ⁱ Our Author nevertheless explains the fundamental and principal Questions of Politicks in the two last Books of this Work.

^k For, some pretend that the Determination of what is morally Good or Evil, depends upon the Will of the Sovereign.

yet from hence it does not follow, that upon the laying down of certain Principles, such Affections may agree to these Actions, as may be undoubtedly *demonstrated* concerning them. For 'tis evident, that the Acts which fall under the Conduct of the Law of Nature, do in themselves contain an intrinsic Force and Power, directing towards a sociable Life, tho' the actual Exercise of them depends on the Free-will of Man. While we deliberate, we are properly said to be *free*, and the Effects which are to proceed from our Actions are, with Respect to the *Freedom*, rightly term'd Contingent: but when we have once determin'd which way to act, the Connection between our Actions and the depending Effects is necessary and natural, and consequently capable of Demonstration. Neither do *they* argue any Thing to the Purpose, who deny the Possibility of passing a clear Judgment on human Deeds, upon Account of the great Variety of Circumstances, any one of which seems to put a new Face, and a new Quality on the Action; whence it happens, that Legislators can seldom frame such a Law as shall admit of no Exception, and where there shall not be frequent Occasion to neglect the Letter of the Statute, and to have Recourse to Equity for Relief. Because indeed there are establish'd Principles, by which it may be shewn how much Weight and Force any Circumstance bears in affecting, or varying any Action. And these very Principles are the Occasion, that Law-givers are frequently less anxious about excepting from their Decrees some particular Cases involv'd in extraordinary Circumstances^a, but proceed with more Security in the Use of general Words. For they take it for granted, that the Judges, whose Duty it is to examine particular Actions by the Rule of the Law, will be very well able to understand what Power any Circumstance has over any Fact^{a 2}. But hence it cannot be infer'd, that constant and perpetual Decrees sometimes fail; but we ought rather to conclude, that

'tis not worth while for Legislators, in their written Laws, to prescribe any Thing about Cases that very rarely happen, since such may be easily determin'd by the Judges out of the Principles of the Law of Nature.

VI. But to make the Knowledge of the Law of Nature, of which we are now treating, and which includes all moral and civil Doctrines that are genuine and solid, to make this Knowledge, we say, fully come up to the Measure and Perfection of *Science*, we do not think it necessary to assert, with some Writers, that there are several Things honest or dishonest of themselves^b and antecedent to all Imposition, and so to make these Things the Object of our natural and perpetual Law, in Opposition to positive Laws, where Matters are Right or Wrong, just as the Law-giver was pleas'd to make them either. For, since Honesty (or moral Necessity) and Turpitude are Affections of human Deeds, arising from their Agreeableness or Disagreeableness to a Rule, or a Law; and since a Law is the Command of a Superior, it does not appear how we can conceive any Goodness or Turpitude before all Law, and without the Imposition of a Superior^c. And truly, as for those who would establish an eternal Rule for Morality of the Actions, without Respect to the Divine Injunction and Constitution, the Result of their Endeavours seems to us to be the joining with GOD Almighty some coeval extrinsecal Principle, which He was oblig'd to follow, in assigning the *Forms* and *Essences* of Things. Besides, 'tis acknowledg'd on all Hands, that GOD created Man, as well as every Thing else, according to his own Free-will. From whence it evidently follows, that it must needs have been his Power and Pleasure to endue this Creature with whatever Kind of Nature his Wisdom thought fit. And how then should it come to pass, that the Actions of Mankind should be vested with any Affection or Quality proceeding from intrinsic and absolute Necessity, with-

^a And hence chiefly we are to draw the Reason of it, §. 3, 4, 5, 6. de Legib. Laws are to be enacted, *as Theophrastus us'd to say*, with Regard to Things, as they most commonly fall out, not as they sometimes happen beside Expectation. Little particular Cases and accidental Exceptions are not worth the Notice of a Legislator. ^b *Add. D. Cumberland de Legg. N. Ch. iv. §. 4. n. 1.* ^c *Selden de J. N. & G. Lib. i. Ch. 4.*

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¹ By these Principles (adds this Author) the following Maxims of the Roman Lawyers are to be explained: *Laws are to be made* (says Theophrastus) *about such Things as commonly happen, and not about such Things as fall out unexpectedly and by Chance: For what happens once or twice, Lawgivers pass over.* Dig. Lib. i. Tit. iii. *De Legibus, Senatuf. cons. & longâ consuetudine, Leg. iii. i. e.* In a Word, Laws are made about Things that commonly happen, and not for extraordinary Cases, which may fall out once or twice by Chance. See *Aristot. Ethic. ad Nicom. Lib. v. Ch. xiv.* and what is said *Lib. v. Ch. xii. §. 16 and 21* following.

² We must own, that because of this infinite Variety of Circumstances, we can hardly come to a final Decision in our Examination of all particular Cases; yet that does not at all shake our moral Certainty, nor lessen the Use of it; for the Impossibility of doing any Thing without us, either by the Use of our Senses, or with the Help of Instruments, as to make a single Line perfectly right, a single Surface exactly round or plain, a single Body compleatly regular, or whatever else may be reduced to the like Nature; such an Impossibility (I say) can't destroy the Truth or Benefit of the Principles of Geometry, concerning the Measure of Lines, Superficies, and Solids. It is sufficient that they come so very near Exactness, that nothing considerable can be desired to make them useful to us; and so we may arrive at our Ends as well by the Principles of Morality, as by those of Geometry. It is true nevertheless, that Things moral, such as God and Man, with their mutual Acts and Relations, can't be known so distinctly and exactly, as mathematical Questions, and so moral Conclusions can't be so perfectly known. But as to the Method, Rules of Demonstration, and inferring one Thing from another, they are all exactly the same in Geometry and Morality; and there is no more Need of an absolute Exactness for the Use of Life, than to measure the Distance of Place, or Extent of a Field. *Cumberland. De Legib. Nat. Ch. iv. §. 4. n. 1.* It is thought necessary to give the Reader this Passage entire, which our Author only refers to.

³ To remove all Equivocations, and leave no Place for Cavil, we ought to observe, That we must own Things honest or dishonest of themselves, or in their own Nature, 1. By Way of Opposition to human Appointment, as the Agreements or Opinions of Men. 2. In Respect of the Subject, with Relation to which they are thought so. As for Example, There are some Acts which agree to GOD no way, *i. e.* which he can't do without derogating from his Perfections, and so contradicting himself. There are Actions also, which of themselves agree, or disagree with the human Nature in our present State. But if we understand that an Action is honest, or dishonest in its own Nature, without any Relation to the Appointment of GOD, or the Laws which GOD hath imposed upon us by our Creation, in this Sense the Proposition is false. *Specim. Controvers. Ch. v. §. 7* See *Lib. ii. Ch. iii. §. 4, 5.* following.

out Regard to the Institution, and to the good Pleasure of the Creator ¹? So that in reality, all the Motions and Actions of Men, upon setting aside all Law, both divine and human, are perfectly *indifferent* ²: And some of them are therefore only said to be naturally honest or dishonest, because that Condition of Nature, which GOD has freely bestow'd on Man, strictly enjoins the Performance or the Omission of them ³. Not that any Morality inheres of itself, and without all Law, in the bare Motion, or the meer Application of natural Power ⁴: And therefore we see Beasts every Day doing such Things without Fault or Sin, in committing which Man would have been guilty of the highest Wickedness. Yet are not the natural Motions of Men and of Beasts in themselves different, but some Actions of Men are by the Authority of a Law invest'd with a moral Quality, which does not at all touch or affect the Proceedings of Brutes.

Nor will it be to the Purpose for any one to object, That since Men are endu'd with Reason, which is wanting in Beasts, therefore there must be a natural Difference between human and brutal Actions. For, if we consider Reason, as uninform'd with the Knowledge and Sense of Law, or of some moral Rule, it might perhaps even in this Condition, furnish Man with the Faculty of acting more expeditiously and more accurately than Beasts, and might assist the natural Powers by an additional Shrewdness or Subtily. But that it should be able to discover any Morality in human Actions, without reflecting on some Law, is equally impossible, as that a Man born blind should make a Judgment on the Distinction of Colours ⁴.

Another Argument in favour of our Opinion is suggest'd by *Ostander*, in his Notes on *Grotius, de Jure Belli & Pacis*, p. 60. If (says he) there were any such Thing as moral Good or Evil before all Law, how could there be any Obligation to make such a Difference in our Actions, since all Obligation proceeds from the Command of a Superior? For moral Good or Evil involve a Respect to a Person acting either of those ways; and if that Person be determin'd by no Obligation, he cannot be said properly to act well or ill.

But here we desire it should be well observ'd, That this Indifference of the natural Motion in

human Actions is by us maintain'd and establish'd only in respect to Morality: For otherwise Actions enjoin'd by the Law of Nature have, from the Determination of the first Cause, a native Force in themselves of producing Effects good and useful to Mankind; as Actions forbidden by the same Law are productive of contrary Effects. But this Goodness and Illness, which an Action bears naturally and of itself, can never constitute any new Thing in Morals, which are quite beyond its Reach and Concern. For there are many Things highly conducing to the Happiness and Advantage of a Man, which are not morally good, as neither being voluntary Deeds, nor Performances of any Law ⁵; and many Actions which contribute to human Welfare, do in the same manner promote the Benefit of Beasts, in whom certainly they cannot bear any moral Quality. Thus the abstaining from mutual Hurt, the moderate use of Meat and Drink, the Care of Progeny or Off-spring, are equally serviceable in the Preservation of rational and of irrational Kinds; and yet Beasts are never said to perform Actions *morally good* ⁶. So tho' all human Actions falling under the Guidance of the Law of Nature, may be finally resolv'd into that natural Strength and Force which they bear in advancing the Profit or the Harm of Men ⁶, consider'd either in a single or in an united State; yet it does not follow on the other Hand, that whatever Thing is endued with a natural Power of doing good or harm to any Species of Animals, is therefore the Object of the same Law.

Another Objection against the Doctrines we are now establishing, is taken from that Passage in *Aristotle's Ethics* ⁷: *Every Action and every Affection does not admit a Mediocrity: For there are some Affections which involve a kind of Pravity in their very Name, as Malice, Impudence, and Envy, and ὄνειδος, or rejoicing at another Man's Misfortune; and likewise some Actions, as Adultery, Theft, and Murder. Now these and the like being evil directly and in their own Natures, are not called Vices with relation to any Excess or Defect; for absolutely, and without any Degrees to be guilty of them, is to commit Sin.* But 'tis by no means a good Consequence, that because we have some Names of Actions or Affections, which of themselves, and without any Excess or Defect,

¹ PLATO in *Sympoſ.* This is the Nature of every Action, to be in itself neither good nor vicious; as what we are now doing, drinking, singing, arguing. Neither of these, consider'd by itself, is honest or dishonest; but the Manner of performing it gives every Action its proper Denomination. For what is done right, we call good, and what is done wrong, evil or indecent. The same Rule the Philosopher afterwards applies to Love. ² Such are a Quick Apprehension, Knowledge, Memory, &c. ³ Add. D. Cumberland, *De L. N. Ch. v. §. 9.*

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¹ See Note 4. upon *Ch. i. §. 4.*

² This will appear more plain from this Consideration: There are some Actions, in which the physical Motion is entirely the same, but the Morality is very different; the one being accounted good, or at least allowable, the other evil and unlawful: As for Example; To kill a Man is a Wickedness in a Thief, but a good Action, or at least an allowable one, in an Executioner, a Soldier, or a Person that fights in his own Defence, &c. so that the Action in itself may be reckon'd altogether indifferent.

³ PLATO, in his Treatise of Banquets, speaks to the same Effect. The Nature of all our Actions is such, that they are neither honest nor dishonest in themselves, as to drink, sing, discourse, and such like Actions; but 'tis the Manner of doing, that denominates the Action; for what we do well, and according to our Duty, is honest, but what we do ill is dishonest.

⁴ Here we must distinguish between such Terms and Expressions, as denote purely and simply the Motion of our natural Faculties, and those Terms and Expressions which signify to us an Action purely moral, i.e. a physical and moral Motion. As for Example: To labour, to kill, to speak, signify only certain natural Motions, and those indifferent: But when we say, He laboured to kill his Neighbour, He slew an innocent Person, when he had no Right to kill, He spake ill of his Neighbour, these are bad Actions. And these are good ones, or at least allowable ones, To labour in our Calling, Slay an unjust Aggressor, Speak sincerely, &c. There are also some simple Terms, which in themselves contain both a physical Motion and Morality. As for Example, Adultery, Incest, Theft, &c. as our Author speaks in his *Dissert. Academ. p. 733, 734.*

⁵ Such are (saith Bishop *Cumberland, De Leg. Nat. Ch. v. §. 9.*) a Quickness of Wit, Knowledge of speculative Sciences and divers Arts, an happy Memory, Strength of Body, the Help of outward Things, &c.

⁶ See what our Author writes, *Lib. ii. Ch. iii. §. 21.*

⁷ *Ethic. ad Nicom. Lib. ii. Ch. vi.*

imply Vice; therefore there are some Actions and Affections bad in themselves, without Respect to any Law: because these Terms or Names do not signify bare natural Motions and Acts, but such entire moral Motions and Acts, as are repugnant to some Law, and so take in and express the whole Compass of a moral Deed^a. For why, for Example, are Envy and its vile Consequents, which we but now mention'd under the *Greek* Name of *ἐπιχαιρεκακία*, reputed evil Affections, but because the Law of Nature ordains, that a Man should never be a Stranger to his own Kind, but should bear a Part in the Pleasures and in the Sorrows of his Neighbours; to which Rule it is an open Contradiction, to receive any Joy from the Calamity of others, and to repine at their Happiness and Success^b? And so what else is Impudence, but a wicked Firmness and Hardiness of Mind in the Commission of such Things as the Law bids him be ashamed of? For not to be ashamed, or not to blush, can never be a Fault, when we are not by some Law suppos'd and enjoin'd to do otherwise. After the same Manner, Adultery is the Pollution of another Man's Wife, whom the Laws appropriate to her Husband. Theft is the taking away of another Man's Goods, against the Consent of the Owner, who by the Law is made the sole Disposer of them. Murder is the killing of a Person in his Innocence, and against the Laws. Incest is a Conjunction with such a Person as the Laws oblige us to abstain from, upon account of the Reverence which Men are by Law likewise taught to pay to Nearness of Blood. And the same Judgment is to be made of other Vices. But now, if from all these you take away the Respect to the Law, and the Morality inherent in such Actions, the bare natural Fact will involve no Absurdity or Contradiction: For in a natural and absolute Sense these are altogether indifferent Things; to have Conjunction with your nearest Relation, or with the same Woman who is enjoy'd by another, supposing he has no peculiar Right to her, as he cannot

have without Law; to take away the Life of a Creature of the same Species with your self; to take a Thing which another Man had design'd for his Use, tho' he had obtain'd no Right by Law to exclude others from their Share in it, or possession. And the Reason why so few Persons can conceive and apprehend such a natural Inconvenience as we are maintaining, is only this, because from our Infancy, we are taught to detest such Practices; and this Abhorrence being imprinted on our tender Minds, seems to grow into a kind of natural Judgment; so that it seldom enters into Mens Heads to distinguish between the *Materiality* and the *Formality* of those Actions, or between our Performance of them as natural, and our Commission of them as moral Agents^c. Hence it appears that *Grotius* had not consider'd this Matter thoroughly^d, when among those Things to which the Power of GOD himself does not extend, because they involve a manifest Contradiction, he reckons^e the Malignity of some human Actions. Indeed 'tis impossible that twice two should not make four, because twice two and four are really the same Thing, and only differ in Name, and in our Manner of conceiving them. But the Contradiction which appears in Actions repugnant to Nature's Law, is of a much lower Degree, and can never rise to an *absolute* Impossibility. And upon the same Account he derives this Malignity from such Actions as compar'd with right Reason: For in the very Terms of right Reason, when apply'd to Man, there inheres a Respect to the Law of Sociableness enjoin'd to human Race by the Creator. Thus at the same rate he alledges^f for a Proof of the Independency of some of Nature's Laws, the *necessary* Agreement and Disagreement of Things to rational and social Nature. But Man obtain'd a social Nature from the good Pleasure of GOD ALMIGHTY, not from any immutable Necessity; and consequently the Morality of Actions, agreeable or disagreeable to him as a social Creature, must be deriv'd from

^a Add. *Stob.* Serm. cxi.

^b De *J. B. & P. Lib. i. Ch. i. §. 10.*

^c *Ibid.* §. 12.

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^a It is true, that we sometimes confound the positive Idea and physical Action with its moral Relation, though they are really two very distinct Things. As for Example, To drink Wine, or any other strong Liquor, till we lose the Use of our Reason, is that which we call Drunkenness; but as that Word imports, in its ordinary Use, a moral Turpitude in the Action contrary to a Law, Men are obliged to condemn every Thing that hath a Tendency to that, which we call Drunkenness, as an evil Action, and contrary to the moral Law; but if a Man happen to have his Brain disturbed, by drinking a certain Quantity of Wine, which was prescribed him as a Medicine for the Recovery of his Health, though we may call such an Action Drunkenness, considering it as a Name of a mixt Nature, yet 'tis plain, that if we compare it with the Law of GOD, our supream Rule, 'tis no Sin, nor a Transgression of that divine Law, though Drunkenness is ordinarily taken in that Sense. Mr. *Locke's Essay of the human Understanding, Lib. ii. Ch. xxviii. §. 16.* There is a great Use of this Remark in the Question of Lying, which is treated on, *Lib. iv. Ch. i.*

^b Here's a tacit Answer to an Objection that may be offered. There are some Men that have as natural an Abhorrence of some Vices, as others have of Meats. Now such an Horror being a kind of natural Motion, or Passion, it seems that our Sense of the Turpitude of such an Action ought to be looked upon as a natural Quality, and not as a moral one, resulting from the Law of GOD. This Difficulty is specious, and the Author seems to give it an Answer, which, that we may understand, let us unfold his Words; *Custom being a second Nature*, as the Proverb is, it happens that some Persons, of a more elevated Genius, conceive, from their Cradle, such an Horror against some Vices of a more heinous Nature, that they retain it the rest of their Lives. This sort of Antipathy proceeds more from a confused and indeliberate Thought, than a distinct Knowledge and Reasoning about the Contrariety of those Vices to the Law. As for Example, It is certain, that in the first Ages of the World, Marriages between Brother and Sister were in Use, and authorized by the Disposition of human Affairs at that Time, so that the most of our Divines and Lawyers acknowledge the Prohibition of these sort of Marriages to be only of positive Right; nevertheless, the Usage of them being long since abolished by most Nations, Men have entertained so great an Aversion to them, not only because they are forbidden by their Laws, but upon the Account of the Impressions of their Education, that they look upon it as a monstrous Thing for a Brother and Sister to have a carnal Love one for another. And it seems as if their Senses were lock'd up in that Respect, for we may see young Men converse all their Days with their Sisters of extraordinary Beauty, and yet be under no Temptation, though very amorous towards others of their Sex. Such as have these Impressions regard not the Laws, nor the physical Motion of the Action, but are strongly persuaded that they arise from a Turpitude in the Action, as contrary to the Nature of Man, as excessive Cold, or Heat, Grief, or other physical Qualities destructive to his Being. *Puffend. Letters & Specim. Controv. Ch. v. §. 5.* See *Plato*, cited *Lib. v. Ch. iv. §. 3. Note 4.* and *Plutarch, De Virtut. Moral. Tom. ii.*

^c See the Defence of *Grotius, Lib. ii. Ch. iii. §. 4. Note 5.*

the same Original and Spring; and must be attributed to Man, not by an absolute, but by an hypothetical Necessity; or upon Supposal of that Condition which GOD was pleas'd freely to bestow on Mankind above the Privileges of the inferior Creation. Nor can this Opinion of *Grotius* find any Shelter or Protection in those Places of Scripture which he quotes to shew, that GOD ALMIGHTY permits himself to be judg'd according to the original Laws, and therefore they must be absolutely immutable: For without doubt GOD declar'd to Mankind from the very Beginning of Things, that he would be a *Rewarder of the Good*, and an *Avengeur on the Wicked*, Heb. xi. 6. and that he would *render unto every Man according to his Works*, Rom. ii. 6. From which Declaration his Veracity not permitting him to go back, *Abraham* had Reason to make that Appeal which we find *Gen. xviii. 25. Shall not the Judge of all the Earth do right*? But how does it follow hence, that ' human Actions have any moral Quality antecedent to the divine Imposition? Nor does it at all appear how the same Conclusion can be drawn from the fifth Chapter of *Isaiah*, where GOD is pleas'd to refer the *Cause between him and his Vineyard*, to the Judgment of *Israel and Judah*, and concludes, that he may lawfully neglect the farther Care and Culture of it, since the degenerate Fruit made so ill a Return to his Pains. And lastly, from that Place in the sixth of *Micah*, where GOD is said to have a *Controversy with his People, and to reason with Israel*, it seems to be hinted, that Men may by their own Judgment understand the Equity of returning Thanks for Benefits receiv'd; but we cannot thence infer, that, because Men who have a Sense of Kindness, are oblig'd to be grateful, therefore this Gratitude is not commanded by any Law, but is of itself, before all Law, a necessary Duty. From all that we have urg'd on this Head, it may appear, that the Sentence which is frequently in the Mouths of most Men, ^a *That the Precepts of natural Law are of eternal Verity*, is so far to be restrain'd and limited, that this Eternity ought to reach no further than the Imposition and Institution of GOD ALMIGHTY, and the Origin of human Kind. Tho' to say the Truth, the Eternity which we improperly attribute to the Laws of Nature, is only to be rated in Proportion to the Opposition they bear to *positive Laws*, these being subject to frequent Alterations, while those remain fixt and unchangeable.

VII. It may be farther objected, and with some Face of Probability among vulgar Judges, That Honesty and Turpitude must needs inhere in some

human Actions of themselves, and by the Force of their own Nature, not by the Power of external Imposition; for this Reason, because our very Blood seems to have a natural Sense of wicked Deeds, which it expresses by spreading a sudden Redness over the Face, whensoever we are touch'd, either with the Memory of them, or with the Reproach. Now they say 'tis very improper to attribute a natural Effect to a moral Quality; but, on the contrary, that since such a certain Motion of the Blood raising a Redness in the Face, results in the Manner of a natural Effect from an ill Action, that Illness or Pravity must likewise be applied to the Action, as a natural and a necessary Affection or Quality. In return to which, in the first Place, we confess that the most wise Creator has implanted in the Minds of Men the Passion of Shame, to serve as it were for a Guard and Defence to Virtue, and for a Bridle to wicked Designs. And it is likewise probable, that unless GOD had design'd Man for an Agent, who was to frame his Proceedings by a Law, he would never have mingled such a Passion in human Constitution, since without that Supposition it does not appear to be of any Use at all in the World. But indeed it is no manner of Contradiction, that a moral Quality owing its Original to Institution, should produce in Man (tho' not directly and immediately) a natural Effect: For ^b the Soul being united by the closest Ties to the Body, while itself apprehends moral Concerns, and is affected with them, may at the same Time easily raise a peculiar Motion in some Part of the Body. Besides, we ought to observe, that Shame does not only arise from the Pravity of Actions, but also from any Fact, tho' not morally evil, which we think will lessen our Character and Esteem: For, according to *Des Cartes's* Definition, it is nothing else but a *Species of Sorrow, founded upon Self-love, and proceeding from a Sense or Fear of Disgrace*: Or, as *Aristotle* speaks ^c, *it is a certain Grief and Confusion at Things which appear hurtful to our Reputation*: For, Man is a most ambitious Creature, and highly conceited of his own Excellency, whence he takes an extraordinary Pleasure, if he can find out any Advantage or Perfection in himself, on the Strength of which he may brag, and swell, and carry himself above the Dimensions of his Neighbours. And whenever he apprehends these Talents to be the least impair'd, and to weigh lighter in common Account, he immediately conceives the deepest Regret in his own Mind. Now the Heart, that chief Seat of human Excellency, being affected with this Passion, presently sends up the Blood to be an

^a Add. *Ezek. xviii. 25. Rom. iii. 6.*

^b De Passion. Art. ccv.

^c *Rhetor. Lib. ii. Ch. vi. init.*

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¹ What *Grotius* infers from hence is no direct Consequence. He alledges these Passages, to prove, that GOD contents that Men may judge (as we may say) of his Conduct, by the Principles of the Duties he imposes on them, to which he himself conforms, as much as the great Distance between the Creature and Creator will permit. See the Discourse of *Mr. Noodt, Of the Power of Sovereigns*, with the Note of the *French* Translator, printed, *A. D. 1707.*

² Those who have first spoken of the Eternity of the Laws of Nature, must mean it in Opposition to the Novelty and frequent Changes of the Civil Laws; for they assert only, that natural Light had not its Beginning in the Times of *Minoas, Solon, or Lycurgus*, but existed before any civil Society, and is as antient as Mankind. Further, That this Right is not subject to change, as Civil Laws are, which are abolished according to the Necessities of a State, or the Humour of Sovereigns; but it remains the same in all Times and Places, and shall end only with Mankind. In fine, 'Tis no ways necessary to maintain, that the Law of Nature is co-eternal with GOD; for since it has no Regard to him, and is only contrived for Men, on whom it is imposed; to what Purpose is it to suppose, that it had a Being before Men? But if we say, that he had them from all Eternity in his Prescience, we attribute nothing thereby to the Law of Nature, but what's common to every Thing that exists. *Pufend. Apolog. §. 26.*

³ See the Passage of *PLUTARCH, §. 6. Note 10,* and what goes before and follows it.

outward Sign of it in the Face. But because^a Man does not only value himself upon Account of abstaining from Evil Deeds, but for several other Things, which are not endued with any moral Quality, if he suffer in any of these latter Points, he is equally liable to *Shame*: Thus we see many Persons who cannot forbear blushing at their Lameness, or Baldness; at a Wen, a Crump-back, or any other Deformity of Body; at some particular Diseases; at Poverty; bad Cloaths; at faultless Ignorance, or at harmless Mistakes, and at^b many other Things, which are by no Means morally Evil^c. And among Sins, those especially put a Man to the Blush, which directly argue a Lowness and Dejection of Mind, and which for that Reason make us appear more contemptible^d; nor has the Fear of this Contempt the same general Power, but only when we are in Danger of suffering it from those Persons, whose Esteem and good Opinion we are particularly covetous of enjoying. And those desperate Wretches who have once sinned themselves out of all Care of Credit, are not afterwards^e touch'd with the least Blush, upon the Commission of the vilest Wickedness^f. Whatever we have urg'd against the natural, the absolute, and the necessary Goodness or Pravity of human Deeds, does not at all seem to rob moral Knowledge of its requisite Certainty, for this would remain fixt and unmov'd, tho' the Morality of our Actions depended entirely on Imposition.

VIII. But if this Doctrine be true which we have asserted, what will become of that *moral Latitude*, which is so much talk'd of, and so frequently oppos'd to *mathematical Strictness*? Does not that seem to detract somewhat from the Certainty which we maintain? This Doubt will be clearly solv'd, if it be consider'd how far we affirm Demonstration to prevail in these Notions, and in what Things this *Latitude* is to be found. Demonstrations therefore are here chiefly employ'd about moral Qualities, so far as those Qualities appear, for certain, to agree to such Actions or Persons: When we enquire (for Example) whether such an Action be just or unjust, whether such a Right, or such an Obligation accrue to such a Person, consider'd in general, or as that personal Capacity is common to others with him. Now all these Kinds of Truths we maintain to be so clearly and certainly deducible from their genuine Principles and Causes, that no Man in his right Wits, can entertain a Doubt concerning them. And tho' we should discover some little Latitude, or something analogous to Latitude, in the Questions; yet that would not be able to prejudice the Certainty of

them in itself. As for the Goodness or Pravity of Actions, as they denote their Agreeableness or Repugnancy to the Rule of the Law, in this Respect they seem capable of no Manner of Latitude, but whatever declines from Good must immediately be pronounc'd Evil. Yet under other Considerations, at least with Respect to Men, they admit of something like Latitude; Latitude, properly speaking, being applicable only to Quantity. And first, Because in Laws the Force and Power of obliging Men is not always of the same Tenour and Degree, but appears more strict in commanding and forbidding some *Actions*, and more loose about others. Whence it comes to pass, that we are forc'd to distinguish between Law and Equity, or between what's rigorously and exactly just, and^g what's equal and fair to be done. The Difference between which Things is this, We lie under a more necessary Duty of performing the former, but the latter engage our Obedience with a gentler Tie, and with an inferior Obligation. Yet these last have a wider Object than the first; the Offices of other Virtues being extended much farther than those of Justice. It happens likewise very commonly, that among Men, and in human Courts, smaller Deviations from the Law scarce fall under Consideration or Animadversion. Many Things too are ordain'd and commanded in so weak and indifferent a Manner, that they seem to engage Men rather by affecting their Modesty than their Honesty: So that those who perform them deserve Commendation, those who omit them are not obnoxious to Reprehension. And among these Matters *Grotius*^h seems to reckon *Concubinage*, *Divorce*, and *Polygamy*, before they were forbidden by the Law of GOD: *These* (saith he) *are such Things as Reason itself tells us it is more honest to abstain from; yet not so, as that (setting aside the Divine Precept) they include any grievous Fault.*

But of these we shall treat in their proper Place. Hither likewise is to be refer'd that Passage of *Aristotle*ⁱ; *He that declines but a little from right Dealing, whether to the Excess, or to the Defect, is not charg'd with Guilt; but he that transgresses in a larger Measure, because his Faultiness discovers and betrays itself by its Bulk.* It may happen too that a Thing in itself shall be unobliging and indifferent, and yet the Performance, or the Omission of it shall either always, or however at some certain^j Juncture, be more for our Advantage and Use. To this Case belong those Passages of *St. Paul* in his first Epistle to the *Corinthians*, Chap. vi. ver. 12. Chap. vii. ver. 6, 7, 8, 9. Chap. x. ver. 23. And that Observation of *Grotius*^k, *That sometimes by*

^a Add. *Sirac. Ch. xlii. 9, &c.*

^d *Lib. i. Ch. ii. §. 6.*

^e *Lib. vi. Ch. i.*

^b Vid. *Aristot. Rhet. Lib. ii. Ch. vi.*

^f *Ethic. Ch. ult.*

^c Add. *Cartes de Passion. art. ccvii.*

^g *Lib. i. Ch. i. §. 10.*

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¹ So far from that, that we are sometimes ashamed that we have done Things that we believe to be good, and not done Things that are evil. See *PLUTARCH'S* Treatise of *Falſe Shame*, Tom. ii. p. 528. *Ed. Wech.*

² *SENECA* in his *Letters*, Numb. 11. proves, that Blushing is the Effect of our Temperament, and that diverse Causes produce it. As for Example, *Pompey* the Great could not help Blushing, when he appeared in a great Assembly; and *Fabianus* the Philosopher and Orator blushed, when he came but to give an Evidence before the Senate. *SENECA* says, it proceeds not from Weakness of Spirit, but from Surprize; for what a Man is not accustomed to, disturbs such as are subject to Blushing.

³ *TACITUS* has a like Remark, *Annal. xi. Ch. 26. Ob magnitudinem infamiae, &c.* The Greatness of the Infamy gives Pleasure to the Crime, in the Minds of such as have cast away all Sense of their Honour. Which *Mr. Hertius* cites.

⁴ So that Equity includes not only what is really and fully due to any one, although he cannot require it of us in Strictness by any written Law, but all that is due to another upon a Principle of Humanity, or Charity, or any other Virtue, which is such, that if we do not our Duty, he to whom we ought to do it can't complain of any Wrong done him; so that the Right from whence this Obligation arises, is that which is call'd by our Author, Imperfect. See *Ch. i. §. 19, 20. foregoing*, and *Ch. vii. §. 7, 11. 16. Book iii. Ch. i. §. 3. and Ch. iii. §. 16. and Ch. iv. §. 6. Book viii. Ch. i. §. 1.*

⁵ We may add, or with Relation to certain Persons. See what I have said in my *Treatise of Games*, printed in 1709. *Liv. iii. Ch. vi.*

an abuse of Words, those Things which Reason shews to be honest, or better than the contrary^a, tho' they are not enjoin'd, yet shall be call'd Dictates or Ordinances of the Law of Nature. From all that has been said, we may understand whether, and in what Manner there may be said to be Degrees of Good. If then we consider Good in a strict Sense, for a Congruity to the Law, 'tis as impossible there should be any Thing better than what is good, as that there should be any Thing straighter than what is properly straight. Yet one Good may be pronounced better than another, according to the different Degrees of Necessity which are found in both, and upon Account of which, if they cannot be both perform'd, one of them manifestly gives Place to the other. To this Purpose, see *Matth.* viii. 21, 22. where it was a good Thing to bury a dead Father, but a better to follow our Saviour: *Acts* vi. 2. where it was a good Thing to minister to the Poor, but a better to preach the Gospel: On which Point we shall be larger hereafter^a. Lastly, when Actions, in themselves lawful and indifferent, are measur'd and rated according to their Usefulness or Expedience, one of them is declar'd better than another, as it is more advantageous to the present Circumstance or Occasion^a.

IX. According to our Doctrine already deliver'd, must that Place of *Grotius*^b be explain'd, about the Causes of Doubt in moral Actions; where he says, *There is not an equal Certainty to be met with in Morals and Mathematicks; which therefore happens, because mathematical Sciences treat of Forms, as distinct and abstracted from all Sorts of Matter, and because the Forms themselves are generally such as will admit of no Medium, as we can find nothing which is not either crooked or straight. But in Morals the least Circumstance alters the Matter; and the Forms, of which they treat, have commonly some intervenient Latitude, by Reason of which they sometimes approach nearer to one Extream, and sometimes to the other. Thus between Things absolutely commanded, and absolutely forbidden, there are some Things left indifferent; but this Medium of Indifference sometimes inclines nearer to the Injunction, sometimes to the Prohibition. Whence frequently arises an Ambiguity, somewhat like what we meet with in Twilight, or in Water not perfectly hot.* As to this Assertion, we must confess, that, as about other Actions, so especially about making War, a Doubt may probably arise; either because the Fact which occasions the War is not yet fully made out, or whether it be of so great Consequence as to deserve a Prosecution by Arms, where the Case is so desperate, and where the attending Miseries are so numerous; or whether in the present Juncture and Condition of the Commonwealth, it be a moot Case which Course ought to be taken, either to return the Injury in an hostile Manner, or rather conceal the Affront, and defer the Satisfaction, lest an untimely Pursuit of Revenge should draw greater Misfortunes

on the State. But that the Causes of Doubting in such Cases proceed from the Uncertainty of moral Matters, this we absolutely deny. The Reason why the Demonstrations in Mathematicks are so very accurate, is not the Abstraction from *Matter*, but another, that we shall produce by and by. *That in Morals the least Circumstance alters the Matter*, is an ambiguous Expression. If this be the Sense of it, That the least Circumstance alters the Quality of an *Action*, that is, turns it from Good to Evil, this Variation does not at all injure the Certitude of moral Knowledge. For a Line that recedes never so little from Straightness, degenerates into Crookedness, and yet no Uncertainty arises hence in geometrical Operations. But if this be the Meaning of the Place, that the least Circumstance either raises or lessens^a the Quantity of an *Action*; this, at least in human Regard, is not always true; for trifling Accidents and Punctilio's seldom weigh any Thing in the Sentence of a moral Judge. Yet, if we grant this Supposition, it will not in the least diminish the Certainty of Morality; since even in Mathematicks the smallest Accession, or the most inconsiderable Loss, varies the Quantity. Lawful or indifferent Things, which compose the Medium between Commands and Prohibitions, we have already observ'd only in this Respect to incline sometimes more to one Hand, sometimes to the other, as it appears most expedient and useful sometimes to perform them, sometimes to omit them. Yet even hence nothing of Uncertainty can arise, nor is any such Medium form'd, as we can clearly understand either to be Good or Ill. So that those Examples and Instances of *Twilight* and *lukewarm Water*, are improperly applied to the present Case; they being of that Kind of *Media* we call *Media Participationis*, as *lukewarm Water* partakes of hot and cold together. But those *Media*, which we call *Media Negationis*, as are indifferent and lawful Matters, possess not the least Share of either the Extreams, but equally deny them both. For we say in the same Manner, Good is not Indifferent, and Evil is not Indifferent; and it does not appear, how a *Medium* of this Nature can prove a Cause and an Occasion of Uncertainty.

X. Yet as to the *Quantities* which are used in Morality, they, we confess, are capable of some Latitude; and it's chiefly on this Account, that mathematical Knowledge is esteem'd to have so much higher Degrees of Nicety and Exactness than moral. The Reason of this depends on the different Constitutions of natural and of moral Quantity: For natural or physical Quantities may be accurately compared, and measured, and divided into the most equal Parts; because they are represented as the Affections of material Things, which are the Objects of our Senses. Whence we may precisely determine, what Rule and Proportion they bear to one another, especially if we employ the

^a Lib. i. Ch. iii. §. 8. & Lib. v. Ch. xii. §. 23.

^b Lib. ii. Ch. xxiii. §. 1.

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¹ Such is, for Example, the Custom of covering those Parts of the Body which distinguish Men from Women: To which we may refer what *St. Paul* says of the Customs of his Times, *1 Cor.* xi. 14. Nature itself teaches us, *That if a Man have long Hair, 'tis a Shame to him; but if a Woman have long Hair, 'tis her Honour*, as *Frederick Gronovius* explains these Words, in his *Notes*; but our Author gives them another Turn, *Lib.* ii. *Ch.* iii. §. 22.

² There are other Principles by which the respective Quality of moral Actions may be determined. See *Ch.* viii. §. 5. with the Note.

³ As for Example, It renders a Fault more or less excusable, and a Crime more or less enormous.

assistance of Numbers, by the Application of which all Questions of this kind are most exquisitely solv'd. And besides, those Quantities are the Effect of Nature, and consequently immovable and permanent. On the other hand, moral Quantities proceed from the Impositions and the Estimation of intelligent and free Agents, whose Judgment and Pleasure not falling under natural Dimensions, the Quantities which they thus conceive and determine, cannot be circumscribed by any such Measure, but retain, as it were, somewhat of the Looseness and Liberty of their Original. Nor indeed did the Ends for which moral Quantities were first introduced, require any such punctual Minuteness¹; but it was sufficient for the Use of human Life, that Persons, Things, and Actions should be more grossly rated and compar'd together². Thus we discover a Latitude in the Value or Esteem of Persons; by which, tho' we understand that one Person is to be preferr'd to another, yet we cannot exactly determine whether he exceeds him in a double, or treble, or quadruple Proportion of Worth. The like Latitude occurs in the Valuation of different Things, and of Actions belonging to Commerce; on the account of which we can scarcely fix any³ settled Price on any other Things besides those which the Civilians call *Res fungibiles*⁴, *consumable Goods*, that is, such as we borrow for our present Use, upon Condition of repaying them in the same Quantity and Quality: As to the rest, we esteem them equal and indifferent, and to be determin'd by the private Bargains and Agreements of particular Men. And so likewise the Proportion between many Faults and Punishments is adjusted with some Latitude: For who, for Example, can tell precisely how many Lashes, and how smartly laid on, come just up to the Guilt of some particular Piece of Thievery? But in such Cases we assign what Proportion we think fit, with great Looseness and Security. We find too a very remarkable Latitude in many Businesses and Affairs of Life⁵. Human Lawgivers are

not us'd to cut every Thing to the quick. *The Laws, and the Philosophers* (says^b Tully) *clear Subtilties in a different Manner: The Laws no otherwise than as Things may be felt and handled, by reason of their Grossness; but the Philosophers, as they may be discern'd by Reason and Understanding.* And in the Decision of Causes 'tis a Maxim vulgarly known, That the Judge does not concern himself with every petty Circumstance. And so when such a Number of honest Men are appointed^c Arbitrators of any Controversy, there is fair room for Latitude in their Judgment and Sentence⁶. Farther, in executing vindictive Justice, there is an Indulgence made of a convenient Latitude, not only on the Part of Clemency, but of Severity too. To which purpose is that Saying of Tacitus^c: *All great Examples have somewhat of Injustice; but the Injury they do to particular Persons is recompens'd by the common Advantage they bring to the Publick: And that of Jason in Plutarch^d, 'Tis necessary that those should act unjustly in small Matters, who intend to maintain Justice in the grand and chief Concerns*⁷. Most Virtues likewise, besides Justice, admit a fr^ce Looseness and Latitude in the Exercise of them; as for Example, Pity, Liberality, Gratitude, Equity, and Charity. And so, in common Life, we apply the Names of Habits under a Latitude of Signification⁸. Thus we call him a just Man, who commits (tho' deliberately) but a few Pieces of Injustice. Lastly, we may observe, that if in moral Consideration some Quantities are brought to an exact Standard, and a punctual Measure; as the Price of some Commodities, the Periods of Time⁹ settled by Law, and the like; yet this precise Determination does not so much proceed from the Things themselves, or from the Times, as from the Institution and Will of Men^e. From all these Remarks we conceive the Difference between mathematical and moral Demonstrations to appear very clear and evident; and it is no more than this, that the former are chiefly employ'd about Quantity, which is in its own Nature dispos'd for the nicest Division

¹ To understand what is meant by these Terms, see *B. v. Ch. vii. §. i.* ^b *Off. iii. Ch. xvii.* ^c *Annal. xiv. Ch. xlv.* ^d *De Sanitat. tuend. & Præcept. Reipub. gerend.* See also *Aristot. Rhet. Lib. i. Ch. xii.* ^e *Add. D. Cumberland De L. N. Ch. viii. §. 14.*

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¹ See the Words of Bishop Cumberland, §. 5. Note 2.
² The Author treats here of Quantities moral, which are the Matter of moral Actions. He spake in §. 8. of the Quantity or Degree of Extent, which he conceived to be in the same Actions, in certain Respects.
³ *Que functionem in suo genere recipiunt*, is an Expression of the Civil Law; about which, see the Author, *Lib. v. Ch. vii. §. 1.*
⁴ This is the Foundation of that excellent Expression of the Pagan Philosopher SENECA: *Quam angusta Innocentia est, &c. De Ira, Lib. ii. Ch. xxvii. How little is the Virtue of that Man, whose Goodness extends no farther than the Law? How much larger is our Duty than the Rules of the Law direct? How many Things do Piety, Humanity, Liberality, Justice, and Fidelity require of us, which the Laws give no Commands for? What the Law forbids not, Honour and Conscience restrains us from: As for Example, The Law punishes the Injustice of a Seller, when he has taken more than a just Price; but Philosophy and Virtue order the Restitution of the least Thing, which he has fraudulently got, more than the Worth of his Goods.* See Grotius, *Lib. iii. Ch. x. §. 1.*
⁵ See *Lib. v. Ch. xiii. §. 5. following.*
⁶ So when it is ordered, That one shall immediately pay a certain Sum, it is to be understood with some Limitations; for it can't be supposed, that he must go that very Moment, and deliver the Money into the Hands of him to whom 'tis to be paid. *Drest. Lib. xlvi. Tit. iii. De solutionibus & liberat. &c. Leg. cv.*
⁷ Some Reflections made by Mr. Bayle, *Diét. Hist. & Crit. p. 235 and 2317*, are worth our Observation here. He says, *The publick Good requires, in some Cases, that Justice should depart from the Rigour of the Laws, because an Injury done to a private Person is a less Evil, politickly speaking, than the Advantage that redounds to the Publick by it, is a good-----* For this Reason it is, that the Laws condemn to the most rigorous Punishments, such Servants as lie with their Master's Wife or Daughter, tho' they alledge that they were by many Promises and Threatnings drawn into it: Thus a Footman was hang'd at Paris in 1698. For though the Excuses be true, yet Justice will not release them; that such Persons may expect no Favour, and so may be more cautious of offending. *Bodin* the famous Lawyer, speaking of a Law made by King Henry II. against Women who made away their Children, so rigorous, that it might happen that an innocent Woman might suffer by it, says, "That the Use of profitable Laws ought not to be suspended, upon the Account of some Inconveniences produced by them." And thereupon, he quotes a Saying of Cato's, *That there is no Law that is profitable for all, 'tis sufficient that it is beneficial for the most Part, and generally.* *Liv. Lib. xxxiv. Ch. iii.* See *Montagne's Essays, Lib. iii. Ch. xiii.* and *Charron of Wisdom, Lib. iii. Ch. ii.*
⁸ See *Ch. vii. §. 6. following.*
⁹ *The Periods of Time settled by Law, the Latin is Tempora fatalia*, a Phrase taken from the Roman Lawyers, who meant by it, such a Term of Time, as after it no Appeal will lie against a Sentence given by Law. See *Cod. Lib. vii. Tit. lxiii. Leg. ii.* where you'll find *Tempora fatalium dierum*, and *fatales dies.*

and Determination; whereas the latter endeavour nothing farther than to prove for certain such a *Quality* of such a *Subject*, leaving the Decision of *moral Quantities* to the larger Scope and Range of human Will.

XI. But we must take heed of confounding this moral Certitude, which we have been so long establishing, with that which is so often apply'd to Matters of Fact; as, when we declare (for Example) such a Thing to be *morally certain*, because it has been confirm'd by creditable Witnesses: For, this latter Sort of moral Certitude is nothing else but a strong Presumption grounded on probable Reasons, and which very seldom fails and deceives us. *Zeigler*, in his Notes on *Grotius*^a, has not sufficiently distinguish'd this inferior Certainty from the former and the more noble Kind, while, tho' he grants the more general Precepts of Ethicks to bear an equal Evidence with the Propositions of any Science properly so call'd, yet he affirms, *That the particular Conclusions have a much shorter Degree of Certitude, and are often involv'd in dark Obscurities, by reason that the Things themselves, concerning which such Conclusions are form'd, are many ways changeable and contingent*: And the Example he

^a *Lib. ii. Ch. xx. §. 1.*

brings is this; *We have moral Certitude and Evidence, that an honest and serious Person, when he takes an Oath, swears truly. And yet this Evidence is not absolutely such, but conditionally, because it is not directly impossible, but that a Man of these good Qualities may forswear himself, since he may fall from his Virtue and Integrity.* But now that Certitude, by which we know Perjury to be an Evil, is very different from that by which we believe a good Man is not guilty of Perjury; nor is the latter Proposition deduced fairly, as a Conclusion from the former. Thus, in the same Manner, the Faith we give to Historians is reckon'd morally certain, when they testify a Thing vastly remote from our Memory and Knowledge, and of which there is no real and demonstrative Proof now extant; and especially, if many agree in the Relation: Because it is not probable that many Persons should join together by Compact, in putting a Trick on Posterity, or should entertain any Hopes, that the Lye would not in Time be discover'd. And yet for all this, if Occasion were, we could produce Examples of many popular Fables that have pass'd through several Ages, under the Colour and Character of Truth.

CH A P. III.

Of the Understanding of Man, as it concurs to MORAL ACTIONS.

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| <p>I. Two Faculties of the Understanding.</p> <p>II. What is the Nature of the representative Faculty of the Understanding.</p> <p>III. The natural Understanding apprehends Things moral rightly.</p> <p>IV. Conscience, what it is, and how manifold.</p> <p>V. A right and probable Conscience.</p> <p>VI. Rules for a probable Conscience.</p> <p>VII. Rules how to choose Things profitable.</p> | <p>VIII. A dubious Conscience.</p> <p>IX. A scrupulous one.</p> <p>X. Ignorance, what it is, and how manifold.</p> <p>XI. Error, of how many Sorts.</p> <p>XII. Error in lawful Actions.</p> <p>XIII. Speculative Error about necessary Actions.</p> <p>XIV. Or indifferent ones.</p> <p>XV. Practical Error.</p> <p>XVI. Error in an ill Action.</p> |
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SINCE that Part of Knowledge which we have undertaken to explain, is chiefly employ'd in demonstrating what's right and what's wrong, what's good and what's evil, what's just and what's unjust, in human Actions; in the first Place we are oblig'd to consider and examine the Principles and the Affections of these *Actions*, and to shew how, by the Help of *Imputation*, they are conceiv'd to be morally join'd and connected to the Authors of them: In this Respect then, the Excellency of Man chiefly outshines the Con-

dition of brute Creatures, that he is endow'd with a most noble and exalted Soul, which exerts itself not only with a singular Light, as to the knowing and judging of Things, but also with a prodigious Quickness and Activity, as to the embracing or rejecting them. So that on this Score the Actions of Mankind ought to be rank'd in a much higher Class than the Motions of Beasts, which proceed purely from the Spurs of Senses, without the precedent Help of Reflexion^a, whatever *Charron*^b has alledg'd to the contrary. That Power of the

^b *De la Sageſſe. Lib. i. Ch. xxxiv.*

Mr. BARB. NOTE S.

^a Mr. *Charron*'s Words are these, *Man setting himself above, and calling himself Master of all Creatures, disdains the rest. He divides them into Parts, and allows them what Faculties and Powers he pleases. On the other Side, he degrades himself as it were in Spite; he groans, complains, blames Nature as a cruel Stepmother to him, and makes himself the least and most miserable Creature in the World, both which are equally contrary to Reason, Truth, and Modesty. Nevertheless, Fearſis can't be reasonably deſeas'd to the Condition of meer Automata; i. e. Clock-work: Such an Opinion muſt proceed from Preſumption, and not a ſerious Conſideration of their Actions; for, as Mr. LOCKE ſpeaks very well: ſhall we believe that Dogs and Elephants do not think, when we plainly ſee, that they can find out that in us which we can't diſcern in ourſelves? Do they not give us all the Demonſtrations imaginable of their Senſe, except that they can't tell us ſo? It is hard indeed to fix the Bounds of the Faculties of the Souls of Beaſts, tho' Mr. *Charron* aſſerts, that they can from Particulars infer Universals: but yet we have ſufficient Reason to be convinced, that Beaſts act with ſome Knowledge and Reaſoning. See Mr. LOCKE, *Lib. ii. Ch. ix. §. 11, 14. & x. §. 10. & xi. §. 7, 10, 11.* As alſo Mr. LE CLERC's *Phyſicks, Lib. iv. Ch. xii.* What Mr. *Pufendorf*'s Notion was in this Matter, is hard to know, for he allows Beaſts in one Place, what he denies them in another.*

human Soul, which it bears as a Light for its Guidance and Direction, we commonly call the *Understanding*, and in this, as it is concern'd about voluntary *Actions*, we conceive two Faculties¹: One is that by which, as by a kind of Mirror, the Object is shewn to the Will, with a general and confus'd Notice, whether it be agreeable or disagreeable, good or evil. The other is that by which the Reasons of Good and Evil, which in several Objects offer themselves numerously on both Sides, are weigh'd and compar'd, and Judgment is given, what, when, and in what manner we are to act, and Consultation taken about the most proper Means for the Accomplishment of the propos'd End. And here it must be observ'd, that the Beginning of a voluntary Act should regularly proceed from the Understanding, whence arises the vulgar Maxim,

----- *Ignoti nulla Cupido.*

Objects unknown can never move Desire:

Although this Knowledge, which precedes the Acts of Volition, is not always distinct, because a confus'd Notion is sufficient to make the Will stir itself. And thus when we have not a tolerable Knowledge of a Thing, we cannot be said properly and fully to desire it; yet we may desire to make Trial of it.

II. As to the former Faculty of the Understanding, we must remark, that it is of the Number of those which are commonly call'd *natural Faculties*², contradictinct to the *free*; in as much as it is not in the Power of Man to apprehend Things otherwise than as the Images of them present themselves to the Mind; nor can the Will by any Force hinder the Understanding from assenting to a Proposition which appears clear and evident to it. But thus far a Man is at Liberty; he can more diligently consider the Object in view, and more exactly weigh in his Mind the opposite Reasons of Good and Evil, and so not stick at the outward Face and Semblance of Things, but pierce into the deepest Secrets of their Texture and Constitution. And after so strict an Enquiry and Examination, he can pronounce a positive Judgment in the Cause before him. The Understanding being in this Respect, as in many others, like the Eye, that it makes a very important Difference in beholding Things with a roving and transitory Cast, and in contemplating them with a fix'd and steady Application³. And hence 'tis easy to conceive, how far this Power of the Soul falls under the Culture and Cognizance of Laws. For since 'tis be-

yond human Ability, that the Understanding should apprehend Things after another Manner than they appear; and since Credit or Assent cannot but answer the Idea of the Understanding, no Person can judge otherwise of a Matter, than as he appears to have conceiv'd it; nor can he by any just Law be compell'd to a contrary Judgment: For suppose a Man to be in the Wrong, yet 'a bare Injunction and Command will never make him the wiser. Yet because many Things escape a negligent Searcher, which offer themselves to the Notice of more curious Enquirers; and because the Will may hinder the Understanding from contemplating some Truth, by presenting other Objects to tempt and engage its Care; therefore an earnest and assiduous Application of Mind is of vast Use in confirming the Judgment; and consequently those who are entrusted with a Care and Authority over others, ought to make all fair Provision for the Assistance and Direction of a serious Meditation: and they may likewise engage Men, by the Sanction of Punishments, to apply with Diligence those Means which are most likely to dispel the Clouds and Perplexities of Things, and to represent them in their genuine Colours and Condition⁴.

III. Farther, since the Understanding performs the Office of a Light in our Course of Action; and since, when it doth not guide us aright, 'tis impossible but we should lose our Way; we ought to establish this as a certain Principle, That there is both in the apprehending Faculty, and in the Judgment, a natural Rectitude, which, upon due Attention given, will not suffer us to be deceiv'd in reference to moral Things, and that neither of those Powers are so far corrupted and deprav'd, as to put us under a Necessity of being mistaken. For at the same rate it would follow, that because a Glas ill cut presents every Image in a distorted Confusion, and because the Tongue, when cover'd with the Tincture of the Jaundice, is not able to discern the Difference of Tastes; therefore the Senses, to which those Offices belong, must be, in general, pronounc'd fallacious and uncertain. Neither could it be charg'd on us as Guilt, that we have done a bad Action, if we were not furnish'd with a clear Discernment of Good and Evil; and it would be the highest Injustice to impute that Error as sinful, which was beyond our Power to avoid or shake off. Therefore, unless we would utterly subvert and destroy all the Morality of acting, we must by all Means maintain, that the Understanding of Man is naturally right and certain, and upon sufficient Enquiry and Meditation does always apprehend Things clearly, and as they are in their own

¹ Add. D. Cumberland, *De L. N. Ch. ii. §. 9.*

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¹ To speak truly, one Faculty cannot have another fixed in it, as in its Subject; because every Faculty must have its proper Subject. *Faculties, or Powers* (says Mr. LOCKE) *belong only to Agents, and can only be attributed to Substances; and not to any other Power.* Hum. Understand. *Lib. ii. Ch. xxi. §. 16.*

² By *natural Faculties* is meant *passive Faculties*, which receive the Impressions of Objects, and do not properly act at all; for the Understanding is like the Eye, which discerns Ideas with the different Relations, without adding or diminishing any Thing; whether it only perceives the Objects, or judges what is, or is not to be done. For in the Understanding there is nothing but bare Perception or Reception of Ideas. The Determination from whence Action proceeds, is an Act of the Will only. The Distinction of the Schools; that is, Understanding is either speculative or practical, is founded upon the Nature of the Objects it contemplates; and not upon the different Actions of the Soul: For the Soul is dispos'd alike in the Perception of Good and Evil, Truth and Falshood. See the *Searches after Truth, Lib. i. Ch. ii.* and Mr. Clerc's *Discourse of Spirits, §. 1. Ch. iii.*

³ *i. e.* Without any Reason or Motive.

⁴ But if this fails, 'tis to no Purpose to have recourse to Force and the Authority of the Sovereign. *Elem. Jurispr. Univer. p. 375.* See *Lib. vii. Ch. iv. §. 8. and 11.*

Nature and Constitution: And likewise that the practical Judgment cannot prove so far debas'd and degenerate (at least as to the general Precepts of Nature's Law) as to excuse the Acts proceeding thence from being imputed as if they were Effects of invincible Ignorance^a. And here we desire it should be consider'd, that we are not debating what Power the Understanding has about Matters which depend on peculiar Revelation from GOD, or what it can perform in such extraordinary Cases, without the singular Assistance of divine Grace; because this is the Subject and Business of another Profession. Neither are we concern'd to examine whether in speculative Truths, requiring the most subtil Disquisitions of Mind, a Man may not through ill Information get such firm Possession of a false Tenet, as not to be able to recover himself out of the Mistake: But we are discoursing only about the Power of the Understanding, as it is employ'd in squaring our Actions according to the Dictates of Nature. And, as to this Point, we conceive that there's no Man of proper Years, and Master of his own Reason^b, so desperately dull and stupid, as not to comprehend, at least, the most general Rules of natural Law, and those which are of the greatest Use in common Life, and not to discern the Agreement they bear to the rational and social Condition of Mankind. And though a Person through extrem Idleness may possibly never have thought of one or two Precepts, or through precipitate Rashness may have fram'd wrong Opinions of acting, or by bad Information, or a Mind corrupted with vicious Courses, may have call'd their Truth and Necessity in question, or have taken up other Rules of Action contrary to natural Suggestions; yet we do not by any Means acknowledge this Ignorance or this Error to be insuperable, so as to hinder the Imputation of Deeds consequent on such a Principle. For these universal Edicts are so clearly publish'd and explain'd, and so closely interwoven with our Being, that no one can be overcome with so brutal a Sottishness, as not to be capable of apprehending and discerning them; since to this Business there is not requir'd any singular Force of Wit, any peculiar Shrewdness of Reason, but an

ordinary Portion of natural Light is sufficient, provided that the Mind be not vitiated and obstructed by some Distemper. To which Purpose Tully's Distinction about Folly and Madnets is observable: *Folly* (says^b he) *if assisted with a due State of Health, is able to maintain a competent Set of Duties, and to keep up, in some manner, the Culture and the Methods of common Life; but Madnets is a perfect Disease, that quite extinguishes the Sight of the Mind, and involves all its Objects in a general Obscurity*^c.

IV. The Judgment pass'd on moral Actions by the Understanding, as it is suppos'd conscious of a Law, and therefore accountable to the Lawgiver, is commonly call'd *Conscience*; which as it either^d precedes, or follows the Action, we may, for Distinction sake, branch into *antecedent*, and *consequent*: This last is the reflex Judgment of the Understanding on Things done, or forborn^e, approving what's well, and condemning what's ill; the Attendants of which are either Tranquillity or Restlessness of Mind, according to the different Testimony it bears; and as it gives us Occasion to expect either the Favour, or the Displeasure of the Legislator, and either the Good-will, or the Hatred of other Men^f. The former, coming before the Action, informs us what is good and what evil, and consequently what to be done, and what to be omitted. But here it is carefully to be observ'd, that the Conscience obtains no other Place in the Guidance of human Operations, than with respect to its being instructed in the Knowledge of some Law; since Laws only are the proper Rules of^g acting. And therefore, if any Man will attribute to the practical Judgment, or the Conscience, any peculiar Force or Ability of directing us in our Doings, owing neither its Original to, nor its Dependence on any Law; he will invest with a legal Power the vain Fausy of private Men, and will bring the wildest Disorder and Confusion on the Affairs and Transactions of the World. For we must declare, that as far as our Diligence could reach in searching, the Word *Conscience*, in this strange Sense, is neither to be met with in the holy Scriptures, nor in the antient *Latin* Authors; but it

^a *Phil. D. Cumberland, de L. N. Ch. ii. §. 10.* ^b *Tuscul. Quest. Lib. iii. Ch. v.* ^c *Plin. Panegy. One Man may possibly deceive another, but there's none who can deceive himself; let him only look into his own Life and Conduct, and take his Merit and Character from his Heart.*

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¹ See Note on §. 2.

² See the Note on Book i. Chap. i. §. 4. of the *Abridgment of the Duties of a Man and Citizen*. Printed at Amsterdam in 1707.

³ *Cicero* cites this Case out of the Laws of the twelve Tables, but to a clear different Purpose from what our Author uses it, viz. To prove a Difference between *Inania*, Madnets, and *Furor*, Fury; but our Author has no Regard to the Contexture of the Discourse, and uses the Words to this Sense only, Folly is no Impediment to the comprehending the common Duties of Life; but to be ignorant generally of all the Principles of Morality, is a sort of Madnets. In other Circumstances the Words might be so understood, but our Author mistakes them here.

⁴ This Division is according to the Schools, Conscience antecedent and consequent: but our Author reverses the natural Order, in defining the Conscience, which follows, before that which precedes the Action.

⁵ *Pliny Panegy. Chap. lxxiv. &c. vide*

⁶ This is true, but it hinders not, but that the Conscience may be the immediate Rule of Action; for a Man can't conform himself to a Law, unless he know it, and if he do good without knowing it, he loses his Pains, the Lawgiver regards it not. Nevertheless it follows not, but that every one may do all that he believes either permitted, or commanded, after what Manner soever it comes into his Mind. Here are two Rules, which the most simple may, and ought to follow, to satisfy themselves, upon all Occasions, that the Motions of their Conscience are according to the Law: 1. To consider, whether they are not out of the State of determining concerning an Action, by such clear Arguments as may satisfy any Man of Sense. 2. To see that they have sufficient Reasons to do what their Conscience leads them to, without farther Examination. In the first Case, 'tis evident, that we can't determine or attempt any Thing but with an unwarrantable Rashness. In the other, we must of Necessity suspend our Judgment and Action, till we are fully satisfied. All the Inconveniences and Evils which are consequent upon a misused Conscience, come under the Breach of one or other of these Maxims, which are easy to be observ'd by such as love their Duty. This appears chiefly in Matters of Religion, as every Man's Experience will teach him. See *Biblioth. Univ. Tom. i. p. 343, 344.* and *Parrhasiana, Tom. ii. p. 97.* as also *Biblioth. Choise, Tom. x. p. 336.*

was first introduc'd by the Schoolmen, and has been maintain'd in these latter Ages by the crafty Casuists, for the better securing of Mens Minds and Fortunes to their own Authority and Advantage. But if we have regard to the true and genuine Signification of the Word, to do a Thing against Conscience, is nothing else but to commit a voluntary Evil, knowing it to be such; and is oppos'd to transgressing out of Ignorance and Mistake. And this we mean by Conscience in our present Enquiry, recovering it to its antient Import, and exploding the new Abuses that have been obruded on its Signification.

V. Conscience rightly inform'd is of two Sorts; for either it clearly understands that the Persuasion which it holds concerning some Performance or Omission, is built on certain Principles, and agrees with the Laws, which are the Rule of Action and of Conscience; or else it esteems, indeed, its Persuasion as true and certain, and sees no Reason to doubt of it, tho' it cannot reduce it to a formal Demonstration; but, on the contrary, relies chiefly on Arguments from Probability. In the former Case it is commonly term'd a *'right*, and in the latter a *probable Conscience*. Concerning a *right Conscience* this general Maxim is establish'd, That every voluntary Action against its Suggestion, and the Omission of any Action which it declares to be necessary, is Sin; and so much the more heinous Sin, as the Person had a more perfect Knowledge of his Duty; because a Transgression under such Advantages argues a greater Pravity and Corruption of Mind^a.

The Difference of a *probable Conscience* from a *right*, we conceive not to be in reference to the Truth of the Persuasion, but upon account of its Ignorance and Inability to reduce this Truth artificially into the Exactness of a Demonstration; for which Reason it has not so evident and unshaken a Knowledge of its Certainty. For (as the Logicians speak) nothing is *probable* in itself, but only with respect to our Understanding. And by this Rule of Probability the greatest Part of Mankind are steer'd and govern'd in their Proceedings. For few Persons are able to apprehend human Duties as they flow from their first Origin and Foundation. And most Men rely with so much Security on the Tenor of common Life^b, on the unquestionable Authority of ^{*} unsuspected Teachers, and on the manifest Decency or Conveniency of such and such Actions; that they think it a superfluous Trouble to make a more curious Enquiry into the Reasons and Foundations of them. In the same manner as the greatest Number of Artificers are satisfy'd with performing their Work by Instruments mechanically prepar'd, and leave

the Mathematicians to demonstrate the Reasons of their Operations. And Men are apt especially to content themselves with these probable Appearances, when the Proposition in Debate is remov'd at a vast Distance from the first Principles; and therefore requires a tedious and troublesome Deduction, which is commonly above the Capacity of those who have not run the Course of the Sciences, nor cultivated their Reason by a learned Institution. Yet hence can be drawn no Protection for that pernicious ^{*} *Probability* maintain'd by the later Casuists, and especially by those of the Order of the *Jesuits*, which resolves itself into the sole Authority of a single Doctor, tho' destitute of Reasons, and oppos'd by all other Judgments. For this Principle tends to the utter Subversion of all Morality, and seems design'd only for the keeping under the Senses and the Consciences of Men, and making them depend entirely on the Pleasure of the Priests: as has been prov'd at large by others^c. We need only observe farther, that they act not at all fairly, when they confound Probability of Fact with Probability of Judgment, and of Law. For indeed, in Matters of Fact the Authority of one great and credible Person may raise a probable Presumption, and obtain at least half the Force of a full Proof. But in defining Matters of Law, 'twould be the highest Absurdity and Rashness to attribute so much to the Declarations of one Man, not grounded on good Arguments, and at the same time contradicted by Persons of equal Rank and Power, as that it should be safely admitted for the Square and Standard of Acting.

VI. For the Information and Direction of a *probable Conscience*, there are many Rules commonly laid down, concerning which our Opinion is this, That they take place only where there seems to be a Clashing between strict Law and Equity; or when both sides of the Question are alike free from the Obligation of the Laws; yet so as that one of them may seem to approach nearer to Honesty, or may appear more likely to produce some Convenience or Inconvenience than the other. For in Matters absolutely determin'd by the Command or Prohibition of some Law, there is no room left for such a free Choice, as that we may reject one Side, and take the other; because positive Laws will not be satisfy'd with Equivalents, but demand a punctual Obedience to their Decrees. And therefore this Freedom of Election must be confin'd to indifferent Things, to which the Laws do not extend their Sphere and Authority. The chief Rules are these:

1. In a *probable Conscience* two Opinions being propos'd, neither of them contrary to the Laws,

^a See Luke xii. 47, 48. *Wendrochius*, and *Sam. Rachel*.

^b *Vide Lib. xi. Ch. cxi. § 13.*

^c *Vid. Lud. Montalt. in Lit. Provincial. and upon them*

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^{*} This Epithet is not well apply'd, for our Author owns that a right and probable Conscience are the same, a little lower: He ought rather to have called it a clear Conscience; but his Divisions are not exact: These are better; an antecedent Conscience is, 1. resolved, 2. dubious. The resolved Conscience declares positively, not only about the Quality, but Execution of an Action; in which, if it mistakes, 'tis erroneous; if it judges well, 'tis right; which will be clear or probable according as the Reasons which Men give of their Opinions, are certain, or only probable. A dubious Conscience is either simply so, when the Understanding hangs like a Balance, not knowing which Side to take, or whether the Action be good or evil, and so can't put it in Execution; or scrupulous, when we are determin'd about the Morality of the Action, and Execution of it, yet with some Fear of being mistaken. *Gott. Gerb. Titius's Observ. on Pufend. De Officio Hom. & Civ. Obs. xvii.*

² See *Lib. ii. Ch. iii. § 13.*

³ See *Buddens's Discourse, De Scepticismo Morali, §. 31. in his Analec. Hist. Philos.*

one of which is founded on better Reasons, the other is more safe; either of the Two may be follow'd without Blame.

2. Two Opinions being propos'd, of which one is built on weaker Reasons, the other is the more safe, the latter ought justly to have the Preference.

3. In a *probable Conscience* a learned Man may follow that Opinion which seems to him to have the greatest Degree of Probability, tho' perhaps it may appear different to others, unless he is under Apprehension of incurring some Inconvenience or Damage upon account of dissenting from the common Judgment.

4. An unlearned Man may safely follow the Authority of wiser Persons.

5. A Subject, or one plac'd under the Command of others¹, may, upon the Order of his Superiors, fairly do a Thing which he does not certainly know to be unlawful, tho' in his private Judgment he does not think it very probable that it ought to be done.

6. In things of little Moment and Concern,² if there are probable Arguments alledg'd on both hands, either Side may be taken.

7. In things of great Moment³ if there arise probable Arguments on both Sides, the safer Part is to be preferr'd, or that from which there cannot follow so great an Evil, tho' we are never so much mistaken, as there might have done, had we err'd in the opposite Opinion.

VII. To proceed; tho' according to our present design, we are engag'd only to treat of what's good, and what evil, what just, and what unjust; leaving the enquiring about Things profitable and⁴ unprofitable to another Part of Knowledge; yet it will not be much out of the Way, if we here consider in short, what Rules the Understanding ought to have regard to, in Deliberations concerning Usefulness and Convenience; especially because the Directions already laid down depend very much on these; the Profit or Advan-

tage of Things bearing a great Force in our Proceedings; according to that of the Apostle, *1 Cor. vi. 12. All things (that is, all Things which he had been there speaking of) are lawful for me; but all things are not expedient.* And in Civil Business, Affairs are many times committed to the sole Wisdom and Conduct of the Person employ'd; in which Cases a Man is conceiv'd to have acted ill, if, by Imprudence or by Negligence, he has taken the less profitable Course. In Debates therefore, arising about such Things to which we are bound by any Necessity, or any determinate Obligation (for Necessity excludes all Deliberation and Debates, and determinate Obligations leave nothing to the Agent, but the Duty of Execution) this is laid down for a Foundation, That nothing ought to be undertaken, from which, in moral Esteem (or as far as human Foresight can pierce into the Obscurity and Uncertainty of future Events) there does seem likely to follow as much Evil as Good⁵, or more Evil than Good. The Reason of which Maxim is evident: For as much of Evil as any Thing has join'd with it, so much it loses of its Goodness; and consequently, when the Good and Evil are in equal Degrees, the former is swallow'd up by the latter, and the Thing is depriv'd of the Nature and Denomination of Good. Hence that Field is reckon'd very unprofitable, which does not in the Value of its Fruits exceed the Charges of Tillage⁶. For those Matters which make the Subjects of such Deliberations as we are now speaking of, are undertaken purely on Account of the Use and Advantage which may accrue to us from them⁷. As Corollaries from this general Truth, we may subjoin the three Rules establish'd by Grotius⁸:

1. If the Thing under Debate has an equal Efficacy or Ability for the Production of Good and Evil, that is, if we may as easily gain as lose by it, we may then venture on it, when the good Confe-

Xenophon's Words at^b are inserted according to the Original.

¹ Cato de R. R. l. i. 1. *A Field that is fertile, if it be at the same time chargeable, turns to little Account.*

² Xenophon. *Rer. Græc. Lib. vi.* They are very far from deserving Commendation, who having carried off Glory and Victory from many Encounters, do still continue to engage, till being at length shamefully overcome, they lose their former Honour and their former Labour. The Case is the same with those Gamesters, who once meeting with a Run of good Fortune, are entic'd to venture on, till they lose double to their former Gains, and, in Conclusion, are commonly Beggars. These Examples ought to warn us in our Martial Affairs, that we never suffer our selves to be drawn into such a Combat, where we must of Necessity either win all, or lose all.

Lucan. *Lib. i. v. 282.* Par labor atque metus pretio majore petuntur.

An equal Labour for a greater Prize.

Isocr. Archidam. *Two Things being propos'd, the one plain and evident, the other doubtful and perplex'd; would it not be ridiculous for you to reject that which is beyond Dispute, and to choose that which is controverted and uncertain?* *Lib. ii. Ch. xxiv. §. 5.*

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¹ See *Lib. viii. Ch. i. §. 6.*

² This hath Place commonly in Regard to those Judgments, which we are obliged to make *ex tempore*, upon some urgent Occasions, wherein Necessities of Life oblige us to act. See *Biblioth. Univers. Tom. v. p. 344.*

³ As for Example, If the Debate be about putting a Person to Death, it is better to run the Risk, and let a Criminal escape, than punish an innocent Person. This was the Decision, both of several antient Philosophers, which are quoted by Grotius, *Lib. ii. Ch. xxiii. §. 5. n. 2.* and of the Emperor Trajan, who would have no Man condemned for Suspicion, as he writes in his *Rescript to Assid. Severus.* For it is better that the Crimes of the Guilty escape unpunished, than that an innocent Person should be condemned. *Digest. Lib. xlviii. Tit. 19. De penis, Leg. 3.* For, as Mr. Eruyere speaks, in his Chapter of *Certain Customs, p. 506.* If a Criminal be punished, 'tis a Terror to the Gang; but if an innocent Person be condemned, all honest Men are affrighted. In fine, War brings Evils upon many innocent Persons: If then Judgments be divided, we must incline to Peace.

⁴ The Author does not mean by the Word *Inutili*, unprofitable, but noxious, or hurtful, as he plainly uses it, *Lib. ii. Ch. i. §. 9.* see the *Note*, and *Ch. iii. §. 10.* It is certain, that in Matters of Morality and Politicks, that which is oppos'd to profitable, is noxious.

⁵ The Words of the Apostle have no manner of Connexion with what went before; but on the contrary, refer manifestly to what follows, either to the Liberty of eating certain Meats, without any Regard whether it offends others, or not; or rather, tho' St. Paul applies it indeed to that particular Subject, it is a general Maxim, and extends to all Things indifferent in their Nature. See *Ch. ii. §. 8. Note 4. above.*

⁶ Here is a plain Inversion of the due Order of Things, contrary to the right Way of Reasoning, and Sequel of the Discourse. This Blemish is so notorious, that 'tis a Wonder the Author did not mend it in his last Editions.

⁷ These Words of Xenophon are designed only to shew, that when one has got an Advantage or Gain, he ought to take Care to preserve it, and not Run to the utmost Bounds of his Fortune.

quence is a greater Good, than the ill Consequence is an Evil: that is, if we are like to gain more by being successful in the Attempt, than we can lose if we prove ^a unsuccessful. Thus it would be no Rashness or Imprudence to hazard Ten Pounds, suppose in a dangerous Adventure, when we may get an Hundred, if the Chance prove fortunate ^a.

2. *If the Good and Evil which may proceed from the Thing in Debate, appear equal, we may then choose it, with this Provision, that it has a greater Efficacy or Ability for producing the Good than the Evil:* that is, if 'tis more easy that Gain should arise from it than Damage. In which Point we cannot omit the noble Argument of *Arnobius* ^b: "Since that (says he) is the Condition of future Things, that they cannot be felt or held by any anticipating Touch, is it not much the clearer Reason, of two Uncertainties, the Expectation of which is equally doubtful, rather to believe that which brings some Hopes along with it, than that which brings none? For in the former Case there can be no Danger, tho' the Matter expected never come to pass: but in the latter we incur the highest Damage, if what we disbelieved should not prove a Falshity in the final Event of Things ^c." 3. *If the Good and Evil seem to be unequal, and the Ability of the Thing to produce them not less unequal, then we must determine our Choice by one of the two Conditions, either that the Ability for producing Good compar'd with that for producing Evil, be greater in Proportion, than the Evil itself compar'd with the Good (that is, if the Excess of Evil be less than the Ability for producing Good) or, if the Good be greater, compar'd with the Evil, than the Ability for producing the Evil, compar'd with that for producing the Good:* that is, if the Power and Efficacy which seem to incline towards the Production of the Evil, be less considerable than the Degree by which the Good exceeds the Evil. To which we will add this fourth Rule, That where both the Good and the Ill Effect of a Thing, and likewise its Ability for producing of both, remain uncertain and undetermin'd,

'tis the Part of a wife and cautious Man to abstain from such a Matter, unless he is driven on it by urgent Necessity.

VIII. When the Judgment of the Understanding is at a loss, and cannot discern whether a Thing be good or Evil, and consequently, whether it ought to be perform'd or omitted, we call this a ^a doubtful Conscience. Concerning which this Rule ought to be observ'd, That as long as the Judgment cannot, by the Force of any Arguments, be inclin'd to one Side more than to the other, the Action is to be suspended; and that therefore, he who proceeds to do a Thing, about which his Conscience still hangs in an *Aequilibrium*, commits a ^b Sin; because, as much as in him lies, he has transgress'd a Law. For he declares his Mind to this Effect: *I am not indeed certain, whether or no this Action is repugnant to the Laws; but whether it be or no, I am resolv'd to undertake it.* 'Tis good Advice (says ^d Tully) to forbear doing a Thing, where ^e we doubt whether it be just and just, or foul and injurious: For when we are certain the Thing is just, we have a clear Light and Guide to proceed by; but to act with an unsettled Judgment, does not free us from the Thoughts and Intentions of offering an Injury. *Grotius* ^e says, That this Rule, of abstaining from a doubtful Action, does not hold when we are oblig'd to do either this or that, and yet are unsatisfied in either, whether it be just or not; for then we are allow'd to choose that Side which appears less evil or unjust. For whensoever we are under the Necessity of making a Choice, the lesser Evil assumes the Character of Good. This Observation, we think, ought rather to have a Place in Evils of Damage, than in those of Morality; because in the former it is reckon'd a Gain and an Advantage, to avoid a greater Evil by admitting a less. But it cannot be applied to moral Evils, without a very dextrous Construction. Properly speaking, therefore, of two moral Evils, neither is to be chosen. Yet it frequently happens, that two Laws, either both Affirmative, or one Affirmative and the other Negative, shall seem to clash with one another, so that we cannot

^a *Comp. Epist. Enchirid. Ch. xxxv, xxxvi.* ^b *Lib. ii.* ^c *Add. Pensées de M. Pascal. Ch. vii.* ^d *Off. Lib. i. Ch. ix.* ^e *Lib. ii. Ch. xxiii. §. ii. n. 2.*

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¹ Our Author, in his last Editions, quotes an excellent Passage of *Arnobius* to this Purpose: "Since future Things are of that Nature, that no Man can clearly discover them, nor foreknow their Events; no Man of Sense, but of two Things equally uncertain, will choose that from which he may hope for some Good, rather than that from which he can hope for none." In short, if the Evil that threatens us, has no Effect, we run no Risque; whereas we are expos'd to very great Danger, and hazard All, if, when the Time comes, we find by sad Experience, that we were not afraid without Cause. *Adv. Gentes, Lib. ii.* See *Lib. ii. Ch. iii. §. 21. n. 6.* Our Author mistakes, in annexing this to the first Rule of *Grotius*, whereas *Mr. Pascal*, in his *Thoughts, Ch. vii.* proves it ought to be join'd to the second.

² *Mr. Thomassius*, in his *Instit. Jurispr. Divin. Lib. i. Ch. i. §. 59.* affirms, That there is no such Thing as a doubting Conscience, because Doubting is no Determination of the Soul, but a Suspending the Judgment only. But *Mr. Titius* will not allow this to be a sufficient Reason to take away the Distinction; for besides the Suspension, there is a Determination, by which the Conscience is put upon an Action, the Doubts which ought to prevent it still remaining.

³ *Mr. Titius* (in his *Observat. on Pufend. Observ. 19.*) affirms, That this Maxim is not absolutely true and without Restriction; For (says he) when an Agent has no more Intention to do Evil than Good, he is not blame-worthy, unless the Action be found contrary to the Law; for he acts not according to the Nature of the Action in itself; and therefore whatsoever produces that Quality contrary to the Design of the Agent, hinders the Imputation of a Crime to him, if the Action prove evil. In fine, if we suppose the Agent to be carelefs whether he does Good or Evil, and that the Reasons for and against him are altogether equal, his Disposition, nevertheless, is corrupt before God, because he has resolv'd to act without a certain Knowledge that what he is about to do is good, or, at least, harmless, and so he renders himself liable to fall into Error, and consequently engages himself, as much as in him lies, in all the evil Effects. This hath Place in Matters of the greatest Importance, as when we condemn any one, and do him any Mischief any Ways: for the Justice of an Action ought to be so clear, that they to whom it is done, may acknowledge it such. See *Parrhasiana, Tom. ii. p. 406.*

⁴ 'Tis a Maxim of Holy Scripture, which teaches us, *That whatsoever we do without Faith, i. e. without a thorough Conviction of the Goodness of it, is Sin.* And all the Heathen Wise Men, both *Greeks* and *Barbarians*, have given us the same Rule. *Qui in vero dubitat, male agit, cum deliberat:* He that doubts of the Truth, does ill while he deliberates. *Publ. Syr.* See *Grotius Lib. ii. Ch. xxiii. §. 2.* The Scholars of *Zoroastres* had this Rule, if it be dubious, whether an Action be good or Evil, we must not do it, till we are inform'd by our Doctors. *Hyde in: addit. Persa 50.*

satisfy both at the same time^a. In this Case ignorant Persons are apt to fancy, that a Comparison is made between two Evils, or Sins of Omission, and that we are to do that, which it would have been the greatest Sin to have left undone. But in Reality, we do not here of two Sins choose the lesser; but that Action, which without this clashing and interfering had been a Sin, now ceases to be sinful, when we are oblig'd to a contrary Duty, by the Force of a stronger Law. Thus, for Example, when there seems to be a clashing between the affirmative Command, *Give Alms*, and the Negative, *Do not steal*, without doubt we must not be guilty of Thievery to gather Matter for our Alms; according to that of the Apostle, *we must not do Evil, that Good may come of it*. Yet in this Case, not to give Alms, is not properly a Sin, because Affirmative Precepts exert not their Force of Obligation, when there remains no Supply of Matter to furnish out the Action. So again, when a clashing is made between the two Affirmative Precepts, *Obey God*, and *Obey the Magistrate*, no Question but we ought to obey GOD rather than Men^b: Not because, of two Evils the least is to be chosen, but because it is not an Evil to deny Obedience to the Magistrate, when it cannot be given without violating the Duty we owe to GOD. For a weaker Obligation always yields to a stronger, when both cannot be fulfill'd together.

IX. To a *doubtful Conscience* a *scrupulous* one is very nearly related; and this is, when the Judgment of the Understanding is possess'd with an anxious Fear, lest the Thing which we fancy to be Good, should prove Evil, or *vice versa*. Now when such Scruples are founded on probable Arguments, the Action is to be suspended, 'till they can be taken away and clear'd up, either by the Force of Arguments, or by the Authority of wise Men: But when they proceed only from a melancholy and a superstitious Softness and Indiscretion, they are by all Means to be discouraged, and forcibly driven out of our Thoughts. Therefore 'tis a good Remedy which *Cartes*^c prescribes against Fluctuation of Mind, and the Bitings of Conscience which precede an Action, *to accustom our-*

selves to the forming of certain and determinate Judgments of all Things that offer themselves to us. But we must observe farther, that these Judgments ought to be drawn from genuine and solid Science, or from the Doctrine of the Laws of Nature, and from the Christian Religion, purg'd from the vain Additions of superstitious Men. For tho' without this Security, the Mind may indeed be so far harden'd, as not to perceive any Fluctuation, or to feel any Remorse of Conscience; yet such a Firmness and Obduracy is neither of long Continuance, nor free from the Imputation of Sin. Whence we cannot approve of the latter Part of *Des Cartes's* Prescription, where he tells us, *We should always think our Duty is discharg'd, when we have done what we judg'd best, altho' we have made the worst Judgment that can be*. For this is not to cure the Disease, but by an ill-temper'd Opiate, to bring a Drowsiness and Stupidity on the Mind.

X. When the Knowledge of the Understanding is wanting, as to the Performance or the Omission of any Thing, we call this *Ignorance*. Which, as far as concerns our present Design, may be divided, either with Respect to its *Influence on the Action*, or with Respect to its *Origin*. With Reference to the former, it is of two Sorts, one being the Cause of the Thing ignorantly done, and the other not. The first may be call'd *Efficacious*, and the other *Concomitant*. The first is the Negation of such a Knowledge in the Understanding, which, had it been present, would have hinder'd the Action. Such was *Abimelech's* Ignorance, *Gen. xx. 4, 5*. who, had he known *Sarah* to have been *Abraham's* Wife, had never entertain'd any Thoughts of taking her for himself. The latter is a Negation of such a Knowledge in the Understanding, as would not have hinder'd the Fact, so that the Man, tho' he had known what he was indeed ignorant of, yet would have done the Thing nevertheless. As suppose a Man should kill his Enemy by a chance Blow, whom he would otherwise have kill'd, had he known him to be in that particular Place, where he now threw his Weapon casually, and without any Intention of Hurt^d. Thus the Boy who flung a Stone at a Dog, and by mistake

^a This was the brave Declaration of Socrates, I honour and esteem you, O ye Athenians; but in point of Obedience, my Duty to GOD is to be satisfied before my Obligation to you. *Plato Apolog.* ^b De Passion. Art. 170, & 177.

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¹ See *Lib. v. Ch. xii. §. 23.*

² This Saying of Socrates is by many learned Men compared with the Passage in the *Acts*, *Ch. iv. ix. v. 29.* but, as Mr. *Le Clerc* observes, *Ars Crit. To. i.* he speaks of his Daemon or Genius, and not of the True GOD.

³ *Hurocles* speaks much to this Purpose, in his Discourse of the Honour and Obedience due from Children to their Parents, and therefore is worthy our Notice. His Words are, *Com. in aur. Pythag. Carmina*, p. 53. *Ed. Lond.* *If it happens that the Will of our Parents is contrary to the Law of GOD, what can they do, who fall under such an Opposition of Laws, other than is usually done, when any Duties are incompatible? For when the Choice of two Things is offered, the one Good, the other Evil, we must necessarily prefer the Good, if we can't fairly discharge ourselves of both at the same time, &c.*

⁴ The Divisions of our Author are neither clear nor compleat enough; and therefore *Tritius*, in his 23d Observation, rectifies them, by considering *Ignorance*, 1. With Respect to the Influence of the Object upon the Thing we act; whence arises *efficacious* and *concomitant Ignorance*. 2. With Respect to the Nature of the Object, considered in itself, which produces an *Ignorance of Law*, and an *Ignorance of Fact*. 3. With Respect to the Consent of the Agent; whence results *voluntary* and *involuntary Ignorance*.

⁵ This Definition comes near the Opinions of the Peripateticks, which distinguish the Sorts of Ignorance and Error, by the Sorrow or Penitence which the Agent shews, or not, after the Action, *Ethic. Nicom. Lib. iii. Ch. ii.* which, if it be allowed, scarce any one but would easily avoid the Imputation of his Crimes. But Mr. *Pufendorf's* Definition, depends not only upon a false Supposition, but is incompleat, because it agrees not to Actions allowable and indifferent. Nothing but want of Knowledge, which hinders acting, renders Error efficacious, and consequently not to be imputed. Now such Ignorance is thus distinguished; 1. It is efficacious, when it respects the necessary Knowledge of the Action we are about, either as to the Nature of the Thing, or Intention of the Agent; such Ignorance hinders Consent, and being involuntary, can't be imputed. This may be easily applied to particular Actions, as well lawful as unlawful. On the contrary, 2. Concomitant Ignorance is that which respects that Knowledge which has no Relation to the Affair we are about, and which, not hindring Consent, can't preserve us from Imputation. It is voluntary or involuntary, and having no Influence upon the Business in Question, can't contribute any thing to cause an Alteration. *Tr. Obs. 25.*

hit his Mother-in-Law, and kill'd her, said ¹, *Τ' αὐτόμαλον ἡμῶν καλλίω βελεύεται*, *Fortune had a better Aim than I*. Some distinguish these two Species of Ignorance in this Manner, That what is done by the former shall be said to be done *out of Ignorance*, what by the latter, to be done by *one that is ignorant*. Yet even in the latter Case, no Murder, according to the strict and proper Sense, is committed. For tho' that ill Affection of Mind was in itself vicious, yet it contributed nothing to the Fact. With Reference to its Origin, Ignorance is divided into *voluntary* and *involuntary*. The former is by some term'd *consequent* and *vincible*, the latter *antecedent* and *invincible*. The former, whether it be directly *affected*, or proceeds only from Idleness and Unattention, is when a Man knows not that which he could, and ought to have known: the latter, when a Man knows not such Things, as he had neither Ability nor Obligation to know. This *invincible Ignorance* is either such *in itself*² and *not in its Cause*, or else both *in itself, and in its Cause too*. The former is, when in doing a Thing a Man is not able to overcome the Ignorance from which it proceeds, and yet is in Fault for falling into that Ignorance. Thus frequently when a drunken Man commits a Sin, he does not know what he is doing, yet he is culpable for not knowing it. The latter is, when a Man not only is ignorant of such Things as could not be known before the Action, but is also free from any Blame upon the Account of his falling into that Ignorance, or his continuing in it. On this Point is observable what *Aristotle* has said in his *Ethicks*, *Book iii. Chap. i, ii.* and what *Eustathius* has commented on the Place. Where he distinguishes between what is done *by one being ignorant*, and what is done *out of Ignorance*. For Instances of the former, he brings the Actions of a drunken, or of an angry Person; for such Men, tho' they often know not what they do, yet the Ignorance is not the Cause of their acting, but the Drunkenness, or the Anger, of which 'twas in their Power to decline the former, and to restrain the latter. He adds farther, that those Persons cannot be said to do a Thing unwittingly, who sin upon

account of not knowing what was to be done, or what to be avoided, which Ignorance he calls *Ignorance in Election*³, or *Ignorance of Universals*⁴: for these every Man was oblig'd to know. But that *Ignorance of Particulars* is the Thing, which renders an Action capable of being construed involuntary. These Particulars are, *who, what, about what, and in what, with what Instrument, for what Cause, and by what Manner*. All these no Man in his Senses can be ignorant of together, because he is at least apprehensive of his own acting, and therefore can resolve the first Question (*U'bo?*) But⁵ in all the other Circumstances Ignorance may intervene. Thus Persons offend who say⁶ what they ought not, not knowing that *what* they have said ought to be kept secret. And the same is the Case of a Man who intending to shew his Friend some shooting Engine, should let it go off, and kill him. An Instance of Ignorance *about what, and in what* (which are the same Thing) may be, when a Man kills his own Son, mistaking him for his Enemy. *Ignorance of the Instrument* is, suppose a Man should throw a pointed Spear at another, and kill him, taking it to have had no Point. *For what Cause* comes to be consider'd in Ignorance, in such a Case as this: Suppose a Man should apply a Remedy to another, with design of preserving his Health, and the Remedy should (against his Knowledge) prove mortal. The last Circumstance is, *in what manner*; as if a Man in teaching another should intend only to give him a slight Blow, but should by Accident desperately wound him⁷. The *Roman Lawyers* have treated under a peculiar Head concerning *Ignorance of the Law, and Ignorance of the Fact*⁸. But they did not consider Ignorance so much for the Force and Use it had in moral Actions, as for the Influence it had on Matters of Right, and as it made for the keeping, or⁹ acquiring, or losing of any legal Possession or Qualification. But their numerous Reasonings about both Kinds may be reduc'd to this short Issue, That Ignorance of the Law is, for the most part, join'd with some Degree of culpable Negligence¹⁰, but Ignorance of the Fact is not; and that therefore Equity

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¹ *Plutarch*, who mentions this Sentence, in two Places of his Works of Morality, makes this to be the Speech of the Step-Son, *ὄνοσ' εἰς καυῶς*; 'twas not badly thrown. *De animi tranquill. p. 467. Ed. Weck.*

² This Division is not very necessary, for only the last sort of Ignorance is involuntary or invincible; for in Matters moral, voluntary comprehends not only what is formally consented to, but what precedes Consent, if it be a necessary Consequent of it. *Titus Obs. xxviii.*

³ *i. e.* When we are ignorant which of two Things propos'd to us is most advantageous, or with what View we must act; as for Example, when we prefer a profitable or agreeable Good before an honest one.

⁴ Such is the Ignorance of the Law of Nature, at least of its common Principles; and the Ignorance of the Civil Laws of the Government to which we belong: So that tho' we may kill or poison another without any such Design, we can't innocently persuade ourselves that Murder or Poisoning is allowable.

⁵ There are some other particular Circumstances, the Ignorance of which is as inexcusable as that of general Principles. As for Example, If one shall shoot off a Gun in a publick Place, and kill a Man, it will be no Excuse that he thought no Man would pass that Way, because he must needs imagine that such Places are much frequented.

⁶ Thus says *Aristotle*; *Aeschylus the Poet, being accused for publishing the Mysteries of Venus Elufina, was acquitted, because he knew not, that those Things which he had spoken were to be kept secret. For the Ignorance of a Thing as to the Quality, or what, consists not in being ignorant of what is done, but of its being of such a Nature, or having such a Quality.*

⁷ Two other Circumstances may be added; as, 1. The Time; for we may be ignorant whether a Day be holy or not, a Festival, or Working-day, &c. 2. The Place, whether it be consecrated or common.

⁸ See the *Digest. Lib. xxii. Tit. vi. and Cod. Lib. i. Tit. xviii.* see also *Mr. Daumat's Civil Laws in their natural Order, Part. i. Lib. i. Tit. xviii. §. 1.*

⁹ Ignorance of Right (say the *Digest. Lib. xxii. Tit. vi. Leg. vii.*) hinders not from preserving our just Due, but is of no Use to acquire any Thing. As to Crimes, their Judgment is, that Ignorance of what is forbidden by the Law of Nature, or Nations, or by the revealed Law, is altogether inexcusable; but as to what is contrary to the Civil Laws, Ignorance or Error excuses sometimes, either wholly, or in part; in which Case Men are considered as having Means, or not, to know the Law.

¹⁰ The Reason is, because the Law may, and ought to be clear and determinate, but Facts are often very intricate, so that the wisest Men can't unfold them; and thereupon, in Matters of Fact, when Ignorance is gross, it can't be alledged as a Reason available. *Ibid. Leg. ii. & vi. & ix. §. 5.* see *Cujas Observ. v. 39.*

directs us to interpret the former to the Man's Prejudice, and the latter not.

XI. When not only a Knowledge of the Truth is wanting in the Understanding, but a false Persuasion has intruded into its room, which passes itself for Truth, then we say a Man has an *erroneous Conscience*, or that his Mind is possess'd by an *Error*. This Error is (like Ignorance) either vincible or invincible: The former is that which a Man could and ought to have overcome, by applying such Diligence as is morally possible, or as the common Condition of Humanity admits and allows: The latter is such as a Man could not vanquish by all Diligence morally possible. Where it must be observ'd, that should we approve of that Saying of the Emperor *Antoninus*, Book ix. Chap. xlii. *Whosoever sins, does in that decline from his propos'd End, and is certainly deceiv'd*^a; yet if the Error were not insuperable, the ill Actions proceeding from it cannot be exempted from the Number of Sins properly so call'd, nor ought to be pardon'd in Gross by a promiscuous Indulgence^b.

XII. But it ought especially to be remark'd, that Error has different Effects in Actions, which a Man may undertake or omit as he pleases, or the Exercise of which is left to his free Will; and in such Actions as are enjoin'd or forbidden him by the Law or the Command of a Superior. In the former kind of Actions, the Error is suppos'd to intercept our Consent: And therefore those Consequences do not flow from it, which are otherwise apt to follow on such an Action as we have thus consented to; especially if the Error did not steal on us thro' supine Carelessness and Neglect. And therefore in Bargains an Error about a Thing, or about its Quality, upon Prospect of which a Man was induc'd to come to such an Agreement, renders the Bargain void. For in this Case the Man is not conceiv'd to have agreed absolutely, but upon Supposal of the Presence of such a Thing or Quality, on which, as on a necessary Condition, his Consent was founded: and therefore the Thing or Quality not appearing, the Consent is understood to be null and ineffectual. Which Point shall be discuss'd more fully in its proper Place.

XIII. But the Case seems to be very different in necessary Actions, or in such as are commanded or forbidden by a Superior. Where we must first enquire, whether the Error arises in the Theory, or in the Practice; that is, whether a Man entertains a false Opinion concerning the Necessity of

some Actions, thinking those ought to be omitted which should have been perform'd, or *vice versa*; or whether some Error occurs in the very Exercise of an Action, by Means of which the Action is not applied so rightly as it ought to have been. The former Kind of Errors do not, in our Judgment, at all hinder the *Imputation* of an Action to the Agent, according as it shall appear to agree or disagree with the Rules prescrib'd him, because they must upon all Accounts be esteem'd superable: For he that would restrain the Actions of another by a Rule, ought at the same Time to make a sufficient Declaration of his Will, that it may be clearly known by the Person whom he is to oblige. For otherwise 'tis the most unjust Thing in the World to require Obedience to a Law, when either the Law is unknown, or the Discovery of its Sense exceeds the Capacities of those whom it affects. Therefore, if a Man *errs in Theory*, that is, if he fancy a Thing to be commanded which is really forbidden, or, *vice versa*, he is suppos'd not to have apply'd sufficient Diligence, and therefore he cannot refuse to bear the Imputation of Faults committed upon such an Error. This Doctrine is by some Casuists thus explain'd in other Words: If the Conscience entertain a vincible Error about an evil Thing, the Man sins, as well if he acts for it, as if he acts against it: That is, if he has persuaded himself that an Action was commanded, which was indeed forbidden, or that an Action was forbidden, which was indeed commanded, he sins by performing the former, and by the forbearing the latter; because such a Performance and such a Forbearance are repugnant to the Law, but the Agent might and ought to have known the Law, according to its true Import and Signification: And yet^c the same Man has sinn'd no less, if he has forborn an Action which was indeed forbidden, but by him believ'd to be commanded; or if he has perform'd an Action really commanded, yet such as he imagin'd to be forbidden. For tho' in these Cases there be no external Acts repugnant to the Law, yet because the Man thinks his false Notion and Construction of the Law to be right, therefore the contrary Intention shall be imputed to him as Sin: For the evil Intention of the Agent makes the Action appear evil, at least with Respect to the Agent himself. From all which it appears, that from an erroneous Judgment no Action can proceed which may be imputed as good and right to the Actor, and that

^a *Adl. Arrian Epictet. Lib. i. Ch. xxviii. & Ch. v. §. 13.*

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¹ For 'tis a Rule of the Law, That Ignorance of the Law hurts any Man, but of the Fact not. *Digest. ibid.*

² See *Ch. vii. §. 16.* The Questions about invincible Ignorance and Error, have been much debated in *France*, in order to maintain the Rights of Conscience in Matters of Religion, against the Attempts of such Teachers as are against a Toleration, and are for prosecuting all that differ from them; for which 'tis convenient that the Curious consult the Books.

³ It is certain, that when Men are arrived at the Height of Wickedness, they sin not for sinning's sake, but are ordinarily seduced by their Passions, which on a sudden divert the Mind from the Thoughts of their Duty; but tho' a Man considers not the Sin formally in the Instant of sinning, he is not less to be blamed, because his Ignorance respects Things which he might and ought to know; and to the Maxim of *M. Antonine*, if understood with the Restriction beforementioned, will rectify the Error of the philosophical Sin of the Jesuits. About which, see *Biblioth. Univers. Tom. xv.* In fine, Since we never resolve upon an Action, but upon the account of some positive Knowledge, and a simple Defect of Light rarely carries us to any Action, Ignorance and Error are often confounded in Morality, and what is said of the one, may be applied to the other.

⁴ Moreover a Man likewise sins as much in doing a good Action contrary to his Conscience, as by doing a Thing evil in itself, in following the Motions of an erroneous Conscience. The Reason is, because in the first Case he directly and deliberately disobeys GOD, which is the most aggravating Circumstance of Sin; and besides, all the Good that can be in the Action, can't be imputed to the Agent, who could not but be sensible that he had no Design to do it. Whereas in the other Case, there is no formal Contempt of the Authority of the Lawgiver; nay, on the contrary, there is a Design to obey him; which shews that the Action contains in it some moral Goodness, altho' in some Respects it may be accounted Evil, if the Error appears not unconquerable. See the *Philosophick Comment. Sec. Tom. ii. Ch. viii.*

when a Man is *falsly* persuaded that such a Thing is unjust, the Thing is unlawful for him to do, so long as his Persuasion shall continue uncorrected. *Add. Lib. lxxvi. §. 8. D. of Thefts.*

XIV. But if a speculative Error be entertain'd concerning a Thing indifferent; that is, if a Man should be persuaded that he ought to do, or to omit somewhat, which was indeed left free on both Sides, he will only sin, if he acts contrary to what this false Opinion suggests, upon the account of the Pravity of his Intention, but will not sin, if he acts according to the Directions of his Error. For indifferent Things are plac'd without the Bounds of the Law; which cannot be transgress'd by their Performance or Omission: And that Error appears very harmless, which does not give Occasion to sin. Yet it is plain, the Actions undertaken upon the Motions of such an Error, cannot obtain those good Effects which otherwise follow the like Instances of Obedience to the Laws: Thus, if a Legislator had constituted such a Reward to those who comply'd with his Injunctions, this Reward could not be challeng'd by one, who through Error and Mistake should have observ'd some indifferent Things, fancying them to be positively determin'd, and legally enacted.

XV. But 'tis much more usual that an Error should intervene in the Practice and Exercise of Actions commanded by the Laws: As suppose the true Object of the Action should be remov'd, and another substituted in its Place; or if we should mistake the Time or Place of the Execution enjoin'd. Such Actions, as they are not follow'd by those Effects which are otherwise due to Actions rightly apply'd; so neither are they attended with the Effects proper to bad Actions, because the Error was not contracted by any culpable Negligence: Which some Authors thus express in other Words, An intervening Error hinders the Action from being imputed on either side, making it neither good nor evil. *Whoever (says Seneca Herc. fur. v. 1237.) gave Error the Name of Wickedness?* Thus, tho' otherwise you would be freed from your Obligation by paying a Man what you owe him, yet should you pay him undesignedly, and by pure Mistake, you will not indeed have committed a Sin, but you will by no Means have cancell'd the Obligation. Thus when a Man has, with an ho-

nest Intention, tho' with an inconsiderate Liberality, conferr'd a Kindness on a wicked Person, who will abuse it toward the maintaining of his Disorders; he cannot at all boast of having done a good Action, yet he shall be excus'd from any Share in the consequent Wickednesses, and not be reckon'd to have contributed any Thing toward their Commission. But when a Man has been particularly commanded to discover and observe precisely the Object, the Place, or Time of acting, it will be a hard Matter for him to escape the Imputation of those Effects which shall proceed from the ill applied Action, unless he can demonstrate his Error to have been morally insuperable and unavoidable. Thus if you give your Servant a strict Charge to wake you at such a certain Hour of the Night, it will not serve him for an Excuse of his Default, to say, that he mistook in telling the Clock; yet if by any Casualty the Clock went wrong, or was out of Order, the Servant shall be free from all Offence and Blame.

XVI. It frequently happens too, that an Error intervenes in the Exercise of a bad Action, while the Actor misses the Object at which he aim'd. In which Case, the *Malice* of the Actor shall continue the same as if he had not mistaken, but the Action itself shall be esteem'd more or less heinous, according as the Object is on which it casually lighted. Thus a Person who intending to kill his Enemy, accidentally kills another Man, shall be nevertheless guilty of Murther. *See Lib. xviii. §. 3. D. of Injuries, & Lib. xiv. D. L. Cornelian de Sicariis, & Grot. in Sparf. Florum ad h. l.* Yet the Murther shall receive more or less Aggravation, according to the Dignity or Meanness of the Man, who has been so unfortunately slain. Hitherto must be refer'd the Case of a Man's killing another outright, whom he intended only to wound, or to hurt in a less Degree; for here the Fact itself must be the Rule to go by in Judgment: But when in the Exercise of a faulty Action, a Man by Mistake lights on a lawful Object, such an Action will be no farther evil, than as it flows from an ill Intention in the Actor; so that this Error shall hinder the Fact from coming under the Name of the Vice design'd to be committed. And therefore that Saying of *Seneca*, of the *Constancy of a wise Man*, *Ch. vii.* will not hold, at least² in human Courts and

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¹ 'Tis on this account that the *Roman Law* has decreed, that he that takes away any Thing from another, thinking that he does it without the Consent of the Owner, commits a Robbery, tho' afterward he find that the Proprietor was willing he should take it and have it for his own; but he that has as much as in him lies committed the Robbery, can't be prosecuted in Law as a Thief. The Law is this; If I against the Will and Consent of the Owner, as I believe, do meddle with his Goods, tho' the Owner is willing I should, whether am I guilty of Theft? And *Pomponius* says, I am a Thief: yet it is true, that if I am willing he should have the Use of them, tho' he know it not, he can't be impleaded as guilty of Theft. *Digest. Lib. xlvii. Tit. ii. Of Thefts, Leg. xlvii. §. 8.*

² Indeed before God it is real Adultery; for, as the Author has observed more than once before, and as he hereafter speaks, *Chap. vii. §. 4.* an evil Intention renders the Action evil, which otherwise is good and innocent, as to the Matter, and in itself: tho' a good Intention is not sufficient to render an Action materially evil, or good. Whereas, on the contrary, if a Man designs to do a good Action, and happens (thro' Mistake) to do an ill one, there is no doubt but God will accept of that Intention, as if he had effected the Good that he propounded to himself to do; and although it gives Place, by Accident, to some Sin of another Nature, 'tis no less commendable for the Good which he would have done, unless the Execution of a pious Design either become unprofitable, or be hindered by the Change of certain Circumstances. So that the Maxim which our Author has laid down in the last Section, I mean, *That every Action, in doing of which we may fall into an Error, can neither be imputed to us as Good, nor Evil:* This Maxim, I say, had need be understood with some Restrictions. Nor is it generally more true, that these sort of Actions must always want, before human Judicatures, those Effects which they would have, if they were well applied. As for Instance, If a Man not knowing it, marries a Woman who hath a Husband already, or is a Relation within the Degrees forbidden, as he is no Adulterer or incestuous Person, supposing that it be a real Error, so their Children cannot be reputed Bastards, provided that both the Father and the Mother be under an invincible Ignorance in that Respect. This is the very Example that *Mr. Hertius* alledges here, and we may also consult his Discourse of a *Supposed Marriage*, *Tom. i. of his Commentaries and small Works.* Printed in 1700.

Consideration ^r, That if a Man lies with his own Wife, fancying her to be another's, the Man shall be an Adulterer, tho' the Woman be no Adulteress. Add.

Sen. of Benefits, *Lib. ii. Ch. xix. & Lib. v. Ch. xiii.* in the End. And compare *Libanius Declam. xxxv. p. 780.* of *Morellius's* Edition.

^r Consult also the new Letters of Mr. Bayle, written upon the Occasion of his general Criticising upon Mr. Maimbourg's *History of Calvinism*, Lett. ix. §. 12.

C H A P. IV.

Of the Will of Man, as it concurs in, or consents to MORAL ACTIONS.

The CONTENTS of every Section of the fourth Chapter.

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| <p>I. Of the Acts of the Will.</p> <p>II. Of the Liberty of the Will.</p> <p>III. That the Will must of Necessity be indifferent, i. e. not forced to choose Good or Evil.</p> <p>IV. How the Will is inclined to good Things, and to Goodness in general.</p> | <p>V. Certain Dispositions of the Body stir up the Will.</p> <p>VI. As also some Habits.</p> <p>VII. And Passions.</p> <p>VIII. Also Intemperance.</p> <p>IX. Actions of a mixt Nature.</p> <p>X. Involuntary, and forced Actions.</p> |
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THE most wise Creator being pleas'd to make Man an Animal governable by Laws, for this Purpose implanted a Will in his Soul, as an internal Directress of his Actions; that the Objects being propos'd and known, this Power might, by an intrinsic Principle, and without any physical Necessity, move itself towards them, and might choose that which seem'd most agreeable and convenient, and reject that which appeared unsuitable and incommodious. The Will is concern'd to govern human Actions by the Administration of two ^rFaculties, by one of which it is said to act spontaneously, and by the other ^rfreely. To Spontaneity, if we may so speak, are attributed certain Acts and Motions, of which some are interior, commonly call'd ^rEliciti, others exterior, generally term'd *Imperati*. The former are such Acts as are immediately produc'd by the Will, and terminated in the same Power. Some of these are employ'd about the End, as Volition, Intention, Fruition; others about the Means, as Consent, Election, and Use. *Volition* is that Act of the Will by which it is simply carried toward some End, without Regard had whether the End be present or absent; or that Act by which the End is barely approv'd of. Others call this the Will of simple Approbation, by which a Thing is understood to agree with the Nature and Inclinations of some Person, though he has not yet actually and

effectually mov'd himself towards the producing or obtaining of it. *Intention* (or *Proæresis*) is a *Desire efficacious toward the obtaining of an End*, or it is an Act of Will, by which it effectually tends toward an absent End, and endeavours actually to produce or to acquire it. This Act being join'd with the Hopes and the Attempts of procuring an End, we may easily conceive what sort of Things it is employ'd about: and they, to be sure, must be Things possible in themselves, and Things in our Power; as *Aristotle* has more largely observ'd, *Ethic. ad Nicom. Lib. iii. Ch. iv. Election is concern'd only about those Things which are in our Power. Every Man purposeth to do that alone which he imagines himself able to compass.* Again, *Lib. vi. Ch. ii. What is already done, cannot be the Object of our Choice and Pursuit; for no Man consults of what is past, but of what is to come, and is changeable and contingent. Whereas what is already done cannot be alter'd or recall'd.* And therefore *Agatho* well says, *This alone is beyond the Power of God himself, to make that never to have been done, which hath really been done.* For it enters into the very Definition of *Intention* or *Προαίρεσις*, that it may be made with Reason and with Thought. Tho' there be many Degrees of *Intention*, with Reference to its different Height and Force; yet as far as concerns the Occasions and Purposes of civil Life, 'tis sufficient to divide it into plenary and semi-plenary. The former is that by which the Will determines on any Thing after a full Ex-

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^r See what is said about this unprofitable and ill-designed multiplying of Faculties in the second Note of the first Chapter foregoing.

^r Mr. LOCKE seems to have Reason to believe, That Liberty is nothing else but a Power properly appertaining to Agents, and not an Attribute or Modification of the Will, which is itself nothing but a Power. See his *Philosophical Essay about the Understanding*, *Lib. ii. Ch. xxi.* where this whole Matter about the Will, and Liberty in general, is treated on at large. Mr. LE CLERC, in his *Latin Treatise about Spirits*, *sect. 1. Ch. iii.* is of the same Opinion with Mr. LOCKE, as to the Seat of the Will (as I may speak) but he elsewhere enters upon a more particular Matter of the Hypotheses of that great Philosopher, and shews, that his Notions are neither exact nor clear. See his *Choisite Biblioth. Tom. xii. Art. iii. p. 83, &c. and Tom. xvii. Art. vi. p. 236, 237.*

^r The Author makes use of the School Distinction here, of *Actus Eliciti*; i. e. Acts springing up (as we may say) from the very Bottom of the Will; which being Terms not used in the French Tongue, they are better expressed by, *The immediate Acts of the Will.*

^r Our Author in all this Quotation follows very unfitly some *Latin Translation*, which had rendred the Greek, *προαίρεσις*, Election, instead of Deliberation, Consultation, or Counsel.

^r This Writer being deceiv'd by the *Latin Interpreter*, translates, *ὅσα αὐτῷ ἐν ἑαυτῷ δι' αὐτῶν, quæ ex sese fieri posse existimaverit*, i. e. *which he thinks may be done of themselves*; which being a Mistake, the *English Translator* has truly avoided it, as I have done, by rendring it, *which he believes himself able to execute.*

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amination of the Matter, and without being driven to it by the Violence of the Passions. The latter, when due Deliberation has not been taken, or when the Hurry of the Affections has created a Confusion and Disorder in the Reason. *Fruition* ¹ is the Rest, or the Delight of the Will in the End now obtain'd and present to it. To which is oppos'd Repentance, or an Aversion (commonly join'd with Shame or Grief) to somewhat which we have before design'd or affected. *Consent* is our simple Approbation of Means, as we judge them proper for our Work: And these Means, when they are plac'd within our Reach and Power, imply the two remaining Acts mentioned in our first Division; for *Election* determines, and *Use* applies them to the compassing of the End propos'd.

Those Acts are call'd *Imperati*, or enjoin'd, which are perform'd by other human Faculties upon the Motion and Appointment of the Will.

II. *Liberty* is a Faculty of the Will, by which, all Requisites of acting being given, it may out of many propos'd Objects choose one or more, and reject the rest; or if one only Object be propos'd, may admit that, or not admit it; may do, or not do it. What we call the Requisites of acting, some express by the single Term *Occasion* ²: now from these the last Determination of the Agent is conceiv'd as a distinct Thing, which being added to the other Requisites, we immediately proceed to Action; and therefore those Requisites, mention'd in the Definition of *Liberty*, do not include that Share which the Man himself bears in the Action, but are contra-distinguish'd to it. But more particularly, we call ³ the Faculty of choosing one or more out of many Objects, *Liberty of Specification*, or of *Contrariety*, and the Faculty concern'd in the Admission or Rejection of one only Object, *Liberty of Contradiction*, or *Liberty of Exercise*.

Now *Liberty* is suppos'd to superadd to Spontaneousness, first an Indifference of Acts as to their Exercise; so that the Will is not oblig'd necessarily to exert one of its Acts, as to desire or refuse: For tho' in general it is impossible but it should affect Good, and refuse Evil, *as such*, yet in Reference to any particular Object propos'd, it may determine on which Side it pleases, tho' perhaps it may seem to have a greater Propension toward the one than toward the other. Another Thing that *Liberty* superadds to the Notion of *Spontaneousness*, is the *Freedom of Determination*; so that the Will may, upon an internal Impulse and Motion, exert either of its Acts of wishing or loathing, just in

such a Place, and at such a Time. We must add farther, That tho' the Reason, which makes a Thing desired or avoided, does not depend upon the Will, but upon the Condition of the Object, according as it bears the Face of Good or Evil; yet that Appetite, and that Aversion, which thus follow the Appearance of the Object, are not of so much Force and Sway, but that there still remains in the Will a Liberty, whether or no it shall determine itself to any external Act about such an Object; especially since such an evil Thing may bear the Countenance of Good, and consequently be desirable, as long as it shall be set in Opposition to a greater Evil. And therefore to refute that Notion of *Hobbes*, *De Homine*, Cap. xi. §. 2. that Appetite and Aversion necessarily follow our Pre-conception of some Pleasure, or of some Uneasiness likely to proceed from the Object; no room being thus left for Free-will, we must carefully distinguish the Volition of simple Approbation, from effectual Intention or Προαίρεσις ⁴, of which the latter does not so necessarily depend on particular Objects. In the Words following this Assertion, he applies a very idle Piece of Nicety, while he observes, *That when we say a Man has free Will of doing this or that, we ought always to understand it with this Condition, If he pleases; for 'tis absurd to say that a Man has free Will of doing this or that, whether he will or no.* For no Body is so stupid as not to apprehend this Contradiction: And 'tis extream foolish to add the very same Thing which the Proposition asserted as a Condition to it. To say that a Man may freely will the doing of a Thing if he will, is the same thing as to say, *Peter runs if he runs*: And who would ever give this Clause the Name of a Condition? From what has been said it likewise appears, how we are to judge of those Notions laid down by Monsieur *Le Grand* in his Institutions of Philosophy, Part iii. Art. v. as if it were impossible for a Man not to desire what he clearly and distinctly perceives to be good; and as if a Man sinn'd only upon this Account, in not having a clear and distinct Perception of Evil ⁵.

III. But the chief Affection of the Will, and what seems immediately to flow from its Nature, is an *intrinsic Indifference*, upon the Account of which it is not restrain'd to any certain, fix'd, and unalterable way of acting; and which cannot be entirely extirpated by the Force of any external Means. And this Indifference we are the more firmly to assert and maintain, because, upon the Removal of it, ail the Morality ⁶ of human

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¹ This Term (*Fruition* or *Enjoyment*) is very improper (as any Man may observe) because the Notion of it, which he here lays down, is the Effect of Fruition, and not Fruition itself. It is true, that the *Latin* word *Fruitio* comes something near it; but it is very hard to find a word in *French* (or any other modern Language) fit to express the Moralists Notion upon which these Divisions are built.

² See Chap. v. §. 5 following.

³ This Distinction does not appear to be very necessary. The Liberty of Contrariety implies no more than a double Act of the Liberty of Contradiction. As for Example, If a Man is to choose, whether he shall read *Greek* or *Hebrew*, he consults with himself, 1. Whether he shall read *Greek* or no, and resolves in the Negative. Then, 2. Whether he shall read *Hebrew* or no, and chooses the first. *This Instance is taken out of Mr. Le Clerc's Latin Discourse of Spirits, Sect. 1. Ch. iii. §. 12.*

⁴ That is to say, Altho' we can't but be sensible of such Impressions as particular Objects make upon us, yet we are not necessarily carried to search for them, or avoid them; but a Man may by Reason deny himself the Pleasure which the Apprehension of it may flatter us with, and, on the contrary, expose himself to that Grief and Uneasiness, from which he might be exempted without those Considerations, which have induced him to undergo them. See Note 5. upon Ch. v. §. 13. following.

⁵ See the former Chapter, Pag. 32. Note 4. and Chap. v. §. 13. following.

⁶ We may add to these Quotations another Saying of the same *Epictetus*; Ἀντὶς προαιρέσεως ἔ γίνεσθαι, τίρπονθ' ἔ γίνεσθαι, *No Man is a Thief or a Tyrant of his own Will.* See *Gataker's* Notes upon *Marc. Antoninus*, Lib. xi. §. 36. where the Emperor quotes the Words of the same Philosopher.

Actions is inevitably overthrown. So *Arrian* on *Epictetus*, Lib. i. Ch. xvii. *What can overcome an Appetite? Another Appetite. What can conquer a Desire or an Aversion? Another Desire, or another Aversion. You will say, He that threatens me with Death compels me. I deny it; 'tis not the terrible Proposal which lays the Force upon you, but 'tis your own Choice which inclines you rather to the Commission of such a Deed, than to the Desire of Death. In this Case therefore, as well as in all others, nothing compell'd you but your own Opinion; that is, nothing overcame your Will but your Will. Idem Lib. i. Ch. xxix. The Will is not conquerable by any Thing but by itself. Add. Simplic. ad Epictet. Ch. i. p. 22. Of which wicked Design those Men are in a great measure guilty, who fancy some strange Kind of physical Predetermination in human Deeds, by which the Motion in itself, and as it is a natural Being, is so determin'd by the first Cause, that it cannot be done in any other Manner; tho' it afterwards receive its Morality from the second Cause. Nor are they in a less Fault, who from the Divine Preſcience would derive an absolute Necessity on all our Proceedings. For tho' this Attribute of GOD cannot be deceiv'd, yet that it does not take away the Indifference of the Will, may be easily understood, if we either clear the Word *Preſcience* from the Imperfection which it seems to imply, as do all other Terms taken from human Things, and applied to the Divine Nature (since in GOD there can be no Succession of Time) or if we say, that the Divine Concurrence does in such a Manner accompany second Causes, as still to leave them the Power of acting in the way originally assign'd them by their Creator, not debating them with Reference to moral Actions from principal into merely instrumental Causes. Add. *Lucian, Niñoce, & Jupit. Confut. Anton. le Grand Inst. Philosoph. Cart. p. 8. Ch. xvii, xviii. How prejudicial such Notions are to a State or Kingdom, Grotius* is well aware, when he observes, *Observ. de Dogmat. Reip. Nox. That those who utterly discard the Doctrine of Free-will, can hardly avoid making GOD the Author of all Wickedness; an Attempt which Plato himself declar'd ought not to be born with in a Commonwealth; De Repub. Lib. ii. Τῶν κακῶν ἄλλ' αἴτια δὲ ζῆλειν πᾶ ἀίτια, ἀλλ' ἑ τὸν θεόν. We ought to ascribe any other Cause of Evil, but never to refer it to GOD. To the same purpose Suetonius speaks well when he makes Tiberius (Lib. lxix.) a Contemner of all Religion, say, Quod omnia fato agi crederet, for believing the World to be guided**

by Fate. For thus *Proclus (ad Timæum)* divides Actions into three Ranks and Orders; two of which he makes those who deny GOD the Care of human Actions and Affairs; and those who attribute such a Care to GOD, as imposeth an absolute Necessity on all Events, utterly depriving Men of their Freedom and Choice. So also *Salust* the Philosopher speaks in his Book *De Diis & Mundo: To attribute Injustice, or Lust, and Wantonness to the overruling Influence of Fate, is to make ourselves good, and the Divine Natures wicked. Again, in Plautus (Aulular. iv. 10.) when one says, I believe this was the Will of the Gods, for otherwise I am certain it could never have come to pass. Another answers him merrily, And I, for my part, believe, 'tis the Will of the Gods, that I should take you and hang you up for a Rascal.*

IV. For the right Understanding of this Indifference of the Will, somewhat ought to be premis'd concerning the Nature of Good in general: Now tho' Good by many of the Philosophers is consider'd absolutely, so that every Being really existent may be pronounc'd Good; yet we without regarding this Signification, which we judge to be very usefess, will only consider Good, as it denotes Respect to others, and as it is said to be Good to one, or for one. According to which Sense the Nature of Good seems to consist in that Aptitude, by which one Thing is dispos'd to benefit, preserve, or compleat another; because this Aptitude, depends either upon the Nature of the Things themselves, or such Properties as they have naturally, or by Virtue of human Industry; and therefore this Good, to which we may give the Name of natural, is firm and uniform, and has no Dependance on the erroneous and various Opinions of Men. But because Good does not excite the voluntary Appetite of Man, unless it be known, at least under a confus'd Notion; and because Knowledge arising from Sense, gives but a gross Representation of the genuine Natures and Consequence of Things, so that the Understanding is often clouded with Error, and disorder'd by the violent Noises of Sense and Passion; hence it comes to pass, that many Men invest things falsely with the Name and Notion of Good, and this is what we call *imaginary Good*. And farther, every particular Person, as he understands a Thing to make for his Profit, his Preservation, or his Perfection, loves and desires it; and, on the contrary, what he conceives to be Evil for him, he hates and

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* The whole Sentence of *Plato*, of which our Author cites only the last Part, is very emphatical; GOD, because he is good, can't be the Cause of all Things, as some assert, but is only the Cause of some few Things among Men; and no Cause of many; for good Things are much fewer than evil among us, and none can be the Cause of good Things but God; but we must seek out some other Cause of Evils than him. These Words are but a little before the Place where that Philosopher delivers the Words which *Grotius* refers to, κακῶν ἡ αἴτια, &c. We must with all Zeal oppose them who assert, That GOD, who is good, is the Cause of any evil: Nor must it be endured in any well-governed City, that any Man whatsoever, either young or old, no not so much as a Poet by way of Fiction, should but lightly, much less plainly, either speak, or hear any such Things, as are neither pious, convenient, nor consonant in themselves to be mention'd, when spoken.

† All the Metaphysicians.

‡ According to the Definition which *Mr. Locke* gives of Good (in his *Philosophical Essay upon the Human Understanding*, Lib. ii. Ch. xv. §. 2.) every Thing is so called, which is proper to produce and increase Pleasure in us, or to lessen and shorten any Grief; or is able to procure or preserve us in the Possession of any other Good, or a Freedom from any Evil. And, on the contrary, every Thing is accounted Evil, which is proper to produce or increase Grief in us, or lessen any Pleasure; or is able to cause any Evil to us, or deprive us of any Good. This Definition, which respects the Effect chiefly, that Things good or evil work upon our Spirits, is consequently more natural than that of our Author, which refers to the Dispositions and Qualities of the Objects, as to the Effect which they produce, with relation to the Constitution of our Nature in general, not distinctly expressing the Sense of Pleasure or Pain, which in all Languages, and in the Opinion of all Men, are comprehended under the Notion of Good and Evil. In fine, Tho' the Philosophers distinguish sometimes between agreeable and profitable, and in some Cases these two Things may be oppos'd one to the other, yet 'tis certain that every real Good is both agreeable and profitable, as every real Evil is disagreeable and disadvantageous, if not at present, yet at least in the Consequents, and at the End of a certain Time.

See Note 5. of the following Page.

avoids. But as it is not requisite to the Nature of Good, and to its Power of moving the Appetite, that it should be consider'd precisely as Good only for the Person desiring, and abstracting from the Advantage of others; especially since upon account of the Society and Conjunction of Men, the Good of others may redound to our Benefit and Use; so amongst Mankind there is so fair an Agreement about the general Nature of Good, and its chief Parts and Species, that barely on the Score of their being divided about some Particulars, there's no manner of Reason either why we should deny the universal, and unshaken, and uniform Notions of Good, or why, in a State of natural Liberty, we should make it depend on the bare Opinion of every private Man, in a State of Government on the sole Judgment of the supreme Magistrate, as the only proper Measures and Rules for its Determination. Add. D. *Cumberland, De L. N.* iii. where he refutes *Hobbes's* Notions of Good, &c. *Ch. i. §. 20.* As for the moral Good which appears in human Actions, it shall be discuss'd by and by in its proper Place.

From the foregoing Observations this manifestly appears to be the Nature of the *Will*, that it is always desirous ¹ of Good in general, and always averse to Evil in general: For it implies an open Contradiction, ² not to incline towards that which seems agreeable, and to incline to that which seems disagreeable to us. And therefore in this general Inclination of the Will there can be no Indifference admitted, as if it could (with the Appetite of simple Approbation) sometimes desire Good and sometimes Evil. But they are the particular Goods and ³ Evils, which give room for the Indifference of the Wills of particular Men, who at different Times, and upon different Occasions, are very various in their Scents and Pursuits. And there is this evident Reason why it should be so, because there are scarce any Goods or Evils which appear to a Man in their native Colours, and without suffering any Mixtures, but commonly they are blended and shuffled together; Good is adulterated with Evil, and Evil is sweetned with ⁴ Good; to which, if we add the strange Inclination which we find to some good Things in particular Persons, and how all Men have not the Ability to distinguish solid and durable Enjoyments, from those which are ⁵ only painted and

transitory; we shall see how there must needs arise hence an infinite Variety in the Wills and Inclinations of Men; and how all pursue what they think their own good, but in different Paths, and by different Means. Besides, many Men do not know what Things are good for them, and therefore do not desire them; many more prefer the fair Face and Semblance of Evil to real and substantial Good, and so reject what they ought to desire, and desire what they ought to reject. To which purpose *Aristotle* well observes, *Ethic. ad Nicom. Lib. iii. Ch. vi.* That to be desireable by the Will, simply and properly speaking, which is truly Good, but that to be desireable by every particular Man which he imagines so. What *Gunter* writes to *Li-gurinus* may be here applied, *Lib. iii. ver. 289.*

-----*Tantum falsa loquendo*

*Fallere nemo potest: veri sub imagine falsum
Influit, & furtim deceptas occupat aures.*

When Falshood bare and undisguis'd appears,
It never can deceive: but when it wears
The Garb of Truth, it cheats the heedless Ears.

Thus then in almost every Thing and every Action many Species of Good and Evil, both *real* and *apparent*, crowd themselves into our Thoughts, and when these have for some time variously agitated the Mind, and driven it one while to favour one, and one while another, at last the Will by an intrinsic Force determines itself to the embracing of one Object, and discarding the rest. And an Action perform'd in this Manner, is call'd spontaneous or voluntary, which *Aristotle* thus defines, *Ethic. ad Nicom. Lib. iii. Ch. iii.* Τὸ ἐκείσσιον δὲ βίαιον εἶναι, ὃ ἢ ἀρχὴ ἐν αὐτῷ, εἰδότες τὰ καθ' ἕκαστα ἐν οἷς ἢ πράξει. That is to be esteem'd spontaneous, the Principle of which is in the Person acting, who likewise understands the Particulars in which the Action consists. *Eustratius* comments on this Place to this purpose: Both these Conditions are necessary to the constituting a spontaneous Action, that the Principle be in the Actor, and that the Actor know the Particulars. For he that acts out of Ignorance, has the Principle of acting in himself; and he that knows the Particulars, may yet act by the Compulsion of others. And therefore neither of these Conditions by itself can make a Thing properly voluntary.

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¹ This is what is implied by that common Maxim, That all Men naturally and unmoveably desire their own Happiness; for true Happiness consists not only in the Enjoyment of all good Things, of which they are capable, but in a Freedom from all Evil: the least Pain being sufficient to mar our greatest Pleasure.

² The Quotations which are annexed by the Author a little lower (*viz.* at the End of the Paragraph in the *English* Translation, and are noted by *a, b, c*) are more properly to be put in here, and especially the last of them. I shall add, upon this Occasion, a Passage out of the Emperor *Marc. Antoninus*, τὴς δὲ ὀργῆς ἐστὶ, &c. Is it not a cruel Thing to hinder Men from pursuing Things, which they believe to be useful and agreeable to them? *Lib. vi. §. xxvii.* See *Gataker's* Notes upon the Place, where he has gathered several Sentences out of ancient Writers to the same Purpose.

³ Such are all those that concern this Life.

⁴ Every Object (says this Author in his *Abridgment of the Duties of a Man and Citizen, Lib. i. Ch. i. §. 11.*) makes different Impressions, as it works upon Man in different Places: As for Example, Some work upon him by way of Esteem, or according to the great Value he has for himself. Other affect the Senses with Pleasure; and move him by Self-love, which engages him upon Self-preservation. He looks upon the first as honest and convenient; the second, as suitable; and the last, as profitable. Every one of these Goods in particular draws him with more or less Violence, according as the Impressions, which it makes upon the Heart, are more or less strong. See *Note 3. of the foregoing Page.*

⁵ Mr. *Locke* in his *Phil. Essay of Human Understanding, Lib. ii. Ch. xxi. §. 58.* speaks well to this Purpose: The present Judgment of Good or Evil, which we make, is always right. Indeed, Things considered as we actually enjoy them, are what they seem to be, so that in this Case, Good apparent and real are the same thing; for Grief and Pleasure being esteem'd so as we feel them, and no more; the Good or Evil present is really no greater than it appears: and, by Consequence, if every one of our Actions be respected in itself, without any regard to its Consequences, we can never mistake in our Choice of Good, but must always infallibly adhere to the better Part. Compare these Words with what goes before and follows, where that great Philosopher clears this Matter with much Solidity and Exactness.

V. But it does not always fall out that the Mind shall maintain a kind of *Æquilibrium*, and apply itself to acting or not acting, without any considerable Advantage on one Side more than on the other. But for different Reasons, and by different Causes, it frequently bends with great Violence one way; and sometimes external Violence bears so hard upon it, as to take away its Strength, and to disable its Powers. As the Mariner does not always cut the Sea with an even and prosperous Gale, but sometimes oppos'd by furious Winds, he hardly holds the Helm, and sometimes being violently shaken out of his Seat and his Command, he is oblig'd to commit his Vessel to the Rage of the Tempest.

Among the Things then which are forcible in drawing the Will to one Side, are the peculiar Genius's and Dispositions of Men, by which many Persons are render'd extremely inclinable to some kind of Actions. These Dispositions arise in a great measure from the Nature of the Climate and of the Soil, as *Lucan. Lib. viii. ver. 366.* speaks,

-----*Emollit gentes clementia cæli,*

-----The Heavens sweet Clemency
Softens the Tempers of the Men.

And *Herodot. Calliop. It is the settled Appointment of Nature, that soft Soils should breed soft Men; and that the same Land should never be famous for the Excellency of the Fruits, and for the Vigour of the Inhabitants.* To which add *Charron de la Sagesse, Lib. i. Ch. xlii.*) from the Temperature of Humours in Mens Bodies (occasion'd by the Food, the Age, the Diet, the Health, the Studies and Pursuits of particular Persons) from the Conformation of those Organs, which the Soul employs in performing its Duties, and from the like Causes^a. Concerning all which it must be in general asserted, That none of them, as they belong to the Production of a moral Action, are of so great Force and Vehemence, as to render it impossible for the Will to take^b the contrary Side^c. And tho'^d as to some particular Impulses^e arising from the Difference

of Constitutions, the Will sometimes seems unable to hinder their Existence, or their breaking out into Action, yet it may provide so far, as to see they shall not break out into Sin. Thus, if a Man be so far vanquish'd by the warm Motions of Love, as to raise his Passion above Restraint, a Power is still left him of satisfying his Desires in an innocent and lawful Manner. See *1 Cor. vii. 2.* And thus *Plato* disputes well, *De leg. Lib. xii.* "That however the most unnatural of Lusts had prevail'd in the Grecian State, they might yet be suppress'd by the Laws, if rightly fram'd and apply'd." By the same Rule we must judge of what *Horace de Arte Poet.* and others have deliver'd concerning the different Manners and Inclinations of the several Ages of Life: Thus, for Example, if old Men are violently inclin'd to Covetousness, yet 'tis in their Power to seek Wealth without injuring others, and without usurping the proper Goods and Possessions of their Neighbours. Add *Huart. Scrutin. Ingen. Ch. v.*

VI. Another Thing that inclines the Will vehemently to some particular Actions, is the frequent Repetition and Custom of those Actions; whence it comes to pass that they are undertaken very freely and with great Dispatch, and that when the desired Object presents itself, the Mind seems, by a kind of Magnetism, to be drawn towards it^f. And these Inclinations being join'd with an exceeding Desire and Dexterity of acting, pass commonly under the Name of *Habits*, which, as they are concern'd about *moral Actions*, either good or evil, are call'd either *Virtues* or *Vices*. There's no Reason why we should tire ourselves to reckon up these according to their full Tale and Number, since most Authors, who have hitherto profess'dly treated of moral Philosophy, have fancied the main Part of their Business and of their Science discharg'd, by explaining only the eleven Words that stand for so many Virtues. It will suffice to observe in general, that those Dispositions of the Mind are *Virtues*, by which a Man is inclin'd to Actions making for the Preservation of himself, and of human Society; and that those on the

^a Add. *Hobbs de Homine, Ch. xiii.* & *Bacon De Augment. Scient. Lib. iv. Ch. i.*

^b *Horat. Lib. i. Epist. i. ver. 39, 40.*

*Nemo adeo ferus est, ut non mitemere possit,
Si modo culture patientem commodet aurem.*

^c *It is my Opinion (says Socrates in Xenoph. Apomnem. i.) that whatever is good and honest, Men, by Exercise and Application, may attain.*

The fiercest Soul to Temper may be brought,
If calm to Rules, and patient to be taught.

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^f A little Care and Diligence (adds this Author elsewhere) seldom fails of taming, and considerably amending these natural Dispositions. But if sometimes it doth not perfectly succeed, it at least prevents the Commission of such outward Acts as are punishable in the civil Judicatory, and the Difficulty which we find in conquering these kind of Inclinations, is abundantly recompens'd by the Honour consequent upon such a Victory. *The Duty of a Man and Citizen, Lib. i. Ch. i. §. 12.*

^g *Socrates's* Words signify no more than this, as *Charpentier* has very well translated them; *It is my Opinion, that all Virtue depends upon Exercise and Use; that is to say, to preserve them, we must practise them;* and the Series of the Discourse will not suffer us to doubt that this is *Socrates's* Meaning. So that these Words are nothing to the Purpose of our Author, who being deceived by the *Latin* Translation, thought they signified, *It is my Opinion that all Virtues may be acquired by Exercise.*

^h See *Chap. xiii. of Tome i.* of *Mr. Bayle's* Answer to the Questions of a Provincial, where you'll find some curious Passages about the Power of the Constitution. But if we reflect seriously upon this Matter, we must acknowledge, that those over whom Nature has such an absolute Command, are commonly such Men as will take little or no Pains to conquer their Inclinations, or have taken no proper Methods to do it. These depraved Inclinations are a kind of natural Distemper, yet not altogether incurable; as *Cicero* very well observes, who alleges a notable Example to this Purpose, *viz.* that of *Socrates*, who freely confessed, that he was naturally inclin'd to those Vices which a Physiognomist charged him as guilty of, but that he conquered them by the Assistance of Reason: *Cicero's* Words are, *Qui autem naturâ dicuntur iracundi, &c.* Such Persons as are said to be by Nature passionate, merciful, envious, or the like, are so made by some evil Dispositions of the Mind, but are curable; as *Socrates* is said, when *Zopyrus*, who profess'd himself to know every Man's Nature by the Figure of his Face, had in a great Assembly loaded him with many Vices, for which he was laugh'd at by all the rest; but *Socrates* cleared him of any Mistake, by saying that he had once such Inclinations, but he had mastered them perfectly by his Reason. *Tusc. Quæst. Lib. iv. Ch. xxxvii.* See also the same Author concerning *Fate*, *Chap. v.*

ⁱ We may add, Or if it be absent, it hopes for it with very great Expectation; as our Author speaks in his Abridgment of the *Duties of a Man and Citizen, &c. Lib. i. Ch. i. §. 5, 13.*

contrary are Vices, which addict us to Actions destructive of ourselves, and of the Community to which we belong. And here Mr. *Hobbes* must fall under Censure for that Assertion in his Book *De Homine*, Ch. xiii. §. 9. where he declares, *That, except in civil Life, there can be no common Measure found out applicable to Virtues and Vices*, and that, consequently, *in a State of Nature there can be no such Measure establish'd, by which, as by a Standard, those Things which we call Virtues and Vices may be settled and determin'd.* For the Definition which we but now set down, will reach even to a natural State: and whatever Things are enjoin'd as Virtues in civil Communities, ought to agree to that Definition; and if any Things should be ordain'd contrary to it, they ought to be reckon'd absurd and unreasonab'le Commands.

The Diversity which appears in the Laws of several different Communities^a, does not hinder, but that there may be some universal and uniform Definition of the Virtues. For this Diversity either is concern'd about such Things as are plac'd without the Sphere of natural Laws, or it arises from hence, That what is really a Precept of the Law of Nature, is in one Place invest'd with the farther Force of a civil Law, and in other Places not; or lastly, it is an Evidence, that some Legislators, in framing their Edicts, were not befriended by good Reason. Of which we shall have more to say by and by^b.

Farther, tho' Vices and ill Manners confirm'd by long Use and Habit, seem to pass into a kind of second Nature, so as not to be without great Difficulty resist'd, as *Calpurnius Flaccus* speaks, Declam. ii. *When Modesty hath once lost its Influence, no Ruin, no Horror appears deform'd to Minds bent upon Wickedness*; and *Lucian* against an unlearned Man, *A Dog that is accustomed to eat Tripes, can hardly be brought off from it*, (Add. *Bacon's Essays*, Ch. xxxvii) yet Actions proceeding from them ought nevertheless to be reputed voluntary. And altho' Actions which precede any Habit, and by which it is introduc'd, are undertaken with a fuller Intention, and with a more urgent Endeavour, than those which are perform'd after the Habit has been contract'd, when as it were without staying for the Command of the Will, the other Faculties rush swiftly upon the Object: yet neither the Goodness nor Pravity of the Actions seem upon this Account to be at all diminish'd. For 'twould be a Thing of very ill Consequence, if a good Action were therefore to be reckon'd less good, because it has been often repeated, or if a Man were to be esteem'd less a Sinner, because

he had frequently sinn'd. Especially, since every Man is the Cause of his own obtaining a Habit, or of his acting so suddenly and expeditiously. *Aristotle* has an Observation very close to this purpose in his *Ethicks to Nicom.* Lib. iii. Ch. viii. Οὐχ ὁμοίως δὲ αἱ πράξεις ἐκείσιν εἰσι, καὶ αἱ ἕξεις. Τῶν μὲν γὰρ πράξεων ἀπ' ἀρχῆς μέγχε τέλος κύριοί ἐσμεν, εἰδότες τὰ καθ' ἕκαστα τῶν ἕξεων δὲ τ' ἀρχῆς, τ' καθ' ἕκαστα δὲ ἡ προῖδησις ἢ γινώσκουσι, ὡσπερ τ' ἀρρώσιων. ἀλλ' ὅτι ἐφ' ἡμῖν ἦν, ἔτιως ἢ μὴ ἔτω χρήσασθαι, διὰ τῆτο ἐκείσιν. *Actions and Habits are not spontaneous in the same Manner; for as to our Actions we are Masters of them from the Beginning to the End, because we understand all the Circumstances that belong to them: but of Habits the beginning only is properly in our Power, continual Additions being beyond our Knowledge or Prevention, just as it happens in the Increase of Distempers. But because we had originally the Power of doing so, or otherwise, therefore the Habits likewise are to be construed as spontaneous, upon account of the Principle whence they spring.* On which Place *Eustratius* thus descants; *We have a Command only over the Beginnings of Habits, not over their Increase or their End. For the Progress and Improvement of them is unperceiv'd and unregarded, while they rise and advance by silent Degrees; whence it happens, that some Men run deeper now and then into Wickedness and Vice than they intend'd.* This may be seen particularly in *Drunkenness and Uncleaness*, in which Men sometimes going on freely and heedlessly, as if it were left to our Pleasure whether we should get a Habit or no, by a Continuance of bad Practice, contract a Habit before they are aware. Nor is it in Vices only that the Additions and Augmentations are undiscover'd, but in Virtues likewise the Advances are made by such secret Steps, that a Man may sooner observe his own Proficiency, than he can know how he came by it.^c

VII. Those Motions of the Mind which they call Passions or Affections, chiefly excited by the Appearances of Good and Evil, have likewise a great Force in driving the Will violently to some certain Actions, besides their ill Influence on the Judgment, which they frequently cloud and obscure^d. How many these are, by what Means they are either rais'd or allay'd, and what Use and Service they have in Life, is most excellently shewn by *Des Cartes*^e and his Follower *Le Grand*^f; to whom may be added Mr. *Hobbes*^g. It is enough to our Design, if we only remark, that however violent the Affections may prove, they can never quite extinguish the Force of our Will.

^a *Pindar* in his *Olymp.* Od. vii. ver. 55. says, αἰ δὲ φρενῶν, *A troubled Mind betrays into Mistake the wisest Heads.*

^b *Cartes de Passion.* §. 50.

^c *Le Grand.* *Infl. Phil. Cartes.* p. 7. Ch. ix.

^d *Leviath.* Ch. vi. & *de Homine*, Ch. xii.

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¹ See what I have said in my Preface, §. 3.

² See Book viii. Chap. i.

³ The natural Consequence of this is, that we must ever omit, and avoid, whatever has the least Tendency in the World to engage us in an ill Custom. See what I have said in my Treatise of Games, Lib. ii. Ch. iii. §. 2.

⁴ See the Author's Abridgment of the *Duties of a Man and Citizen*, Lib. i. Ch. i. §. xiii. and what he says in the following Chapter, §. 13.

But that Men of the weakest Souls may obtain ' an absolute Command over their * Passions, if they use a sufficient Diligence in managing and directing them, as Des Cartes has prov'd ¹. Ovid's Medea put a Cheat upon herself, when she said,

*Sed trahit invitam * nova vis.*

especially since she acknowledges, that the Judgment of Reason oppos'd her Passion.

-----aliudque cupido,

*Mens aliud suadet, video meliora proboque ;
Deteriora sequor.* ----- Metam. vii. 19, &c.

The Observation of Grotius on Matthew v. ver. 22. is very applicable to our present Purpose: He considers three distinct Things in Anger, the Παθή or Affection, the Ὀρμή or Impetus, and the συγκατάθεσις or Consent. The Παθή or Faculty, enabling us to be angry, being implanted in us by Nature, cannot be extirpated; but it should be rank'd among those indifferent Things which we may make either a good or a bad Use of ¹. But because that Part of the Mind where the Παθή or Passions are seated, is in itself irrational, hence it comes to pass, that without expecting the Judgment of Reason, the Ὀρμῆ or sudden Sallies, ex-

¹ Senec. de Ira. II. iv.

² De L. N. Ch. ii. §. 26, 27.

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* This wholly depends upon our Endeavours timely to conquer these dangerous Enemies. 'Tis a known Speech of Ovid's, Remed. Amor. ver. 91, 92.

*Principiis obsta: Sero Medicina paratur,
Cum mala per longas invaluere moras.*

Indeed, as Mr. Montagne says (Essays, Lib. iii. Chap. xiii.) if a Man looks closely into the Motions and Circumstances of his Passions, which prevail usually upon him, he may observe how they come, and abate a little of their Furioufness and Course. They don't fall upon him all of a sudden, and, as I may say, take him by the Throat, but they threaten, as it were, and creep on him by Degrees. Seneca has some fine Reflections of this Nature, which I can't pass over without Notice (Epist. cxvi. at the End, and De Ira Lib. ii. Ch. xii, xiii. which deserve also our Perusal) *Scis quare non possumus ista? Quia nos posse non credimus, &c. Do you know why we can't command our Passions? 'Tis because we can't believe we can. There's more in't. We love our Vices heartily, and therefore we become the Defenders of them, and instead of banishing them, we do all we can to excuse them. Nature has made us able enough to resist them, and to free ourselves from their Dominion, if we would make use of our Forces, if we would rally them, and employ them wholly in our own Cause, or at least would not turn them against ourselves. Our only Hindrance is, we will not, and the Inability that we plead is a vain Pretence. There is nothing so hard but the Mind of Man may compass and accustom itself to it, by frequent and daily Meditations. There is no Passion so fierce and commanding, but Education and Care can tame. The Soul can govern itself as it pleases. Some have found out a Way to restrain Laughter altogether, others have forborn Wine, Venerie, and all sorts of Drinks; others have accustomed themselves to long and almost perpetual Watching, unless with Slumbers for a small Moment; others have learned to dance upon a Rope, to carry vast Burdens, which have seem'd to be above all human Abilities, and to dive very deep into the Sea, and stay a long time without breathing. See what shall be said on Chap. v. §. 13. Note 6. & Heliod de Oper. & Dieb. ver. 290, &c. Edit. Cleric.*

² That is to say (as our Author speaks in his Apology, §. 22.) at least, that they do not produce any Action that is punishable in human Judicatures. Indeed if we examine all the Laws of the World, we shall find none that wholly excuse Offences committed in a violent Passion; an Evidence, that all Legislators suppose, that it is in the Power of a Man to restrain his Passions. Aristotle has observed the same Thing in these Words, *Τοις τοις ὁ νόμος.* &c. To these Things agree not only what's done privately by every one, but what's done by Law-givers themselves, who punish and correct all sorts of Offences, except such as are done through Force or Ignorance, of which they are not the Cause. Ethic. ad Nicom. Lib. iii. Ch. vii.

³ Dist. loc. Art. v. & Cicero Tusc. Quest. Lib. iv. Ch. xiv. speaks thus, *All Diseases and Disturbances of Mind arise from the Scorn and the Neglect of Reason.*

⁴ There is a Place in Xenophon's Cyropædia, i. e. the Book of Cyrus's Education, which contains some notable Reflections to this Purpose: "A Mede, named Araspes, maintains there, That Beauty has no Force naturally to incline a Man to depart from his Duty, whether he will or no; for if it were so (adds he) it would have the same Effect upon all Men, as Fire burns every one that comes near it. But we see that some are affected with Beauty, and some not; one loves one Beauty, and another, another. In a word, 'tis a voluntary Thing, and every one loves whom he pleases. A Father does not fall in Love with his Daughter, nor a Brother with his Sister: Fear and Law restrain us from entertaining a Desire of such Persons as others love. Whereas were there a Law strictly forbidding Men not to be hungry, because they have nothing to eat; or not to be thirsty, because they have nothing to drink; nor to feel Cold in Winter, and Heat in Summer; no Man would obey such a Law, because 'tis above their Power to do it. But Cyrus objected to this Assertion, If it be in our Power to love or not, why can we not cease to love as we please? How comes it to pass that Love tyrannizes over so many Men, who sacrifice all to that Passion, and put themselves upon a thousand mean Actions to please the Object loved? What is it that makes their Chains so strong, and makes them avoid all Means that may free them from their Slavery? Araspes answers, They are Men of vicious and loose Tempers, lazy Souls, and Slaves to their Appetites, who tho' they wish a thousand Times that Death might deliver them from their Torments, yet they have not Courage to undertake it themselves, tho' nothing were more easy, if they desired it. Men of this sort scruple not to thieve to satisfy themselves, and as they are in the Judgment of all the World punishable, because nothing could force them to rob another, so we may say, that the fairest Countenance does not force a Man to love it, or seek that which he ought to abstain from. So that a Man who gives himself up to his Lusts, without Reserve, absurdly accuses Love of constraining them, when as indeed 'tis nothing but his own Weakness. Such as stand upon their own Honour and Integrity are subject to these Affections, as well as others, they love Money, fine Horses, and handsome Women, but they easily pass them by when they can't be attained without a Crime." This is the Substance of Xenophon's Words, *Και ὁ νόμος ἄριστος.* &c. Xen. de Instit. Cyr. Lib. v. Chap. i. §. 5, 6, 7. Edit. Oxon. See also Chap. ii. §. vi. Pag. 19. Note 2.

⁵ See Seneca of Anger, Lib. ii. Ch. iii, 4.

ert their Force; and unless these are diligently kept under, the συγκατάθεσις or Consent certainly follows, when the Power of the Soul, which was constituted for the governing and restraining of the Affections, idly lets go the Reins, and permits itself to be dragg'd by those it ought to guide. This συγκατάθεσις then, or Consent, he declares to be voluntary, and to be perform'd at the free Pleasure of Man: But he tells us farther, that from diligent Attention and Exercise, but more especially from the holy Spirit of God, sufficient Assistance may be obtain'd, even against these first Motions (which the Philosophers compare to the twinkling of the Eyes) so as to hinder them from any long Continuance, or any forcible Sway.

Besides, that Man is arm'd by Nature with some peculiar Instruments for moderating the Passions, and that he is engag'd by a stricter Necessity to restrain them, in as much as he incurs a far greater harm to his Health and Life from their Violence and Rebellion, has been fully made out by Dr. Cumberland ^b. To conclude this Point, since some of the Passions are excited by the Appearance of Good, others by the Appearance of Evil, and accordingly spur us on toward the pro-

Oppose beginnings: Med'cine comes too late,
When long Delays have hasten'd on our Fate.

curing the one, and avoiding the other: This difference is observable between them; that the former Kind afford little or no Excuse, if any Thing be done otherwise than it ought to be, by their Instigation; but the latter deserve the greater Degree of Favour and Pardon, according as the threatening Evil which excited them was more ungrateful to human Nature. For 'tis much easier to want a Good, not necessary to the Preservation of Nature, than to admit an Evil tending to the Destruction of our Nature: Whatever *Aristotle*^a has affirm'd to the contrary in that Maxim of his, *καλεπώτερον ἰδοῖν μίχρῃσιν ἢ θυμῷ*, 'It's harder to resist Pleasure than Anger. When a Man has done an ill Action out of Obedience to an itching Lust, he is suppos'd for the sake of the present Pleasure, voluntarily to run the Hazard of bearing whatsoever Evil may thence ensue; and therefore when he has already had the Enjoyment, which he thought equivalent to the Evil that might arise from it, he cannot upon any Pretence plead for the Mitigation of that Evil. But he that has done amiss upon the Fear of an impending Evil, has all the Infirmary of human Nature apologizing and interceding in his Behalf, since the only Cause of his Miscarriage was his being willing to admit what he imagin'd to be the least of the Evils likely to befall him. But of those Cases we shall hereafter have a larger Field to consider and determine, viz. in *Lib. viii. Chap. iii. §. 19, 21.*

VIII. *Lastly*, The Vice² of *Drunkenness* is a great Inciter of the Will to some particular Kinds of Actions; and this is procur'd either by Drink, or by some other Sorts of Fumes, or by Opium, a Thing of so universal Use in the Eastern World, the Effect of which is, that it disturbs and drives along the Spirits of the Blood with a most violent

Motion, and by these Means renders Men extremely prone to Lust in the first Place, *Properit. Lib. iv. El. 9. ver. 6.*

—— *Potæ non satis unus erit.*

—— Her Sparks she doubles in her Drink.

and not much less to Anger and Rashness: Upon which Account *Lycurgus* us'd to call Wine an evil Potion (or a magick Draught) because it chang'd and turn'd Mens Minds. *Hygin. Fab. cxxxii. Iſocrat. ad Demonic. The Mind, when debauch'd with Liquor, is in the same Condition as a Chariot that has lost its Driver: The latter is not more fatally hurried into Danger, than the former into Sin.* And for the same Reason the *Cretians* receiv'd this, among other Laws, of their famous *Minos*, *Μη συμμιξεν ἀλλήλοις εἰς μέθην*^b, *Not to drink with one another so far as to Disorder and Excess.* Among the *Indians* Drunkenness lies under the heaviest Censure, being rank'd in the Number of their five most heinous Sins, which are said to be these: 1. *To lie with one's Mother*, which takes in both a Mother in Law, and the Wife of a Master or Teacher. 2. *To kill a Brachman.* 3. *To steal Gold.* 4. *To be drunk.* 5. *To converse and keep Company with Persons guilty of any of these Crimes*^c. *Mahomet* too, under the Notion of Religion, found Means to prohibit his People the Use of Wine, tho' they were naturally more addicted to it than most other Nations³.

Whosoever is voluntarily guilty of this Vice, since he knew, or at least might presume what Effects would follow it, can with no more Reason desire to be freed from the Imputation of Faults committed under its Guidance, than he can with a good Grace complain of a Shower of Rain falling into his House, when he himself,

^a *Ethic. Nicom. Lib. ii. Ch. ii.* ^b *Plato, Minoe. Add. Plin. Lib. xiv. Ch. xxii. Aristoph. Vesp. Drunkenness is all Mischief and all Terror: It tears down Gates and Doors, and desies Opposition. And then you pay for it doubly the next Morning, in your Pocket and in your Head.*

^c *Manil. Astron. Lib. v. 226. Ardescit vitio vitium, viresque ministrat Bacchus, & in flamma seras exuscitat iras.*

One Vice adds Fewel to another's Fire,
And *Bacchus* makes their Fury blaze the higher.

Mr. Creech.

Mr. BARB. NOTE S.

¹ Our Author might have observed, that *Aristotle* contradicts himself, for elsewhere he thus speaks, *καλεπώτερον ἔσθαι, &c. It is harder to bear Grief, than to abstain from Pleasure, Lib. iii. Ch. xii.* See also the Beginning of *Chap. xv* and *Lib. vii. Ch. vii.* where he maintains, that *Intemperance* is more voluntary and shameful than the Transports of *Anger*. *Muretus* endeavours to prove the Truth of the first of these contradictory Propositions in his posthumous Comments, printed at *Ingolstadt*, 1602, but his Reasons are very weak; and I don't observe that he speaks any Thing about those Places that I shall quote presently, to reconcile them with that he was treating of. He had a good Opportunity, and I doubt not but he might have prevented so palpable a Contradiction. All that can be said for *Aristotle* is, that after he had advanced such a Paradox, he thought it necessary to maintain his Proposition, and forgetting himself, reason'd at length from the Light of common Sense and Experience; for the Philosophers hold this as a constant Maxim, *That he that yields to Pleasure is more to blame than he that is overcome with Grief, because 'tis easier to conquer the first than the last.* *Aristotle* does but repeat what his Master *Plato* asserted before him, *Α θ. Νῦν ἐν πόσει, &c. Ath. shall we say that he is worst who is conquered by Grief, or by Pleasure? Cl. He seems to me worse who is conquered by Pleasure, for we all agree, that he who is conquered by Pleasure is shamefully baffled by himself, but the former is vanquished by grief.* To this we may add the Authority of the Imperial Philosopher *Marcus Antoninus, Lib. ii. Ch. x.* where he thus speaks: *Theophrastus, in his Comparison of Crimes, following the common Opinion, determines as a great Philosopher, That those which come from Lust, are greater than those that proceed from Anger; for those that are moved by Anger seem to act against Reason, contrary to their Purpose, and with a secret Remorse; but they that follow their Lusts, and are conquered by their Pleasure, appear more intemperate, and effeminate in their Faults. So that it is with great Reason and Truth, which is an Honour to Philosophy, that he adds, The Crime that is done with Pleasure, is greater and more punishable, than that which is committed with Sorrow and Grief.* Indeed he that is angry resembles a Man, who having received an Offence, is provoked by Grief to revenge himself, whereas the Voluntary is moved by his own Passion to do an Injustice for his own Satisfaction. See further what is said on *Chap. vi. §. 14. Note 4.*

² This Author elsewhere joins those sort of Vices, which deprive us of the Use of our Reason, either for a Time, or for the rest of our Life. But, to speak truly, the Effect of those Vices, as well as Drunkenness, is not so much to incline the Will to certain Things, as entirely to destroy the Principle of human Actions, because in that a Man knows not what he does. *Titius Obs. xxxvii. upon Putendorf of the Duty of a Man and Citizen, Chap. i. §. 15.*

³ See what is related in the *Universal Library*, concerning the Inhabitants of *Siam*, *Tom. 8. p. 529.*

out of a petulant Humour, has been pulling off the Roof. *Plautus* has a merry Jest to this purpose; *Wine* (says he) *would be too cheap at the Price it now brings, if a drunken Man might do whatever he pleas'd, without being call'd to an Account.*

Yet in indifferent Actions, which are left to every Man's Pleasure to perform or omit, Drunkenness is allow'd this Favour, that the Effect which would have follow'd any such Action, had it been¹ deliberately perform'd, shall now be utterly invalid, since the overtaken Person acted with much Disadvantage.

And those Causes which we have hitherto reckon'd up, are the most considerable among such as impose a kind of physical Bias and Tendency on the Will. That which morally inclines it most, or at least, *ought to incline it*, is *Obligation*: And yet this, how great soever, neither takes away the Will's intrinsic Liberty, nor renders the Action voluntary, tho' the Lusts and Passions may strive vehemently to oppose it. Hither may be refer'd that Sentence of *Aristotle*, ἀτοπον τὰ ἀκρίσια φάναι, ὅν δ' εἰ ἐρέμεθα, 'Tis absurd to call those Things involuntary, which we ought to desire and to pursue, *Ethic. Nicom. Lib. iii. Ch. iii.*

We say, Obligations ought to incline the Will; for such is the perverse Disposition of human Minds, that frequently the very forbidding of a Thing, raises a Desire of doing, or of enjoying it², as *Ovid Amor. iii. 4.* speaks,

*Nititur in vetitum semper, cupimusque negata.
Quicquid servatur, cupimus magis; ipsaque furem
Cura vocat.* —————

————— *Jurat inconcessa voluptas.
Cui peccare licet, peccat minus: Ipsa potestas
Semina nequitiae languidiora facit.*

We court the more what Men the less will grant;
Warm when deny'd, and fiercer by Restraint.
What's closely kept, improves in our Belief;
To hoard the Gold is to invite the Thief.
Forbidden Pleasures have a quicker Taste.
They that have Freedom use it least; and so
The Power of Ill doth the Design overthrow.
Sir Charles Sidley.

Which Unhappiness, if we consider its closer and nearer Causes, may be refer'd, partly to the vicious Curiosity of Mortals, who admire every Thing that they are Strangers to (which Opinion

is strongly confirm'd by the Harshness of the Edict, and by the Care and Trouble of Obedience) and partly to the Hatred and Obstinacy which we bear towards the Forbidder, whence we disdain that our Liberty should be abridg'd by a Person who looks so ill in our Esteem; whereas, on the contrary, it's the Nature of Love to make us willing to comply with the Commands and Desires of the Party we affect.

IX. It is farther observable, That sometimes upon the Approach of extraordinary Dangers, and such as are suppos'd to exceed the common Strength and Firmness of human Minds, the Will is so vehemently urg'd and press'd, that it gives Consent to somewhat, which had it been free from that Necessity, it would have utterly abhor'd. Actions of this Kind have the Name of *mixt*, being partly voluntary, and partly involuntary. Thus far they are to be esteem'd voluntary, in as much as their Principle is in the Agent, who is acquainted with the Nature and Circumstances of the Thing he is going about: And in as much as the Will for the present Time and Necessity, inclines toward them as toward a lesser Evil, or toward one Part of an Evil, when otherwise a greater or an entire Evil must be undergone: And this lesser or partial Evil turns into a kind of Good, when both it and the Evil compar'd with it, cannot be both avoided together. *Aristotle Ethic. ad Nicom. Lib. v. Ch. vii.* says, *A lesser Evil, if it be compar'd with a greater, may be esteem'd a kind of Good.* So *Quintil. Instit. vii. Ch. iv.* *In comparing Evils, that which appears lightest, must pass for Good.* *Aristot. Ethic. iii. 1.* *Simply and absolutely speaking, no Man in his Wits willingly throws away his own Goods, but for the Security or Preservation of himself and others. Such Actions then are to be account'd mixt, tho' they approach nearer to voluntary than to involuntary.*

But the same Actions are likewise in some Degree involuntary, because the Will seems to be driven on them contrary to its Inclinations, and would never undertake them, if the impending Evil were by any other Means possibly to be escap'd. For which Reason they have this Quality in common with involuntary Actions, that the moral Effects and Consequences attending Actions merely voluntary, do in these, in a great Measure, if not totally, fail³. For tho' sometimes a Man may have so strait an Obligation laid upon him, that even upon the Threats and Appre-

^c *Adular. iv. x. 20.*

MR. BARB. NOTES.

¹ If we will make a more curious and exact Distinction of the Effects of Drunkenness, we must observe how a Thing may be imputed to a Man which is done in his Wine, according to the several Degrees of Drunkenness, *viz.* The one moderate, which does not hinder a Man's acting freely, and with Deliberation; the other strips him entirely of the Use of his Reason. This last Sort, if it be also involuntary in the Original, that is to say, if a Man falls not into it by his own Fault, brings forth Actions altogether involuntary, and consequently furnishes him with a sufficient Excuse; but if Drunkenness be voluntary in its Principle, then we must distinguish Actions indifferent from Actions unlawful. As to the first, If a Man, for Example, make a Contract, that hinders the Effects of an Imputation, because those sort of Actions require a particular Knowledge of what is done, and the Fault which went before them, and from which they derive their Original, is not sufficient to make it of Force. See *Lib. iii. Ch. vi. §. 5.* But it is not the same in unlawful Actions; for if a Man be in an Estate, from whence 'tis his Fault if he fall, because he might and ought to hinder it, his perfect Drunkenness will not excuse him from the Crimes which he has committed thro' Excess of Wine. And if he puts himself into that Condition on purpose to execute some ill Design, he deserves a double Punishment. *Titus Observ. xxxviii.*

² See *Montagne's Essay, Lib. ii. Ch. xv. p. 451, &c. Edit. Fol. at Paris, 1657.*

³ The Author speaks nothing here of good Actions, or indifferent, but contents himself to speak of ill ones only. Mixt good Actions are accounted for nothing; and every one may see the Reason. Indifferent Actions done in the same Manner, can no more be imputed to the Agent, for tho' there is a kind of Will, it is not sufficient to produce an Obligation. The Injustice of the Author of Violence, rendering him incapable of acquiring any Right by that Action, which is not fully voluntary, and consequently laying no Obligation upon him, who never consented, but with Regret. *Titus Objure. xl. See Lib. iii. Ch. vi. §. 10.*

hensions of Death, the most terrible of natural Evils, ^a he ought not to recede from it; yet where this does not expressly appear, it is not easily presum'd and suppos'd, as being too sharp and rigorous for the Condition of Humanity: And where there is no such severe Obligation impos'd, it would be downright Folly not to come off as cheaply as we can, and not to suffer as small a Share of Evil as we may compound for. And therefore many Things, which ^b would have deserv'd Reprehension, had they been undertaken without such a Necessity, when they are done under the Urgency of so hard a Case, are commended by all fair and equitable Judges; ^c other Things deserve Pity rather than Revenge; others again are for the same Reason, either entirely, or for the most part ^d excus'd, and in others the Odium and Fault of the Action is devolv'd upon the Person ^e who reduced him to that unhappy Extremity ^f, the Man who perform'd the Deed being declar'd innocent. *Aristotle* discourses well on this Point ^g, *Ethic. ad Nicom.* Lib. iii. Ch. i. For these kind of Actions, says he, Men are sometimes commended, when for the sake of great and honest Things, they have sustain'd some Indecency or Hardship. To some Things, tho' we allow no Praise, yet we grant a Pardon, when a Man has done what he ought not, upon the fear of Evils exceeding human Nature, and not tolerable by mortal Strength. And there are some Things perhaps, which no Man can be forc'd or compell'd to commit, but ought rather to endure the utmost Extremities, and Death itself. Add. *Eustrat.* ad loc. But I question whether it were proper (especially for a Christian Bishop) to give this Example of a mixt Action, Familiarity with another Man's Wife, though in itself foul and sinful, yet ceaseth to be so, if undertaken on the Account of killing a Tyrant.

X. Lastly, since to make an Action voluntary, there is requir'd not only that the Principle of Motion be in the Agent, or that the Agent address himself to work by the Impulse of his own Will, but likewise that he knows what he is doing; upon the want of both, or of either of these Conditions, the Action is rendered involuntary, as *Aristotle*

speaks, *Ethic. ad Nicom.* iii. 1, 2. Those Things seem to be involuntary, which are done either upon Force, or upon Ignorance. An Action cannot be said to have been perform'd involuntarily out of Ignorance, unless it be follow'd with Sorrow and Repentance. ^h Now a Man is properly said to be compell'd, when by the Force of a stronger extrinsecal Power, he is brought to apply his Limbs otherwise than he would, so as to express his Aversion and Dissent by manifest Signs, and especially by corporal Resistance and Reluctancy. As if (to use *Aristotle's* Examples) the Wind, or Men superior to us in Power, should violently carry us any where against our Consent. Tully in his second Book of *Invention*, Lib. ii. Ch. xxxii. gives an Instance after this Manner: The Rhodians had a Law, that whatever beak'd Vessel should at any time be found in their Harbour, it should be condemn'd as Prize, and expos'd publickly to Sale. Now the Question is, Whether a Vessel of this kind, being driven into their Ports by a Tempest, ought nevertheless to suffer the common Penalty? 'Twas upon this Topick, that the Friends of the ravish'd *Lucretia* ⁱ comforted her under her deep Affliction, by turning all the Guilt on the vile Author of the Crime, telling her, That the Mind only properly sinn'd, and not the Body; and that there could be no Fault where there was no Deliberation or Design.

This Reluctancy in Civil Courts is presum'd to have been us'd in such Actions or Passions, as are not vulgarly thought to be willingly perform'd or undergone, and where all Signs of an actual Consent are wanting; whence arose the Term of *interpretative Reluctancy*.

Thus, whereas by the Jewish Law a Virgin is suppos'd to have suffer'd Ravishment, if she lost her Honour in the Field, without Witnesses; yet *Philo the Jew* ^j denies the Favour of this Law to reach a Maid, who admitted a Debauch willingly, tho' in a Solitude: As neither can the same Law hurt a Maid in the City, who in the like Danger either could not cry out, or cried to no Purpose, and without Relief.

A forc'd Thing may be so either in itself, and

^a *Liv.* Lib. i. Ch. lviii.

^b *De Legib. Special.*

MR. BARB. NOTES.

^c See *Lib.* ii. Ch. vi. § 2. following.

^d As for Example, When a Woman, or Maid, slays the Man that makes an Attempt upon her Chastity. See *Lib.* ii. Ch. v. §. 11. following.

^e Such is the Case of a Woman, who, in a Famine, is forc'd to eat her own Child, as it happened in the Siege of Jerusalem, as *J. Josephus* tells, *Lib.* vii. de Bell. Jud. Ch. viii. and as it befel the seven Englishmen, of which our Author speaks, *Lib.* ii. Ch. vi. §. 3.

^f As when a Woman, or Maid, slays herself to avoid the Loss of her Chastity, with which she is threatned by an extravagant Man, who will satisfy his Lufts at any Rate. See *Lib.* ii. Ch. iv. §. 19. following, where Mr. *Hertius* refers us to what the Author speaks, *Lib.* ii. Ch. v. §. 15. of an Husband who slew his Wife's Gallant, or his Wife, when he took them in the Heat of their Lust. But this is the Effect of a furious Anger, and Desire of Revenge, which ought to be referred to §. 7. above, and not to mixt Actions, such as our Author calls them. I say the same of an Example which Mr. *Hertius* gives of a Woman, that poisoned her Husband and Son, because they had killed a Son of hers by a former Husband. See *Valer. Max.* *Lib.* viii. Ch. i. in the End, and *Aul. Gell.* *Lib.* xii. Ch. 7.

^g See the following Chap. §. 9. Mr. *Hertius* makes an Application, not very proper here, out of *Justin*, of the Phœceans, who seeing themselves deprived of their Lands, Wives, and Children, went and robbed the Temple of *Delphos*. for the Historian reflects upon it as a Thing not to be excus'd altogether; though they that committed it were less worthy of Blame, than those who had brought them to this Case of Despair. For so he speaks, *The Fact of the Phœceans, though all Men abominated it upon the Account of the Sacrilege, yet the Thebans, by whom they were compelled to this Necessity, were more detested than they.* *Lib.* viii. Ch. i.

^h Mr. *Pufendorf* might have joined with *Eustratius*, another Bishop more famous, who fell upon a loose Thought about a Subject something near it, but of more Difficulty. Read Mr. *Bayle's* Dictionary under the Head *Acynidius*. See further concerning these Sort of mixt Actions, upon the Account of which some Evil in itself is committed, what is said upon the following Chap. §. 9. Note 2.

ⁱ See *Ch.* iii. §. 10. Pag. 30. foregoing, about the beginning Note 5.

^j In fine, *Sextus* did not use an immediate Force upon *Lucretia*, as when a Woman defends herself, as much as she can, with her Hands, Feet and Teeth. She was not forced, any otherwise than such are, who resolve to cast their Goods into the Sea for fear of Perishing. She resist'd his Threatnings of Death: but when *Sextus* threatned to expose her Reputation to eternal Disgrace, she did what he wish'd, and slew herself. So that this Example does not well agree to this Place, where he is treating of mixt Actions. See Mr. *Bayle's* Dictionary.

not in its Causes, or else both in itself and in its Cause. The first is, When a Person remains in such a State at present, as to be unable to repel the offer'd Violence, and yet was in a Fault for getting into such a State. Of this Kind was the Rape of *Dinah*, *Jacob's* Daughter^a; for the Virgin ought not to have wander'd among Strangers. The latter is, When the Person has, not by his own Fault, been brought into those Streights,

^a *Genesis* xxxiv.

which now occasion the Compulsion of him to any Fact. By the not being his own Fault, we mean, if he has done nothing but according to the Laws of Prudence and of his Duty. For if a Man performs the Office enjoin'd him, or uses his Right any other way, and acts not rashly or inconsiderately, whatever Violence over-powers him, he will have no Guilt imputed to him, and no Sin to answer for.

C H A P. V.

OF MORAL ACTIONS in general, and of their Application to the Agent, or their Aptness to be imputed.

The CONTENTS of every Section of the fifth Chapter.

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| <p>i. <i>What a moral Action is.</i>
 ii. <i>Its Matter.</i>
 iii. <i>Its Form, where we treat of a moral Cause.</i>
 iv. <i>A moral Action consider'd in itself is a positive Entity.</i>
 v. <i>The Cause or Ground why a Thing may be imputed, or not.</i>
 vi. <i>Things not to be imputed to a Man, are Things necessary.</i></p> | <p>vii. <i>The Operations of our vegetable Faculties.</i>
 viii. <i>Things impossible.</i>
 ix. <i>Things compell'd, where meer Execution is treated of.</i>
 x. <i>Things done through Ignorance.</i>
 xi. <i>Things done, or seen in a Dream.</i>
 xii. <i>Evils to come.</i>
 xiii. <i>But evil Actions, proceeding from an Habit, must certainly be imputed.</i>
 xiv. <i>How other Mens Actions may be imputed to us.</i></p> |
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HAVING, in Pursuance of our Design, examined and explained the Will and the Understanding, as the Principles whence human Actions obtain the Privilege of being ranked in a different Class from the Operations of Brutes, the next thing which we are concern'd for, is the general Disquisition of moral Actions, since in discovering their Rectitude, or Pravity, the Science we are now engaged in is chiefly employ'd. Moral Actions then, are *the voluntary Deeds of Men consider'd in common Life, as they include the Imputation of their Consequences and Effects.* We call those voluntary Deeds, which in such a Manner depend on human Will as on a free Cause, that without its Determination (proceeding from its¹ internal Acts drawn forth by the previous Knowledge of the Understanding) they would never have been perform'd; and which therefore, as to their being done or not done, must be referr'd to the Power of Man. And these Actions are here consider'd, not as they are bare Motions produc'd by some Power according to the natural Constitution of Things, but as they proceed from the Determination of the Will; a Faculty dispos'd to embrace either Part of two contradictory Choices. For a voluntary Action contains something *material* and something *formal*; the first is nothing else but the

Motion of a Power existing by Nature, or its Exercise consider'd barely by itself; the other is the Dependence of that Motion or Exercise on the Determination of the Will, as on a Cause that is truly free, and acts by its own Resolution. The Exercise consider'd separately and by itself, is, for Distinction sake, rather call'd, *an Action of the Will*, or of the *willing Power*, in a Man, than a *voluntary Action*.

We may farther consider the *Action*² of the *Will*, either in itself, and *absolutely*, as it is a physical Motion, undertaken upon the previous Injunction of the *Will*, or else *reflexively*, as the Effects of it may be imputed to the Actor. Now *voluntary Actions*, as they comprehend this Reflexion, are, by a special Appropriation of the Word, call'd *human Actions*. And because from these Actions, as they are perform'd *well* or *ill*, as they are agreeable or repugnant to their Rule, the Law, one is said to be a *good* or an *ill moral Man* (the Inclinations of the Mind resulting from frequency of acting, being likewise term'd *Morals*) hence it comes to pass that *moral Actions* seem only another Name for *human*.

II. The Essence of moral Actions,³ according to the last Way of considering them, may be divided into two Parts or Notions, a *Material*

Mr. BARB. NOTES on §. 1.

¹ The Original is, *Actibus Elicitis*, which is better rendred, *Immediate Acts*. See §. 1. of the preceding Chapter.

² The Original is, *Actio Voluntatis*; which Expression, tho' 'tis used in all the Editions, and his *Elements of the Universal Civil Law*, yet 'tis a plain Mistake of the Author, contrary both to his own Distinction, and the following Part of his Discourse; for he says positively, *When moral Actions include in, &c.* The *English* Translator was not aware of this.

On §. 2.

³ That is to say, As they are voluntary Actions, whose Effects may be imputed unto Men.

and a *Formal*. The material Part, or the Matter of a moral Action, is of a very wide Extent: Such may be first any physical Motion, whether it be of the locomotive Faculty; or of the sensitive Appetite; or of the external, or of the internal Senſes; or of the Underſtanding, ſo far as concerns the Exerciſe of Apprehenſion. For the Act of Judgment depends ſo much on the Quality which appears in the Object, that it is not capable of the Direction of the Will, tho' in forming of that Judgment, our Free-will and our Induſtry are allow'd ſome Influence and Power. The Act of the Will it ſelf may likewiſe be the Matter of a moral Deed, if we conſider it in its natural Condition, or as it is preciſely taken, for an Effect produc'd by a *physical* Power, *as ſuch*. So likewiſe may be the Privation of any *physical* Motion, which a Man might have produc'd either in it ſelf, or in its Cauſe: For a Man may render himſelf obnoxious to Punishment, as well by Omiſſions as by Commiſſions. As alſo the Inclinations of the natural Powers toward certain Objects (acquir'd by the voluntary Actions that have already paſſ'd) at leaſt ſo far as they are Spurs and Incentives to acting. Nor are my own Motions and Habits, or the Privations of either, alone the material Parts of my moral Actions; but the ſame Motions and Habits or Privations proceeding immediately from others³, provided they could or ought to have been directed by my Will. Thus the *Spartan Inamorato's* were to⁴ ſuffer for the Faults committed by their Minions⁵. Nay, the Operations of Brutes, of Vegetables, and of inanimate Things, may furniſh out the *Matter* of my moral Actions, when my Will ſhould have guided their Proceedings. Thus even in the Law of GOD, a Miſchief done by a going Ox is imputed to the Owner, in caſe he knew before-hand that the Beaſt was faulty this way⁶. Thus a Vine-dreſſer is reſponſible, if, through his Negligence, the Vine has ſpent all its fruitful Strength and Vigour in ſending out numerous and unneceſſary Suckers. Thus the Damages by Fire are repairable by the Perſons who occaſion'd it; and Waſtes cauſed by the breaking in of the Sea, or of Rivers, are to be made good by him who has either broke down, or neglected to keep up the Banks. *Quintilian*^c has propos'd two Declamation Lemmas much to our preſent Purpoſe. *A Piper had play'd a Pbyrgian Ayre to a Man who was offering Sacrifice; the Man running Mad, and throw-*

*ing himſelf down a Precipice, the Piper is accuſ'd as the Perſon who had cauſ'd his Death. A Club of young Perſons, who had frequent Meetings and Entertainments, one day made an Agreement to ſup together by the Sea-ſide; one of the Society being abſent, the others wrote his Name upon the Stone Table which they had reared: The young Man's Father at his Return from a long Voyage, landing in this Place, and reading the Inſcription on the Stone, took it for his Son's Monument, and hang'd himſelf for Grief. The Company is hereupon impeach'd as acceſſory to his Death. Laſtly, the Admiſſions or Receptions of another Man's Deeds, as far as my Default contributed to their Production, may be the *Matter* of my own moral Actions. Thus a Rape is partly imputed to the Woman, if it appear that ſhe raiſhly ventur'd into ſuch a Place, where ſhe might have expected to meet with ſuch violent Treatment.*

III. The Formality of a moral Action conſiſts in the *Imputativeness* of it, if we may ſo ſpeak, by which the Effect of a voluntary Action may be imputed to the Agent, or eſteem'd as ſomething properly belonging to him, whether he himſelf physically produc'd that Effect, or whether he cauſed it to be produc'd by others. And from this Formality of the Action, the Agent likewiſe has a Share in the Denomination of Morality, being call'd a moral Cauſe. Whence we may eaſily underſtand, that the *Ratio Formalis* of a moral Cauſe, in Strictneſs and Propriety of Speech, conſiſts in Imputation, conſider'd with Reference to the Perſon in whom it terminates; and that therefore ſuch a Cauſe can be nothing elſe but a voluntary Agent, to whom the Effect is, or muſt be imputed, upon account of his being either wholly or partly the Author of it; and that therefore, whether it be Good or Evil, both are to be reckon'd as owing to him, and he is liable to give an Account for both. Thus one Man is the moral Cauſe of Hurt in another Man, whether he has made his Head ſwell by Blows of the Fiſt, or whether he has broke it with a Club, or whether he has ſet Dogs or Murderers upon him. Thus *Anah* was the moral Cauſe^a of Mules, he being recorded in *Genesis xxxvi. v. 24.* to have firſt found them out, or to have join'd the Mare and the Aſſes together for their Production. So *Jacob* was the moral Cauſe of the different Colours in *Laban's* Sheep, *Chap. xxx. v. 37.* And thus *Lyſius* (*Orat. contra Ayorat*) pleading againſt an Informer, upon whoſe Accuſations many Perſons had been executed, calls

^a *Alian. l. v. H. Lib. iii. Ch. x.*

^b *Add. Lib. i. §. 1, 2, 3. D. Si Quadrup. Lib. ix. §. 5. D. ad L. Aquil. Lex. Wiſigoth. Lib. viii. Tit. iv. Ch. xvi. l. Exod. xxi. 29.*

^c *Inſt. Orat. Lib. i. Ch. x. and Lib. iii. Ch. vii.*

Mr. BARB. NOTES on §. II.

² If we will find the Author's Meaning, we muſt remember what he has ſaid, *Ch. iii. §. 2.*

³ That is, when one may or ought to engage others to do a certain Thing, or hinder him from it, or contribute towards the begetting a certain Habit, or prevent it, he is reſponſible for that which he did not properly do, and in which he was guilty of nothing but pure Negligence or Want of Acting, which is yet looked upon as a real Action in reſpect to the moral Effect. This reſpects all them who are charged with the Management of others. See §. 14. following.

⁴ See *Alian's Various Hiſtory, Lib. iii. Ch. x.* and Mr. *Perizonius's Comment* on it. But that Example ſeems to be ill choſen, ſince there are many other which are commonly to be had. It is poſſible that this being ſo unlike our Opinions and Cuſtoms, made this Author think fit to give this Inſtance. For they pretended, that this Love, ſo dear and conſtant, had nothing but what was honeſt in it, and ſerved to inflame thoſe young Men who were the Objects of it with the Love of Virtue, tho' in Time it degenerated into an infamous Converſation, chiefly among the *Greeks*. See *Poster's Antiquities of Greece*. Theſe Inamorato's being then, as *Alian* ſpeaks, *The continual Guardians of thoſe they loved,* 'tis no wonder that they were to answer for their Behaviour.

On §. 3.

¹ But *Moses* does not ſay in that place, That that *Idumean* was the firſt that cauſed Aſſes and Horſes to couple together, and ſo was, morally ſpeaking, the Original of Mules. מִיִּם is the Name of a People, and ſo ought to be tranſlated, not, He produc'd Mules, but, He fought againſt the *Jemians*, as Mr. *Bochart* has fully proved in his *Hieroicoicon, Part i. Lib. ii. Ch. xxi.* However, had the Thing in itſelf been true, this Author might better have paſſed over this Example.

him the manifest Cause of their Death. So also
OVID. HEROID. Epist. ii. 147.

*Phyllida Demophoon leto dedit, hospes amantem;
Ille neci causam præbuit, ipsa manum.*
Poor Phyllis dy'd, by him she lov'd oppress'd;
The truest Mistress, by the falsest Guest:
He was the cruel Cause of all her Woe;
But her own Hand perform'd the fatal Blow.

MR. POLEY.

Yet it does not always happen, that a Man who has barely given Occasion to the Fact of another Man, should be² reputed the moral Cause of that Fact: and therefore the Sentence pronounc'd by Piso, which Seneca speaks of, was extream foolish as well as cruel, when ordering a Soldier to be led to Execution, upon Suspicion of whose Murder another Soldier had before suffer'd Death, he gave his Reason in these Words³, *I order you to be executed for being the Cause of the Condemnation of your Fellow Soldier*. There seems no great Necessity that we should here, with the Author of the Treatise *De Principiis Justi & Decori*⁴, distinguish between a moral Cause by *it self*, and a moral Cause by *Accident*. For a Cause by Accident is a Term of vast Obscurity, and very likely to create and encourage vain Disputes: And besides, if we cannot rightly impute the Effect of an Action to a Man, we cannot upon any Account, call him a moral Cause by Accident, tho' he contributed never so much to the material Part of the Action. Yet thus far we must plainly acknowledge, that in weighing and rating the Greatness of the Imputation, it is a very important Query, whether the Action proceeded from such a Person as the Principal, or as the Accessory? as likewise, whether the Agent directly intended such an Effect, or whether it proceeded from his Inadvertency, or any other concomitant Reason? For if the last of these Cases appear true, the Consequence will be, that the Action shall not be imputed to the Person, as if committed against the Laws of Ju-

stice, but against those of Prudence and Fore-sight; and that therefore he shall not be reckon'd to have acted wickedly, but only rashly or unadvisedly. It will not be amiss to examine more closely what the above-mentioned Author lays down in the same place. First, therefore, he establishes this as a Maxim, *Whatever is Evil in its own Nature, so that it can never be chang'd into Good, yet may by Accident follow upon the Exercise, or upon the Defence of my Right, without my incurring the Guilt of Sin; and therefore I am not oblig'd to decline the Use of my just Right in such Cases*. Grotius likewise⁴ proposes a Rule much to the same Purpose, in his Third Book⁵, but judiciously tempers it with⁶ a good Restriction. But our Author proceeds: *A Sin is said to follow by Accident upon another free Act, when upon the Use of a Thing, to which I have a Right, some Effect follows, which I have otherwise no Right to produce*. For an Instance in this Case may be alledg'd what Divines call Scandal or Offence taken; concerning which they tell us, That a Man ought not to omit an honest, a pious, or a due Act, though a wicked Person should take never so much Offence at it; and this Rule they confirm by the Authority of our Saviour. But now this very Example might have taught our Author to lay aside his Term of *Causa per Accidens*; since even in that restrain'd Sense it would be little less than Impiety to call him the Cause of Evil, who is the Spring and Fountain of all Good. We ought rather to say, That a Man who exerts a good and necessary Action, is by no means the Cause of Sin in another Man, who shall thence take Occasion of offending. Thus we commonly say, He who uses his own Right, does no body any Wrong. But he further adds, *Since every Man has a Right of preserving his Health, it is lawful, for the Recovery of Health, to make use of a medicinal Potion, tho' upon the taking of this Potion should follow Distraction (for some little time) or Drunkenness, or (voluntary) Pollution, or Abortion*⁶ (in case both the Mother and the *Fetus* must otherwise infallibly perish) and that therefore the Person who takes the Medicine is only the Cause of such Effects by

² Velthuysen, Pag. 161.

³ Ch. i. §. 4. and Ch. xi. §. 9.

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² He must (as our Author speaks in his *Elements of the Universal Civil Law*, p. 3, 4.) either do, or neglect to do something that he was obliged to, otherwise another Man's Action has so necessary a Connexion with what he himself does or neglects, that it cannot otherwise happen. Further, we must consider how far he, that gave the Occasion, might know the Effect that would follow upon it, and that it is not necessary that he should certainly know it, 'tis sufficient that there was some Probability. I will explain this by an Example: If I leave a Pistol charged, or some other dangerous Weapon, upon a Table, in a Room where every body has Liberty to come, I am not sure that a Child, or any other Person will come, who, not knowing the Danger of the Weapon, will run the Hazard of killing or hurting himself, by meddling with it out of Curiosity; nevertheless, because the Thing is possible, I might fear such a Thing might happen, and I am certainly to answer for it. The same may be said concerning the Good of which we have given Occasion. As it can't be attributed to us, if we were the Cause of it without our Knowledge, and had no such direct Design, so on the other side, 'tis not necessary that we be sure of the Success of what we undertake for another's Advantage; 'tis sufficient, that we had Reason to believe it; for tho' the Effect was not obtain'd, the Intention is very commendable at all times; as, on the contrary, the Neglect is not altogether excusable, although it luckily had no ill Consequence.

³ Seneca's Words are (*De Ira. Lib. i. Ch. xvi.*) *Te duci jubeo, quia causa damnationis commilitoni fuisti.*

⁴ This Rule (according to Grotius) takes place in the just Defence of a Man's self, which this Author explains in another place. And so it does also when we labour after the Recovery of what belongs to us; for if we can recover the full Value, we have a Right to take it, nevertheless, upon Condition that we return the Over-plus, if any be. So also we may cannonade a Ship full of Pirates, or an House full of Thieves, altho' we know there are some Children, Women, or other innocent Persons in it, who are in Danger of being involved in the Ruin of those that deserve it, *Iib. iii. Ch. i. §. 4. Num. i.*

⁵ He further adds, in the same place, *Num. ii.* That those Things that a Man hath an indisputable Right to do, are not to be allowed him to do in all Respects. Love to our Neighbour often hinders us from using that Right, and obliges us likewise to avoid those Things which do, or may happen, contrary to our Intention, at least, if the Advantage we aim at be not greater than the Damage which may justly be feared; or if there be an equal Probability of Benefit and Damage, or the Hope of the Benefit be not better grounded than the Fear of Damage; but this must be left to every Man's Judgment and Prudence. But this ought only to be observed, That where there is a Doubt, we ought to incline to that Side, that is more favourable to another than to ourselves, as the surest Part. See what follows, and *Ch. xi. §. 8.* of the same Book. See also what has been said above, *Ch. iii. §. 7.*

⁶ See *Book vi. Ch. ii. §. 6.* following.

Accident. On which Doctrine we only observe, that it had been much plainer to have said, that those Effects are not to be accounted Sins in the Cases here mention'd. Neither do all the Examples brought by the same Author to illustrate the *moral Cause per se*, or that which is truly and properly such, rightly hold. For a Criminal, as he speaks, *who is to suffer, tho' he go on to the Place of Execution, and ascend the Ladder*, cannot merely upon this Account be call'd the *moral Cause* of his own Death, because if he had refus'd to go willingly, he had been dragg'd along by the publick Officers. And yet there is no Reason why one Man who drinks immoderately, or another who wastes his Strength in honest and necessary Labours, may not be reputed the *moral Cause* of their own untimely Deaths; tho' the former Person sins, and the latter not; and tho' neither, properly speaking, can be call'd a Murderer. But such a one we should rightly call the *moral Cause of his own Death*, who is therefore condemn'd, because he would not declare such Matters as might demonstrate his own Innocency.

IV. It must be farther observ'd, that this *Imputativeness* which we have made the *Formale* of a moral Action, bears the Nature of a *positive Form*, from which, as from the Spring and Root, all the Affections, Properties, and Consequences of such an Action result. And therefore a moral Action may be call'd a *Positive Being* (at least in the Order of *Morals*, if not always in the Order of *Naturals*) whether the Matter of it be a physical Motion, or the Privation of a physical Motion. For to constitute a positive Being in Morality, 'tis sufficient that we conceive something in it, from which there arise true Affections of the same Kind; since as a *Non Ens* can have no Affections, so whatever has certain and positive Affections cannot upon any Account be stil'd a *meer Non Ens*.

V. Now, that a moral Action should belong, or should be *imputed* to any Man (in which we have asserted the *ratio formalis* of it to consist) there can be no other Reason or Cause, but that the Man had Power and Ability to do it, or not to do it; to perform or omit it. And this is so manifest a Truth, that the most ignorant and unskilful Mortals, when they are accus'd of any Omission, or of any Fact, think they cannot bring a fairer Excuse, than to say in the first Case, *That they could not do it*, and in the other, *that they could not help it*. So that it is to be establish'd as a prime Maxim in *Morals*, That a Man is accountable for those Actions, the Performance, or the Forbearance of which were both in his Power: Or (what comes to the same thing) that every Action dirigible by a moral Rule, which a Man is able to do, or not to do, may be imputed to him: And, on the contrary,

that whatever neither in itself, nor in its Cause, was in a Man's Power and Disposal, cannot be rightly imputed to him¹. Nor is it any Breach of this Rule, that sometimes a Man is oblig'd to perform a Business depending on Chance, and consequently not in his Power. For this Case can never happen, unless the Man voluntarily takes on himself such an Obligation². Thus much therefore is in the Man's Power, to bind himself to repair a Damage, proceeding from Causes not capable of human Direction. To conclude then, that an Action or Fact should be imputed, it is sufficient that it was not involuntary, according to our Discourse in the preceding Chapter, §. 10. and that it was subject to the Guidance of our Will. But to make an Omission truly *imputable*, 'tis requisite that there have been both Power and Opportunity for Performance, which Conditions of Power and Opportunity seem to conclude these four Things, *First*, That the Object be ready at hand. *Secondly*, That we have a commodious Place, where we may neither be hindred by others, nor suffer any Evil from them upon our acting. *Thirdly*, That we have a convenient Time, in which we are not call'd to the Discharge of more necessary Duties, and which is equally seasonable for those who are to concur with us in the Action. And, *Lastly*, That our natural Powers administer sufficient Strength for the Business. When any one of these Conditions is wanting without the Fault of the Man, it would be most absurd and unjust to lay the Omission of any thing to his Charge. *Cicero de Invent. Lib. i. Ch. xxvii. Occasion or Opportunity is a Part of Time implying a Convenience of doing a thing, or not doing it.* See *Cartes of the Passions. Art. 144, 145, 146.*

VI. Thus much being premis'd in general, it will be worth our while to consider more distinctly and in particular, what Things may be imputed to a Man, which proceed from a physical Necessity, or from any Cause placed beyond the Direction of Men. And therefore 'tis a simple³ Practice they tell us of the Kings of *Mexico*, that at the Commencement of their Reign they us'd to promise their Subjects, that they'd take Care the Sun should rise and set at due Times; that Rain should fall as often as there was Occasion; and that the Land should bring forth Fruit. Neither can it be imputed to Man, that natural Causes produce this and no other Effect, or that they produce it in this and no other way; as for Instance, that the Fire warms, and not cools us. Yet thus indeed the Effects of natural Causes furnish large Matter for Imputation, as their active Force is drawn out, or confirm'd by Man, applying Actives to Passives, or exciting their internal Strength by proper Means. On which

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¹ *Culpam autem nullam esse, cum id, quod ab homine prestari non potuerit, evenierit.* Cicero. Tuscul. Quest. Lib. iii. Ch. xvi.

² See what is said *Lib. v. Ch. ix.* following. Sometimes also we must answer for an accidental Mischance without engaging in it, because we have neglected to do a Thing which we were obliged to do, altho' the Neglect itself did not contribute at all to the unforeseen Accident. See *Lib. iii. Ch. i. §. 6. Note 3.* and *Lib. v. Ch. v. §. 3.* following.

NOTES on Chap. V. §. vi.

³ This Author ought to have mention'd the Historian who relates this Fact. Mr. Titius (*Observ. 47.*) relates a favourable Explication, which a certain Person (*viz. Keib's Treatise De Lig. & Lapid. Part. I. Class II. Sect. ii. §. 1.*) gives of this Promise. According to him it is the Effect of great Wisdom, and these good Kings would have Men understand no more by it than this: *That a Prince by his good Laws, and by the Prudence and Justice of his Government, can in some measure so order the Stars and Elements, that they shall promote the good of his Subjects.* Upon this Foot their Assertion, as absurd as it may seem at first Sight, is not altogether without Ground, and proves, that even the *American Princes* are less barbarous than many *European*.

Account a Plenty of Fruit is imputed to the Husbandman, inasmuch as his diligent Culture obtain'd it from the Earth: Thus the Damage of Fire is imputed to him that kindled it; and thus the varied Colour of *Laban's* Lambs may be imputed to the Subtilty of his Shepherd *Jacob*^a. A natural Effect may be farther imputed to a Man as he has mov'd the supream Cause and Director of all Things to determine^a such an Effect. Thus the *Three Years Drought* might be imputed to *Elias*^b. As in fabulous Story a long Drought is said to have ceas'd on the Prayers of *Aacus*^c. Thus too, the Death of the Men who fell in the Pestilence^d, might in some measure be imputed to *David*, tho' not to the Degree of a Murther.

VII. Neither may we impute to a Man the Actions and the Effects of vegetative Faculties which appear in his Body, as they arise from his Birth, or from other Causes beyond his Disposál. Yet thus much is in a Man's Power, to supply those Faculties with convenient or with unfuitable Objects, which may either maintain and cherish, or weaken and extinguish their Force; as also to distort and abuse their proper Organs. Thus he to whom Nature has given a large, a sound, and an able Body, is liable to no Imputation of Merit on that Score. But to correct a weak Constitution by Industry and Exercise, and to increase the natural Powers, gives just Occasion for Commendation; and, on the contrary, to break or destroy the same Powers by Idleness and Petulancy, turns to a just Shame and Reproach.

Hence no Man can be fairly reprehended for a weak, or a tender, or a diminutive Body; for distorted, or for maim'd Limbs, or for want of Strength, provided that none of those Infirmities were contracted by this Default. ^a *Aristotle* talks very pertinently to this purpose, *Ethic. ad Nicom. Lib. iii. Ch. vii.* Οὐ μόνον δὲ αἰ τῆ ψυχῆς κακίαι, &c. "Not only Faults of the Mind (says he) are Voluntary, but those of the Body too in some Persons, whom we therefore discommend. For we do not blame those that are naturally deformed, but those who are grown so by neglect of Exercise, and by a careless way of Life. And the Case is the same as to any Meanness or Unfightliness arising from Distempers, or from the maiming of any Part of the Body. For Men will not reproach, but rather pity his Blindness who had it from Nature, or from a Distemper, or from an honourable Wound: But he will justly fall under universal Scorn or Censure who has lost his Eyes by Drunkenness, or by any other kind of

"Intemperance." *Plutarch de Audiend. Poet.* speaks to the same Purpose: *Ulysses doth not upbraid¹ Therfites with his Lameness, his Baldness, or his Crook-back, but with his Scurvility and Impudence.* Thus the wise Poet silently derides those who are ashamed of Lameness, Blindness, or the like Defects; it being his Judgment, that nothing can be Blame-worthy which is not vicious, and nothing vicious the Cause of which is in Fortune, not in our selves. *As those who brush or strike Cloaths touch not the Body, so those who censure others for their Imperfections of Birth or of Fortune, vainly and foolishly strike the outward Parts, but never reach the Soul, nor those Blemishes which really deserve Reprehension and Correction.* Ibid. Add. *Sympos. Lib. ii. Qu. i.* Yet it was not without Reason, that among the ancient Gauls, as *Strabo* relates, *Lib. iv. The young Men were fin'd for exceeding the Measure of their Girdle:* Because they took it for granted, that such a large Paunch, at such early Years, could proceed from nothing else but Laziness and Gormandizing. So says *Nichol. Damascen. de Mor. Gent. The Iberians use a Girdle of a certain Measure, and whoever suffers himself to grow beyond those Bounds, is look'd upon as highly infamous.*

The same may be said of the other Faculties which Nature, and not our own free Pleasure, has implanted in us; as that a Man has sharp or heavy Parts, quick or dull Senses, a firm or a deceitful Memory; unless these natural Abilites have been improv'd or impair'd by the Man himself. Hither must be referr'd that Observation of *Aristotle* in his *Ethicks*^c, *Many Things according to our Nature we do and suffer, which we are truly conscious of, and yet which cannot be call'd Voluntary or Involuntary: as to grow old, and to die.* These Things therefore are not proper Matter of Imputation. Neither can the getting of wicked Children be imputed to Parents, provided they have not encourag'd them in their Vices by ill Education. Whence the witty Turn of *Vindex* will not hold in strict Truth, when he said, *That Nero's Mother was justly put to Death by her Son, for bringing such a Monster into the World*^e 2.

VIII. It's evident likewise, That those Things cannot be imputed, which exceed our Strength, either as to the Hindrance or the Performance of them: Provided that this Inability has not been of our own sinful¹ Procurement. On which Foundation are built those common Maxims, That Impossibilities are incapable of Obligation²; That no Man can be conceiv'd to have enjoin'd impossible Duties in a Law; and that therefore if any such³ Thing occur in a Statute, or a Co-

^a Gen. xxv. 37. ^b 1 Kings xvii. 1. James v. 17. ^c *Apollodor. Lib. iii. Ch. xi.* ^d 2 Sam. xxiv. 13, 17.
^e Lib. v. Ch. v. ^f *Philost. Apollon. Lib. v. Ch. x.*
¹ We must explain the Words of our Author, who says only, *Ad eum effectum determinandum*, i. e. to determine that Effect; for it appears by the following Examples, and by the Nature of the Thing, that he treats here not only of the Existence of the Effect, but also of its Non-existence and Discontinuance.

NOTES on §. VII.

¹ *Plutarch's Greek* is, 'Ο Θμιστης ὑπὸ τῆ Ὀδυσσίας, ἔ χαλος, ἔ φαλακρός, ἔ κωτικός, ἀλλ' ἀκριτόμηθ' λαιδοροῦται — Οὐτως Ὀμισθ' κἀναγλῆ ἢ αἰχνομοιαν ἐπὶ χαλοτσῶν. κ τριφύτῶν, ἔτε δεκτὸν ἠγερθῆτο τὸ μη αἰχρεῖν, ἔτε αἰχρεῖν τὸ μη δι' ἡμῶν ἀλλ' ἀπὸ τύχης γινόμενον. Κατωτέρω ἢ οἱ τα ἰμάτια μασηγῆται, ἔχ ἀρῶται. τῆ σάμαθ', κτῶς οἱ δυστυχίας τιμὸς, ἢ εὐσυχίας οὐδ' ἔλατος, εἰς τὰ κῆρος ἐνέουσται κῆρος, κ' ἀνοίας. τ' ψυχῆς δ' ἔ δειγμένον, εἶτε ἢ ἀλλῶς ἐταπεινώσεως ὀνομασι, κ' ἀλκίας. Plut. p. 35. Ed. Wech. Tom. ii.
² The Greek is, Τῶ γὰρ μητέρα ἐν δίκῃ ἀπικτεῖται, ἐπὶ τῆ ταύτῃ ἵσταται.

NOTES on §. VIII.

¹ In this last Case we may lawfully be treated in the same Manner as if we were in a State of acting. Otherwise, as soon as any Obligation we are under becomes in the least punishable, or incommodious, we shall find a Way to avoid it, by putting ourselves on purpose into a Condition unable to fulfil it.
² *Impossibile nulla obligatio est.* Digest. Lib. l. ut. 17. ³ See Lib. iii. Ch. vii. §. 2, &c. following.

venant, or a *Will*, it is either to be esteem'd as null, or else a more commodious Interpretation of it is to be found out ^a. To this Purpose we meet with a pleasing Passage in *Herodotus* ^b; he tells us, that when *Themistocles* desir'd a Supply of Money from the Inhabitants of *Andros*, supported by the two strong Goddesses *Persuasion* and *Necessity*, the *Andrians* oppos'd him with two stronger Goddesses, *Poverty* and *Impossibility*. But here it must be carefully observ'd, that it is one Thing to be *physically*, and another Thing to be *morally impossible*. The former Impossibility lays an Obstacle, which binds up the Will in such a Manner, that either it cannot break out into Action, or else that it shall lose all its Labours and Endeavours. But a moral Impossibility lays no Impediment surpassing the active Power which inheres in the Will, but on the contrary arises wholly from the Will itself. And in this Manner, we say, 'tis impossible that all Men should conspire together in delivering down a Lie to Posterity, without any Prospect of Advantage: Or that any Man should lead a Life of such exact Holiness and Circumspection ^c, as not to offend (at least through the Precipitancy of his Passions) in some smaller Instance of Duty. Hence the Author of the Treatise *De Principiis Justi & Decori* ^e infers, *That a Legislator cannot indeed enjoin what is physically impossible, but he may exact Obedience to Things which include a moral Impossibility. Because in this he commands nothing contrary to the Liberty of the Will, since all the Difficulty of obeying arises from the Will itself. Thus 'tis not impossible for any Man to frame a Lie gratis; and if not for any Man, then not for the whole Multitude; and yet 'tis certain that the whole Multitude will not do so. In the same Manner every Man has the Power of speaking Truth, and consequently a whole Society or Community; and yet 'tis most certain, that a Commonwealth will never be so happy, as to have all its Members abstain from false Speeches: yet this Impossibility does not take away the Liberty of particular Men, or excuse them from sinning. Thus too we say,*

^a Ovid. de Pont. Lib. i. El. 7.

----- *Nulla potentia vires
Præstandi, ne quid peccet amicus, habet.*

So far can no Degrees of Power extend,
To purge all Frailty from a mortal Friend.

Quintilian. Inst. Lib. vi. Ch. iii. We usually reckon it inhuman to upbraid a Man with his ill Fortune: either because it comes without his Fault, or because it may be the Censurer's Turn to suffer next.

^d Lib. ii. Ch. xx. §. 19.

^e Lib. i.

^f De Invent. Lib. i. Ch. xxx.

^b Uran.

^c Velthuisen, p. 174.

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⁴ Mr. Hertius alleges here the Encomium which *Valerius Paternulus* gives *Scipio Æmilianus*, viz. That in all his Life he never did speak or think any Thing, but what was commendable, Lib. i. Ch. xii.

NOTES on §. 9.

¹ Our Author here speaks of the Extremity that one is reduced to by the immediate Violence of a Person, who will force us to suffer, or do some thing. But he ought also to have set down what a Man is constrained to do by other Circumstances, which are not less pressing, and no less exclude all Imputation. In a word, we ought to reduce to this Head all the Effects of Necessity in general, of which we shall elsewhere see the Benefit, Lib. ii. Chap. vi. where the Passages in the Margin may refer to the Cases of Necessity, which are omitted.

² Which he may suffer in that very Instant, as this Author adds, in his *Abridgment of the Duties of a Man and Citizen*, Lib. i. Chap. i. §. 24.

Execution of some Enormity to which he is otherwise exceedingly averse; yet so that he shall not be the Author of the Deed, but the other Person who compell'd him to it. Examples of the former kind are, when a Man by Superiority of Strength violently thrusts another upon a third Person, or strikes him with a forcible Bend of the other Man's Hand: Or when any one commits a violent Rape upon a Woman that did not provoke his Lewdness by her own Fault. Her Body indeed, in this Case suffers Dishonour, but the Blemish doth not reach her Soul. *The Body is stain'd, but the Mind is pure*, says *Lucretia* in *Livy*, *Lib. i. Ch. 58.* See *Hen. Stephens's* elegant Discourse on that Story in his *Apolog. for Herodot.* *Ch. xv.* But a Nymph will not have the Benefit of this Interpretation, when with a faint Resistance she lets her Ring be stolen off from her *digitus male pertinax*, as *Horace* calls it. An Instance of the latter Compulsion may be when a Sergeant, or a Guardsman is commanded to kill a Man whom he knows innocent, under Pain of being immediately kill'd himself upon Refusal: For he can by no Means lie under an Imputation in this Case, since nothing is enjoin'd him but the bare Execution, which in itself is agreeable enough to his Person and Character, and ought not to be refus'd upon the Hazard of losing his Life: Especially since tho' he threw away himself, he could not by that Means save the other innocent Party. Yet it must be confess'd, that the bare Execution of some Acts is so very foul and detestable, that it is a generous Bravery for a Man rather to die, than to apply his Body to such Operations, tho' if committed, the Fault of them would not light on himself, but on others. To which Case the Passage of *Aristotle* relates, above-cited: An Instance of it may be, Suppose a Man should be commanded to commit a Rape on his own Mother, which Fact, in *Oedipus*, tho' com-

mitted out of invincible Ignorance, yet tormented him so, as to make him tear out his own Eyes. But when *Aristotle*, *Ethic. Nicom. Lib. iii. Ch. i.* alleges for an Instance of a forced Action, the doing a base Thing, upon the Command of a Tyrant who has our Parents or Children in his Hands, and will save or kill them, according to our Obedience or Disobedience; what he then calls *αισχρον τι*, or a base Thing, must be understood in a limited Sense, so as not to reach those more odious Villanies we are now speaking of.

X. Ignorance likewise takes off all Imputation, so far as it renders the Action involuntary. This Point may be illustrated from several Passages of *Aristotle's* Morals; *Magu. Moral. Li. i. Ch. xxxiv.* *Ὅταν μὲν γὰρ ἡ ἀγνοία αἰτία ἢ τῷ προῆξαι τι, ἢ ἐκὼν τῷ ἀσφίττει, &c.* "Whensoever (says he) Ignorance has been the Occasion of doing a Thing, that Thing is not done willingly, and consequently cannot be injurious. But when a Man is himself the Cause of his own Ignorance, and out of that Ignorance commits a Deed, he plainly offers an Injury, and may in Justice be accountable for the Crime. This is the Case of drunken Men, who if they commit any Disorder under that Condition, without Dispute do a real Injury, since they themselves have been the Causes of their Ignorance. For 'twas in their Power, whether or no they would tittle themselves so far out of their Senses, as to make them (for Example) beat their own Father. The same Rule will hold in all other Instances of Ignorance, the Cause of which is in the Agent; so that he who injures another upon the Strength of those Pleas, is nevertheless properly unjust. But those Persons cannot by any Means be called unjust, who offend out of Ignorance, not of their own procuring. For such Ignorance is to be

Xenophon. Cyropæd. Lib. iii. I take all those Things which Men commit thro' Mistake, to be done against their Inclination and Design. Euripid. Hippol. Coronat. ver. 1334. Your Ignorance and Error cleanse the Deed from sinful Stain.-----

Mr. BARB. NOTES.

* Our Author then believes, that this last sort of Compulsion, as well as the first, excludes all Sorts of Imputation. He explains himself better upon this Head, in his *Abridgment of the Duties of a Man and Citizen*, *Lib. i. Ch. i. §. 24.* where he maintains, That we can have no more Ground to impute the Actions committed in the like Circumstances, than to the Spear, or Ax, that is used to kill an Enemy with; *At least*, says he, *whoever is reduced to that Necessity, is not under any Obligation to sacrifice himself for the Person to whom he sees himself constrain'd, upon Peril of Life, to do some great Mischief.* I own that this Sort of Compulsion much lessens a Sin, but yet it doth not seem to me (as *Mr. Turtius* remarks, *Observ. xl. and xlviii.*) to free it from all Imputation at the Judgment-Seat of God. For indeed the Instance of the Spear and Ax is not well apply'd, for they are Instruments purely passive; whereas a Person forced by the Threatnings of some great Evil, without any physical and irresistible Violence, acts with a kind of Will, and consents in some Manner to the Action, visibly evil, which he performs. So that tho' before a civil Judicature he ought not rigorously to be punished for the like Action, he can't attempt it without Hurt to his own Conscience. Here also we may apply those Principles which we shall lay down, *Lib. ii. Ch. vi. §. 2, 3.* following, for in the Example which our Author there alleges, of an Officer, who was commanded, under Pain of being put to Death himself, to put a Person to Death, for a Crime of which he knew him innocent, the Evil he does to such an one, is as great as if he would warrant it himself, otherwise this Execution were an uncertain Means, because it depends entirely on him who laid the Obligation on him. And who is there that can assure himself, that the Person who forces a Man to do such Things, shall have a greater Respect for him that executes his Orders, than for him against whom he has used this Force? This last Reason has yet a great Strength, as any one may see, when a Son is forced to lie with his Mother: An Action which our Author seems to take some Pains to excuse, when he is treating of the Case of Compulsion. See what is said upon *Lib. ii. Ch. vi. §. 2.* and upon *Lib. viii. Ch. i. §. 6. Note 4.* and *Mr. Thomasius's Divine Civil Law*, *Lib. ii. Ch. ii. §. 149.* and 161, &c. as also *Wherner's Elements of the Law of Nature and Nations*, *Ch. ii. §. 9, 10.*

* The Author refers to these Words of *Horace*, *Lib. i. Od. ix. Pignusque direptum Latertis, aut Digito male pertinaci.* See also to the same Purpose, *Lib. ii. Od. xii.*

----- *Aut facili Sævitia negat,
Quæ poscente magis gaudeat eripi.*

* *Mr. Pufendorf* unwarily followeth a bad Latin Translator, who has rendered these Words ill, though plain enough in themselves. They that do it, shall escape, and they that will not do it, shall perish, as if the Greek had been, *περὶ γὰρ τῶν, &c.* whereas it is, *πράξαντες, He that does it.* The English Translator has amended this Fault.

* But why must this Case be excepted, if our Author's Principles be found? Or what Rule doth he give us to distinguish these sorts of Things, where Force excludes not Imputation? The Truth is, we must either excuse every Act of Compulsion, how infamous soever it be in itself, or account every Thing vicious, which we cannot do innocently of ourselves, and in our own Name, let the Threatnings of him that would constrain us, be never so terrible. See *Note 3.* of this Paragraph. The Change of our Author, and the small Connexion there is between his Notions in this Matter, shew that he had not considered it with sufficient Attention.

esteem'd

“esteem’d Natural; as when little Children strike their Parents, their natural Ignorance, which is the Cause of the Fact, hinders it from being still’d Unjust; the Ignorance not at all depending on their own Power”. So also *Seneca Phœnif. vel Thebaid. ver. 249.*

————— *Aliquis intra viscera
Materna letum præcocis fœti tulit;
Sed nunquid & peccavit?*

————— An Infant with untimely Fate,
Dies in the Womb before the Gift of Light;
And has it therefore sinn’d?

But this must be extended no farther than *human* Consideration.

But in reference to Infants, it is farther observable, that we chide and beat them for some Actions, not because in human Judgment they be strictly Crimes, but meerly for the sake of Amendment, that they may not prove troublesome to others by such Tricks, or may not get an ill Habit when they are little, and so keep it when they are grown up. And the same must be said of delirious Persons, provided their Disease was not occasioned by their own Fault. For the Blows given to one in this Condition, have no more the proper Nature of a Punishment answering to a Fault, than those we give to a kicking Horse, to break him of that Custom. *Vid. Anth. Matthæ. de Crimin. Proleg. Ch. ii. §. 5, 6, 7, 8.*

But he who is the Cause of his own Ignorance, and who has wittingly and willingly hindred himself from the Knowledge of those things, which he might, and should have known, is in the same Case as if he had offended upon Knowledge and Deliberation. *Aristot. Magn. Moral. Lib. i. Ch. ix. We then blame diseas’d, or deform’d Persons, when we judge them to have been the Authors of their own Distemper or Disfigurement; because it was in their Power to have kept sound and perfect.*

And more fully, *Ethic. Lib. iii. Ch. vii. Legislators correct and punish those who commit Evil, provided they did it neither upon Violence and Compulsion: nor out of such Ignorance as they did not themselves occasion. For otherwise, Ignorance it self is punishable, when contracted by the Person’s own Fault. Hence there is a double Punishment ordain’d against Drunkards, because the Spring of that Vice is in a Man’s self, he having the Power of avoiding it; and therefore what he doth through Ignorance in that Condition, is nevertheless to be charged upon him. In like manner they punish those who plead Ignorance of the Laws,*

^a These are properly the ἀμαρτηλώα of Aristotle.

^b *Magn. Moral. Lib. i. Ch. xvii.*

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⁴ The one for being drunk, and the other for having done wickedly in their Drunkenness, for he treats not of all Sorts of Drunkenness, but only of such as do some Injury in their Wine. *Aristotle* alludes to a Law of *Pythagoras*, of which he speaks, *Polit. Lib. ii. Chap. xii.* Our Author quotes it, *Lib. viii. Chap. iii. §. 21.* where we shall see upon what it is grounded.

⁵ *Apud quosdam lex erat, ne quis Diana vitulum immolaret. Nauta quidam, cum adversâ tempestate in alto jactarentur, voverunt, si portu---potius essent, se vitulum immolatuuros. Casu erat in eo portu sanum Dianæ, &c.*

⁶ The Roman Law is this, That when one gives a Potion to cause a Miscarriage, or to cause Love, although the Party who gives it has no Design to do Evil, nevertheless by reason of its Consequences, he should be condemned, besides some Part of his Goods Confiscated, either to the *Quarries*, if he were of a mean Condition, or to Banishment into some Isle, if he were of a good Family. But if the Man or Woman, who had taken the Potion, died of it, he was condemned to Death without Mercy, *Digest. Lib. xlviii. Tit. xix. de Pœnis Leg. xxxviii. §. 5.* In fine, that we may have a just Idea of invincible Ignorance, as to Imputation, let that be remembered which we have observed *Chap. iii. §. 10. Note 2.* For Ignorance purely concomitant, in the Manner we have explained it, be it vincible, or invincible, doth not hinder Imputation, and to know whether it be invincible or no, we must judge according to common Estimation, *Titius Observ. xlv. See Chap. vii. §. 16. following.*

when the Points were easy, and such as ought to have been known. The Case is the same with all that are ignorant by their own Neglect, they being Masters of their own Powers, and capable of Diligence and Application. Ignorance of Universals, and that which we were oblig’d to know, does not take off Imputation; but only Ignorance of Particulars, and of what concerns the present Fact. *Aristot. Ethic. Lib. iii. Ch. ii.* He that is ignorant of his Duty or Interest, ought not to be said to act against his Will; for Ignorance upon Choice doth not produce an involuntary, but a wicked Action. An Ignorance of Universals renders Men liable to Reprehension; but an Ignorance of Particulars, or of the Circumstances of the Action, deserves Pity and Pardon, in as much as the Person thus offending doth truly proceed involuntarily. An Example of this Ignorance is thus given by *Tully, de Invent. Lib. ii. Ch. xxxi.* ^a There was a Law in some certain Place, forbidding to sacrifice a Calf to Diana; now a Company of Mariners being in Distress at Sea, made a Vow that if they gain’d the Port which was now in sight, they’d offer a Calf to the Deity who presided there. It happen’d that in that very Port there stood a Temple of Diana, to whom no Calf was to be offer’d by the Laws; but the Mariners not being acquainted with these Laws, offer’d the Calf which they promis’d: and upon this Fact they are accus’d^a.

If an Action be done without any malicious Design, and not with Ignorance voluntarily contracted, but such only as crept in by Inconsideration and Inadvertency^a, the Imputation is not altogether taken away, yet it is considerably diminished. And thus far only may we allow the Saying of *Quintilian, Inst. Lib. i. Ch. vi.* Even an Error is commendable in those who follow great and noble Guides. *Vide Aristot. Ethic. Lib. v. Ch. x.* Hither we may refer the Case propos’d by *Aristotle^b*, of a Woman that gave a Love-potion to her Gallant, of which he died. Now the *Athenian* Judges absolved the Woman from this Indictment, because she did the Fact undesignedly, and only mis’d the Effect of her Potion, and procur’d his Death instead of his Love, which was her only Aim. But to make this Sentence equitable, it must have been suppos’d as a Principle, that the Woman never so much as thought the Potion she administred was any way hurtful. For otherwise it were more rational to proceed according to^c the Law of the Roman Lawyers. *Add. Anth. Matth. de Crimin. ad l. 48. D. tit. 5. Ch. v. §. 6.*

XI. Farther, Since the Images form’d by the Fancy in Sleep are not in our Power, nothing can be imputed to us which we seem to do in a Dream,

only as far as by thinking on such things * in the Day-time with Delight, we have fix'd the Ideas deeply in our Minds^a. Hence the Man whom Tacitus^b speaks of, and reports to have seen the Emperor Claudius in his Sleep, cover'd with a Crown made of Ears of Corn, was not guilty of any Crime. And the Fisherman in Theocritus^c entertain'd a very vain Scruple, when he appear'd concern'd for an Oath he had made in his Sleep, never to venture out again to Sea^d. Neither was Julius Cesar guilty of Incest, upon account of his strange Dream, recorded by Sueton.^e Yet Byblis was not altogether innocent, when, as Ovid tells the Story, Met. ix. 469.

Sæpe videt, &c.

In Sleep she oft does the lov'd Shadow seem
To grasp, and joys, yet blushes in her Dream.
Mr. Oldham.

Nor is Plutarch^f much out of the way, when he maintains, that a fair Argument may be drawn from a Man's Dreams, as to the Temper and Composition of his Mind: and therefore 'twas a good Saying of Epicurus, That a wise Man will be like himself, even in his Sleep^g. Diog. Laert. Lib. x. Some apply to this Purpose Psal. xvii. 3. Vid. Claudian Pref. ad Lib. iii. de Raptu Proserp. Theocrit Idyll. 22.

————— Καὶ γὰρ ἐν ὕπνοις
Πᾶσα κούαν ἄρτως μαντεύεται.—

The hungry Dog prefaces in his Dream
A mighty Spoil of Crufts.—

XII. Lastly, It is against Reason, that the Imputation of any future Crime should be as it were

antedated, or that it should affect us backwards: unless, perhaps, the future Crime should depend on some * past or present Act of ours, as a necessary Effect does on its Cause: For it is a common thing to impute the Effect to him to whom the Cause properly belong'd. Indeed it is not at all absurd, that by Imputation of Favour a future Deed shall procure some good Thing to the Agent, or to some Body else, long before it is perform'd. For since any Man may (if he pleases) do a Kindness gratis, it is certainly in the Power of a Benefactor, who knows what will afterward happen, to confer a present Favour under some Term and Condition hereupon to be fulfilled. But since ill Actions cannot be imputed, but by way of Debt or Guilt, it would be the highest Absurdity, to reckon so far backwards, as to lay Imputation on Persons who neither had any Knowledge of Futurity, nor any Obligation or Power to hinder the Thing from being done; nor, lastly, any Communication of Action with the Author of the Fact^s.

XIII. Beyond these Exceptions no Human Action ought to be reckon'd involuntary or incapable of Imputation, tho' to undertake it be never so contrary to right Reason, or tho' any Disorder of Mind violently hurry us into the Commission. Indeed Plato^h lays it down for a Rule, That "in those Injuries which 'tis impossible to repair, no Man is voluntarily injurious, because no Man is willing to admit the greatest of Evils into any of his Concerns, and much less into those Things which are most dear to him, and most excellent in themselves; such as is his Soulⁱ." To the same Purpose Aristippus says in Diogenes Laertius, "That all Mistakes (by which he means all smaller Offences) "deserve Pardon, because no Person is mistaken willingly, but as he is compell'd by

* Nonn. Dionys. Lib. iv. ————— Ἀλίπτου δὲ
Ἔργων ὅτις τελεῖ τις ἐν ἡμέρῃ καὶ δοκιμῇ.

————— Fancy's idle Play
Mimicks by Night the Labours of the Day.

^b Ann. 11. Ch. iv. See Ammian. Marcellin. Lib. xv. Ch. ii. ^c Idyll. 22. ^d See Evagrius's Oath made in a Dream, in Sozomen, Hist. Eccl. Lib. vi. Ch. xxx. ^e Cas. Ch. vii. Nam visus erat per quietem matris stuprum inulisse. ^f De Profess. Virtut. Sent. ^g Cicero de Invent. Lib. i. A Remote Argument is such as depends on a Cause and Principle too far distant. For Instance, If P. Scipio had not married his Daughter to Tiberius Gracchus, by whom she brought forth the young Gracchi, the Seditions had been prevented which those Brothers rais'd in the State: And therefore all those Disturbances are chargeable on P. Scipio. ^h De Leg. Lib. v. ⁱ Vid. Timæum, P. 1085. & Marsil. Ficin. Prefat. ad Plato, Lib. ix. de LL. & Apulei. de Philoſophia.

Mr. BARB. NOTES on §. XI.

¹ See what Mr. Bayle says, concerning such as have dreamed that they were present at the Meetings of Magicians and Sorcerers, in his Answer to the Quest. of a Province, Tom. 1. P. 304, 305.

² Some of these Quotations of our Author are not much to the Purpose. He puts the Third Book of Claudian de Raptu Proserp. for the Second, and one Work for another; for his Quotation is taken out of his Preface to his Poem in VI. Consul. Honori. Omnia que sensu voluntur vota diurno, Pectore sopito reddit amica quies. See Lucretius Lib. iv. ver. 959, &c. and Cicero's Somn. Scip. Ch. i. Here he ought to have spoken of the Actions of such as walk in their Sleep, who have beaten, wounded, and killed others, while they were in that State. The Canon Law in the Clementines propounds such a Supposition, and determines, that their Actions are involuntary, and consequently not punishable. Si furiosus, aut infans, seu dormiens hominem mutilet, vel occidat, nullam ex hoc irregularitatem incurrit, Leg. de Homicid. vol. & cas. Lib. v. Tit. 4. But Mr. Hertius adds, with Reason (in his Treatise De Param. Jur. Germanic. Lib. iii. Param. 1. §. 4.) That if a Person that walks in his Sleep, being advertised of what he does in his Sleep, does not secure his Arms, and take other necessary Precautions to hinder him from doing any Mischief whatsoever, he is not excusable. See Tiraque. de Pan. temper. Caus. 5. Mr. Thomassius has published a Treatise of the Laws about Sleep and Dreams, which is the XI. of his Disputations held at Leipzig, and are collected into one Volume, Printed 1695.

NOTES on §. XII.

¹ 'Tis in the Original, Present or Future, which is a plain Mistake, and ought to be corrected thus, Present or Past, for that a future Crime be imputed by way of Retrospection, upon the account of some Action, which it is necessarily consequent upon, that Action must necessarily be produced. This is so true, that the Author himself, in his Elements of Universal Civil Law, P. 368, from whence these Words are copied, expresses himself exactly so. Neither the English Translator nor Mr. Hertius were aware of this Mistake, which quite spoils the Sense.

² Remotum est, quod ultra quam satis est, petitur, hoc modo: Quod si non P. Scipio Corneliam filiam Tiberio Graccho collocasset, atque ex ea duos Gracchos procreasset, tantæ seditiones nate non essent: quare hoc incommodum Scipioni ascribendum videtur. Cicero de Invent. Lib. i. Ch. xlix. See also the Thought of Vindex above, §. 7.

“ some Perturbation of Mind.” And the Emperor *Antoninus* frequently advanceth the like Doctrine^a. But *Aristotle* hath in many Places refuted this Opinion. As when^b he recites the following Argument of *Socrates*^c, design’d to prove, that *it was not in our Power whether we would be good or bad*: “ Because, supposing we should ask any one, whether he had rather be just or unjust, no Man would choose Injustice; whence it should appear, that if some Men are wicked, they are not wicked of their own Accord, and consequently none are of their own Accord good.” In Confutation of which *Aristotle* hath us’d these Reasons; “ That it would be absurd for a² Lawgiver to enjoin good Actions, and to forbid and to punish Evil, unless both were ἐφ’ ἡμῖν, in our Power: And that otherwise there would be no manner of Cause why Virtue should meet with Praise, or Vice with Disgrace and Reproach. In another Work^c he handles the Point more at large, and with good Reason³ rejects that common Argument of the *Stoicks*, *All desire and follow what appears good to them; but now no Man is Master of his own Fancy, but the Ends he pursues appear to him just, according as he is inclin’d and dispos’d.* For in spite of this Objection, the Understanding of what is just, and what unjust, must be acknowledg’d both to be in the Power of Man, and to be attainable without much Difficulty or Labour^d. In the same Place *Aristotle* well observes, that as Ignorance contracted by our own

Fault doth not render an Action involuntary, so neither can an ill Habit, or a Mind corrupted by Frequency of sinning⁴. “ If (says he) a Man, not out of Ignorance, does Things which may denominate him unjust, he is voluntarily, unjust; but he cannot, at his Will and Pleasure, turn from unjust to just again (but this we are to understand⁵, either in a compound Sense, *i. e.* that he cannot be just and unjust at the same Time; or else in this Meaning, that the bare Will cannot presently abolish a confirm’d Dis temper of the Mind; tho’ by long and earnest Endeavour it may be overcome) “ no more than a sick Man can be found again when he pleath, tho’ his Sickness, perhaps, was voluntary, occasion’d either by his intemperate Way of Life, or by his Disobedience to the Orders of his Physician: Such a Person at first had it indeed in his Power not to be sick; but when he hath once neglected his Health, it is not in his Power to restore it: In the same Manner, as one, who hath thrown a Stone out of his Hand, cannot recover it again, though at first he had the Power of throwing or not throwing it. Thus the unjust and the intemperate, at first might have been otherwise, and therefore were voluntarily such, but being once under those Conditions, they are not at Liberty to be without them; that is, before they have reform’d and corrected themselves⁶”.

It may not be amiss to cast an Eye upon what the

^a Lib. iv. §. 3. Lib. vii. §. 22, 62. Lib. viii. §. 14. Lib. xi. §. 18. ^b *Magn. Moral. Lib. i. Ch. ix.* ^c *Ethic. Lib. iii. Ch. vii.* ^d *Vid Eustrat. ad loc.*

MR. BARB. NOTES ON §. XIII.

¹ Σαυκράτης ἴφθ, ἐκ ἐφ’ ἡμῖν γινώσκῃ τὸ σπαρδαίως εἶναι ἢ φαύλως· εἰ γὰρ τις, φησὶν, ἐραστήσῃ ὅτινα ἐν, πίπτειν ἀν βέλονται δίκαιον εἶναι, ἢ ἀδίκον, εἰς ἐν λέγοντο τὴν ἀδικίαν ——— ὄντων ὡς εἰ φαύλοι· τινὲς εἰσιν, ἐκ ἐν ἑαυτοὶς εἴσαν φαύλοι ὡς ἐν δόλο· ὅτι ἐδὲ σπαρδαίως, *Magn. Moral. Lib. i. Ch. ix.* We may observe, that there is something of Truth in this Notion, *viz.* That ordinarily Men do not sin for nothing, nor do any ill Thing purely and simply for Evil-doing. ’Tis a common Maxim us’d by *Salust*, *Men are wicked for Rewards, take away them, and scarce any Man will do Evil.* *Orat. 2. de Re- pub. Ordinan.* See *Lib. iii. Ch. i. §. 1. Note 5.* following, and *Lib. viii. Ch. iii. §. xix. Note 1, 2.* The Use of this Principle is to make us merciful to our Neighbours Faults, a Consequence which the Emperor *Antoninus* draws from most of the foregoing Places; but when we deal with our selves, as we never are severe to our own Faults, let us turn the Balance, and always say, as *Max. Tyrius*, though a *Platonist*, expresses himself pithily and in a few Words. *Εκείνου η̄ μαχθηρία ——— μισήται τὰ ἐκείνου* *Dissert. xli. p. 426. Edit. Davis.*

² The Greek of *Aristotle* runs thus: Ο̄ δὲ ταῦτῳ λόγῳ ἐκ εἶναι ἀληθὲς διὰ τὸ ὅτι ο̄ νομοθέτης ἐκ ἐπὶ τὰ φαύλα πράττει, τὰ δὲ κακὰ ἢ σπαρδαίως κίσει; ἢ ἐπὶ μὴ τοῖς φαύλοις ζῆλον τάττει, ἀν πράττει· ἐπὶ δὲ τοῖς καλοῖς, ἀν μὴ πράττει; καὶ τοῖ ἀποπῶν ἀν ἐπὶ ταῦτα νομοθετῶν, ἀ μὴ ἐφ’ ἡμῖν ἐστὶν πράττειν· ἀλλ’ (ὡς εἰκὸν) ἐφ’ ἡμῖν τὸ σπαρδαίως εἶναι, ἢ το φαύλως, ἐπὶ δὲ μαρτυροῦσιν ὅτι ἱκανοὶ ἢ ψόγοι γινώσκουσι ἐπὶ μὴ ὅτι τῆ ἀρετῆς ἔτανον, ἐπὶ δὲ τῆ κακίᾳ· ψογῶν ἔτανον δὲ ἢ ψογῶν ἐκ ἐπὶ τοῖς ἀκαρίοις. *Arist. Mag. Moral. Ch. ix.*

³ The Greek is, Ἐπὶ δὲ τις λέγει, ὅτι πάντες ἐφίονται τῷ φαινομένῳ ἀγαθῷ, τὸ δὲ φαινομένῳ ἐκ εἶναι, ἀλλ’ ὁποῖός ποθ’ ἑκαστὸς εἶναι, ταῦτο ἢ το τελῶ φάνεται αὐτῷ. *Ethic. ad Nicom. Lib. iii. Ch. vii.* He answers to this, That as every one is himself the Cause of that Disposition which causes Things to appear to us after a certain Manner, so he is in some Sense the Cause of that Appearance, as these Words import, *εἰ μὴ ἐν ἐκαστῷ αὐτῷ τὸ εἶναι ἐστὶν αὐτοῦ αὐτοῦ, ἢ τὸ φαινομένῳ εἶναι πᾶς αὐτοῦ αὐτοῦ.* See *Eustratius’s* Comment on the Place.

⁴ The Greek is, Εἰ δὲ μὴ ἀγνοῶν τις πράττει, ἐκ ἐν ἑαυτῷ ἀδίκῳ, ἐκὼν ἀδικῶν ἀν εἶναι· ἐκ μὴ ἐκὼν γὰρ βέλονται, ἀδίκῳ· ἀν πάνσι- ται, ἢ ἔσται δίκαιῳ· εἰς ἐπὶ ὁ νοσῶν, ὕγιος ἢ εἰ ἔσται ἔτιον, ἐκὼν νοσῶν, ἀκαρτέως βιοτείναν, ἢ ἀπὸ τῶν τοῖς ἰατροῖς· τότε μὴ ἐκ ἐκὼν αὐτῷ μὴ νοσῶν προσιμένῳ δὲ, ἐκ ἐπὶ ὡσπερ ἐδ’ ἀφ’ ἐπὶ λίθου, ἐπὶ αὐτὸν δυνάμει ἀναλασῶν ἀλλ’ ὅμως ἐπ’ αὐτῷ τὸ βυλῆν, ἢ εἰς· εἰ μὴ ἄρρη ἐπ’ αὐτῷ ἔσται δὲ ἢ τῷ ἀδίκῳ, ἢ τῷ ἀκαρτέω, ἐκ ἀρχῆς μὴ ἐκὼν ταῖς μὴ γινώσκῃ· διὸ ἑκόντες εἰς γινώσκῃς εἰ ἐκὼν ἔσται μὴ εἶναι. *Ethic. Nicom. Lib. iii. Ch. vii.*

⁵ That is to say, that Sinners, as such, can’t desire to be good Men. See the *Art of Thinking, Part. iii. Ch. xviii. §. 6.*

⁶ Now that a Man may hinder himself from yielding to a Passion, and may reform an ill Habit at length, if he pleases to take the Pains, appears not only from the secret Checks which he finds in himself when he sins, and the inward Sense he has of the Freedom of Will by which he acts, but also by Experience. It oftens happens, that in the very Moment when a Man offends, the Presence of some considerable Person, or of a Magistrate, who has Power to punish the Action, is of Force to prevent the Commission; and there are some Men who can curb themselves in, when their Passions are strongest. Sometimes also a small Thing is able to make us resist a Temptation. Suppose, for Example, a Drunkard by Profession, being in perfect Health, and free from all Cares, comes thursty into a Tavern, where he finds his Companions with Glafs in Hand, who doubts, but that upon a Wager, he could, he could, and would resist all Allurements of the Objects which might tempt him, and the most earnest Entreaties of his Comrades? Since then the Hopes of a small Gain, or a little Vainglory, is able to oblige him to abstain from a Thing he loves so well, why may he not be able, by little and little, wholly to abstain from it, being moved with better Arguments, and a Principle of Virtue? It is certain, at least, that if a Prince resolves to make severe Laws against Drunkenness, and sees them well executed, he’ll soon put a Stop to that Vice. ’Twas by this Means that the Madness of Duelling, not long since so very common in *France, Brandenburg, Saxony, &c.* is almost quite laid aside, because of the severe Prohibitions of that pernicious Custom; and we should see fewer Examples of it, if the Laws against it were not eluded, by making a Duel pass for a single Encounter.

the Author of the Treatise *De Principiis Justi & Decori*, p. 165, &c. hath advanced on the Subject of moral Habits. "Those moral Habits which we commonly call Evil, are not (says he) really Sins, nor worthy of Punishment, if consider'd in themselves; because they do not touch the Effect with any moral Causality, so long as they continue Habits, but only as they break out into Acts. And if they prove a Hindrance to Virtue, this is done by an *elicit* Act of Mens Will, which Will is then the Cause of the moral Vice. But to establish a moral Cause superior to the Will, is to take away the Nature of that Faculty, it is to turn one *elicit* into an *enjoin'd* Act, and to attribute to Habits an actual Efficacy of operating without any Operation. For we operate only by the Will, and nothing truly moral can work before the *elicit* Act of that Power, from which alone proceeds the Morality of any Performance. For an ill Habit before the Act of the Will, is only a physical Thing, or a Mode of the Soul; but when the Soul works sinfully by the Will, then the Habit ceaseth, and is superseded. The Efficacy by which ill Habits dispose the Mind to ill Actions, is different from that (for Instance) by which lewd Discourse instils Wantonness into the Minds of the Hearers: Because that Discourse may be properly said to work antecedently to the Will of him to whom it is applied, though the Effect doth not always follow." Which abstruse Doctrine may fitly enough be explained by this Similitude: Splayness of Foot in itself, and as long as the Foot rests, is not a Fault against the Rules of Dancing, but when the Spark makes an ill Step; the moral Cause of that Miscarriage is not the turning out of the Toes too far, consider'd in itself, but the Will of him that hath so awkwardly mov'd them.

The same Author adds, That "the Reason why we hate ill Habits, is partly because the Persons got them by ill Actions, and partly because they are more prone to ill Actions on the Account of them:" And that *tho' they are Diseases of the Mind, yet they do not deserve Punishment in themselves, but because they were voluntarily contracted.* As if we should say, when we beat an unlucky Boy that puts out his Ankle by a wanton and negligent Leap, the Reason why we beat him, is not the putting out his Ankle (*in itself*) but the idle Leap that caus'd it.

XIV. A Man is not only liable to have his own Actions imputed to him, but likewise the Actions of other Men. Yet this cannot rightly be, unless he has some way or other efficaciously concurr'd in their Production. For otherwise Reason will never suffer that the Effect of a moral Action should be transferr'd from one to another, unless this other Person had some Influence on the Action, by some Performance, or some Omission of his own. *Arrian. Epict. Lib. i. Ch. xxviii. 'No Man suffers for the Fact of another.* *Marc. Antonin. Lib. viii. §. 53. Unto my Free-will my Neighbour's Free-will (as his Life, or his Body) is altogether indifferent. For although we are all made one for another, yet have our Minds and Understandings each of them their own proper and limited Jurisdiction. Else another Man's Wickedness might be my Evil; which GOD would not have, that it might not be in another Man's Power to make me unhappy.* Thus when a Sound arrives at our Ears against our Consent, the bare *Hearing* can be no Crime, if we proceed no further; unless, as *Lucian De Imagin.* speaks, *You fancy any Crime in the bare Act of Hearing.* Though sometimes indeed a quiet and silent Hearing is construed as a Token of Consent. And 'twas on this Account that the brave *Germanicus*, when on the News of *Augustus's* Death, his seditious Soldiers offer'd him the Empire, started immediately in Confusion from his Seat of Command, *as if he had been already tainted with Rebellion,* *Tacit. Annal. Lib. i. Ch. xxxv.* So also *Themist. Orat. xix. Heretofore, in Crimes of this sort, no Distinction was made between Misfortune and Guilt: it being judg'd as heinous to bear a villainous Proposal, though against one's Will, as to contrive the Plot, or to attempt the Execution. But this was indeed to censure and reproach Nature for framing our Ears flat and open, and for not putting it in our Power to close and contract them, as we do our Eyes or our Mouth: since these alone, of all our Instruments of Sense, are plac'd beyond our Will and Command, lying ready to receive of Necessity every Thing that flows in, like a House without Gates or Doors. But you at length, have restor'd our Faculty of Hearing to its just Character of Innocence.*

Sometimes, then, it happens that an Action is not imputed to the immediate Performer of it, but to him who commanded it to be done. As when a Superior, under the Penalty of the severest Evils, and such as he is really able to inflict, enjoins a Subject the bare Execution of some Deed. Thus,

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See Chap. iv. §. 7. Note 2. foregoing, and Mr. Clerc's *Ontology*, Chap. xiii. §. 4. In a word, we may say, with an antient Greek Poet, That it is, in truth, hard to reform an ill Habit, that is become almost natural, but not impossible, since we have seen several Persons reform their Manners by good Advice given them by others, as his Words shew,

Τὸ ἦδ' ἀποστῆναι χαλεπὸν Φύσει ἢ ἐξήλ' τις αἰεί. Καὶ τοὶ πολλοὶ ταῦτ' ἔπαυον.	Ἐνώπιος γνάμμαις ἐτέρων Μεταβάλλοιο τὰς τρίπυς. Aristoph. Vesp. ver. 1446.
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7 Very well, but they are answerable for their evil Dispositions, because they have brought them on themselves; by their own Fault. In short, all these Reasonings contain nothing in them but the idle Speculations of subtil Philosophy.

NOTES on §. XIV.

1 The Greek of *Arrian* runs thus: Δι' ἀλότριν ἔργον πλείη ἔδειξ, &c. *Antoninus's* thus, Τῶ ἐμῷ προαιρητικῷ τὸ τῆ πλησίον προαιρητικῶν ἐπίσης ἀδιόφασον ἐστίν, ὡς καὶ τὸ πνευματικῶν αὐτῶν, καὶ τὸ σαρκικῶν καὶ ἦδ' εἰ ὅτι μάστιγα ἀλλήλων ἐπέκειν γηγίνεωσιν, ὅμοιαι τὰ γρημοικα ἡμῶν ἕασον τὴν ἰδίαν κυρίαν ἐχθ' ἐπί τοῦ ἔργου ἢ τῆ πλησίον κακία ἐμῶ κακῶν εἶναι ὅπερ ἐκ ἰδούε τῷ Θεῷ, ἵνα μὴ ἐπ' ἀλλῶ ἢ τὸ ἐμῆ ἀτυχεῖν. *Marc. Antonin. Lib. 8. §. 56.*
 2 *Lucian's* Greek is this, Ἐκτός εἰ μὴ τινα νομίζεις ἀπρόαυτεῖ ἐνθυμῶν εἶναι. *Apolog. in fine.*
 3 *Themistius's* Words (*Orat. xix. De humanitate Theodosii*, p. 230. *Ed. Par. Hard.*) are, Καὶ πάσαι μ' εἰ δεικνύμετο ἐν τῷ τοιαῦτο ἐγκληματι ἀδίκημα δυσυχμαῖο, ἀλλ' ἐν ἰσῶ καθίσκη τὸ βασιλεύσαι τι τῶν ἀθέσμων, καὶ τὸ πειθεῖσθαι μὴ προελαμένον καὶ τοὶ φ' φύσιος ἐγκλημα ἢν τῆτο, ἐ τῆ ἀθεῶτα. ὅτι τὴν ἀκον ἐποίησεν ἀναπειλαμένῳ, καὶ εἶχε ὡσπερ τὰ βλεφαρα καὶ τὸ στόμα ἐφ' ἡμῶν κλείει καὶ ἀνοίγει, ἔτσι καὶ τὰ ὦτα. ἀλλ' αὐτῆ μόνῃ χειρὶ ἢ αἰδέσις σιπέφυγε τὴν ἐφ' ἡμῶν ἐξουσία, καὶ δεικνύει ἀνάγκη πᾶν τὸ πεισπαίειν αὐτῆ, ὡσπερ ἄνημα ἄβυρον καὶ ἀνεργμῶν. Σὺ δὲ τὴν μὲ ἀκον ἐξῆλες παντάσῃ τῶ ἐγκλημάτων.

as ^a *Procopius Hist. Goth. Lib. i.* well observes, “ An Ambassador, at the Command of him whom he represents, speaks such and such Words; in which if there appear any Fault or Offence, it ought not to be charged on him, but on his Master, whose Orders and Instructions he is under a Necessity of obeying.” When the Roman Senate declar’d the League with the *Samnites* to be base and inglorious, and voted the delivering up the General, the Author of it, to the Enemy; it was a very senseless Proposal mov’d by one of the grave Fathers, that the same Punishment should be inflicted on the Person who held the *Swine* during the Ceremony of making the Agreement ^{a b}. When *Mithridates* put to Death *Attilius* and other Conspirators against his Life, he pardon’d *Attilius’s* Freed-men, who were of the Company, *ὡς δεσπότῃ διακονισαμένους* ^c, as Persons that only obey’d thier lawful Master.

But it’s more usual that the Action shall be imputed both to the Performer and to the Commander of it. And this is chiefly done in these three Ways: Either, that the Commander shall be the principal Cause of the Action, and the Performer, the inferior and accessory Cause, or that both shall be deem’d equally guilty, or that the Commander shall be the inferior Cause, and the Performer the Principal. And in all Cases the Concurrence to another Man’s Action is made either positively or privately, by some Commission or Omission.

First then, he is esteem’d the principal Cause of an Action committed immediately by another Man, who commands something to be done by one under his Power and Sway, or who by his bare ^d Authority, not easily to be resisted, moves a Man to the Performance of some Deed, which he could not have enjoin’d by Command or Power, properly so call’d. And this last was the Case of

Piso in ^e *Tacitus*, whom *Tiberius* himself excus’d from having any Guilt in the Civil War, since as he was a Son he could not decline his Father’s Orders ^d. But now his Father, by his paternal Right and Power, could not have oblig’d him to engage in such a Crime, and therefore he was mov’d only by his Authority.

Secondly, He who gives a Consent necessary requisite to the Performance, and without which the Agent had not proceeded. *Comp. Valer. Max. Lib. ii. §. 8. §. 2.* ^f *Liban. Progymn.* He is to suffer for the Fault, without whose Leave it had not been committed. *Id. ibid.* They are not so properly to be accounted the Authors of Crimes, whose Hands commit them, as they who gave the Power and Authority of committing them.

Thirdly, He who ought to have forbidden an ill Action, and did not; provided he had a full Obligation thus to prohibit it, and that upon the Account of that Obligation other Men had a Right of exacting such a Prohibition from him. *Vide Lib. xlv. D. ad L. Aquil. Lib. ii. De Noxal. act. Lib. i. §. 1. D. famil. furt. fec.* *Seneca Troad. Qui non vetat peccare cum possit, jubet.* Not to forbid a Sin, when in our Power, is to command it. *Sophocl. Philoctet.* ^g — Men are influenc’d into Vice by bad Instructors. On this Score *Diogenes* beat a Schoolmaster, whose Boys were too much given to their Bellies, Not imputing the Fault (as ^h *Plutarch* says) to them for not learning better Things, but to him for not teaching them. *Libro, virtutem doceri posse.* *Vide Ælian. Lib. iii. Ch. x. Juvenal. Sat. xiv. 233.*

Nemo satis credit tantum delinquere, quantum Permittas; adeo indulgent sibi latius ipsi.

All think too streight th’ Indulgence they receive; And to themselves a kinder License give.

Add. Lib. iv. §. 2. D. De Offic. Procons. Thus *Messalinus* in *Tacitus An. 4.* ⁱ advis’d, that a Decree of

^a This Custom of using Swine at Times of Pacification, is accounted for, *Livy, Lib. i. Ch. xxiv. Si populus Rom. prior defecerit publico Consilio, dolo malo; Tu illo die, Jupiter, P. Rom. sic ferito, ut ego hunc Porcum hodie feriam: tantoque magis ferito, quanto magis potes pollesque. Id ubi dixit, Porcum Silice percussit. To this Purpose, Virg. En. viii. 641. --- Casa jungebant fœdera Porca.* See Mr. Kenner’s *Rom. Antiquities, Part ii. Ch. xvii.* ^b *Cicero de Invent. Lib. ii. Ch. xxx. Mamertin. Paneg. i. Whatever is transacted by his Commission, is properly the Deed of the Emperor. Seneca Troad. Ad authores rediv sceleris coacti culpa. The Guilt of Mischief acted upon Force turns on the Authors. --- Appian. B. Mithridat. ^d *Add. Lib. xxxvii. Princ. D. ad L. Aquil. Lib. ix. §. 2, &c. D. De Injuriis; Ant. Matth. de Crimin. Proleg. Ch. i. §. 13.**

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⁴ The Greek is this, *Λόγους δὲ ὕστερ ἀν ἐκ τῆ περιψαυθῆ ἀκκηκῶς εἶπη, ἐκ αὐτὸς τῶν ἐντεῦθεν αἰτίαν, ἢ γε ἐκ ἀγαθοῦ τύχῳσιν ἀνέως εἰκότας ἐν λάσῃ. ἀλλ’ ὁ μὲν κλέστας φερατο ἀν δικάως τὸ ἔγκλημα τῆτο, τὰ δὲ προσεδότη τὸ τὴν ὑπερρίαν ἐκτελέσαι πᾶσι μόνον.* *Procop. Hist. Goth. Lib. i.* Among the Greeks, where a Master had an absolute Authority over his Slaves, these were looked upon as meer Tools, whatever they did, whether Good or Evil, employed by their Master. See Baron *Spanhemius* upon *Callimachus Hymn. in Cerer.* Yet we ought to observe, that an Action perform’d at the Command of a Superior, is not altogether excusable at the Judgment-Seat of God, especially if he doth any Thing which he knows clearly to be Evil in itself. See §. 2. Note 9. So that we must by no means approve the Opinion of the Antients. That it is a sort of Virtue to commit a Fault in Obedience to a Master, as the Poet speaks, *Pro Dominis peccare, etiam virtutis loco est.* *Publ. Syr. §. 567.*

⁵ Authority here, signifies not a Power, or Command, which one has over another, but the particular Respect which a Person bears in his Mind to another, either upon the Account of his Merit, or Superiority, or some other Reason, which engages him to pay a great Deference to his Will and Pleasure (for which Reason the French Translation renders it, *La Consideration, Respect, or Regard*) according to *Livy’s* Distinction, speaking of *K. Evander, Autoritate magis quam imperio regerat ea Loca, Lib. i. Ch. vii.* He ruled more by his Authority than Command. And, on the contrary, of a King of *Numidia*, named *Capusa, Quum magis jure gentis quam Autoritate inter suos, aut viribus obtineret Regnum. Lib. xxix. Ch. xxix.* He obtained the Kingdom more by Law of the Nation, than by any Authority he had with his People, or Power to oblige them. *Tacitus* also speaks of the antient German Kings, *Mox Rex, vel Princeps, prout atas cuique, prout nobilitas, prout decus bellorum, audiuntur, autoritate suadendi, magis quam jubendi potestate, Ch. xi.* Then the King or Prince, as every one was more aged, noble, or warlike, was listened to more for persuasive Eloquence than commanding Power.

⁶ *Tacitus’s* Words are, *Post que Tiberius Adolescentem [Pisonem] crimine civilis Belli purgavit: Patris quippe Jussa nec potuisse filium detrectare. Tacit. Annal. Lib. iii. Ch. xvii, num. 1.*

⁷ The Greek runs thus, *Ὁ γὰρ μὴ συγκαταστήσας ἐκ ἀν ποτε ἐπέπρακτο, τῆτοι ἡγάτο δίκην ἢ πραχθῆσαν ἐφ. ἰδὲν—Δεῖ τὰ ἀδίκηματα νομίζῃν ἢ τὰς χερσὶν ἐργαζομένον ἑακθον, ἢ τὸ δυνθῆσαι διδασκῆται. Liban. in Progymn. p. 12. D. Ed. Morel.*

⁸ The Greek is, *Οἱ δ’ ἀκοσμητὲς βροτῶν διδασκάλων λόγοισι γίγονται κακοί. ver. 386.*

⁹ His Words are, *Παιδὸς ὀφθαλμῶν, ὁ Διουγῆς τὰ παιδαγωγῶν δάκτυλοι ἴδωναι. Οὐδῶς ἔ τῶ μὴ μολύσσει, ἀλλὰ τῶ μὴ ἀλλάξει, τὸ ἀνώδημα ποίησαι. In Libro, Virtutem doceri posse.*

¹⁰ *Tacitus’s* Words are, *Messalinus Cottam--- censuit cavendum esse Senatūs consulto, ut quanquam Infantes Magistratus, & culpe alienæ nescii, provincialibus Uxorū criminibus, perinde quam suis plesterentur. Tacit. Annal. Lib. iv. Ch. xx. num. 5. Senatē*

Senate should pass to punish the Magistrates for the Crimes committed by their Wives, in Relation to the Government of the Provinces, whether they themselves were concern'd or unconcern'd in the Fact. And thus too, by the *English* Laws, the Husband is oblig'd to answer and to make Satisfaction for the Wrong his Wife doth to another, either by Word or Deed; because he neglected to use his Power of restraining her. Nay, if the Husband and Wife commit *Felony* together, the Wife is accounted neither a Principal nor an Accessary in the Crime, because she is suppos'd to have acted upon Necessity, by virtue of the Obedience she owed her Husband ^a.

Fourthly, He who commands, or hires a Person to perform a Villany ^b.

Fifthly, He who assists; as he who brings and holds the Ladder, while a Thief gets into a Window: He who strikes the Money out of a Man's Purse, that another Rogue may pick it up: He that drives away a Man's Cattle, that his Comrade may seize them, and carry them off ^c.

Sixthly, He that conceals or receives stolen Goods. *Phocylid.* Ἀμφοτέρω κλέπτες, καὶ ὁ δεξάμενⓄ καὶ ὁ κλέψας. They that receive arearrant Thieves no less than they that steal. *Plato* LL. Lib. xii. He that knowingly takes into his Keeping stolen Goods, shall be esteem'd equal in Guilt to the Thief himself. Lib. i. Princ. D. de fugitivis. Add. Ch. i. D. de receptoribus, & Edict. Reg. Theodoric. Ch. cxvi. Concerning the Assistants or Abettors in Adultery, see Lib. viii. Lib. ix. D. ad L. Julian de adulter. ^d Perianther the Tyrant of Corinth threw all the Bawds into the Sea, *Heraclid.* de Polit. Add. Anth. Matth. de Crimin. Proleg. Ch. i. §. 11. & ad Lib. xlvi. D. tit. 10. Ch. i. & ii.

Seventhly, He who did not assist the suffering Party, tho' he was oblig'd to do so. ^e *Cicero* Off. i. He that doth not, when he is able, guard and protect an injur'd Person, is as much in Fault as if he should desert his Parents, his Country, or his Friends. Add. Anth. Matth. de Crimin. Proleg. Ch. i. §. 15. Thus Soldiers, who are hired for a Guard in a Journey, if, on the Approach of a Number of Villains, whom they are able to grapple with, they refuse to fight, they are to be reckon'd themselves among the Villains. Thus a Fire shall be rightly imputed to the Watchman, who saw it kindling, yet neglected to stop it, or call for Help ^f. Thus a-

mong the *Egyptians*, if a Man on the Road saw another kill'd, or suffering any Violence, and did not rescue him though he was able he was obnoxious to capital Punishments. And if the Man was too weak to give Assistance and Deliverance, he was oblig'd to discover and prosecute the Actors: Upon Default thereof, he received a set Number of Blows, or was injoin'd a three Days Abstinence from Victuals ^g. And thus *Abas* King of *Persia*, to clear his Country of Thieves, publish'd an Order, that whenever any Person was kill'd, or plunder'd, the Inhabitants of the next Town should be accountable for the Fact ^h. So with ⁱ the *Spartans*, he that did not reprove a Person who offended in his Pretence, was punish'd as a Partner in the Crime. So ^k *Cato* exhorting the Magistrates to put the Laws in Execution against Offenders, told them, "That those who were able to restrain wicked Doers, and yet neglected this Power, did plainly assent, and contribute to their Enormities ^l." As for the Silence and the Dissimulation of the Magistrates, *Plato* ^m has given those Crimes their due Centure: *The second Enemy to a State* (says he) is the Man, who, tho' he be not strictly a Partner in this Villany (he means Treason) yet while he enjoys the highest Offices in the Commonwealth, does not observe the Conspiracy; and if he does observe it, out of a timorous Baseness neglects to succour and to deliver his Country. The Story of *Scedasius's* Daughters in *Plutarch*, *Amator*. Narration. *Grotius* ad Prov. xxix. 24. He that knows the Thief, and doth not, when requir'd upon Oath before a Magistrate, discover him, is in Guilt equal to him, *Vide* Levit. v. 1. ⁿ

For the same Reason, if a Keeper, who has undertaken the Care of a Madman, prove negligent, and the Madman happen to do any Hurt, the Keeper shall be answerable for the Fact, tho' the Madman be not capable of *Imputation*. *Vide* Lib. xiv. D. De Offic. Præsid.

Those Persons are reckon'd the inferior, or less principal Causes of other Men's Actions, who have advis'd, commended, or cajol'd them before the Facts, in such a Manner, as that their Counsel, or Praise, or Flattery, has had any Weight in promoting their Undertakings. For otherwise, a Man who barely commends a Crime, and yet by his Commendation contributes nothing to it, ought not to be punish'd for the Crime itself, but should suffer for his ill Thoughts and Designs ^o. It will not be very unjust to reckon those in the same Class,

^a Chamberlain's *Present State of England*, p. i. Ch. xvi.

^b *Id.* Lib. liv. §. 4. Lib. lxxv. §. 2. D. De furtis.

^c *Id.* Lib. vii. D. Nautæ caus. Stab. Lib. ii. Lib. vi. D. ad l. Pompeian de Paricid. Lib. vii. d. Ch. Lib. ix. §. 1. D. ad. D. Cornel. de fals. Lib. vi. §. 8. D. De re militari.

^d *Vide* Pet. de Valle Trinear. p. ii. Epist. i.

^e *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^f *De* LL. Lib. ix.

^g *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^h *De* LL. Lib. ix.

ⁱ *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^k *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^l *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^m *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

ⁿ *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^o *Vide* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^b *Vide* Anth. Matth. d. Lib. §. 12. & ad Lib. xlvi. D. tit. Ch. iii.

^c *Id.* Ezech. xxxiii. v. 6.

^d *Id.* Diador. Sic. Lib. i. Ch. lxxvii. Add.

^e *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^f *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^g *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^h *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

ⁱ *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^k *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

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ⁿ *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

^o *Id.* Lib. ii. D. De noxal. act. Lib. vii. L. qui sine manumissione, t. 1. De Magistratibus conveniendis.

Qui monet ut facias quod jam facis, ille monendo Laudat, & hortatu comprobat acta suo.

Who prompts you to go on, approves the Ways You took before; and his Advice is Praise.

So in the Constitutions of the Lombards, Lib. i. tit. 9. §. 25. He that stands by and encourageth the Commission of any Villany, is himself adjudg'd an Actor in it. Add. Rom. Ch. i. ult. *Quintil.* Declam. 255. To commit a Villany, and to approve of it, are Actions naturally resembling each other, Anth. Matth. De Crimin. Proleg. Ch. i. §. 9, 10, & 14.

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¹ The Greek is τὰς προαγωγὰς πᾶσας κατεπόντισα. As to those who are Procurers for Adulterers, see *Digest.* Lib. xlvi. Tit. 5. ad Legem. *Julian* de Adulteriis, Leg. viii. & ix.

² *Cicero's* Words are, Qui autem non defendit, nec obsistit, si potest, injurie, tam est in vitio quàm si parentes, aut amicos, aut patriam deserat. De offic. Lib. i. Ch. vii. Mr. *Hertius* cites also *Aristotle* de Mirab. auscult. where he speaks of a certain Road of Italy between France and Spain, in which the Inhabitants nearest the Place were oblig'd to indemnify Travellers, if they had had any Thing taken from them, or received any Wrong or Injury.

³ *Plutarch's* Words (*Insit. Lacon.*) are these, Ὁ δὲ μὴ ἐπιπλήτῳ παρόντιⓄ αὐτῷ ἁμαρτάνοντα, ἕοχⓄ ἢ τῷ ἰσῆ ἐπιτιμίᾳ, ὥσπερ καὶ ὁ ἁμαρτάνων.

⁴ *Plutarch's* Words are, Παρορμηθῶν δὲ τὰς ἀρχοντας ἐπιτιμῶν τοῖς ἁμαρτάνουσιν, ἔλεγε τὰς δαυμῶνας καλοῦν τὰς κακῶς τοῖντα: ἐὰν μὴ καλοῦσι, κατακέλευν. *Plut. Arothibegm.*

⁵ The Author himself a little lower says, Nothing is to be imputed to the Madman; whereupon it would have been better to have put this Example among those Actions for which a Man is as much responsible as if they had been actually done by him. See *Dig.* Lib. i. Tit. 18. De Offic. Præsid. Leg. 14.

who by their Recommendation have prefer'd a Man to the Care and Management of any Business, since 'tis decent they should blush for his Faults and Miscarriages ^a.

But as to the Matter of Counsel, it's worth while to run over the Disputes of the ¹⁶ *Civilians*, where they are arguing whether the Words *Ope* and *Consilio*, by *Help* and by *Counsel*, are to be understood in a Conjunctive, or in a divided Sense. For if *Counsel* imports the same as Intention or Design, he only will be guilty of another Man's Theft, who assisted him in it, not out of Imprudency, but with premeditated Wickedness ^b.

If Counsel has been given without Help, it will be requisite to enquire, whether it were General or Special. The former kind is, for Example, when a Man, hearing another complain of Poverty, advises him to support himself by Stealing; and such a Counsellor will not, in human Cognisance, pass himself for a Thief. But if a Man has given special Counsel to another, as, if he has shewn him what way to break into a House, told him the fittest Time, and where the Things be that may be most conveniently carried off, or how he may hide himself after the Fact, such an one will have a very strong Twang of the Thief ^c. It is further observable, in reference to Counsel, and other like Influences on other Mens Actions, that by them the Guilt is only communicated; but not wholly devolv'd from the Actor to the Exhorter, unless the former were under an ¹⁷ Obligation to put his Advice in Practice. Hence *Diodotus* in *Thucydides* ^d complains with good Reason, "That the Orators in a State should be accountable for their Advice, and the People not at all accountable for hearkening to them." He adds ^e, "If he that believ'd, as well as he that persuaded a Business, were liable to be punish'd, you would proceed much more wisely in your Judgments. But now, when you fall into Passions on any Disappointment of your Hopes, you only punish him who gave the Advice, and not your selves, who have always born so great a Share in the Mistake, or Miscarriage. Hence Mr. *Hobbes* ^e thus declares in general, *This is also incident to the Nature of Counsel, that whatsoever it be, he that asks it cannot in Equity accuse or punish it: For to ask Counsel of another, is to permit him to give such Counsel as he shall think best; and consequently he that gives Counsel to his Sovereign (whe-*

ther a Monarch, or an Assembly) when he asks it, let it please or displease, cannot be punish'd, because he gave it to such as were willing to bear it, whatsoever it should be. But he here should have added, If the Counsellor gives his Opinion bona fide, and has a perfect Knowledge of the Matter in Debate. For it is a Piece of Wickedness to pretend to give a Judgment about a Thing which we are unacquainted with. He presently subjoins; But if one Subject gives Counsel to another to do any thing contrary to the Laws, whether that Counsel proceed from evil Intentions, or from Ignorance only, it is punishable by the Commonwealth, because Ignorance of the Laws is no good Excuse, where every one is bound to take notice of the Laws to which he is subject.

Hence that Maxim in England, commended so highly by Dr. *Bates* ^f, cannot be receiv'd without some Limitation; *That the King can never mistake, nor do any Man an Injury, because all the Fault and Punishment is deriv'd, as it ought to be* ¹⁹, *on his Ministers and Counsellors, whose Duty is to Admonish the Prince, to deny him their Assistance, when he enters on ill Designs, and rather to quit their Places than to obey him, when he commands the doing of any thing contrary to the Laws.* Add. *Gell. Lib. i. Ch. iii.* Where he tells us of *Chilon*, that he was troubled with Remorse of Conscience, upon his having persuaded the Judges to ²⁰ absolve a Friend of his manifestly guilty, and whom he himself had in private condemn'd. 'Tis a remarkable Story which we find in the same Author, *Lib. xi. Ch. xviii.* of a Person's being convicted as a *Man-stealer*, for hiding, with a Cast of his Gown, a *Runagate Slave*, who was passing within Sight of his Master.

It is doubtful, whether we should rank under this, or under the former Class those, who by their Example excite others to such Sins, as they would have otherwise declined. *Matth. xviii. v. 6. Juvenal. Sat. ii. 79.*

—————*Grex totus in agris
Unius scabie cadit, & porrigine porci;
Uvaeque conspecta livorem ducit ab uva.*

From one infected Beast the Murrain reigns
O'er all the Drove, and spreads them on the Plains:
And one corrupted Grape its purple Neighbour stains.

Add. *Grot. Lib. ii. Ch. xvii. §. 6. &c. and Ch. xxi. §. 2, &c. Ant. Matth. de Crimin. Proleg. Ch. i. §. 6, &c.*

^a Vide *Socrat. in Xenophon. Apomn. Lib. ii. P. 429. Ed. Steph.* ^b *Lib. lii. §. 13. D. de furtis.* ^c Vide *Ant. Matth. de Crimin. Proleg. Ch. i. §. 7.* ^d *Lib. iii. Ch. xliii.* ^e *Leviath. Ch. xxv.* ^f *Ulench. Mor. Part i.*

Mr. BARB. NOTES on §. xiv.

¹⁶ The Words of the Roman Law are, *Interdum quoque furti tenetur, qui ipse furtum non fecit, qualis est is, cujus ope & consilio furtum factum est.* *Instit. Lib. iv. Tit. 1. De obligationibus, quæ ex delicto nascuntur* (and not *De furtis*, as this Author and *Grotius* cite it, for that's no Title in the *Institutions*.) See also *Digest. Lib. 1. Tit. 16. De verborum signifi. Leg. 55. §. 2. and Lib. xlvii. Tit. ii. de furtis Leg. 36. §. 1.*

¹⁷ Which does not commonly happen; but, on the Contrary, he is responsible for his Fidelity only, as *CICERO* speaks very well, *Deinde, etiamsi te auctore, quid debet, qui consilium dat, prestare præter fidem*, i. e. If we advise others for the best, we are not answerable for the Event. *Lib. xvi. ad Attic. Epist. 7.* See Mr. *Hertius's* Notes upon §. 12. of this *Chap.*

¹⁸ The Greek is this, *Ἐὶ γὰρ ὁ τε πεισθεὶς, καὶ ὁ ἐπισταλθεὶς ἰσχυρῶς ἐλαπτοῦτο, σωφρονιστέον ἀν' ἐμίνετε, ἢν δὲ πρὸς ἕγγυ ὠττωα τοχῆτε ἔσιν ὅτε σφαλῆναι, τὴν τὲ πείσασθαι μίαν γνώμην ζημιῶτε, καὶ ὁ τὰς ὑμετέρας αὐτῶν, εἰ ποδαὶ ἔσαι ἐπιζημιῶσαι.* *Thucyd. Lib. iii. Ch. xliiii.*

¹⁹ In England, it is common to lay all the Faults of the Prince upon his Ministers, who are indeed very often most guilty of them, but the Fault of the Ministers does not always excuse the Fault of the Sovereign; for they have their Reason and Judgment, and may over-rule them; so that if they suffer themselves to be govern'd by those that are about them, 'tis their Fault. In most Affairs they ought to see with their own Eyes, and not leave themselves to be biased by a vicious and corrupt Ministry. But if they are not able to search into the Bottom of Things themselves, and distinguish between Good and Evil, they ought to leave the Governing the People to such as are able, for I do not see but the Saying of *Charles Barromaus*, which he spake of bad Bishops, who could not govern their Flocks, may be applied to Princes who manage ill. *If they are incapable of such an Employ, why are they so ambitious as to seek it? If they are capable, why so negligent?* Mr. *Bernard*, in his *Nov. Rep. of Letters*, speaks the same thing in plain Terms, which 'twere to be wish'd Princes would consider on as they are judiciously made.

²⁰ See the Reflections which Mr. *De Sacy* makes upon it, in his *Treatise of Friendship, Lib. ii.*

From all these Observations it is easy to perceive the Reason and the Limitation of those common Axioms; *What a Man does by another, of that he himself is reckon'd the Author: We make those things our own, to which we grant our Consent^a. That which, in Matters relating to us, is done by others upon our Command, obliges us our selves: That is esteem'd our Action, the Execution of which we have impos'd on another; and the like.* As for that Communication of Actions, which results from the Union of a moral Body, it will be hereafter explain'd in its proper Place.

When one is said to partake of another's Action, upon account of his own Permission, or because he did not hinder the Action, in this Case it is requisite not only that he should have been able by his natural Strength to have hindred it, but likewise that he should have had an Obligation incumbent on him to hinder it. When either of these Two Conditions fails, nothing can be imputed to him, who gives another leave to act at Pleasure. And therefore GOD ALMIGHTY is capable of no Imputation, upon the account of

his Permission of Sins. For he is not oblig'd to restrain them in such a Manner, as to make them impossible to be committed: That is, by withdrawing our natural Strength, or extinguishing the Liberty of our Will: since upon the Removal of these, no sort of moral Actions could be perform'd by Man^b.

That Permission then of another Man's Action, is void of all moral Effect, which we give when to hinder the Action is beyond our Duty, or above our Strength; unless this Weakness and Inability is procur'd by our Fault, and unless the Ignorance arose thro' supine Negligence, and within that Degree of Diligence which we are oblig'd to observe.

Lastly, Nothing can be imputed upon the account of permitting a good Action, which we might indeed, but ought not to have hinder'd. Thus he can impute nothing to me (or I owe him nothing) who has given me Permission, or has not forbidden me to use my Right; that is, has done me no Injury.

^a Lib. ii. tit. x. D. *Do eo per quem factum erit.* ^b 'Tis a notable Saying of Lucian, de Merced. Conduct. GOD is not in the Fault, but the Man that makes it. And thus we intend no more than a Jest, when we say, on some Occasions, Now I'll give it leave to rain, or the like.

CH A P. VI.

Of the Rule of MORAL ACTIONS, or Law in General.

The CONTENTS of every Section of the sixth Chapter.

- I. A Law differs from Counsel.
- II. From a Bargain, or Covenant.
- III. And from Right.
- IV. What a Law is.
- V. What an Obligation.
- VI. How it comes to pass that a Man is obliged.
- VII. No Man is obliged to himself.
- VIII. He that is to be obliged, must have a Superior.
- IX. How a Man may lay an Obligation on another.

- X. It can't be done by meer Force.
- XI. Nor by any Excellency of Nature alone.
- XII. What gives greater Force to an Obligation.
- XIII. The Law-giver and Law ought to be known.
- XIV. What are the essential Parts of a Law.
- XV. What is the Permission of a Law.
- XVI. The Matter of Laws.
- XVII. Who is obliged by a Law.
- XVIII. The Division of a Law.

WE come now to consider of that moral Rule, or Law^a, by which moral Actions are to be squar'd, and according to their Agreement or Disagreement with which, they acquire peculiar Qualities^b. And here we must take Care in the first Place, accurately to distinguish Law from some other things which seem to bear some Relation to it, and which for that Reason are frequently confounded with it: And these are *Counsel*, *Covenant*, and *Right*. Now Law differs from *Counsel* in this, that by the latter a Man endeavours, with Reasons taken from the Nature of the Thing, to induce another Person to some Performance or O-

mission, over which Person, at least as to the present Business, he has no proper Power, so as that he can lay any direct Obligation on him, but must leave it to his Pleasure and Choice, whether he will follow the Counsel, or not^c. Yet Counsel indeed may administer Occasion to an Obligation, inasmuch as it furnishes a Man with some Knowledge, by which an Obligation may be produc'd or increas'd. Thus, a Physician cannot by Virtue of any Power, or Command, order his Patient to take such things, and to abstain from others; but while he shews one thing to be conducive, and another pernicious to Health, the Pa-

^a See Book ii. Ch. i.

Mr. BARB. NOTES on §. I.

¹ Our Author ought to have treated in the beginning of this Chapter, of the Necessity of a Law in general, *i. e.* shew that it is not agreeable to the Nature of Man to live without some Law; which natural Order he follows himself, in his *Abridgment of the Duties of a Man and Citizen*, Lib. i. Ch. ii. §. 1. See also what he says, Lib. ii. §. 1.

² So the Civil Law teaches, *Nemo ex consilio obligatur; etiam si non expediat ei, cui datur; quia liberum est cuique apud se explorare, an expediat sibi consilium.* Digest. Lib. xvii. Tit. i. *Mandati.*

tient is bound to embrace the former, and to avoid the latter; not upon Account of any Right which the Physician holds over him, but by the Law of Nature, which commands every Man to take care of his own Life and Health. But Law, though it ought not to want its Reasons, yet these Reasons are not the Cause why Obedience is paid to it, but the Power of the Exactor, who when he has signify'd his Pleasure, lays an Obligation on the Subject to act in Conformity to his Decree, tho' perhaps they do not so well apprehend the Reasons of the Injunction. To which Purpose Mr. Hobbes^a thus expresseth himself; *Counsel* (says he) is a Precept, in which the Reason why we Obey, is taken from the Thing prescribed: But Law, or proper Command, is a Precept, in which the Reason of our Obedience is taken from the Will of the Prescriber. For no Man can say, *Sic volo, Sic jubeo*, so I will, and so I command; unless

--- -----*Stet pro ratione voluntas,*

his Will is his Reason.

We obey Laws therefore, not principally upon Account of the Matter of them, but upon Account of the Legislator's Will. And thus, *Law is the Injunction of him, who has a Power over those to whom he prescribes; but Counsel, of him who has no such Power. To do the Things enjoind by Law, is Matter of Duty; to do those appointed by Counsel, is Matter of free Pleasure. The End of Counsel is directed toward him who receives it: And this End he is at Liberty to weigh and to approve. But tho' Law too has commonly some End directed towards those who receive it, yet it does not leave them the Right of examining and rejecting this End, but actually determines it by enjoining it. Counsel is only given to those who are willing to have it, but Law reaches the unwilling. Lastly, The Right of a Counsellor ceases at the Pleasure of him who receives the Counsel; but the Right of a Law-giver cannot be taken away at the Pleasure of those on whom he imposes the Law*^b.

II. Neither were those Antients accurate enough in their Expressions, who frequently apply to Laws the Name of ¹ *Common Agreements*^c. For, besides that, neither the Divine positive Laws, nor the Laws of Nature, had their Rise from the Agreement of Men, and therefore that Title can only be attributed to *civil* Laws; even ² these are not properly Covenants and Agreements, tho' there was indeed some Intervention of Compact at the Original of Civil Power. It is plain that the *Grecians*, as in their other politick Speeches, so in this too, had an Eye to their own Democratical Governments; in which, because the Laws were

made upon the Propofal of the Magistrate, with the Knowledge, and by the Command of the People, and so, as it were, in the Way of Bargain or Stipulation, they gave them the Name of *Covenants* and *Agreements* before-mention'd. Tho' indeed, neither upon Account of the major Part of the Peoples consenting or agreeing to them, can democratical Laws be properly call'd Covenants. For this Agreement is only the Manner by which the supream Power, lodg'd in a general Assembly, exerts its Force; that being taken for the Will and the Decree of all, to which the greater Number gives Consent.

So that the Efficacy of a Vote given in Council by any Member about framing a Decree, is very different from the Consent which a Man declares at his Entrance on a Covenant: For in this last Case, a Person that dissent's is not bound, and the Party cannot proceed without him: Whereas in the former Case, even the dissenting Party is tied and obliged by the Plurality of Votes.

The remaing Points of Distinction between a Compact or Covenant, and a Law, are obvious. For a *Compact* is a *Promise*, but a *Law* is a *Command*. In *Compacts* the Form of speaking is, *I will do so* and so; but in *Laws* the Form runs, *Do thou so*, after an imperative Manner. In *Compacts*, since they depend, as to their Original, on our Will, we first determine what is to be done, before we are oblig'd to do it; but in *Laws*, which suppose the Power of others over us, we are in the first Place oblig'd to act, and afterwards the Manner of acting is determin'd. And therefore he is not bound by a *Compact*, who did not freely tie himself by giving his Consent; but we are for this Reason oblig'd by a *Law*, because we ow'd an antecedent Obedience to its Author^d.

III. As for the Term of *Right*, as it imports a Power of acting granted, or left free by the Laws, we must take care not to let it pass for the same Thing as the Law itself: That is, When we are said to have a *Right* by the Divine Law of doing such or such a Thing, we must not imagine that the same Thing is injoin'd and commanded by the Divine Law, and that therefore we may fairly do it, tho' it should be forbidden by the Laws of Men. For, since a Man hath a Power of doing all such Things as can proceed from his natural Abilities, except those which are forbidden by some Law, hence, by common Custom of Speech, those Things which are not prohibited by such or such a Law, we are said to have a *Right* of doing^e by that Law. *Right* therefore, in this Sense, denotes a Liberty; but *Law* includes some Bond

^a De Cive, Ch. xiv. §. 1. ad Alex. Ch. i, ii, iii.

^b Add. Dig. B. 17. Tit. 1. De Mandato.

^c Συμβολή τῆς πόλεως. So Aristotle Rhetor.

^d Vide Hobbes loc. cit. §. 2. Add. Grot. Annot. in Matth. Inscript. vocab. καὶ διατακῶν.

Mr. BARB. NOTES on Chap. VI. §. 2, and 3.

¹ Κοινὰ συμβόλαια, ἢ ἐπιμορφοίαι, as the Greeks almost every where in their Writings do. So Aristotle defines the Law, νόμος αἰρεσιμότητος καὶ ὁμοιογένειαν καὶ τὴν πόλιος. A Law is an Order decreed by the Common Agreement of a City, Rhet. ad Alexandr. Ch. i. See also Chap. ii, & iii. So Isocrates calls an Act of Oblivion and Indemnity, συμβολήν πόλεως, the Covenant of a City. Orat. adv. Callim. Dionysius Halicarn. says, Συμβόλαια εἶναι κοινὰ πόλιων τῶν ἡμῶν, i. e. Laws are the common Agreement of the City, Lib. x. ch. iv. See also the Digest. Lib. i. tit. 3. de Legib. Senatusque Consult. & Longa Consult. Leg. i. & 2.

² Indeed the End of Civil Laws is to engage Men to the Observation of certain Things, by a Motive more prevalent than any natural Obligation, i. e. by the Fear of Punishment, which the Breaker of them must expect from certain Persons invested with an Authority over them. But suppose a Number of Men should separate themselves from any Civil Society, and agree together to observe certain Rules to act by, yet having no Sovereign Power provided with sufficient Abilities to punish Transgressors, this Engagement could have no other Effect, than such Agreements as are made by natural Right have, and by Consequence could not oblige as a Law. Element. Jurisprud. Univers. p. 250.

³ This Usage is norill-grounded, for the Liberty which the Laws leave us to do, or not do, certain Things, includes something more than a negative Permission. See Note 2. on Paragraph 15.

and Engagement, by which our natural Liberty is restrain'd ².

IV. In general, a Law may conveniently enough be defin'd, a Decree by which a Sovereign obligeth a Subject to conform his Actions to what he prescribes ¹. We call it a Decree, not as it remains in the Mind and Will of the Party decreeing, but as it is communicated to the Subject in such a Manner, as to let him understand the Necessity of his conforming to it: And therefore the Term Decree is here equivalent to Command. And we think it an indifferent Matter, whether one should call a Law a Decree or a Speech, provided it be not esteem'd necessary to it, that it be promulgated either *vivâ voce*, or in Writing; since it is sufficient that the Will of the Legislator be any way made known to the Subject, tho' it should only be by the internal Suggestion of Natural Light. Therefore we take it to be an useless Piece of Subtily and Niceness in Mr. Hobbes ³, when he maintains, that the Laws of Nature have no farther the Force of Laws, than as they are promulgated in Holy Scriptures by the Word of God; and not as they are certain Conclusions apprehended by Reason, concerning the doing, or the omitting of Things. For, from the bare Dictates of Reason, we do not only understand that the Observance of Nature's Laws is good and profitable to Mankind, but likewise that it is the Will and the Command of GOD, that Men should govern their Actions by those Rules; which is sufficient to the Essence of a Law. Tho' still indeed this Reply may be made, that natural Laws, even as they are the Dictates of Reason, cannot be conceiv'd any otherwise than in the Manner of Speeches, Propositions, or Sentences ².

As to Grotius's Definition ⁴, where he says the Law obligeth to *that which is Right*, we must observe, that he supposeth somewhat to be Just and Right before any Rule or Law; whence it must follow, that the Law of Nature doth not make what we call Right, but only denotes and points it out as a Thing already Existing. Concerning which Hypothesis we have already declar'd our Mind, *Ch. ii. §. 6.*

To conclude this Head, It is evident, that under the Name of *Laws*, not only those are comprehended which belong to Justice strictly so called, directing us, upon a full and perfect Obligation ⁵,

to exhibit such and such Things to others; but those too which are concern'd about the other Virtues, and which extend no farther than the Agent's own Person. For which Reason Laws may, and frequently are, made against Drunkenness ⁶, and other kinds of Intemperance, which Vices are so very prejudicial to the Parties committing them ⁴. The same must be held as to *Sumptuary Laws*, which prescribe the Measure of Expences in Victuals, Cloaths, Building, and other Furniture or Provisions. In which Particulars, if any Man offends, he doth no one an Injury, provided he defray the Charges out of his own Stock: And yet there's no Question to be made, but that a Subject may by Laws be obliged to Frugality, which conduceth so highly to every Man's Interest and Advantage.

V. But since in the Definition of Laws it hath been asserted, that they proceed from a Superior, and that they have in themselves the Power ¹ of obliging, it seems necessary that we here shew what Obligation is, and whence it ariseth; as also who is capable of receiving an Obligation, and how one Man can oblige another, or, which is the same thing, how it comes to pass that one Man may, by Virtue of his Authority and Command, enjoin another such and such Duties.

Obligation, then, we have already defin'd, *Ch. i. §. 21.* as a moral operative Quality, by which a Man is bound to perform somewhat, or to suffer somewhat. In thus defining Obligation we consider it as it inheres in the Person obliged. Bishop Cumberland, *Ch. v. §. 27.* in his Definition proceeds another way, considering Obligation as it is an Act of the Legislator, by which he shews or declares, that Actions conformable to his Laws are necessary to be done by the Persons for whom the Laws are ordain'd. The Roman Lawyers call it ² *the Bond of the Law*, by which we are necessarily tied to this or that. For, by Means of it a kind of moral Bridle is put upon our Freedom of Action, so that we cannot rightly take any other way than what we are thus guided to. Not that it can so far restrain Mens Wills, as to render them unable to steer a different Course, tho' at their own Peril: For in this Sense Arrian's ³ Assertion will ever hold true, Περαιρέσεως ἀλλοτριζες ἐδὲς κώριθι, No Man is Master of another's Will.

¹ De Cive, Lib. iii. §. ult.

² B. i. Ch. i. §. 9.

³ In Epictet. Lib. iv. Ch. xii.

Mr. BARB. NOTES on §. iii, iv, v.

⁴ This fully includes the general Notion of a Law. See the same Note.

⁵ This Definition agrees only to obligatory Laws, *i. e.* which oblige us positively to act, or not. But we shall shew in our second Note on §. 15. that the general Notion of a Law taken in the full Extent of it, as 'tis my Design to explain it there, comprehends that besides a Permission to act, or not act, in certain Cases, as we judge convenient.

⁶ To make the Arguing of the Author compleat, these Words ought to be added, *But this is no Foundation for Mr. Hobbes's Hypothesis.*

⁷ To understand this Distinction of perfect and imperfect Obligation, see *Chap. vii.* of this Book, §. 7. and *Book iii. Ch. iv. §. 3.* &c. See also what has been said before, *Ch. i. §. 19.* concerning Power.

⁸ To this we may refer a Law of Seleucus, commanding, That whosoever of his Subjects happening to be indispos'd, should drink pure Wine, unless upon the Advice of a Physician, if he recover'd, should suffer Death, for exceeding the Bounds of Temperance without express orders. Which Penalty was, no doubt, unreasonably severe. *Ælian. in V. H. Lib. ii. Ch. xxxvii.* But the learned Dr. Bentley is of Opinion, that all the Laws which pass under the Name of Seleucus, and of which we find divers Fragments in Authors, are all forged. See his *English Discourse on Phalaris*, p. 335. and *Novell. de Repub. des Lett.* by Mr. Bernard, June 1699. Art. v.

⁹ The Author will treat of them *Lib. viii. Ch. v. §. iii.* There is a curious academick Discourse upon this Subject, among his more choice academick Dissertations (which I shall sometimes quote) printed at *Lunden in Sweden, Anno 1675.* and reprinted at *Amsterdam*, under the Title of *Analecta Polinca, i. e. Politick Fragments*, some Years since, if I mistake not.

¹⁰ This is the Effect of all Laws obligatory, for as for the Laws of simple Permission, of which we shall speak *Note 2. §. 15.* the Effect is to give a moral Right, or Power, to have certain Things certainly and lawfully, or to do and require certain Actions of another, if we judge it convenient. See *Chap. i. §. 19. 20.* foregoing.

¹¹ This Author gives the general Definition of the Institutes, which properly respects Payments, or all other Engagements which Men enter into of their own Accord, with Relation to another; for thus it runs, *Obligatio est Juris vinculum, quo necessitate obstringimur alicujus rei solvenda, secundum nostræ civitatis Jura. Institut. Lib. iii. Tit. 14. princ.*

Now, altho' there are many other Things which have an Influence on the Will, in bending towards one side rather than the contrary, yet *Obligation* hath this peculiar Force beyond them all, that whereas they only press the Will with a kind of natural Weight or Load, on the Removal of which it returns of its own Accord to its former Indifference; *Obligation* affects the Will in a moral Way, and inspires it inwardly with such a particular Sense, as compels it to pass Censure itself on its own Actions, and to judge itself worthy of suffering Evil, if it proceed not according to the Rule prescrib'd. And hence alone we may understand how sufficient the Strength of the Obligation is to the bending and inclining the Will; since there's nothing but the Thoughts of that Good or Evil which our Actions may bring on ourselves or others, that can lay any Necessity of such a Performance, or of such an Omission, upon the Mind of Man whilst in Debate about future Concerns; supposing that the Will is allow'd its proper Liberty, and that such Actions are to be exerted, as may be properly imputed to the Agent. And in this Respect chiefly, Obligation differs from downright Compulsion, that altho' both do ultimately represent some Object of Fear, yet Compulsion only shakes the Will with an external Force, and drives it on to the Choice of an ungrateful Thing, by the bare Sense of approaching an imminent Danger: whereas Obligation doth farther engage the Person to acknowledge, that the Evil denounc'd against the Transgression of such or such a Rule, doth not undeservedly fall upon him, since by observing the Rule he might have declin'd and escap'd it.

VI. As to Man's being capable of receiving *Obligation*, one Reason how he comes to be so is, because he is endu'd with Will, which can turn to either Side, and so guide itself by a moral Rule; unlike those other Beings which by some intrinsic Constraint are determin'd to one and the same Way of acting. Whence it follows, that so far as no Necessity is interpos'd by any external Principle, Man must be conceiv'd to be perfectly free, and to have a Power of doing all those Things which fall within the Sphere of his natural Strength and Ability. Nay, when he hath once determin'd and resolv'd with himself, or when he hath once made any Choice, yet in the Determination, Resolution, or Choice, consider'd purely as they proceed from the Will, there is no such Force, but that he may, at his Pleasure, rightly change or relinquish them: unless there intervene some outward Restraint, forbidding any Alteration of the Will, when once settl'd and declar'd; for a Man upon once signifying his Will and Pur-

pose; may put himself under such a Condition as that it shall be unlawful for him afterwards to recede.

Now a Man is suppos'd to have chang'd his Will, not only when he expressly declares his present Dislike of his former Choice, but likewise when he hath done any Thing inconsistent with his preceding Resolution. And from this Principle may be deduc'd the greatest Part of what the Civilians deliver concerning *Repentance*, or the altering of a Purpose. For, if we enquire after the general and ultimate Cause, why to repent of a Design should in some Acts be lawful, in others not, we shall find it to be no other but this, that some Acts are attended with an external Bond, which forbids any Change of Purpose once declar'd; whereas in the rest, the Will is left to the Exercise of its intrinsic Liberty. The former Case usually happens, when, upon Supposition of a Change in one Man's Resolution, some other Man would be highly injur'd and prejudic'd, and so Occasion would be administred to the breaking off of all Society and Commerce amongst Men. And therefore from a Signification of the Will, this other Man is said to obtain a Right, by Means of which he is now impower'd to make the promising Party stand to his Word, and upon Default may prosecute him by Force, either such as he himself can exert, or such as proceeds from the supream Ruler, according as the Persons live, either in a State of Nature or of civil Society. Therefore, when upon Declaration made of my Will, another Man doth not obtain a Right over me, I am then at Liberty to repent of what I have done. And such a Right over us is then not obtain'd, when the Sovereign, under whose Power we live, hath not given another Man Authority to require and exact that from us, which we have signify'd as our Intention². And hence it appears why positive Laws may be repeal'd by him that enacted them; because they do not convey to the Subjects any such Right upon the Legislator, by Virtue of which they may demand and require their Continuance. Tho' some Commonwealths have endeavour'd to preserve the Perpetuity of their Laws, by obliging the Members to declare upon Oath, that they will not consent to their Alteration. Nay, tho' at the End of the Statute or Ordinance a Clause should be affix'd, pronouncing all Decrees that may hereafter be made contrary to this, to be null and void, yet such a Clause cannot hinder the altering or reversing of a Law by which no Man has obtain'd a Right. For 'tis absurd that a former Decree should disannul a latter; since absolute Power cannot bind and restrain itself; and since that which is in its

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⁴ This is the Opinion of Bishop Cumberland, whose Words our Author transcribes. Another *Englishman*, in a Work which we hoped would have been turned into *French*, embraces the same Notion. According to him, the Duty or Obligation of a Man can be nothing else but a Reason and Motive propounded after an agreeable Manner, and necessarily determining him to choose and prefer one Manner of acting before another; and that Reason or Motive can be no other than a great Degree of Misery to be avoided, and Happiness to be attained; which can't be avoided or gained by acting after any other Manner. He owns no other Obligation, and if there be any other, he believes, that if it be looked into with Care, it will be found to end in that. Mr. Bernard expresses Dr. Gasfrel's Sense after this Manner, in his *Nov. De la Rep. des Lettres*, April 1700.

Mr. BARB. NOTES on §. VI.

² It is a Rule of the Roman Lawyers, *Nemo potest mutare consilium suum in alterius injuriam*, i. e. No Man can change his Purpose to another's Prejudice. Digest. Lib. I. Tit. xvii. De diversis Reg. Juris. Leg. lxxv.

² We shall hereafter treat of several Cases in which 'tis lawful for a Man to change his Designs and Intentions. See chiefly *Lib. iii. Chap. vi, vii.*

own Nature subject to change³ cannot be made fix'd and irrevocable. The *Athenians* in *Thucydides*^b, laid up a thousand Talents in the Citadel, denouncing a capital Penalty against him who should either decree or persuade the employing that Money to any Use, except in Case the City were attack'd by a hostile Fleet: And yet upon the Revolt of the Inhabitants of *Chios*, their Fears engag'd them to repeal that Decree^c. When Princes^d add expressly in some of their Constitutions, that altho' they should hereafter order any Thing to the contrary in a particular Edict, yet the Magistrates and Judges shall not obey or regard any such Command, this Addition doth by no Means amount so high, as to prove they may not abrogate such Constitutions, but rather shews, that the latter Orders are not serious, or that they dropt from them unawares. And sometimes by this subtil Artifice they cut off and prevent the Importunities of sawcy Petitioners, whom perhaps it would not be safe for them absolutely to deny^d.

But there's need of distinguishing very nicely between the positive Law itself, and that Right which it occasions to be obtain'd. The Law itself may be disannul'd by the Author, but the Right acquir'd by Virtue of that Law, whilst in Force, must still remain: For, together with a Law, to take away all its precedent Effects, would be a high Piece of Injustice: For Example, 'Suppose it were a Law in any State, that as a^e *Man dispos'd of his Possessions by Will, so the Right to them should stand*. It would be very fair, in this Case, for the Sovereign to retrench this Liberty of Testaments, and to order that for the future all these Inheritances shall pass to the Heirs at Law. Yet it would be unreasonable to take away from Persons what fell to them by Will, whilst the former Law was in Use and Vigour. And by the same Rule we may judge of that Action of Pope *Boniface VIII.* when, out of Hatred to *Philip the Fair*, King of *France*, he recall'd all the Indulgences which his Predecessors had granted to the *French Nation*; which *Harry Stephens* hath so justly ridicul'd in his pleasant Apology for *Herodotus*^e.

We must take Care likewise to distinguish the other Acts of Sovereigns from their Laws, lest any should imagine that all their just Donations, Alienations, or Compacts, may be retracted by them-

selves, or⁷, by their Successors. For upon these Acts a Right is obtain'd by other Men, which ought not to be taken from them against their Consent. Hence it appears, that when a Man renounceth his Right, it is not necessary to add expressly, that neither he nor his Heirs will do hereafter any Thing contrary to that Renunciation; and that if they do attempt any such Matter, it shall be esteem'd void. For, since in Deeds of this Nature a Man plainly declares his receding from his Right to any Thing, and professeth to translate it on another Person, it would be evident, without that additional Clause, that he cannot (with any Force or Effect) afterwards dispose of that Thing, having no longer any Right or Title to it. And for the same Reason, because whilst the Testator lives, no Man hath obtain'd a Right by Virtue of his Testament, he may fairly alter it, even tho' he had strengthen'd it with a Clause, declaring all Wills that should hereafter be made to be invalid. For this indeed carries Grounds enough to make us presume the latter Will did not proceed from his serious Intentions; yet if that very Clause be revok'd in that latter Will, the former will be of no Virtue or Efficacy. And so in Deeds and Instruments of Conveyances and other Contracts, if a Dispute arise about any Point,⁸ that which bears the latter Date shall take Place of that which was made first.

VII. From what has been said, we may likewise gather the Reason why a Man cannot be oblig'd to himself, or why he cannot enter into any Agreement or Promise purely directed to his own Person, no other Party being concern'd with him. For he who obtains a Right by any Obligation, may fairly wave that Right, when by so doing he injures not a third Man. But now in this Case the obliged and the obliging Party, or he that owes the Right, and he that obtains it, are one and the same. Therefore should a Man never so much resolve to oblige himself, yet the Obligation would be in vain, since he could excuse himself from Performance at his Pleasure: And he that can dispense with himself in this Manner is actually free. Besides, such an Obligation could be of no manner of Use; because when a Man gives or denies any Thing to himself, he neither gets by the Performance, nor loseth by the Omission^f.

^a Vide *Cicero*, ad *Attic.* Lib. iii. Ep. xxiii.

^d Vid. *Cod.* Lib. v. Tit. viii. *si ex rescripto nuptie petantur.*

^b Lib. ii. Ch. xxiv. Ed. *Oxon.* p. 98.

^e Cap. xl.

^c *Ibid.* Lib. viii. Ch. xv. p. 476.

^f *Add. Senec.* de *Benef.* Lib. v. Ch. vii. &c.

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³ If Kings were infallible, as they would in the Case before us always take proper Measures, and command nothing but what is for the great Advantage of the State, we might believe that whatever Laws and Orders they make, ought never to be altered; but since the contrary is evident by Experience, it is as absurd, as prejudicial to a Society, to affirm, That what is once resolv'd and established, in what Manner soever it is done, should always continue in Force, whatever Inconveniences may arise from it. The antient Kings of *Perſia*, whose Laws were looked upon as unalterable, found themselves often obliged to hinder their Effect by some latter Edicts, (See *Esth.* viii. 8, &c.) and the Princes who in all Times have acted upon this Principle, altho' closely, must easily observe the bad Consequences of it, if they were careful to do their Duty, unless they were intoxicated with a good Opinion of themselves, and puffed up with a false Notion of Grandeur.

⁴ See Mr. *Horſius's* Discourse, entitled, *De Lege, Clausulâ, ut nê abrogari unquam possit, munita*, i. e. *Of a Law strengthened with a Clause, that it shall not be repealed*, which is the first of his third Tome of small Tracts and Comments.

⁵ So in the Civil Law, new Laws and new Constitutions have no Force but for the future, they meddle not with what's past; as these Words import, *Leges & Constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari.* *Cod.* Lib. i. Tit. xiv. *De Legib. & Constitut. Principum*, Leg. vii. See Mr. *DAUMAT's* Civil Laws according to the Order of Nature. Tit. i. f. 1. §. 13, &c. of the Preliminaries.

⁶ It is a Law of the xii. Tables, *Ut quisque legasset sua rei, ita jus esto*, i. e. *As every Man bequeaths his Goods, let Right be.* *Instit.* Lib. ii. Tit. xxii. *De Lege Falcid.* in the Beginning. See also *Digest.* Lib. l. Tit. xvi. *De verbor. Significat.* Leg. cxx.

⁷ See *Lib.* viii. Ch. x. following.

⁸ See *Lib.* v. Chap. xii. §. 6.

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But whereas it is sometimes said, that a Man is obliged to preserve himself^a, the Meaning of this is no more, but that the Exercise of that Obligation, inherent in every Man, is terminated in a Man's own Person, but it hath likewise a reference to GOD, the Author of natural Law, as to him who hath a Right of requiring the Performance of that Obligation, and of punishing its Neglect: And therefore a Man is so far bound to consult his own Preservation, as he is a Servant of GOD, and a part of human Society, to which by the Divine Command he ought to shew himself a useful Member. In the same manner as a Master may rightly punish his Servant, and a Sovereign his Subject, who hath render'd himself unfit to discharge his proper Labours and Employments. Neither is this Maxim, that a Person cannot oblige himself, confin'd to single Men, but extends to whole Bodies and Societies^b. As for that which some Authors urge about a Man's swearing to himself, That he will, for Instance, refrain from this or that Enormity to which his evil Appetites incline him, this Obligation bears the Nature of a Vow, the exacting of which appertains to Almighty GOD^c.

VIII. Another Reason why, since the Will of Man is capable of conforming to a Rule, such a Rule may be prescrib'd to it, and an Obligation laid on it thus to conform, is, because he stands under the Command of a superior Power. These two Conditions put together, render Men liable to Obligations, proceeding from eternal Principles. For when the Powers of any Agent are so tied up by Nature to an uniform way of acting, as that it cannot by its inward Motion steer a different Course, the Action thus produc'd is rather *physical* than *moral*, and ariseth rather from Necessity than from Obligation. And, on the other hand, where a Person acknowledgeth no Superior, there can be no essential Principle apt to restrain his inward Liberty. And, altho' such an one should never so exactly observe a certain Method of proceeding, and constantly refrain from some kinds of Actions, yet this would not be taken for the Effect of any Obligation, but of his own free Pleasure. It follows then, that he alone is capable of Obligation, who^d can have Knowledge of a Rule prescrib'd him, and hath a Will intrinsically free, able to steer contrary ways; which Will must, however, when a Rule is enjoin'd it by a Superior, be sensible that it ought not to re-

cede from it. And that such is the Nature of Mans every one's Observation may inform him.

IX. *Obligations* are laid on human Minds properly by a *Superior*, that is, by such an One as not only hath sufficient Strength to denounce some Evil against us upon Non-compliance, but hath likewise just Reason to require the retrenching of our Free-wills by his own Pleasure. For when any one is endued with these Qualifications, so soon as he shall command any thing, and shall farther signify the good and evil Consequent on Obedience and Disobedience, there must needs arise in the rational Faculty, a Fear mix'd with Reverence, the former proceeding from his Power, the latter from the Consideration of such other Reasons, as without that Motive of Fear, and barely by way of Counsel, ought to prevail on us to embrace the Command. Hence we conceive, that the Right of imposing Obligations on another, or, which comes to the same Thing, the Right of commanding another, and of prescribing Laws, doth not arise barely from Strength, or from the superior Excellency of Nature^e. Strength indeed, may of it self so far bend me contrary to my Inclinations, as to make me choose rather, for a while, to obey another's Will, than to venture the Experience of his Force: But this Inducement ceaseth, when once the Fear is over, and I shall then have no Reason why I should not act rather according to my own Pleasure, than according to *his*. And where a Man can bring no other Argument for my Compliance to his Orders, but Force and Violence, nothing hinders, but that if I judge it expedient for my Affairs, I may try all Means to repel the Violence, and to assert and vindicate my own Liberty^f.

X. It may not be improper here, to examine that Assertion of Mr. *Hobbes*, which he hath laid down in his Book, *De Cive*^g, and which runs thus, in the *English* Improvement of his *Leviathan*^h. *The Right of Nature, whereby GOD reigneth over Men, and punisheth those who break his Laws, is to be deriv'd, not from his Creating them, as if he requir'd Obedience as of Gratitude for his Benefits, but from his irresistible Power.* The Argument with which he defends this Notion is carried on to this Purpose: "All Right over others being either by Nature, or by Compact, that Right may be said to be granted by Nature, which Nature doth not take away." *Now seeing all Men, by Nature, had a Right to all Things, they had a Right every one*

^a Com. *Felden ad Grot. Lib. ii. Ch. xiii. §. 1.*

^b *Ch. xv. §. 5.*

^c *P. 187.*

Mr. BARB. NOTES, on §. VII, VIII, and IX.

¹ That is to say, That Man is the Object of the Duties that respect himself, but not the Foundation of them; and if he is obliged to preserve himself (for Example) or improve himself, he is not the Cause of it himself altogether, as if he could lay an Obligation upon himself, but because GOD will have him do so. See *Lib. ii. Chap. iv. §. 16.*

² This is, because these Bodies are looked upon as a single moral Person. See what is said above, *Chap. i. §. 13.*

³ These Words ought to be added, *acknowledging a Superior, can*—and the Author himself has not omitted them in his *Abridgment of the Duties of a Man and Citizen, Lib. i. Ch. ii. §. 4.* where the rest of this Sentence is found Word for Word.

⁴ All the Power of obliging an intelligent Creature, as Man, is founded upon the Ability and Will which he hath to make himself happy, or less miserable, than he would be, if he disobeyed. If Man were such a Creature, that he must necessarily be unhappy, or that it were impossible that his Misery could be increased or diminished, GOD might force him indeed to act after such or such a Manner, but he could not properly oblige him to it (*Gastrell in his Extract of the New Rep. of Letters.*) It were also in vain for an intelligent Being to pretend to subject another's Actions to a certain Rule, if it be not in his Power to reward his Obedience, and punish his Disobedience, and that by some Good or Evil, which is not the natural Effect or Produce of the Action itself, for that which is naturally profitable, or unprofitable, works of itself without the Help of any Law. Mr. *Lock's Philos. Essay, p. 428.*

⁵ *Terent. Adelph. Malo coactus qui suum officium facit, &c.* He that doth his Duty out of Fear of Punishment, will be sure to take care whilst he is under Apprehension of being discover'd; but upon the Hopes of Privacy and Security, he never fails to give a Loose to his old Inclinations.

of them to reign over all the rest. But because this Right could not be obtain'd by Force, it concern'd the Safety of every one, laying aside that Right, to set up Men with sovereign Authority, by common Consent to rule and defend them: Whereas if there had been any Man of Power irresistible, there had been no Reason why he should not by that Power have rul'd and defended both himself and them, according to his own Discretion. To those therefore, whose Power is irresistible, the Dominion of all Men adhereth naturally by their Excellence of Power; and consequently it is from that Power, that the Kingdom over Men, and the Right of afflicting them at his Pleasure, belongs naturally to Almighty GOD, not as Creator and Gracious, but as Omnipotent. Now in this Discourse there are several Things that deserve to be censur'd. For, in the first Place, it may be question'd, whether or no those two Expressions, *A Right of Sovereignty* (upon account of Strength) is granted by Nature, and, *A Right of, &c.* is not taken by Nature, hang very well together. Because in most Cases, my not taking away a thing is by no means an Argument, that I therefore grant it. And since, *not to be taken away*, and *to be granted*, are different Things; such a Right may seem to be granted by some other Principle than Nature, tho' Nature doth not take it away. Besides, that Maxim, *All Men by Nature had a Right to all Things*, ought to be interpreted with great Caution. By *Right*², he means the Liberty which every Man hath of using his natural Faculties according to Reason. Therefore his Principle, in a sound Sense, will amount to no more than this; By Nature, that is, upon the Removal of all Law, every Man may fairly use his natural Strength against those whom his Reason instructs him thus to deal with, for the sake of his own Preservation. But it doth not hence follow, that barely by natural Strength an *Obligation*, properly so call'd, may be laid on another: For to *compel* and to *oblige*, are very different Matters; and tho' natural Strength be sufficient for the former, yet the latter cannot be perform'd by that Superiority alone. For, even according to Mr. *Hobbes's* own Notion, as one Man hath a Right of *compelling others*, so those others have a Right of *resisting him*. But now Obligation cannot stand with a Right of resisting; because it presupposeth such Reasons as inwardly affecting Mens Consciences, make them conclude, by the Judgment of their own Mind, that they cannot *honestly*, and therefore *rightly* resist. And though it be irrational, to contend violently against a superior Strength, and by that means to draw upon ourselves³ greater Mischiefs; yet there remains in us a Right of trying all Ways, either to drive off the Force, by the dexterous Application of other Force, or to elude it by Subterfuge and Escape: But neither can this Right consist with that *Obligation* which is precisely so term'd, and which *Grotius* commonly op-

poseth to *Extrinsical*³. So that, on the whole Matter, by bare Force, not the Right of Resistance, but only the Exercise of it, is extinguish'd. We may explain the Point by the Case of Brutes, with which we Men live in a lawless State: Now those of them which we can master by our Strength, we lay hold on, and employ in our Service; but if any of them escape our Power, we are not apt to complain of any Injury receiv'd from them. Nor can it be here replied, that Brutes are not capable of Obligation; and that therefore they cannot be ried and engag'd any other Way, than by Strength: For Mr. *Hobbes* himself acknowledgeth, That a Captive in War, although capable of Obligation, yet is under none, whilst he is restrain'd only by *natural Bonds*, and before the Interposition of any Faith, or Compact; and that therefore, such an one may give his Conqueror the slip, or may assault him violently; so soon as he finds Opportunity. *Seneca de Ira. Lib. ii. Ch. xi. Nature hath so order'd Things, that he whose Greatness depends on the Fear of others, is not without Fear himself.* Were we dispos'd to be tedious, we might farther shew, that this Maxim of Mr. *Hobbes* is meer Absurdity and Nonsense, if applied to GOD Almighty. For how can Nature be said to have granted any thing to GOD: Since Nature is either GOD himself, or, at least, the Work of GOD? For these Reasons therefore, and because it seems unworthy of the Divine Goodness, we conclude, that the Right of Commanding, or the Sovereignty of GOD, as it denotes the Virtue of imprinting Obligations on Mens Minds, is not to be deriv'd from the bare Consideration of his Omnipotence.

Neither do those Arguments, brought by Mr. *Hobbes* from Scripture, prove the Truth of his Position. When GOD seems to have Recourse to his Absolute Power, about the Calamities sent on *Job*, we cannot hence infer, that he hath no Right over his Creatures, but what ariseth from that Power only. *Job* himself, at the beginning of his Sufferings, made a true Declaration, by what Right GOD had deprived him of his Goods, and of his Children: *The Lord gave (says he) and the Lord hath taken away: That is, why may not he recall at his Pleasure, those Things which he gave upon the same free Account?* But when his Grief had so far prevail'd on his Reason, as to make him enter into Expostulation with Heaven, then GOD, to repress the Insolence of the Complaint, alledg'd his Power, since the Sufferer had now neglected to consider the other Reasons of the Divine Sovereignty and Command. And thus we commonly deal with obstinate and refractory Subjects; when they refuse to hear our *Reasons*, we shew them our *Strength*, to make them understand not only their Sin, but their Folly too in opposing our Dominion. In the same Manner, if a Person complains of the Misfortunes of good Men, and the Prosperity of the

¹ Vide *De Cive*, Ch. i. §. 7.

² *De Cive*, Ch. viii. §. 2.

³ *Add. Senec. ad Polyb. Ch. xxix.*

Mr. BARB. NOTES on §. x.

¹ See Book II. Ch. ii. §. 3.

² *Pindar. Pyth. Od. 2. Περὶ κίρκου δέ, &c.* To kick against the Goad is a very dangerous Attempt.

³ But this external Obligation imposeth also, according to *Grotius*, a Necessity of not resisting. All the Difference is this, That the internal Obligation has respect to Right, properly so call'd, by Virtue of which we act according to Reason, and agreeable to the Light of Conscience, whereas an external Right, which produces an external Obligation, imports no more than Impunity to him that uses this Right, and hinders not but that he may do Evil in the Use of it, altho' in this last Case he can't resist lawfully. *Grotius*, among other Instances, gives an Example of the ill Treatment which a Prisoner of War receives from a Conqueror, and a Subject from his Prince. See *De Jur. Bell. & Pacis Prolegom. §. 41.* and *Lib. i. Ch. iv. §. 3.* and *Lib. iii. Ch. vii. §. 6. 7.*

Wicked, when he persists deaf to the genuine Causes of that Proceeding, in the last Place, we confound him with Divine Omnipotence: As if we should say, *You that fancy your self injur'd, go and try your Strength against GOD for Satisfaction.*

Nor is it a better Inference of Mr. *Hobbes*, when he says, that the Obligation of paying Obedience to GOD is incumbent on Men, upon Account of their Weakness. For this only could make it a piece of Folly in us, not to redeem our selves by obeying, from some greater Evil: But it doth not at all take away our Right of desiring, and of endeavouring, by all Means, to escape the superior Strength which thus oppresseth us. But such a Right is utterly excluded by every true Obligation. Nor is this Consequence good, *Of two Omnipotents, neither can oblige the other, therefore Men are oblig'd to GOD, only because they are not Omnipotent;* were the Antecedent never so unquestion'd. Not to say, that the Fancy of two Omnipotent Beings is ⁴ an impossible Supposition. Neither did our Saviour intend to assert his Right against *Saul* by that Argument, *It is hard for thee to kick against the Pricks;* but rather to reprove the Boldness and Vanity of *Saul's* Design. Nor was that mighty Convert afterwards invited by *Ananias* into the Christian Faith, barely by being inform'd how much above his Strength it was, to destroy that Profession. We have applied so much the more Diligence to the confuting of this Opinion, the more Danger we apprehend of its being abus'd by violent and headstrong Men. In *Thucydides* ⁵ the Athenian Ambassador speaks to this purpose, *We follow the common Nature and Genius of Mankind, which appoints those to be Masters who are superior in Strength. This Law is not of our making, nor are we the first who have used it; but we receiv'd it as it came down to us, and we shall leave it to guide the Practice of all Posterity.* *Dionys. Halicarn. Lib. i. It is a Law of Nature common to all Men, and which no Time shall disannul or destroy, that those who have more Strength and Excellence shall bear Rule over those that have less.* ⁶ *Brennus* (in *Plutarch's Camillus*) calls it a most ancient Law, that which gives to the Valiant the Posses-

sions of Cowards; derived from GOD himself, and reaching even to brute Creatures; for even amongst these, Nature gives larger Privileges and Portions to the Strong than to the Weak. *Livy* hath express'd the Notion more concisely, *Omnia fortium esse*, that the World was made for the Bold and the Strong. *Callicles* (in *Plato's Gorgias*) pursues the same Argument: In the first place, he lays down this Supposition, That Nature and Law are many times contrary to each other: He instanceth in the Case of Injury; to receive which is by Nature the most base and vile, ⁷ as the Treatment of a Slave, not of a free Subject; yet to do an Injury is much worse in the Construction of the Law. He observes it to have been the Policy of Law-givers to encourage this latter Notion; so to order the useful Engines of Praise and Dispraise, as to hinder others from growing too powerful for them; well knowing, that they were otherwise ⁸ an unequal Match for the Multitude. ⁹ *Now Nature herself* (says he) *as I imagine, shows it to be just and right, that the Good and the Strong should have, in every thing, a larger Share than the Bad and the Weak.* And therefore, whereas *Xerxes* and *Darius* had both made use of this Pretence, the former against the *Grecians*, the latter against the *Scythians*; he says they did all this according to the Law of Nature. He complains that the rigid Doctrine of Justice damps and oppresseth the generous Spirits of young Men; or that, on the contrary, when any one breaks thro' those formal Restraints, he seems to shake off his Rust, and to shine in all the Splendor of natural Right. On this Principle, he says, *Hercules* drove off *Geryon's Oxen*, who neither sold nor gave them him; *the Hero* having a natural Right to the Oxen, and all the other Goods and Possessions of inferior puny Mortals. And this is indeed the Maxim which the great Bullies of Mankind would have prevail in the World: *Hoc Ithacus velit, & magno mercetur Atride.* *Plutarch's* Opinion is much more moderate, and might be admitted with less Exception, ¹⁰ *It is the first and principal Law of Nature* (says he) *that he whose Circumstances require Protection and Deliverance, should admit him for his Ruler who is able to rescue and defend him.*

Mr. BARB. NOTES.

⁴ See how Mr. *Locke* proves this, in one of his Letters written in *French*, because it was to be shewed to a Person of Quality, who did not understand *Latin*. Two Omnipotent Beings are altogether inconsistent, because we must necessarily suppose, that the one must always will what the other does; and in this Case, he, whose Will is necessarily determined by the other, consequently has not that Perfection; for 'tis better to be free, than to be subject to the Determination of another's Will. But if they are not both reduced to the Necessity of willing the same Thing always, then the one may desire to have that done which the other would not; in which Case the Will of the one must prevail over the Will of the other, and so he, of the Two, whose Power can't bring about what he would, can't be Omnipotent, because he can't do so much as the other. So that there can't be two Omnipotent Beings, and consequently not two Gods, p. 413. See also Mr. *Clerc's Ontology*, Sect. iii. Ch. x. §. 3.

⁵ *Ἡγεμῖνα ἢ τὰ τε θεῶν δόξα, τὸ ἀνθρώπων τε σαφῶς διαπνυτός ὑπὸ φύσεως ἀναγκαιῶς, ἢ ἀν κρατῆ ἀρχῆν, ἢ ἡμῶν ἕτε θέντες ἢ νόμον, ἕτε κινῶν πρώτοι χρῆσάμενοι, ἔντα δὲ παραλαβόντες, ἢ ἐσόμενοι ἐς αἰὲ καταλείψοντες, χρώμεθα αὐτῶ. Thucyd. Lib. v. Ch. cv.* See also *Dionys. Halicarn. Lib. i. Ch. v.*

⁶ *Brennus's* Words, in *Plutarch's Camillus*, are these, *Οὐδὲν εἰδὲ ἡμῶν γε ὄφρον εἰδὲ ἀδίκων ποιῶντες, ἀλλὰ τῶ πρεσβυτάτων ἢ νόμων ἀκολουθεύοντες, ὡς τῶ κρείττονι τὰ τῶν ἡττιῶν δίδωσιν, ἀρχώμεθα ὑπὸ τῆ Θεῶ, ἢ τελειῶν εἰς τὰ ἴσηρα. ἢ ἢ τῶτοις αἰ φύσεως ἐνείν. το ζῆτέν πλέον ἔχον τὰ κρείττονι ἢ ὑποδεστέρον.*

⁷ *Plato's* Words are, *Οὐδὲ ἢ ἀνδρῶν τῆτο ἢ ἐστὶ τὸ πάθημα, τὸ ἀδικεῖν, ἀλλ' ἀνδραπόδε τινός, &c.*

⁸ It appears plainly by this Place, as it is printed in all the Editions of the Original, that this Writer did not consult the Greek Authors, which he quotes, nor, thro' Inadvertence, did he sometimes thoroughly understand the *Latin* Translation. *Callicles* in *Plato* says, *οἱ τίμεινοι τῶ νόμου, οἱ ἀδυνεῖς ἀνθρώποι εἰσι καὶ οἱ πολλοί.* Words both very clear and coherent with the former Discourse; but *Marsilius Ficinus* having translated them in an ambiguous Manner, unless one considers them thoroughly, thus, *Qui leges condunt, imbecilliores sunt ac multitudo ipsa est;* Mr. *Pufendorf* thought that he had said, *Law-givers are weaker than the People*, as if the *Latin* had been, *Imbecilliores multitudine ipsa,* or in the *Greek*, *ἀδυνεστεροι ἢ πολλῶν,* whereas the Sense of *Callicles* is, That the Laws were first established by the People, who thought themselves not strong enough to defend themselves against the Insults of others, and chiefly by those People, which supposed the Great ones to oppress them, and so I have render'd it, tho' the *English* Translator did not mind it.

⁹ *Ἡ δὲ γε (ἡμῶν) φύσις αὐτῆ ἀποφάναι ἀν, ὅτι δίκαιόν ἐστι τὸ ἀμείνω τῆ χρείων πλεον ἔχον, ἢ τὸ διωλιώτερον τῆ ἀδυνατωτέρων. Ibid.*

¹⁰ *Ὁ ἢ πρώτων (ὡς ἔοικεν) καὶ κυριώτατων νόμων, τῶ σώζοντων δεομένων, τὸ σώζον διωλιώτερον, ἔρχεται κατὰ φύσιν ἀποδίδωσι. Plutarch in Pelop. p. 290.*

XI. Others there are who derive the Origin of Sovereignty, or of the Power of imposing Obligations on another, from Eminency or superior Excellency of Nature, which they pretend is of itself sufficient for that great Purpose. They draw a main Argument from the Nature of Man, in whose Mind, as in the most excellent Part, is seated the $\tau\omicron\ \eta\gamma\epsilon\mu\omicron\nu\eta\theta\epsilon\nu$, the *Directive Power*. To illustrate which, they alledge the Authority of Cicero¹, when he commends the Latin Phrase *exire de potestate*, as applied to those, who are carried away from rational Acting, by the Fury of their Passions and Lusts; such Men being truly *gone out of the Power or Command* of their Minds. ² Aristotle likewise is brought in to strengthen their Party, because he hath somewhere declared, that if a Man can be found excelling in all Virtues, such an one hath a fair Title to be King. Thus the most superlative Pre-eminence of GOD, would, they say, deserve Veneration, though he had never created the World. Farther, to this Pre-eminence of Nature they add *Non-accountableness*; and affirm, That for this Reason only, if a Man useth brute Creatures (whom he so far excels) any otherwise than with Decency and Moderation, he may do it fairly and securely, and they have no Right to complain of their hard Treatments: Because when one contends with another about Matters of Right, he doth, as it were, compare himself with him, and is willing that both should be judg'd by the same Law; but this cannot be admitted in two Natures so vastly different, that one may be said to have been made for the sake of the other. And therefore they pretend, that GOD declar'd Mens Right over Brutes, purely on Account of their superior Nature. Whence, they tell us, if a Man, for abusing his Cattle happen to be punish'd by the Magistrate, this is not done in Favour of the Beasts, but for the sake of the other Subjects, whose Interest it frequently is, that every one should use well what he possesseth. On the same Score, they say, the Body ought not to complain, though it should, by the Command of the Soul, be watted and worn out in Labours; since it is in so high a Degree surpass'd by that Nobler Part.

But, to deliver our own Judgment, we cannot yet be persuaded, that from a bare Transcendency of Nature, can spring a Right of imposing Obligation on others, who have in themselves a Power of being their own Governors and Directors. For neither doth a superior Nature always imply a Fitness to Rule an Inferior; nor do the different Degrees of Perfection, in natural Substances, immediately denote a Subordination, and a Dependence of one upon the other. But rather, since the Person who is to receive the Obligation, hath in himself a Principle of guiding his own Actions,

which he may judge sufficient for his turn; there appears no Reason why he should stand presently convicted in his own Conscience, if he acts rather by his own Pleasure, than at the Will of another, who in Nature excels him. And therefore tho' that Notion of the *Epicureans* was most senseless and impious, in which they describ'd the Gods, as enjoying their own Happiness with the highest Peace and Tranquillity, far remov'd from the troublesome Care of human Business; and neither smiling at the good, nor frowning at the wicked Deeds of Men; yet they rightly enough inferr'd, that upon this Supposition, all Religion, and all Fear of Divine Powers, was vain and useless. For who will worship another, that is neither willing to assist, nor able to injure him? ³ The Contemplation of so noble a Being as this, may indeed excite Wonder in us, but it can never produce Obligation. Besides, we *Christians* confess, that there are created Spirits endued with a Nature far surpassing our own; and yet we acknowledge no Sovereignty that they bear over us, immediately on their own Account. *Apocalyps. xxii. 9. Mar. Antonin. Lib. vi. Ch. xlv. If the Gods do not at all regard or order human Affairs (which yet it is the highest Impiety to imagine) to what Purpose are our Sacrifices, our Supplications, and our Oaths, and our other Acts of Worship, by which we suppose the Divine Powers to be ever present and conversant amongst us? Cicero de Natur. Deor. Lib. i. Ch. ii. There have been Men in the World, who thought the Gods not in the least concern'd about human Affairs. Were this Opinion admitted for true, there could be no such Thing as Piety, Holiness, or Religion amongst Men: For to pay these Regards to the Divine Nature, is most agreeable to Goodness, and to Purity, provided they take Notice of our Actions, and are the Authors of any Benefits and Advantages in our Lives. But if the Gods are neither able nor willing to help us, nor at all bestow their Care and Observation on our Proceedings, and so derive no Blessings, no Favours upon Mankind, to what End is our Worship, our Honours, and our Prayers, the Tribute which we now pay to the Immortal Beings? As no Virtue can subsist in Hypocrisy and Shew, so especially Piety would be soon lost in that Disguise; and then farewell to all Holiness, and all Religion; which being once banish'd the World, what could follow but the Misery of utter Disorder, of universal Confusion? And again, What Piety can you owe to him from whom you have receiv'd no Benefit? Or how can he claim any Thing as his Due, who hath no Merit to plead in his Behalf? Idem de Nat. Deor. Lib. ii. The common Title which our Ancestors gave Jupiter was, *Optimus Maximus*, most eminent in Goodness and in Greatness. In which we find Goodness or Beneficence prefer'd to Greatness; it being a more noble, and more excellent, as well as the most acceptable*

Mr. BARB. NOTES on §. XI.

¹ Tully's Words are, *Itaque nihil melius, quam quod est in consuetudine sermonis Latini, cum exisse ex potestate dicimus eos, qui effrenati feruntur, aut libidine, aut iracundia*, Tusc. quaest. Lib. iii. Ch. v. To which Words it may be convenient to add another Passage of Cicero's, which will shew that the former is very well apply'd, *Qui igitur exisse ex potestate dicuntur, ideo dicuntur, quia non sunt in potestate mentis, cui regnum totius animi a natura tributum est*. They therefore who are said to go beyond their Power, are so term'd, because they are not under the Command of the Understanding, to which Nature has given the supreme Government of the Soul.

See this Author's Treatise *De Republica*, Lib. iii. Ch. xvii.

³ The Greek of Antonine is, *Ἐὶ δὲ ἄρα περὶ μηδενος βελτιοτατος (εἰ θεοὶ) πιστόν τε ἐξ ὅσιον, ἢ μηδὲ θύραρ, μηδὲ ἐυζώνητα, μηδὲ δυνάμειον, μηδὲ τα ἕλλα πρόσσάρη, ἀπερ ἕκασα ὡς πρὸς παρῆλας καὶ συνβιβάνας τὰς θεὸς πρόσσάρη*. And Tully's Latin is, *Sin autem Dii neque possunt nos juvare, neque volunt, nec omnino curant, nec quid agamus animadvertunt, nec est quod ab his ad hominum vitam permanere possit, quid est quod illos Diis immortalibus cultus, honores, aut preces adhibeamus?* See also Tully *de Nat. Deorum*, Lib. ii. Ch. xxv.

Prerogative to be good, than to possess the highest Degrees of Majesty and Strength. *Ovid. de Pont. Lib. ii. El. ix.*

*Nunquid erit quare solito dignemur honore
Numina, si demas velle juvare Deos?*

What Vows would to regardless Powers be paid?
They lose their Altars, if we lose their Aid.

The Instance about Brutes is nothing to the purpose; for they are not held by Obligation, but only by Force, or by the Enticement of Food: Neither would they act contrary to their Natures, should they endeavour to throw off the Yoke and the Authority of Men. As to the Argument about the Soul, when that is said to bear a Sovereignty over the Body, the Speech is figurative: For Sovereignty, or Command, is not properly understood but between two Persons, or two compleat Natures; and the Body is subject to the Soul, by Virtue of the physical Combination, not of any moral Tie. Lastly, the Citation from *Aristotle*, if a King were to be constituted by free Election, the Crown ought to be given to the most deserving Person⁴; yet would he bear the Sovereignty by a Right deriv'd purely from his superior Gifts and Excellencies, but by Virtue of the Donation made him by the Consent of the Electors.

XII. It must be acknowledg'd therefore as a certain Truth, That neither Strength, nor any other natural Pre-eminence, is alone sufficient to derive an Obligation on me from another's Will; but that it is farther requisite, I should either have receiv'd some extraordinary Good from him, or should voluntarily have agreed to submit myself to his Direction. *Plin. Paneg. Chap. xxxviii.* Nature doth not ordain amongst Men as she doth amongst Beasts, that the Power and the Sovereignty shall pass to the strongest. For, as we naturally yield and give up ourselves to some singular Benefactor,² so if it appears that this Benefactor both intends my Good, and can consult it better than I myself am able, and, farther, doth actually claim the Guidance of me, I have no Reason in the World to decline his Government and Sway. Especially if it so happen, that I am beholden to him for my very Being, *Acts xvii. 24, &c.* For he who first conferr'd on Man the Benefit of free acting, why may not he, by his own Right, retrench that Freedom in some Particulars? And then, as for the other Case,

he that consents to admit another for his Sovereign, declares, by this his own proper Act, that he will conform to his Sovereign's Pleasure. Though indeed to make a lawful Sovereignty arise from Consent, it is farther necessary, that by this new Subjection no Prejudice be offer'd to the well-grounded Right of a third Person, and that the one Party may justly have such Subjects, and the other Party as justly such a Governor. From these two Springs we conceive all those Obligations to flow, which do, as it were, cast an inward Tie and Restraint upon the Liberty of our Wills. But because 'tis beyond the Power of any moral Bonds, utterly to suppress our natural Freedom of acting; and because such is either the Lightness, or the Wickedness of most Mens Minds, that they despise these Grounds of Dominion, as feeble Reasons for Obedience; hence there ariseth a Necessity of adding some further Motive, which may work on our disorderly Lusts with a stronger Effect than the bare Sense of Decency and Honour. And this Addition is the more requisite, in as much as, generally speaking, the Wickedness of one Man tends to the Damage of another: Whereas we should be more willing to leave a Man to his own Guidance, provided his Sins would incommode no Body but himself. Now there is nothing which could have such an Effect as this, but the Fear of some Evil to be inflicted upon our violating an Obligation, by some stronger Power, whose Interest it was, that we should not have thus offended. So that Obligations receive their final Strength and Authority from Force, and from a Supposition that he, whose Business it is to see them observ'd, is furnish'd with so much Power, either originally inherent in himself, or conferr'd upon him by others, as to be able to bring some considerable Evil on the Disobedient. For amongst wicked Subjects, he must needs be a very precarious Ruler, whom they can despise without Danger. On the contrary, his Dominion is settled on a firm Bottom, who, in the first Place, bears a just Title to it, and, besides this, hath so much Force always at his Command, as is sufficient to reduce the Seditious, and to restrain the Transgressors.³ *Sophocl. Ajac. Flagellif. ver. 1092.*

Nor Laws, nor Governors could stand secure,
Without the Guard of Fear; nor mighty Chiefs
Secure the Faith of Armies, but sustain'd
By awful Dread, and Shame of doing ill.

² So far the Saying of Cyrus will be true, That no one ought to be a Governor, who is not better than his Subjects. *Plutarch. in Apophthegm. And in the same sense we must take what Socrates argueth in Xenophon. De rebus memorab. Lib. iii p. 453, 454. Ed. H. Steph.*

MR. BARB. NOTES.

⁴ *Plutarch's* Words are, Ἄρχην δὲ μηδὲν προσέχον, ὅς ἐ κρείττων ἐστὶ τῷ ἀρχαίῳ.

² *Pliny's* Latin is, Nec uti inter pecudes, sic inter homines [Lex Natura] potestatem & imperium valentioribus dedit.

³ This and the following Reasons serve rather to make an Obligation stronger and more reasonable, than to establish it upon a sure and proper Foundation; for, in my Judgment, there is properly but one general Foundation of an Obligation, to which all others may be reduced, and that is, our natural Dependence upon the supream Authority of GOD, who has given us a Being, and being Almighty, can punish those that disobey him; and, on the contrary, reward those that obey him. From hence ariseth all lawful Authority, upon the Account of which one Man commandeth another; for that is lawful only, when it is conformable to the Will of GOD, known to us, either by Revelation, or the mere Light of Nature. But if amongst Men, the immediate Reason why they ought to be subject to the Command of another is ordinarily this, That they have voluntarily consented to it, that Consent, and all other Engagements whatsoever, which they enter into, being obligatory upon the Account only of that Maxim of natural Right, which tells us, That every one ought to observe what he has engaged himself to. See *Lib. ii. Ch. iii. §. 20.* following.

¹ The Greek of *Sophocles* is, Οὐ γὰρ ποτ' ἔτι ἂν εὐ πολλὴ νόμοι καλῶς
Φερίη' ἂν εἶδα μὴ καθεστῆκαί δι' ἐμῶ,
Οὐκ ἂν εὐτυχὸς γε σωφρονῶν ἀρχοίτ' ἔτι
Μηδὲν φοβῶς πρόσλημμα μηδ' αἰδῶς ἔχων.

Arrian & Epict. Lib. i. Ch. xxix. p. 164. Ed. Cantab. 'Tis not Man who is the Lord of another Man, but Life and Death, Pleasure and Pain, are the proper Sovereigns whom we obey: Take away these, and bring me before Cesar, and see how little Majesty without Terror can prevail upon a Man's Resolution.

From our Disquisitions on this Head, some Temper may be found and applied to that Maxim, which some have more crudely utter'd, that *Right and Law is nothing else but what pleaseth the stronger Party*: For indeed Laws can hardly obtain their outward End and Effect, unless they are supported and arm'd with Strength, so as to be able, upon Occasion, violently to force a Compliance. *Solon*. as he us'd to say of himself, achiev'd the greatest Things, *οὐκ ἔβην τε καὶ δίκην συναρμύβους*, by coupling together Justice and Strength, *Plutarch Solon. p. 86. Ed. Wechel*. And there is no Argument of greater Efficacy in human Affairs, than that which *Scylla* in *Ovid*. (*Metam. Lib. viii. ver. 59.*) useth concerning *Aminos*,

In causaq; valet, causamq; juvantibus armis.

With a good Cause, he brings as good a Sword to second it.-----

Even all that Pleasure, and Joy of Conscience, upon Performance of our Duty, and those Horrors and Tortures of Mind, which are the constant Attendants of Sin, both which we are in Piety oblig'd to admit and acknowledge, proceed from the Strength and Power of Almighty GOD, who can as easily make such Wretches their own

Punishers, as contemn the Authority and Restraints of other Men. *Juvenal. Sat. xiii. v. 193. & seqq.*

----- *Cur tamen hos tu
Evasisse putes, quos diri conscia facti
Mens habet attonitos, & surdo verberere cædit,
Occultum quatiente animo tortore flagellum?
Pœna autem vehemens, ac multo sævior illis
Quas aut Cæditius gravis invenit, aut Rhadamanthus,
Nocte dieque suum gestare in pectore testem.*

But why must those be thought to 'scape, that feel Those Rods of Scorpions and those Whips of Seel, Which Conscience thakes, when the with Rage (controuls, And spreads amazing Terrors thro' their Souls? Not sharp Revenge, nor Hell itself can find A fiercer Torment, than a guilty Mind; Which Day and Night doth dreadfully accuse, Condemns the Wretch, and still the Charge renews.

MR. CREECH.

And indeed it highly concerns the common Good of Mankind, that all Men believe and confess the Certainty of a divine Tribunal, incapable of the least Corruption, where Judgment is to be pass'd on those, who, by Means of Cunning, Collusion, or Strength, have declin'd the just Performance of their Duty. Hither may be refer'd that of *Plutarch* (*advers. Colot.*) 'Tis easier to build a City without Ground to hold and support it, than to make a Commonwealth either unite or subsist, without the Acknowledgment of a GOD and a Providence.

They,

MR. BARB. NOTES.

⁴ The Greek of *Arrian* is, Ἀνθρώπου ἀνθρώπου κύριος ἐκ ἐστὶ, ἀλλὰ θεῶν καὶ ζῶν, καὶ ἡδονῆς, καὶ πόνου, ἐπὶ χάρις τέταν ζῶντος καὶ τὸ Κρίνον. καὶ ἐπὶ πάσι ἐυσταθῶ.

⁵ *Plutarch's* Words are, Ἀλλὰ πάλιν ἂν μοι δοκῆι μᾶλλον ἐδάφους χάρις, ἢ πολιτεία, τὸ πᾶσι θεῶν δόξης ἀνεπιθέσις παντάπασι, σὺστασιν λαδῶν, ἢ λαδῶσα τῶν σῶσι. But our Author treats more largely elsewhere, of the Use of Religion in the Life of Man, and shews us, how it is the principal and most strong Bond of Society. In the independent State of Nature, if there were no Fear of a Deity, so far as every one found himself able to oppress another with Impunity, they would attempt any Thing as they pleas'd: Honesty, Modesty, and Fidelity would be esteem'd meer Chimera's and empty Names; no Man would take himself oblig'd to do any Good but upon the Account of his own Impotency. Further, without Religion no civil Society can be maintained; the Fears of temporal Punishments, the most solemn Oaths and Engagements to be faithful Subjects, the Reputation of keeping our Engagements inviolably, and the Knowledge of the Cares of our Kings and Governors, to secure us from the Inconveniencies of our natural State, are not of themselves sufficient to keep Subjects to their Duty: for Death being the only Thing in the World which is most feared by them who believe no GOD, we can't but acknowledge the Truth of that Maxim, *He that knows to die, knows not to be forced.* He that has Resolution enough to die bravely, is capable of attempting any Thing against his Sovereign, and he can't want some specious Motives or Pretences to entertain such a Design: as for Example, The Desire he hath to avoid the Evils which he apprehends from the present Government, an Endeavour to procure himself the Supream Power, but above all, the Justice, which he may fancy himself to do by such an Attempt, either because his King may seem to him not to discharge his Duty, or because he flatters himself, that if he were in his Place he could do much better. Such Pretences as these readily present themselves, when Men have a Mind to put such Projects in Execution, and they may effect their Designs, if the Prince neglects in the least to secure himself against the Attempts of Assassins (in such Cases, who can answer for his Guards themselves?) or several Persons conspire together against him, or in a foreign War, his Subjects revolt to the Enemy. Besides, Subjects themselves would do many Injuries one to another; for as in Civil Judicatures Sentence must be given according to the Acts and Proofs that are evident, all the Crimes, from which some Profit may be acquir'd, may pass for good Management, which every Man applauds himself for, as often as he is so lucky as to commit them without Witnesses. No Man would exercise any Acts of Charity, or do any friendly Offices, were it not for the certain Hope of some Glory or Advantage, which would redound to him by it. If the Sense of all Chastisement from Heaven were banished, no Man could depend upon another's Fidelity, every one would live in perpetual Disquiet, thro' Fear and Suspicion of some Deceit, or base Usage from their Equals. Nor would Sovereigns themselves be better dispos'd than their Subjects to good Actions. For having no Principle of Conscience to keep them in, they'd sell all Offices, yea, Justice itself; they'd aim at nothing but their own Interest, to which they'd sacrifice the Happiness of their Subjects. And if they apprehended their Subjects to revolt, they'd endeavour to weaken them as much as possible, as the only Way to maintain their Authority against Attempts of the Oppressors. The Subjects, on the other Side, for Fear of Oppression, would seek all Occasions to shake off the Yoke, and in the mean Time live in Distrust one of another. The Husband and Wife, at the Disagreement that happens between them, would lay hold on the Sword or Poison to destroy each other, and live in Fear of their Children, Servants, and the rest of their Family. For since without Religion there is no Conscience, it will be hard to discover these sort of Crimes, which are usually committed in secret, and are seldom discovered, but by such Means as arise from a guilty Conscience. *The Duties of a Man and Citizen, Lib. i. Ch. iv. §. 9.* Thus our Author explains this Point, and Experience verifies his Assertion. We may add to this, two Examples, which the excellent Author of *Parrhasiana* makes use of to prove the same Thing. *The History of China* (says he) tells us, that the great Men among the Chinese believe neither the Being of a GOD, who governs all Things, nor the Immortality of the Soul, and so we say that the Virtue of the Chinese consists in nothing but a profound Disimulation of their Vices. *Mem. de La Chine Tom. i. Lib. v. and Tom. ii. Lib. i.* Among the Jews, the Sadducees who denied the Immortality of the Soul, tho' they believed a GOD, and tho' they rejected a Providence, made it appear by their Conversation, that they could not be of that Opinion, but they must be Enemies to Society. For *Josephus* says of them, *De Bel.*

Jud.

They, therefore, who would prescribe Laws to others with any Effect and Validity, must build their Power on the Foundations which we have here established.

XIII. But that a Law may be able to exercise its directive Force, there is required in the Person for whom 'tis made, a Knowledge both of the Law-giver and of the Law. For how can any Man pay Obedience, who neither apprehends to whom it should be paid, nor to what Duties his Obligation binds him? And here it will be sufficient, that a Man hath once been Master of such a Knowledge: For he that forgets what he once knew, is not at all loos'd from his Obligation, since he might well have secur'd his Remembrance, had he taken up, as he ought to have done, a real Desire and Resolution of obeying. Now to the Knowledge of the Legislator, 'tis hardly possible any Man should be a Stranger. For, as to natural Laws, that they have the same Author with the Universal Frame of Things, none can be ignorant, that will but make Use of their ordinary Reason. Much less can the Author of civil Laws be hid from the Apprehension and Notice of his Subjects: Since he is constituted, either ¹ by the express and open Consent of those Subjects, or else ² by their tacit Agreement, whilst they any way submit to his Command. How we arrive at a Sense of natural Laws by the Contemplation of human Condition, we shall hereafter have occasion to explain. Civil Laws are convey'd to the Subjects Knowledge by a Promulgation, publicly and ³ perspicuously made. In which there are two Conditions which ought to be clear and certain; first, That the Laws proceed from him who hath the chief Command in the State; and, secondly, That the Meaning of the Laws is such, and no other. The former Condition is then known, when the Sovereign promulgates a Law, either by his own Voice, or by Persons of his Deputation. That these Persons publish Laws by the Command and Authority of the Sovereign, there is no Question to be made, if it appear that they have been ⁴ employ'd usually by the Sovereign, in declaring his Will; if the Laws are brought into Use at judicial Proceedings, and if they contain in them

nothing derogatory to the Sovereign's Power. For it is not to be suppos'd that a Minister should vent that for a durable Decree of his Prince, which is not so, or that he should impudently usurp so extravagant a Power; since in an Enterprize of this Nature, there could be no hopes of Concealment, or of escaping due Punishment for so insolent an Offence. As to the other necessary Point, that the Sense of a Law may be clearly apprehended, it is incumbent on the Promulgators, to use the greatest Plainness that the Thing is capable of: Contrary to that Management of *Caligula*, who wrote his Laws in small Letters, and fix'd them in a high Place, in this Manner only shewing them to the People ^a.

If any thing in the Laws seems obscure, the Explication of it is to be sought, either from the Legislator, or from those Persons who are by him appointed to judge according to the Laws. For it is their Business, observing a right Interpretation, to apply the Laws to particular Cases, or upon the Proposal of such or such a Fact, to declare the Sovereign's Pleasure concerning it ^b.

We cannot here but observe, that the Notion maintain'd by some Authors, *That the Consent of the People is requisite to make Laws oblige the Subject in Conscience*, is neither true in the Laws of Nature, nor in the Civil Laws of monarchical or aristocratical Rulers; nor indeed at all, unless it be understood of implicit Consent; as a Man by agreeing to the Sovereignty of another, is at the same time suppos'd to have agreed to all the future Acts of that Sovereignty. Though it would really be very useful, and contribute much to engaging the Subjects in a voluntary Obedience, if the Laws could be made with their Consent and Approbation; especially such as are to pass into their Lives and Manners. Agreeable to this is *Pericles's* saying in *Xenophon. Apom. Lib. i. P. 418. Ed. Steph. I/bo-cver, either by written or unwritten Commands, enjoins another to do a Thing, without persuading him that he ought to do it, seems to me, not to use Law, but Violence.* Comp. *Sanderfon de Oblig. Conscient. Prælect. 7. §. 22* ^c.

XIV. As in the Sovereign, or in him who is to govern another by Laws, two things are requisite,

^a *Dio Cass. in Excerpt. Pierefc. Lib. lix.*

^b *Comp. Hobbes de Cive, Ch. xiv. §. 11, &c. and Leviath. Ch. xxvi.*

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Jud. Lib. ii. Ch. xii. The Sadducees are rude and inhuman to one another, and as cruel to their own Countrymen the Jews, as to Strangers. In fine, that Religion may produce all the good Effects to Society which naturally result from it, it is necessary that we have right Apprehensions of the Deity; otherwise, if we term to ourselves a Deity too merciful, or such an one as favours our Sins, either by his Example, or any other Way, Religion will be so far from firmly upholding Society, that it will utterly destroy it. So that according to the Principles of the Heathens, every one may reason as he in the Poet does, *As miserable a Mortal as I am, shall not I be wiser than the greatest of the gods?* *Terent. Eunuch. Act. iii. Scen. v.* Wherefore we must think that the virtuous Heathens either did not believe what was commonly reported among them, about the Vices of their gods, or were not aware of the Consequences that naturally followed from the Principles of a Religion so monstrous. See what shall be spoken, *Ch. iii. Lib. ii. §. 19. Note 2. and Ch. iv. §. 3. Note 4.*

¹ This is done either when a Multitude of Men joins together to make up a Civil Society, or when a Society already formed takes an Oath of Fidelity to their Sovereign. We shall treat more at large of this Subject, *Lib. vii.*

² This hath place always when we enjoy the Protection of a State, and of the Laws established; for we must be suppos'd to consent tacitly to submit ourselves to the Laws, tho' we have not formally engaged to do it, as *Plato* observes in the Case of the Citizens of *Athens*, who had Liberty to go whither they would, unless they submitted to the Government of that famous wealth, *ὅς δ' ἐν ἡμῶν παραμύνη, ὅρῳ ὃν τρέπον ἡμεῖς [οἱ Νομοὶ] τὰς τε δικὰς διαζόμεν, καὶ τ' ἄλλα τὴν πόλιν διοικέμεν, ἡδὲ φάρμ' ἔστιν ὧ ΜΟΛΟΓΗΚΕΝ Αἱ ἘΡΓΩ ἡμῶν, ἃ ἂν ἡμεῖς κελύμεν ποιῆσθαι ταῦτα.* In *Criton*, and in the next Page, the Greek is, *ἐργῶν, ἀλλ' ἔ λόγῳ.*

³ In the antient Times, before the Invention of Writing, Laws were compos'd in Verse, which were frequently sung in publick, that Men might remember them, *Aristot. Problem. §. 19. Problem. xxviii. Horat. de Arte Poet. ver. 399.*

⁴ This Author, in his *Abridgment of the Duties of a Man and Citizen, Lib. i. Ch. ii. §. 6.* says, *That it is the Business of their Employ; a Circumstance worth our Observation.* For we may doubt of the Validity of the Action of any Minister, or Magistrate, which belongs not to his Office, unless it plainly appears that the supream Governor hath given him a Commission extraordinary.

^c The Greek of *Xenophon* runs thus, *Πάντα δοκεῖ, Φύνας ἢ Περικλῆα, ἕσα τις μὴ πείσας ἀναγκάζει τὰς ποιεῖν, εἴτε γράφῃσιν εἴτε μὴ, βία μάλλον, ἢ νόμῳ εἶναι.*

that he understand what is fit to be prescrib'd, and that he have sufficient Strength to denounce and to execute some Evil on those who shall not conform to his Rules (for we suppose the Persons for whom the Laws were made, to have both Power and Inclination to disobey them) So every Law consists of two Parts; in one is defin'd and declar'd what is to be perform'd, or omitted; in the other is signify'd, what Evil shall be incurr'd by those who transgress in either respect; and this latter part is usually term'd the *Sanction* of a Law; about which Bishop *Cumberland* ^a hath open'd a wide Field of Enquiry, whilst contrary to the general Opinion of the Lawyers, "He maintains that the Sanction of Laws is made, not only by Punishments, but by Rewards too, and more principally by the latter than by the former. That as to the Sanctions of the Laws of Nature, it is impossible by any natural Signs, more openly and more forcibly to persuade Men to do a Thing ^c, or to judge with good Authority, that such a Duty is commanded by the Governor of the World, than if such Acts are grac'd by him with natural Rewards. That, altho' in the Sanction of Laws by Men, use is made of negative Conceptions, and of Words properly expressing them, yet in the Nature of Things, that which drives us on to Action, is some positive Good, which we hope to preserve, or to acquire upon keeping off those things that would have a contrary Effect. That Privations and Negations do not move the Will of Man, and that the avoiding of Evil is by no means its Object, any farther than as it denotes the Preservation of some Good. That, whatever Strength is usually ascribed to natural Punishments and Evils, in engaging Men to shun and decline them, is all to be resolv'd into the attractive and impulsive Force of those Goods which the Punishments or Evils would deprive them of. That, thus all those Things which are commonly said to be done for the sake of escaping Death or Want, might be more properly affirm'd to proceed from the Love of Life, or of Riches. That, unless Life went before it, Death would signify nothing, and that the former would never be fear'd, if the latter were not first desir'd. That, the Nature of Things moves our Affections more strongly with the Love of a present Good, or the Hope of a future, than with the Hatred of a present, or the Fear of a future Evil; and that good things are desir'd upon account, not of the opposite Privation, but of their inward Agreeableness to our Natures. That, civil Laws receive a

" firmer Establishment from their End ^d, the publick Good, a part of which is communicated to every honest Subject, than from the Penalties they threaten, the Fear of which can prevail only on a few Men, and those the most wicked in the Commonwealth." To this purpose Bishop *Cumberland* discourseth. On whose Opinion we may first observe, That if we would comprehend under the Term of *Sanction*, even the good Things and the Rewards following the Observation of Laws; it is requisite, that those good Things should really proceed from our Obedience, and be, as it were, bought and purchas'd by it. But now 'tis apparent, that all the good Things we possess, we do not obtain by conforming to Laws; and therefore those which we any other way acquire, do not come under the Notion of Rewards. Thus, our Selves, our Lives, and all the natural Benefits we enjoy, are not paid to us as the Rewards of fulfilling any Law, but the Divine Goodness freely confer'd them on us, before we could so much as think of any Law to be fulfill'd. Neither is the Continuance of these good Things (since it proceeds from the inward Force of natural Substance) deriv'd from any Performances of ours, but is the Gift of our Great Creator, who ^b *makes his Sun to shine on the Evil and on the Good, and sendeth Rain on the Just and on the Unjust*. Thus likewise, what a Man gets by his proper Labour and Industry, he doth not directly and principally ascribe to his own Obedience, but to his Creator, who gave him the Strength, and to himself, who rightly employ'd it. Yet this Effect indeed, we may obtain by Laws, both the Preservation of those good Things which either the free Bounty of Heaven, or our own Diligence hath procur'd us, from the Incurfions and Assaults of other Creatures, that might otherwise hurt or destroy them; and likewise the Increase of the same Enjoyments by various Methods and Means: And therefore these Advantages only, in as much as 'tis in the Power of the Legislator to make them good, are properly to be esteem'd Rewards. And that these may have a perfect Force, in disposing Men to Obedience, the Legislator is to signify, that such Effects will most certainly follow such a Cause.

We may observe farther, That altho' the Will may be incited to an Action, by the Proposal of some Good likely to proceed from that Action, yet this Consideration doth not impose any Necessity ^e of Performance, unless it be strengthened with the Commination of some Punishment, to be incurr'd upon Non-compliance. And therefore, that any good Effect proceeds by natural Conse-

^a *De Leg. Nat. Prolegom.* §. 14. ^c *Ch. v.* §. 40.

^b *Matth. v.* 45.

Mr. BARB. NOTES on §. XIV.

¹ These Words, *ut quicquam agant*, i. e. that they may do any thing, which are omitted in all the Editions of this Work, either by the Neglect of the Author, or carelessness of the Printers, quite spoil the Sense. The *English* Translator has not taken the Pains to consult the Original, where these Words are expressed distinctly, *Ch. v.* §. 42. He hath also carelessly copied out a Fault in the Impression, in these Words, *aut cum Authoritate judicare*, for *indicare*, i. e. to judge, for to shew his Authority, which makes the Sense disagreeable.

² These Words, *Which wise Legislators and good Citizens have propounded with a Desire of*, ought to be added to render the Sense of Bishop *Cumberland* more clear, tho' they be not in the Original.

³ Mr. *Locke* proves in a most solid Manner, "That it is not the most positive Good, but Uneasiness (as he calls it) that usually determines the Will. That is to say, that Good, nay the greatest Good, tho' we judge it such, does not determine the Will, at least, to desire it with an Earnestness proportionable to its Excellence; yet this Desire makes us uneasy, because we are deprived of it. As for Example, persuade a Man, as long as you please, That Wealth is more advantageous than Poverty; make him to see and confess, that suitable Conveniencies of Life are to be preferred before a fordid Indigency, if yet he be contented with this latter Estate, and finds no Inconveniency in it, he'll persist in it contrary to your Advice, his Will is not inclined to any Action whereby he will renounce it. *Essay of hum. Understand. Lib. ii. Ch. xxi.* §. 35. See the following Part of the Chapter.

quence from any Action, is indeed a Token of the superlative Bounty of our Creator, who is so willing to confer that Good on us, and so kindly invites and persuades us to embrace it. Yet this must not presently be thought a necessary Argument, that he at the same time commands us, by performing the Action, to acquire such a Good. He might perhaps judge it sufficient to have offer'd us so fair an Occasion of receiving his Munificence. But if some Evil be farther pronounc'd against us upon Omission, then there can remain

no doubt, but that the Action is really and directly enjoin'd. To which we may add, that the Minds of Men * are mov'd more forcibly by the Infliction of Evil, than by the Possession of Good. It must be confess'd, that the Acquisition of Good hath very powerful Charms; especially when it is fresh, and join'd with the Deliverance from some present Evil. But the Sense of this Pleasantry wears off in a long course of Possession; and when once that Motion of Mind ceaseth, which either the Absence of the Good, or the fresh En-

* The famous Mr. Bayle maintains the contrary Opinion in his Treatise upon a Comet, saying, *That a Man has more Love for Joy, than Hatred to Sorrow*; which Paradox he pretends to prove thus; *No Man* (says he) *scruples to put himself into an uneasy and sorrowful Condition, provided it carries a Shew of Mirth and Pleasure*--- This appears from the Examples of so many young Maids, who being transported with the Expectations of some present Pleasure, suffer themselves to be led into such Actions, as they are sensible will produce a long Train of Miseries: As also by the Example of great Numbers of Men, who have found a thousand times, that the eating of certain Meats, and their drinking too much, has caused terrible Pains in them, who will not yet refrain their Appetites from them, when they have occasion. But 'tis my Opinion, that these young Maids and Drunkards do not usually think of the bad Tendency of their Actions, so far are they from determining, after they have exactly compar'd the present Pleasure with the Misery that will follow. 'Tis not then a Time of Reflection; we might do it when we are serious, and the Object and Occasion being at a Distance, our favourite Passion is silent; but when the Heart is briskly attacked in a sensible place, all these good Reflections vanish, we dream of nothing but the greatest Satisfaction, and never trouble ourselves with what may happen. The present Pleasure, unless it be very small, and next to nothing, fills the narrow Capacity of our Soul, and so engrosses the whole Mind, that it troubles not itself to think at all of Things absent (as Mr. Locke speaks, *Essay of Hum. Underst.* p. 326.) The Orator Eschines speaking of those who engage themselves in some great Wickedness, says, *That they neither consider of the Disgrace or Punishment, which they bring on themselves, but are wholly employed with the Thoughts of that Pleasure they shall obtain, if they compass their Design*; Οὐ γὰρ τὴν ἀρχὴν, ἐδ' ἂν πείσοιται κηφέσις λογίζονται ἀλλ' ἐφ' οἷς καθορθόσασιν; ἐνφρανεύονται, τῆτοις κερήλωται. *Orat. in Timarch.* p. 197. *Ed. Gen.* But if, notwithstanding the Earnestness of the Desire which the Presence of the Object excites, there are some Intervals which invite them to consider the Consequence of the Action, they always have a great Inclination to flatter themselves. They think, that tho' the Consequence is important, nevertheless 'tis not so certain, but that it may happen otherwise, or at least that it may be avoided by some means or other; as by Industry, Courtship, change of Behaviour, &c. (Mr. Locke of *Hum. Underst.* p. 328.) Furthermore, the prevailing Power of present Pleasure, by which they are hurried, is, properly speaking, a real Sorrow, for in the Fit of a violent Passion, the earnest Desire, which is inflamed by the Nearness and Allurements of the Object, causes such an Uneasiness, as affects us in the same Manner, as what we ordinarily call Grief, and the Uneasiness present being greater, determines the Will, as Mr. Locke has very well prov'd, altho' the future Sorrows, to which Men expose themselves by suffering themselves to be carried away by the prevailing Power of present Pleasure, may be seen at a Distance, and as a greater Evil in its own Nature than what they feel themselves actually press'd with, the Delusion caused by a small Difference of Time, inclines the Mind to choose the worst part. Most of our Pleasures (says Montaigne, according to the Opinion of the Heathen *Wisdom, viz. Seneca, Ep. li. &c.*) tickle and embrace us, to strangle us, as the Thieves which the Egyptians call Philetas, did; and if the Head-ach seize us before Drunkenness, we abstain from overmuch drinking, but the Pleasure going before deceives us, and so conceals the Consequence from us. See the same Thought in two Comic Poets quoted by Athenæus in his *Deipnosophists, Lib. i. & xv.* whose Words Gataker recites in his Preface to *Marcus Antoninus*. If at the same Moment (says Mr. Locke) that a Man takes the Glass into his Hand, the Pleasure that he finds in drinking were accompanied with that Pain in the head, and Qualms of Stomach which never fail to seize some Men some few Hours after they have drunk to Excess, I do not believe that any Man would, upon these Conditions, put the Cup to his Lips, whatever Pleasure he might have by drinking. So that in the Examples alledged by Mr. Bayle, and in other like Cases, none can propound to himself to undergo any Uneasiness or Sorrow, provided it passes with us for Pleasure, but he aims to free himself from some Uneasiness, or Grief that lies upon him, which his Passion, or erroneous Judgment, hinders him from comparing fully with the Decree or Certainty of Sorrow at a Distance. The other Reason of Mr. Bayle is, That Men stick not to pass thro' many Sorrows and Uneasinesses, provided at length they can arrive at Pleasure. The Corsairs (says he) having received an Affront, will hide themselves five Days together in the Bushes to wait for their Enemy, being well contented to feed on the Roots of Grass all that while, on Condition, that they may have the Satisfaction of seeing their Ambush successful. But we may rather say, that the Uneasiness or Grief which these Men have conceived at the Affront given them by their Enemy, who has provoked, and the eager Desire of Revenge with which they are possessed, renders them insensible of those lesser Disturbances which are caused by the Coldness of the Weather, or an hungry Appetite. We can observe very few Men, who will willingly undergo any great Pain or Trouble, to arrive at the Enjoyment of those Pleasures of which they are most sensible, but when indeed only some small Inconvenience, or little Uneasiness, which they think can hardly be born, attends, there needs no great Resolution to open a way to the Possession of that Object which has made so great Impressions upon our Heart. But the Prospect of some great Evil abates the Eagerness of the strongest Passions, and fills pliable Minds with such a Fear, as keeps them from swallowing the Baits of Pleasure: But if sometimes to satisfy these Desires, Men run themselves carelessly into great Troubles and sharp Sorrow, we must think, that as soon as they are sensible of what they have done, they'll immediately repent of their Rashness and Imprudence; the Pleasures, whose sweet Morfels have drawn us away, will then appear to have been bought too dear, and we shall renounce, with all our Hearts, the Hopes of all we once accounted Delightful, to be delivered from the Evil we endure; a Proof sufficient that we have not well consulted our own Good, or that the Violence of our Passions so blinded us, that we did not perceive all the Bitterness of the Sorrow, into which we have so blindly thrown our selves. To come then to the Subject our Author is on, Suppose that two Law-givers, willing to settle the same Law, shall propound, the one great Rewards to such as observe it, and the other severe Punishments to such as break it: Do we think that the first would more effectually engage Men to Obedience, than the other? No Body, I believe, will venture upon the affirmative; for there may be many Men who will not much regard the greatest Rewards that can be given, and being contented with their present Condition, aspire not to any higher Degree of Happiness: But how few are there who will not be affrighted at the Prospect of a great Punishment, tho' they do not attentively consider it? For one Man who will yield to a Temptation in spite of such Threatenings, we shall find a thousand who will not in the least be affected with the Hopes of the greatest Rewards; especially, if to deserve them, they must offer Force to any strong Inclination, I shall add one more Remark, which is this, If a Man were more sensible of Good than Evil, those Sins into which Men fall for fear of Trouble, ought to be punish'd with greater Severity, than those which are drawn into the Love of Pleasure. Now this Consequence which naturally flows from the Principle of Mr. Bayle, is contrary to the Judgment of all the wisest Legislators and most able Philosophers, as well as the constant Practice of all the Judicatures of the most civiliz'd Nations; and I am apt to think, that Mr. Bayle himself would not approve of a more gentle Treatment towards that young Maid who (as he instances) suffered herself to be carried away with the Prevalency of a present Pleasure, than of her who yields to the Threatenings of a furious Spark. See *Chap. iv. §. 7. Notes* there, and what the Author farther says, *Lib. viii. Chap. iii. §. 19.* as also *Grotius, Lib. ii. Ch. xx. §. 29. N. ii.* with the Notes. I am aware also that in the same Book in which this Maxim, which has occasion'd this large Note, is contained, these Words, which will confirm my last Reflection, are found, *I much doubt* (says Mr. Bayle) *whether the Prevalency of that Pleasure which hurrieth us, will be able to diminish the Crime,* p. 341.

joyment of it rais'd, there remains scarce any thing but a dull Acquiescence and Contentment. Whence it comes to pass that many Persons, then only begin to value their good Things, when they either have lost, or are in danger of losing them. But Grief, into which all Evils and all Privations of Good are at last resolv'd, is not itself a bare Privation, but a Thing of a most positive Nature, and of such prodigious Strength, as to be able so far to extinguish all Sense and Value of Happiness, as sometimes to make us desire so severe a Remedy as Death, for its Cure.

Hence, we think, civil Legislators have sufficient Grounds and Reasons for choosing to make the Sanction of their Laws consist rather in Punishments than in Rewards. The Observance of human Laws is indeed advantageous enough in general, as it secures the Possession and Enjoyment of those Blessings which attend a civil Life: But were the Exercise of common Virtues enforc'd by the Proposal of particular Rewards, 'twere impossible to furnish Stock enough for so profuse a Bounty. On the other hand, the denouncing of Punishments was the surest way to make Men shake off that heavy Drowsiness, with which most of them are befotted and benumm'd: And because generally the Transgression of the Laws is join'd with the Hurt of others, and with some imaginary Good of the Offender, therefore it seem'd most expedient to repress the enticing Allurements of Sin, by representing the frightful Image of that Pain and Grief which was unavoidable to follow it. Thus we find that civil Laws do always come enforc'd with a Penalty denounc'd against Transgressors, either expressly defining the kind of Muilt or Punishment; or else intimating, that it is left undetermin'd to be settled by the Discretion of the Judges, and of those who are to take care of putting the Laws in Execution. Indeed the Roman Lawyers tell us of some Laws, which were im-

perfect, viz. such as have no Punishment enacted for Offenders, as *Macrobius* speaks⁷, or which wanted this penal Sanction. Such a one they reckon the *Lex Cincia*⁸, which had no other Clause added at the End to enforce it,⁹ but this, *He that doth otherwise, shall be accounted to have done wickedly*. But I should conjecture, that in that Law either the Infamy alone was thought a sufficient Punishment, or it was left to the Power of the Censors to fix some further Mark of Disgrace on the Delinquents in this Point. That such Persons were not altogether unpunish'd, we may fairly conclude from *Tacitus*¹⁰. *Cicero de Legibus*, Lib. ii. Ch. ix. ¹¹ *The Punishment of Perjury is from Men Disgrace, and from Heaven Destruction*. *Livy*, Lib. x. Ch. ix. gives us an Instance of another Law seemingly imperfect. ¹² *The Valerian Law*, says he, *when it had forbidden the scourging, or the beheading of a Man, who should make an Appeal, only added, that whoever acted thus, acted wickedly*. This I suppose (so great was the Modesty of Men in those Days) might be thought a sufficient Tie for a Law: But in our Times such a Simplicity of Expression would be us'd in no Threats, but those which were design'd for Jest. In the same Rank we may place the Law of ¹³ *Zalenchus* mention'd by *Diodorus Siculus*, Lib. xii. Ch. xx. *Let no Citizen prosecute his Enemy with implacable Hatred, but let him so maintain Enmity with him, as if he were shortly to return into Favour and Friendship*. *He that doth otherwise, let him be reputed a Man of a fierce and barbarous Disposition*. Unless you'll say, that in this Case, as well as the former, the Infamy may well be interpreted as a Punishment. And so likewise in those other Laws recited immediately after by the same Author, *Lib. xii. Ch. xxi. Let not a free Woman, unless she be drunk, go attended with above one Maid. Let her not stir out of the City in the Night-time, unless when she goes to prostitute herself to her Gallant. Let her not wear golden Ornaments, nor Garments interwoven with Gold, unless she designs to act the Courtesan*.

⁵ One small Pain is sufficient to spoil all the Pleasures we enjoy. The Reason of it is, because so long as we are troubled with any Uneasiness, we can't think our selves happy, or in the way of Happiness, because every one looks upon Grief and Uneasiness as Things inconsistent with Happiness. Mr. *Locke of Hum. Underst.* p. 299.

⁶ The Original being so confuted in this Place, that the Author's Reasonings quite lose their Force thereby, I have thought fit to remedy it, by transplanting two small Sentences, and changing the Connection, viz. after *De leur Loix*, put, *Car il falloit*, &c. thus in the *English Translation*, after *Rewards*, Lin. ix. put, *The denouncing of Punishments*, Lin. xii. and reading to, *follow it*, return to, *The Observance*, &c. Lin. v. and so go on at Lin. xii. because to put the first Periods into a Parenthesis, as the Author does, makes an harsh Confusion.

⁷ *Inter Leges quoque illa imperfecta esse dicitur, in qua nulla deviantibus pena sancitur*. *Macrob. in Somn. Scip. Lib. ii. Ch. xvii.*

⁸ The *Cincian Law* is so called from *M. Cincius* the Tribune, who proposed it, *A. U. C. 549*. It forbid all Advocates and Pleaders to take any Money or Presents, from whence *Plautus* calls it *Muneralis*. See *Tacit. Lib. xi. Ch. v.*

⁹ The Latin is this: *Qui secus fecerit, improbe scisse videbitur*. It is not known whence our Author took these Words; But these sort of Laws do not make void what was done against their Prohibition. *Imperfecta Lex est, veluti Cincia, que supra certum modum donari prohibet, exceptis quibusdam cognatis, & si plus donatum sit, non rescindit*, i. e. *Cincius's Law* is an imperfect one; because, tho' it forbids all immoderate Fees and Gifts, unless to some Kindred, yet if more be given, it makes them not void. *Ulp. Instit. Tit. i. §. 1.* See *Lib. iii. Ch. vii. §. 6.* following.

¹⁰ Who says, *Annal. xiii. §. lxii. Suillii opprimendi gratia repetitum credebatur Senatusconsultum, Panaque Cincia Legis aduersus eos qui pretio causas orassent*, i. e. The *Cincian Law* was made to ruin *Suillius*.

¹¹ *Perjurii Pœna divina, exitium, humana, dedecus*. *Cicero de Legibus, Lib. ii. Ch. ix.*

¹² The Latin is, *Valeria Lex, quum cum qui provocasset, virgis cedi, securique necari vetuisset, si quis adversus ea fecisset, nihil ultra, quam improbe factum, adjicit*. *Id (qui tum pudor hominum erat) visum, credo, vinculum satis validum Legis. Nunc vix serio ita minetur quisquam*. But here, by the Bye, we may observe, that the last Words of this Passage are much varied in the Manuscripts, where they are greatly corrupted. *Gronovius* the Father faintly conjectures, that they should be read thus, *Nunc vix si summas penas minetur quisquam*; and he builds it upon two of the best Manuscripts, which read thus, *Nunc vix si summo serio minetur*, &c. Others add, *Ita, ad servata*, which being joined with the former Readings, and keeping to the Sense, we may gather the true Reading to be, *Nunc vix si summos cruciatus minetur quisquam*, i. e. *Men at this Day can hardly be kept to their Duty by the plainest Denunciation of the most severe Punishments*.

¹³ *Diodorus Siculus's* Greek, is, *Προσάτιον μηδένα τῶν πολλῶν ἐχθρῶν ἀκατάμακτον ἔχειν, ἀλλ' ἔστω τὴν ἐχθρῶν ἀναλαμβάνων, ὡς ἦεντο πάλιν εἰς συζυγίαν ἢ φιλίαν τὸν δὲ παρ' αὐτὰ πάντα, διαλαμβάνων παρα τοῖς πολιταῖς ἀμύεσσι ἢ ἀγροῖσι τῆν ψυχῶν*— *Γυναικὶ ἐλευθέρᾳ μὴ πλείον ἀκολοθεῖν μῆος τετραπέμω, ἢ μὴ μισθῶ, μηδὲ ἐξέναι νεκτὸς ἐν τῷ πόλει, εἰ μὴ μοιχορρομῶν. μηδὲ περιτίθεσθαι χρυσία, μηδὲ ἐδωῆτα περιφασμένω, ἢ μὴ ἑταίρειον μηδὲ τὸν ἀνδρα φορεῖν δακτυλίον ὑπόχρησον, μηδὲ ἡματιον ἰσομιλησιον, ἢ μὴ ἑταιρευαται, ἢ μοιχευῆται διδ ἢ βελδῶς ταῖς τῶν προσήμων ἀρχαῖς ὑπεχαιρέσειον ἀπέσθῆψε τῶν θελοῦσῶν τρυφῆς ἢ ἀκολοσῶς τῶν ἐπιτηδουμάτων, ἐδῶς ἢ ἐδωλετο τὴν ἀρχαῖον κέλευσιν ὁμολογῶσῶς, καταγέλασθῶ ἐν τοῖς πολιταῖς εἶναι*. See *Montagne's* Essays, *Lib. i. Chap. lxiii. Digest. Lib. xl. Tit. 7. De Religiosis, & Sumptib. Funer. C. C. Leg. xiv. §. 14. & Lib. xlvii. Tit. 12. De Sepulchr. viol. Leg. iii. §. 4.*

Let not a Man wear a Ring allied to Gold, or a Garment approaching near to Milesian Richness, unless he be guilty of Fornication, or of Adultery. Thus (as the Historian proceeds to observe) by such scandalous Exceptions and Conditions, he easily diverted his Subjects from the Pursuit of Luxury and of Intemperance. For no one could bear the exposing himself to his Fellows by so foul a Disgrace ^a.

Thus then, there are two Parts of a Law, one *Definitive*, and the other *Vindicative*, which is the penal Sanction. These, we say, are two Parts of the same Law, and not two Species of Laws. For as it is lost Labour to say, *Do this*, if nothing follow besides; so it is absurd to say, *You shall undergo a Penalty*, unless it have been before signified by what Means we shall render ourselves obnoxious to this Suffering. We must therefore take Notice, that the whole Strength and Force of a Law properly consists in declaring what our Superior is pleas'd we should perform or omit, and what Penalty we shall incur upon Default. Whence also it may be understood in what Sense the Power of obliging is attributed to the Law. For, properly speaking, the Power of obliging, or laying an inward Necessity on Persons to act in such a Manner, is in him who bears the sovereign Command. But the Law is only the Instrument of Sovereignty, by which the Ruler makes his Pleasure known to his Subject, which being once discover'd, an Obligation to Obedience is produc'd in them by Virtue of his supreme Authority. Hence too it appears, that the vulgar Distinction of the Power of a Law, into *directive* and *compulsive*, was ill made; unless by the compulsive Power we understand the penal Clause. For the proper Efficacy of a Law consists in *directing*, as it declares the Will of the Sovereign, and denounceth Threats against the Subject, if he prove disobedient. But the

compulsive Power, or the Power of exacting from the Subject a Conformity to the Rule ¹⁴ prescribed them by decreeing and actually inflicting Penalties, is properly in the Person of him who made the Laws, or of him who hath the Care of their Execution. *Liban. Orat. V. Laws were of no Force without Judges to put them in Execution. Bare Statutes have neither Ears to hear our Cause, nor Feet, nor Hands, to hasten to us and defend us: But all the Assistance which Justice gives us, is convey'd by its Ministers.* Tho' 'tis a common Thing with Writers to attribute to the Laws themselves such Effects, as in a strict Sense belong to the supreme Power. Of which kind of Speech, that one Passage of *Apuleius* ^b may be a sufficient Instance, *Quod est lex in urbe, dux in exercitu, hoc est in mundo Deus. What the Law is in a City, what the General is in the Army* ¹⁵, such is GOD in the World. When *Livy* says ¹⁷, *The Commands of the Laws are more powerful than those of Men*; this is so far true in Democracies only, that the Magistrates cannot recede from the Laws, nor over-rule their Force.

Legislators, as such, are said to *compel*, only *morally*; not that by any natural Violence they so constrain a Man, as to render it impossible for him to act otherwise than as they direct; but because, by declaring and exhibiting a Penalty against Offenders, they bring it to pass that no Man can easily choose to transgress the Law; since, by reason of the impending Penalty, Compliance is in a high Degree preferable to Disobedience.

XV. Now by attributing thus to Laws the Power of *obliging*, we immediately exclude *Permissions* from the Number of true and proper Laws: Tho' *Modestinus* ^c tells us, the ¹ Virtues of Law are to *command*, to *forbid*, to *permit*, to *punish*. For ² *Permission* is not properly an Action of the Law,

^a Add. Lib. xi. Tit. vii. D. De Relig. Sumptibus Funeral. & Lib. iii. §. 4. Leg. de Sepulchro violato.

^b De Mundo, p. 749. Ed. in usum Delph.

^c Lib. i. D. Tit. iii. L. 7.

¹⁴ The Original is, *ab ipsis*, for *ipsis prescriptam*.

¹⁵ This Author cites only the Latin Version of *Libanius's* Oration V. He has some Declamations, but I have never seen his Orations.

¹⁶ The Sense of this Passage is certainly taken out of *Aristotle*, who speaks exactly the same Thing in his Book *De Mundo*, Chap. vi.

¹⁷ *Imperiaque legum potentiora, quam hominum.* Tit. Liv. Lib. ii. Chap. i.

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¹ The Words of the Digests are, *Legis virtus [hæc] est, imperare, vetare, permittere, punire, Digest. Lib. i. Tit. iii. Leg. vii.*

² This is not always true, for every one knows, that Laws sometimes positively grant certain particular Privileges and Rights: If we carefully reflect upon the Nature of moral Things, we shall find that the general Notion of a Law, as it implies a Constitution by which a Superior orders the Actions of such as are subject to him, includes not only an Obligation to do or not do certain Things, but also a Liberty to do or not do others. So that Liberty imports always a Concession, either express or tacit, which is a positive Thing. And indeed on what are all the Rights we have founded, but upon the positive Will of our Superior, by Virtue of which we may defend ourselves, or require the Protection of the Law against all them who endeavour to molest us in the Enjoyment of some lawful Right? Farther, Right and Obligation are two relative Notions, which always go Hand in Hand. And why may we not allow a Law of meer Permission, as well as a Law obligatory? Certainly, if this Law be necessary to impose upon us a Necessity of acting, or not acting, the other is no less necessary to put us in a State of acting or not acting with Security and Impunity, as we think fit. *Grotius*, who, like this Author, affirms, that Obligation is the Essence of all Law, seems tacitly to acknowledge in the same Chapter (*Lib. i. Ch. i. §. 17.*) that *Permission* is comprehended in the Notion of a Law. We must therefore allow, That the Law of meer *Permission* is an Ordinance or Constitution by which a Superior gives to those that are subject to him, a Right, or moral Power to have Things safely and lawfully, or to do and require of another certain Actions, if he judges convenient. See what *Mr. Titius* speaks much to the same Purpose in his *Observ. on Pufendorf*, l. li. *Mr. Selden* has already maintained the same Opinion, and uses a Comparison very proper to make it understood, *viz. All the Boundaries which divide my Field from my Neighbour's, set out the Extent of his Field as well as mine; so the obligatory Right, which determines what Actions are commanded and what forbidden, being once settled, there necessarily follows a Right of meer Permission, which has for its Object all other Actions, about which the Lawgiver has determined nothing authoritatively, and consequently permits every Man to do, or not to do, as he pleases.* *De Jure Nat. & Gent. Lib. i. Chap. iv.* Again, We must remember, that there is a great Difference between the Permission of human Laws and divine; for the Permission of divine Laws is always absolute, so that every one has a full Right to do all that they permit, provided the Things permitted are not forbidden by any human Law, to which he ought to submit, in Obedience to some other divine Law; but as to human Laws, the Permission which they give is for the most part imperfect, which implies only Impunity in human Judicatures, as our Author explains himself a little lower. Nevertheless I am aware, that this Author forgetting his Principles, seems to allow, besides a Law of meer Permission; for speaking of the Goodness or Evil of Actions in the following Chapter, §. 3. he says expressly, *By a Law I mean always here a Law which indispensably obliges to some Thing, and not a Law that only permits.* *Legem necessitantem, non permittentem.* *Grotius* also speaking of the first Right of the Occupant says, *It is founded upon the natural Right of bare Permission.* *Est hoc jus ex jure naturæ permittente.* *Lib. ii. Ch. iii. §. 5.*

but the Negation of an Action. Whatsoever Things the Law *permits*, those it neither *commands* nor *forbids*, and therefore it really doth nothing at all concerning them. Some maintain, that there is nevertheless a kind of Obligation in *Permissions*; not indeed affecting him to whom we say a Thing is *permitted*, but binding up a third Person from giving him any Hindrance, in case he undertake what the Law thus permits. Tho' this is by many restrain'd to such Things as are fully and perfectly permitted, so as not to take in those lesser and imperfect Permissions, which may be more properly stil'd Indulgences or Connivances. Thus, for Example, the Laws of some Countries permit the killing of a Wife taken in Adultery; yet they do not forbid others from using their utmost to hinder her Death. But if we would be accurate and exact in our Way of talking, even this Effect doth not properly result from the Permission of the Law, but from every Man's just Liberty³. For about those Things in which the Law gives me no Stop or Hindrance, I have a perfect Freedom of acting, the chief Effect of which is, that no Man ought to disturb me in the harmless Exercise of it. So that for a Law expressly to permit those Things to which we claim a sufficient Licence by their not being prohibited, which cannot well fall under Doubt or Dispute, seems little better than useless and superfluous. As likewise, it is not always necessary, that when any prohibiting Law is repeal'd, an Act hitherto *forbidden*, should by an express Ordinance be declar'd *permitted*: Since upon Removal of the former Impediment, our natural Liberty doth, as it were, revive and recover itself. There are indeed two special Cases, in which civil Lawgivers are wont to use express *Permission*: First, when Licence and Impunity is indulg'd to such an Act, within such a Measure; and, secondly, when the Licence or Impunity is to be purchas'd by some Fine or Burthen. Of the former Case, some give an Instance in the Laws of most Countries permitting Usury, within such a fix'd Degree: Of the latter, in the Constitutions of some Places, where Women are allow'd to prostitute themselves, upon Condition of paying a certain Tax⁴: which whether it be well or ill done we are not now to dispute⁵.

Legal *Permission* is divided into *Plenary*, which gives a Right of acting, and makes the Deed altogether lawful; and *less Plenary*, which either affords Impunity, or Freedom from Impediment, or both. Now that several Things find an Impunity amongst Men, is occasion'd by some of these Reasons: Either, that the Matters exceed the Reach of human Courts and Cognizance, as do the Faults of Kings; or, that human Law hath either deter-

min'd nothing plainly about such an Action, or hath declar'd it shall be lawful; or, lastly, because civil Ordinances frequently leave many Things to the Modesty and common Honesty of every particular Man⁶.

Some have more accurately observ'd concerning these *Permissions* of Civil Laws and Civil Courts, that they are made either by the Action of the Law, or only tacitly. To the former they refer the Omission, or passing by of a Matter, not simply, and, as it were, by Accident, but when the Design and the Form of the Law run in such a Manner, that the Legislator shews his Intent of making a full Enumeration of Particulars: For, in such a Case he is suppos'd to have *permitted* whatever he hath not expressly reckon'd up amongst Things prohibited; provided the Matter be not repugnant to natural Honesty. Those Things are understood to be tacitly forbidden, which the civil Power lets pass by conniving at, tolerating, or dissembling; either for the present only, or for a longer Time, so as to let them obtain the Force of Customs. Yet a Permission granted by a civil Law, cannot cause that an Action shall not be contrary to the divine Law, or set it beyond the Fear of the divine Punishment.

We may farther remark, that when a Thing is said to be *permitted*, which is not determin'd by the⁶ express Command or Prohibition of any Civil Law, we are not to cavil at the Words of the Law, but to consider the Scope and Intention of it. For many Things are contain'd in the Sense of the Laws, and are suppos'd to be really implied by them, either as they are necessary Consequences, or upon account of their near Affinity and Resemblance to the determin'd Cases. Regard is likewise always to be had to natural Law, or to common Honesty, which is the perpetual Supplement of civil Decrees. *Lastly*, Those Things which are tolerated only for a Time, or upon the Score of Necessity, cannot fall under the proper Notion of *Rights*. All⁷ which Observations are chiefly to be understood of the most perfect or *plenary Permission*⁶.

XVI. The Matter of *Laws* in general, is whatever *can be done* by those Persons for whom the *Laws* are made, at least at the Time of their Promulgation. For if any Man afterwards, by his own Fault, loseth his Ability to fulfil the *Law*, the Force of the *Law* doth not thereupon cease and expire; but the Legislator hath Power to punish him, for rendering himself thus incapable of conforming to the Rule prescrib'd him. But, otherwise, to make such a *Law* as the Subject cannot fulfil, and yet hath not lost his Power of fulfilling by his own Fault, is not only a most vain,

³ Vid. *Evagr. Hist. Eccles. Lib. iii. Ch. xxxix. Of the Tribute paid by common Strumpets, which Anastasius the Emperor took off.* See *E. viii. of our Author. Ch. i. §. 3.* ⁶ Vid. *Digest. Lib. l. Tit. xvii.* ⁷ Vid. *Baclar. in Grot. Lib. ii. Ch. i. §. 9.*

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³ But the free Usage of this Faculty in such and such Cases, is an Effect of the Permission of the Sovereign Legislator, who has impos'd Laws upon us in giving us a Being. See Note 2. above.

⁴ See *Evagrius's Eccles. Hist. Lib. iii. Chap. xxxix.* about a Tribute called *Chrysfargyrus*, which was levied upon the Curtezans, and which was abolished by *Anastasius*, as our Author there observes.

⁵ See what is said, *Lib. viii. Chap. i. §. 3.*

⁶ In all the Editions of *Pufendorf*'s it is printed *Volente aut Jubente* (and therefore the *English* Translator renders them, *the express Command*) but the Author would have said, *Verante aut Jubente*, as the Connection of the Discourse requires, for *Ville & Jubere* signify the same Thing.

⁷ See *Lib. v. Chap. xii. §. 17.* following.

but a most unjust Design^x. As to the subject Matters which employ the particular Species of Laws, we shall more conveniently consider them in their proper Place.

XVII. To know who is capable of being oblig'd by a Law, we need seek no further than to the Right of the Legislator; which certainly takes in all those who are subject to his Command. What Persons the Legislator intended to oblige, is plain enough from the Law itself. For in all Laws it is signified whom they concern; either by express Determination, made sometimes by a general Sign, sometimes by a Restriction to certain Individuals; or else by some Condition or Reason, which a Subject finding in himself, at the same time apprehends that he therefore stands oblig'd by such a Law. Regularly then, a Law obligeth all Persons subject to the Legislator, whom the Reason of the Law reacheth, and to whom the Matter of it may be applied. For otherwise, Tumults and Confusions would continually arise amongst Subjects, the Prevention of which Disorders was a principal Reason why Laws were first introduc'd. And therefore no body shall be esteem'd exempted from a Law, unless he can shew his peculiar Privilege. Yet this indeed frequently happens, that a Man may be exempted from the Obligation of a Law, after the Time of its being enacted, and this we call being *dispens'd with*. For if the Legislator may rightly abrogate or repeal a Law, he may as fairly suspend the Effect of it in some certain Person. *Dispensation* differs from *Equity*², with which it is generally confounded, in this Respect, that the former cannot be granted, but by one endued with Legislative Power; whereas an inferior Minister of Justice, not only may, but ought to apply the latter; so that if he follow the strict Letter of the Law, in a Case where there is room for an Equitable Construction, he shall be judg'd to act contrary to the Mind and Intention of the Legislator. *Dispensations* therefore depend on the free Grace of the Lawgiver, but *Equity* on the Office and Duty of the Judge. In granting *Dispensations*³, great Prudence is to be us'd, lest by a promiscuous Indulgence, the Force and Authority of Law be enfeebled: or lest, if the

same happen to be denied to Persons of the like Condition, Occasion should be given to Anger and Repentment, whilst Men of equal Circumstances are not admitted to equal Favours. *Plutarch* hath recorded several Instances of very nice and subtil Dispensations. As when *Agefilaus* suspended the Laws for one Day, with this Form, *Let the Laws sleep to Day*^a; to hinder those Persons who had fled in an Engagement, from suffering the usual Disgrace. So when *Demetrius* desir'd to be admitted at once into all the *Athenian Mysteries*, whereas it had ever been a Custom to celebrate the greater *Mysteries* in *November*, and the lesser in *August*, *Stratocles* publish'd a Decree, that the Month *March*, in which *Demetrius* visited *Athens*, should be call'd, first *November*, and then *August*^b. What the same Author reports of *Demosthenes* is more plausible: *Demosthenes*, upon his being recall'd from Banishment, lay under a Pecuniary Mulct, and the Law forbidding that he should be entirely discharg'd from it without Payment, they invented this Way of eluding the Law; they had a Custom of giving Money to the Man who prepar'd and adorn'd the Altar, at the Time of Sacrificing to *Jupiter the Deliverer*: This Office, and this Money, they decreed *Demosthenes*; and under that Pretence allotted him fifty Talents, the Sum in which he had been amerced. The *Lacedemonians* made use of much such another Evasion in Reference to *Lysander*. It was a Law amongst them, that no Man should bear the same Office above once^c; but now resolving to let *Lysander* have again the chief Power in a Naval Expedition, they gave *Aracus* the Formal Command of the Fleet, but join'd *Lysander* with him^d in a private Station, with express Orders, *That the General should never act contrary to his Advice*^e. I know not whether the *Spanish* Custom mention'd by *Naudeus*^f, may not be reckon'd likewise amongst these nice *Permissions*: "In *Spain*, he says, "when they deem a Man to be guilty of Treason, they appoint Judges to sit on him in secret; "who form a Process, and condemn him to suffer "Death; after which they seek by any means to "put the Sentence in Execution. And this they "practise as a Salvo to their Consciences; that

^a *Plutarch Apophthegm. Lacon. & Agefil. Appian. Libyc.* ^b *Idem Demetr. & in Alexandr. p. 672, & 679.* ^c *Diodor. Sic. Lib. xiii. Ch. c. Plutarch Lysand. Add. Valer. Max. Lib. vi. Ch. v. §. 3.* ^d *Coups d'Etat. Ch. iii. p. 198.*

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¹ It is necessary that what is forbidden should produce some Advantage, either to those for whom the Law is made, or to others; for 'tis not reasonable that the natural Liberty of Subjects should be restrain'd, and no Profit thereby redound to any body, *De Offic. Hom. & Civ. Lib. i. Ch. ii. §. 8.* See what is said, *Lib. vii. Ch. ix. §. 5.* Laws are made only about such Things as commonly happen, as is observed above, *Ch. xi. §. 5.* Again, as to what concerns our natural Right in particular, we ought to take Notice, with Mr. *Titius* (*Observ. 59.*) That natural Right, which is obligatory, has for its Object such Actions as carry with them some Convenience, or Inconvenience, necessary for the human Nature, as hath been proved, *Lib. ii. Ch. iii.* As for all other Actions, which we may call indifferent, the natural Right of simple Permission leaves every one at Liberty to dispose of them as he pleases. But most of these last are for the most Part regulated in different Manners, by the positive Laws of GOD and Man, as the legislative Power sees convenient.

² See *Lib. v. Ch. xii. §. 10.* following.

³ See *Lib. v. Ch. xi. §. 21.* following, as also his *Abridgment of the Duties of a Man and Citizen, Lib. i. Ch. ii. §. x.* Farther, to speak properly, what he here calls *Equity*, ought to be called, *An Interpretation according to Equity*; as *Titius* speaks, *Observ. 62.* See a little Treatise of *Grotius's* upon this Subject, printed in the latter Editions of his Book *De Jure Bel. & Pac.* which is entitl'd, *De Equitate, indulgentia, & facilitate.*

⁴ See Mr. *Bayle*, in his *Divers Observations about a Comet*, p. 456. and the second Volume of his *Parthasiana*, p. 178.

⁵ The Greek of *Plutarch* is, *Καὶ φησας, ὅτι τὰς νόμους θεῶν σημερον ἐξῆν καθύποδον, καὶ δὲ τὸ σημερον ἡμῶν κερὶς ἵνα πρὸς τὸ λατρεῖν.*

⁶ The Word *bis*, being omitted in all the Editions of this Author, spoils the Sense quite; and therefore as the *French* Translator adds, *deux fois*, so the *English* puts in, *above once.*

⁷ Here's a great Mistake in all the Editions of the Original, putting *Aratus*, the Name of a General of the *Achians*, a very different Person from this Admiral, for *Aracus*.

⁸ The *Latin* says, *Privatus*, as the *English* Translator renders it, but surely our Author meant *Legatus*, a Deputy; but however that be, 'tis safest to follow *Plutarch*, who calls him, *Επιτολόμενος*, i. e. *Præfectus Classis*, a Counter-Admiral, at least. See further about these sorts of intricate Dispensations, in *Montagne's Essays, Lib. i. Ch. xxii.*

“ they may not be accus'd of Injustice in punish-
 “ ing Men capitally, without a legal Knowledge
 “ of their Crime.”

XVIII. Law may be best divided, with reference to its Original, into *divine* and *human*; the former having *God*, and the latter *Man* for its Author. But if we consider Law as it bears a necessary Agreeableness to the subject Matter, in this Respect we divide it into natural and positive. The former is that which is so exactly fitted to suit with the rational and social Nature of Man, that human Kind cannot maintain an honest and a peaceful Fellowship without it: or, in other Words, that which carries in it a natural Goodness, or a Usefulness arising from its internal Efficacy, towards Men in general. Though there be also a farther Reason of this Denomination; in as much as this Law may be found out and known by the ordinary Sagacity of Men, and from the Consideration of human Nature in Common.

Positive Law is that which doth not by any means flow from the general Condition of human Nature, but from the sole Pleasure of the Law-giver; tho' these Laws ought likewise to have their Reason and their Uses; in reference to that particular Society for which they are enacted.

^a Vide, *Ethic. ad Nicom. Lib. v. Ch. x. Et Vid. Lib. xv. D. de condit. Instit.* ^b Divine natural Law is distinguish'd from *positive*, because this is alterable by the Authority that made it; that is not, but is Eternal and Immutable. See what our Author says in Book ii. Ch. iii. §. 4.

Mr. BARB. NOTES on §. XVIII.

¹ The Text here is either corrupted, or not clear. It may be rectified partly from his *Elements of universal civil Law*, where our Author thus expresses himself; *Quantum autem ad materiam, quasdam cum ipsa humane nature, quæ talis, conditione manifeste congruunt, & ex eâ fluunt, i. e.* As to the Matter (of Laws) some plainly agree with the human Nature, as such, and others flow from it. And partly from his *Abridgment of the Duties of a Man and Citizen, Lib. i. Ch. ii. §. 16.* where he says, *Sed si lex consideretur prout necessarium, & universalem Congruentiam cum hominibus, vel minus, habet, &c. i. e.* If the Law be considered, as it has a necessary and universal Agreement with Men, though in the lowest Degree, &c. The *English* Translator is so far from clearing this Passage, that he has made it more obscure, by taking it in a wrong Sense; for he understands by the Word *Subje-tis*, in the Original, the *Subject*, or *Matter* of the Law; whereas the Author plainly treats of the *Persons* upon whom a Law is imposed.

See what we have said, *Ch. i. §. 4.* and *Ch. ii. §. 6.* with the *Notes*.

² The Author here cites *Vitellius's* Reflection, *Movem accommodare, prout conducatur, i. e. To accommodate the Custom to the Interest of State.* Tacit. *Annal. Lib. xii. Ch. vi.*

³ *Aristotle's* Words are, *Τὰ δὲ, κατὰ συνθήκην, καὶ τὸ συμφέρον ἢ δικαίων, ὁμοίᾳ ἐστὶ τοῖς μέτροις: ἢ ἢ παλαιᾶ ἴσα τὰ αἰσθητὰ, καὶ σιτηρὰ μέτρα, ἀλλ' ἢ ἢ ἄνθρωποι μείζω, ἢ δὲ πάλαι ἴσα τῷ.*

⁴ This is an essential and distinguished Character between Laws natural and positive, the first are immutable, so just every Way, that no Authority can change or abrogate them lawfully; whereas positive Laws are so arbitrary, that as a lawful Authority may establish them, so he may change and abolish them as he sees Occasion.

⁵ *Grotius* (*Lib. i. Ch. i. §. 15.*) affirms, That there is a Divine voluntary Right, that obliges all Men, as soon as they come sufficiently to their Knowledge; and adds, That this Right hath been published upon three Occasions, *viz.* 1. At the Creation of our first Parents. 2. After the general Deluge. 3. By the Gospel. This great Man did not proceed to Particulars; but, some Years since, Mr. *Thomasius*, Professor at *Hall* in *Saxony*, composed a System of the Divine positive universal Laws, in his *Institutions of Divine Civil Law*, printed in 1702. But this able Lawyer being none of those who count it an Honour to defend what they have once asserted, right or wrong, did, at length, own himself mistaken, and pulled down his own Building, when he found the Foundation to be weak. See his *Select Observations*, made at *Hall, Tom. 6. Observat. xxvii.* and his *Principles of the Law of Nature and Nations, drawn from common Sense*, printed in 1705, and again in 1708. Others affirm, That all the Laws which relate to a Divine positive Right, either oblige all Men in all Ages, Places, and Nations, or may be deduced from Principles of natural Right, which we shall prove true as to some, in *Lib. vi. Ch. i. §. 35. Note 2.*

CHAP. VII.

Of the Qualities of MORAL ACTIONS.

The CONTENTS of every Section of the seventh Chapter.

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| <p>I. <i>How many are the Qualities of moral Actions.</i>
 II. <i>A necessary, lawful Action.</i>
 III. <i>The Goodness or Evil of Actions, in what they consist.</i>
 IV. <i>A good Action must have all Thing requisite, an evil one is made such, by wanting one Condition.</i>
 V. <i>GOD can't be the Cause of any Evil.</i>
 VI. <i>Justice is either in Persons or Actions.</i>
 VII. <i>What is the Justice of Actions.</i>
 VIII. <i>Universal and particular Justice.</i></p> | <p>IX. <i>Justice distributive.</i>
 X. <i>Commutative.</i>
 XI. <i>Grotius's Opinion about Justice.</i>
 XII. <i>Aristotle's Judgment upon the same.</i>
 XIII. <i>Hobbes's Opinion of Justice and Wrong.</i>
 XIV. <i>What is an unjust Action.</i>
 XV. <i>What an Injury is.</i>
 XVI. <i>An Injury is done by Design and Choice only, where the Nature of a Fault is treated of.</i>
 XVII. <i>No Wrong is done to any Man that wills it.</i></p> |
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OUR next Business is to consider the Qualities of moral Actions: Now according to these Actions are said to be *necessary, or not necessary, lawful or allow'd, and unlawful or disallow'd, good or evil, just or unjust.* So that the Qualities of moral Action must be Necessity, Licencie, or Allowance, and the Opposites of these, which want proper Names; together with Goodness and Illness, Justice and Injustice.

II. A *necessary* Action is that which by Virtue of the Law, or the Command of a Superior, the Person to whom the Law or the Command is given, is bound absolutely to perform. For in this consists the Necessity of moral Actions, that they ought not to be omitted, nor yet to be done in another Manner than what was enjoin'd; though by our natural Power and Strength we are able either to omit them, or to do them in another Manner. Yet it is usual for the Lawyers to say absolutely, that a Thing which wants only this moral Necessity, *cannot be done*. To a *necessary* Action is oppos'd not only a *forbidden* Action, expressly prohibited by the Laws, or other Orders of the Superior, but likewise a *lawful* or an *allow'd* Action, which the Laws neither command nor forbid, but leave it to every Man's Pleasure, whether he will undertake or decline it. *Cicero pro Balb. Ch. iii. There are some Things which we ought not to do, tho' we might lawfully do them: But on the other Hand, whatever we cannot lawfully do, it's very certain we ought not*

to do. Now by the common Usage of Speech, not only those Things are said to be *lawful*, which neither divine nor human Law forbids, and which therefore may be undertaken without Sin or Blame, but likewise those Things which altho' prohibited by the Laws of Nature, yet the Laws of particular States so far permit, as not to impose a Penalty on them in human Cognifance; leaving them to every Man's private Confidence and Honour. *Tully's* Observation is admirable to this Purpose, *It is not lawful (says he) for any Man to sin; but we commit an Error in Speech, whilst we say that such a Thing is lawful, which is indeed tolerated or allow'd.* The former kind of Actions we may call *perfectly lawful*, the latter *imperfectly*. So *Lampridius* reports of the Emperor *Severus*, that he had some Thoughts of prohibiting the publick Professors of Lewdness: But he feared this might rather increase Debauchery in private; Men naturally affecting what is unlawful, and pursuing with Eagerness and Fury any Practice which hath been forbidden them.

But farther than this, we sometimes in a very loose Sense, term even those Things *lawful*, which all Men agree and confess to be the most base and vile; whensoever the Person who performs them is Master of so much Strength, as to be too big for human Punishment or Reprehension. *Senec. de Clement. Lib. i. Ch. xviii. Tho' we commonly say, All Things are lawful towards a Slave, yet there are indeed some Things which common Nature for-*

¹ *Nam que facta ledunt pietatem, existimationem, verecundiam nostram, & (ut generaliter dixerim) contra bonos mores sunt: nec facere nos posse credendum est.* Dig. Lib. xxviii. Ch. vii.

Mr. BARB. NOTES.

² The Morality of human Actions may be consider'd two ways, 1. In the Manner the Law disposes them, in which Respect they are either permissive or necessary. The first are such as the Law gives Right positively to do, if we will, and not, as our Author affirms, upon the Account of which the Law orders a Thing to be done in such a Manner; for this Definition agrees to such Actions only, as are allow'd by an imperfect Permission, of which he speaks a little lower. 2. As they agree, or disagree with the Law, and so Actions are either good, or bad, or indifferent. This Division seems more exact than our Author's. *Tinius Observ. lxiy, lxy.* See our Notes on Chap. vi. §. 2. and our Notes on this Chap. §. 5. Note 5.

³ *Nam qua facta, &c.* For we ought to suppose those Things impossible to be done, which prejudice Piety, Reputation, Honour, and, in general, good Manners do forbid or hinder.

⁴ *Ἄ ᾧ ἢ κελεύεται τις ποιῆναι, ταῦτα ἔδει μὴ ποιεῖν, κεκώλυται.* i. e. What a Man is not ordered to do, that he is not hindered from doing. *Liban. Declam. xvi.* The Author himself cites this Passage in his later Editions.

⁵ There are some Things not to be done, tho' lawful; but whatever is not lawful, that ought not to be done. *Tully's* Words are, *Esti peccare nemini licet, sed sermonis errore labimur; id enim licere dicimus, quod cuique conceditur.* *Tusc. Quæst. Lib. v. Ch. xix.*

⁶ This Quotation making little to our Author's Purpose, and containing something obscene in it, 'tis no Damage to omit it, and instead of it put some of the Sayings of the Roman Lawyers, viz. *Digest. Lib. 1. tit. 17. De divers. Res. Juris, Leg. cxliv. Every Thing is not honest that is lawful.* And *Leg. cxviii. We ought to consider, not only what is lawful, but what is also honest.* Mr *Stryck*, Professor at *Hall* in *Saxony*, has publish'd a Discourse of the Law of what's lawful, but not honest, reprinted in 1704 in 4to, where we may find a particular Account of Things permitted and authorized by Custom, which in themselves are contrary to natural Honesty, and much more to Christianity, altho' the Author had but little of his Matter from any certain Places.

bids us to act towards a Man, one of our own Species and Condition ⁵.

III. We call that Action *good* morally (for the other kind of Goodness, term'd Natural or Material, by which a Thing or an Action tends to the Benefit or Perfection of any one ¹, is explain'd in another Place. Tho' we must observe, that in the Precepts of natural Law, and in most civil Constitutions, it goes along with this moral Goodness, and amongst rational Creatures ², seems to give the first Spring or Occasion to it) or in moral Estimation, which is agreeable to the Law, and that Action *evil*, which is disagreeable. Inasmuch as the *ratio formalis*, the proper and distinguishing Nature of the Goodness or Illness of Actions, consists in a *Relation* determining them towards a directive Rule; and this Rule is what we term a Law (under which Name we here mean a *necessitating*, and not a *permitting* Law, and if it be human we suppose it not contrary to those which are Divine) ³ for when a design'd Action is form'd according to the Rule prescrib'd, and exactly agrees with it, it is said to be *good*: Whereas, if it is undertaken against the prescrib'd Rule, or varies from it, it is call'd *Evil*, and, in one Word, *Sin*. Now it is plain, that any directing Rule; for instance, the Mariner's Compass is said to be *the Cause* of his right Sailing, and of his coming to the Port, not so much in regard that the Ship takes a Course falling in with its Direction, as because the Pilot guides himself by it in managing the Steerage: In like Manner, a Law is said to be the Cause of Rectitude in an Action, not when the Action, however intended, is agreeable to it; but when the Action proceeds from the Dictate of the Law, and from some Dependence on it; that is, from an Intention of paying Obedience to its Injunctions. Whence, if a Man by Chance, or without thinking of any Obedience to a Law, performs a Thing prescrib'd by that Law, he may indeed be said to have done *rightly*, or *not ill*, in a negative, rather than in a positive Sense; but he cannot be said to have done morally *well*, no more than one that by discharging a Gun at venture and random, hath brought down a Bird, can be said to have shot skilfully, and like a Marksman.

IV. Farther, since the Law determines either the Disposition of the Agent, or else the Object,

or the End or the Circumstances of the Action; an Action is morally Good or Evil for one of these Reasons, either because the Agent is so dispos'd as the Law requires him to be, or otherwise; or, because the Action is directed towards the proper Object, with that End, and those Circumstances which the Law prescribes, or with the contrary. But here it must be observed, that to make an Action good, 'tis necessary, that it not only conform to the Law in all its *material* Requisites and Conditions; but likewise, that in respect of its *Formality*, it be exercis'd, not out of Ignorance, or any other Cause, besides the Intention of paying Obedience to the Law. And therefore an Action, tho' otherwise on the Account of the Matter of it *Good*, may, by Reason of the bad Intention of the Agent, be imputed to him as *Evil*. For a Man who designing an ill Thing doth a good one, hath by no means a Title to any Reward for his Service: As he in *Valerius Maximus* ² who intending to kill *Jason*, luckily broke his Imposthume. Upon the same Account, he who mispends his lawful Power in ill Service, is guilty of Sin: As a Judge, suppose, who abuseth his Authority of punishing Offenders, to the satisfying his own private Resentments. For which Reason the *Carthaginians* sentenc'd their Generals to Death, if they had undertaken an Enterprize, tho' with good Success, yet with ill Counsel and Design ³. *Liv. xxxviii. Ch. xlviii. Val. Max. Lib. ii. Ch. vii. §. 1. Extern.* But, on the other Side, an Action as to the *Matter* of it Evil, cannot ² by virtue of the honest Intention of the Agent, be turn'd into Good. Whence the Reason is clear, why a Man cannot use his own Sins as Means for the Attainment of any virtuous End, or why we must not *do Evil that Good may come of it*, Rom. iii. 8. For to render an Action Evil, it's sufficient that it be incongruous to the Law, in any one Point or Condition, whether *Material* or *Formal*: That is, If either the Disposition of the Agent, or the Object, or the End, or any one of the Circumstances contradict what the Law directs. 'Tis a most vain Distinction of some Men, when they affirm, that an Action, as to the Substance of the Work, may be good, altho' the End required by the Law be not intended by the Agent. For the End makes a main Part of the very Essence of a moral Action, inasmuch as it enters into the

² *Lib. i. Ch. viii. §. 6. Extern.*

⁵ The whole Chapter treating of a Master's Power over his Slaves, is worth perusing.

¹ See *Book i. Ch. iv. §. 6.* and *Book ii. Ch. iii. §. 21.*

² *Seneca's* Words, *Ep. cxx.* may serve as an excellent Comment upon our Author's Notion, *Nobis videtur observatio collegisse, & rerum sape factarum inter se collatio, per analogiam nostro intellectu & honestum & bonum judicante ----- Noveramus corporis sanitatem, ex hac cogitavimus esse aliquam & animi. Noveramus corporis vires, ex his collegimus esse & animi robur. Aliqua benigna facta, aliqua humana, aliqua fortia, nos obstupescerant, hanc cupimus tanquam perfecta mirari, i. e.* "Our Notions of Goodness and Honesty are the Result of the Reflections and Comparisons, which the Mind makes by Analogy, upon such Things as it often sees and observes. We know that there is such a Thing as Health of the Body, and from thence we conclude, that there must be also an Health of the Soul. We know that the Body hath Force and Strength, and from thence we infer, that the Soul also hath its Force. We are wrapp'd with Admiration at the View of some eminent Acts of Goodness, Humanity, and Courage, and we begin to look upon them as Patterns of Perfection."

³ The two following Periods not being well placed in the Original, must be a little varied to make the Discourse coherent.

² These two Passages cited by our Author are nothing to the Purpose; and, tho' clear in themselves, are mistaken by him in this whole Discourse. The first is that of *Livy*, where *Cn. Manlius*, answering those that contested with him about the Honour of the Triumph, under a Pretence that he had managed the War against the *Gallogræci*, or *Galatians*, with sufficient Conduct, says, That he was sure to carry his Cause, tho' it were not before a *Roman*, but *Carthaginian* Senate, who are said to crucify their Generals, if they acted by bad Advice, tho' they were successful; for so are his Words, *In quo considerem equidem causa mes, etiamsi non apud Romanum, sed Carthaginiensem senatum agerem, ubi in cruce tolli imperatores dicuntur, si prospero eventu pravo consilio gesserunt.* The other Passage is out of *Val. Maximus*, whose Words are much the same about this Custom at *Carthage*. Mr. *Pufendorf* believes that these Words, *pravo consilio*, signify *with a bad Intention*, whereas they plainly signify, *without taking good Measures*; as *Montagne* rightly takes them, when he says, *The Carthaginians punish'd the ill Conduct of their Captains, although they made Amends for it by their good Success.* *Essays*, *Lib. iii. Ch. viii. p. 693. Fol.*

² What is Faulty, 'tis no Matter with what Intention it is done. *Publ. Syr.* see the next *Chap. §. 2, 3.*

Intention, which is a Principle of the greatest Force in determining the Action's Quality. Hence it is sinful to direct an Action, not only to an ill End, but likewise to any other End, than what is prescrib'd by the Law, *Matth. vi. 5. Juo. Sat. 8. v. 215. Causa facit rem dissimilem.* Nor is an accomplish'd Fact only, or such as hath obtain'd its End, accounted Wickedness, but even a commenc'd Enormity: And this latter is by Civil Laws sometimes punish'd with equal, or however with little less Severity than the former; according as they find it necessary to repress a Villany in its first Rise and Appearance *Senec. de Constant. Sapient. c. 7. All Villanies before the Accomplishment of the Work are complet in respect of the Guilt.*

V. This Goodness, and this Evil of Actions, as they consist formally in such an Agreeableness or Disagreeableness to the Law, as we have been speaking of, so they depend entirely on him as their efficient Cause, who performs an Action which the Law either commands or forbids. For his Determination so constitutes the Action in the Rank of *Moral Beings*, that it must be imputed to him, and to him only¹. And therefore those Men have tormented themselves with a needless Fear, who, lest they should seem to make GOD Almighty the Author of Sin, have plac'd the *ratio formalis* of an evil Action, in the *Privation of Conformity to the Law*². For tho' the Position of any Form necessarily infers the *Privation* or Absence of the contrary Form; yet how mistaken must he be in his Opinion, who would seek for the Essence of a Thing in this Privation? Nor will he find himself any great Proficient in Wisdom, who hath arriv'd to know that Straightness is the Privation of Crookedness, and Crookedness the Privation of Straightness. But these Inventions and these Fears of Men, both proceeded from their Ignorance of

moral Things. GOD, the Author of all natural Beings, need not, and ought not to be esteem'd the Author and Cause of all moral³, all notional, and all artificial Beings. Some loose Thinkers must needs be touch'd with a strange Itch of Wit, when they imagine they have given us an extraordinary Specimen of their Philosophical Subtility, in numbering GOD among the Causes of our sinning. For a Man, who hath the least Insight into the Constitution of Morality, will judge nothing more absurd, than to enquire whether or no *He* be the Cause of an Action, who forbids it by a Law, and punisheth it for being done after his Prohibition. As for GOD's concurring to the Physical Part of an Action, he can with no more Reason be on this Account stil'd the Author of Sin, than one who hath furnish'd an Artificer with Materials to work upon, can be reckon'd the Cause of a Deformity in his unskilful Work. Wherefore, to use the Term or Name of *Cause* in a Signification so very improper, and so remote from common Sense, is to join our Pride and Ambition in offering an Irreverence to the Divine Nature. *Philo Judaeus de profug. 4. What greater Instance of Blasphemy can there be, than to make GOD, and not our selves, the Author of Evil? Maxim. Tyr. Dissertat. iii. 5. These dreadful Names of Furies, Fates, and Destinies, what are they but the specious Pleas and Excuses of human Wickedness, by the Means of which we are wont to charge our own Faults upon the Providence of Heaven? When, alas! these, and all the other Ministers of Terror, and over-ruling Necessity, which we so often complain of, are Monsters of our own making, and such as we carry about us in our Breast.* Idem. Dissert. xxv. Let the Wretch who sins upon Choice, take all the Guilt upon himself, and let GOD be clearly justified⁴.

VI. We are, in the next Place, to discourse of *Justice,*

¹ Seneca's Words, *Omnia scelera, etiam ante effectum operis, quantum culpe satis est, perfecta sunt.* The Scholars of Zoroastres say, *We must banish every sin from our Hands, Tongue, and Thought.* In Sadler, Porta lxxi. They add elsewhere (Porta xxv.) *as also from our Eyes.* See what this Author says afterwards, *Lib. viii. Ch. iii. § 14.*

² § v. That is, as the immediate Author of the Action; for, as our Author himself shews at large, *Ch. v. § 14.* the Actions of another may also sometimes be imputed to a Person.

³ This Notion much resembles Aristotle's Opinion of the Principles of natural Bodies, among which he ranks Privation. See the *Art of Thinking*, Part iii. Ch. xviii. § 1. where the Author seems to have taken the Expression from *Montaigne's Essays*, *Liv. ii. Ch. xii. p. 293. Fol. Ed. Par.*

⁴ The Author understands by this, the Operations of our Understanding.

⁵ *Quæ potest esse Blasphemia gravior, quam contendere, non ex nobis mala provenire, sed ex Deo?*

⁶ The Greek is, *Ἐὰν δὲ ταῦτα τὰ νόματα ἴσως προέβησαν ἀφ' ἑωυτοῦ ἀποφασίζουσι, ἀνέλκτου αὐτῶν τῶν αἰτίων τῶν ἀναγκαίων, ἢ τῶν Νομῶν, ἢ Ἐπινοῶν.* — *Ἡ δὲ Ἐπινοῶν, ἢ ἡ Αἴτια, ἢ οἱ Δαίμονες, ἢ ἡ οὐκ ἄλλα ἐπινοῶν, κτιστικῆς* (for so it must be read with *Heinsius* instead of *ἐπινοῶν*) *ἀπόστα, ἕδω ἐν τῷ ἑωυτοῦ κατ' ἑωυτοῦ.*

⁷ Our Author treats here only of Actions morally good or bad, *i. e.* fully agreeable, or plainly contrary to some Law in Force. But he ought also to have spoke something of Actions morally indifferent, *i. e.* which every one may lawfully do or not do, according as he pleases, by virtue of a Law of simple Permission. See §. 1. Note 1. That then we may have a true Notion of this last sort of Actions, we must observe, that the Term *Indifferent* may have three Significations, which ought to be carefully distinguish'd; for, 1. If we say, that an Action may be indifferently either commanded, or forbidden, or permitted by the Law, even in this Sense we must acknowledge all human Actions are not indifferent; as for Example, Man-slaughter can't be commanded nor permitted, because it is so great a Prejudice to the human Nature. 2. But if we consider our Actions, as Motions purely physical, and with a Relation to any Rule, in one Word, without a Regard to any Law, 'tis certain that in this Respect all Actions are indifferent. See *Ch. ii. §. 6.* foregoing. Lastly (and 'tis in this Sense that our Author treats of it here) if we consider an Action as freely permitted by the Law. This is an Action morally indifferent, which we may in a negative Sense call good, because it is not evil. Now there can be no Difficulty in judging of these sort of Actions; for what else can those things be, which are neither commanded nor forbidden, by any Law, Divine or Human, and which we have Power to do, or not do, as we see fit? The Schoolmen foolishly affirm, That Dancing (for Example) consider'd abstractly in it self, is morally indifferent; but it ceases to be so in the very Moment when we look upon it as a particular Action, done by such, or such a Person, at such, or such a Time, in such, or such a Place, with such, or such an Intention; for an Action thus stripped of all its Circumstances is a meer Chimera and Nothing. So that if Dancing be morally indifferent, it must be so with relation to certain Circumstances, of Persons, Times, and Places. It signifies nothing to say that every particular Action that is done with a good or bad Intention, ought to be good or bad, for this Conclusion is not absolutely true. An Action done with a good Intention is good only in a negative Sense, that is to say, either not evil, or indifferent, so far as some Law has formally prescribed it, for there are a great Number of Actions done for a lawful End, which are not commanded by any Law, and consequently can't pass for such as are good positively. This is almost all taken out of Mr. *Tinius's Observ.* lxxv. 'Tis long ago since that learned *Englishman Thomas Gataker* spake something like this against the vain Subtilties of the Schoolmen, about Actions indifferent. See his Treatise of the Use and Nature of Lots, printed at London, 1619. *Chap. v. §. 4.* where he mentions the famous Distinction of the *Stoicks*, and cites, among others, a Passage of *Aulus Gellius*, who has the same Notions, which I shall set down here, because he expresses the same thing well in it. *Omnia, quæ*

Justice, concerning which, it ought to be our first Observation, that the Signification of this Term as applied ^a to *Persons*, is very different from that, by which it denotes an Attribute of *Actions*. For when we use ^a it with regard to *Persons*, to be *just*, imports as much as to delight in acting justly, to study after *Justice*, or to endeavour in every thing to do what is just: And to be *unjust*, is to neglect *Justice*, or to think it should be measur'd, not according as it is really due, but as it suits with present Advantage. So that a *just Man* may perform several *unjust Actions* ^b, and an *unjust Man* several *just Actions*. For he is to be esteem'd a just Person, who doth just Things in Obedience to the Law ^c, and unjust Things only thro' Infirmity; and he an unjust Person, who doth just Things in Fear of the Punishment annex'd to the Law, and unjust Things either out of Perverseness and Pravity of Mind, or for the procuring of Glory, or any other seeming Benefit. *Hobbes de Cive, Ch. iii. §. 5.* And to the same Purpose *Pliny*, in his *Panegy. Ch. lvi.* *A wicked Man may do many Things, in themselves commendable: But to deserve Commendation in his own Person, is the Prerogative of a Man truly good and virtuous.* ^d *Philemon in Strabo. Serm. ix.*

or *Timorousness*, is not to be reckon'd in the Number of bad Men, so neither is he who hath perform'd some Acts of the opposite *Virtues*, immediately to be rank'd amongst the good. But the true Judgment of *Persons* is to be made, not from any short Period of acting, but from the whole Course and Tenor of Life. *Agathias, Lib. v.* hath left a very judicious Censure of those People in *Constantinople*, who upon a terrible Earthquake in the City, had contended with each other in the Performance of good and pious Works. *All this they did* (says he) *for a certain Time; so long as the Impression of the Fright was fresh and strong upon their Apprehension.* But when the Calamity began to abate, most of them return'd to their former Looseness of *Practise*. Now such a sudden Motion of the Mind, such a Fit, as it were, of *Goodness*, cannot be call'd true *Justice*, or solid and fruitful *Piety*, such as is wont to be form'd in Men by right Opinions and constant Application; but an unnatural *Disguise*, an ill-contriv'd *Stratagem*, a meer huckstering in *Holiness*, taken up as a *Preservative* against the common Evil. *Virtue upon Necessity is just as long liv'd as the Fear that occasions it.* Hence it appears, that the Definition of ^a *Justice* so much in vogue with the *Roman Lawyers*, in which they call it, *A constant and perpetual Inclination to give every ^e one their Due*, belongs to the *Justice of Persons*, not to that of *Actions*. And this we take to be very inconvenient: Inasmuch as the Science of *Law* is chiefly employ'd about the *Justice of Actions*, and toucheth on the *Justice of Persons* only by the bye, and in some few Particulars.

VII. The *Justice of Persons* differs from their *Goodness* chiefly in this, that *Goodness* barely denotes a Conformity to the Law, but *Justice* farther includes a Respect to those Persons towards whom the ^f Action is perform'd. So that we apprehend that Action to be *just*, which with full Design and Intention is applied to the Person to whom it was due. And therefore *Justice*, in this Sense, will be nothing else, but the right Application of

He is not Just who barely acts no Wrong,
 But he who spares, when fraught with Power to
 Nor will the Conquest of a puny Lust (harm:
 Ensure his Triumph; but a Strength of Soul,
 Fit to sustain the united Force of Sin,
 And foil Temptation in its last Attack.
 Solid in Worth, and generous Honesty.
 Nor bent with crooked Guile, nor brib'd with
 (Praise,
 He courts the *Virtue*, and contemns the *Fear*.

Architas De viro bono & beato ^g. As he who hath some time or other been guilty of *Immodesty, Injustice,*

^a *Instit. Lib. i. tit. i. Digest. Lib. i. tit. i. §. 10.*
in rebus humanis fiunt, sicut docti censuerunt, aut honesta sunt, aut turpia; wherein he omits the third Member of the Division, as other good Authors do, for the Reason which Mr. Noodt gives us, in his Book entitled Probabilia Juris, i. e. The Probabilities of the Law, Lib. i. Ch. xii. Quæ sua vi recta aut honesta sunt, ut fidem colere, patriam defendere, amicos diligere, ea fieri oportet, si ve imperet Pater, si ve non imperet. Sed quæ his contraria, quasque turpia & omnino iniqua sunt, ea ne si imperet quidem. Quæ vero in medio sunt, & à Grecis tum ἀδιάφορα, tum μισα appellantur, ut in militiam ire, rus colere, honores capessere, causas defendere, uxorem ducere, uti jussum proficisci, accersitum venire, quoniam & hæc & his similia per se ipsa neque honesta sunt, neque turpia, sed proinde ut à nobis aguntur, ita ipsis actionibus aut probanda sunt, aut reprehendenda; propterea in ejusmodi omnium rerum generibus patri parendum esse censent, &c. Lib. ii. Chap. vii. See also Velthuyzen of the Principles of Justice and Decency, p. 19, &c.

^b *§. vi.* ² This is not only true concerning *Justice*, but also concerning all *Morality* in general, i. e. concerning ever *Virtue* and *Vice*.

^c We must indisputably treat of the *Justice of Actions*, before that of *Persons*, because this last supposes the first, as appears by the Definition which our Author gives of it. The Way to understand these Expressions, *to do justly, to delight in Justice*, is not to be ignorant what *Justice* is.

^d *Laudabilia multa etiam mali faciunt, ipse laudari, nisi optimus, non potest, Plin. Panegy. Chap. lvi. Sinners themselves do many Things commendable, but only the best Men deserve Commendation.*

^e There is also a Case when we may do justly in a negative Sense, i. e. not unjustly, altho' the Thing in itself be not just. This happens when a Man is really in an Error, or ignorant, as it often comes to pass, both in respect to Right and Fact. On this Ground *Grotius* maintains, and that with good Reason, That War may sometimes be just on both Sides. See his Book *De Jure belli & Pacis, Lib. ii. Ch. xxiii. §. 13.* and what shall be said, *Lib. viii. Ch. vi. §. 4. Note 2.*

^f The Greek is, Ἄνε δίκαιός ἐστιν, ἔχ' ὁ μὴ ἀδικῶν. Ἄλλ' ὅστις ἀδικεῖν δυνάμενος μὴ βέλτεται. Ὅυδ' ὅς τὰ μικρὰ λαμβάνειν ἀπέχρηστο. Ἄλλ' ὅς τὰ μεγάλα καρτερῶν μὴ λαμβάνων. Ἐχόν δυνάμενος ἢ κρατῶν ἀζημίως. Ὅυδ' ὅς γε ταῦτα πάντα διασφραττῶν. Ἄλλ' ὅστις ἀδολον γησίαν τ' ἔχων φουσι. Ἔναι δίκαιος, ἢ ἔδοκίμει εἶναι δέλφ.

(6) Οὐ τοι δὲ ἀκολασάνοισι ἐν τισι καιροῖς, εἰδὲ τ' ἀδικήσαντα, εἰδὲ τ' ἀποδηγιάσαντα ἐς τὰς κακὰς ταχίους ἀνδρας, εἰδὲ μὴ τὰς πᾶσι κατασφραττίας ἐς τὰς ἀγαθὰς. — τὰς δὲ ἀλθίνας κίσιον ἐπὶ ἕνα καιρον ἀποστέλεσθαι, εἰδὲ ἐπὶ χρόνῳ τὶ πάλυθ, ἀλλ' ἐπὶ πᾶσι τ' βίον.

^g *Justitia est constans & perpetua voluntas jus suum cuique tribuendi, Instit. Lib. i. tit. i. de Justitia & jure. Digest. Lib. i. tit. i. §. 10.* See the Explication of this Definition, in Mr. Noodt's *Probabilia Juris, Lib. iii. Chap. i. ii.*

^h *§. vii.* ² There is not properly any Difference between *Goodness* and *Justice*; for, as our Author himself shews us above, the Idea of a good Action contains in it the Notion of an Object agreeable. We may better distinguish good Actions according to the threefold Object which they may have, viz. GOD, other Men, and ourselves. Those that have GOD for their Object, are comprized under the general Name of *Piety*: Those that have other Men for their Object, are contained in the Term of *Justice*; and those that directly regard ourselves may be reduced to *Temperance* or *Moderation*. This Division, which is the most common, seems to be the plainest and most natural.

the Action to the Person. We shall choose to divide Justice chiefly with Regard to the Matter which is owing, or which bears a Relation to another by way of Debt or Due.

But we must observe beforehand, that some Actions may be call'd *pure*, and others *mixt*. The former are perform'd and finish'd by the Motion of some of our Powers applied in such a certain Manner to the Object; of this Kind are honouring, paying Duty and Respect, loving, hating, comforting, praising, dispraising, &c. the Product of all which is nothing else but the causing the Object to be really affected, or to be thought affected by the Action in a certain Way, either with Complacency or Dissatisfaction. But the latter, or the *mixt Actions*, are join'd with the transferring of some Advantage or Disadvantage on the Person towards whom they are exercis'd; and therefore their Effect consists principally in some Operation, either profiting or hurting another Man in his Person or in his Goods². Again, there are some Actions which make a great Part of Commerce amongst Men, and are valu'd at a certain Rate; others have no Price or Rate impos'd upon them: Concerning which Difference we shall enquire farther hereafter³. Lastly, we must take Notice that some Things are *due to us perfectly*, others *imperfectly*. Those Things which are due to us in the former Manner, if voluntary Payment be not made, we may constrain the Debtor to discharge, if we live in a natural State, by Arms and main Strength; if we are Members of the same *civil Society*, by preferring an Action against him in Courts of Justice. But what is due to us in the latter Way, we ought neither to claim by Methods of Hostility, nor to extort by legal Process. It is usual⁴ with *Latin Authors*, to express *perfect Right* by the help of the Word *Suus*, as when they say a Man claims such a Thing, *suo jure, by his own Right*. Now that some Things should be thus *due to us perfectly*, and others *imperfectly*, the Reason amongst those who live in a State of natural Liberty is, the great Diversity of Precepts in Nature's Laws, of which some conduce to the very Being, others only to the well-being of Society: And therefore, since there's less Necessity of performing these latter than the former, Reason shews that the former may be requir'd and execut-

ed by more severe Courses and Means; whereas in regard to the latter, it is meer Folly to apply a Remedy more grievous than the Disease. Besides, there usually passeth between Men some Covenant about the former, but not about the latter; and consequently, since they are left to every Man's Conscience and Modesty, it would be very improper to extort them violently from another⁵, unless in Cases of extraordinary Necessity. In civil Communities this Difference ariseth from the particular Laws and Constitutions allowing or disallowing an *Action* in such or such Cases. Tho' most Commonwealths do in these Points follow the Tract of the Law of Nature; except where they have some particular Reasons advising the contrary.

VIII. When, then, we exhibit to another either Actions or Things due to him only by *imperfect Right*, or when we exercise towards another, Actions not coming under the Head of strict Commerce, we are said to have observ'd *general, or universal Justice*. As when a Man supplies another with his Counsel, Goods, or Help, as he hath Need; or when he performs the Offices of Piety, Reverence, Gratitude, Humanity or Beneficence towards those to whom he is in Duty bound to pay them. This Kind of Justice only enjoins that the Debt be paid, not considering whether the Thing given in Payment be equal to the Reason why it is due, or not. Thus a Man sufficiently dischargeth the Duty of Gratitude, if he make all the Return that his Abilities will allow; tho' perhaps the Kindness he hath receiv'd were in Value much greater⁶.

But when we perform towards another Actions falling under Commerce, or such as transfer any Thing on another, to which he had a *perfect Right*, this is call'd *particular Justice*.

IX. Now this *perfect Right* accrues either to single Persons by a Covenant (tacit or express) made with some Society, in order to their being admitted Members of it; or to a Society by a Covenant made with single Persons, in order to the receiving them into the same Community: Or, lastly, from⁷ Pacts made between any Parties concerning Things or Actions falling under Commerce. When we pay those Things which are due upon the Pact of a Society with a Mem-

² For Example, a Gift, a Loan, a Theft, Murder, &c.

³ See *Book v. Ch. i. §. 5.*

⁴ As for Example, When we say, *Ille suo jure hoc postulat*. See *Grotius, Lib. i. Ch. i. §. 5.* with *Gronovius's* first Note. And we also say ourselves, We must render to every one their own; we wrong no Man, when we require our own.

⁵ We could not otherwise discern such as are truly good, from such as do justly against their Will, if there were no Duty to which we might be constrained.

⁶ §. viii. It is nevertheless no great Virtue to own an Obligation to such as have done us Good, provided that the Acknowledgment does not much surpass, in its Effects, the Obligation we have to our Benefactors; for, according to the Maxim of JESUS CHRIST, *If you love those only, that love you, what Thanks have you?* Matth. vi. 46.

⁷ §. ix. This Division is not compleat, because it contains in it the Obligation we are in to another, by Virtue of some Engagement that we are entred into, or of a Society to which we are joined. Now there are Things which our Neighbour may require of us in Strictness, without any Relation to a particular Society, Promise, or Convention; as not to do them any Injury, to make good a Damage done them, and to look upon them as Beings equal with ourselves. It would please me better, with Mr. *Buddens* (*Elem. Phil. pract. Part. II. Ch. ii. §. 46.*) to divide particular Justice, which we may more strictly call *rigorous Justice*, into that which Equals Use one towards another, and that which Superiors exercise towards their Inferiors. The first may be subdivided into several Sorts, *viz.* The Duties which a Man may in Strictness exact of all other Men, and a Citizen of every Person subject to the same Government. The other contains divers Kinds, as there are divers Kinds of Societies, where some command and others obey, which is much the same as *Grotius's Jus Rectorum & Aequatorum, Lib. i. Ch. i. §. 3.* The Epithet of *Universal*, given to the other general sort of Justice, is also very improper. We had better call it *imperfect Justice*.

⁸ Our Author here uses the Term *Convention*, but it must be understood in a large Sense, which comprehends perfect Promises, of which he spake, *Lib. iii. Ch. v. §. 7.* which confer upon him, to whom the Promise is made, a perfect Right to require the Accomplishment. For in these sort of Promises, the Acceptation of him to whom the Promise is made, is a kind of Engagement on his Part. See *Lib. iii. Ch. v. §. 1.*

ber, or of a Member with a Society ³, upon the Accounts just now specified, we are said to exercise *distributive Justice*. For whenever a Man is receiv'd into a Society, a Pact is either expressly, or, at least, tacitly made between the *Society* and the *Member* now to be introduc'd, by which the *Society* engageth to give him a just Share and Proportion of the *Goods* which it enjoys as a common Body: and the *Member* promiseth, that he will bear his proper and equal Part of those *Burdens* which conduce to the Preservation of the *Society*, consider'd as such. The exact Determination of the proper Share of Goods to be assign'd to the Member, is made according to the Rule and Value of the Pains or Charges employ'd by him, towards preserving the common Society, in Proportion to the Pains or Charges contributed by the other Members. On the other Hand, the Determination of the proper Share of Burthens to be laid on the Member, is made according to the Value of the Benefits receiv'd by him from the Society, consider'd in proportion to the Advantages which the rest of the Members enjoy. Hence, since it generally happens, that one Member contributes more towards the Preservation of the Society than another, and that one likewise exceeds another in deriving Advantage from it, the Reason is very apparent, why, upon the Supposal of many Persons, and of this Inequality amongst them, we ought, in the Exercise of *distributive Justice*, to observe a *comparative Equality*: Which consists in this, that what Proportion the Merits of one Person bear to the Merits of another, such Proportion shall his Reward bear to the other's Reward.

⁴ For, as *Philo Judæus de Monarchia. Lib. ii. p. 640. Ed. Genev.* observes, 'tis high Inequality to give equal Honours to those who are not equal in Merit. *Arrian. Epictet. Lib. iii. Ch. xvii. This is a settled Law of Nature, that he who is more excellent, should on that very Account have a larger Share of good Things, than he who is less.* Thus, for Instance, if six Things of the same Value are to be distributed amongst *Caius, Seius, and Titius*, upon Supposition, that *Titius* exceeds *Caius* in a triple Proportion, and *Seius* in a double, *Titius* shall have three, *Seius* two, and *Caius* one. Nor is it requisite to this Equality, that the Reward fully answer and come up to the Merits of the Person; but 'tis sufficient, that what Proportion the Service of the one bears to the Service of the other, the same Proportion there should be between their Shares of the common Benefits. And the same Rule must be follow'd in distributing Burthens.

As for what Mr. *Hobbes* ⁵ alledgeth, to overthrow this *respective Equality*, that *I may of my own*

Goods distribute least to him that deserves most, and most to him that deserves least, provided I pay but for what I bargain'd for; and use the Authority of our Saviour, in the xxth of St. Matth. ver. 13, &c. to confirm his Opinion: All this, if rightly consider'd, makes nothing to the Purpose. For in the Place of Scripture above-cited, it is shewn indeed that he doth not offend against Commutative Justice (which governs the Contracts about Hire, &c.) who out of his Liberality gives to some a larger Reward than their Service deserves; or who, to the Wages due upon this commutative Justice, adds something out of free Bounty, which is comprehended under universal Justice. But how doth this affect our distributive Justice, the Business of which is nothing else, but to assign to many Persons their proper Shares of a Thing, to which all of them have a perfect, though (in regard to the Quantity) an unequal Right? And then as for the word Distributing, which occurs in the Instance alledg'd from Scripture, this doth not in the least make the Act fall under Justice, strictly call'd Distributive; but only hints that the Labourers were many, to every one of whom their Wages were to be paid according to commutative Justice ⁶.

To clear the Doubts rais'd on this Head by *Grotius*, in his first Book and first Chapter, we need only observe, that his ⁶ *expletive Justice* doth not exactly come up to *commutative*, nor his *attributive* to *distributive*; and that his Division is not founded on the same Bottom as ours. For *ours* is chiefly taken from the *Matter* which is owing, and from the *Cause* of owing it; but *his* from the *Manner* and the *Degree* in which a Thing is ow'd. Whence the Reason is evident why the parting of Gain in Contracts of Societies, is by him referr'd to *expletive*, and by us to *distributive Justice*. The observing of ⁷ *Geometrical Proportion* in these Cases, is indeed only accidental; since 'tis not necessary, that the Members should have contributed unequal Shares, but they might as well have contributed equally, and then in parting the Gains a *simple* or strict Equality must have been follow'd. As for that Case stated by *Grotius*, *If* ⁸ *one Man only be found fit for a publick Office, his Reward shall be assign'd him according to simple, or Arithmetical Proportion*; it must be farther enquir'd, whether the Man had a *perfect*, or ⁹ *imperfect* Right to this Office. If the latter, the Case will then belong to *universal Justice*: If the former, we agree to *Grotius's* Remark, that the Species of Proportion call'd *Geometrical*, is, tho' generally, yet not always follow'd in *distributive Justice*. Nor have we taken the Difference of our two Kinds of Justice from their making use of a different Proportion. And

³ *De Cive, iii. §. 6.*

⁴ We must remember this Restriction, for otherwise a Society may treat with any one of its Members, as it would treat with another Society, or as particular Persons treat one with another.

⁵ *Philo's* Words are, Το ἴσον τοῖς τοῖς ἀξίως ἀνεμοῖς οὐνοῦ ἀποδόντων, ἄριστον. *Arrian's*, Νόμος ἔστος φυσικός, ἢ κρείττονα τῶν χειρόνων, πλείον ἔχειν, ἐν ᾧ κρείττονα ἔστω. The true Meaning of which Word is, That 'tis a Law of Nature, that good Men, as such, should have the Advantage of Sinners; and if so, they are nothing to our Author's Purpose.

⁶ *Hobbes* gives another Example, see the next Section.

⁷ Our Author will explain and examine more largely this Definition of *Grotius*, in §. 11. of this Chapter.

⁸ To understand what *Geometrical Proportion* is, the best way is to give an Example of it: When I say then, Six is to Two, as Twelve is to Four, there is a *Geometrical Proportion*; because Two is as often found in the Number Six, as Four is found in the number Twelve.

⁹ This is to suppose a Thing impossible (says *Gronovius* the Elder, in his Notes) viz. That all Citizens, one only excepted, should be equal, which can only happen when they can have but one Nose, Mouth, Eyes, and, in a Word, a Face exactly alike. See Mr. *Vander Meulen* in his Comment on *Grotius*, Tom. i. Page 31.

⁹ See *Lib. iii. Ch. i. §. 3.* following.

fo, for the other Instances of *Grotius*, the assigning of *Legacies* belongs not to *distributive Justice*, but to *universal*: And when a City or State repays out of the common Stock, what some particular Members have expended on the publick Account, *commutative Justice* is exercis'd, and not *distributive*. Because the Reason of the Debt ariseth, not from that Pact by which the Society first admitted the said Members, but from a particular, and a very different Contract.

X. When we exhibit to another Things or Actions due ¹ upon reciprocal Pact, and coming into Commerce, this is call'd *commutative Justice*. And since Pacts of that Kind tend to this Issue, that for a Thing or Action of my own, falling under Commerce, I receive from another an equivalent Thing or Action, at least such as I esteem equivalent; the Reason is hence obvious, why in this Species of Justice a *simple Equality* is requir'd, which we commonly call ² *Arithmetical Proportion*, but that the strict Mathematicians will allow it that Title, we dare not engage. The Thing or Action then, coming in Commerce to another, ought to be answer'd by somewhat exactly of the same Value in moral Estimation. For, the Objection of Mr. *Hobbes* ³ that if we sell our own Goods at the highest Price that can be, we do no Injury to the Buyer, who inclin'd and consented to the Bargain, shall be examin'd at large hereafter ³. As for *vindicative Justice*, which, according to our Notion, constitutes a particular Species, it will be consider'd in a more convenient Place ⁴.

XI. It may be worth our while to take farther Notice of ^b *Grotius's* Opinion concerning Justice, which he, neglecting the usual Distinction of *general* and *particular*, divides into *expletive* and *attributive*. This Difference is founded on the Diversity of that Right which one Man hath to receive any thing from another, which, as we have already observ'd, is either *perfect* or *imperfect*; the latter being also term'd *Amplitude*, in Opposition to *strict Right*. Therefore an Act belongs to *expletive Justice*, when we render that to another which is due to him by a *perfect* Right; but to *attributive Justice*, when we render that which is due to him only by an *imperfect* Right. Now the Reason of these two Appellations of Justice seems to be this; whatsoever is due to me by *perfect* Right, is conceiv'd to be already in some Measure *my own* ¹, and consequently so long as it is withheld, somewhat of my own is suppos'd to be wanting. (Thus

even Names and Titles are reckon'd Part of our Patrimony, and may pass in Payment to others.) So that if a Man pays me what is my Due by a *perfect* Right, he gives me no new Thing, but only fills up the Place of a Thing which before was absent, and which in the mean Time ² was suppli'd by an Action. For Example, a Man who hath borrowed a Book out of my Study, when he restores it, doth not properly increase my Study, but only ³ fills up a Place made empty on his Account. But such Things as I have only an *imperfect* Right to receive, I cannot reckon my own, nor put them into my Patrimony; since they depend entirely on the Modesty and common Honesty of another Man, who may not, by any violent Means, be compell'd to pay them. And therefore 'twould be ridiculous, if a Beggar, for Instance, should make over to a Shoe-maker, for the Price of a Pair of Shoes, an Alms which he *expects* to receive from some rich Person. Thus then, he who renders to another any thing due by *imperfect* Right, doth properly *attribute*, give or add to him somewhat which he could not before call *his own*. For this Reason *Grotius* calls *attributive Justice* the Companion of those Virtues which tend to the Benefit and Advantage of others, as *Liberality*, *Mercy*, *Humanity*, and the like. For these Dues Men receive only by *imperfect* Right. When he adds to these, *Providentia reatrix*, or *State-providence*, he is, in our Judgment, chiefly to be understood of the Distribution of those Rewards, to which the Subjects have only an *imperfect* Right; in which, tho' a greater Liberty may be taken than in giving those which are due upon Contract, yet it would be, perhaps, most adviseable to proportion every Man's Share to his Merits, as the surest Way to prevent Strifes and Complaints⁴. Thus *Isocrates* (*Areopagit.* p. 247, 248. *Ed. Paris.*) observes of the old *Athenian* Ministers: *One Thing which prov'd of great Advantage to them in the Management of the Commonwealth was this; that whereas there are two sorts of Equality, one which gives exactly the same Portion to each Man, and another which proportions Mens Shares to their particular Merits, they were not ignorant which of these two was most beneficial to a State: But rejecting that as unjust, which dealt out the same Allotment to good and bad Men without Distinction, they chose the other which assigns Honours and Punishments according as every Man deserves, for the surest Guide of their Proceedings.*

Why *Grotius* forbore the Use of the common *A-*

^a De Cive, Ch. iii. §. 6.

^b Lib. i. Ch. i. §. 8.

§. X. ¹ The Engagement is not always mutual. Understand this in the Manner I have mention'd before, §. 8. Note 2.

² This Author observes here with Reason, that he uses not the Words *Arithmetical Proportion* in the Sense of the Mathematicians, tho' we find that *Plutarch*, *De amore fraterno*, uses it for an exact Equality; but he speaks of it a little lower, §. 12. properly, when he relates the Opinion of *Aristotle*.

³ Viz. Lib. v. Ch. iii. §. 10.

⁴ Viz. Lib. viii. Ch. iii. §. 5.

§. XI. ^a *Id apud se quisque habere videtur, de quo habet actionem; habetur enim quod peti potest*, i. e. Every one seems to be in Possession of that for which he may have a just Action; for that is possess'd that may be required, *Digest. Lib. 1. Tit. 16. De verborum significatione, Leg. cxliii.*

² The Author understands by this, either the Act of Engagement into which a Man is entered, or the Right a Man hath to require his Due, which Right he expresses by the Phrase, *To have an Action against another.*

³ *Gronovius* the Father, and Mr. *Vander Meulen*, in their Notes upon *Grotius's* Treatise, *Of the Right of War and Peace*, affirm, That this Distinction bears much the same Sense, as the ordinary one of Justice *commutative* and *distributive*, and that, as in *Latin* the Word *Explere* signifies sometimes to satisfy, Justice *expletive* is so called, because by the Practice of it we satisfy those to whom we owe any thing which they have a Right to require, by way of Return of what they have received. But all this is of little Importance.

⁴ Μειζον δ' αὐτοῖς συνέβαλετο πρὸς τὸ καλῶς οἰκῆν τὴν πόλιν, ὅτι οὐαὶ ἰσότητον νομιζομένων ἴκαι, καὶ τὸ μὲν τῶντων ἅπασιν δαπέμεσθαι, τὸ δὲ πρὸς τὸ προσήκον ἰκασίαι, ἐκ ἡρόων τῶτων τὴν χρησιματικῆν, ἀλλὰ τὴν μὲν τῶν αὐτῶν ἀξίωσιν τῶς χρησῶς καὶ ποιησῶς, ἀπεδοκίμαζον ὡς ἰ δικαίαν ἔσαν τὴν δὲ κατ' ἀξίαν ἰκασίαν τιμῶσαν, καὶ κολάζουσαν προσηύθη. But here we must take notice of a Mistake in our Author, who has rendered *κολάζουσαν*, *præmia*, for *pænas attribuit*, he renders Rewards for Punishments.

Aristotelian Terms, he himself gives this Reason, because the Word *Συναλλακτικὴ* doth not come up to the full Import of *Expletive*; for, that he who is possess'd of my Goods should restore them again, doth not proceed from any *συνάλλαγμα* or *Commutative Contract*, and yet it belongs to *Expletive Justice*: That is, tho' I have a perfect Right of retrieving what is my own, from any Possessor, yet my Action is not founded upon any Contract made between us about the Restitution; but 'tis sufficient to my Purpose, if I can prove my self to be the true Master and Proprietor of the Thing thus withheld. It is clear then, that there may be an Act of *expletive Justice* without any *συνάλλαγμα* or Contract. Neither doth the other Term *διανεμητικὴ* fully answer that of *attributive*; because it supposeth a Necessity of many Persons, amongst whom the Distribution is to be made. But now *attributive Justice* may be exercis'd towards a single Person, when he alone is fit to receive such an Honour, or such a Reward.

XII. *Aristotle's* Opinion concerning the Species of Justice, as far as we can apprehend, seems to be this: *General Justice*, which he calls *the Universal Exercise of Virtue towards others*, is a Duty which belongs to all Men. Particular Justice he divides into three Kinds. First *Distributive*, which takes in the Partition of Honours or Money, or other Things capable of being divided amongst the Members of the same State. Secondly, *Corrective*, which consists in rectifying *Commutations*: And of these some are *Voluntary*, others *Involuntary*. The former are made without Constraint, as Buying and Selling, Hiring and Letting to Hire, in Loans, Usury, and Suretiship. The latter consists in Crimes, when Men are forc'd to a *Commutation* against their Wills: For Instance, when my Goods pass to a Thief; for then there ariseth an Inequality, he having *more*, and I *less* than we ought. The Correction then of this Inequality is made by taking from him what he had above his Due, and restoring it to me. Thus, suppose a Man, by the Fraud of the Seller, gives nine Shillings for a thing that is worth but six; three Shillings are to be taken from the Seller and given to the Buyer, to make an Equality. Now between these three Numbers, 3, 6, 9, there is

properly an *Arithmetical Proportion*, the third Number exceeding the second just as much as the second exceeds the first^a. These two Kinds of Justice belong properly and principally to those who bear some high Command in a State. For 'tis the Duty and Office of such, and not of private Persons, to distribute the publick Goods amongst the particular Members; and to correct the Inequalities which arise either in Contracts or Crimes, by reducing them to a Parity. *It is the Business of the Judge to reduce those things to an Equality, which upon account of an Inequality are unjust*^b.

The third Species of Justice assign'd by *Aristotle*, is *Retaliation*, which serves to regulate the *Commutations* made between Man and Man, by comparing Things that are different and unequal, and reducing them to a Geometrical Proportion. To give an Instance, Were a pair of Shoes to be exchange'd for a Horse, the Question would be, how many times the Price of the Horse contains the Price of the Shoes, which supposing to be twelve times, the Rule of *retaliating* or compensating is, that twelve Pair of Shoes be given for one Horse^c. And this Species of Justice belongs as well to Men of private, as of publick Capacities. As for our former Remark, that the other Species assign'd by *Aristotle*, concern'd principally the Magistrates and Judges; this will be easily granted by any who take a closer View of his moral Works: For they will find, that in ranging and marshalling the Virtues, he had always in his Head the Idea of some *Grecian State*; in which time all the Subjects had not the same Duties to perform, 'tis no Wonder that he hath given us some Virtues applicable only to Men of particular Quality and Degree.

XIII. Mr. *Hobbes*^d hath advanc'd one single Notion of Justice to comprehend every Kind; making it nothing else but a keeping of Faith, and fulfilling of Covenants; which Opinion he borrow'd from *Epicurus*^e. *Commutative Justice*, he says, takes place in Contracts, as in Buying and Selling, Hiring and letting to Hire, Lending and Borrowing, Exchanging, Bartering, and the like. *Distributive Justice* (tho' improperly so call'd) is, he says, *the Justice of an Arbitrator, when being trusted by them who make him Arbitrator, if he perform his Trust, he is said to distribute to every Man his own*. Nor will

^a Vide *Felden ad Grot. Lib. i. Ch. i. §. 8.*

^b Vide *Aristot. Ethic. Lib. v. Ch. viii. & Michael Ephes. in loc. eund.*

^c *De Cive, Ch. iii. §. 6. & Leviathan, Ch. xv.*

^d *In Diog. Laert. Lib. x. circ. fin.*

^e We must not take the Term *συνάλλαγμα*, Exchange, or Contract, in the natural and ordinary Signification, but in the Sense that *Aristotle* uses the Word. See the next Paragraph, and *Gronovius's* Notes upon *Grotius*.

§. XII. ^a These are *Aristotle's* Words, Ἡ μὲν δικαιοσύνη τῶν ἄλλων ἀρετῆς ἕνεκα χρῆσις πρὸς ἄλλων. *Ethic. Nicom. Lib. v. Chap. v.*

² *Aristotle* further goes on and says, Τῆς δὲ κατὰ μέρος δικαιοσύνης — ἐν μὲν ἐστὶν ἴσος, τὸ ἐν ταῖς διανομαῖς ἢ τιμῆς, ἢ χρημάτων, ἢ τῶν ἄλλων, ὅσα μείζω ταῖς κοινανδοῖσι τῶν πολιτῶν — ἐν δὲ, το ἐν ταῖς συναλλαγμασὶ διορθωτικῶν, τὰς δὲ μέρη δὴ, τῶν συναλλαγματῶν τὰ μὲν ἕκαστα ἐστὶν, τὰ δὲ ἄκρῃσι. ἕκαστα τὰ τοιαῦτα, αἷον πρῶσις, ἀλή, δανισμὸς, ἔγγυη, χρῆσις, παρακαταθήκη, μίσθωσις — τῶν δὲ ἀκρῶν, &c. *Ibid.*

³ By the Word *συνάλλαγμα*, which signifies a Contract, Exchange, or Commutation, *Aristotle* means every Action by Virtue of which we are obliged to do any thing to another, whether at present, or for the future: In a word, every Affair in which we may have Commerce one with another. So that we must take this Term in the Sense that it is commonly used in, for we shall afterwards see that it is to be taken in a more large Signification, which would extremely perplex us, if we should follow *Aristotle's* Notion without Examination, or it were necessary to know his Idea.

⁴ By Crimes, we understand all sorts of Injury done to another.

⁵ This Sentence, which was not in the first Edition of all, is so very much corrupted in all the others (the last of 1706 not excepted) either thro' the Fault of the Printers, or Oversight of the Author, that we can make no Sense of it: His Words are, *Quia excessus, quo posterior numerus priorem superat, sunt aequales*. Doubtless he intended to have said, *Excessus, quo posterior numerus secundum superat, & excessus, quo secundum priorem superat, sunt aequales*, as the *English* and myself have translated it. In fine, an *Arithmetical Proportion* is found also between four Degrees of Magnitude, of which the first exceeds the second, or is exceeded by it, in an equal Quantity, as the third exceeds the fourth, or is exceeded by it; as for example, five is to ten, as seven is to two.

⁶ So *Aristotle* speaks, Ὡς τὸ ἀδίκον τῆτο, αἰσων ἢ ἰσάξην πρὶταται ἡ δίκαιοσι. *Arist. Ethic. ad Nicom. Lib. v. Ch. viii.*

§. XIII. ^a We ought to observe, That Mr. *Hobbes* owns no Equality to be observ'd as to the Price of Things, which are the Matter of Contracts. See his *Leviathan, Ch. xv.*

he allow any other Equality to be observed but this, that since we are all equal by Nature, one Man ought not to arrogate to himself more Right than he allows another, unless he hath obtain'd a greater Right than ordinary, by the Intervention of Covenants. Farther, since, according to his Sentiments, an Injury, or an unjust Action, or Omission, is nothing else but the Violation of a Covenant; he hence infers, that we cannot offer an Injury to a Man, unless we have before covenanted with him. This Assertion is founded on his old Maxim, of *the Right of every Man to all Things*, which he hath stretch'd far beyond its just Limits; so that he imagines, before any Covenant is made, by which one Man might transfer his Right to another, every Man hath a Right of doing to others what he pleaseth; and thus, only using his Right, he cannot be said to commit an Injury^a. But we shall by and by² shew, that this *Right of every Man to all Things* can be extended to no farther Sense than this, That Nature allows a Man to use all such Means as Reason shall judge conducive to his firm and lasting Preservation: As indeed Mr. *Hobbes* himself in his Definition of *Right*^b, inserts the *Use of Reason*. But now found Reason will never advise us, out of our own Pleasure and Humour, to put such Affronts on another, as cannot but provoke him to War, or to a reciprocal Desire of hurting us. Besides it implies a manifest Contradiction to say, that upon the Supposal of many Men equal in Rights, each of them hath a Right to all Things; since the Right of one Man to all Things, if it hath any Effect, must extinguish the Rights of the rest; and if the Right hath no Effect upon the others, it is useless, absurd, and ridiculous: For, in moral Account, *not to be*, and *not to be effectual*, are much the same. And indeed, how can we call that a Right, which another may oppose with an equal Right? Who would say, I had the Right, of commanding a Man, if he, by the same Right might despise my Orders? Or, that I had a Right of beating another, when he too had a Right of returning my Blows, and, if he pleas'd, with Advantage and Increase? 'Tis certain therefore, that he that doth these Things to another, hath no Right of doing them, and consequently is injurious. On the contrary, the other Party hath a Right that such Things should not be put upon him, and is therefore injur'd. Thus we see, that such *Right* as being violated produceth an In-

jury, is not only acquir'd by Covenant, but was given at first by Nature, without the Intervention of any human Act: And so the Assertion, that an Injury can be done to no Man unless we have transfer'd³ something on him by Covenant or Gift, is false and unreasonable.

The other Position of Mr. *Hobbes*^c, that Justice as well as Property owes its Original to civil Constitutions, we shall hereafter consider and refute.

Indeed, so far is it from being rational to resolve all Justice into Performance of Covenants, that, on the contrary, before we can know whether any Covenant is to be perform'd, we ought to be certain that it was entred upon, either by the Command, or with the Permission of the Laws of Nature; that is, that it was *justly* made^d.

From what hath been here offer'd, it is farther evident, that altho' otherwise *Damage* and *Injury* are very different Things, and though it be possible that^e the Injury of an Action may redound to one Man, and the Damage to another; yet the Inference which Mr. *Hobbes* draws from this Consideration will not hold, that a bare Damage, and not an Injury is done to him, who is either hurt, or hath something taken from him, by a Man with whom he had pass'd no Covenant. Nor do the Instances which he brings to countenance this Conjecture, make very much to the Purpose^f. *When the Master*, says he, *commands his Servant to give Money, or to do a Kindness to a third Person; if it be omitted, the Injury is done to the Master, but the Damage to the third Person.* But indeed, if the Servant does not pay the Money which is due, as he is order'd, the Creditor shall suffer no³ Damage since his *Action* remains good against the Master. Nor, if a Servant, being commanded to do a Kindness to another Man, fails in performing it, shall the other Man incur any Damage: Tho' he is indeed guilty of Theft, or the like Crime, if he intercept and keep for his own Use, what he ought, on his Master's Account, to have deliver'd to others. For, besides that from the not receiving of a Kindness which is not strictly due, Damage properly so call'd cannot arise^f, the other Person may complain to the Master, who will be sure to compel the Servant to his Duty. And tho' we suppose the Servant to have been never so far from doing an Injury to the third Person, yet for all this, 'tis certain he did not what by *Right* he ought to have done; because he affords the other Man sufficient

^a Vid. *Gassend. Syntagn. Phil. Epicur. par. iii. Ch. xxvi, xxvii.*

^b *De Cive, Ch. i. §. 7.* ^c *Lev. Ch. xv.* ^d *Dr. Cumberland De L. L. N. Ch. viii. §. 6.* ^e *De Cive, Ch. iii. §. 4.* ^f *Vid. Grot. Lib. ii. Ch. xvii. §. 2.*

² *Viz. Lib. iii. Cap. v. §. 3.*

³ This Expression of Mr. *Hobbes* is founded upon his great Principle, That every Man hath a Right to every Thing; for, according to him, in every Engagement we yield to another the Right which we had to certain Things, and to break an Agreement is to require, in some Measure, what we had granted.

⁴ This ought to be understood either of one and the same Action, in which several have concurred, but so as that some have acted without an evil Intention, and others with a Design to injure; or of an Action done by a single Person, but in such a Manner, as that the Effect redounds to several others, and in Respect to some it is an Injury, but in Respect to others it is a single Damage; as if a Man, designing to kill another, should slay or hurt a third Person, contrary to his Intention.

⁵ He may receive one at least for the present, if he had a necessary Occasion for it, and because he had it not in Hand, he sustained some Loss, or lost an Occasion of getting some Advantage. Further, it may happen, that his Master might become altogether insolvent, or not in a Capacity of paying for a long Time; when any of these Inconveniences happen from this, that a Master has given Money to his Servant to pay his Creditor, the Creditor has a full Right to require, that the Servant pay him that Sum, as a Thing belonging to him, tho' he knows nothing of his Commission; for the Servant, by keeping the Money, does what in him lies to cause the Creditor to lose his Debt. We may also add, the Deceit of the Servant has frustrated the Liberality of his Master; for tho' these Works of Charity are in their own Principle not rigorously due, yet from the Moment that a Master determines to do some Good to the Poor, and he is actually kept out of that Money, that should enable him to give, the Servant, by keeping it, robs the Poor of it, as much as if he had already received it; for Men have a true Right to that which is lawfully given, in respect of the Donor, in so much as that he can't demand it again, unless upon some extraordinary Reasons. See *Book v. Chap. iv. §. 1. Note 1. following.*

Grounds of a Complaint against him. His other Instance Mr. *Hobbes* thus propofeth in his *Leviathan*, Ch. xv. p. 75. *Private Men may remit to one another their Debts, but not Robberies, or other Violences whereby they are endamag'd: Because the detaining of a Debt is an Injury only to themselves, but Robbery and Violence are Injuries to the Person of the Commonwealth.* Which we are willing enough to admit, provided he will not hence infer, that in Crimes an Injury is not likewise done to the particular Person who is hurt. But as he propofeth the fame in his Book *De Cive*, Ch. iii. §. 4. it is by no Means to be endur'd. He fays, that *in a State, if anyone hurts another, with whom he hath not covenanted, he damageth the Party on whom he brings the Evil, but he doth an Injury only to him who holds the fovereign Power in the State.* For, if one of my Fellow-Subjects hurts me by Violence, doth he offer an Injury to the King only, and not to me? Or fuppofe we fhould grant, as Mr. *Hobbes* defires, that when Men live in a natural Liberty, each of them hath a Right to all Things, yet will this hold good amongst the Members of the fame Republick, who own one common Mafter? As to what he fubjoins, that *if the Person who receiv'd the Damage, fhould accufe the other of injuring him, he would be answer'd in this Manner, What are you to me? Why fhould I act according to your Pleafure, rather than my own, fince I don't hinder you from acting by your own Will, rather than by mine?* 'Tis fo far from being true, that *if no particular Covenants have interven'd, this way of fpeaking will not be free from Reprehenfion*, that we fhould rather imagine a Man to be out of his Senfes, who fhould hope by fuch a way of arguing to fatisfy the Complaints of one whom he had hurt. Yet one Thing Mr. *Hobbes* hath well remark'd, that *the Term of Injuftice fignifies with Reference to the Law, but the Term of Injury with Reference both to the Law, and to the particular Person.* For, when an unjuft Thing is done, all may call that unjuft, or it is unjuft to all. But an Injury may have been done, not to me, or to him, but to a third Person, and fometimes to no private Subject, but to the State only; as when a Man is kill'd in a Duel, for Instance, upon a fair Challenge. For in this Cafe, the Party who receiv'd the Hurt, cannot complain of having an Injury done him, fince he himfelf agreed to the Chance of the unlawful Combat: But the Legislator may, however, profecute the Survivor for tranfgreffing his Prohibition.

XIV. Having arriv'd to know what Justice is, we may eafily fettle our Notions of *Injuftice*, and of its feveral Species. An Action, then, is unjuft, either when we apply it defignedly, to a Person to whom we ow'd a different Action, or when we deny another fomewhat which was really his due. That is, We are equally guilty of a Breach of Justice, by doing any Evil to another which we had no Right to do, and by taking

from another, or denying him any Good which he had a fair Title to require. ^a For good Things are of that Nature, that they may be given to any Man without a Reason, provided a third Person is not defrauded thereby: And the Evils likewise which a Man hath merited, we may without Injury withhold from him, if at the fame Time we do not endamage others by our Forbearance. An unjuft Action, therefore, either brings upon another Man what it ought not to bring upon him, or denies and withholds what it ought to give him. For the Denial or Omiffion of an Action, is, in moral Account, itfelf an Action.

XV. But an unjuft Action, proceeding from Intention, and trefpaffing on the perfect Right of another, is, in one Word, call'd *Injury*. Which if we would exactly ftate, we muft again obferve, that a Man may be hurt three ways; either, if he be denied what he ought to have ^a, or if that which he now hath for his own be taken from him, or if fome Evil be put on him by another, who had no juft Right of doing it. As to the firft of thefe Ways, Things may be faid to be due to a Man, either by the bare Law ^a of Nature, yet fo as that he hath no perfect Right to them; of which Kind, are the Offices of Humanity, Beneficence, and Gratitude: Or elfe by Covenant, and that either fuch as is exprefs and particular, or fuch as is contain'd under our Obligation to Civil Laws, by which we engage ourfelves to perform thofe Things towards others, which the Laws command us to exhibit. If Things of the latter Kind are denied a Man, an *Injury* is properly done; but there is no proper Injury in the Denial of Things which belong to the former Kind; tho' there be a Sin indeed committed againft the Law of Nature. Yet neither doth the Law of Nature itfelf allow of compelling another by Violence to pay thefe Duties (efpecially if the compelling Party have no Power and Authority over the other) unlefs upon urgent Necessity: Since the Nature and Property of thofe Offices requires that they be perform'd voluntarily, and without the Motive of Fear. Thus far therefore, and no farther, will the Maxim of Mr. *Hobbes* hold true, *That an Injury cannot be done, but to a Man with whom a Covenant has been made.* But when we ftudiously and induftrioufly bring an Evil on another Man, unconfenting and unprovoking, either by taking from him any Good which he poffeffeth, or by pofitively inflicting on him an Evil: In thefe Cafes an Injury is always done, whether a Covenant hath interven'd, or not. For Nature hath given this Right to every Man, that no Evil be offer'd him from another Man, without his own preceding Demerit: Nor is it allowable for any Person, unlefs when provok'd, to hurt another, any farther than the due Exercife of Government fhall require. We add, *unlefs provok'd*, becaufe to make an

^a *Marc. Anton. Lib. ix. §. 5. It often happens that there may be Injuftice in the not doing of a Thing, as well as in the doing.*

§. XIV. ^a The three following Sentences feem ill placed in the Original, and therefore ought to be altered; and another Expression fhortned, becaufe it contains a needlefs Repetition.

§. XV. ^a *Ex mero Jure Naturæ*, by which our Author underftands what he elfewhere calls *absolute Duties*; that is to fay, fuch as are grounded upon the original Conftitution of our Nature, and which every Man is obliged to perform to another Man, confidered precifely as fuch, in Oppofition to thofe who fuppofe fome other Eftablifhment, or other human Act, and which they call *Duties conditional*. See *Lib. ii. Chap. iii. §.* the laft, following.

on properly *Injurious*, there is requir'd the τὸ πρό-
τερον, that it be done first: For Aristotle tells us ²,
that he who returns another what he first suffer'd
from him, cannot be said to do an *Injury*.

XVI. In an *Injury*, properly so call'd, it is farther requir'd, that it proceed from Intention and deliberate Design of hurting or vexing another. And therefore the Harm which is done casually in Ignorance and unwillingly, is not us'd to come under the Name of *Injury*. As suppose a Soldier that is exercising himself, in the usual Place, at casting his Javelin, should strike it through a Man that pass'd by accidentally: Or, if a Lopper of Trees should let fall a Bough upon a Person who had no Right to be in that Place. So Antiphon, an antient Orator, defends a Young-man who had unfortunately kill'd a Child with a Cast of his Javelin: 'He was engag'd, says he, in no forbidden Exercise, but in his proper and necessary Business; nor by himself, but with his Companions in Arms: Nor did he strike the Youth by an unskilful Throw, at a Distance from the Mark: but he guided the Weapon with exact Art and Care, and was so far from doing any Thing amiss, that he rather suffer'd in having his Throw spoil'd, and in being hinder'd from hitting what he so well aim'd at.

Aristotle ² tells us, That the doing of a thing justly or unjustly, depends on its being done voluntarily or involuntarily. And again, That when we do a Hurt beside Reason, it is only a Misfortune; but when we do a Hurt which is not beside Reason, and yet not out of Malice, then we commit an Ἀμάρτημα, or *Trespass*. On which Place Michael of Ephesus thus comments: Of Hurts, some are done out of Ignorance and against our Wills, others with our Knowledge and Consent. Those which are done out of Ignorance, are again divided into such as are done without any Likelihood, and beside all Expectation; and such as are done, tho' involuntarily, yet not beside all Expectation and Probability. Therefore after the Philosopher hath said, that all Hurts proceeding from Ignorance fall under the general Names ³ of Errors or *Trespass-*

ses, he then makes a kind of Subdivision, and tells us, that those which are done beside Reason are Misfortunes, and those which are done not beside Reason are properly *Trespasses*. Now those Things are beside Reason which happen very rarely and unexpectedly; as if a Man by suddenly thrusting open a Door should strike his Father, who stood accidentally behind it; or if, whilst he is exercising himself at his Javelin, in a Place thro' which none are wont to pass, he wounds some body who happen'd to come by when the Weapon was flying. For these, and such like Accidents, fall out beyond all Thought and Expectation. But Actions done indeed ignorantly, but not beside Likelihood or Probability, are call'd *Trespasses*. For, a Man who exercising his Bow and Arrows in a Place commonly frequented, strikes any Person, doth properly trespass, as a Man is then always said to do, when he himself was the Principle and Cause of the Unluckiness of the Action: But now the Man whom we speak of, was no doubt the Principle and Cause of what he did, since he ⁴ voluntarily chose such a Place to shoot in, where it was probable some body or other would pass by.

An Ἀμάρτημα, or *Trespass* of this Nature, is what the *Civilians* properly term *Culpa*, or a *Fault*; which they say is committed through Negligence or Unskilfulness, when a Man is either careless or ignorant of such things as he ought, and was able to have known, and to have observ'd. Of *Faults* they make three Degrees, answerable to the Degrees of Diligence, by the Omision of which the Fault is contracted. First then, there is a ⁵ general Diligence of all Men, not work'd out by Labour and Wit, but deriv'd, as it were, from common Sense. Next to this, there is a Diligence more improv'd ⁶ proper to every Man in his own Affairs; and which is requir'd by Nature in the Management of human Life, according to each Person's Capacity and Parts. Lastly, there is a Diligence of the greatest Exactness and Accuracy, us'd only by the most knowing and experienc'd Men ⁷ in their own Business and

² Ὁ δὲ δίκαιος ἔπαυε, καὶ τὸ αὐτὸ ἀντιποιῶν, ἐδεχάτο ἀδικεῖν. *Arist. Ethic. ad Nicom. Lib. v. Chap. xv.* See what is said, *Lib. ii. Chap. v. and Lib. iii. Chap. i. §. 7.*

³ *Antiph. Orat. 7. p. 56. Edit. Hanov. 1619.* Οὐτε γὰρ ἀπρηρῆσαν, ἀλλὰ προσπαγρῆσαν ἐξυμελέτω ἢ τε ἐν ἡμιμαζομένοις, ἀλλ' ἐν τῇ ἴσῃ ἀκοιτιζόντων τάξῃ ἠκοντιζόντων ἕτε τὸ σκοπῆ ἀμαρτημάτων, εἰς τὰς ἀφειστάτας ἀκοιτισίας, καὶ παίδας ἔτευχε, ἀλλὰ πάντα ἐβῶς ὡς ἐπὶ τοῦ ἔδατος, ἔορασε γὰρ ἔδιν ἀκροῖον, ἔπαυε δὲ, διακολοῦσθαι τὸ σκοπῆ τρυφῆ.

⁴ Ἀδίκημα δὲ καὶ δικαιοπραγίαν ἀριστὰ τὰ ἐκαστῶν καὶ ἀκρίβως. Ὅταν γὰρ ἐν παραλόγῳ ἢ βλάβῃ γίνονται, ἀτύχημα ὅταν δὲ μὴ παραλόγῳ, αἰὲς δὲ κακίῳ, ἀμάρτημα. *Ethic. ad Nicom. Lib. v. Chap. x.*

⁵ A little before the Words which he is about to quote, are these, Τα γὰρ μὴ μετ' ἀρῆρας, ἀμαρτημάτων ἔστω. And here, to speak by the By, *Grotius, Lib. iii. Chap. xi. §. 4. Num. 2.* renders ἀμαρτηματα, *Infortunium, a Misfortune thro' Mistake*, whereas he says in another Place, that it signifies, *Culpa aliqua*; I am amazed that neither Mr. *Courtin*, in his Translation, nor *Gronovius* the Father, in his Notes, did amend this Slip in their Author.

⁶ We may call it, *An indirect Will*, because he did not directly and formally intend to hurt any Man; but he did, or neglected to do a Thing, from whence a Damage did redound, which was occasioned (as may easily be presumed) by that Action or Omision.

⁷ *Lata culpa est nimia negligentia, i. e. non intelligere, quod omnes intelligunt. Digest. Lib. l. Tit. xvi. De verborum signific. Leg. cxxiii. §. 2.* See also *Leg. cxxiii. and Lib. xxii. Tit. 6. De juris & facti ignorantia, Leg. ix. §. 2.* It would be (for Example) a great Fault, if having borrowed a Robe, you leave it in your Porch, where the first Comer may carry it away.

⁸ *Si cum distrabere deberet, non fecit, lata culpa, non levi, & rebus suis consueta negligentia; hujusmodi rei rationem reddet, Digest. Lib. xxxvi. Tit. 1. Ad Senatusconsultum Trebellian. Leg. xxii. §. 3. Si venditor eam diligentiam adhibuisset in insula custodienda, quam debent homines frugi & diligentes prestare, &c. Lib. xviii. Tit. vi. De periculo & commodo rei vendita, Leg. xi. Si nihil appareat convenisse, talis custodia desideranda est a venditore, qualem bonus paterfamilias suis rebus adhibet, Lib. xviii. Tit. i. De contrab. empt. Leg. xxxv. §. 4. Si quis non ad eum modum, quem hominum natura desiderat, diligens est, &c. Lib. xvi. Tit. iii. Depositi vel contra Leg. xxxii.* It would (for Example) be a small Fault, if when a Man has received a Thing to keep, he leaves it in his Chamber, and puts it not in his Trunk, or forgets to take out the Key of the Trunk where it is. In fine, the Lawyers ordinarily call this sort of Negligence by the Name of *Culpa*, i. e. a Fault. See, for Example, *Digest. Lib. ix. Tit. ii. Ad Leg. Aquilian, Leg. xxxi.* but sometimes we mean by it one of the two other sorts, of which we may judge by the Sequel of the Discourse.

⁹ *In lege Aquilia & levissima culpa venit, Digest. Lib. ix. Tit. ii. Leg. xlii. In rebus commodatis talis diligentia prestanda est, qualem quisque diligentissimus paterfamilias suis rebus adhibet, Lib. xiii. Tit. vi. Commodari vel contra, Leg. xviii.* A Fault of this Nature does not excuse (for Example) him that hath borrowed any Thing for his Use, if the Thing lent be lost. See *Lib. v. Ch. iv. §. 6.* following. This also would be a very small Fault, if through Heedlessness a Man shuts the Chamber where he has laid the Thing entrusted to him, but badly, and going away forgets to see whether he has well turned the Key of his Door.

Concerns ¹. To this last kind of Diligence they oppose their *Culpa levissima*; to the second, their *Culpa levis*, and to the first, their *Culpa lata*. As to this *Culpa lata*, they observe, that it is equivalent to Malice and Deceit, in Contracts and other civil Business, and in Cases of Reparation for Damages ². But that ³ in criminal Matters it bears not so hard an Interpretation; where however it doth not take away, but only extenuate the Guilt. The Effects of the *Culpa levis* and *Culpa levissima* they shew at Large, when they treat about Performances of Contracts.

The *Trespases* we have hitherto spoken of, are suppos'd to be done without Intention. But now if a Man through the Violence of his Passions, and only with an imperfect and semiplenary Intention is driven to hurt another, this Hurt shall not be exempted from the Name of *Injury*, altho' the Man be not immediately, for such a Fact, branded with the Character and Stile, of *Unjust* ⁴. *Aristotle's* Distinction is excellent in this Case: *An ill Thing*, says he, *done with Knowledge, but without Deliberation, is unjustly done; such are the Effects of Anger and of other natural and necessary Passions. For Persons who offend on such Accounts, commit Injustice indeed; yet they are not for this Reason accounted unjust and wicked Men, because the Hurt did not proceed from any meditated Malice. But when a Man hurts another out of Choice and Design, then only he incurs the*

Name of unjust and wicked. Hence Facts proceeding from Anger, are always interpreted as done advisedly; for the Principle and Cause of such Mischances, is not the angry Person, but he who provok'd him to Anger.

XVII. Lastly, It is requisite to the making an Action properly *Injurious*, that it be done to a Person against his Will. For 'tis a Maxim in every Man's Mouth, that *volenti non fit injuria*, *Nothing can be an Injury when the Party is willing to receive it.* *Aristotle* says, *A Man with his own free Consent may be hurt, or may suffer things which are in themselves unjust; but he cannot properly be injur'd, except it be against his Will.* See *Dig. Lib. I. Tit. 17. De divers. reg. Juris. Nemo videtur fraudare eos, qui sciunt & consentiunt.* The Reason of which is, that both the Good which I take from a Man, and the Debt which I withhold from him, with his Consent, are, as it were, *Gifts* from him to me: But now, who will say I do an Injury, by taking what is given me? Nor can that be esteem'd Evil which a Man desires to receive; since all Evil necessarily includes an Abhorrency of the Will from embracing it. But then it must be suppos'd, that the Man enjoys the full Use of his Reason, and is not transported with the Violence of any extravagant Affection ⁵. Hence *Aristotle*, *Ethic. Lib. v. Ch. xv.* gathers, that a Man who in a Passion lays violent Hands on himself, doth an Injury not to himself, but to the State, which he robs either of a General,

¹ Add. *Ant. Matth. de Crimin. Proleg. Ch. iii. §. 2, 3.* Mr. *Hobbes's* Definition which he gives in his Book *De Cive*, Ch. iii. §. 7. is founded upon a wrong Supposition, that *Injury consists in nothing but the Violation of a Covenant.*

² In all things which are not capable of an exact and mathematical Measure, we may always distinguish three Degrees at least, *viz.* two Extreams and a Mean, which sometimes comes nearest the First, and sometimes the Last. If we admit of a greater Number, we must determine just to a Point, where each Degree begins and ends, without which there will be no way to discern them: But 'tis not necessary when we confine ourselves to Three. It sufficeth then to consider here Watchfulness as well as Negligence, either as being raised to an higher Degree, or as sinking to the lower, between which is the Medium, which inclines sometimes to one Side, and sometimes to another. Now these middle Degrees (as we may say) must be measured according to the Nature of those things, which are the Objects of our Cares, as they are more or less considerable, and consequently require more or less Caution. This Comment is taken out of Mr. *Titius's* Observations *Ratiocin. in Comp. Jur. Laut. Obs. 397.* See also a curious Discourse of Mr. *Thomafius*, entitled, *De usu Pract. Doctr. diffie. Jur. Rom. &c.* printed at *Hall in Saxony, 1705.*

³ *Magna negligentia culpa est, magna culpa dolus est.* Digest. Lib. I. Tit. xvi. De verbor. signifi. Leg. ccxxvi. See also *Lib. xvi. Tit. III. Depositi vel contra, Leg. xxxii.* and Mr. *Noodt's* *Probabilia Juris, Lib. i. Ch. xiii. §. 8, 9, 10, 11, 12.*

⁴ *In lege Cornelia dolus pro facto accipitur, nec in hac lege culpa lata pro dolo accipitur.* Digest. Lib. xviii. Tit. viii. *Ad Leg. Corn. de Sicariis & Veneficiis Leg. vii.* There is a Case, or as Mr. *Titius* speaks, a gross Fault in unlawful Actions, which renders them culpable, as well as Deceit, or a bad Intention; as for Example, If a Man orders another to be stricken with a Sword, with a Design only to hurt him, expressly forbidding the Person commissioned to slay him, to whom he would have it done, he shall nevertheless be thought directly and maliciously to have murdered that Person, if he die of the Wound, which may and often does happen, and deserve to be treated as a Murderer. For he indirectly willed it; and being the Effect of a formal ill Design, it ought to be looked upon as a malicious Act, and not as a single Fault. See a like Case, *Digest. xviii. Tit. xix. De Pœnis Leg. xxxviii. §. 5.* So those that fight a Duel, have a Design often only to wound and hurt one another, yet this hinders not but if one of them be killed, the other shall be counted a Murderer.

⁵ The Greek is, *ὅταν δὲ, εἰς αὐτὸν μὴ προσκελευσας δὲ [ἢ βλάβη γενήσεται] ἀδικήματα ἢν ὅσα τε δια θυμῶν, καὶ ἅπαντα πάντα, ὅσα ἀναγκῆς καὶ φύσεως, συμβῶσι τοῖς ἀνθρώποις ταῦτα, καὶ βλαπτόντες καὶ ἀμαρτανόντες ἀδικῶσι μὴ, καὶ ἀδικημάτων ἔσο' ἢ μὴ τοῖς παρ' ἀδικῶν δια ταῦτα, ὅσα ποιεῖται ὅσα ἢ δια μορθηρίαν ἢ βλάβη ὅταν ὁ ἐν προαιρέσει, ἀδικῶν καὶ μορθηρῶν, διὰ κολῶς τα ἐκ θυμῶν καὶ ἐκ προαιρέσεως κινήσῃ καὶ ἄλλ' ὁ θυμῶν ποίῳν, ἀδικῶν ὁ ὀργισίας.* *Ethic. ad Nicom. Lib. v. Chap. x.* See also *Cicero de Offic. Lib. i. Chap. ix.* with *Grævius's* Notes.

§. xvii. ¹ *Ethic. Lib. v. Chap. 11.* *βλάπτεται μὴ ἐν τῷ ἐκόν, καὶ τὰ ἀδικα πάρα ἀδικεῖται δὲ ὅδ' ἐκόν.*

² These Limitations are not sufficient to prove the Maxim he is speaking of true, and therefore the Philosopher *Hermias* with Reason maintains, That no Man must make use of the Ignorance of a Seller, to his own Advantage, unless he will incur the Guilt of doing a great Wrong. A good Maxim, which every one should practise (*Phot. Biblioth. p. 1044.*) as Mr. *Bayle* observes in his *Historical and Critical Dictionary.* To set this important Matter in a due Light, I shall borrow some judicious Restrictions made by Mr. *Placet*, upon this Maxim in his *Treatise of Restitution, p. 74, &c.* I. The Consent of the Sufferers ought to be counted for nothing, unless it be absolutely free and voluntary. Now there are three Orders of things which may hinder that Liberty, so that his Consent is not so full and entire, as to authorize what he suffers, *viz.* In the first Rank is every Thing that debars us of the Use of Reason, as *Infancy*, *Folly*, and *Drunkenness*; in the second, *Fear* and *Force*; and in the third, *Ignorance*, *Heedlessness*, and *Error.* As to the first, there is no Difficulty; as to the second, we will suppose that *Fear* or *Force* proceeds directly or indirectly from him who gives his Consent; lastly, as to the third, That Consent is of no Use, because he that gives it knows not what he consents to, nor sees the Prejudice which he does himself by it; for if he be ignorant in whole or in part, his Consent is not voluntary, and no Man can, without Injustice, make an Advantage of his Ignorance. Indeed Ignorance renders the Actions which it produces more involuntary, than *Fear* does, for this does not render an Action involuntary, but when it is caused by him that is to get by it; whereas Ignorance has always that Effect, whatever be the Cause of it. I own, that the Injustice is the more notorious, when he that gets by the Action designedly leads him that gives his Consent, into the Error; but this does not disannul the Contract, when the Gainer is not the Cause of that Ignorance: But he that buys precious Jewels at a low Price, of an ignorant Person that knows not the Value of them, does him an Injury, if knowing it himself he doth not advertise him of it. II. There are two sorts of Rights; the one when we are so much Masters of a Thing, that we can dispose of it as we please, such is that which every Man

ral, or a Soldier, or an Artificer, or the like, according as his Station was. Upon which Account it hath been a Custom in most Commonwealths, to punish such Offenders even after their Death, by affixing some Mark of Disgrace on their Bodies, and on their Memory. Add. *Mich. Epbes. ad loc.*

dictum. Tho' Aristotle's Reasoning in that Place, (*the Law commands not a Man to kill himself; but what it doth not command it forbids*) is false and absurd; unless we say, that by *κελεύει*, *commands*, he rather means *permits*.

has of his own Goods. The other we can't renounce, because a superior Law forbids it; such is that, which every Man has over his own Life; for we may defend our selves against an unjust Aggressor, tho' we can't deprive our selves of it. The Maxim which imports, *That we can't do an Injury to such as consent*, has Place only in Respect to the first Sort; for, as to the last, which are in their Nature unmoveable and unalterable, a Consent given to the Violation of them is ever null and void. Thus when an Husband lecherously consents to the Debauching of his Wife, that does not hinder but that Crime is really Adultery. III. Altho' the Consent of him that is deprived of a thing, may be sufficient to acquit him that deprives him of the Injury, in Respect of the Person deprived; yet we ought to take Care, that a third Person, who has some Interest in the Thing, be not injur'd. As for Example, a Wife, Child, or Creditors. IV. Lastly, The Consent of him that is deprived of any Thing belonging to him, must be known to him that does it, if not by a full Assurance, yet by a probable Presumption, grounded upon good Reason; for if it afterwards appears, that the Person who was thought to consent, did not, tho' the Action might be innocent when it was done, yet he ought to make good the Injury done thereby, tho' he did not think he did any.

CHAP. VIII.

Of the Quantity [or Estimation] of MORAL ACTIONS.

The CONTENTS of every Section of the eighth Chapter.

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| <p>I. <i>The absolute Quantity of moral Actions.</i>
 II. <i>What Intention is requir'd to make an Action good before GOD's Tribunal.</i></p> | <p> III. <i>What Intention is sufficient in human Judicatures.</i>
 IV. <i>What is a perfect and compleat Action.</i>
 V. <i>The relative Quantity of Actions.</i></p> |
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HAVING done with the *Quality*, it comes next in our way to say something of the *Quantity* of moral Actions; or to consider on what Account they fall under different Rates and Measures. Now we find the voluntary Deeds of Men to be capable of undergoing a double Measure or Valuation, either absolutely in themselves, or relatively towards one another. As to the absolute Estimate, the Case is very different in good and in evil Actions. For in a good Action, if we consider it formally and precisely, we discover nothing which bears an Analogy to Quantity: Since the Goodness of it consists only in an Agreeableness or Conformity to the Law, which doth not appear capable of Measure. Hence good Actions, consider'd, as we said, precisely as to their *Form*, are not better one than the other; tho' they surpass each other in Excellence as to their *Matter*, with Regard to the Condition of the Object, and to the Intensity or Strictness of the Obligation. But now, an evil Action, as declining from the legal Rule, is conceiv'd to bear a greater or a less Distance from it; and on that Account may, even consider'd *formally* and *in itself*, be esteem'd *greater* or *less*: In the same manner as one crooked Line may recede farther from a right Line than another doth. For *Zeno's* Argument in *Diogeus Laertius*³ is not worth confuting: *All Sins*, says he, *are equal*; for *'as nothing is truer than Truth, nor falser than Falsity, so neither can Deceit be greater than Deceit, nor Sin than Sin.* *As he*

that is an hundred Furlongs from CANOPUS, and he who is only one Furlong distant from the same City, may be said both alike not to be at CANOPUS; so he that sins less, and he that sins more, are both at an equal Distance from doing well. But because this Distance between evil Actions and the Law, if any one will exactly compare them with other Kinds of Quantity, may have some Likeness to a Right-lined Angle, whose Greatness is measured by the Arch of a Circle, having straight Lines drawn from the Circumference to the Center; therefore when I was young, and studied the Rudiments of the Law, I compar'd them to a Circle²; but in my riper Age I have thought it better to lay aside such Niceties, and explain them more plainly.

II. Farther, since to the Goodness of an Action it is requisite, not only that what the Law commands be fully done, but likewise, that it be done with such Intention as is agreeable to the said Law; it appears hence, that to make an Action be esteem'd perfectly Good, there is a Necessity, not only that the Prescription of the Law be answer'd in all its Parts; but besides, that the only thing which prevail'd on the Mind of the Agent, and put him on such a Proceeding, was a Desire of paying ready Obedience to the Legislator. And for this Reason, since we are, in the Divine Law, commanded *to love GOD, with all our Hearts, and with all our Souls, and with all our Strength, and our Neighbour as our selves*, Mark xii. 30, 31. 'tis manifest, that no Action can be approv'd by GOD Almighty

³ Lib. vii. See *Cicer. Paradox. Ch. iii.*

MR. BARB. NOTES on Chap. VIII. §. i.

² His Greek is this, *'Αξιοὶ δὲ αὐτοῖς ἴσα ἠγνοῦν τὰ ἀμαρτήματα — Εἰ γὰρ ἀληθὲς ἀληθῶς μᾶλλον ἐκ ἔστιν, ἢ δὲ ψεύδος ψεύδους, ὅπως ἔδε ἀπάτη ἀπάτης, ἢ δὲ ἀμαρτήματα ἀμαρτήματος, καὶ γὰρ ὁ ἑκατὸν σταδίους ἀπέχων Κανάβω, καὶ ὁ ἓνα, ἐπίσης ἐκ εἰσὶν ἐν Κανάβω, ἢ τω καὶ ὁ πλείων, καὶ ὁ ἕλαττον ἀμαρτάνων, ἐπίσης ἐκ εἰσὶν ἐν τῷ κατερθέν* *Diog. Laert. in Zenon. Lib. vii. Seg. 120.*

³ These are the Elements of the Universal Civil Law, printed at Hay in Saxony, 1660. and reprinted at Francfort on the Mein in 1620. p. 311.

as entirely Good ¹; but such an one as was undertaken with the fullest Intention, and in which the Agent propos'd nothing else to himself, but a Compliance with the Pleasure of his Creator. Especially, since the Divine *Searcher of Hearts* cannot but discover the least Wavering in our Resolutions, and the smallest Obliquity in our Designs. Whoever considers this Point as he ought, will find but very little Inclination to boast of his Uprightness towards GOD.

III. But in human Account so exact a Diligence is not requir'd. For, since our Earthly Lawgivers propose as the chief End of their Constitutions ² the Benefit of their Subjects, which commonly proceed from the outward Performance and Exercise of the Actions, whatever the Intention of the Actor may be; hence they are usually satisfied if the exterior Action be conformable to their Injunctions. And so much the rather, because they are unable to dive into the Recesses of Mens Minds, nor can at all understand the Intention of any Agent, but by Conjectures, and by Signs obvious to their Senes, which are by no means infallible Guides in discovering our inward Sentiments and Purposes. Therefore they value good Actions only as they appear to Sense, or so far as the Reach and Condition of human Sagacity, and the Use of civil Life do admit or require; and are not very solicitous how full or sincere the Intention of the Agent was, provided his exterior Work deserve their Approbation ³. Yet in evil Actions, even amongst human Judges, more Regard is had to the Intention. And where this shall appear to have been absolutely wanting, as happens in things done upon invincible Ignorance or Error, the Action shall be accounted involuntary: And such an Action, as it is not usually *imputed* to the Agent, so is it conceiv'd to be destitute of all Moral Quantity. But otherwise, an evil Action, undertaken

upon Knowledge and Deliberation, as it proceeds from a former and fuller Design. And since an ill Intention is to mortal Judges scarce more evident than a good one, by reason of their Incapacity to search into the Heart; they are us'd to settle this Point by the Help of various Indications and Conjectures, which we shall elsewhere explain at large ³.

IV. With Regard to the *Matter* of moral Actions, that good Action is esteem'd Perfect in its Kind, which hath attain'd its utmost Complement, or to which no Part is wanting that it ought to have. Those which decline from this Perfection, are reckon'd inferior in a greater or less Degree, according to their Distance from it; whether the Cause of this Defect be, that the Action was destitute of some Part which should have made it compleat; or that it was ¹ only attempted, and not actually perform'd. On the other Hand, of evil Actions, that is reckon'd the worst in its Kind, which hath fully arrived at the End propos'd; and every one is less evil, according as it falls shorter of this final Completion.

And here we must observe a twofold Difference in ² the *Objects* of Actions, as set down in Laws. For some admit of a Division, others do not: or, to speak more plainly, some are so constituted, that when we exercise an Action about them, we must either entirely perform, or entirely omit them, or do what's directly contrary to them: But in others, it is possible to perform some one Part only, and to omit the rest; or something may be done which is opposite to them, not directly, but in an inferior Degree. We may likewise consider Objects under a second Distinction: For some of them contain things into which they may be divided, as into so many Species. Thus the Affirmative Law of the ³ sixth Commandment enjoining us to succour our Neighbour in

§. ii. ¹ See the precedent Chapter, §. 3, 4.

§. iii. ² See Mr. Noodt's *Discourse about Liberty of Conscience*, translated into French, and printed at Amsterdam in 1707, and what I have said in my *Treatise of Sports*, lib. iii. ch. vi. §. 19.

³ When the Intention is dubious or equivocal, we ought to incline to that Side which is most favourable to the Agent. There is a pretty Passage to this Purpose in *Plutarch*, which it may be pleasant to read here. *Ἐν μὲν ὅ τοις εὐδοκίμοισιν ἔργοις, καὶ πράγμασι ἐπαινεθῆναι, αὐτὰν φωνῆν ἐπιπέσει. καὶ καταρεταὶ τοῖς διαβολαῖς εἰς ἐπιπέδιον ἀπόπαισι, ὡς ἂν ἐν ἀφανεί προαίρεσις, καὶ πράγματι αὐτῶν [which last Words should rather be read τὰ πράγματα αὐτῶν] τὸ περιγεμένον ἐμφανῆς καὶ διωρόμενος ἵσχυρῶς ἐνδύλον ὅτι φωνῆς καὶ κακοηθείας ἐπιπέδων ἐ λλοῖσι. De Herodoti malignitate.* They, who like *Herodotus* can't deny that an Action is praise worthy in it self, and can find no plain Reason to blame it, will pry into the Secrets of the Heart, and supposing them to be evil, endeavour by their Calumnies to create Suspicions in other Mens Minds, manifestly arrive at the Height of Envy and ill Nature. *I observe* (says Mr. *Montague* very well) *that the greatest Wits of our Time employ their Ingenuity to darken the Splendor of the brave and generous Actions of the Antients, by putting a bad Interpretation upon them, and devising some vain Causes and Occasions of them. A cunning Cheat! Left I should grant an Action to be very excellent and good, I will find out five hundred vicious Intentions*, Lib. i. Chap. xxxvi. The famous Mr. *Bayle*, in his *New Letters* upon Mr. *Maimbourg's* *Critical History of Calvinism*, Let. xii. §. 12. affirms, That the Laws of Charity, which oblige us to put a favourable Construction upon the Actions of our Neighbour rather than a disadvantageous, are altogether contrary to Reason, but I have endeavour'd to invalidate his Proofs of that Position in my *Treatise of Sports*, Lib. i. Ch. iii.

³ See Lib. viii. Chap. iii. §. 19, 20.

§. iv. ¹ An Attempt is counted for an Action, when the Impediment of performing arises from an Impossibility coming on it by some unforeseen Accident, or invincible Hindrance, and not from any Refusal or Discouragement in the Person acting. *Seneca* has a fine Passage to this Purpose, of which Mr. *Hertius* cites a Part; 'tis thus, *Quaedam ejus conditionis sunt, ut effectum prestare debeant, quibusdam pro effectu est, omnia tentasse, ut efficerent. Si omnia fecit ut sanaret, peregit Melicus partes suas. Etiam damnato reo, oratori constat eloquentis officium, si omni jure usus est. Laus imperatori etiam victo, et duci re dditur, si prudentia, et industria, et fortitudo muneribus suis sancta est. Omnia fecit, ut beneficium redderet, obtulit illi felicitas tua. Nihil incidit durius, quod veram amicitiam expernetur. Locupletari donare non potuit, sano adfudere, felicit succurrere. Gratiam retulit, etiamsi tu beneficium non recepisti.* De Benef. lib. vii. Ch. xiii. "Some things are of that Nature, that they must produce an Effect; in other things 'tis the same with an Effect to have endeavour'd. The Physician has done his Office, if he has done all he can to cure. The Pleader, if he has urged the Law well; and a General, if he hath managed with Courage and Conduct, tho' a suitable Success do not follow. Thanks is sufficient, where no Requital can be made."

² The Original expresses itself thus, *Objecta Actionum*, i. e. The *Objects of Actions*, but the Object of Action can neither be commanded nor forbidden, but the Person who does, or not does a thing; and so our Author himself uses it in the next Paragraph. Doubtless he means, the *Matter* of Actions, and the Mistake arises from hence, that in his *Elements of the Universal Civil Law*, he had said (p. 317.) the *Objects of Laws*; for in changing the Expression, he was not aware, that *Actions* would not well fit the Place of *Laws*.

³ Our Author calls this the fifth, and the next Commandment the Sixth, according to the *Lutheran* Division of the Decalogue.

all Necessities and Distresses of his Body, contains under it in the Manner of different Species, the Preservation of his Life, of his Members, of his Health, the turning away of any Thing that doth, or may grieve, or molest him, the supplying him with Food in Time of Famine, &c. And the opposite or negative Law, in the same Commandment, forbidding us to hurt the Body of our Neighbour, comprehends, in like manner, Murder, Maiming, Wounds, Stripes, Threats^a, &c.

Thus too the affirmative Law, in the³ seventh Commandment, enjoining Chastity, contains under it, Purity of Thoughts, Modesty of Words and Gestures, Abstinence from unlawful Love, &c. And the opposite Law, forbidding Unchastity, comprehends Adultery, Fornication, obscene Speeches and Gestures, and impure Imaginations. For, to give an Instance in this Case, obscene Words do not respect Adultery in the Way of a Part or Degree: But because the divine Lawgiver was pleas'd, for Brevity sake, to comprehend many special Acts under one general Law, hence it comes to pass, that he who commits simple Fornication, doth as fully and entirely sin against the seventh Commandment, as he that is guilty of Adultery. Therefore, as to these Objects, when what the Law commands is not perform'd, we must of Necessity either quite omit, or do directly the contrary. But other Objects of Actions, as determin'd in Laws, are in such a Manner divisible, that they seem to consist of⁴ integral Parts. So that here it is not necessary we should do all, or omit all, or perform the contrary; but 'tis possible to perform one Part, and to let the rest alone. For Example, the Law commands me to pay the Labourer his full Hire; now I may perhaps pay him

some Part of it, and keep back the rest. But when I not only deny a Man his Due, but farther take something from him, or bring any Evil upon him, this Act will be quite of another Species, and bear no Reference or Affinity to the former.

V. Besides all this, since one may be concern'd about a more noble, another about a more ignoble Object; and since one may produce more Good or Evil than another; it is plain, that upon this Account likewise, amongst good Actions some are far better than others, and amongst ill Actions, some far^a worse than others. Horace's^b Instance may serve to illustrate this Truth;

*Nec vincet ratio hoc, tantundem ut peccet, idemq;
Qui teneros caulos alieni fregerit horti,
Et qui nocturnus divum sacra legerit. —*

Reason will never call't an equal Sin,
To rob an Orchard and a sacred Shrine.

Add. Cicero pro Muræon: Where he smartly refutes the Stoicks Notion, that all Sins are equal. And his *Paradoxes*, Chap. iii. as also *Montaigne's Essays*, Lib. ii. Chap. ii. in the Beginning, and *Gassendus Phil. Epic. Tome iii.* Yet in many Cases Horace's Reasoning will hold good, *Lib. i. Epist. xvi.*

— *De mille fabæ modiis quum surripis unum,
Dammum est, non facinus pacto mihi lenius isto.*

When from a thousand Pecks you steal but one,
Less Loss is felt, but no less Guilt is shown.

And this is the relative Estimation of Actions, which is treated of at large, *Book viii. Chap. iii.*

^a *Vid. Lib. xvii. Tit. x. D. De Injuriis.*

^b *B. i. Sat. iii. v. 115, 116, 117.*

⁴ We must understand them of Parts really distinct one from the other, and which consequently can exist separately.

§. v. ² Since this Author does not express himself either distinctly, or largely enough upon this important Subject here, and in the Place, *Lib. viii.* to which he refers us, treats of evil Actions only; I shall give you an Abridgment of what he says in his *Elements of universal Civil Law. The relative Quantity of Actions may be consider'd,* 1. *In respect to the Object.* For the more noble the Object is, the more is that good Action, done to that Object, better than another; and, on the contrary, an evil Action the more criminal. See *Lib. viii. Chap. iii. §. 18.* 2. *In Respect to the State and Condition of the Agent.* And so a Benefit conferr'd by an Enemy, is more considerable, than that which is received from a Friend. And, on the contrary, an Injury done by a Friend is more sharp, and affects more than that done by an Enemy. See the same Place, §. 20. 3. *In Respect to the Actions themselves,* according as we take more or less Pains to do them. A good Action, the more difficult it is, the more excellent and more commendable, otherwise all Things are equal. On the contrary, the more easily an evil Action may be avoided, the more enormous it is above others of the same Kind. 4. *In Respect to the Effect and Consequences of an Action, on which account an Action is better or worse,* accordingly as the good or bad Consequences are, or may be foreseen and prevented. 5. *In Respect to the Circumstances of Time and Place.* See the Place already quoted. In fine, 'Tis evident from this Comparison of good Actions one with another, that some are more excellent than others, according as the Practice of some ought to give Place to the Practice of others, since we can't discharge all at the same Time. See what is said about this, *Lib. v. Chap. xii. §. 23.*

CHAP. IX.

Of the Imputation of MORAL ACTIONS;

THE CONTENTS.

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| <p>i. Of actual Imputation.</p> <p>ii. Of Imputation thro' Favour.</p> <p>iii. Of Imputation from Debt.</p> | <p>iv. What can be effectually imputed to another.</p> <p>v. Merit, and Demerit what.</p> <p>vi. How the Effects of Moral Actions may be abolished.</p> |
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WHAT Conditions are required to make an Action capable of being imputed, or of being consider'd as really belonging to a Person, we

have formerly shewn at large: It remains, that we see how and by what Means it may be actually imputed, so as to produce some moral Effect, either

in the Agent, or in some other Man. And here we must first of all distinguish between those Actions which are directed by Law, and those which are left to every Man's free Pleasure. Actions of the former Kind are then said to be *imputed* to the Agent, when the Legislator or Sovereign declares him to be the Author of them, and at the same Time decrees¹, that the ordinary Effects of such Actions shall redound on him, or shall be conceiv'd as inherent in him. But the latter Kind of Actions are then said to be *imputed*, when he, who without being bound by any Necessity, hath exercis'd them for the Use and Benefit of another Man, doth signify, that he undertook such an Action for the other Man's sake, and out of an Intention to oblige him. The latter Sense of the Word *Imputatio* is most frequent in Classick Authors, and the former more in Use with the Divines and Moralists. But there is between them this manifest Difference, the former tends from the Legislator or Sovereign toward the Agent, but the latter proceeds from the Agent, and rests in the Person, for whose Sake or Use the Action was perform'd.

II. The former Kind of *Imputation* is subdivided into *Imputation of Favour*, and *Imputation of Debt*. *Imputation of Favour* is when a Man, out of pure Benevolence, derives upon another the Effects of an Action perform'd by a third Person; which Effects the second Party had no Right to, without the Grant of the first. Or, when one, out of free Kindness makes a larger Effect redound to the Performer of a certain Action, than the Action would otherwise of itself have produc'd. But this last Instance will hold good in Matters of Reward only², not in Matters of Punishment. For, as such is the Nature of good Things, that they may be given to another *gratis*, without any Colour or Condition; so, if a Man is not willing to confer a good Thing on another, by the Name of a pure Gratuity, he may lawfully do it under the Notion of rewarding him for some *imputed* Action, which either did not otherwise belong to him, or could not have given him a Right of demanding such a Benefit. But, on the other hand, common Reason will not allow me, on the same Pretence, to derive on another the Effects of an evil Action, which he is not really guilty of, and without the *Imputation* of which, these Effects would not follow his natural State and Condition. And therefore 'tis very incongruous and absurd, that either for a Fault purely another's, I should have those Things taken from me, which Nature gives every Man, on the very Account of his being a Man; or that, under the same Colour, such Things should be impos'd on me, as Nature, by an Indulgence universal to all Mankind, hath forbidden us to suffer without Reason. A Prince, for Example, may *impute* the Father's Merits to a Son not illustrious by his own Achievements; and may, on the Account of those Merits, load him

with Honours not otherwise his Due. But to punish the Innocent for the Father's Crime, is (strictly speaking) unreasonable³. This indeed may happen, that the Father's Fault shall be the Occasion of not conferring on the Son, or of taking from him, those Things which he was neither to receive nor to retain, but under certain Conditions. But a Person thus dealt with, cannot be said to suffer an Evil, which his natural State would otherwise have made him a Stranger to. For Nature, in this Case, gave no Security to the Children that they should certainly possess the Parents Goods, or that they should be admitted to the like Posts of Honour: But their Right to those Goods, or those Honours, proceeded on these Conditions and Proviso's, that the Parents should deliver them down safe and untainted, and should not fall under such and such Penalties by their Crimes. Nor can he, by any Means, be said to be in a worse Condition than human Nature admits or allows, who having no paternal Inheritance, is forced to work out his Fortunes by his own Industry.

It is just, likewise, so far to proceed against innocent Children upon Account of their Parents Demerits, as to oblige them to quit the Kingdom or State. For no Man hath a Right from Nature of living in this or that Territory; but³ every one attains to such a Right by some Act of his own, or of other Men: And it may be a Condition of keeping this Right, that he shall lose it in case his Parents are found guilty of some particular and high Offences. It is not repugnant to Reason, that the Possession of a Right should depend on contingent Terms. Though, that the Laws of some Countries are too rigorous and severe in this Point, no Man can pretend to deny.

III. *Imputation of Debt* consists in this, that those Persons, whose Interest it concerns that an Action be done or not done, do declare that the said Action belongs to the Agent, and that the Effect assign'd to that Action shall redound or fall upon him. Hence, if in any Law a certain Reward be decreed to such or such a good Action, so soon as the Sovereign, or the Guardian of the Laws shall understand that particular Action to have been perform'd by any Man, 'tis manifest, that the Man hath immediately a Right of demanding the promis'd Reward. But when a Man is enjoin'd to do a Thing, solely by the Authority of the Commander, and without any such Proposal of a Reward, he ought to rest satisfied with the bare Approbation of his Superior, and to esteem it a very sufficient Recompence, that he hath avoided his Displeasure, which would necessarily have follow'd upon Default. On the other Side, when an ill Action hath been committed, so soon as the Author of it is discover'd, he hath Reason to fear the Execution of the legal Penalty.

As to inferior Persons, to whom neither the

Mr. BARB. NOTES on Chap. ix. §. 1.

¹ That is to say, adjudging to him the Rewards, and decreeing to him the Punishments inflicted by the Law, with all their Consequences.

§. 11. ¹The Author will explain, *Lib. v. Ch. xii. §. 12.* the Distinctions which the civil Lawyers make in treating upon Bargains and Laws, of Things, 1. Odious. 2. Favourable. and, 3. Mixt. But here he treats only of Things advantageous and disadvantageous.

² See what is said, *Lib. viii. Ch. iii. §. 31.*

³ See *Lib. viii. Ch. xi. §. 6, 7.* following.

Guardianship, nor the Execution of the Laws do belong, if they either approve a good Action, or reprehend a bad one, their Judgment can affect only the Credit and Character of the Agent. According to that elegant Saying of *Diodorus Siculus*; *Praise is a kind of Reward of Virtue putting us to no Charges, and Dispraise is a Punishment of Vice inflicting no real Wound.*

It is farther to be observ'd, that when the Interest of many Persons is concern'd in the doing or the not doing of an Action, if one of those Persons should forgive and not *impute* it to the Agent, he cannot by this Means abate any thing of the Right of the others, which he hath no Power to controul. Thus, if a Man hath done me an Injury by an illegal Fact, I may forgive him for my own Part and Concern, but at the same Time I do not in the least derogate from the just Pretensions of the Publick, and of the Sovereign Authority. And thus too the Pardon which GOD Almighty is pleas'd to vouchsafe to repenting Sinners, doth not at all impair or hinder the Proceedings of human Judicature. But when all the Persons whom the doing or the not doing of a thing concerns, agree that they will not *impute* it, in such a Case the Deed is conceiv'd to be Null and Void as to all moral Effects. Now the Persons concern'd in a Thing's being done or not done, are either the Objects or the Directors of the Action; that is, those towards whom the Action is perform'd, and to whom it brings either Good or Evil, and those who have a just Power of guiding and supervising such an Action. For which reason, if, in Case of an Injury, the Deed be forgiven by the Person to whom it was offer'd, by the civil Magistrate, and by GOD Almighty, in moral Estimation it shall be suppos'd undone, and consequently shall be attended with no ill Effect.

IV. Very different from the Imputation of which we have been speaking, is that by which the Agent is said to *impute* an Action, which he might have omitted, to the Party for whose Sake and Use he perform'd it. A Man who hath exactly fulfill'd the Command of his Superior, may indeed expect the Approbation of his Performance, as from all others, so especially from him who enjoin'd it. But he cannot lay claim to any farther Reward, unless such as is expressly promis'd in the Law. For the same Reason, no Man can demand that it should be *imputed* to him, in order to the giving him any *Right*, that he hath abstain'd from a bad Action, forbidden by the Laws, or by any Command of his Superior; but he must be satisfied that his Obedience hath pleas'd him who requir'd it. For since upon acting contrary to the Law, he would have justly incurr'd a considerable Evil, to escape such a Punishment must pass with him for a Reward. Hence in *Seneca's Controversies*, *Lib. iv. Controv. vii.* when a Man, who being ta-

ken in Adultery by a Tyrant, had forc'd the Sword out of his Hand and kill'd him, desir'd a Gratification from the State, he is put off with this Rebuke, *imputat nobis quod deprehensus in adulterio mori noluit. He reckons we are indebted to him, because being taken in Adultery he had the Sense to save his own Life:* And *Tully*, in his second *Philippic*, denies himself to have any Obligations to *Antony* upon account of his not being murder'd by him: *Here lies the Kindness to me (says he) in your keeping your self from so horrid a Villany?* Others maintain the Reasonableness of our present Assertion from this Topick, that the Omissions of ill Actions are purely *non Entia*, and consequently can have no positive Affections or Properties. Tho' to such an Argument it might perhaps be answer'd, That even these Omissions may, in moral Account, pass for Entities, as they are the real and actual Restrictions and Confinements of our natural Powers.

But now, if for the sake of another Man, I do what I might rightly and properly have omitted, or omit what I might fairly and conveniently have done, it is highly reasonable, that I should *impute* my Service to him; or, that I should, by virtue of my Right, demand of him to acknowledge my Kindness, and his own Obligation, according to the Quality and Condition of it. This *Imputation* cannot rightly be laid, unless there was in the Actor a real Intention of procuring some Good to the other Man; and in the Receiver an express, or, at least, a presumptive Consent to admit it. For no Man can *impute* or *reckon* to us a Service forc'd upon us against our Will: And it would be a much higher Degree of Impudence, to charge such a Fact to us for a Kindness, as was perform'd either without any Regard to our Benefit, or perhaps with a Design to hurt us. Thus he must be extremely foolish, who would desire a Reward from a Man whom he had restor'd to Health by breaking an Imposthume, otherwise incurable, whilst he intended to give him a mortal Stab. Yet *Marius Celsus*, in *Tacitus*^b, when he was brought before *Otho* as one of *Galba's* Servants and Confidants, immediately confessing his Loyalty to his old Master, propos'd it as an Example, how faithful he would be to the new Emperor; and thus reckon'd he had already oblig'd *Otho* by sticking resolutely to *Galba*. And thus *Eudoxia*, when she was married to the Emperor *Theodosius*, sent for her Brothers, by whom she had been formerly expell'd her Father's House; and was so far from resenting their Injury, that she rather paid them Thanks, as the Authors of her Promotion: Since unless she had been driven from Home, she had never seen *Constantinople*^c.

When the Parties concern'd and interest'd do agree in defining the Rate at which a Thing shall be reckon'd or *imputed*, in this Case a Covenant intervenes, expressing how far, or to what Value

^a See Luke xvii. 9, 10.

^b *Hist.* Lib. iv.

^c *Zonar.* Tom. iii. *Add Gen.* xlv. 5. Lib. xx.

§. iii. ¹ *Diodorus's* Words are, *ἔστιν ὁ μὲν ἕτανος ἑσταθλον ἀρετῆς ἀδάπανον, ὁ δὲ ψόγος τιμαριε φουλήτος ἀνευ πλόγης.* In *Excerpt. Pierefc.*

² See *Lib. viii. Ch. iii. §. 16.* following.

§. iv. ³ This Example had been better plac'd a little lower, where the Author speaks of those who do some Service without any such Design, and by Consequence have some other Motive for their Actions.

⁴ *Tully's* Words are, *Quale autem beneficium est, quod te abstinueris nefario scelere?* *Philip.* 2. *Ch. iii.*

⁵ See *Tully, De Nat. Deor. Lib. iii. Ch. xxviii.* and *Plutarch de Capiendi ex Inim. Utilit.*

⁶ *Tacitus's* Words are, *Celsus constanter servata erga Galbam fidei crimen confessus, exemplum ultro imputavit.* *Histor.* Lib. i. *Ch. lxxi. Numb. 2.*

the *Imputation* shall extend, and beyond which it shall not reach in any Business or Transaction^a. For *Merit* (as Mr. *Hobbes*^b observes) *presupposeth a Right, and implies, That the Thing deser'ed is due by Promise*.

V. Hence 'tis easy to gather what is the Force of *Merit*, or what Actions are properly meritorious, which some Men would vainly set to the Account of GOD himself. Now the main Spring of all *Merit* is the Performance of a Work which we did not owe: or, which the Person towards whom it is exercis'd, had no Right of requiring from us. For he that performs a Thing which he lay under a full and perfect Obligation of doing, only dischargeth his necessary Duty, and lays no Foundation for any consequent *Merit*. *M. Senec. Cont. Lib. i. Ch. viii.* ¹ *Give me leave to perform some Service to my Country, which may properly be a Piece of Merit: What I have hitherto done in the common Course of Arms, is not owing to me, but to the Laws. Julius Capitolinus, in his Life of Antoninus Pius, reciting the Reason of the Emperor's obtaining that Title, from lending his Hand to support his antient Father-in-Law, in the Presence of the Senate adds, This Action was really no great Argument of Piety: Since the Debt we owe our Parents is such, as rather denominates a Man impious if he neglects, than pious if he pays². Neither is it fair to impute a Thing which we do not owe to a Person against his Consent; and much less, if our doing of such a Thing did not turn to his Benefit. Whence it is clearly apparent, that no Man can pretend to any *Merit* with Reference to Almighty GOD, ever tho' it were possible for him to pay a full Obedience to all the Divine Laws. And that, therefore, GOD cannot any other way become a Debtor to mortal Men, but upon account of his free Promise, the Breach of which would be repugnant to his³ Goodness; not that any *Right*, properly so call'd, is thence deriv'd to us. Indeed no Actions enjoin'd by Virtue of a supreme Authority, do produce *Merit* towards the Enjoiner. For tho' both the Sovereign of Heaven, and the inferior Rulers of the Earth, are wont frequently to confer certain good Things on those who comply with their Commands, in order to the encouraging and exciting their Obedience; yet to the Payment of these good Things they are not bound by the Merits of the Agent, or as in the manner of Covenants; but by their own free Offer and Promise: And therefore they cannot be so properly call'd *Rewards* as *Gratuities* in the strictest Sense of that Word^c.*

But notwithstanding all this, if the Legislator do expressly declare, that upon the Performance of such or such an Action, the Agent shall have a Right of demanding such a Reward; there's no doubt to be made, but he may fairly and justly require it. But the bare Omission of forbidden Actions is utterly unable to produce any *Merit*, or any Matter for Boasting or for Praise. *Philosofrat. de Vit. Apollon. Tyan. Lib. vi. Ch. i.* ⁴ *It is not an Act of Justice to abstain from Injustice, nor an Act of Prudence to have declin'd a foolish Resolution; nor of Valour not to desert one's Colours, nor of Temperance not to fall into the base Effeminacy of the Medes; nor will a bare negative Goodness entitle you to any Commendation: When we escape Punishment, but yet do nothing worthy of Honour and Reward, such an Indifference cannot reasonably be call'd Virtue.* Add *Luke xviii. 11. Ammian. Marcell. Lib. xxx. Ch. xi. To forbear Plunder and Rapine, is a false Foundation for Praise.*

It remains then, that the only Actions whereby we cannot obtain *Merit* towards other Men, are such as we do not owe them; at least, not by a full and perfect Obligation: Whether natural Reason either commands or adviseth them in general, leaving the Application of them to particular Persons in our Power; or whether they are only not enjoin'd by the civil Laws. For whatsoever I owe another as a full and proper Debt, to that he hath already a Right, and therefore when I pay such a Due, I do not, properly speaking, part with any thing which I have then a Right of retaining or of otherwise applying, because upon denying and keeping it back, I should bring a real Injury and Damage on the Person to whom I stand engag'd. And therefore since Things which I owe in this Manner, do already belong, in some respect, to another Person, and I have no longer a Power to dispose of them as I please, they cannot be proper Matter for the founding of *Merit*. But when I perform any thing towards another Man, which I was not bound to pay by any perfect Obligation, such a thing really passing from me, and accruing to him, leaveth in me either a perfect or an imperfect Right of receiving an equivalent Return. And this is properly *Merit*^d; the Retribution or Payment of which, when it is determin'd by express Covenant, we call *Wages*: But when as to the Manner, the Time, and the Quantity, it is left to the Equity of the other Party, it bears the Name of *Reward*. Now upon such Accounts and Considerations we may receive four Kinds of Things, ^e Corporeal, Incorpo-

^a Comp. *Matth. xx. 13, 14.*

^b *Leviath. Ch. x.*

^c *Euripides Rhof. Rewarded Virtue gives a double Joy.*

^d Add. *Senec. de Beneficiis, Lib. iii. Ch. xxi, xxii.*

§. v. ¹ The Latin of *Seneca* is this, *Sine me aliquod meritum in patriam conferre, adhuc militia mea Legis munus est.* And *Julius Capitolinus's* Words are, *Quod quidem non satis magnæ pietatis est argumentum, quam impius sit magis, qui ista non faciat, quam pius, qui debitum reddat, Ch. ii.*

² The Author might have added here, the Words which an antient Rhetorician makes his Son speak, when his Father would hinder him from going to War the fourth Time, to secure him from the Danger. *Sine me aliquod meritum in patriam conferre, adhuc militia mea Legis munus est, Seneca Controv. Lib. i. Contr. 8.* Suffer me to do a meritorious Service to my Country, for as yet I have done no more in War than I was obliged to do by the Law.

³ Or rather his Veracity; which this Author himself mentions in his Elements of *Univers. Jurispr.* and therefore unfitly omits it here. For it is properly out of his Goodness that GOD at first promises a Reward to our imperfect Performance; but his Veracity, that he performs such Promise. See *Nehem. ix. 8. 33.* 1 *John i. 9.* where he is called *Just*, who departs not from the Truth, neither in his Discourse nor Department.

⁴ The Greek, *Μη ἢ εἶναι δικαιοσύνην, τὸ μὴ ἀδικεῖν* ———— ἕτε ἢ φρόνησις, τὸ μὴ ἀνοήτως τι εὐθυμειῖσθαι ἕτε ἀνδρεία, τὸ μὴ λήπειν τὰ τῶν ἄλλων σωφροσύνη, τὸ μὴ εἰς τὰ ἴδιον μόνον ἐπιπέτεσθαι ἕτε ἀξιοεπαινετὴ, τὸ μὴ κακῶν φάσις. πᾶν γὰρ ὁ τιμῆς τε καὶ τιμωρίας ἰσὺν ἀξιοῦμαι, ἕτοι ἀρετῆ.

⁵ See the Explication of this Distinction of the Lawyers, *Lib. iv. Ch. ix. §. 7.*

real, Moral, and ^o notional. Of the first Sort are, Money, Land, &c. Of the second, the Grant of Privileges and Immunities: Of the third, Honours and Dignities: Of the last, Statues, Inscriptions, Crowns, and the like Tokens and Testimonies of Worth. Add. *Montaigne's Eff. Lib. ii. Ch. vii.*

And thus, as hath been shewn, *Merit* ariseth from those Actions which we do not owe to others; and chiefly as they are useful and beneficial to them. On the contrary, from evil Actions, especially such as damage or injure others, ariseth *Demerit*; by Virtue of which a Man is oblig'd to make Satisfaction for the Harm he hath done: But in general, all evil Actions produce a Guilt, by which the Agent is suppos'd liable to undergo some Penalty: Which Point we shall hereafter find more Room to explain. See *Lib. viii. Ch. iii.*

VI. As the actual applying of *Imputation* causeth the Effects of moral Actions to exist; so the ceasing, and as it were the recalling of it, doth dissolve and extinguish those Effects. And as to this Matter, the Case is very near the same in good Actions and in evil. For both good and evil Actions, whilst they are *such*, or so long as they are enjoin'd or prohibited by the Laws, must necessarily be attended with *Imputation*; at least ^a in the first and plain Import of that Term. But when a Law is repeal'd, the Action about which it was concern'd can no longer be *imputed*. The Imputation of an Action not properly due, he alone can remit, whose Interest it is that the Effect or Consequence of the Action should be made good. Therefore if he who hath perform'd a Work remits the Imputation, the Wages otherwise due cannot on any account be demanded. But to make this Release or Remission, is not in the Power of the Person for whom the Work was done; it being the Creditor's Part to forgive, and not the Debtor's. So likewise to take off the Imputation of an ill Action, as to any Force and Efficacy, belongs to those whose Interest it is that such an Action be attended with its due Effects; that is, to the Party injur'd, and to the Maker and Guardian of the Law, not to the Author of the Fact.

The *Civilians* reduce the chief Ways by which Crimes are cancell'd or extinguish'd in Human Courts, to these Five. First, when the Punishment defin'd by the Law shall be compleatly undergone: For no Man is punish'd twice, and with equal Severity for the same individual Fault. Though many Punishments indeed leave a kind of lasting Stain behind them ^a, and frequently

after the Completion of a corporal Punishment, moral Punishment or Infamy, with its scandalous Marks, continues. Secondly, he whom the Judges have acquitted, passeth in Human Esteem for an innocent Person. The third Way is, when the Delinquent dies. Tho' sometimes in extraordinary Crimes, for a Terror to others, Severities are shewn on the Body, the Goods, and the Memory of Wretches after they are dead. Fourthly, by Length of Time Crimes are so far taken away, as that the Author cannot be afterwards try'd on the same Account. *Senec. Oedip'.*

Latere semper patere, quod latuit dia. V. 826.
What long hath lain conceal'd should ever lie.

Tho' *Lyfias* (Orat. xii.) denies that a Crime can be blotted out by any Space of Years. The fifth and last Way is the procuring of Pardon for the Offence from the sovereign Power ^b.

As the Effects of an evil Action do so long lie dormant, as the Action is either conceal'd, or thoroughly dissimul'd or pardon'd (as it were) beforehand: So when once these Effects have broken out in Publick, their *moral* Part may indeed be effac'd, but not their *physical*. For what is once done, cannot in a physical or natural Sense be render'd undone; but it may be so order'd, as that it shall no longer have any moral Effect in civil Life. Thus a Man who hath been whipp'd for a Misdemeanor, must still keep the Scars and Signs in his Back, tho' all the Disgrace and Scandal of the Punishment may be remov'd by a Decree of the Government. And when the Imputation is taken off, the Action is to all Intents and Purposes, no more than if it had never been done ^c.

We need only add by way of Remark, that those Authors are strangely overseen, who in order to the taking away the Guilt of an evil Action, besides the Non-imputation, or the Forgiveness of it, require the Infusion of some contrary Quality, or of the Habit of Justice and Honesty: In the same manner, as by plaistering over a Wall we rid it of the Spots that were in it before; and as we drive away an ill Smell by burning Frankincense in a Room. Which Mistake was occasion'd by their Ignorance of moral Things, and because they imagin'd that moral Qualities were produc'd and destroy'd in the same way as physical: The Absurdity of which Notion is plain enough from what we have before deliver'd.

^a Vid. *Sueton. Claud. Ch. xxi.* ^b All which are treated of at large, by Anton. Mattheus de *Crimin. ad Lib. xlviii. D. Tit. xix.*

^c And thus we are to understand those Sentences of Ovid de *Pont. Lib. i. El. i.*

Estque pati poenam quam meruisse minus.

'Tis less to feel, than to deserve our Doom; [?]

Pœna potest demi, culpa perennis erit.

The Penalty may cease, but ne'er the Crime.

Mors faciet certè, ne sîm cum venerit exul,

Ne non peccarim mors quoque non faciet.

Death's kind Release may end my banish'd State.

My Sin will live, and mock the Power of Fate.

⁶ Our Author understands by this a thing, that serves only to raise some high Thoughts of our selves in our Minds, and signifies something done for that by human Institution.

§. vi. ¹ To understand this, we are to know, that this Author (in his *Elements of Univers. Jurispr. p. 357.*) divides Imputation into Simple and Efficacious: Simple Imputation consists in simply approving or disapproving an Action, so far as there redounds no Effect from it to the Agent. And this Sort of Imputation may be made indifferently by any, whether he hath any Interest or no in the Action that is done, or not done. An Efficacious Imputation is that which produces some Effect, with Relation to the Agent; and this belongs to those, whose Interest it is, that the Action be done or not.

² Our Author here quotes the Words of *Seneca's Oedipus*, where an Old Man advises *Oedipus* to keep that always secret, which had long lain hid. This can hardly be thought to our Author's Purpose: For, it plainly appears by what follows, and is spoken by the same Old Man, that he intends nothing about the Imputation of Crimes, for (thus he says) *Sepe eruentis veritas patuit malo.* v. 827. they who make such Discoveries, often endamage themselves by laying open the Truth.

OF THE

LAW of NATURE

AND

NATIONS.


BOOK II.

CHAPTER I.

It is not agreeable to the Nature of Man to live without LAWS.

The CONTENTS.

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| <p>I. <i>Whether a Law may be imposed on Man, is doubtful.</i></p> <p>II. <i>What Freedom of Will is.</i></p> <p>III. <i>What sort of Freedom of Will is in God.</i></p> <p>IV. <i>What is the Freedom of Beasts.</i></p> | <p>V. <i>Man too Noble a Creature to be allowed such a Freedom.</i></p> <p>VI. <i>The Corruption of such a Freedom.</i></p> <p>VII. <i>The Variety of Mens Tempers.</i></p> <p>VIII. <i>Man's natural Weakness and Rudeness.</i></p> |
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I. AVING in the preceding Book explain'd the Condition of moral Things in general, together with the most frequent Uses of the Common Terms (which Notices, if inserted otherwise, and only as Occasion serv'd, would have interrupted us in our Business, and broken the Series of our Undertaking) we come now to fall more directly on our main Design; and the first Enquiry we are here to make, is, whether it would be convenient or not for Men to pass their Lives without the Restraint of any Law. Whence it will evidently appear, why the All-wise Creator hath not invested them with such a wild Liberty, as should empower them to act merely as they list, and as their wandering Inclinations lead them; without being under the Restraint of any Rule, [†] Necessity, or Law. For since GOD Almighty has been pleas'd to endue Man with a Will (that is, with a Power working by a kind of internal Impulse, and enabling him to incline towards such things as appear agreeable to him, and to turn from such things as seem inconvenient or unpleasant) and with such a Will as cannot be compell'd; a Doubt may be rais'd, whether it did not become the Divine Goodness to allow

him the full Range of this flexible Faculty, without any Limit or Impediment. For to what Purpose, some will say, did GOD first make us intirely free to all Things, and afterwards confine us to certain Bounds and Rules? And as the Motion of our Joints is render'd useles by the Restraint of Chains and Fetters; so may the Liberty of the Will seem vain and of no manner of use, if we can incline to many things which must of Necessity be forborn, and if we can be averse to many things, which we must as necessarily pursue and undertake.

II. In tracing this Point to its proper Spring, we think it convenient first of all to shew, that an absolute Liberty would be so far from being useful, that indeed it would be destructive to human Nature; and that therefore the binding and restraining it with Laws is highly conducive to the Good, and to the Safety of Mankind. And this Consideration rightly pursued, will at the same time discover what Scope may be fairly indulg'd, and how far the Reins may be given to our Freedom. Here then we must know, that Liberty in general implies, *an internal Faculty of doing and of omitting, things according to the Direction of our Judgment.* When we call it [†] a Faculty or Power, we intimate, that the Person to whom this Liberty is

Mr. BARB. NOTES on Chap. I. § i.

§ i. [†] Our Author does not treat here of a physical, but moral Necessity, such as is explain'd, *Lib. i. Chap. vi. § 4. ad fin.* and *Chap. vii. §. 2.* Necessity is no more than an Obligation.

§ ii. [†] Our Author says only, *A Faculty*, which Term implies no more than a Power of Acting, or Moving, &c. for there are Faculties purely Passive, and therefore I have added this Definition of a Faculty to do, or not, that we are to understand by it, a Power of Acting or Moving, not only itself, but communicating a Motion to other Things, and modelling them after a certain Manner.

applied, is Master of sufficient Strength for many Performances, and has a Force and Ability not only to move himself, but to imprint Motion on other Things, and to affect them in a certain Manner. We term this Faculty *internal*, to signify that its Force and its Motion arise from an inward Principle, contrary to that outward and violent Impulse, which is the Cause of Movement, rather in a Log than in a Man. Lastly, we add *according to the Direction of our Judgment*, to hint that the Motion is not rais'd at a Venture, or by some blind kind of Force; but that the Agent is suppos'd, in some Degree at least, to have had a Knowledge of the Object, and to have determin'd himself to Action after some sort of Deliberation, so that the immediate Reason of his acting shall be, because he was pleas'd to act. At the same Time it will be understood, that all Rubs and Hinderances, which may either prevent the Motion, or turn it another Way, ought to be suppos'd absent, when we state the Notion of Liberty in Perfection and without Alloy.

III. Matters being thus settled, if we cast our Eyes over the universal Frame of Things, we shall find that many have no Liberty at all, such as are all inanimate and vegetative Creatures. Others enjoy several Kinds of Liberty, and in several Degrees. An universal Liberty, void of all Hinderance and of all Defect, is applicable only to GOD Almighty; this is conceiv'd as the most noble Attribute of his most perfect Essence, admitting no Bounds or Circumscription, and intimately join'd with Omnipotence. And therefore, the Reason why GOD doth not do some Things, or why he doth not always do all Things, is not to be fetch'd from the Deficiency of his Liberty, but from his own absolute Pleasure. So likewise when we say, he cannot do all Things, this does not proceed from any outward Impediment, whether natural, or moral; but from his own Intention and Design, which we Mortals endeavour to conceive in Proportion to his Greatness and his Excellency. In which Sense we are to interpret that common Saying, *That GOD is a Law to himself*. Thus too the Justice which we ascribe to GOD, is not to be suppos'd to bear a Regard to any Obligation, or to any Right in another Person, as the Nature of human Justice necessarily implies. But in as much as he has shewn, both by his Works and by his Revelations, that such a Manner of acting is suitable to his most compleat Nature, hence we come to express it by the same Term which denotes our own equitable Dealings towards other Men. Thus the Reason why GOD's Promises do not fail, is not because his Liberty is restrain'd by any Obligation arising from his Promise; but because it is agreeable to the divine

Excellency to let us not expect in vain, what he commands us to expect; or because to violate a Promise, implies some kind of Imperfection, from which the supreme Nature is most immensely remov'd. Upon which account, we Men do not challenge the divine Promises as of Right belonging to us, but receive them with Humility and Reverence, as Gratuities proceeding from GOD's free Pleasure. For 'tis not here as in human Promises, where there lies an Obligation to Payment, where the Promise turns into a Debt, and what was before free, is brought under a Necessity: But those Things which GOD performs upon Promise, do as fully retain the Nature of Gifts and Benefits, as those Things which he dispenses without any such seeming Engagement. Thus may we weak Mortals faintly represent the divine Liberty; but that alone which we can determine with Certainty about it is, that it surpasses, in an infinite Manner, both our Notion and our Condition.

IV. Brute Creatures which are plac'd below our Degree of Being, do however enjoy a Liberty proper to their Nature and State. But this Liberty cannot be otherwise than very ignoble, since the Power of these Animals is confin'd to such narrow Bounds, and since such is the Dulness of their Senses, and such the Lowness of their Appetite, that they are concern'd about very few Objects, and regard even those but very negligently and superficially; nor are excited by any Thing but what is extremely gross and perpetually obvious, and tends to the Service of their Belly. As to other Matters, they have no Custom, no Law, no Right to bind them, in transacting either with one another, or with Mankind. Amongst a few of them there is some Semblance of Marriage, but of such as is observ'd in the bare Act of Conjunction, and in some Shew of Love or Liking, not in any Strictness of serious and constant Fidelity. Most of them, as soon as they have satisfied their lustful Desires, retain no farther Mark of Love, no Sense of Shame, no Regard of Offspring. Some indeed are most passionately fond of their Young, but then their Kindness continues no longer than till they are able to provide for themselves. After this Period, all Love is lost and forgot on both Sides; the Dams take no Care or Notice of their Progeny, and the Progeny do not shew any Gratitude, any Sense of Debt or Duty to their Dams. Those Beasts which feed on Flesh, tear and devour without Distinction, whatever is agreeable to their Palate; and many when they fall out, pull one another in Pieces without Regret. Being ignorant of the Laws of Propriety, whenever a sharper Hunger than ordinary pinches them, we may see them fighting furiously for the common Pasture or Prey; and what some

^a See Psalm cxv. 3. Ephes. i. 11.

^b Add Cumberland *De Legg. Nat. Ch.* vii. §. 6.

^c There are, in general, two sorts of Obstacles or Impediments, which hinder us from acting according to our own Wills, the one physical, as Bonds, Fetters, Prisons, &c. The other Moral, as a Bond, Law, Government, Authority, &c. *Elem. Jur. Univers.* p. 20.

§. III. ^d For Example, doth not make several Moons to circulate round the Earth, as may be seen to go round the Planets of *Jupiter* and *Saturn*. *Apologie Pufend.* §. 7.

^e As to create every Day new Kinds of inanimate Bodies or Animals, *Ibid.*

^f See Note 2. of §. foregoing. When we say that GOD can't do a Thing absolutely, as for Example, Lye, or be worse than his Word: for since there is no Being superior to GOD, to lay any Obligation upon him, nor more powerful than he, to hinder him from doing as he pleases, or to constrain him to abstain from certain Things, and do others, the Inability which we attribute to GOD can proceed from nothing but his own good Pleasure, and infinite Perfections, *Ibid.* See *Chap. iii.* §. 5, 6. following.

§. IV. ^g See *Chap. iii.* §. 2. following.

have laid up or seiz'd for their private Use, the others make no Scruple to invade and to devour. Nor is there among them any such Thing as Esteem, as Honour, as Command, as Prerogative, unless such as is deriv'd purely from Superiority of Strength. It must be confess'd, that Likeness of Kind does produce in some Creatures a Shew of Friendship and of Society. Hence many delight to live in Herds, and those which are more fierce than others, have some Aversion to preying on their own Kind. Thus *Juvenal* observes, *Sat.* xv. *ver.* 159, &c.

————— *Parcit*

*Cognatis maculis similis fera: quando leoni
Fortior eripuit vitam leo? quo nemore unquam
Expiravit aper majoris dentibus aprī?
Indica tigris agit rabidā cum Tigride pacem
Perpetuam: servis inter se convenit urfis.*

Beasts of one Kind from other each refrain:
No weaker Lion's by the stronger slain:
Nor from his larger Tusks the Forest Boar
Commission takes his Brother Swine to gore.
Tyger with Tyger, Bear with Bear you'll find,
In Leagues offensive and defensive join'd.

MR. T A T E.

But, not to say that there's something of a Poetical Figure in these Expressions, we may only take notice, that this seeming Relation is but a very weak Bond for a lasting Friendship: since 'tis immediately broken whenever the Concerns of the Belly intervene. Thus you shall see a Litter of Puppies play very lovingly together, but throw a Piece of Meat amongst them, and you breed a dangerous and a general Quarrel. The Reason why some Creatures exercise a little Shadow of Duty, Love, Faith, and Gratitude towards Men, is purely to be refer'd to Custom, and to their Desire of being supplied with Food. If these Obstacles are once remov'd, and if they find themselves of sufficient Strength, Man himself cannot escape their Violence, if he unhappily provokes them. The Liberty of Brutes then is not restrain'd by any intrinsic and moral Tie: Tho' their external Motions are often violently put under Confinement by Men. Now if any one is so curious as to enquire on what Account brute Creatures are allow'd so unbounded a Freedom, the plain Reason seems to be, because GOD Almighty has not given them a Mind capable of the Knowledge of Right and of Law. There was indeed no Occasion to be so very careful and exact in en-

ring the Safety and Preservation of such Beings, as are not only produced by Nature with such vast Fertility and with so little Pains, but are likewise denied the Privilege of an immortal Soul; and whose Life consists in nothing else, but in the curious and accurate Disposition of the little Parts of Matter, with the additional Benefit of Motion. Hence GOD is pleas'd, in producing and in destroying these inferior Animals, to give us frequent Instances, and evident Tokens of his Power. Another Reason why Brutes had no need of the Restraint of Laws, is, because their Appetite is rais'd by nothing else but by Hunger, or Thirst, or by salacious Desire, for their Satisfaction in all which Enjoyments Nature has made such large Provision. Neither is it likely, that their unlimited Way of proceeding should render them very hurtful and destructive to Mankind, since we are enabled, by our superior Strength and Cunning, to prevent any such unhappy Effects^a.

V. Now why the great Creator should not indulge us Men in so lawless a Liberty, many Reasons may be given, arising both¹ from the primitive and from the accessory State and Condition of human Nature. The Dignity of Man, and his Excellency above all the other Parts of the animal World, made it requisite that his Actions should be squar'd by some Rule; without which no Order, no Decorum, no Beauty can be conceiv'd. Hence it is his greatest Honour that he has obtain'd an immortal Soul, endu'd with the Light of Understanding, with the Faculties of judging and of choosing Things, and with an admirable Capacity for Arts and Knowledge. On which account he is justly term'd,

Sanctius——*animal, mentisq; capacius altæ*
———*Et quod dominari in cætera possit.*

an Animal blest with Loftiness of Mind and with Sanctity of Reason, and fram'd for the Dominion and Sovereignty of all the rest^b.

Farther, That the Soul was design'd by the All-wise Creator for a much nobler End than to serve only as Salt to keep the Body fresh, may be gather'd from this Consideration, that the greatest and most shining Part of its Faculties are such as contribute either little or nothing to the Preservation of the Body, which² might be secur'd without any such mighty Parade, without so great and pompous a Provision. It's plain, that the Power and the Activity of the rational Soul³ is chiefly exercis'd about such Things as belong⁴ to the Worship of GOD, and to a Life⁵ of Society and of Civility. And 'tis principally for

^a Add *Charron of Wisdom*, B. i. Ch. xxxiv.

^b *Solinus* (cap. iii.) calls Man a Being whom Nature has preferr'd to

all others in Excellency of Sense, and in Capacity of Reason.
§. v. ¹ We must understand by the *Primitive State*, that in which Man was when he came out of the Hands of his Creator, considered purely and barely as a Man, before he had any Use of his Faculties, where his accessory State (*post superveniens*) is that wherein he is left to himself, and consequently supposes the Use of his Faculties. The first is treated of in this Paragraph, and the other in the three following.

² This appears from the Example of some Beasts which live a long Time, as Stags; and of some Trees, as the Oak, which continue a long Time, tho' they have no Sense. *Cumberland*, Chap. ii. §. 4.

³ The Sagacity of our Mind consists not in finding out what sort of Meats, Exercise, or Medicines are proper to lengthen out our Lives here; for the most able Physicians and Philosophers have had but a very imperfect and uncertain Knowledge of those Things. *Ibid.*

⁴ See Chap. iii. §. 20. following, *Nota* 2.

⁵ *Cicero* observed this, when he reckoned up the Advantages of Men above Beasts in these Matters, in these Words, *Eademque natura, vi rationis, hominem conciliat homini ad Orationis & ad vitæ Societatem*——*Nec vero illa parva vis nature est, rationisque, quod unum hoc animal sentit, quid sit ordo, quid sit quod deceat, in factis, dictisque qui modus*, i. e. "Nature by the Force of Reason renders Men fit for Conversation——Nor is this a small Force of Nature and Reason, that Man only is sensible what Order is, and how both Words and Actions are to be moderated." *De Offic. Lib. i. Chap. iv.* See also *De Legibus*, Lib. i. Chap. vii.

the Service and Furtherance of these Great Ends, that it can * from known Things infer and explain those which are less known, that it can discern and judge what is agreeable and what disagreeable to it; that it can form universal Notions by Abstraction from Singulars; that it can by proper Signs communicate its Notions to others, can form Inventions, can apprehend the Nature of Numbers, Weights, and Measures, and compare them with one another; that it can perceive the Beauty and the Force of Order and Method; that it can either raise, or repress, or moderate Affections; that it can hold in Memory an endless Compass of Things, and call out, as it were at its Beck, any Part of the Stock which it has Occasion to use; that it can turn its Sight inward upon itself, recollect its own Dictates, and by them judge of its Actions, whence arises the Force and the Authority of Conscience. Of all these Powers and Abilities there would be very little Use, or rather none at all, in a lawless, a brutal, and an unsociable Life †. Now the more Gifts GOD has bestow'd on Man, and the greater Inlargements he has granted to his Wit and Mind, the more base and unseemly would it be, that all these noble Endowments should rust for want of Culture and Regulation, should be vainly spent and squander'd away without Use, without Order, and without Grace. Nor was it altogether in vain, that GOD indued Man with a Mind apprehensive of Accuracy and of Decency; but it was without doubt intended, that he should so employ the Powers he had receiv'd, as to manifest the Glory of his Creator, and to promote his own true Interest and Happiness. The Heathen Poet was able to make such an Inference as this :

----- *Quis dubitet hominem conjungere caelo ?
 Eximia natura dedit linguamq; capaxq;
 Ingenium, volucremq; animum; quem deniq; in unum
 Descendit Deus atq; habitat, seq; ipse requirit.*

Then who can doubt that *Man*, the glorious Pride Of all, is nearer to the Skies allid ?
 Nature in *Men* capacious Souls has wrought,
 And given them Voice expressive of their Thought.

In *Man* the God descends, and joys to find
 The narrow Image of his greater Mind.

Mr. CREECH.

VI. Another Reason why it was inconvenient to allow *Man* the same extended Liberty as *Brutes*, † was his prodigious Corruption and Degeneracy so many Degrees beyond theirs. That we charge him thus, no one will wonder, who has had the Curiosity to reflect a little on the various Pursuits and Inclinations of Mankind. *Beasts* are solicited only by their Belly and by their Lust: And then their Lust has some Shew of Temperance, provoking them only at certain Times and Seasons, and being exercis'd not for empty and superfluous Pleasure, but for Increase and Propagation of their Kind. *Oppian Cynege. Lib. iii. v. 151, 152.*

Ὅου γάρ τοῖς θήρεσι νόμος· γαστήρ ὅτε πλήθει
 Ἔις λέχος ἐρχόμεοις τελέειν φιλοτήσιον ἔργον.

Beasts in their Joys a decent Temp'rance keep;
 Nor offer Love, when 'tis the Time for Sleep.

But the carnal Desires of *Men* do neither observe any set Times for their Eruption †, nor are by any Means so moderate in their Heat, as to make no further Efforts than are necessary for the Preservation of human Species. Again, the Hunger of *Beasts* is easily satisfied with such Food as Nature has spread in all Places for their Sustenance; nor do their Meals stand in need of the Formality of Furniture, or of the Incentives of Sauce. And when they find this Appetite reliev'd and quieted, they put an End to their Business and their Care. (Nor are they very forwardly dispos'd to Rage or Mischief †, provided they are unprovok'd, and that their two chief Desires are at rest.) But now the Food of *Man* must not only satisfy his Belly, but tickle his Palate †. Nature has taken care that *Beasts* should have no need of other Cloathing besides what she has given them. But *Man* turns the Infirmary of his Nakedness into an Occasion of Vanity and Pride. Besides, do not *Men* float in a whole Tide of Affections and Desires, utterly unknown to *Beasts*? Covetousness †, Am-

* Add. *Cumberland de Legg. Nat. Ch. ii. §. 4. who likewise in the 33d Section of the same Chapter, has drawn most admirable Proofs from the Frame and Structure of Human Bodies.*

† See *Chap. 3. §. 10. following, Note 5. and Cicero de Nat. Deor. Lib. 2. chap. 59.*

§. VI. † *Lycurgus*, an antient Poet, quoted by *J. Lipsius* upon *Seneca, Epist. ciii.* says, That were it not for this, no Laws need be made for *Man*; and that *Man* is naturally a fierce Beast, who differs nothing from them we call so, but that he lifts up his Head towards the Heavens. His Words are these,

Φεῖ πῶς πόνηρον ἐστὶν ἀνθρώπων φύσις
 Τὸ σανάλα· Οὐ γὰρ ἂν πόλ' ἐδύθη νόμος
 Οἷς τι τ' ἄλλων διαφέρει θηρίων
 Ἄνθρωπον; Οὐδὲ μικρὸν, ἀλλὰ σθηματι.
 Πλαγὶ ἐστὶ τ' ἄλλα, τῶτο δ' ὄρθον θηρίων.

Mr. Hertius has collected together abundance of Authorities about this Matter, which we may find in his *Flourish of Civil Prudence, Part I. Sect. i. §. 5. &c.* I know they are not all to the Purpose, nor taken at the first hand; nor the first of them gives a just Suspicion to the contrary. *Seneca* says indeed, *Exterum idem semper de nobis promittimus debemus, malos esse nos, malos fuisse, invitum adiciam, & futuros esse.* *De Benef. Lib. i. Ch. x.* But there is not one Word of what *Mr. Hertius* adds, as if it were subjoined in the same Place, *Vix amplius dicam? Homo est omnium animalium pessimum, ac deterrimum, quo nihil peius, ac atrocius.* See *Lib. vii. Ch. i. §. 4. Note 5. following.*

† Δὲ ἀνοσιώτατος, ἔ ἀγροτάτος [τὸ ζῶν ἀνθρώπος] ἀνὸ ἀρετῆς, ἔ πρὸς ἀφροδίτην ἔ ἰδωθῶν χειρῖσιν. *Aristot. Pol. Lib. 1. Ch. ii. in fine.* *Man* without Virtue is the most profane and wild Creature, as to Venerly and Eating.

† *Nunquam enim illas [feras] ad necendum, nisi necessitas misit, aut fame, aut timore, coguntur ad pugnam. Non nisi perdere hominem libet.* *Seneca Epist. ciii.* "Nothing but Necessity drives the *Beasts* to hunt one another, either Hunger or Fear forces them to fight. *Men* take a Pleasure in killing one another."

† To compleat the Sense, we may add, out of this Author's *Abridgment of the Duties of a Man and Citizen, Lib. 1. Chap. iii. §. 4.* And he often desires more Food than his Stomach can digest, as well as that which respects Revenge, in the Enumeration of those Passions of *Man*, which are unknown to *Beasts*. Of which the Author speaks a little lower,

† *Vixi (animantium) ambicio, uni avaritia, uni immensa vivendi cupido, uni superstitio, uni sepulchri cura, atque etiam post je de futuro.* *Plin. Nat. Histor. Lib. vii. Proem.*

bition, Vain-glory, Envy, Emulation, Contentions of Wit, Superstition, the Care of future Things, and the Spur of Curiosity, do all claim Entertainment in human Breasts, and yet are Strangers to the dumb Creation. *Manilius Astron. Lib. iv.*

-----*Nulla votorum sine beati
Viresuros agimus semper, nec vivimus unquam,
Pauperiorq; bonis quisque est, quo plura requirit :
Nec quod habet numerat, tantum quod non habet optat.
Quumq; sui parvos usus natura reposcat,
Materiam struimus magnæ per vota ruinae,
Luxuriamq; lucris emimus, luxuq; rapinas,
Et summum census pretium est effundere censum.*

Why should deluding Hopes disturb our Ease,
Vain to pursue, yet eager to possess?
With no Success, and no Advantage crown'd,
Why should we still tread on th' *unfinish'd* Round?
Grown grey in Cares, pursue the senseless Strife,
And seeking how to live, consume a Life?
The more we have, the meaner is our Store,
The unenjoying craving *Wretch* is poor.
But Heaven is kind, with bounteous Hand it grants
A fit Supply for Nature's sober Wants:
She asks not much, yet Men press blindly on,
And heap up more, the more to be undone:
By *Luxury* they *Rapine's* Force maintain,
What that scrapes up, flows out in *Luxury* again;
And to be squander'd, or to raise Debate,
Is the great only Use of an Estate.

MR. CREECH.

Liban. Declam. 9. Is not a Man a mild and peaceable Animal, so far as Words go; but in Reality savage and ungovernable? For when do we hear of Lions undertaking an Expedition against Lions? When do wild Beasts war against their own Kind? What Perjury do we find amongst them? What Breach of Covenants? What Perfidiousness and Avarice, what insatiable Love of Riches? What Intemperance, what Adultery can we lay to their Charge? Whoever considers and examines the unhappy Variety of Contentions and Quarrels that continually arise amongst Men, will find that the greatest Part of them proceed from such Inclinations and Propensions, as never disturb the Peace of Brutes^a. Now in so violent a Fierceness, and in so wide a Diversity of Affections and of Desires, what a Life would Men lead, were they destitute of the Benefit of Law to unite and to compose them? We should see nothing but a furious Multitude of Wolves, of Lions, of Dogs tearing and devouring one another. Every Man would indeed be a Lion, a Wolf, a Dog, to his Neighbour, or rather a Monster, more pernicious and more spiteful than the fiercest of these Creatures; since Man, of all Living Things, is the most able to hurt Man, and, if left to his own furious Passions, the most willing. And since Men are continually bringing so many Evils and Mischiefs on one another, while they now live under the Force of Law, and under the Fear of

Punishment, what would become of the World, if they were left to the wild Sway of their Corruptions, if they had no inward Bridle to curb their Inclinations and to check their Pursuits. *Add. Aristotle's Problems, Sect. 29. Quest. 7. Plin. Nat. Hist. Lib. xviii. Proem. Jamblichus Protrept. Ch. xx. That Men should maintain a Familiarity with one another, and at the same time live contrary to the Laws, is an impossible Thing: For by this Means they would suffer more Injury and Damage, than if every Man led a separate Life by himself. On these Accounts, and for these Necessities, Law and Justice are to be admitted as it were for Sovereigns amongst Men, without the Government of which they could not continue or subsist.*

VII. It is still farther observable to our Purpose, that a much greater Variety of Dispositions may be discover'd in Men, than in Beasts. All the several Kinds of irrational Creatures are for the most Part indu'd with the same Inclinations, and rais'd and incited by the same common Appetites and Affections. We may understand a whole Species by the Knowledge of one single Member of it. But amongst Men there are *not more Heads than Wits*; and every one is equally zealous in giving the Preference to his own Opinion, and to his own Possessions. So *Horace, Sat. i. Lib. ii. speaks.*

----*Quot capitum vicunt, totidem studiorum millia.*

As many Men as live, of them the Brain
As many thousand Studies entertain.

Philemon in Stobæus, Speech 2. If a Man should get together thirty thousand Foxes, he'd find that they not only have all one Nature, but all one Method and Tenour of Life. But amongst US, as many Bodies as there are, so many ways of Living may we discover. Plin. Pan. There are no Things in the World more likely to displease all, than such as are done with an Aim of pleasing all. Nor are all mov'd with a simple and an uniform Desire, but with Propensions as vast in their Number, as they are various in their Mixture and Compositions. Nay, the same Man is very frequently unlike, and unequal to himself, and what he once most eagerly desir'd, he shall at another time most strongly abhor:

-----*Magno curarum fluctuat æstu,
Atq; animum nunc huc celerem, nunc dividit illuc;
In partesq; rapit varias, perq; omnia versat^b.*

This Way and that he turns his anxious Mind,
Thinks, and rejects the Counsels he design'd;
Explores himself in vain through ev'ry Part,
And gives no Rest to his distracted Heart.

MR. DRYDEN.

Neither is there a less Difference in their Studies, their Institutions, and their Inclinations to employ and exert their Vigour of Mind, as appears from the numberless Professions, and the endless Methods of Living. ^a *Quintus Calaber. Lib. i. Now*

^a *Add. Charron of Wisdom, B. 1. Ch. xxxiv. n. 12. and Ch. xxxix. n. 11. ^b Virg. Æn. viii. v. 19. Add. Charron de la Sageffe, Lib. i. Ch. xxxiv.*

§. VII. ^a His Words are, Έαν περισμυρίας ἀλάπειας τις σιωπαγάγοι, μιάν φύσιν ἀπαζάρασιον ὄψεται, τρόπον δ' ἕνα ἡμῶν ὅσα καὶ τὰ σώματα τ' ἀριθμῶν καθ' ἑνός, τοσούτους ἐστὶν ἑ τρόπος ἰδίῳ. And *Pliny's Nulla magis omnibus displicent, quam quæ sic sunt, tanquam omnibus placeant.*

^b His Words are,

Πᾶσι δ' ἄρ' ἀνθρώποισι ὁμοῦν γένεθ', ἀλλ' ἐπὶ ἑρῶ κα
Στραφῶσι ἄλλοι ἐπ' ἄλλα

All Men indeed have th' same Original,
But them to divers Works their Genius's call.

as the more Voices there are, the more harsh and unpleasent would be the Sound, unless they join'd in Confort and Harmony; so would human Life be nothing else but Noise and Confusion, were not the jarring Dissonance compos'd and sweeten'd by Law, and turn'd into a musical Agreement. As Things stand, this exceeding Variety of Parts and of Dispositions, is at the same time an Ornament and an Advantage to Mankind; since, when it is thus rightly temper'd, there naturally results from it so admirable an Order and Grace, as could not have been produc'd by an universal Likeness. And besides, there was likely to be much less Clashing and Contest in so vast a Multitude, whilst their various Humours and Inclinations led them to quite different Objects of Choice. The same wise Counsel Providence seems to have us'd in spreading so wonderful a Distinction of Features over the Faces of Men. For since different Offices are to be discharg'd, and different Behaviour to be us'd towards different Persons; there would arise a most wild and fatal Disorder, if all Men exactly resembled one another, and could not be distinguish'd but by artificial Marks, which would be liable to so many counterfeiting Cheats. *Add. Dr. Cumberland, de L. N. Cb. ii. §. 23.* And there lies this farther Secret in this natural Distinction, that one Face pleases the Fancy of one Man, and one seems more agreeable to another; so that out of the universal Stock, every Man may choose what he thinks most beautiful, and what may engage his Affection with the sweetest Comfort and Delight.

VIII. Besides all this, it was inexpedient for Man to live without Law upon account of his exceeding Weakness; which is our last Reason. A few Days will set a Brute Creature in a Condition of providing for himself; nor is he in any great Need of the Company of others for his Assistance and Support. But Man, from his first coming into the World, undergoes a long and tedious Course of helpless Infirmary. *Quintilian Declam. 306. The Frailty of human Nature appears most in its Beginning and early Growth. The Beasts see their Young, immediately after the Birth, standing on their Feet, and seeking for the Dug; but we are forc'd to take up the helpless Infant, and to protect him from the Cold; and, after all this Nicety and Care, it is not unlikely, he may die between the Arms of the Parents and the Bosom of the Nurse. Add. Plin. N.H. Lib. vii. Prefat. What a Length of Years is requir'd, and what Diligence of Information, to enable him by his own Strength to accommodate himself with Food and Cloathing? Let*

us suppose a Man bred up by another, just so far as to be able to walk, and without hearing a Word spoken, insomuch that he shall be destitute of all Instruction and Discipline, and enjoying no Knowledge, but such as sprouts naturally from the Soil of his Mind, without the Benefit of Cultivation; let us suppose the same Man to be left in a Wilderness or Desert, and entirely depriv'd of the Company and of the Assistance of others: What a wretched Creature should we at last behold! A mute and an ignoble Animal, Master of no Powers or Capacities, any farther than to pluck up the Herbs and Roots that grow about him; to gather the Fruits which he did not plant; to quench his Thirst at the first River, or Fountain, or Ditch that he finds out in his Way; to creep into a Cave for Shelter from the Injuries of Weather, or to cover over his Body with Moss, and Grass, and Leaves. Thus would he pass a heavy Life in most tedious Idleness; would tremble at every Noise, and be scared at the Approach of any of his Fellow-Creatures, till at last his miserable Days were concluded, by the Extremity of Hunger, or of Thirst, or by the Fury of a ravenous Beast. That Mankind therefore do not pass their Life in a more forlorn, and a more deplorable Condition than any other living Thing, is owing to their Union and conjunction, to their Intercourse with the other Partners and Companions of their Nature. The Divine Saying, *'Tis not good for Man to be alone,* is not to be restrain'd to Matrimony, but seems to belong in general to any Society with other Men. But now without Law, 'tis impossible that any Society should be either introduc'd or maintain'd in Strength and Quietness. And consequently, unless Man had been design'd for the safest and the most wretched Part of the animal Creation, it was not by any Means convenient that he should live loose from all Direction and Obligation of Law. *Plutarch's Philosophy* could teach him, that a general and unbounded License of Acting was disagreeable to the Condition, and to the Dignity of Man. *Those Persons only* (says he, *De Audit.*) *who live in Obedience to Reason, are worthy to be accounted Free. They alone Live as they will, who have learnt what they ought to will. Those who give the Reins to unworthy Practices and Pursuits, use an imaginary Freedom, to purchase a real Dissatisfaction.*

From all these Remarks it is sufficiently evident, that the natural Liberty of Man, such as really and truly agrees to him, and not only in an abstracted Sense, must always be understood as guided and restrain'd by the Ties of Reason, and by the Laws of Nature.

§. viii. *Quintilian's* Words are, *Caducum circa initia animal; homines sumus, nam ferarum, pecudumq; fratribus est statim ingressus, & ad ubera impetus: nobis tollendus infans, & adversus frigori nutriendus: sic quoque inter parentum manus, gremiumq; nutricis saepe labitur.* And *Theocritus's*, these, *ἄλλα δ' ἄλλοι ἕως ἑξῆς ἢ ἐπιδοῦσα φῶτα,* i. e. *GOD made Man to want each others Help.* To these we may add the fine Description of *Seneca*, *Quid est homo? imbecillum corpus, & fragile, nudum, sicut natura inermis, aliene opis indigens, ad omnem fortuna contumeliam projectum, quam bene lacertos exercet, cuiuslibet feræ pabulum, cuiuslibet victima, ex infirmis fluidisque contextum, & lineamentis exterioribus nisi limum; frigoris, æstus, laboris impatiens: ipso rursus situ, & orio iturum in tabem, alimenta metuens sua, quorum modo inopia, modo copia rumpitur; anxius, sollicitusq; tutæ, precarii spiritus, & male hævrentis, quem pater repentinus, ad æt' usque ex improposito jonus auribus gravis excutit: Soli semper sibi nutrimentum vitiosum & inutile,* i. e. *What is Man? His Body is frail and weak, naked and defenceless, wanting Help, and exposed to Misfortunes; when he is arrived at some Strength, a Prey to Beasts, every Body's Sacrifice; made up of Infirmities, tho' of a neat Composure, unable to undergo Heat, Cold, or Labour; growing diseas'd by Idleness; suspecting his Food, by Want and Plenty of which he is sometimes ruin'd; anxious and solicitous; of a precarious and inconstant Mind, which a sudden Fear and Noise distracts; his Nourishment is vicious and unprofitable to himself alone, *De Consol. ad Marcium. Ch. xi.* Our Author seems to have had these Words in his Thoughts, because he expresses himself much to the same Effect.*

His Words are, Τῷ λογῷ τὰς ἐπομένους ἀξίον ἔστι μόνος ἐλθεῖν τῶν κτηνῶν. Μοσι δὲ, ἂν εἴθ' ἐθέλει, καθύπερθε, ὅς ἐθέλειται ἔσται, τοῖς δὲ ὑπειδύται, & παραλογίαις ἐξωμῶς & πᾶσι σὺν ἑστί, & μὴ σὺν πολλῷ τῶν μετασθῆται ἐκείνου. De audit. in princip.

See Bullæi Elementa Philosophiæ practice, Part II. Ch. iii. where he is both particular and large in shewing how People incorporated into Society, are under a Necessity of having Laws impos'd upon them.

C H A P. II.

Of the natural State of MAN.

The CONTENTS.

- i. Man's natural State diversly considered.
 ii. His Misery.
 iii. Its Laws and Rights.
 iv. The State of Nature qualified.
 v. Whether it has an Inclination to War.
 vi. Hobbes affirms it, and his Reasons are produc'd.
 vii. Mens Relation one to another concludes the Negative.

- viii. Hobbes's Reasons answered.
 ix. Reason is not to be deny'd its Use in the State of Nature.
 x. The Manners of barbarous Nations do not make up the State of Nature.
 xi. Natural Peace has no need of Covenants.
 xii. Natural Peace is not to be trusted to.

BY the natural State of Man in our present Enquiry, we do not mean that Condition which is ultimately design'd him by Nature, as the most perfect and the most agreeable; but such a State as we may conceive Man to be plac'd in by his bare Nativity, abstracting from all the Rules and Institutions, whether of human Invention, or of the Suggestion and Revelation of Heaven; for the Addition of these Assistances seems to put another Face on Things, and to frame human Life anew, by an exacter Model. By this wide Exemption we do not only exclude all the various Arts and Improvements, and the universal Culture of Life, but especially civil Conjunctions and Societies, by the introducing of which Mankind was first brought under the decent Management of Order and Regularity. That we may be able to form clear and distinct Notions of this suppos'd State, we will first consider it *in itself*, and examine especially what Rights and what Inconveniences attend it; that is, what would be the Condition of particular Men, if there were no Arts or Inventions set afoot, and no Communities form'd and establish'd in the World. And then, secondly, we will consider it *in order to other Men*, whether in this Regard it bears the Semblance of Peace, or of War; that is, whether Men who live in a natural Freedom, so as neither to be subject to one another, nor to acknowledge a common Master, are likely to prove Enemies, or Friends. In this second Consideration the State we are speaking of, is capable of a Subdivision, being either *full and absolute*, and so bearing an equal Regard towards all Men in general; or else *limited and restrain'd*, as it has

Respect only to a certain Part of Mankind. This double Notion of a State is answerable to the double Manner in which we may consider the Men who are to compose it, either as each particular Man lives in a natural Liberty towards all others; or as some Men have entred into a Society between themselves, but are join'd to all the rest of the World by no other Ties, besides those of common Humanity.

II. Now to form in our Minds some Image of this natural State, such as it would be, if destitute of all Arts and Assistances either invented by Men, or reveal'd by GOD, we must fancy a Man thrown at a Venture into the World, and then left intirely to himself, without receiving any farther Help or Benefit from others, than his bare Nativity; we must likewise suppose him to be furnish'd with no larger Endowments of Body or Mind, than such as we can now discover in Men, antecedent to all Culture and Information; and lastly, we must take it for granted, that he is not foster'd under the peculiar Care and Concern of Heaven. The Condition of such a Person could not prove otherwise than extremely miserable, whether he were thus cast upon the Earth in Infancy, or in Maturity of Stature and of Strength. If an Infant, he could not but have sadly perish'd, unless some Brute Creature had, by a kind of Miracle, offer'd its Dugs for his Support; and then he must necessarily have imbib'd a fierce and savage Temper, under the Nursery and Tutelage of Beasts. If in Perfection of Limbs and Size, we must, however, conceive him naked, able to utter nothing but an inarticulate Sound, a Stranger to all Institution and Discipline, amazed and startled at the Things about him, and even at his own Being: The Admonition of Hunger

MR. BARB. NOTES on Ch. II. §. 1.

* If Mr. Titius (*Observat.* 452.) had considered well these Words, he would not have criticised upon our Author, as calling that Estate Natural very unfitly, which is contrary to Nature, *i. e.* to the Intention of GOD, who appointed Man for Society. See what our Author says at the End of §. 4.

§. ii. † This appears from an Instance which *Procopius* (*Lib. ii. Gothicorum*) relates of a Child nursed by a Goat. Mr. *Hertius* also quotes *Hartmann's* History of *Poland*, *Lib. i. Ch. ii.* who relates something like it of an Infant who had been suckled by a Bear, and being brought to *Warsaw*, was presented to *Casimir* King of *Poland*, in 1661. I shall also add at length a like Story which the same Mr. *Hertius* has set down in his *Treatise of Society*, the first Principle of the Law of Nature, *Secl. i. §. 8.* yet leaving the Reader at Liberty to see into the Truth of it, tho' the Author warrants it. "In 1344 there was a Child found in *Hesse*, who, as we understand since, was taken away by Wolves, when it was about three Years old, and wonderfully maintained by them. They carried it to a Tree, where they laid up the greatest Part of their Prey, and in the Winter they dug a Ditch, into which they cast Leaves, and Herbs, which they laid under the Child, lying themselves by it to keep it from the Cold. They taught it to go on the Hands and Feet, and run like themselves, insomuch that by Custom it would run as fast, and make as great Leap. When he was first taken, they bound some Pieces of Wood to him, to restore him, and accustom him not to go like a Beast with his Face downward. He was carried to the Court of *Henry* Prince of *Hesse*, and was often heard to say, That if it were not for him, he had rather live amongst the Wolves again, than among Men." This Story is related by the Author of the Additions to the History of *Lancelotti Schaffnaberg*, about 1344.

would

would make him seize greedily on any Thing that was near him, his Thirst would direct him to the first Water, and Dens or Trees would afford a Refuge from the Injuries of Weather. Should we suppose a Number of such helpless Wretches thrown together by Nature on some uninhabited Soil, we cannot but think that they would so long however continue in a brutal Wildness and Disorder, till at last, either by their own Wit and Experience, or by some Hints and Instructions taken from the Conduct of mute Creatures, they should by Degrees arrive at some Method and Elegancy of Living, and as *Virgil* says,

———*Varias usus meditando extunderet artes,*
 Studious Need might beat out useful Arts.

This will easily be acknowledg'd by any one that looks about on the numerous Improvements and Assistances which we make use of in our daily Actions, and at the same Time considers how difficult it would be for any Man to invent all these of his own Head, if he were not put in the Way by the previous Labour and Guidance of others; and how great a Part of these Ornaments and Conveniencies of Life, would at once enter into the Thoughts of the Generality of Mankind. Hence it is no Wonder that the Heathen Writers, who understood not the true Origin of Men as deliver'd in holy Scriptures, should make so foul a Representation of their primitive State.

Quum prorepissent primis animalia terris,
Mutum & turpe pecus, glandem atq; cubilia prensant
Unguibus & pugnis, dein fustibus, atq; ita porro
Pugnabant armis, quæ post fabricaverat usus.
Donec verba, quibus voces sensusq; notarent
Nominaq; invenere; debinc abfistere bello,
Oppida ceperunt muniere, & condere leges,
Ne quis fur esset, neu latro, neu quis adulter.

When the first Fathers of our human Brood,
 Dirty and dumb crawl'd from the teeming Mud;
 A War began with Nails, and Fists, and Heads,
 For Acorn Banquets, and for leafy Beds.
 Cudgels came next in Play, and riper Hate
 Arm'd them with surer Instruments of Fate.
 At length their Voice grew Index of their Thought,
 Joyful to name the Things for which they fought.
 Now Rage began to cool, and Force to cease,
 And gen'ral Parlies work'd a gen'ral Peace.
 Towns rose, and Laws were settled, to remove
 Invading Thefts, and check licentious Love.

This is *Horace's* Description, and we may expect a fuller from *Lucretius*.

Et genus humanum multò fuit illud in arvis
Durius, ut decuit, Tellus quod dura creasset.

Quod sol atq; imbres dederant, quod terra crearat
Sponte sua, satis id placabat pectora donum;
Glandiferas inter curabant corpora quercus;
Plerumque.

At sedare sitim fluvii fontesq; vocabant.

Nec dum res igni scibant tractare, nec uti
Pellibus, & spoliis corpus vestire ferarum:

Sed nemora atq; caros montes sylvasq; colebant.
Et frutices inter condabant squalida membra,
Verbera ventorum vitare imbresq; coacti.
Nec commune bonum poterant spectare, nec ullis
Moribus inter se scibant, nec legibus uti.
Quod cuique obtulerat prædæ fortuna, ferebat,
Sponte sua sibi quisque valere & vivere doctus.
Et Venus in sylvis jungebat corpora amantum,
Conciliabat enim vel mutua quamque cupido,
Vel violenta viri vis atq; impensa libido.

——— *Illud erat curæ quod sæcla ferarum*
Infestam miseris faciebant sæpe quietem.

Inde casas postquam ac pelles ignemq; pararunt;
Et mulier conjuncta viro concessit in unum,
Castaq; privatae Veneris connubia leta
Cognita sunt, prolemq; ex se videre creatam.
Tum genus humanum primum mollescere cepit:
Ignis enim curavit, ut alia corpora frigus
Non ita jam possent cæli sub tegmine ferre.
Et Venus imminuit vires; pueriq; parentum
Blanditiis facile ingenium fregere superbum.
Tunc & amicitiam ceperunt jungere habentes
Finitima inter se, nec ledere, nec violare:
Et pueros commendarunt muliebreg; sæclum,
Vocibus & gestu cum balbe significarent,
Imbecillorum esse æquum misererier omnium.
Non tamen omnimodis poterat concordia gigni,
Sed bona magnaq; pars servabant fœdera casti;
Aut genus humanum jam tum foret omne peremptum,
Nec potuisset adhuc perducere sæcla propago.
At varios lingue sonitus natura subegit
Mittere, & utilitas expressit nomina rerum, &c.

Then Man was hard, as hard as Parent-Stones,
 And built on bigger and on firmer Bones.

Contented they with the poor easy Store
 That Sun and Earth bestow'd, they wish'd no more,
 Soft Acorns were their first and chiefest Food.
 When thirsty, then did purling Streams invite
 To satisfy their eager Appetite.

They knew no Use of Fire to dress their Food,
 No Cloaths, but wandred naked thro' the Wood.
 They liv'd in shady Groves, and Caves confin'd
 Were Shelter from the Cold, the Heat, and Wind.
 No fix'd Society, no steady Laws,
 No publick Good was sought, no common Cause.
 But all at War, each rang'd, each sought his Food
 By Nature taught to seek his private Good.
 Then to renew frail Man's decaying Race,
 Or mutual Lust did prompt them to embrace,
 Or else the greater Vigour of the Male,
 Or some few treacherous Presents did prevail;
 Some Acorns, Apples some, some Pears bestow,
 The Thing the same, the Price was less than now.

The most they dreaded was the furious Beast,
 For those i'th' dead of Night did oft molest,
 And lengthen into Death their slumbering Rest. }

But when they built their Huts, when Fire began,
 And Skins of murder'd Beasts gave Cloaths to Man;
 When One to One confin'd in chaste Embrace
 Enjoy'd sweet Love, and saw a num'rous Race;
 Then Man grew soft, the Temper of his Mind
 Was chang'd from rough to mild, from fierce to kind.

For us'd to Fire, his Limbs refus'd to bear
 The piercing Sharpness of the open Air:
 Lust weaken'd him, and the sweet playing Child
 Tam'd his wild Sire, and into Peace beguil'd.
 Then Neighbours by Degrees familiar grown,
 Made Leagues and Bonds, and each secur'd his own.
 And then by Signs, and broken Words agreed,
 That they would keep, preserve, defend, and feed
 Defenceless Infants, and the Female Train;
 A Right which Pity urg'd them to maintain.
 Tho' this fix'd not an universal Peace,
 Yet many kept their Faith, and liv'd at Ease;
 Or else, almost as soon as it began,
 The Race had fall'n, this Age ne'er seen a Man.
 Kind Nature Power of framing Sounds affords,
 And these at length Convenience turn'd to Words.

Mr. CREECH.

We have much the same Story in Prose from *Diodor. Sic. Lib. i. c. viii.* They tell us, that Men at their first Origin led an irregular Life, in the Manner of Beasts; scattering themselves about in Search of Food, which was presented them by the savoury Herbs, and the Fruits which grew of their own Accord. But being infested on every Side with the wild Beasts, they learnt by Use the Security of mutual Assistance; and being forc'd by Fear to unite in Society, they came acquainted by Degrees with their Similitude of Figure and Shape. The first Men, before any Inventions of Convenience and Use, supported Life with great Labour and Trouble; being, as yet, destitute of Cloaths and Dwellings, unaccustom'd to the Relief of Fire, and Strangers to all sweet and regular Food. Being ignorant of Stores and Provisions, they neglected to secure so much of the Fruits of the Earth as was requisite for necessary Subsistence. And thus many perish'd in the Winter by Hunger and Cold. But being afterwards instructed by gradual Experience, to spend that sharp Season in Caves, and to lay up a Stock of Necessaries, and finding out the Use of Fire and other Comforts and Supports, they began to introduce many Arts, and many Advantages of living. Add, *Lib. i. Ch. xliii.* Cicero pro P. Sectio. *Il'ho amongst you does not know the Condition of Nature to have been once such, that Men, in*

those Days, before the Settlement of natural or of civil Laws, wandered separately about the Fields, and possess'd no more than what they could get or keep by mutual Force, and Wounds, and Slaughters. Now between our present Way of Life, polish'd with Humanity and Civility, and that rude and barbarous Course, the only distinguishing Marks are Law and Violence. *Vid. de Invent. Lib. i.*

Euripid. Supplic.

I praise the generous Pow'rs, that fenc'd our Life
 With Rules and Graces from the lawless Herd;
 By giving first a Soul, and next a Tongue,
 The Soul's Interpreter; and Fruit for Food,
 And kindly Rain to breed a future Store:
 And close Abodes, to skreen us from the Rage
 Of threatening Skies; and Sails to wing our Course
 To distant Shore, to join the Globe in Trade,
 And mix the common Treasures of Mankind.

It is a general Custom with the Poets to attribute to the Gods the Invention of all Things useful in human Life. *Vid. Oppian. Halieut. Lib. ii. v. 16, &c.*

However fabulous these Accounts appear, yet so far the Authors of them were in the right, that upon Supposal of such an Origin of Mankind, the Face of Nature would have born all these Features which we now esteem so monstrous and extravagant. In the same Manner being ignorant of the State of Paradise, they pleas'd themselves in making Descriptions of a singular and constant Temperateness of Air, and of a spontaneous Fertility of the Earth, in the first and the golden Age of the World. Because they thought it impossible that human Race could have been preserv'd, as according to their Notion they were produc'd, if the Weather and the Seasons had been then as changeable and as unsteady as now, and if the Support of Food had not been more easy to procure. And indeed, tho' it is clear from the Authority of Scripture, that the primitive Mortals, by the divine Direction and Assistance, arriv'd at a very early Knowledge of the most necessary Arts (*Sec Gen. iii. 21, 23. and iv. 17, 22.*)

* *Vid. Ovid. Metamorph. Lib. i. v. 107. Virg. Georg. xi. v. 336. Lucret. Lib. v.*

*At noxitas mundi nec frigora dura ciebat,
 Nec nimios aestus; nec magnis viribus auras.*

Nature, whilst new, no cruel Cold brought forth,
 Nor raging Heats; nor arm'd the stormy North.

* Altho' Mankind was never in such a State of Nature as we have described, yet it is good to imagine what that Estate was, not only to convince us, how great an Advantage we receive one from another, and by that Means may be induced to a reciprocal Sense of Love and Sociableness, but also because it may happen, that every Man may be reduced to that Condition, either altogether or in Part. Such an one, for Example, may an Infant be, who is left in a Desert, where no Man passes; and if this Infant, who is thus forsaken by his cruel Parents, lives to grow up without any human Assistance, he'll represent to us perfectly that State of Nature we are now speaking of. Nay, a Person at Man's Estate, who by a Shipwreck, or some other Accident, is cast upon an Island that is desert and uninhabited, will find himself in some Degree of that State of Nature, because he'll be forced to call to mind Arts, and other Conveniences of Life, that he may more easily provide for his Necessities. I have taken this out of the Academical Discourse of our Author, *De statu hominum Naturali*, §. 5.

† This appears from this Expression in the first of those Texts, *And God made Coats of Skins, and clothed them;* which, according to the Hebrew, imports, that God taught them to make them; for otherwise how could the first Men, who were destitute of all necessary Instruments of Iron, and before there was any Custom to kill Beasts, in so little a Time find out that Invention, and bring it to any Perfection by their Industry? From hence we may infer, in my Opinion, that divine Providence instructed them in several other Things which were as necessary for human Life, and no less difficult to find out. So God commanded our first Parents to till the Ground, and get their Bread by the Sweat of their Brows, or to that End, 'tis probable, he taught them the Nature of the Grain, the Time of Sowing, and the Manner of Tillage and making Bread; which Things they could not have discovered of themselves, but by long Experience and many Trials. The Histories of Greece tell us, that the ancient Inhabitants there, having lost the Use of Bread-Corn, I know not by what Accident, lived upon Acorns and wild Fruits, before the Use of Husbandry was restored among them; whereas the Sacred History tells us, that Adam's eldest Son was an Husbandman, which shews, that the Art was well known before; and consequently, so was the Use of Iron; for 'tis not necessary for us to understand what the Scripture says of *Tubal-Cain, Gen. iv. 22.* that he was the Inventor of Iron; for we may suppose the more plain Use of that Metal was before discovered, and that *Tubal-Cain* found out a Way of forging it into more curious Works; for 'tis said only that he polish'd all Works of Brass and Iron. As to Fire, the Invention of it among the Greeks was looked upon as such a considerable Thing, that they feign'd that *Prometheus* brought it down from Heaven. 'Tis related of the Inhabitants of the Canary and *Philippine* Islands, and of an Isle bordering on *China*, called *Los Jordenas*, that they knew nothing of Fire till the Spaniards arriv'd there; and perhaps they had been in this Ignorance many Ages, neither their own Ingenuity, nor any Chance, having been

which they daily improv'd and increas'd by their own Industry and Application; yet the Condition of Men had been most deplorable and base, if no Societies had been set on Foot, but every one had reign'd a separate Prince in his own Family, and suffer'd his Children, when once grown up, to seek their Fortunes in a State of natural Liberty. And then we might pronounce of all Mankind, as Euripides does of the Cyclops, they would be

Νομάδες, ἀκέει δ' ἔδ' ἐν ἑδ' εἰς ἑδ' εἰρός

as wandering Swains, never bearing, and never breeding one another. Hobbes has⁶ been lucky enough in painting the Inconveniences of such a State. *Out of Society* (says^a he) *we are defended only by our single Strength; in Society, by the Strength of all. Out of Society no Man is⁷ sure to keep Possession of what his Industry has gain'd; in Society every Body is secure from that Danger. To conclude, out of Society we have⁸ the Tyranny of Passions, ⁹ War, ¹⁰ Fear, ¹¹ Poverty, ¹² Filthiness, Barbarity, Ignorance, and Wildness; in Society we have the Stay*

of¹³ Reason, ¹⁴ Peace, Security, ¹⁵ Riches, ¹⁶ Decency of Ornament, Company, Elegancy, Knowledge, and Benevolence^b. And I believe there cannot be a more effectual Way found out to silence the Complaints and Murmurs of the common People, when they pretend to find Fault with the Miscarriages and the Impositions of the Government, than if we would lay before them a true Prospect of the Misery and Confusion which attends a natural State. Which trouble those Persons had certainly a right Notion of, who brought into a proverbial Saying, ¹⁷ *That unless there were such Things in the World as Courts of Justice, Men would infallibly devour one another.*

III. What kind of Rights attend Men in a State of Nature we may easily gather, as well from that Inclination common to all living Things, by which they cannot but embrace and practise, with the greatest Readiness and Vigour, all possible Ways of preserving their Body and their Life, and of overcoming all such Things as seem to drive at their Destruction; as from this other Consideration, that Persons living in such a State are not

been able to gain the Use of so necessary a Thing. See *Geo. Hornius de Origin. Gent. American. Lib. i. Ch. viii. Lib. ii. Ch. ix.* We find also, that several Nations have been ignorant a long time of the Use of Iron, tho' they had Mines of that Metal in their Country. We must then believe, that the first Men were early instructed by divine Providence in these sorts of Things, and many other Necessaries of Life. And if a long time after we discovered some People among whom the Use was lost, 'twas because they had chose a barren Country, or because some ambitious Persons had forced great Numbers of Men, by their irresistible Power, to fly into far distant Deserts, where they wanted all the Instruments of Tillage used in the Places they had lost; or some Colony going to settle itself in a far Country, neglected to carry those Instruments, or lost them by the Way, by some unknown Accident, after which 'twas very hard to recover them, because Traffick was not yet settled. Nevertheless, some have endeavour'd to supply this Defect, by making use of other Materials for the same End. Thus several People of *America* use, instead of Iron, Oyster-shells, the Bones and Teeth of some Creatures, Canes, and such like Things. See *Dapper's Description of America.* This is also taken out of our Author's Treatise quoted in the foregoing Note.

^a *De Cive, Ch. x. §. 1.* ^b *Comp. Polyt. Lib. iv. Ch. xlv.* Where he relates the Miseries of the *Byzantines*, occasion'd by their endless War with the *Thracians*.

⁶ Our Author ought not to have approved Mr. *Hobbes's* Words so generally, as Mr. *Titius* has observed (*Obs. 460, 461.*) as I shall shew in this and the following Notes. And first, what Mr. *Hobbes* says is not absolutely true; for what hinders but in a State of Nature, many may join together in their own Defence? I own, that such a Protection, tho' founded upon an united Force, is not comparable to what is found in a well regulated Society; but this may in some measure be sufficient to guard us from the Insults that we are liable to in a State of Nature, because 'tis not likely that we shall be attacked by so great a Number of Enemies at one time; for it often happens in a Civil Society, that private Persons are oppressed by the Forces of the whole Body, an Inconvenience not to be feared in a State of Nature.

⁷ On the contrary, In the State of Nature we seem to enjoy, for the most part, the Fruits of our Labour with greater Security; for poor Subjects are very often fleas'd by evil Princes.

⁸ This he ought also to have proved, for why should our Passions have greater Command of us then? If the Fear of Laws keeps the People to their Duty, it will make a like Impression upon the great ones, and Persons of Quality, but they easily find out Ways to evade the Laws; for those in whom the Passions reign with the greatest Fury, and in a manner most prejudicial to Society, are beyond Contradiction these Persons in Authority, of which we can't find any Examples in a State of Nature, nor can there be any in a Condition of doing so much Mischief.

⁹ Wars are not a necessary Consequence of a State of Nature, and our Author proves it a little lower, §. 5. against Mr. *Hobbes.* There would be doubtless some Wars, but neither so furious, nor so cruel, nor with such great Armies, as to lay waste large Provinces and great Kingdoms.

¹⁰ There want not as many Means to appease and lessen Fear. See what is said *Lib. vii. Ch. i. §. 7.* And in Civil Governments is there not often more Reason for terrible Apprehensions from Princes and their Ministers?

¹¹ Labour and good Husbandry would easily furnish us with all Things necessary for Life. None but Sluggards and Prodigals would fall into Poverty, and this often happens as well in civil Societies.

¹² This is founded upon the false Hypothesis of Mr. *Hobbes*, that *A State of Nature is a State of War.* But that civil Societies are not free from these Inconveniences, the Empire of *Muscovy* shews, as also do several People of *Asia, Africa, and America*, which are neither less miserable nor barbarous for having a King.

¹³ Whence come those Monsters of Ambition, Covetousness, Pleasure, Cruelty, and Inhumanity, which ordinarily reign in the Courts of Princes, and whose contagious Examples spread almost always to their Inferiors?

¹⁴ The horrible Persecutions which the Subjects sometimes suffer, and the bloody Wars which often harrass the most flourishing States and Empires, prove, that Peace and Tranquillity do not more ordinarily flourish in civil Societies, than in the State of Nature.

¹⁵ How comes it to pass that we see so many Families reduced to Beggary, and so many Subjects ruin'd by Extortion?

¹⁶ Under these fine Names are often hidden Vanity, Sottishness, Folly, Pedantry, irregular Passions, and subtle Cheats. There is no good Thing that can be secured to us by Society, but it may have Place in a State of Nature. Further, this Beauty, Politeness, and Pleasures of Life, of which Men boast so, are found only in great Cities; the rustick Behaviour is still kept up every where in the Country, in the most civilized Kingdoms. Let us then, by way of Conclusion, make an exact Parallel between the States of Nature and Civil. Experience teaches us, that contrary to the natural Appointment of the Creator, and thro' Man's Corruption, both States are often troublesome and unhappy; but Civil Government being a proper Means to restrain the Malice of Men, the Civil State, without Contradiction, may be more social and happy than the State of Nature; but then we must suppose the civil Society to be well governed, otherwise, if a King abuse his Power, or devolves the Management of Civil Affairs to Ministers both ignorant and vicious, as it often happens, a Civil State is more unhappy than the State of Nature, which appears by the Wars, Calamities, and Vices which spring up from such Abuses, and from which the State of Nature is free. See what Mr. *Locke* says in his second Treatise of Civil Government, *Chap. i. §. 10. and Chap. xviii. §. 17.* near the End.

¹⁷ 'Tis a Proverb of the *Jewish* Doctors. See *Grotius. Lib. i. Chap. iv. §. 4. num. 2.*

subject to any Sovereignty or Command. For from the former Reflexion it follows, that Men plac'd after this manner in a natural State, may use and enjoy the common Goods and Blessing, and may act and pursue whatever makes for their own Preservation, while they do not hence injure the Right of the rest. From the latter Supposition it is clear, that they may use not only their own Strength, but their own Judgment and Will (provided they are form'd and guided according to the Law of Nature) for procuring their own Defence and Safety. And in this Respect likewise, the State we are treating of has obtain'd the Name of natural Liberty; in as much as, antecedently to all human Pact and Deed, every Man is conceiv'd to be perfectly in his own Power and Disposal, and not to be controll'd by the Pleasure or Authority of any other. On which account too, every Man may be thus acknowledg'd equal to every Man, since all Subjection and all Command are equally banish'd on both Sides. According to this Temperament, we ought to correct and explain those Assertions laid down by Mr. *Hobbes*, in the Beginning of his Book *De Cive*, *That the first Foundation of natural Right, is the Liberty which each Man hath, to preserve, as far as he is able, his own Life and Limbs, and to apply all his Endeavours towards the guarding his Body from Death, and from Pains.* From which it follows, *That since 'tis in vain to have a Right to the End, if one has not likewise a Right to the Means, therefore every Man has a Right of using all Means, and of doing all Actions, without which he cannot defend and ensure himself.* But now since in a natural State no Man is subject to another as to a Superior, to whose Pleasure his own Will and Judgment should be submitted, hence every Man is by natural Right a Judge, *whether the Means which he uses, and the Actions which he performs, are necessary to the Preservation of his own Life and Limbs, or not:* For altho' in this Case one Man should pretend to give Advice to another, yet the other not having subjected his Will and Judgment to his Controul, may still judge of this Advice, whether it be proper and expedient to be follow'd, or not. And therefore he may, perhaps, do according as he was advis'd, but then it will not be for the sake of the Counsellor, but because he himself approves of the Proposal; and consequently he will at last act by the Determination of his own Judgment. From all which he concludes, *That Nature has given to every one a Right to all Things; that is, in a meer natural State, or before Men had bound themselves to one another by any Covenants, it was lawful for*

every one, to do all Things whatsoever and against whomsoever he pleas'd; and to possess, use, and enjoy all that he would or could. Whence it may be understood, that in a State of Nature, Profit or Utility is the Measure of Right. Which Notions, however paradoxical they appear at first View, yet no Man can fairly draw from them a Licence of doing any Thing to any Person, who considers that *Hobbes*, even in this State of Nature, supposes a Man subject to the Laws of Nature, and to the Government of a sound Reason. But since such an unbounded and injurious Licence could never, by any Man in his Wits, be thought a likely Means for the lasting Preservation of himself, we must presume that it was never granted or intended by Nature. And suppose some Man should be so extravagant as to endeavour the putting it in Practice, it's plain his Experiment would turn in a high Manner to his own Prejudice and Mischief. So that the only fair Sense of *Hobbes's* Principle is this; the Things which make for the Preservation of Men, Nature has laid in common, before they have divided them amongst themselves by Covenant: And he that has no Superior, may by the Direction of his own best and soundest Reason, do any Thing that is truly conducive to his lasting Safety. But if that Philosopher really intended his Words with the same Harshness, and the same gross Appearance which their Countenance bears, and to reject our kind and favourable Interpretation, the Fault is his own, and let him shift how he can to escape the perpetual Censure and Reprehension of wise Men. This is evident, that the Author of the *Theologico-Political* Treatise, who goes commonly by the Name of *Spinoza*, has describ'd that *Right of all Men to all Things* which attend a natural State, in most horrid and barbarous Terms; and therefore it may not be improper to take the Trouble of discussing his Notions on the Point. *By the Right and Institution of Nature, he understands nothing else, but the Rules of the Nature of every individual Thing, according to which we conceive every one of them to be naturally determin'd to a certain Manner of Existence and of Operation.* For Example, *Fishes are naturally determin'd to swim, and the bigger of them to eat the lesser; and therefore Fishes, by the biggest natural Right, possess the Water; and by the same Right, the larger Kinds of them prey on the smaller.* Here it is observable, that by the Term of *Right* he does not express any Law directive of an Action, but only the Power of acting² and what may be done without Injury, and that therefore 'tis by no Means a fair Conclusion, that one ought necessarily to do

§. III. ¹ Mr. *Hobbes*, as he himself says in a Note upon §. 1. of the second Chapter, understands by right Reason, not as most do, the infallible Faculty, but the Power of Reasoning, i. e. the proper and true Arguings which every one makes upon his own Actions, so far as they conduce to the Advantage or Detriment of other Men. If we ask him what is this true Reasoning, he'll answer, It is founded upon the Principles laid down in the foregoing Chapter, §. 2, 3, 4, 5, 6, and 7. upon the State of War, wherein he supposes all Men to be naturally one against another; a false Supposition, which our Author will conclude a little lower, §. 5, &c. So that we see, that according to Mr. *Hobbes*, all is reduced to every Man's Judgment, either well or ill founded. This appears clearly from what he positively maintains, *That in whatever Manner a Man deals with a Person, with whom he makes a bargain, or Contract, he does him no injury.* See above *Lib. i. Chap. vii. §. 13.* If a Man sins against God, or the Laws of Nature, 'tis, according to him, because we pretend something is necessary for our Preservation, which we know in Conscience not to be so. *Note on Chap. i. §. 10.* See also that on *Chap. iii. §. 27.*

² The Words of the Original, in all the Editions of *Germany* and *Holland* (for in that which the Author published at *Lunden* in *Sweden* in 1672, there is nothing of this Confutation of *Spinoza*) not excepting that which Mr. *Herius* put out in 1706, the Words are placed as we find them in this *English* Edition, but they make a strange Hotch-potch; for if we examine into the Sequel of the Discourse, and the Design of the Author, we may easily discern them misplaced; for these last Words, *And what may be done without Injury*, ought not to refer to the pure Faculty of acting, which may do a great deal of Injury, but to the Laws, which forbid doing an Injury to any Man, and therefore I have placed it in its right Order in my Translation.

all those things, which one has³ a Right of doing. Farther, as it is an improper Acceptation of the Term of *natural Law*, to make it denote that according to which every thing acts by a certain and determinate Manner, so is it likewise improper to apply the Name of *Right* to that Power and manner of acting which appears in irrational Beings: For he alone can be truly said to have a Right of acting, who acts on previous Reason and Deliberation. He proceeds to tell us, *That Nature absolutely consider'd has the highest Right of doing whatever it can; that the Right of Nature extends itself as far as the Power of Nature: For the Power of Nature is the very Power of God, who hath the highest Right to all things.* Here, if by *Nature absolutely consider'd*,⁴ he means **GOD** in Conjunction with all created Things, we grant his Assertion, and willingly acknowledge in **GOD** the highest Right to all Things, yet such a Right as is limited to the Perfections of his Essence. But if by *Nature* he understand the University of created Beings, as contradictinguish'd to the Creator, then we may deny the Power of Nature to be the Power of **GOD** himself, or that these two Powers have the same Latitude and Extent. The Power of Nature is indeed produc'd by **GOD**, but not in such a manner as to exhaust all the Power of the Divinity, but to contain itself within the Bounds prescrib'd by its Author. His next Inference runs thus, *Since the universal Power of all Nature is nothing else but the Power of all the Individuals taken together, it follows that each Individual has the highest Right to all things that it can compass, or that the Right of each Individual extends itself as far as the determinate Power of the same Individual.* But 'tis beyond me to apprehend the Conclusiveness of this Argument, *The Power of all Nature is the Power of all the Individuals together, therefore each Individual has the highest Right to all Things.* For is it not rather true, that each Individual has a certain and definite Share or Portion of Right; and that therefore no particular Individual can fairly arrogate to itself that Right which is proper to all; as they make up one universal Nature? He adds, *And because it is a supreme Law of Nature, that every thing endeavour as far as it is able to continue in its own State, and this not with any regard or respect to other things, but only to itself, hence it follows, that each Individual has the highest Right to this Advantage; that is, to exist and to operate as it is naturally determin'd.* Here, besides that *Law of Nature* is us'd in an improper Sense, it is apparently false as to Men at least, that their Nature is so determin'd, as to make them endeavour their own Preservation and Continuance⁵ with respect to themselves only, without any Care or Consideration for others. Properly speaking, those things are said to be *Naturally determin'd* which are tied to an uniform

Method of acting, and are so contradictinguish'd to free Agents: And therefore Men, as to those Actions which are left to their own Guidance and Direction, are determin'd to certain Ways and Courses not by Nature, but by some Law; and consequently they are not presently invest'd with a Right of doing all things within the reach of their natural Powers and Abilities. But the Vanity of such Reasonings will more fully appear, if divesting them of their dark Turnings and Intricacies we thus clearly propose them; **GOD** has the highest Right to all things; the Power of Nature is the Power of **GOD**, therefore Nature has a Right to all things: But the Power of Nature is the Power of all the Individuals together; therefore each Individual has a Right to all things. Let any Man judge whether the Connexion in this Argument be just, or not. *Spinoza* very fully declares, *That in this Point no Difference ought to be made between Men, and the other Individuals of Nature; or between Men who understand and exercise Reason, and those who do not; nor between Men in their Wits, and Fools and Madmen.* For, as to the first Part of this Assertion, the Question of Right ought not to proceed but about the Right of Men. And as to the latter Part, altho' some Men may have a quicker and some a slower Use of Reason, yet whoever has any Use at all of that Faculty may at least understand thus much⁶, in Order to his own Preservation he has no Need of an unlimited Right to all Things, and that therefore such a Right doth by no Means belong to him. As for those who have no Manner of Use of Reason, 'twould be frivolous to dispute about their Right; nor from the unhappy Circumstances of diseas'd Persons, can we pronounce any thing about the natural Condition of Mankind: Nor is it impossible for any one of these poor Creatures to be preserv'd otherwise than by a Right to all things. The Reason which he subjoins is equally vain and fruitless, *For whatsoever any thing acts by the Laws of its Nature, it acts with the highest Right; inasmuch as it acts as it is by Nature determin'd, and cannot do otherwise.* Because we deny Man when he acts by the Law of Nature, to affect a Right to all things, or to be determin'd by Nature to the Exercise of any such Right. *Spinoza's* Conclusion therefore is false, *Amongst Men, as they are consider'd to live only under the Command of Reason; he who is not come to a Knowledge of Reason, or who has not yet acquir'd a Habit of Virtue, doth as well by the highest Right live according to the Laws of his Appetite, as he who directs his Life by the Laws of Reason. That is, as a wise Man has the highest Right to all things which Reason suggests, or according to the rational Laws of living; so an ignorant and senseless Person has the highest Right to all things which his Appetite affects, or according to the Laws of living by Appetite.* But now the natural

³ In Reality, the meer physical Power of doing a Thing, does not prove that we are indispensibly obliged to do it, nor that we can lawfully do it, if we will; at least, it supposes what is in Question, that a physical and moral Power are one and the same Thing.

⁴ We may see plainly enough that *Spinoza* does not acknowledge a **GOD**, or such an intelligent Being as is altogether perfect. What he calls God is nothing but the World, which he supposes eternal, and not created.

⁵ See §. v. below, and the following Chapter, where Society is treated of.

⁶ This is so true, that Mr. *Hobbes*, whose Notions, at the Bottom, are not much distant from *Spinoza's*, makes a Necessity to come to some Agreements, which according to him are the Foundation of Justice, upon which it could not be possible to preserve ourselves, by making use of that boundless Right about every thing, and against all Men. See his Book *de Cive*, Ch. i. §. 11. 13. and Ch. ii. §. 3. *Spinoza* himself, as our Author observes at the End of this Paragraph, asserts, *That it is more advantageous to follow the Maxims of Reason, than the Desires of Nature only.*

State or the Command and Dominion of Nature, supposes Reason in Men, nor are other Laws prescrib'd to the Sagacious, and others to the Simple. Those who are govern'd purely by Appetite, are Subjects incapable of Right or Law. But when the Appetite in Men proceeds contrary to their Reason, they are so far from living by any Right, or by any Laws, that they are continually guilty of transgressing the Laws. The Corollaries which he deduces are no truer than the foregoing Propositions. *The natural Right of each Man is not determin'd by sound Reason, but by Desire and by Power. For all Men are not naturally determin'd to operate according to the Rules and the Laws of Reason; but on the contrary, all are born ignorant of all Things, and before they can attain to know the true and rational Way of Living, and acquire the Habit of Virtue, a great Part of their Age (altho' they have been well educated) passes away; and yet notwithstanding all this, they are in the mean time bound to live, and to preserve themselves to the best of their Power; and this Obligation is fulfilled by obeying the sole Motion of their Appetite, since Nature has yet given them no other Guide, denying them the actual Power of living by sound Reason; and therefore they are no more oblig'd to live by the Laws of true Sense and Judgment, than a Cat is oblig'd to live by such Laws as are proper only to the Nature of a Lion.* For to make a Man oblig'd to live according to Reason, it is not necessary that he should be *naturally determin'd* to act according to the Laws of Reason, that is, that he should not be able to act otherwise; but it is sufficient, that he has so much natural Power, as may enable him to abstain from bringing Injuries and Troubles on other Men; than which nothing in the World can be more easy. Neither is the Manner and Method of preserving himself so very difficult and laborious, as to make him stand in need of a Right to all Things. And then from him who through Defect of Age is yet in absolute Ignorance, none can require a more accurate Direction of his Proceedings, than is consistent with his low Capacity, and his small and feeble Efforts of Reason. But that what is done in this State of Simplicity may not prove very hurtful or troublesome to others, Nature has carefully provided; by giving it so little Strength of its own, and by commending the Care and Guidance of it to those of maturer Years. The following Inference is as false as the former. *Whatever therefore any one, consider'd only under the Command and Guidance of Nature, shall judge convenient for himself, either by the Direction of Reason, or by the Impulse of his Passions, this by the highest natural Right he may desire, and may seize upon by whatever means he can, whether by Force, or by Fraud, or by Entreaty, or the easiest way he can think of; and consequently he may reckon every one his Enemy, who would hinder him from satisfying his Inclinations.* As also this, *Whence it follows, that the Right and the Institution of Nature, under which all are Born, and the most part Live, is averse to nothing, besides that which none can desire, and which none can hinder; not to Contentions, not to Hatred, not to Anger, not to Deceit, nor absolutely*

to any thing which it's possible for the Appetite to pursue. This Assertion, if applied to Men, is manifestly false and absurd. But if it includes all living Creatures, and be meant in this Sense, that there is no Way or Manner of Self-preservation, which some animate Being doth not follow and make Use of, out of natural Instinct, then it is nothing to the Purpose; since the only Question is, whether Men have such a Right to all Things, as they may use against all other Men. But that *Spinoza* intended the latter Sense, is evident from what follows, *And no wonder, for Nature is not restrain'd to the Laws of human Reason, which concern only the true Profit and Preservation of Men; but comprehends an Infinity of other Things, which fall under the universal Order of all Nature, of which Man is but a little Part.* He afterwards confesses, that it is more convenient for Men to live according to the Laws and infallible Dictates of Reason, which point out their true Interest and Advantage. But then what occasion was there for the feigning of such a Right, as Man, if he intended to be safe, must necessarily relinquish; while other Animals, which exercise a kind of Right to all things, lie under no necessity of quitting it for their own Preservation? Neither indeed, could such an absurd Abdication be necessary for Man, upon supposal, that Nature had invest'd him with the same Right.

IV. We are ready to acknowledge it for a most certain Truth, that all Mankind did never exist together in a mere natural State: Inasmuch as upon the divine Authority of the Scriptures, we believe all human Race to have proceeded from one original Pair. Now it's plain that *Eve* was subject to *Adam*, *Gen. iii. 16.* and those who were born of these primitive Parents, and so on, did immediately fall under paternal Authority, and under Family Government. But such a State might have befallen Mankind, if, as some of the Heathens believ'd, they had, in the beginning of their Being, leapt out of the Earth like Frogs, or had come up from Seed, like *Cadmus's* human Crop, *Ovid. Metamorph. Lib. iii. ver. 122, 123.* Which Fable is, methinks, a very exact Representation of that State of Nature, and of that War of all Men against all, which *Mr. Hobbes* would introduce; where

————— *fuit omnis turba, suorum;
Marte cadunt subiti per mutua vulnera fratres.*

Rage hurries all; and in so blind a Fray,
The sudden Brothers fall a mutual Prey.

A State of Nature then did never naturally exist, unless qualified, and, as it were, in Part; namely, while some Party of Men join'd with some more in a civil Body, or in some Confederacy like that; but still retain'd a natural Liberty against all others. (Tho' it must be own'd that the more and the smaller those Societies were, into which Men at first divided, the nearer Approach was made to a meer natural State. * Thus

* S. IV. † The three Sentences following, in my Opinion, are unfitly placed, and may better be ranged thus, Thus in the primitive Age — Liberty, And when of Old Mankind — among Men, Therefore not the first Mortals, &c. Let the Reader judge.

of Old, when Mankind were parted into distinct Families, and now since they are fallen into separate Communities, those might have been then, and may now be said to live mutually in a State of Nature, neither of whom obey the others, and who do not acknowledge any common Master among Men. Thus in the primitive Age, when Brethren left their Father's House, and set up particular Families for themselves independent from any other, then they began to live in a natural State or Liberty. Therefore not the first Mortals, but their Offspring, did actually exist in such a State. Now a State of Nature thus temper'd and qualified, is attended with none of those Inconveniences which follow a meer natural Liberty, especially if we apply it to publick Communities: And besides, it passes for the highest Pitch of Honour amongst Mortals, by Virtue of the united Strength of the whole publick Body, to acknowledge no earthly Superior. So that Commonwealths, and the Governors of them, may fairly declare themselves to be in a State of natural Liberty, while they are furnish'd with sufficient Strength to secure the Exercise of that grand Privilege. Whereas, when Men live singly in a meer natural State, it is no manner of Pleasure or Advantage to them to own no Superior; inasmuch as upon account of their own small Force and Ability, their Safety must needs be in perpetual Doubt and Danger.

There are some indeed who maintain with great Eagerness, that such a natural State either doth not at all exist, or is not rightly call'd natural, and they form their Argument in the following Manner. Nature inclines Men to an orderly Society or Fellowship; now there being no such thing as Order without Government, it follows that there can be no Society without Government, and that therefore Government or Command ought rather to be shild Natural than Liberty. To strengthen this Assertion, they alledge the Authority of Cicero, * Nothing (says he, *De Leg. Lib. iii. Ch. i.*) is so agreeable to the Right and to the Condition of Nature, as Government: Without which no House, no State, no Nation, not human Race in General, not the universal Nature of Things, not the World it self could stand. For the World obeys GOD, and the Seas and the Earth obey the superior Frame of the World, and the Life of Man is led in Conformity to the High and the Sovereign Law. Hence they bring a general Accusation against Mr. Hobbes, for feigning such a State under the Name of Natural, as is unworthy of human Nature, and more agreeable to that of Beasts, who are ignorant of Reason and of Speech. For that all Men have a Liberty of doing, of desiring, of possessing all Things, no Reason, no Nature truly and rightly judging can advise. Such Inclinations may indeed flow from depraved Nature, but cannot be the Dictates of right Reason, which by desiring Society, doth at the same time desire an Order in Society, and by that means cuts off all such licentious and irregular Motions. For what Order can be conceiv'd without tending

to some first and principal Point? This first and principal Point must be Government, or the Sovereign Power in Society, without Regard to which, no Society can be desir'd by thinking and speaking Beings. Nature itself instructs us, That Government is essential to all Society, but that such a Liberty as excludes all Government, tends to unnatural Confusion. Add. *Bœcler. ad Grot. Proleg.*

What may be return'd in answer to all this Process of Argument, is clear from the preceding Doctrine. A meer natural State is a Representation of Mens Condition abstracting from all human Institution; but doth not suppose that Nature intended Man for such a Way of Life. For by the same Allowance of Expression, an entire Ignorance of all things may be said to be natural to Man, or to be born with him; without implying any such thing as that it should be repugnant to Nature for Men to acquire very high Degrees of Knowledge. Besides, we have been so cautious as to attribute no such natural Liberty to Man, as shall be exempt from the Obligation of natural Law, or of divine Commands. But such a Liberty as excludes all human Sovereignty and Superiority cannot be said to contradict Nature, any more than it can be said to reach as far as Infinite itself. Government indeed is Natural; that is, it was the Design of Nature that Men should constitute Governments amongst themselves. But this doth not make it e'er the less Natural, that he who himself bears the supreme Government and Command amongst Men, should himself be exempt from all other human Command, and in that Sense should enjoy a natural Liberty: Unless in the same Order, we can fancy somewhat before the first, somewhat superior to the Supreme. Upon the same Account it is in general very agreeable to Nature, that he who hath no Lord or Master should govern himself and his Actions by the Guidance of his private Reason.

V. There is a Dispute of much greater Consequence, whether this natural State, in Regard to other Men, bears the Semblance of War or of Peace: Or, which comes to the same Thing, whether they who live in a State of Nature, that is, who do neither obey one another nor own a common Lord, ought to be reckon'd Enemies amongst themselves, or quiet and peaceful Friends? And here our first and chief Business must be to examine the Opinion of Mr. Hobbes, who as he calls his meer natural State not a single War, but a War of all Men against all, so he maintains, that when some Men have agreed to enter into Society, they immediately quit their hostile State in Regard to one another, but still continue against all the rest of the World. Thus in his Book *de Cine, Ch. ix. §. 3.* Every Man is an Enemy to every Man whom he neither serves nor obeys. (He ought to have added, and with whom he has no common Master.) And again, *Ch. xiii. §. 7.* The State of Commonwealths amongst themselves is Natural, that is, Hostile. And tho' they cease to fight, yet this Intermision must not be call'd a Peace,

³ See Plato concerning this whole Matter, *De Legib. Lib. 3.* a good way from the Beginning. P. 680, 681. Tom. ii. Ed. Steph. and Aristotle's *Politics, Lib. i. Ch. ii.* p. 297. Edit. Paris.

⁴ He means by it the Law. These are his Words, *Nihil porro tam aptum est ad jus, conditionemque nature (quod cum dico, legem à me dici, & nihil aliud intelligi volo) quam imperium, sine quo nec domus ulla, nec civitas, nec gens, nec hominum universum genus stare, nec rerum natura omnis, nec ipse mundus potest. Nam & hic Deo parat, & huic obediunt maria, terraque, & hominum vita jussis supreme legis obtemperat.*

⁵ See *Ch. iii. §. 13,* and 16, following, at the beginning.

but a Breathing-time, during which each Enemy, observing the Motions and the Countenance of the other, rates his Security, not by Covenants, but by the Strength and Designs of his Adversary. (He should have added, and by his own Force^a.) He adds, in his *Leviathan*, Ch. xiii. *That War consists not in Battle only, or the Act of Fighting, but in a Tract of Time wherein the Will to contend in Battle is sufficiently known: And that therefore the Notion of Time is to be consider'd in the Nature of War as in the Nature of Weather. For as the foul Weather lieth not in a Shower or two of Rain, but in an Inclination thereto for many Days together: So the Nature of War consists not in actual Fighting; but in the known Disposition thereto, during all the Time there is no Assurance to the contrary.* Nor indeed was Mr. Hobbes the first Inventor of these Notions; for we meet with somewhat much of the same Strain in *Plato's* First Book of Laws; where *Clinias*, a *Cretan*, is giving the Reasons why the Law-giver of that Country introduc'd a great Number of Ordinances in Reference to military Affairs, he concludes, *'By which Conduct he seems to me to have accus'd many Men of extreme Folly and Ignorance, in their not being sensible, that all Cities are in a perpetual War with all. And that which we call Peace is no more than a bare Name, while in Reality Nature has set all Communities in an unproclaim'd War against one another.*

We may observe, by the Way, that some Authors have given a very unaccurate Explication of this great Question; while they tell us, that by a natural State is understood that Condition by which we are conceiv'd to live singly, or out of Society; and that this is a State of War, that is, of Inclination to possess what another hath, and to drive the Owner from it; so that their whole Meaning amounts to this, that if Men liv'd without all Society, they would be engag'd in a perpetual Quarrel; or, if Men did not lead a Social Life, they would continue in a State of endless Discord. But now here's a great Impropriety committed, the opposing a State of Nature to a social Life; for those who live in a State of Nature both may, and ought, and frequently do, consent to live Socially.

^a Just as *Oppian* describes the State of Fishes, *Halicut*. Lib. ii.

In mutual War they swim, and mutual Hate,
The Weak the Strong, the Smaller feed the Great:
Destructive Rage boils in the restless Flood;
Each frights and fears, pursues and is pursu'd.

And hence the scaly Tribes, with wakeful Eyes,
Still watch, and live, and die upon Surprise.
Unfixt, unwearied, all their Age they stray,
In Hopes, or Fears, to find, or prove a Prey.

^b *Seneca de Ira*. Lib. i. Ch. iii. *There is no one so low or contemptible, who may not hope to wreak his Revenge on the greatest Person. We are all strong enough to do Mischief.*

^c It is very probable there may be some Person like *Achilles*,

Jura negat sibi nata, nihil non arrogat armis.

Or like those whom *Manilius* describes,

*Nec pacem a bello, civem discernit ab hoste,
Ipse sibi lex est, & qua fert cunque libido,
Præcipitat vires: laus est contendere cumitis.*

| Scorning all Judges and all Law but Arms.

Who make no Difference between War and Peace,
But Friends and Foes with equal Fury seize,
They every Thing to wild Condition draw;
Their Will their Ruler, and their Sword their Law.
They scorn that Rest which private Minds enjoy,
But fawn upon the Crowd, and court Employ,
Love Noise, and Stirs, and Tumults—— M. CREECH.

§. v. ^a *Plato's* Words are, *'Ανοιον δὴ μοι δοκί καταγρῆναι τῶ ποδῶν, ὡς ἔ μανθανόντων, ὅτι πόλεμος αἰετῶσι δια βίε ζυωχῆς ἐστὶ πρὸς ἀπάσας τὰς πόλεις——* ἢ ἢ καλῶσι οἱ πλῆσοι τῶν ἀνθρώπων εἰρήνην, τῶν ἔναι μόνον ὄνομα, τῶν δ' ἔργον πάσαις πρὸς πάσας τὰς πόλεις αἰετῶν πόλεμον ἀκίρυκτον κατὰ φύσιν ἔναι. *De legibus*. Lib. i. princ.

§. vi. ^a *Seneca's* Words are, *Deinde nemo tam humilis est, qui poenam vel summi hominis sperare non possit. Ad nocendum potentes sumus.* We may add what *Curtius* delivers in a Speech to the *Scythians*, *Leo quoque aliquando minimarum avium fabulum fuit. Nihil tam firmum est, cui periculum non sit etiam ab invalido*, Lib. vii. Ch. viii. Num. 15.

hurting

hurting arises frequently from the Contention of Wit, while every Man thinks himself wiser than his Fellows; and yet at the same time cannot bear the same Arrogance in others. Hence, he says, it comes to pass that it is not only odious to contradict, but likewise not to consent: For not to consent to another in a Thing, is tacitly to accuse him of Error in that Matter; and to dissent in very many Things, is as much as to count him a Fool, in not being able to apprehend such an evident Truth, as every one takes his own Opinion to be. Hence since all Pleasure and Satisfaction of Mind consists in this, that one be able to prefer one's self to others, 'tis impossible but that now and then some Signs of Contempt towards others will break out; than which no Affront is more provoking to human Minds. The last and most frequent Cause of a mutual Desire of hurting, arises, according to *Hobbes*, from hence, that many desire one and the same Thing at once, which frequently they neither can nor will enjoy in common, nor yet divide: From whence it follows, that it must be given to the stronger; and who is the stronger, can only be known by Fighting. Upon all these Accounts he declares it to be impossible but that Men should live in perpetual Fear and Suspicion of one another. And that since not only natural Passion but Reason too, recommends to every Man his own Safety in the highest Manner, and indulges him in the Use of all Means for the attaining of that End, the Fitness of which, no Superior being yet admitted, is to be determin'd by each Man's particular Judgment; hence there must necessarily arise a Desire rather of preventing others, than of yielding to their Invasion: From whence there will at last result a State of infinite War, of all Men against all; the Consequence of which is, that it shall be lawful for any Man to do to any Man, either secretly or openly, whatever he shall think expedient for his own Affairs: In doing which, altho' his Reason should sometimes fail him, yet he would not offer an Injury to any Body, since

Justice and Injustice have nothing to do but with Societies and establish'd Corporations: Tho' a Man may indeed sin against Reason, by using unfit Means for his own Preservation.

VII. These Notions are in some Measure tolerable, if propos'd only by way of Hypothesis. And that *Hobbes* design'd them for nothing more, we may be apt to conclude from those Words in the eighth Chapter of his Book *De Cive*; *But to return again to a natural State, and to consider Men as if they were just now risen out of the Earth like a Musbrome, and of full Stature without any manner of Obligation to one another.* Yet in the 13th Chapter of the same Book, and frequently in other Places, he calls the State of publick Bodies, not by way of Supposition, but seriously and absolutely, *natural*, that is, as he explains it, *hostile*. Which seeming Contrariety we may do him the Justice thus to reconcile; it shall be pure Hypothesis, that all Men did at any time live together in such a State of Nature, as they would have done if they had risen suddenly in a great Multitude from the Earth: But what he seriously maintains shall be only this, that such a natural State doth really exist amongst some Men; that is, amongst such as are neither subject one to the other, nor to a common Master, as is now the Case of all establish'd Communities. And this indeed is his own Judgment, as he has moderated it in his *Leviathan*. *Tho' (says he) there never had been any Time, wherein particular Men were in a Condition of War one against another; yet in all Times, Kings and Persons of Sovereign Authority, because of their Independency, are in continual Jealousies, and in the State and Posture of Gladiators, &c.*

But the contrary Opinion seems more reasonable, as what is clearly favour'd by the Origin of Mankind, as related in the infallible Records of holy Scripture; which represent the natural State of Man, not hostile, but peaceful, and shew that Men in their true Condition are rather hearty Friends than spiteful Foes. From these sacred Histories we learn, that the first Man being by

^a Cicero Off. i. Ch. xxvii. *Contraque falli, errare, labi, decipi tam dedecet, quam delirare, & mente esse captum. To be mistaken, deceiv'd, or put upon, is reckon'd no less Disgrace, than to doat, or to be out of one's Wits.* Hora. Ep. i. Lib. ii.

*Vel quia nil rectum, nisi quod placuit sibi, ducunt;
Vel quia turpe putant, parere minoribus, & que
Imberbes didicere, senes perdenda fateri.*

Juvenal. Sat. xv.

Or making their own Taste the Rule of Wit;
Or to their Juniors scornful to submit;
That what they beardless learnt, All Beard they should forget.

*Summus utrinque
Inle furor vulgo, quod numina vicinorum
Olit uterque locus, quia solos credit habendos
Esse Deos quos ipse colit.*

In furious Anger they each other mock;
Each calls the other's God a senseless Stock,
His own divine, tho' from the felt-same Block,
One Carver fram'd them ————— Mr. TATE.

^b Cicero Off. i. *Nam quicquid eiusmodi est, in quo non possint plures excellere, in eo sit plerumque tanta contentio, ut difficillimum sit, sanctam servare societatem. Whatever is of that Nature, as not to admit more than one to excel in it at the same Time, usually proveth the Subject of so much Strife and Contention, as exceedingly to endanger the sacred Peace of Society. Sic ista in Græcorum levitate perversitas, qui maledictis insectantur eos a quibus de veritate dissentiunt. Cicero de bon. & mal. Lib. ii. Chap. xxv. It is a Perverseness not peculiar to the Grecian Levity, to reproach those from whom they differ in Opinion. See also Charron of Wisdom, Lib. i. Chap. vii. Edit. Bourd. Thus Socrates discourseth, Xenophon. Apomem. Lib. i. *Ἐστὶ γὰρ ἔχθρη οἱ ἀνθρώποι τὰ ἢ φιλικὰ (δοῦμαι γὰρ ἀλλήλων, καὶ ἐλεῖσι, καὶ συμπροσέτισι ἀφίστασι, καὶ τῆσσι σωματικῆς χάριτι ἔχθρη ἀλλήλων) τὰτε πολεμικὰ, τὰτε γὰρ αὐτὰ καλὰ καὶ ἴδια νομίζοντες. ὡσεὶ τῶνται μετῴνται, καὶ διαφορημωμένους ἐναντιῶνται, πολεμικὴν δὲ καὶ ἐχθρὴν καὶ ὄργην, καὶ εὐσφῆν μὴ ὁ τὰ πλεονεκτητῆ ἔως, μετῴνται δὲ ὁ φιλία.* Men have partly a natural Propension to Friendship. For they stand in need of each other's Assistance, and are comforted with each other's Pity, and make the Return of mutual Thanks, upon receiving mutual Helps and Favours. And partly they are inclin'd to Enmity; for taking a Fancy to the same Things, as good and pleasant, they must needs fall into Quarrel and Opposition about them. Now Anger and Contention are the proper Marks and Characters of Enemies. And then Envy, and Suspicion, and Covetousness never fail to produce the most violent Hatred. Seneca de Ira Lib. iii. Ch. xxxiv. *The desiring the same Thing, which ought to be the Band of Love and Friendship, is often the Cause of Hatred and Sedition. For these which they affect being perhaps small, and not to be possess'd by one, unless he can take them forcibly from another, administer Occasion to fighting and reviling.* Add. Charron de la Sageſſe. Lib. i. Ch. xxxix. N. 8.*

divine Power produc'd out of the Earth, a Companion was soon join'd to him different in Sex, whose Substance was therefore taken out of him, to engage him immediately in the deepest Love and Affection for her, as being *Bone of his Bone, and Flesh of his Flesh*. This primitive and original Couple GOD Almighty was pleas'd to unite in the most solemn Manner, and with the most sacred Tie; and since from them all human Race orderly descended, we may conceive Mankind mutually engag'd, not only by such a vulgar Friendship as might result from Similitude of Nature^a, but by such a tender Affection as endears Persons allied by a Nearness of Race and of Blood: Altho' the Sense of this kind Passion may be almost worn off amongst the Descendants, by Reason of their great Distance from the common Stock. Now if any Man should pretend to divest himself of this Affection, and entertain a Temper of Hostility against all others, he ought to be censur'd as a Revolver from the primitive and natural State of Mankind. Nor will it signify much here to object, that even from this Account of Matters it follows, that the natural State of Men is a State of War; in as much as if Societies were therefore instituted at the Beginning of the World, to make Men live peaceably together, it must be true on the contrary Side, that without Societies, Men would not have liv'd peaceably, and that hence arose the Necessity of making Societies be born with them. To which we reply; that our present Enquiries are not made after such a natural State, as may be conceiv'd by the Help of Abstraction, but after such an one as really has been and is now in the World. And that therefore, since the first Mortals were plac'd in such a State as inspir'd them with Love, and not with Enmity, and since from this State all the rest of Mankind descended, it is plain if Men were mindful of their first Original, they might be rather accounted Friends than Foes. Nor were Societies therefore establish'd amongst Men from the Beginning, to hinder a natural State from taking Place, but because human Kind could not otherwise have been propagated and preserv'd. But a State of Nature did then arise, when Men being largely multiplied could no longer be contain'd in one Society². Hence it's Nonsense to say that without the Help of a social Condition, Mankind at the Beginning of their Being would have liv'd like Enemies one to another, unless we first suppose, that in the

Beginning of Things a Multitude of Men started up together, without being beholden to one another for their Production. *Aristot. Rhetor. Lib. i. Ch. xi*^b. *Because whatever is according to Nature, is pleasant and agreeable, and because those Things which are allied in their Original have a natural Resemblance to each other, all Things that are thus related, and thus alike, are, commonly speaking, as mutually delightful as Man to Man.* Cicero De Fin. Lib. iii. Ch. xix. *Nature hath given Men an universal Recommendation to each other; on which account, every Man owes so much to his Neighbour barely for the sake of being a Man like himself, as should hinder him from shewing any Unkindness or Strangeness.* Idem De Nat. Deor. Lib. i. Ch. xxvii. *Do you not see how full Nature is of Charms and Engagements, as if she intended to act the kind Procureess to herself? Do you imagine there is any Monster of Land or Sea, which is not delighted with the Fellow-Monster of its own Race and Shape? And is it any Wonder then, that she should have insill'd this Principle into Man (the most noble Member of her Family) to think nothing so beautiful as Man? Quintil. Declam. v. There is a publick, or universal, Kindred amongst Men, derived from Nature their common Mother.* Add. M. Antonin. Lib. ix. §. 9. Where he prosecutes at large the Argument of the Likeness of Nature, inclining Men to Unity and Love. Add. & D. Cumberland, De L. N. Ch. ii. §. 18. We must interpret only of particular Love and Hatred that Saying of *Belisarius in Procop. Hist. Vandal. Lib. ii. Ch. xv.* *By Nature Men have neither mutual Affection nor mutual Aversion. But their particular Actions, either by their Agreeableness inviting our Company and Friendship, or by their contrary Dispositions provoking our Hostility, render some the Objects of our Love, others of our Hate.*

VIII. As to Mr. *Hobbes's* Reasons, they are easily answer'd. In the first Place, those cannot immediately hurt one another, who are divided by Distance of Place; for he who is absent cannot hurt me, except by some Body else who is present, and my Possessions cannot be destroyed unless by one upon the Spot: Therefore, since those who live separately, or at a Distance from one another, can offer no mutual Hurt so long as they continue thus distant, it doth not appear why such Men should not rather be reckon'd Friends than Enemies. For if any Person is more inclin'd to call them *Neuters*, he ought to understand, that the Term of Friendship may be there fairly applied, where there is neither Will nor Power to injure¹. And then

^a And such is that spoken of in *Lib. iii. D. De Jusit. & Jure.* ^b This is contrary to Aristotle's Notion of Friendship, who makes it to consist, not only in doing no Injury to others, but in the real and outward Performance of Kindness towards them.

§. VII. ¹ The Original has it, *ne illi pacatè viverent, that they might not live in Peace.* A gross Contradiction, tho' it be continued in all the Editions, even that of Mr. *Hertius* in 1706, and therefore I have changed the Words, and rendred them, *That they might not live in perpetual Discord,* as the English has also.

² Tradition has preserv'd some plain Footsteps of it among the Pagans. See *Grot. de Ver. Rel. Christianæ Lib. i. §. 16.* and the Interpreters upon *Acts xvii. 26.*

³ The Greek of Aristotle is, *Και επί τὸ κατὰ φύσιν ἴδου, τὰ συγγενῆ δὲ κατὰ φύσιν ἀλλήλοις εἶναι, ἅπαντα τὰ συγγενῆ καὶ ὅμοια, κτλ. α, ὡς ἐπὶ τὸ πολὺ. οἷον αἰθρῶπος ἀνθρώπων, καὶ ἵππος ἵππων. καὶ ἄλλοι κτλ. — Cicero's Words are, *Ex hoc nascitur, ut etiam communis hominum inter homines naturalis sit commendatio, ut oporteat hominem ab homine, ob id ipsum quod homo sit, non alienum videri.* And again the same Author says, *Non videt quam blanda conciliatrix, & quasi sui sit lena Natura? An putas ullam esse terra marique belluam, que non sui generis bellui maxime deleatur?* — *Quid igitur mirum si hoc eodem modo homini natura prescripsit, ut nihil pulcrius, quam hominem pularet, eam esse causam quod Deos hominum similes putaremus?* *Belisarius's* Words in *Procopius* are, *ψοσι μὲν ἴδ, ἕδεις τῶν πάντων ἀνθρώπων οἰκίαις ἐν ἡ ἐνωπίαις ἀλλήλοις ἔχουσιν, αἱ δὲ πράξις ἐκαστων, ἢ τῶ ὁμοιότητι ἐς ζυμωχῶν σωμαπτασαι, ἢ τῶ διακρίσσει τῶ γρημῆς ἐς τὸ δυσπῆξις οἰακίαισσι, οἴαις (αἱ ἕταις τύχει) ἢ πολεμῆς ἀλλήλους ποῖσσι.**

§. VIII. ¹ The Original imports, Word for Word, by the Will and Power not to hurt; but since our Author treats here of such Men as are not in a Condition to do Injuries one to another, tho' they have a Desire to do it, I believe that this Sentence may be better translated, *A simple Want, if a Desire to hurt, joined with an Impossibility to do it actually, may pass for Friendship.*

as for that Equality of Strength which *Hobbes* asserts, it is certainly more ^a ² fit to restrain, than to provoke a Desire of hurting. For no Man in his Wits is very fond of coming to an Encounter with his Equal, unless he is either driven upon it by Necessity, or by the Fairness of the Opportunity put in Hopes of Success. Otherwise, to engage in an unnecessary Fight, where the Blows one gives will be return'd with no less Force, and where the Event is merely dubious; is no better than Foolhardiness. For when two equal Combatants are so far engag'd as to put both their Lives in Danger, neither of them can possibly gain so much by the Victory, as he must lose who is kill'd in the Fight; nor is it so much to have taken away another's Life, as to have hazarded one's own. For the Danger to which I expose my Life, takes from me more Good, than can possibly accrue to me from my Enemy's Life being in the same Danger; nor is his Safety increas'd upon account ³ of the Uncertainty of mine: But each Party is a Loser, and yet the Loss of neither turns to the Advantage of the other.

Besides, the Causes alleg'd by Mr. *Hobbes*, why Men must have a mutual Desire of hurting, are only particular, and therefore cannot infer a Necessity of an universal War of all Men against all, but only a War of some particular Men against some others. And then it doth not always happen, as he would suppose, that modest and civil Men should have a more fierce and insolent Generation living near them; or if the Case be so, yet it is not necessary that the latter should be in a Humour of invading the former. *Contention of Wit* prevails only amongst Men exalted above the ordinary Level; the greater and vulgar Part of Mankind have none, or but very slight Touches of that Disease. Nor has the All-wise Creator been so unkind, or so sparing in his Provisions for human Race, that two Persons must always lay Claim to the same Thing. Farther, the general Wickedness of Men may have so much Effect as to hinder any one from rashly thrusting, or offering (as it were) his bare Breast to another, especially if he has not a Knowledge of him ^b ⁴. But, that this Suspicion or Diffidence should proceed so far as to the seizing, or the oppressing another, unless he hath declar'd a particular Desire and De-

sign to hurt us, no Man of Sense will admit ⁵. *Cicero* (*Off.* i. 7.) rightly calls it, an *Injury out of Fear*, when he that is contriving to do another Man *Mischief*, doth it by way of *Prevention*, suspecting he should otherwise suffer Hurt from the Quarter where he now offers it. *Hobbes* is the more inexcusable for maintaining that his natural State cannot be remov'd and broken up, but by letting in the Sovereignty of another, and by uniting in the same Commonwealth: For that those Commonwealths, how distinct soever, which are allied by Friendship and by Leagues, should still continue in a State of mutual War, is a Contradiction evident to the common Sense of Mankind. Nor should we (as he would have us) discard all Peace, as not deserving that Name, which is not sufficiently firm and certain, any more than we should forbear saying, that such a Man is in Grace and Favour with another, because the Wills of Men are subject to continual Alterations.

IX. We must likewise take special Care to observe, that we are not disputing about the natural State of a meer Animal, govern'd by the sole Impulse and Inclination of the sensitive Soul; but of an Animal whose noblest and chiefest Part is Reason, the Sovereign and Controller of all other Faculties; and which, even in a natural State, has a common, a firm, and an uniform Measure to go by; namely, the *Nature of Things*; which, lastly, is very free and ready in offering itself, so far as to instruct us in the general Precepts of Living, and the Dictates of natural Law. And those who would rightly design and represent a State of Nature, ought by no Means to exclude the just Use of this Reason, but should join it with the Operations of the other Faculties. Forasmuch then as Man has not only the rash Cry of his Lufts, but also the sober Voice of Reason (not measuring itself purely by private Interest) to hearken to, if his wild Affections incite him to a War, such as that extravagant one of all Men against all, his Reason will be more powerful in dissuading him from it; and that chiefly by giving him these two Intimations, that a War undertaken without Provocation from the other Party, is both ¹ unseemly and unprofitable. For it is easy for any Man to gather thus much, that he did not exist of himself, but was produc'd by some Super-

¹ See D. *Cumberland De L. N. Ch. ii. §. 29.* Thus the *Scythians* argue in *Q. Curtius, Lib. vii. Ch. viii.* *The firmest Friendship is between Equals, and those seem properly to be Equals, who have not made Experience of each other's Strength.* So *Cesar* (*De B. C. Lib. iii. Ch. x.*) admonisheth *Pompey*, that *this was the only Time to treat of Peace, whilst both seem'd Equals, and each had good Confidence of his own Power.* *Florus* makes the like Remark on another Occasion. *The Romans and the Parthians*, says he, *having try'd their Force against each other, and Crassus on the Side of the former, and Pacorus of the latter, having given them Examples of their mutual Abilities, they renew'd their antient Friendship with equal Deference and Respect.* In *Thucydides, Lib. iii. §. 11. Edit. Oxf.* *Mutual Fear* is asserted to be the surest Guard of States, because on either Side the doubting of their Safety would keep them from any open Attempt of Violence, though it were never so much in their Desires. ^b *Plautus Asinar.* *A Man doth not shew himself a Man, but a Wolf, to another whose Temper and Designs he is not acquainted with.*

² In the *Latin* of *Q. Curtius* the *Scythians* thus speak to *Alexander*, *Nam & formissima est inter Pares amicitia, & videntur pares esse, qui non fecerunt inter se periculum virium.* *Cesar's* Words are, *Hoc unum esse tempus de pace agendi, dum sibi utroque consideret, & pares ambo viderentur.* The Words of the *Embassadors* of *Mitylene* in *Thucydides*, are these, *ὅτι ἐς ἀντιπαλον δεος, μὲν οὐκ ἐς ἐχθρομαχίαν, ὁ δὲ παραεὐνήθη βελήμπος τῶν* [and not τῶν as it is commonly read] *μη ἀμελεῖν ἐν ἰπ: ἄθειν δὲπρεσεται.*

³ The Original in most of the Editions runs thus, *Quoniam inde certa est metus*, which imports a contrary Sense than the Author seems to intend, but in the Edition of *Frankfort* the Reading is true, *inde incerta*, as it is in *Dr. Cumberland*, from whence this Sentence is taken; and so I have translated it, as also doth the *English* Translator.

⁴ See *Chapter v. §. 6.* and *Lib. iii. Ch. vi. §. 9.* and *Lib. viii. Ch. v. Note 3.* following.

⁵ *Cicero's* Words are, *Atque illa quidem injuria, que nocendi causa de industria inferantur, sive a metu proficiscuntur, quum is, qui nocere alteri cogitat, timet, ne si id fecerit, ipse aliquo afficiatur incommodo.*

§. 18. ³ It is in the Original, *inutile*, but the Sequel makes it evident, that it ought to be understood, *hurtful and prejudicial*, and not barely, *unseemly and unprofitable.* See *Note 1.* upon §. 7. of *Chap. iii. Lib. 1.*

rior, who consequently retains a Power and Authority over him. And when he finds himself spurr'd on as it were by a double Principle, of which one is wholly fix'd on Things present, the other can embrace in its Thought what is absent or future; of which one drives him furiously on Dangers, Doubts, and Disorders, the other conducts him to nothing but what is comely and safe; he will conclude without any Difficulty, that 'tis the Pleasure of his Creator, he should rather follow the latter Guide than the former. And when to this Consideration is added, the exceeding great Benefit and Advantage of that quiet Condition which Reason advises, a Man cannot but naturally incline to Peace. Especially, since if at any Time he should happen to neglect his Reason, and follow his blind Passions, he would find by the sad Event that he took the wrong Measures, and would be ready to wish those Things to be undone, which were done against the Orders and Directions of his noblest Faculty. From all which we conclude, that the natural State of Men, altho' they be consider'd as not united in Commonwealths, is not War, but Peace. And this Peace chiefly depends on the following Laws and Conditions; that no Man hurt another, who doth not assault and provoke him; that every one allow others to enjoy their own Goods and Possessions; that he faithfully perform whatever shall be covenanted for, and voluntarily promote the Interest and Happiness of others, in all Cases where a stricter Obligation doth not interfere. For since the natural State of Man includes the Use of Reason, we must by no Means separate from it those Obligations which Reason tells us we lie under. And because every Man may discover it to be most for his Interest and Advantage, so to manage his Behaviour, as to procure rather the Benevolence, than the Enmity of others; he may easily presume from the Likeness of Nature, that other Men have the same Sentiments about the Point as himself. Therefore it is very foul Play, in describing this imaginary State, to suppose that all Men, or however, the greatest Part of them do act with Disregard and Defiance to Reason, which is by Nature constituted supreme Directress of human Proceedings; and such a State cannot, without the highest Absurdity, be call'd *natural*, which owes its Production to the Neglect, or to the Abuse of the natural Principle in Man ^a.

X. It will be in vain for any one here to object, the strange Barbarity which reign'd among most of the antient Nations and People; who seem to have had scarce any other Pleasure, or any other Business, but the Pursuits of Plunder and ¹ Prey; and amongst whom Robbery pass'd for one of the particular Professions and Ways of Living. For thus Aristotle in his Politicks, reckoning up the several Callings or Lives of the Herdmen, the Husbandmen, the Fishermen and the Hunters, adds to the rest the βίη ληστεικῆς, the Life of Thieves. And afterwards, War is in some sort a natural Way of acquiring Possession. For Hunting, or violently pursuing, is one of its chief Parts; and this may not only be used against Beasts, but likewise against such Men as, tho' they were born to obey, do

yet refuse Subjection. We have numerous Testimonies to this Purpose in antient Writers. *Vid. Homer. Odyss. iii. v. 73. and Odyss. ix. v. 252.* on which Place Didymus tells us, that the Profession of Robbers amongst the Antients was not infamous but glorious. *Diodor. Sic. Lib. iii. Ch. xlix.* The Libyans on no Account observe any manner of Right, or any manner of Faith towards Strangers. *Cæsar* reports of the Germans, that those Robberies do not fall under Censure or Reproach, which are practis'd beyond the Bounds of each particular State: And the Excuse they alledge for them is, That they serve for the Exercise of Youth, and the Discouragement of Idleness. *De B. G. Lib. vi.* He tells us farther, That every State reckon'd it the greatest Honour and Glory to have as large Solitudes round them as possible, caus'd by their own Devastations: esteeming it a noble Testimony of their Valour, that their Neighbours were forc'd to quit the Country, and that none are so hardy as to live near them. *Mela, Lib. iii. Ch. iii.* gives the like Account of the Germans in general; but Tacitus speaks in manner only of the *Vendredi*, a particular People amongst them. Of the Spaniards, *Plutarch* (in *Mario*) reports, that Robberies pass'd amongst them till that Time for gallant Adventures. And *Thucydides* says as much of the antient Grecians, *Lib. i.* To the same Purpose some produce the Roman Law (*l. ult. D. De Colleg.*) where those Covenants are declar'd valid which pass between τῶν ἐπὶ λείαν ἐρχομένων, or ἐιχομένων, Persons who unite on the account of Booty or Prey. Tho' *Salmasius, de Usuris Lib. i. Ch. xii.* corrects the antient Reading into εἰς κατήλειαν, on the account of a drinking Match. *Polybius, Lib. iii.* mentions it as a Clause in a League between the Romans and Carthaginians, that the former should neither drive Booty to Massia and Tarfeium, beyond the fair Promontory, nor exercise Merchandize: As if both these Practices had been then esteem'd equally lawful. *Justin, Lib. xliii.* says of the People of Phocis, that they supported themselves by Piracy, which at that Time was look'd upon as Glory. *Sextus Empiric. Hypot. Lib. iii. Ch. xxiv.* To rob and spoil is reckon'd by no Means disgraceful amongst many of the barbarous Nations: Nay, the Cilicians are said to have accounted these Adventures most highly creditable and renown'd, so as to pay Honours to the Memory of such as died in their Prosecution. And Nestor, in the Poet, having kindly receiv'd Telemachus and his Company, asks them,

What, are you Rovers of the Plundering Trade—?

Now if Robbing had been then scandalous, it is not likely he would have entertain'd with so much Civility Persons whom he suspected of such a Course. *Lib. ii. D. De Captio & Postlim.* If there be a Nation, with which we have no Tye of Friendship, Hospitality, or League, we must not presently esteem them Enemies: Yet whatever of ours comes into their Possession belongs to them; and even a free Man of our Country, if taken by them becomes their Slave. *Comp. Lib. ex. viii. de verb. signific.* *Dio Cassius, Lib. liv.* speaking of the Rhetians, Often plundering, says he, their Neighbours the Gauls, they had driven Booty from the Borders of Italy, and had infested the Romans and their Allies in

^a This is most largely demonstrat'd by Bishop Cumberland, to whom the Reader is recommended for fuller Satisfaction.

§. x. ¹ Here our Author uses Virgil's Words, as he makes Numanus, surnam'd Romulus, to speak,

Semperque recentes
Conscelere juvat pradis, & vivere rapto. *Æneid. ix. v. 612, 613.*

their Passage through those Parts: And it was then a receiv'd Custom amongst them, to deal in this Manner with all those whom they were united to by solemn Leagues and Agreements. Mocrates (Panathen.) observes of the Triballians, *There are no Men who observe a stricter Concord amongst themselves; but then they endeavour utterly to destroy all besides; not only their Borderers and Neighbours, but any People to whom they can force an Access.* *Add. Grot. Lib. ii. Ch. xv. §. 5.* This ancient Hostility, amongst other Reasons that are given for it, might proceed, in a great measure, from the gross Superstition and Idolatry of those Nations, by which every People imagin'd themselves to have peculiar Gods, and those only true ones². *Vid. Juvenal. Sat. 15.*

In return to this vulgar Argument, 'tis sufficient to say, that in those blinder Ages of the World, the Dictates and Informations of sound Reason were choak'd and stifled by the Prevalency of corrupted Manners. Yet it doth not follow from hence, that there was no Man, even in those Nations, sensible enough to apprehend that the Laws of Nature were violated by this Course of Robberies and Spoils, or to disallow that State to be natural, into which wild and ungovernable Men had thrown themselves, in Neglect and in Contempt of the noblest Part of their Being. For that a promiscuous Liberty of Rapine doth not flow as a Consequence from a State of Nature, is evident, because the like ill Effect is not seen in the State which different Commonwealths now bear to one another, which is really natural. Nor must we admit what *Hobbes* farther asserts, that *supposing Matters stood thus, Robbery or Pillaging would be contrary to the Law of Nature.* For those who had plunder'd us in this Manner without Provocation, we might have treated with the like Violence, and have made Reprisals on their Possessions for the Loss of our own: But then we could not have shewn such rough Usage to a third Person, who had offer'd no Injury or Molestation to us before. The Impudence of some Persons, in breaking the Law of Nature, is no justifying Example for us to imitate. Nor is the Remark more tolerable which *Hobbes* subjoins, that *this Kind of Life was not without Glory to them who exercis'd it valiantly, and yet not cruelly. As it was the Custom of some, who laid violent Hands on every thing else, to spare the Persons Lives, and to pass by the ploughing Oxen, and all the Instruments of Husbandry. Which they did, not as if they were oblig'd to it by the Law of Nature, but purely consulting their own Glory, lest their Cruelty should betray their Cowardice.* A wondrous Glory indeed, to accomplish only half a Villany, when to have carried it through, would not have turn'd to so much Advantage!

XI. When we affirm that the Exercise of a Peace towards all Men *as such*, is the natural State of Man, we imply that it is instituted and

establish'd by bare Nature, without the Intervention of any human Deed; and that therefore it depends solely on that Obligation of natural Law by which Men are bound as they are reasonable Creatures; and doth not owe its first Introduction to the Agreement and Covenant of Men. Hence to us it seems useless to frame any Pacts or Leagues, barely for the Defence and Support of this Universal Peace¹. For by such a League or Bond, nothing is superadded to the Obligation of the Law of Nature; or, no Agreement is made for the Performance of any thing, which Men were not before by the Law of Nature bound to perform: Nor is the former Obligation rendred stricter or firmer by such an Addition. For we suppose both Parties to remain in a natural Equality, and consequently not to be held to their Covenant by any other Tie, than that of Reverence towards GOD Almighty, and Fear of such Evil as may fall on them if they break the Agreement. Though indeed there appears somewhat of Balencis and Foulencis in refusing a Thing which one has expressly engag'd to perform. As for the Power and Liberty which the injur'd Party hath, of proceeding against such a Violator of Nature's Law, this is altogether the same, whether any antecedent Covenant hath been made, or not. Men of any tolerable Culture and Civility must needs abhor the entering into any such Compact, the Heads and Conditions of which imply only thus much, that the Party concern'd shall not offend in some Point, which was before an express Command of Nature. Besides, we should be guilty of great Irreverence towards GOD, should we suppose, that his Injunctions had not already laid a sufficient Necessity upon us, unless we ourselves voluntarily consented to the same Engagement; as if our Obligation to obey the divine Will depended on our own Pleasure. Therefore in every Covenant some Matter is to be insert'd, the Performance of which the other Party could not have required from me, by a bare Right of Nature, or which by viture of that Right only I did not fully and perfectly owe him; tho' it now becomes a true and absolute Debt, upon my Declaration, and his Acceptance of my Consent. Thus, as a Man who lets himself out to hire as a Servant to another, doth not set it down expressly and immediately amongst the Terms and Conditions of the Bargain, that he will not act perfidiously towards him, or that he will not pillage or plunder him; so that would be a shameful Agreement, in which a Man should only bind himself not to break the Universal Peace towards another; that is, not to use such a Right against him, as he obtains and exercises over Beasts. Yet supposing any such Robberies and Depredations, as we have been lately speaking of, to prevail amongst some Barbarous Nations, then, in order to the restoring the *Universal Peace*, there

² But this very Example may prove to our Author, that his Conjecture is not good, since the Poet sets it down as a singular Example, and he could not but know, that the Heathens did not hate, and persecute one another purely for Religion's sake. The Truth is, it was their Ignorance of the Law of Nature, and of the true Religion, which caused them to approve of these publick Robberies. And if any Persons looked upon them as unjust, yet they were forced, in a manner, to practise them, partly for their own Preservation, and partly by way of Reprisal. We may find that the *Israelites* themselves used them, as appears from the Example of *Jephtha*, *Judges xi. 3.* upon which Place consult Mr. *Le Clerc's* Comment. In fine, We may observe, that in the *Select Observations*, printed at *Holt* in *Saxony* for some Years, there are two Discourses upon this Subject worth our reading, *viz.* the sixth and seventh in *Tom. VII.* thus entituled, the one, *Historia de latrocinio Gentis in Gentem*; and the other, *Moralitas latrocin. Gent. in Gent.* The Author is *James Thomajus*, the Father of Mr. *Thomajus*, the famous Professor of Law at *Hall* in *Saxony*.

§. xi. * See *Lib. viii. Ch. ix. §. 2.* following.

would be Occasion to enter into Covenant, by which all Parties should tie themselves to the Practice of the Law of Nature towards one another. The Case is much the same, when two Nations, hitherto engag'd in War, shall, by Agreement, lay down their Arms on both Sides; for supposing that they do not come to any Terms of Settlement about particular Matters and Performances; then the only Thing concluded on and establish'd, is that general and common Peace. We find indeed in History, many Examples of Commonwealths reduc'd to such Extremities, as to purchase of their Spoilers this ² universal Peace and Forbearance of Injuries, not only by Compact, but by Tribute. *Claudian De Laudib. Stilicon. Lib. i. v. 210, 211.* says, that the Antients were obliged to do so, in these Verses,

*Illi terribiles, quibus otia cedere semper
Mos erat, & fœda requiem mercede pacisci.*

—————Those dreaded Foes,
Traders in Peace, and Hucksters of Repose.

If between Nations or People, hitherto not known to one another by Benefits or Injuries, by Peace or War, any common Leagues are made, without descending to particular Points or Conditions; such Leagues are suppos'd to be entred on for the Establishment of a Friendship, which is reckon'd to imply a closer Union, than is produc'd by that general Peace of Nature. Or else we may take them only for solemn Protestations made by both Parties, that they will for the future observe ³ their mutual Offices and Duties. In the same Manner as Persons related, at their first Meeting, or their first Knowledge of one another, are us'd to make long Declarations and Promises to express their mutual Benevolence and Love.

XII. After all, it must be confess'd, that this natural Peace is but too weak and uncertain, and such as, without other Assurances, would prove but a very mean Defence to the Safety of Mankind; so that we might well enough express, and represent it in *Ovid's* Verse ⁴;

Pax tamen interdum est; pacis fiducia nunquam,
A Peace which all pretend, yet none can trust.

The Cause of which Unhappiness is the great Wickedness of Men, their unbridled Lust of Power, and their Desire of encroaching on the Rights and Possessions of others. When *Micipsa* King of *Numidia*, in *Salust's* ⁵, grew jealous of the growing Power of *Jugurtha*, we are told the chief Things

that frighted him and set him on his Guard, were the Nature of Mankind, covetous of Dominion and Government, and violently bent on gratifying its Desires; and then the Advantage of Opportunity, which by the fair Hopes of Gain and Success, is able to seduce Men to ambitious Practices, who were otherwise moderate enough in their Wishes and in their Pursuits. Indeed these pernicious Charms of Avarice and of Ambition have taken so fast hold on human Minds, that even the most mild and gentle Doctrine of our Saviour CHRIST, which is perpetually inculcating the Rules of Peace, of Kindness, of Good-will, of Propension to forgive Injuries, of Humility, of Contempt of Riches and worldly Power; hath not been able to extinguish the most unjust Oppressions, Treacheries, and Wars amongst the Professors of that holy Religion. So that *Plutarch's* ⁶ Description will too exactly hit the Character of some Christian Princes, whose Desires, not Seas, nor Mountains, nor Deserts, can stop and conclude; not the Bounds which separate Europe and Asia can circumscribe. When such ambitious Spirits border on one another's Possessions, it is scarce possible that they should live satisfied with their proper Shares, and abstain from mutual Injuries and Invasions. In Effect they are continually engag'd against each other, Envy and Plotting being the necessary Consequences of their Temper. As for the two Names of Peace and of War, they use them just as they do Money, not as they are determin'd by Reason, but according to Custom and Convenience. Nor doth *Paterculus's* Remark affect only the Romans and Carthaginians, when he says ⁷, Amongst those People, there was perpetually either a War, or a Preparation for War, or a deceitful Peace. Therefore, as it is the Duty of an honest and good Man to rest contented with his own Lot, and not disturb the Portion of his Neighbour either by actual Invasions, or by covetous Desires: So it becomes a cautious and wary Man, and one who has a true Care and Concern for his own Safety, in such a Manner to believe all Men his Friends, as that they may soon turn his Enemies; in such a Manner to observe this Peace with all the World, as a State which may suddenly be converted into War ⁸. And the famous Saying of *Dionysius Halicarnassensis* ⁹, should often run in our Thoughts: So long as wicked Men have the Power of doing Mischief, they cannot want the Will. For which Reason *Euripides* ¹⁰, tells us, that a prudent Diffidence is a most useful and advantageous Quality: And that a wise Man ought ¹¹ neither to act like a Sheep, nor like a wild Beast, to be neither tame in suffering Violence, nor furious in offering it ¹².

Tacitus, in describing the Manners of the German

¹ *Vid. de Trist. Lib. v. Eleg. 2. v. 71.*

² *Comp. Sophocl. Ajax. Flagell. v. 688, &c.*

³ *Add. Hobbes de Cive, Ch. xiii.*

§. 7, 8.

⁴ *xi.* ² Our Author refers us to *Claudian's Consulat. Mallii.* but thro' Mistake. See *Grotius, Lib. i. Ch. iii. §. 22.*
³ *i. e.* Which the one could not require of the other in Strictness, or by virtue of any indisputable Right, as appears from what our Author has said a little before.

§. xii. ² *Salust. Bell. Jugurth. Ch. ii. Terrebat eum [viz. Micipsam] natura mortalium avida imperii, & præceps ad explendam animi cupidinem; præterea opportunitas, suæque & liberorum stas, quæ etiam mediocres viros spe prædæ transversos agit.*

⁵ *Plutarch in Pyrrho, p. 389, Edit. Wechel. Οὐδ' ἔτι ἐπὶ πλεονεξίᾳ, ἐκ ἡσυχίας, ἐκ ἀνεκτικῆς ἡμετέρας πέρας ἐστὶ τὸ πλεονεξίας, ἢ δ' οἱ διακρινόμενοι Ἐυράπην καὶ Ἀσιαν τέρμονες ὀρίζεσι τὰς ἐπιθυμίας. Δυσὸν δὲ ὁμομάτων, ὡς περὶ νομισμάτων, πολέμου, καὶ εὐνοίας, τὰ παρατυχεύοντι χροῦνται πρὸς τὸ συμφέρον, καὶ πρὸς τὸ δίκαιον.*

⁶ *Vid. Lib. i. Ch. xii. Aut bellum inter eos populos [viz. Romanos, & Pænos] aut belli preparatio, aut insida pax fuit.*

⁷ *B. 6. Εὐς δ' ἂν πικρὴ τὸ δύναντος ποικίλη δρᾶν, ἐκ ἐπιεικείης τῆς ποικίλης τὸ βέλους.*

⁸ *Eurip. Helen. v. 1633, 1634. Σώφρονον δ' ἀπιτυχίας*

Οὐκ ἐστὶν ἐδὲν χρησιμώτερον βροτοῖς.

⁹ The Greek is, Μὴ ὡς πρόβατον, εἰ καὶ ἐπιεικὴς, ἢ βλάπτικον, ὡς θηρίον. We know not from whence these Words are taken; The English Translator attributes them to *Euripides*, but without any Certainty.

Nations, hath left these two Characters of the *Chauci* and the *Cherufci*, very remarkable for their Opposition ⁸. The former he calls a most noble People, who choosing to maintain their Greatness by their Justice, living in Secrecy and Quiet, without Ambition, and without Insolence, by never inviting War, they never feel it; by never doing, they never suffer Violence and Spoil. And this is the principal Mark of their Virtue and of their Power, that their Superiority is not obtain'd by Injury. Yet they have always Arms ready at hand for their Defence; and upon Occasion could bring together a mighty Army: And their Numbers of Men and Horses make them

famous and terrible, in the midst of their peaceful Repose. The latter, he tells us, *Ch. xxxvi.* were too fond of cherishing a long and a decaying Ease. This was more pleasant to them than safe. For amongst stout and daring People, 'tis never the true way to lie still; and where Men are busy in Action and Contention, Honesty and Probity belongs to the Titles of Conqueror ⁹. Thus the *Cherufci*, who had once the Repute of Equity and Justice, now lie under the Imputation of Folly and Cowardice. So true is the Observation of *Dio the Orator* ¹⁰, that those who are best prepar'd for War, may most securely live in Peace.

⁸ Tacit. de Morib. German. Ch. xxxv. n. 4, 5, 6. Populus inter Germanos nobilissimus, quique magnitudinem suam malit iustitia tueri, sine cupiditate, sine impotentia, quieti secretique, nulla provocant bella, nulli raptibus, aut latrocinis populantur. Idque precipuum virtutis ac virum argumentum est, quod, ut superiores agant, non per injurias adsequantur. Prompta tamen omnibus arma, ac si res poscat, exercitus; plurimum virorum, equorumque, & quiescentibus eadem summa.

⁹ The same Author's Words are, *Cherufci* nimiam ac marcentem diu pacem inlaccessit nutriterunt, idque jucundius, quam tutius fuit; quia inter impotentes, & validos, falso quiescas, ubi manu agitur, modestia, & probitas nomina superioris sunt. Ita qui olim boni & quique *Cherufci*, nunc inertes, & stulti vocantur.

¹⁰ Orat. i. De Regno. p. 6. Ed. Par. Morell. Ὅτι τοῖς καλλίστοις πολεμῶν παρεσκευασμένοις, τῆτοις μάλις αἰετὴν εἰρήνην ἄγειν

CHAP. III.

Of the Law of Nature in general.

The CONTENTS.

- I. The Connexion.
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- VII, VIII, & IX. The natural Law does not depend upon the Consent of Nations.
- X, & XI. Whether Profit be the Foundation of Law.
- XII. Whether the Law of Nature appears plain from the End of the Creation.
- XIII. The Principles of natural Right are discover'd by the Light of Reason.

- XIV. The true Original of the Law of Nature is derived from the Condition of Man.
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- XX. The Obligation of the Law of Nature is from GOD.
- XXI. Of the Establishment of the Law of Nature.
- XXII. Some Things are said to be of the Law of Nature reductively and improperly.
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SINCE then it appears inconsistent with the Nature and the Condition of Man, that he should live entirely loose from all Law, and perform his Actions by a wild and wandering Impulse, without Regard to any Standard or Measure; it follows, that we make Enquiry into that most general and universal Rule of human Actions, to which every Man is oblig'd to conform, as he is a reasonable Creature. To this Rule Custom hath given the Name of *natural Law*, and we may call it likewise the Law *universal* and *perpetual*; the former, in Regard that it binds the whole Body of human Race, the latter, because it is not subject to change, which is the Disadvantage of *positive* Laws. What this Law is, whence the Knowledge of it arises, what are the chief Marks and Tokens by which it is discover'd, what Matters are to be refer'd to that, and what to po-

sitive Constitutions; are Points which require the more careful Examination, because if this Basis and Ground-work should be ill laid, whatever we afterwards build upon it must fall of Course. 'Tis a good Rule of *Plato* (in *Cratyl*, p. 299. Edit. *Francof.*) *A Man ought to be very strict and accurate in examining the first Principle and Foundation of Things, and no less copious and distinct in explaining them; inasmuch as these Points being once clearly settled, the whole Scheme of Doctrine regularly follows.* And so much the more ought this Rule to be observ'd in our present Subject, the more Truth there is in that Remark of ² *Lactantius*, *Lib. iii. Ch. vii. p. 224.* Ed. *Oxon.* *Because in framing the Manners and forming the Model of Life, it is the highest and most fatal Danger to mistake; we ought to apply the stricter Diligence to the Study of our Duty. In this great Point there is no Allowance for Error or Disagreement, all*

Mr. BARB. NOTES on Chap. III.

¹ Plato's Words are, Δεῖ δὲ πρὸς τὴν ἀρχὴν παντὸς πράγματός τινος παντὶ ἀνδρὶ τὸ πολλὸν λόγον εἶναι, καὶ τὴν πολλὴν συνέτην εἶτε ὁρθῶς, εἶτε μὴ ἰσχύεται. Ἐκείνης δὲ ἐξετασθεὶς ἰκανῶς, τὰ λοιπὰ φάνειος ἐκείνη ἐπιθήσει.

² Lactantius's Words are, Et quoniam in disponendo vite statu fermandisque moribus, periculo majori peccatur, majorem diligentiam necesse est adhiberi, ut sciamus, quomodo nos oporteat vivere. — Hic vero nullus dissilio, nullus errori est locus, omnes unum sentire oportet, ipsamque philosophiam, uno quasi ore precipere, quia, si quid fuerit erratum, vita omnis evertitur.

ought to be of one Opinion, and to declare with a common Mouth the same Doctrine : Since the least Slip may overturn the Rule and Order of Living. To the same Purpose Diogenes Apollonias (in Diog. Laert. Lib. ix. Segm. 57.) Every Discourse, in my Judgment, ought to take its Rise from some clear and manifest Principle ; and the Style made use of should be plain and grave.

II. The Roman Lawyers defin'd the Law of Nature, to be that Law which Nature teaches all living Creatures ; which therefore is not peculiar to Man, but is apprehended and observ'd by other Animals. So that according to this Hypothesis, those things must be said to belong to the Law of Nature, which Brute Creatures either affect and pursue, or avoid and abhor : Whence it naturally follows, that there must be a Law common to Men and Beasts. Which Opinion it's likely might proceed from that famous old Notion about the Soul of the World, of which all other Souls were a kind of ἀσπάρματα or Particles, being in themselves all of the same Nature, but exerting different Operations, according as they fell on different Bodies, and met with different Organs for the Conveyance of their Strength and Powers. Nearly allied to this Fancy was the Μετεμύθεσις, or Transmigration of Souls, according to which Men and Beasts were thought to differ only in their corporeal Figure, having Souls altogether of the same Nature, and mutually lending to each other. But the general Consent of learned Men hath discarded this common Law of animate Beings : Inasmuch as it is impossible to conceive how a Creature should be capable of Law, and at the same time incapable of Reason. Hesiod. Op. & Dier. Lib. i. ver. 275.

Τὸν δὲ ὃ ἀνθρώποις, ἴμεν (Δίκα) διδάξει Κρόνος,
Ἰχθύων, ἔρ, καὶ θηρίων, καὶ ἀσπίδος πετεινῶν,
Ἐστὶν ἀλλήλων, ἐπεὶ καὶ δίκην ἐστὶν ἐπ' αὐτοῦ.
Ἀθρότοις, ὁ ἔδωκε δίκην, ἢ πομπὴν ἀρίστην
Γότα.

This Law did Jove for human Race ordain :
The Beasts, the Fishes, and the feather'd Train
He left to mutual Spoil and mutual Prey,
But Justice gave to Men.

And altho' there are several Actions of Men and

Beasts very much alike, on the Performance of which the former are said to have fulfill'd the Law ; yet in Strictness and Reality they are extremely different, since they are done by Brutes out of simple Inclination of Nature, but by Men out of Obligation, of which those other Creatures have no Sense. And therefore we must suppose Authors to speak figuratively, when they attribute to such inferior and dumb Animals, Justice, Fortitude, Pity, Gratitude, or Chastity ; only because they perceive in some of their Proceedings the Shadow and Semblance of these Virtues. For Things which seem alike in their external Face and Appearance, are by no means the same, if they proceed from different internal Principles. As for Grotius's Opinion, that some Acts of other Creatures are dispos'd in an extraordinary manner, by an external Reason or Principle, as the Works of Bees and of Ants, and the Frugality which some seem to use about what they have got, for the Benefit of their Kindred and Offspring ; this is allowable only if we mean by it, that the Nature of these Creatures is in such a manner temper'd by the Divine Creator, as to be capable of producing such Actions ; not that any outward Principle violently guides and steers them, as a Pilot doth a Vessel. Nor is it difficult to understand, why they do not discover the same Cunning in other Matters equally obvious ; if we suppose with the new Philosophers, that whatever Form irrational Animals enjoy, arises purely from the Figure and Disposition of material Particles, and from the Variety of their Movements. Especially since even amongst Men we may find those who are extremely quick and ready at some sorts of Business, yet strangely dull and heavy about others, not more difficult and abstruse : Which can proceed from nothing else, but from the particular Disposition of their Parts, especially of the Brain and Spirits. Those therefore who will have a Law of Nature in Brutes, because they see them acting now and then with some Appearance of Regularity and of Design, abuse the Term of Law, by an undue and unnecessary Application.

Besides, there can be found no dumb Creature

^a Vid. Virgil. Æn. vi. 724, &c. Ovid. Met. Lib. xv. v. 75, &c. Ch. v. ^b Prolegom. De J. B. & P. & Lib. i. De Ver. Rel. Christian. p. 163. Ed. Wech.

^b Vid. Sellen. De. L. N. & G. secund. Hebr. Lib. i.

^d Vid. Plutarch. Conviv. Sept. Sapient.

§ II. *Jus naturale est, quod natura omnia animalia docuit. Nam jus istud non humani generis proprium, sed omnium animalium, que in terra, que in mari nascuntur, avium quoque commune est.* — *Vilicinus etenim cetera quoque animalia, feras etiam, istius juris perita censeri.* Digest. B. I. Tit. i. *Of Justice and Law.* Leg. i. §. 3. See Instit. B. I. Tit. ii. §. 1.

^a 'Tis certain, that this was the Opinion of the Stoicks, as Justus Lipsius in his *Physiol. Stoic. Lib. i. Diff. viii.* and *Lib. iii. Diff. viii.* makes it appear, and most of the Roman Lawyers were of the same Principles as that Sect of Philosophers, as Mr. Gravina has proved by many Examples. See his *Origines Jur. Civil.* printed at Leipzig in 1708. p. 80, &c. But it does not from hence follow, that the Definition of natural Right which Ulpian gives, is grounded on this Opinion, as after our Author, Mr. Buldus in his first Discourse of the Errors of the Stoicks, which is amongst his *Analecta Hist. Philosoph.* §. 6. and Mr. Ludovici in his *Delineatio Hist. Juris Divin. Nat. & Posit. &c.* §. 14. affirm, who also quotes, *Ja. Thomae. Physic.* Chap. xxxviii. Quest. xxxii. and *Hornius, De Subjecto Jur. Nat. &c.* for they suppose, as they necessarily must, that the Stoicks attribute Reason to Beasts, but they take it for granted, by a *Petito principi*, without Proof, since they alledge no Authority but the Definition itself, which they produce, to prove, that according to them, these ancient Philosophers must believe that Beasts have Reason. The contrary appears by divers plain Passages. *In homine optimum quid est? Ratio* (says Seneca) *hac antecedit animalia, Deos sequitur—Quid in homine proprium? Ratio* Epist. lxxvi. p. 294, 295. See also his cxxiv. Epist. p. 621, 622. *Ed. Gron.* 'Tis certain that the Stoicks did not acknowledge a Law common to Man and Beasts. Cicero is plain as to this Point, *Et quo modo hominum inter homines juris esse vincula putant, sic homini nihil juris esse cum bestis.* De finib. bon. & mal. Lib. iii. Chap. xx. and *Diog. Laertius.* *Ἐπι αἰσθητῶν ἀποτοῦ μὴ εἶναι ἡμῶν δικαίον πρὸς τὰ ἄλλα ζῶα, διὰ τὸν ἀνομοιωτήτα.* &c. *In Zenone,* Lib. vii. §. 129. p. 446. Edit. *Amstel.* See what is said upon §. 3. Note 10. following. As also Cicero *De Offic.* Lib. i. Ch. xvi. and Grotius, Lib. i. Ch. i. §. 11.

^c The Original has it, *Principio intrinseco*, contrary to the Connexion of this Discourse, and the express Words of Grotius. But Mr. Horius has amended it in his Edition of 1706, and made it, *extrinseco*, as it ought to be.

^d See Mr. Bayle's *Dictionar. Historiar. & Critic.* Tom. iii. p. 261c. of the second Edit.

^e Nevertheless our Author does not follow that System, as we may judge from many Places in his Works, which suppose the contrary. See what I have said, *Lib. i. Chap. iii. §. 1. Note 1.*

which

which performs all the Duties and Offices of Man; on the contrary, there is scarce any rational Proceeding, to which some Brutes do not ⁶ act directly opposite. Yet in Harangues to the People, it is reckon'd a high Aggravation of a Crime, to shew, that even brute Creatures abhor the Commission of such Enormities. Thus *Plato* ^a says, that in arguing against the unnatural Vice of Pollution with the same Sex, it would be proper to appeal to the Nature of Beasts, in whom we do not discover the same foul and monstrous Practices ^b.

III. Some Persons indeed (rather I believe to shew their Wit, than out of any serious Design, have asserted this Community of Law between Men and Beasts, and back'd their Assertion with a numerous Heap of Arguments, all which have been long since most solidly confuted. It shall be enough for us to touch lightly on the Proofs which they draw from Scripture. That Text then in *Gen. ix. 5. Your Blood will I require at the Hand of every living Thing*, according to some Expositors, imports only thus much, that *GOD* would revenge the Murder of a Man committed, not only by the Hands or the Weapon of another, but by the Fury of wild Beasts set on him by the others Command. Inasmuch as in the Antediluvian Times many violent Tyrants and Oppressors us'd to keep wild Beasts, to serve for Executioners of those who displeas'd or affronted them ^c. Others give this

Interpretation, that *GOD* will sometimes make even wild Beasts ² the Instruments of punishing Murderers. Others again understood by *every living Thing* ³ only *every Man*, as if *GOD* only declar'd that no human Murderer should escape his Justice. In *Leviticus xviii. 23. and xx. 15, 16.* Command is given, that if any Man or Woman are found guilty of Bestiality, ⁴ the Beast shall be ston'd, without any Difference of Age. Yet the *Jews* observ'd such a Difference of Years in regard to the human Parties of both Sexes; so that if a Boy were not above nine, and a Girl above three Years old, they maintain'd that no Punishment ought then to be inflict'd, either on the Person, or on the Beast; because they would not allow that the Pollution forbidden in the Law could be actually committed at such an Age. Now when they ston'd the Beast, they did not do it because the Beast had properly offended; but partly lest the Sight of that Creature should incite some other Person to the like foul Passion, and partly lest the Beast remaining alive should keep up the scandalous Remembrance of the human Offender, who had suffer'd Punishment, *Gratian, Caus. xv. Quest. i. Ch. iv. The Reason why the Beasts were order'd to be kill'd, seems to have been because they would renew the unhappy Remembrance of the foul Crime. Philo Judæus (De special. leg.)* adds a third Reason, *Lest the Beast should bring forth any detestable Monster, such as usually proceed from unnatural Impurities, and such as*

^a Lib. viii. De L. L. p. 915. Ed. Francof. *Fere quoque ipsæ Veneris evitant nefas, Generisq; leges inscius servat pudor.*

^b *Senec. Hyppol. v. 910, 911.*
The Beasts themselves avoid enormous Love;
And Modesty unconscious and untaught,
Preserves the decent Lawsof Sex and Kind.

Add. *Oppian, Cyneget. Lib. i. v. 239, &c. & Halieut. Lib. i. v. 702, &c.* which last Place may well be urg'd against Parents who seem to have lost their natural Affection.

⁶ Mr. Bayle has made some Reflexions which may please the Reader, and therefore I shall give him them in his own Words: *It is a pretty Common-place in Morality, to compare Mens irregular Actions with the regular Motions of the Beasts.* (See *Horace Epod. vii. Juvenal. Sat. xv. and Boileau Sat. viii.*) But how finely soever it may appear, and however it may affect, it is nevertheless but a weak way of Arguing; for first, it may be eluded by way of Banter, and secondly may be more seriously answered by this Maxim:

Nil agit exemplum, litem quod lite resolvit.

That Argument is of no Force,
Which when retorted is the worse.

Barbara, the Wife of *Sigismund* the Emperor, designing to marry again after the Death of her Husband, one suggested to her the Example of the Turtle, which always remains single after the Death of her Mate. To which she answered, *if you will propose to me the Example of a beast, instance in that of Pigeons and sparrows.* Thus the first Sort of Argument is easily solv'd without any Inconvenience. Nor is the other more difficult, for the Man whom you'll send to school to the Beasts, to learn his Duty, will reply, he desires no better Masters, for he'll tell you, *I shall learn of them to yield up Right to Force.* The strongest Dog makes no Scruple to take the Moriel from his Fellow. How often do we see Dogs quarrelling for their Meat? Will not Chickens fight one with another in the Sight of their common Mother? Do not Cocks fight so furiously one with another, that nothing but the Death of one of them can end the Combat? Do not Pigeons, the very Image of Mildness, often come to Blows one with another? What more furious Quarrels are there than those of Bulls? Does any Thing but Force decide Right among them in Matters of Love? (*Horace Lib. i. Sat. iii. v. 110.*) Can a more unnatural Barbarity be any where learned than at this School? Do not some Beasts devour their own Young? Shall I not learn Incest from them? (*Ovid Metamorph. Lib. x. v. 323, &c.*) Must I learn to conform my self so to them, as to lay up my Provisions as the Ant does? (*Horace Sat. 7, Lib. i. Sat. i. v. 32, &c.*) May not I rescue myself from that hard Bondage which makes all Men groan, and wrings such grievous Complaints from them as these?

How blest are you,
Wild Beasts, that are, in loving, ty'd unto

No Laws but those of Love! whilst human Laws
Inhumanly constrain us, rather than Canje. Pastor Fido.

This does not hinder but that such Morality may be properly applied to the greatest Part of Mankind, *Distionar. Historie. Crit. Tom. i. p. 475, 476.* See what our Author has said, *Ch. i. §. 4.* *Grotius* also observes, that there is no Action commendable in Man, but *GOD* has impress'd some Footsteps of it in the Beasts which are destitute of Reason. *De Jure bel. & Pac. Lib. ii. Chap. xiv. §. 2. Num. ii.* in the Notes. Lastly, It is always certain, that no Right common to Man and Beasts, can be established, nor can the Instinct of Beasts be taken for a Rule of natural Right, properly so called: and such as take such a Course run a great Hazard of falling themselves into Scepticism, or leading others into it, by the manifest Uncertainty of the Maxims built upon such weak Principles. See the Discourse, *De Scepticismo Morali*, among Mr. *Puddeus's Academiæ Hist. Philosoph. §. 32.*

§. III. ¹ This is but a Vision of some Rabbi. See *Selden* of the Law of Nature and of Nations among the *Hebr. B. i. Ch. v. Ed. Argent.*

² Some turn it thus, *God will require your Blood at the Hand of every Beast*: but the Proposition in the Original will not bear that Translation.

³ I have corrected our Author's Expression, *Others un' stand by every living Creature Man only*; as if every living Creature were in the Text of our Copies or Versions, whereas it is found only in the *Samaritan* Copy, which is corrupted. See Mr. *Le Clerc's* Notes upon this Passage.

⁴ Our Author says, *the Beast shall be ston'd*; but that's only a Conjecture of the Rabbins, for the Scripture determines not how the Beast shall be slain.

no pious Man can bear the Sight of ^a. Thus too, *Deut.* xiii. 15, 16. GOD commands the *Israelites*, in rooting out the idolatrous Nations, to destroy the very Beasts; only to shew the Heinousness of that Crime, not as if the Beasts could be Partakers of it. It is observable, that if a *Gentile* living amongst the *Jews*, had been polluted with a Beast, the Man only suffer'd Death, but the Beast escap'd. According to the Law in *Exodus* xxi. 28. the going Ox was to be ston'd; not because he had properly committed a Fault, but that he might not offer the like Hurt another Time, and that the Owner who had negligently kept him, might be punish'd by his Loss: And hence they were not allowed to eat the Flesh of such an Ox. This Punishment was thought sufficient when the Owner was but slightly in Fault, or when he was ignorant of the Fierceness of the Beast: Whereas if he knew him thus furiously dispos'd, and still neglected to keep him up, he paid for the Mischief with his own Life, being made a sad Partner in the Punishment. And here again the *Rabbins* tell us, that the Ox was ston'd only when he had kill'd a *Jew*, not if a *Gentile* had perish'd by his Violence. And indeed it was a Custom in several other Nations, to destroy such Things as had been the Instrument of any Mischief, or of any Misfortune ^c. Thus it appears from the Orations of *Demosthenes* against *Aristocrates*, and of *Aeschines* against *Ctesiphon*, that by the *Athensian* Laws, Stones, Clubs, Axes, and several other such Things, when they had been made use of in the Commission of Murder, were brought formally into Court, as it were in order to undergo a Penalty. Thus the Statue of *Theagenes* in *Thasos* having unfortunately kill'd a Man by falling on him, the People order'd it to be dragg'd into the Sea ^b. *St. Ambrose* calls the Copulation of Asses and Mares, by which Mules are produc'd, *forbidden*, not because the Beasts contract any Guilt in those Practices, but because Men are forbidden to procure any such unnatural Mixture ^d.

We may excuse those learned Compilers of the *Roman* Laws, by urging in their Defence, that by the Term of *the Law of Nature*; they meant that ⁷ Order instituted by the great Creator, chiefly in those Things which make directly for the Preservation of Nature, or of the Species and Individuals of all animate Beings. And it is the more probable, that they took it in such a Sense, because ⁸ they set down as the chief Heads of this Law, only the Conjunction of Sexes, the Procreation and Education of Off-spring, and Self-defence. Many other Authors have us'd the same Terms in the same improper Manner; as particularly *Mr. Yves of Paris*, in his Treatise concerning the *natural Law ordain'd by God over all created Things*, and *Des Cartes*, in his Principles of Philosophy. We may conclude this Point with the excellent Observation of *Plutarch* ^e, *Nature*, says he, *as in those Trees and Shrubs which we call wild, she hath sown the crude and imperfect Principles of true and pleasant Fruits; so in Brutes hath implanted an imperfect Love of their Off-spring, not belonging to the Head of Justice, nor reaching beyond the Inducements of Profit and Advantage. But in Man, whom she produc'd for a rational and a civil Being, for the Worship of God, for the Observation of Justice and of Laws, for the building of Cities, and for a social and friendly Life; in Man, I say, she has fix'd the Seeds of this Love in a fairer and in a more plentiful Manner: And in this she hath follow'd the first Principles of his Body, and the original Ingredients of his Constitution.*

IV. Others make the Object of natural Law to be such Acts as do in themselves include a moral Necessity or Turpitude, and which are therefore in their own Nature either absolutely requisite or unlawful, and which we must of Consequence suppose to be necessarily commanded, or necessarily forbidden by GOD. And this Mark, they say, distinguishes natural Law, not only from human, but from the divine positive Law, which doth not command or forbid Things in their own

^a Add. *Selden*. De J. N. & G. Lib. i. Ch. iv. & *Mornac*. ad Leg. vii. D. De his qui effuderint vel de'ec. Lib. ix. Tit. iii.

^b Vide *Dic. Christi*. in *Rhodiac*. p. 340. Edit. *Morell*. ^c *Hexaemeri*. Lib. v. Ch. iii. ^d *Leviti*. xix. 19. Vide *Selden* & *Ant. Marsh*. De Crimin. Proleg. Ch. ii. §. 1. The Account which *Ihuanus* (Lib. v.) gives of the Process against the Mice in *Burgundy* is no more than a Jest. ^e Lib. i. Tit. ii. D. De Just. & Jure. ^f De amore prolis, Edit. *Wechel*. p. 495.

⁵ Our Author hath forgot a fourth Reason, as considerable as any of them, which is this, That GOD, that he might make us sensible how detestable such abominable Crimes were to him, would have every Thing destroyed which contributed any way to the Commission.

⁶ The Officers of *Lyons*, *Maçon*, and *Autun* in the xvth Age, pass'd several Sentences upon the Beasts that annoyed their Country. Sometimes also they caus'd the Case of the Inhabitants and Beasts to be pleaded judicially by their Advocates, who produc'd the Reasons for each Party, before they pass'd Sentence. See the *Critical History of Superstitious Practices*, written by *F. Le Brun*, an Extract of which is found in the *News from the Republ. of Letters*, in July 1702. Article iv. p. 63.

⁷ There is all the Evidence in the World to believe, that they understood by it what the Stoicks call, τὸ πρῶτα κατὰ φύσιν, as *Mr. Hærtius* briefly observes. See *Aul. Gellius*. Lib. xii. Chap. v. & *Cicero De fin. bon. & mal.* who translates it, *Prima secundum naturam*, Lib. v. Ch. vii. Not that they believed, that this natural Impression, which inclines Men to preserve themselves and theirs, is exactly the same, as is observed in Beasts, or that it established a common Right in either of them; but they held, that this latter had some Relation to the former, and the Likeness of the outward Effects made this natural Right to be looked upon to be in some sort common to Man and Beasts, in a figurative Notion. See *Vinnius* upon the *Institutes*, Lib. i. Tit. ii. *init.* This appears, in my Judgment, from the Manner in which *Ulpian* expresses himself, for he doth not say that the Beasts are, *istius juris perita*, but only, *perita censerit*; that is, they did not properly know the Engagements of natural Right, but are only thought to know them. The same *Ulpian* says elsewhere, *That a Beast in hurting a Man, or doing him some Damage, does him no Injury, because he doth not know what an Injury is; from whence it follows, that there is no Right common to Man and Beast. Pauperies est damnum sine injuria facientis datum. NEC ENIM potest animal injuriam fecisse, quod sensu caret.* Digest. Lib. ix. Tit. i. Leg. i. §. 3.

⁸ *Hinc descendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus, hinc liberos procreatio, hinc educatio.* Digest. Lib. i. Tit. i. De justitia & jure, Leg. i. Nam jure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, jure fecisse existatur. Ibid. Leg. iii. This last Law, as it is placed, has Respect to the Right of Nations, as *Vinnius* upon the *Institutes* has observed; and this appears by the Reason alledged by the Lawyer of *Florence*, from whom these Words are taken, for he appeals to Nature, which has established a kind of Relation among us, by Virtue of which one Man can't, without a Crime, do any Evil to another. Our Author, who ought to have observed this, says, That divers learned Men, and among them *Yves of Paris*, in his Treatise *De Jure Nat. à Deo rebus creatis constituto*, and *Mr. Des Cartes*, in his Principles, have made a wrong Use of this Term, *natural Right*.

Nature necessary or unlawful ¹, but by forbidding Things makes them unlawful, and by commanding Things makes them necessary: while the Things forbidden by the natural Law are not therefore evil, because GOD hath forbidden them; but GOD therefore forbid them, because they were in themselves evil: And, on the other Hand, the Things enjoin'd by the same Law, are not made good or necessary by GOD's enjoining them; but were therefore enjoin'd by GOD, because they were in themselves simply good and necessary ². But now besides that upon admitting this Opinion, it would remain a most perplexing Doubt what those Acts are which we thus suppose in themselves unlawful, and by what distinguishing Token they may be clearly known from others: We have already shewn in our former Book **b**, that no Actions are in themselves good or bad, honest or vile, till they are made so by some Law. Nor ought any Man to be shock'd with such a Scruple as this; "If all the Morality of human Actions depends on some Law, might not GOD therefore have so fram'd the Law of Nature, as to enjoin Things directly contrary to the present Duties?" for Example, if amongst the mutual Offices due from Men to one another, he should have put killing, stealing, fornicating, and bearing False-witness; and amongst the prohibited Actions, Gratitude, keeping Faith, paying Loans, and the like." For here, tho' it seems altogether a needless and an impudent Curiosity to enquire what GOD might have done, when it appears plainly what he hath done; yet if any Man should persist in such Vanities, we may assure him, that such a Doubt as we have been proposing, implies a manifest Contradiction. For altho' GOD was not oblig'd by any Necessity to create Man (as I think those Persons have but a very narrow and unworthy Notion of the divine Power, who believe it would have diminish'd any Thing from GOD's Glory, not to have made these poor In-

habitants of the Earth ³) yet when he once decreed to create him a rational and a social Being, it was impossible but that the present natural Law should agree to him; not by an absolute, but ² by an hypothetical Necessity. For should Man have been engaged to the contrary Performances, not a social Animal, but ³ some other Species of barbarous and horrid Creatures had been produc'd. Notwithstanding all which, it remains for a certain Truth, that antecedently to the Imposition of any Law, all Actions are to be esteem'd indifferent. For by decreeing to create Man, that is, to create an Animal whose Actions should not be all indifferent, GOD immediately constituted a Law for his Nature. Neither from our Assertion, that all Actions are in themselves indifferent, before the Application of Law, doth it follow, that GOD could have order'd our worshipping him with Blasphemy, or ⁴ with Contempt; as *Vasquez* ^d rashly maintains. For a rational Creature, that is, a Creature indued with the Faculty of apprehending Things as they truly are, cannot form any other Conception of GOD than to acknowledge him a Being not only vastly his Superior in Nature and Dignity, but likewise his proper Lord and Governor in the highest Degree. For otherwise he would conceive a meer Idol, or indeed any Thing rather than a GOD. But now it is plainly contradictory, to suppose a Being at the same Time the most eminent and the most despicable; a Governor design'd purely to be insulted on by his Subjects; and to express our Acknowledgment of the Excellency and the Power of the divine Nature, by such Signs as denote directly the contrary. Therefore to say that GOD cannot establish such horrid Absurdities by a Law, doth no more detract from his Omnipotence, than to say, that he cannot die, that he cannot be untrue, that he cannot make Things undone, which have been already done.

^a Vide *Grot. Lib. i. Ch. i. §. 15. Num. i.* ^b *B. i. Ch. ii. §. 6. Lib. i. Ch. xxvii. Num. ix, &c.*

^c Vide *Job xxxviii. v. 4.*

^d *Controv. Illustr.*

§. IV. ^a *Grotius* (*Lib. i. Ch. i. §. 15. Num. i.*) criticises upon the Philosopher *Anaxarchus*, as having spoke too generally, that *what Things GOD wills, he wills not because they are just, but they are just because he wills them.* This was the Occasion; *Alexander the Great*, despairing of the Life of *Clitus*, his Favourite, whom he had slain in his Passion, because he had spoken sincerely to him, *Anaxarchus*, to comfort him, said to him, in vile Flattery, "Οὐκ ὀσέει δὲ τὴν Διὸς ἔχει παρεδρονὸν Ζεὺς, καὶ τὸ Θέμισ, ἢ αὐτὸν τὸ πραχθεὶ ὑπὸ τῷ κρατύντος θεοῦ καὶ δικαίου; *Plut. in Alexand. p. 695. ed. Wech. i. e. Know'st thou not that the Poets say, that Jupiter has Themis? i. e. Right and Justice sitting by him, which signifies, That all that a Prince does is holy, right and just? By which Anaxarchus gives us to understand, That as GOD regulates Justice according to his Will, so a Prince can change, as he pleases, the Rules of Right and Wrong.* This is just the Language of Flatterers, and the Principle of *Mr. Hobbes*, who destroys all Justice, and yields up plainly the Will of GOD to the Humour of Princes, since all that a Prince does being just, because he does it, if he thinks good to do it, GOD must will it also, and approve of it as just. *Plutarch* elsewhere relating this Story, maintains that *Anaxarchus* did very ill to speak so to *Alexander*, because instead of advising him to repent of his Fault, he had laid down a Maxim, which would encourage him to do the same again. *The Truth is* (says he) *that Jupiter has not Justice sitting on his side, but is himself perfect Justice, and is more ancient, as well as more perfect than all Laws.* This Fiction of the Antients tends to make us understand, that without Justice, *Jupiter* himself could not govern as he ought, "Οὐκ ὀσέει εἶναι τὴν Διὸς παρεδρονὸν, ἀλλὰ αὐτὸς δίκη καὶ θεμὶς ἐστὶ, καὶ νόμος ὁ πρῶτος καὶ τελειότερος: οἱ παλαιοὶ ἔτα δέξασθαι, καὶ γράφασθαι, καὶ διδασκασθαι, ὡς ἀπὸ δικῆς ἄρχεται μηδὲ τῷ Διὶ καλῶς δυναμῆρα. *Ad Princip. indoct. Tom. ii. p. 781.* We may see by these Words, that this Philosopher in establishing the Will of GOD, as the Foundation of Right and Wrong, supposes at the same Time, that his Will is not purely arbitrary, but that he immutably follows what the Perfection of his Nature requires. See also the Reflexion which *Arrian* makes upon this Matter in his *Expedit. Alexand. Lib. iv. Ch. ix.*

² We understand by hypothetical or conditional Necessity, that which is founded upon some Supposition without which it could not be. And so in the Matter in hand, we must suppose the Will of GOD as a Condition, without which there could be no Law of Nature, since if GOD had not freely determined to send into the World such a Creature as Man, we can't conceive that there should be any Rule of Life given, which should necessarily agree to the Constitution of a reasonable and sociable Creature. See *Lib. i. Ch. i. §. 4. Note 4.*

³ This is to say, In case GOD had created a Creature like us in Body only, and in outward Shape, and by Reason of that Resemblance had called him, *MAN*, this is only a Supposition, and a Reduction *ad absurdum*, to make us understand the Ridiculousness of the Hypothesis. See also what our Author says in his *Dissertationes Academ. p. 747.*

⁴ Our Author observes here, that the Sacrifices of *Hercules* of *Linlus*, of whom, among others, *Laclantius* speaks (*Insultu. Divin. Lib. i. Ch. xxi. p. 98, 99. Edit. Oxon.*) are the abominable Inventions of senseless Men.

We may observe farther on this Argument, that if the Definition of natural Law is to be founded on that necessary Honesty or Turpitude of some Actions, it must be always perplexed and obscure, and run round in an unconcluding Circle; as will appear to any Man who examines the Definition laid down by *Grotius*. And Dr. *Cumberland* excellently remarks, *Ch. v. §. 9.* that in defining the Law of Nature, when we use the Word Good, we must mean natural, and not moral Good; since it would be the highest Absurdity to define a Thing by such Terms as suppose it to be already known; those very Terms being deriv'd as Consequences from it, and depending on it as to their own Evidence and Certainty.

V. Those Authors who search for the first Pattern, or the original Draught of natural Law in GOD himself, are divided into two Parties. For some placing the Spring and Fountain, as it were, of it in the divine Will, do thence conclude, that inasmuch as that Will is in the highest Manner free, the Law of Nature may therefore be chang'd by GOD, or 't the contrary be commanded, as is the Case and the Condition of positive Laws. Others affirm this natural Law to be founded after such a Manner, in the essential Holiness and Justice of GOD, as to represent and express a kind of Image or Copy of those Attributes. And hence likewise, they say, proceeds the Immutability of the Law of Nature: Inasmuch as the divine Justice and Holiness are utterly incapable of Change or Alteration. Concerning the former of these Opinions, we have this to remark, that it was indeed at first entirely free to the divine Pleasure to produce or not to produce an Animal to whom the present Law of Nature should agree. But that since GOD Almighty hath been pleas'd to create Man, a Being not possibly to be preserv'd without the Observation of this Law, we have no manner of Rea-

son or Colour to believe that he will either reverse or alter the Law of Nature, so long as he brings no Change on human Nature itself; and so long as the Actions enjoin'd by this Law do by a natural Consequence promote Society, in which is contain'd all the temporal Happiness of Mankind; while the contrary Actions do by as strong a Necessity destroy that Society: That is, so long as Beneficence, Kindness, Fidelity, Gratitude, and the like Practices, shall have a Power of engaging and of winning on Mens Minds; and Injuriousness, Treachery, and Ingratitude, a Power of raising and provoking them. And therefore supposing human Nature and human Affairs to be fixt and constant, the Law of Nature, tho' it owed its original Institution to the free Pleasure of GOD, remains firm and immoveable; unlike to those divine positive Laws which depend in such a Manner on the divine Will, as not to seem so necessarily requisite to the good and safe Condition of Mankind in general. Besides, tho' this Opinion be so far right, as it makes GOD the Author of natural Law, a Truth which no Man in his Wits can doubt of³; yet it still remains an Uncertainty, by what Means this divine Will is to be known, and what Tokens there are to evince, that GOD intended to comprehend such or such a Thing under the Law of Nature. And the same Inconvenience attends likewise on the latter Opinion. For though no one can be guilty of such horrid Impiety, as to assert that the Law of Nature contains any Thing in it repugnant to the divine Holiness or Justice⁴; yet it would be very difficult to prove, that the same Law is so exact a Copy or Resemblance of those Attributes, that in what Manner soever GOD Almighty is pleas'd to deal with his Creatures, particularly with Men, in the same Manner the Law of their Nature commands Men to deal with one another. Nor doth it ap-

³ Our Author proves this in his Apology, §. 19. thus, If we demand of them who define the natural Law so, What Things are the Matter of this Law? They'll answer, Such as are honest or dishonest in their Nature. If we again ask them, What are those? They can answer nothing else, than that they are the Matter of the natural Law. This makes well for the Schoolmen. But can't we speak something here in the Behalf of *Grotius*? I own, that the Notions of this great Man are not sufficiently cleared and freed from vulgar Prejudices: But I am very much mistaken, if he has not found out the Truth, and can't explain his Notion so, that when the Thing is searched to the Bottom, the Difference between him and our Author will prove a verbal Dispute only. *The Right of Nature* (says *Grotius*, *Lib. i. Chap. i. §. 10. Num. 1.*) consists in certain Principles of right Reason, by which we know that an Action is honest or dishonest morally, according to the necessary Agreement or Disagreement: it hath with a reasonable or sociable Nature. So that it is no Circle; for if you ask *Grotius* whence comes that necessary Honesty or Baseness of the Actions commanded or forbidden by the Law of Nature, he'll answer you, From the necessary Agreement or Disagreement with a reasonable and social Nature. Very well. He seems to acknowledge also, with our Author, that this Necessity is not absolute and independent upon the Will of GOD. This appears not only by the following Words, which finish *Grotius*'s Definition, *And by Consequence GOD, who is the Author of Nature, orders or forbids such an Action*, but by what he says in his Preface, where he expresses himself more fully, *The Law of Nature, as well that which consists in our uniting in Society, as that which is so called in a more extensive Sense*. This Right, I say, altho' it flows from the internal Principles of Man (*i. e.* from the Constitution of the human Nature) may nevertheless, and that with Reason, be attributed to GOD, because he has implanted such Principles in us. I will now leave it to any Man, whether the Commentators upon *Grotius* have not mistaken his Sense, and if when he speaks of honest or dishonest Actions, he does not mean them in the same Sense that our Author allows them, as I have shewed above, *Lib. i. Chap. i. §. 4. Note 4.* and *Ch. ii §. 6. Note 1.*

§. v. ¹ Mr. *Buddens* esteems them Scepticks who favour this Opinion: For, says he, they may easily imagine that it is uncertain, whether GOD has not changed this or that Law, in this or that Case, and whether he does not command what we suppose forbidden, and on the contrary forbid what we believe commanded, since he may do it at all Times without any Hindrance, according to them. *De Sceptic. Moral. §. 32. p. 257.*

² The Immutability of the natural Law is a Principle acknowledged by all such as reason well. Hear what the *Roman* Lawyers say about this Matter. *Sed naturalia quidem jura, quae apud omnes gentes peraeque observantur, divina quadam providentia constituta, semper firma atque immutabilia permanent; ea vero, quae ipsa sibi quisque civitas constituit, saepe mutari solent, vel tacito consensu populi, vel alia postea lege lata, Institut. Lib. i. Tit. ii. §. 11.* See also the *Digest. Lib. i. Tit. i. De justitia & jure. Leg. xi.* and *Lib. iv. Tit. v. De capite minutis, Leg. viii.* as also a Passage in *Cicero*, which is quoted a little lower, §. 20. *Note 4.* and Mr. *Noodt's Probab. Juris, Lib. ii. Chap. xi.*

³ Upon this it is that they ought to reflect, who lay down for the fundamental Principle of the Law of Nature, the Will of GOD, affirming, that there is no great Difference between that and our Author's Hypothesis, whereas what we seek chiefly to know is, what is the general Rule, by which we may discover what is the Will of GOD, that we may draw from that Rule, by direct Consequences, all the Maxims of the natural Law.

⁴ In which Sense we allow the Saying of *Euripides* (*Hecub. v. 800.*) GOD himself acts by a Law, *i. e.* by the Rules of Right and Wrong. See *Lib. vii. Chap. vi. §. 3. Note 1.*

pear how a Right which is to obtain amongst Persons by Nature equal, can be copied from that transcendent Right, which the Creator useth towards his own Works; that is, how a Law imposing a mutual Obligation on Men, can represent any Image of Omnipotency, which no Laws, no Obligations can restrain's. For that Argument drawn from Scripture, about Man's being created in the Image of GOD, is of no Force as to the present Case. For even those who confess that Image to be lost, do yet acknowledge the Sense of natural Law to have still remain'd in Man. Amongst our selves we usually call him a holy or righteous Person, who abstains from grosser Sins, and regularly observes his Duty: But now, who ever fram'd a Notion of the divine Holiness by so unworthy a Model? He amongst Men is accounted just, who makes it his constant Purpose and Resolution to hurt no body, and to pay every one their Due: But in GOD it is Justice to destroy his Creatures, even in the most grievous and painful Manner. Neither can he so owe a Person any thing, as to be accus'd with doing an Injury upon withholding it. If he hath been pleas'd to promise any thing to Mortals, he indeed performs it: Not because by virtue of such a Promise they obtain a Right against GOD; but because it would be some Kind of Deregation from his Greatness and Goodness, to command Men to expect any Favour from him, and afterwards to frustrate their Expectations. For he who breaks his Promise, either wants Power to perform it, or else through Inconstancy or Dishonesty falls from the Engagement he had once well made, or else at the same Time of making his Promise, he was ignorant how the State and Condition of Things would be, when it was afterwards to be fulfill'd; all which Cases imply some kind of Failing and Imperfection. Hence GOD cannot but observe his Promises, and Men ought not but to observe theirs: Hence human Promises turn into Debts, but divine Promises are made good out of pure Favour. What Rules the vindicative Justice of GOD proceeds by, is far above our Apprehension to discover. But thus much is certain, that they are not altogether conformable to the Methods of human Judicature. *Arist. Ethic. Nicom. Lib. x. Ch. viii.*
6 What Kind of Actions ought we to attribute to the Gods? Shall we say they are just? But alas! it would seem most ridiculous to fancy that they are concern'd in driving Bargains, in restoring Loans, and the like Performances, which we reckon honest

amongst Men. Shall we call them valiant and brave, able to endure Hardships, and encounter Dangers? Shall we pronounce them liberal? Who then shall be the Object, or what the Matter of their Bounty? Certainly we must not oppress them with the Load of Money or Treasures. In like Manner it would be an impertinent and troublesome Commendation, to say they are temperate; inasmuch as they have no inordinate Affections to govern and restrain. And so thus, if we run through the whole Train of human Actions, we shall find them all so mean and contemptible, as to be infinitely unworthy of the Heavenly Natures. Catull. ad Manl. 68. ver. 141.

Atqui nec deus homines componitur æquum est.

No just Comparison 'twixt Gods and Men.

From this Consideration, that we ought not to admit any Law common both to GOD and Man, we may draw an easy Answer to those Instances, which some give of GOD's dispensing with the Law of Nature, as when he commanded *Abraham* to kill his Son, and the *Israelites* to rob the *Egyptians*, of their Vessels of Silver and Vessels of Gold. For GOD the supreme Lord and Disposer of all Things, hath a much higher and fuller Right over his Creatures, than one Man can have over another, who is by Nature his Equal. Therefore we cannot properly call it a Dispensation of the Law of Nature, when a Man by express Command from Heaven, executes GOD's Right upon other Men, merely as *His Instrument*. *Comp. Grot. Lib. i. Ch. i. §. x. Note 6.* None, I believe, can be so simple as to imagine, that when the Object is chang'd, or the Circumstances varied, the Law it self suffers Alteration. When *the Creditor hath forgiven a Debt*, it loseth that Name, and therefore is no longer comprehended under the Law, which enjoins Payment. And as for the other Instance, when the Goods of a Person who gave a Thing in Trust, are adjudg'd to the publick Treasury, neither the Law is chang'd, nor its Object. For thus runs the Law, *He who receives a Thing in Trust, ought to restore it either to him who committed the Thing (being his own) to his Charge, or to him on whom the Right descends*. Now this Law cannot affect the Thief, because the Thing was not *his own*; nor the former Owner, who is suppos'd to be at present a banish'd Man, because the Propriety of all that was his passeth to the Publick.

VI. But neither do the Arguments which the

¶ We must add here two important Observations. I. That there are several Acts of human Justice which can't be attributed to GOD, because of the Excellency of his Nature. Such are a great Number of the Acts of universal Justice, and those of particular Justice, which regulate Contracts, invented to carry on the Business and Necessities of Life. See *Psal. l. ver. 10, 11, 12. Rom. xi. 25.* For who, for Example, dare reason thus? Pay your Debts, because GOD pays his. Be grateful, because GOD is kind to them that serve him. Obey your Governours, because GOD is subject to his Superiors. Honour your Parents, because GOD honours his. Are not these Arguings manifestly absurd? II. Moreover, as we know GOD by his Works, and by ascending from the Effect to the Cause, we can't know the Perfections of GOD, but by taking from the Perfections of the Creatures, and especially from Man's, whatever is imperfect, and then attributing them to GOD, when they are so purified. Thus having observed that these are the Perfections of Man, to keep one's Promise, speak the Truth, do no Man any Injury, distribute Justice impartially, we thence conclude, that they ought to be in him, who is the first Cause and absolute Lord of the World, but in a most excellent Manner, and worthy of the supreme and sovereign Being. It would be ridiculous then to establish divine Justice upon the Foundation of human, because this last is better known than the first, as *Dr. Cumberland, De Leg. Nat. Prolegom. §. 6. and Ch. v. §. 13.* acknowledges. I have taken this out of the *Specimen Controvers. Pufendorf. notarium, &c. Ch. iv. §. 4.* and out of his *1st pist. ad amicos p. 262.*

6 Aristotle's Greek is this, Πράξις ἢ ποίως ἀποκρίναι χρῆσι αὐτοῖς; ἢ ποῶρα τὰς δικαίας; ἢ γελῶσι φιλῶνται συναγαγόντες, ἢ παρακαταθήκας ἀποδοῦντες; ἢ ὅσα ἄλλα τοιαῦτα; ἀλλὰ τὰς ἀνδρείας; ἐπιφθόντας τὰ φάρμακα ἢ χυδαινοτάτας, ἢ καλεῖται ἢ τὰς ἐλευθερίας; τῆν ἢ δόσεις; ἀποποιεῖσθαι, εἰ ἢ ἔσαι αὐτοῖς νόμισμα, ἢ τι τοῖστων εἰ ἢ σώφρονες, τι ἀν' ἑαυτῶν; ἢ φρονητικὸς ὁ ἐπιπαινετός, ὅτι ἀκ' ἔχουσι φαντασίαν ἐπιθυμίας; διεξιῶσι ἢ πάντα φανείναι ἢ τὰ ἀπὸ τῶν πρῶτων, μικρὰ ἢ ἐκείνων ἔσονται.

7 See Lib. iv. Ch. xiii. §. 5. following.

Author^a of the Treatise *De Principiis Justitiae & Decorum* produces, seem forcible enough to establish a Twofold natural Law, *divine, and human, which, supposing the present Order of the World to continue, do fall in with one another*¹. For inasmuch as all Law implies Obligation, and that again presupposes some external and superior Principle, it doth not appear how we can, without Absurdity, apply any such Matter to GOD. And it is alike Impropriety to say, that² GOD is oblig'd by himself, or by his own Essence. Nor will that Text which he alledges, of *Rom. i. 32.* ever prove³ such a Law to be in GOD. For since the Gentiles, from the Dictates of their Reason, were able to gather the Knowledge of the Law of Nature, the next thing which they must infer, was, that GOD the Legislator would not suffer the Law to be violated without punishing the Offender. Therefore upon the Violation of that Law, there arises a Right to GOD (if it be decent so to speak) of exacting Punishment; or upon Commission of the Sin, GOD most justly executes what he before threatened. But who can conclude from hence, that GOD is obnoxious to Law? What follows is an ambiguous Expression, *That the supreme Right of GOD over his Creatures is discover'd by natural Reason from those Principles, which make the Foundations of natural Right and Equity amongst Men.* For if this only be the Sense of it, that in many Cases GOD doth proceed in the same Manner in his Dealings with Men, as he would have them follow in their Transactions with each other; it will easily pass without Contradiction^b. For thus GOD by the natural Law, hath enjoin'd Men to keep their Promises, as he will firmly keep those which he makes himself^c. So he forbids human Judges to condemn the Innocent, declaring that he himself will acquit them in his own Judgments^d. But if it be meant to assert that GOD hath no more Right over his Creatures, than Men are allow'd to obtain over each other; there will be need of more convincing Arguments to make us believe, that the supreme Lord and Master hath no fuller Right over his Servants, than the Servants have over their Fellow-Servants, with

whom Nature has set them on a Level: Or, to use Grotius's^e Terms, that the *Jus Recltorium*, and the *Jus Aequatorium*, the Right of Governors, and the Right of Equals are exactly the same Thing.

Neither must we let that Assertion pass by uncentur'd, which the Author of the same Treatise lays down, *pag. 52.* *That GOD ought necessarily to esteem the Laws of Nature as just, the Order of the Universe being establish'd in the Manner we now behold: And that he cannot but own every Deviation from them to be indecent and unjust.* For without doubt those imperious Terms, *GOD ought necessarily*, are very unsuitable to the Majesty of an Omnipotent Legislator. Nor is here any Necessity to be discover'd in the Case^f, except such as owes its Original merely to the divine Pleasure. The Reason which he subjoins is not strong enough to maintain his first Position; *All Things, says he, which our Thoughts can imagine, have always some Kind of $\xi\lambda\epsilon\sigma$ or Relation, arising from the intrinsic Nature of the Thing, and which cannot be separated from the Thing, without offering Violence to Reason.* For this Nature, and this adhering Relation, Things have not from themselves, but from the free Will of GOD; and the Decrees of his Will cannot properly be called his own Law. Thus, the Reason why amongst Men one Benefit obliges to the Return of another; why Violation of Covenants, Inhumanity, Pride, Slander, can never be allowable, is, because GOD hath given Man a sociable Nature, and as long as that Nature remains unalter'd, those Things which are agreeable to it must be good and honest, and those which are repugnant to it uncomely and unlawful. But who can hence infer, either that there is but one Law common to GOD and Men, or that Things are indued with any $\xi\lambda\epsilon\sigma$ or Habitude, independent from the divine Disposal?

VII. Those who found the Law of Nature on the Consent of Mankind in general, or on the Agreement either of all, or however of the most, and the most polish'd Nations, seem chiefly to follow¹ *Aristotle*, as the Author and Patron of their Opinion. He, in his *Ethicks to Nicomachus, B. v.*

^a *Veltbuisen*, p. 253.
^e *Lib. i. Ch. i. §. 3. n. 2.*

^b See *Luke vi. 35.*

^c *Rom. iii. 4.* *Hebr. vi. 17, 18.*

^d *2 Chron. xix. 6, 7.* *Rom. ii. 2.*

§. VI. * Our Author here breaks off his Discourse in a strange Manner, to confute a Writer which he had read over in too great Halle. *Veltbuisen* does no where make two distinct Kinds of natural Right, one to which GOD is subject, and the other to govern Man; but that natural Right which he calls divine, as well as that which he calls human, is a Law only for Man. He has no Word that so much as intimates, that he would establish a Right common to GOD and Men. He only endeavours to prove that the Law of Nature, which is taught us by Reason, is really a divine Law, and that GOD can't dispense with it, but he must contradict himself, so far as the Constitution of Things is such as he himself appointed at the Creation of the World. This appears both by the Coherence of his Discourse, and by what he had before said, *p. 52, 53.* I had not minded to justify this Author in this second Edition of my Work, if I had not forgot it in my first. I know not how to read what follows in the Original.

² I know not what our Author means here, for these Words are not the Person's whom he confutes.

³ Nor is this Mr. *Veltbuisen's* Conclusion which he aims at. His Design was only to prove, that the Gentiles might know very well, that by breaking the Laws of Nature they disobeyed God, and so deserved his Corrections, so that he might justly punish with Death any that had sinned against the Law of Nature. From whence it follows, that in sinning against the Law of Nature they sinned against the Law of GOD.

⁴ Mr. *Veltbuisen* says not the least Thing that tends that Way. He only asserts, that GOD, notwithstanding his Almighty Power, does nothing but what's agreeable to his Perfections. *There is nothing, says he, of a worse Consequence in religious Matters, than to teach that GOD does many Things wherein human Reason can see no Justice. For, if this be allowed, we destroy all reasonable Worship; Men will be obliged to renounce the Use of right Reason. They must do and believe, in reference to GOD, Things contrary to the Light of the clearest Reason, and conform to such Notions as to them are incredible, &c.*

⁵ I can't see that Mr. *Veltbuisen* intends any other Necessity here, than what is founded upon the Perfections of the Deity, who permits us not to will the End, without willing at the same Time the Means necessary to arrive at it, for this is the Principle he uses, as well as our Author, to discover the Original of the Laws of Nature. See §. 12. following.

§. VII. * The Greek of *Aristotle* is, *Φυσικὸν ἢ δίκαιον τὸ πανταχῶς τὴν ἀσιν ἴσον ἐπιφέρει, καὶ ἢ τῷ δικαίῳ, ἢ μὴ.* And again, *Ἔστι γὰρ ὁ ἀνεπινοῦνται τὴ πάντες, φυσικὸν καὶ δίκαιον, καὶ ἀδικον. καὶ μηδένια κοινά πρὸς ἀλλήλους ἢ μηδὲ συνθέτα.* See *Cicero's* *De Officiis, Lib. i. Ch. xiii, xiv.* The Consent of all Men in any Point, is so to be esteem'd a Law of Nature. And again, *The Consent of all Men is the Voice of Nature.*

Ch. x. calls that *natural Justice*, which bears the same Force in all Places, and doth not depend on particular Sentiments. And in his *Rhetorick*, Book v. Ch. xiii. he tells us, *there is a general Right and Wrong, or Just or Unjust, believ'd and profess'd by all Men; although no Society should be instituted amongst them, and no Covenants be transacted.*

Now besides, that this Way of proving the Law of Nature is only *à posteriori* 2, and therefore cannot shew the Cause and Reason of the Thing; so is it very slippery and uncertain, and involv'd in an endless Maze of Doubts and Perplexities. To appeal to the Consent of all Mankind, Mr. *Hobbes* 3 observes to be inconvenient upon this Account, because at this Rate it would be impossible for a Man, actually using his Reason, to sin against the Law of Nature. Inasmuch as his Consent being wanting, who is a Part of Mankind, the common Agreement must needs be main'd and imperfect. Then again, because it would not be fair to gather the Laws of Nature from the Consent of those who break them more frequently than they observe them 4. For, as *Isocrates* b speaks, *It is a natural Misfortune which we all lie under, that we should more frequently transgress than perform our Duty.*

Nor will it be a more happy Way of arguing to appeal to the Consent of all Nations. For, were it possible for us to understand all the Languages of ancient and modern People, yet we should be still far enough to seek in the Knowledge of their Manners and of their Institutions. We cannot hit off this Difficulty by saying, that the Consent of the most civiliz'd Nations is sufficient, and that the Opinions of Barbarians are not to come into the Account. For, what Nation, any Ways able to manage and to preserve itself, will own the Title of Barbarous? Or what Nation can take so much on itself, as to desire its own Manners and Proceedings should be the Standard in trying all others, and that whatever People did not exactly conform to its Model, should be immediately 4 pronounc'd barbarous and savage? Heretofore the Pride of the *Grecians* censur'd all as *Barbarians*, who liv'd without the Bounds of their Country. The *Romans* afterwards succeeded them, as well in their Arrogance as in their Empire. And at the present, some few Nations here in *Europe* have the Vanity to prefer themselves to the rest of the World, in the Opinion of their own Civility and Improvements of Living. But there are not wanting other People, who imagine themselves to have the Advantage of them in all Respects: And 'tis an old Proverb amongst the *Chinese*, that themselves only have two Eyes, only the *Europeans* one, and all the rest of the World are stark blind.

Some too there are, who fall foul upon our Learning, in prosecuting which we spend so much good Time; they will have it to be no better than a Prop, or a Crutch to support and assist our Dulness: Inasmuch as the good Disposition of many Men carry them on to a natural Innocence and Probity, without Improvement or Ornament of Letters; and because it requires no great Clerkship to be an honest Man. It is likewise too evident that high Attainments of Knowledge are not always bless'd with the Attendance of good Manners or of good Temper. Many Nations we see pride themselves in the tedious Pageantry of vain unnecessary Things; despising those who lead a Life of less Gallantry and more Simplicity. Yet were we to seek for Innocency and Integrity, we might, perhaps, find them much sooner amongst these plain and unartificial Mortals, than amongst their stately and formal Neighbours. 'Tis a shrewd Remark of *Justin*, Lib. ii. Ch. ii. speaking of the *Scythians*; *It seems wonderful, says he, that meer Nature should give them, what the Grecians, with the long Institutions of their wise Men, and the Precepts of their Philosophers could never attain; and that the politest Manners should be distanc'd and out-done in the Comparison with Barbarity. Of so much greater Benefit on one side was the Ignorance of Vice, than on the other the Knowledge of Virtue.* Vid. *Valer. Max. Lib. i. Ch. i. §. 2. Extern. & Sect. Empiric. Hypotyp. Lib. ii. Ch. v.* where we meet with several Things to the same Purpose.

Besides, that such a Consent can be of no Force, appears from this farther Reflection; that the Number of Fools far exceeds that of wise Men; and that few Persons have form'd their Opinions upon a full Search into the Foundations of Things; but most Men follow on in the Track of others, and yield an implicit Assent to their Notions, without applying their own Thoughts or Judgments to the Points in Debate. Farther, altho' we have a tolerable Assurance of the Consent of most People, at least as to the general Precepts of natural Law; and altho' we may presume on the Consent of the rest, from the Principles of those who are better known to us, yet it is more safe to conclude hence, what those Nations esteem just and equal amongst themselves, than what they think fair Ways of dealing with Strangers; all whom 6 are by some People accounted Enemies, and treated accordingly 4.

VIII. Tho' the common Use and Custom of many Nations may seem to be alledg'd with more Force for proving a Thing to be lawful or allowable, than for the proving it to be actually commanded by the Law of Nature; yet that we cannot with any Security make so much as the former

2 De Cive, Lib. ii. §. 1. b Orat. ad Philipp. c Plato Epist. x. Firm Integrity, Faith, and sincere Dealing, this I take to be the true Philosophy. d Add. Montaigne's Essays, Lib. i. Ch. xxx.

2 That is, not from the Nature of the Thing it self, but from some external Principle, as from the Consent of People.

3 The Greek is, ἅλλα ἢ πάντες πλείω πιφικωμὶ, ἔξαρμαστάνην. ἢ κατορθόν.

4 *Charron* reckons this among the foolish Opinions that are in the World, to condemn and reject all Things, Manners, Opinions, Laws, Customs, and Observances, as barbarous and evil without Knowledge of them, merely because they are not used by us, and are not thought proper for our Practice. *Of Wisdom*, Lib. i. Ch. vi. §. 9. Numb. 2. See also Lib. ii. Ch. viii. and Ch. ii. §. 5. Let the Reader further consult Mr. *Bruyere's* Characters in his *Chapt. of Judgments*, p. 420. and he'll find something very ingenious and smart upon this Subject there.

5 *Justin's* Words are, *Prorsus ut admirabile videatur, hoc illis naturam dare, quod Greci longa sapientium doctrina præceptisque philosophorum consequi nequeunt, cultosque mores inculta barbarie collatione superari. Tanto plus in illis proficit vitiorum ignorantia, quam in his cognitio virtutis.*

6 This appears especially by the Example of Two of the most famous People in the World, I mean the *Greeks* and *Romans*. See *Parrhasiana*, Tom. i. Page 202, 203. and Mr. *Le Clerc's* *Ars Critica*, Tom. i. Part II, §. 1. Ch. vi. §. 2, &c.

Of these Conclusions seems probable from the great Variety and Contradiction discoverable in the Manners and in the Institutions of the most famous People upon Record. So that we may well apply to the present Case, that Saying of ^a *Socrates*, *ἐκ εἰς σπεδαίεις γε διδασκάλους καταρέυεις, εἰς τὰς πολλὰς ἀναρέρων*. You consult no very expert Masters, when you refer yourself to the Multitude for Instruction. To the same Purpose *Plutarch* ^b observes, that the *Laws of Men are vastly different, some making one Thing to be good, and some another*: And *Tacitus's* Description of an Army compos'd of various Nations, may serve to represent the same wide Disagreement. *Their Languages, their Manners, their Desires, says he, are different; and while some will have one Thing to be lawful, and some the contrary, amongst them all, nothing can escape as unlawful* ^c. To give some Account of this Variety by way of Specimen. *Aristotle* ^d reports of some savage Nations on the Confines of *Pontus*, that it is customary with them, to borrow one another's Children, to furnish out their Feasts. And these People he presently after calls *Irrational, Wild, and living only by Sense*. *Eusebius*, in his Book *de Præparatione Evangelicâ* ^e, reckoning up the foul Customs and Manners which had been corrected by the Doctrine of the Gospel, amongst others, mentions the Pollution with Mothers and Sisters in *Persia* (which *Diogenes Laertius* ^f too takes Notice of from the Authority of *Socion*) the eating of human Flesh, and the murdering of Children under a religious Pretence amongst the *Scythians*: He adds that the *Massagetæ*, and the *Derbices* us'd to kill their Relations when they grew very old, and make an Entertainment with their Bodies; that the *Tibareni* in *Cappadocia*, threw their ancient Persons down Precipices; that the *Hyrcanians* cast out their Dead to the Birds, and the *Caspians* to the Dogs, to be devour'd. Hither also may we refer those foul Watchings and other Ceremonies, design'd for the Honour of their Gods, but mixt with all the licentious Practices of Adultery and Lewdness; as also the human Sacrifices barbarously murder'd on their Altars. The same excellent Author ^g gives the following Relations out of *Bardesanes the Syrian*. *'Tis a Law amongst the Getulians, that the Women offer their Bodies to whomsoever they please, especially to Strangers; and that their Husbands shall not accuse them on these Accounts, or pretend to censure them as guilty of Adultery. The same Liberty obtain'd amongst the Bactrians: Whereas, on the contrary, amongst the Arabians, all Adulteresses were punish'd with Death, and if suspected only, underwent some lesser Penalty. In Parthia and Armenia it is provided by Law, that no Man shall be accus'd for killing his Wife, his Son, his Daughter, or his unmarried Brother or Sister. Amongst the Atrians petty Robberies are punish'd with Stoning; amongst the Bactrians only with the Ignominy of being publicly defiled with Spittle. The wise Men of Greece are not ashamed to court the Love of little beautiful Boys. In Britain many Men possess one Wife. In Parthia many Women belong to one Hus-*

band. ^a *Sextus Empiricus* ^b the Sceptick, to shew that there is no Certainty in the Notions of Honesty or Dishonesty, hath raked up a great Heap of these contradictory Customs and Institutions. But he hath stumbled very fatally in the very Entrance of his Design, while he talks in this Manner: *Amongst us Pollution with the male Sex is unlawful and abominable; yet amongst the Germans, as is reported, it is no Disgrace, but rather a fashionable Practice.* For the Grecians were so scandalously addicted to this unnatural Vice, that *Plato*, in his 8th Book of Laws, thought there was need of using some Reasons to prove the Possibility of restraining it by publick Edicts. And that the *Bæotians*, *Sextus Empiricus's* Countrymen, ought not to stand excepted from this Imputation, may be gather'd from a Passage in *Cornelius Nepos's* Life of *Epaminondas*; though perhaps the vile Custom had ceas'd in those Parts before this sceptical Philosopher wrote. That it once prevail'd there, he himself afterwards relates. But what he reports of the *Germans*, is so groundless a Fallity, that 'tis wonderful how it should enter into the Head of any one, who is the least acquainted with the Manners and the Story of that Nation. He adds, that the *Cynick* Philosophers, and *Zeno*, *Cleanthes*, and *Chrysippus*, esteem'd the same foul Enormity an indifferent Thing. That some of the *Indians* thought it no Indecency to be familiar with their Wives in Publick. That in several Parts of *Egypt* for Women to prostitute themselves was look'd on as a creditable Profession; and that 'twas usual with the younger Sort first to get themselves a Fortune by the jilting Trade, and then to marry. That the *Stoicks* held it to be no irrational Practice either to frequent the Stews, or to maintain one's self by Pimping. That the *Persians* contracted Marriages with their Mothers, and the *Egyptians* with their Sisters: The former of which *Zeno* maintain'd to be agreeable to Reason ⁱ. That *Chrysippus* permitted a Father to have Children by his Daughter, a Mother by her Son, and a Brother by his Sister. That *Plato* allow'd the Community of Wives. That 'twas a receiv'd Custom with many of the Barbarians to feed on Man's Flesh; which the *Stoicks* themselves approv'd of. That, amongst many others, Adulteries pass'd for indifferent Matters. That the *Scythians* offer'd Strangers to *Diana*; and kill'd their own Parents, when they arriv'd beyond the Age of Sixty Years. That by a Law of *Solon's* at *Athens*, the Parents were empower'd to put their Children to Death. That the *Roman* Gladiators, after the Performance of their Murther, receiv'd Honours and Rewards. That Thieves amongst the *Spartans* were punish'd, not for stealing, but for letting themselves be catch'd. That the *Amazons*, if they happen'd to bear male Children, willfully made them Cripples, to prevent their Performance of any manly Actions or Exploits. He enlarges farther about the different Opinions in reference to the divine Nature, about the Diversity of religious Rites and Ceremonies, about the various Manners of Burial, and

^a *Plato Alcibiad. i.* ^b In *Themistocel. Pyrrhon. Hypothef. Lib. ii. Ch. v. p. 125. Ed. Wech.* ^c *Hist. 3. Lib. iii. Ch. xxxix. in fin.* ^d *Ibid. Lib. vii. Ch. vi.* ^e *Lib. i. Ch. iii.* ^f See his Preface, §. 7. with *Menage's* Notes. ^g *Lib. vi. Ch. viii.*

^b *Pyrrhon. Hypothef. Lib. iii. Ch. xxiv.* ⁱ *Ibid. Ch. xxiii.* *Zeno's* Speech, as there represented, reacheth the highest Degree of Insensibility and Impudence.

§. VIII. ² But here he speaks of the Multitude or Populace, and not of the Consent of several Nations.

² These Remarks against *Sextus Empiricus*, in Favour of the *Germans*, contain only an useless Digression, which might well be spared, as I have done.

the absurd Procurements of Death ^a. Tully ^b reports that the Egyptians, having their Minds overcome by wicked Errors, will sooner let themselves be cut in Pieces, than they will hurt a Serpent, an Asp, a Cat, a Dog, or a Crocodile: And if they happen unawares to do any of these Creatures a Mischief, they voluntarily undergo any Punishment. Busbequius ^c informs us, that Theft is an honourable Practice amongst the Colchians: And Fran. Alvarez that in Abyssynia the Custom is, for the Thieves to present a Part of their Booty to the King, keeping the rest without Scandal for their own Use. Philo Judæus de Temulentia, p. 208, 209. Ed. Genev. ³ And these Things may give us Warning not easily to credit those Uncertainties, which being diffus'd thro' almost the whole World, have thrown both Greeks and Barbarians into common Errors of Judgment. I mean those early Institutions, those national Customs, those antient Laws, through the whole Sum of which we cannot find one in which all agree; but in every Country, People, City, Street, and even in every House, the Men at least, differ from the Women, and the Children from both. And indeed I do not wonder, that a confus'd and miscellaneous Rabble, meer Slaves to Laws and Customs, however introduc'd, inur'd from the Cradle to yield Obedience to them no less than to Masters or Tyrants, and having their Mind clogg'd and broken by Severity and Blows, and not able to aspire to any great and manly Attainments, should believe the Traditions they receiv'd from their Ancestors, and letting their Reason lie without Use or Exercise, affirm Things, or deny them unexamind and unobserv'd. But I cannot forbear wondering at the Philosophers; who, whilst the greatest Part of them pretend to hunt for the real Truth and Certainty of Things, dividing themselves into so many Troops and Orders, pronounce of almost every Matter, great or small, ever with Difference, and often with Contradiction. Add. Montaigne's Eff. Lib. i. Ch. xxii. and Charron of Wisdom, Lib. ii. Ch. viii. §. 4, 7.

IX. But that Notion of extracting the Law of Nature from the Manners and Customs of the World, is accompanied with this farther Inconvenience; that 'tis almost impossible to find any Nation, which is govern'd purely by natural Law; but every Country hath its own particular Laws superadded, either in Writing or otherwise; to be made use of when the People have any Bargains or Transactions with their Fellow-subjects. And many times Affairs in Debate between whole Nations, are decided either by civil Law common to both, or by the Law of Nature, as it is not naked, but cloath'd, as it were, with many positive Additions. So that it is no easy Matter to distin-

guish what those Nations admit for natural Law; and what for positive and civil. We may add to this Consideration, that meer Use and Custom when it hath born a long, and an unquestion'd Sway, frequently puts on the Face and Semblance of natural Reason. 'Tis manifest, says Agathias ^d, that whatever Law or Institution hath obtain'd thro' a long Course of Time amongst many People, they certainly cry it up for most excellent and most equitable; and if any Thing be attempted contrary to it, this they reject as ridiculous, and unworthy of all Credit and Allowance. We have a famous Example to this Purpose in Herodotus. Darius, for Experiment's sake, put the Question to the Greeks, who were under his Command, what Sum of Money he should give them to feed on the Bodies of their deceas'd Parents, after the Manner of the Indians. Upon their Refusal to comply on any Considerations, he ask'd some of the Indians, what they'd take to burn their dead Parents after the Grecians Fashion, and not to eat them: But they setting up a general Outcry, desired the King to have better Thoughts of them. Besides, to have been inur'd in any Opinion from one's Infancy, is so forcible a Prepossession, that altho' the Opinion be false, yet it scarce enters into any Person's Head to question it; at least it passes with an uncontrol'd Currency, amongst Men of vulgar Parts and Capacities. ¹ Aristot. Problem. §. 18. Qu. 6. Those Things which Men have at first made Choice of, and to which they have been accustomed, in these they are not able to judge the better. For their Mind is already corrupted by evil Prejudices and Prepossession. Cicero. Tusc. Quæst. Lib. iv. Ch. iii. Some Persons are tied and restrain'd in their Notions, before they are capable of judging what is best, and afterwards, in the weakest Part of their Age, either following the Opinions of some Friends, or taken with the Speech of the first Master they have heard, they give their Verdicts on Points which they do not in the least understand, and being carried with the Violence, as it were, of a Tempest, to some particular Doctrine or Sect, they cleave to it as if they were bugging a Rock to save their Lives. And a little after, I know not how it comes to pass, that most Men had rather continue in a Mistake, and quarrel and fight in Defence of an Opinion which they have once lov'd and embrac'd, than to examine without Obstinacy or Partiality, what is deliver'd with most Agreement on all Sides. Add. Mich. Montaigne's Eff. Lib. i. Ch. xxii. Philo Jud. de Abrahamo p. 294. B. Ed. Genev. Inveterate Custom usually bears as much Force as Nature itself. To the greatest Part of Mankind we may apply Sextus Empiricus's ² Saying, they follow the usual Ways of Life without Thought or Reflection ³. And

^a Add. Diog. Laert. in Pyrrho, Lib. ix.
^c Thalia, p. 112. Gr. Edit. H. Steph.

^b Tusc. Quæst. Lib. v. Ch. xxvii.
^f Pyrrhon. Hypoth. Lib. iii. Ch. xxiv.

^e Epist. iii.

^d Lib. ii. Ch. xx.

³ Philo's Greek is, Ἐκεί δ' ἡμῶς ἐ παρακαλεῖ μὴ λιαν τοῖς ἀφανίσιν προτιπυθεῖν, ἀλλ' ἑρῶν ἀνα πάσαν τὴν δικαίημην ἀνακέχεται, κοινὴ Ἐκδοσὶν οὐκ ἐ βαρβαροῖς ἐπάγοντα τινὲν οὐ τὴν κρίσιν οὐδὲν; τὴν ἐν ταύτ' ἐστίν; ἀγαθαὶ δὴ πικρὴν αἰ ἐν παῖδαν, καὶ ἔτη πατρὶα, καὶ παλαιὸν νόμοι, ἃν ἐν εἴδῳ ὁμολογεῖται ταῦτον εἶναι παρὰ πᾶσιν, ἀλλὰ κατὰ χάρας καὶ ἔτη, καὶ πολλὰ, μάλλον ἢ καὶ κατὰ κώμην καὶ οἰκίαν ἐκδοσὴν, ἀδρα μὴ ἐν καὶ γυναικῶν καὶ κριτικῶν παῖδα, τοῖς ἄλλοις διακρίσεται τὰ γένεαι ἀπὸ παρ' ἡμῶν ἑτέροις καλά, καὶ τὰ προποῦ, ἀπειρή, καὶ τὰ δίκαια, ἀδικα—Ἐγὼ δ' ἐ τεταύμακα εἰ συμπεφορηθῶς καὶ μισῶς ὄχλος εἶδῶν καὶ νόμον ἔδωκεν εἰσηγμέναι ἀκλικῶς ὁδὸς, ἐπ' αὐτῶν ἐτι σπαργάνων μὴ παρακκῶν [for so it ought to be read, instead of ἀκλικῶν] ὡς ἀν δισποτῶν ἢ τυράνων, ἐμαρῶν, κατακεκοδουλιρῶς τὴν ψυχὴν καὶ μίαν καὶ νεανικὸν φρονήμα λαθεῖν μὴ δυνάμειος, πιστεῖ τοῖς ἀταξ παραδοῖσι, καὶ τὴν ἐκδοσὴν ἀνομιῶν, ἀδερικητικῶν, ἀνεξίτασους σωματισί τε καὶ ἀνεησσει χρεῖται; ἀλλ' εἰ καὶ τῶν λεγομένων φιλοσοφῶν ἢ πλάθῃ τὸ ἐν τοῖς ἐπι σιφῆς καὶ ἀψόδῃς ἐπιμορφάζουσα θηρῶν κατὰ σίφην καὶ λόγους ἀνακρίσεται, καὶ δόγματα ἀσυμφωνά, πολλαῖς ἢ ἐναντία ἐ πρὶ ἐκὸς τίθενται τῷ τυχεῖος, ἀλλὰ ἑρῶν ἀπὸ πάντων μικρῶν τε καὶ μεγάλων, ἐν εἰς αἰ ζήτησις σιμίσεται.

§. ix. ¹ Aristotle's Words are, Τί ἢ ἀν τίνες ἐξ ἀρχῆς ἐλθόνται, καὶ οἷς ἀν συνειθίσιν, εἰδὲ κενὴν δυνάμει τὰ βελτίω διεφθάραι ἢ διανοία οὐα φάουλῶς περαισιρῆς. Tully's Words are, Nam cateri primum ante tenentur adstricti, quam, quid esset optimum, judicare poterunt: deinde infirmissimo tempore atatis aut obsecuti amico cuidam, aut una alicujus, quem primum audierunt, oratione capti, de rebus incognitis judicant, & ad quancunq; sunt disciplinam quasi tempestate delati, ad eam, quasi ad saxum, adhaerescunt.

² S. Empiricus's Words are, Ἐπειὴ καὶ ἀδοξάζουσι τῇ βιωτικῇ τῆρσι:

³ Euripides's Observation is no less true, that the Traditions which we receiv'd from our Parents, and which are grown up with us, no Reason can confute, no Strength of Wisdom can over-rule^a. To the same Head we may refer that Text of the ⁴ Apostle, 1 Cor. xi. 14. and that Remark in Plato, in his seventh Book of Laws, that our using one of our Hands more readily than the other, proceeds purely from Custom: Inasmuch as Nature equally favours both. Amongst many People Honour and Respect are measured by the Length of Beards^b; whereas, on the contrary, the greatest Part of the Americans think it a brutish Indecency to appear with any Beard at all^c.

But all this while, we do not ascribe so much Force to Custom, that it should be able in such a Manner to deprave and seduce the Judgment of Reason, as to render the Truths concerning natural Laws impossible to be apprehended^d.

X. This strange Diversity of Laws and Manners, by which most Nations in the World contradict each other, hath, without doubt, been the Occasion why some Men have asserted that there's no such Thing as natural Law, but that all Law first arose from the Convenience and the Profit of particular States, and is incapable of any other Measure. Thus Horace, *Serm. Lib. i. Sat. iii. v. 98, 111, &c.*

Atq; ipsa utilitas, justii prope mater & aequi.

*Jura inventa metu injusti fateare necesse est,
Tempora si fastosq; velis evolvere mundi.
Nec natura potest justo secernere iniquum,
Dividit ut bona diversis, fugienda petendis.*

Of Mother Profit, Just and Right were born.

Turn o'er the musty Annals of Mankind,
And you'll confess that Laws were first enjoin'd
Thro' Fear of Wrong: Meer Nature never knew,
Or Good, or Bad to shun, or to pursue.

Ovid *Ep. Heroid. iv. v. 131, &c.* makes his Phœdra declare her Mind to the same Purpose.

*Ista vetus pietas ævo moritura futuro,
Rustica Saturno regna tenente fuit.
Jupiter esse pium statuit quodcumq; juvaret.*

That Thread-bare Virtue only held its Sway,
Whilst heavy Saturn rul'd the Sons of Clay.
Jove broke the dull Restraint; by Jove's Decree
Profit is made the Test of Piety.

^a In Bacchis, v. 201, &c.
Ch. viii. §. 6. & Ch. ix.
Book ix.

^b Vide Arrian, *Epietet. Lib. ii. Ch. xvi.*

^c Vide Rochefort. *Descript. Antill. p. 2.*

^d Add. Selden de *J. N. & G. secund. Hebræos. Lib. i. Ch. vi.*

^e See Book ii. and

Add. *Græc. Prolegom. N. 16, &c.*

³ Euripides's Words are, Πατρες παραδοχας, ἀσθ' ὀμνικιας χρονον
Κεντήμεθ', ἑδεις αὐτα καταδελι λογος,
Οὐδ' εἰδὶ ἄκρον τὸ σοφον ἑρηαι Φουαν.

⁴ St. Paul in that Place shews us only the Power of Custom, which is so strong, that Nature it self taught the Corinthians, that if any Man among them wore long Hair, it was a Shame to him, whereas if Women had long Hair, it was honourable.

§. x. ² Lactantius's Words are, *Ejus [i. e. Carneadis] Disputationis hæc fuit summa: Jura sibi homines pro utilitate sanxiffe; scilicet varia pro moribus, & apud eosdem pro temporibus sæpe mutata; jus autem naturale nullum esse. Omnes & homines & alias animantes ad utilitates suas, natura ducente, ferri: proinde aut nullam esse justitiam; aut, si sit aliqua, summam esse stultitiam, quoniam sibi noceret alienis commodis consulens. — Omnibus populis, qui florere imperio, & Romanis quoq; ipsis, qui totius orbis potententur, si justii velint esse, hoc est, si aliena restituant, ad casus esse redeundum, & in egestate & miseriis jaendum.*

³ Tully's Words are, in quo [verbo] lapsa consuetudo deflexu de via, sensimq; eo deducta est, ut honestatem ab utilitate secernens, & conjunxerit honestum esse aliquid, quod utile non esset, & utile quod non honestum, qua nulla pernicies major hominum vite potuit adferri.

Again, itaq; accepimus, Socratem execrari solitum eos, qui primum hæc natura coherentia opinione distraxissent.

Photinus's wicked Counsel in *Lucan, B. viii. v. 488. Et seqq.* proceeds on the same Principles,

————— Sidera terrâ
Ut distant, & flamma mari; sic utile recto.
Sceptrorum vis tota perit, si pendere justa
Incipit; exertitq; arces respectus honesti.
Libertas scelerum est, que regna invisa tuctur.

As Fire from Water, as each heavenly Light
From Earth, so Profit stands remov'd from Right:
If nice Regards to Faith and Truth are shewn,
Your Scepter drops, and you unhinge your Throne.
The Way to fix all hated Reigns has been
To grant a general Liberty of Sin.

Aristippus too, and Pyrrho in *Diogenes Laertius*^c, deliver themselves very grossly concerning the Origin of Just and Unjust. But of all the Antients none disputed this Point so largely as Carneades is said to have done. His Arguments, as Lactantius^e hath contracted them, are² to this Effect: That Men first instituted Laws to secure and to promote their own Advantage; whence they came to be so various according to their different Manners, and different Times; but that there was no such Thing as natural Law in the World. That Mankind and all other animate Beings, are by the Guidance of Nature, carried on to the Pursuit of their own Profit; and that consequently there can be no Justice; or, if there be, that it must be the highest Folly, inasmuch as it would make a Man injure himself in consulting the Conveniences of others. That all Nations famous for Empire and Command, and the Romans themselves, who then reign'd Masters of the World, if they would be just, that is, if they would restore every one his own, must return to their antient Cottages, and to their primitive Poverty³. In clearing up these Objections, it will not be amiss to begin with Tully's Remark, in his second Book of Offices, *Ch. iii.* ³ Profitable, says he, is a Word, which by the Corruption of Time and Custom is perverted insensibly to the Signification of somewhat that may be separated from Honesty; so as to make something honest which is not profitable, and something profitable without being honest: An Error of the most pernicious Consequence to the Life of Man. On which Account, in his third Book of the same excellent Work, *Ch. iii.* he tells us, that Socrates us'd to curse the Authors who first divided these Names in Notion and Opinion, which were in Nature so inseparably united. For those Masters of false Politicks cheated the heedless Vulgar with the ambiguous Term of Profit; which is of two Kinds, as

it is rated by two different Principles. One sort of Profit is that which appears such to the deprav'd Judgment of ill compos'd Affections; these being mov'd chiefly by present and transitory Advantages, and very little solicitous about future Concerns. ⁴ The other and the true Profit is adjudg'd so by sound Reason, which doth not only consider Things at hand, but weighs and examines the Effects and Consequences which they are likely to produce. Which therefore must pronounce that alone to be truly profitable, which is universally such, and which gives Assurance of Constancy and Duration ³, but can never judge it a desirable Thing to enjoy a momentary Advantage, drawing after it a Train of endless Mischiefs. 'Tis a most unhappy and a most dangerous Pleasure, in the Heat of a Fever to relieve ourselves with cold Water, which will be sure afterwards to redouble our Tortures. Actions perform'd in Conformity to the Law of Nature have a double Excellency, not being only *Honest*, that is, conducive to the Preservation and to the Increase of the Honour and the good Credit of Men; but likewise *Useful and Profitable*, promoting their Interest and Advantage, and contributing largely to their Happiness. And this latter Quality is so far from being an unworthy Attribute of Virtue, that even in Holy Scripture, *1 Tim. iv. 8. Godliness* is said to be profitable to all things, having both the Promises of this Life and of that which is to come. On the other hand, those Actions which contradict the Law of Nature, are always base and *dishonest*, and tho' they now and then bear some Appearance of Profit and of Pleasure, yet these Charms are quickly over, and never fail of being attended with a more considerable Croud of Evils and Misfortunes ^b. ⁵ Tully in his first Book of Offices, Chap. 4. talks admirably for our present Business. *Between a Man and a Brute*, says he, there is eminently this Difference; the one is carried on by Sense, and to that only which is present, with little or no regard to what is either past or to come: Whereas the other, by the Benefit of Reason, sees the Consequence of Things; their Rise and their Progress, and couples together Causes and Effects; compares Resemblances of Actions and Events; tacks the present to the future; and so taking in his whole Life at a View, he prepares all Things necessary for the Use and Comfort of it. Therefore 'tis so far from being true, that Civil Laws were first instituted for the sake of this momentary and bastard Profit, that

it appears to have been their chief End and Design, to hinder Men from squaring their Actions by so false a Measure. For, should any one resolve to direct all his Proceedings to his own private Advantage, without any regard to the rest of Mankind; since all other Men might as well take the same Course, there could not but arise the deepest Confusion, and a kind of War of all against all, a State ⁶ the most unprofitable and the most inconvenient in the World. On the contrary, it is very manifest, that he who, by observing the Law of Nature, endeavours to win the Affections and the good Grace of others, may conceive much surer Hopes of Profit attainable by their Assistance, than he, who trusting to his own single Power, takes the Liberty of treating others as he lists ^c. Nor is it possible for Men to frame a Notion of any Profit, which will be their own Peculiar, or to which all Men will not have as good a Title as themselves; since Nature hath never given any Man so large a Privilege, as to let him exercise any kind of Right against others, the Use of which they are not allow'd to turn again upon him. Therefore 'tis a great Mistake to fancy 'twill be profitable to you, to take away, either by Fraud or Violence, what another Man hath acquir'd by his Labour ^d; since others have not only the Power of resisting you, but of taking the same Freedom with your Goods and Possessions. And you have as little Reason to think it will prove advantageous to you to break your Faith; since your own Example may be made use of to your own Prejudice. *Isocrates in Areopagitic. p. 252.* ⁷ They judge those who break Faith and Contracts, to injure the Poor more than the Rich. The latter, by losing their Dependents, could suffer only some little Damage in their Revenues. The former, if they were thrown off by their Patrons, whose Support and Assistance they continually needed, must be reduc'd to extreme Indigence and Misery. ⁸ The same Orator, in *Orat. de Pace*, p. 285. Ed. Paris. placeth the chief Strength and Foundation of all his Advice to his Countrymen, in this Principle, that there is more Gain and Profit in a peaceful Competency, than in a needless Pursuit of Abundance. That Justice is much more eligible than Injury, and the Care of their own Possessions, than the Desire of other Mens ^e. ⁹ Nor should any presume so much on his own Strength and Power, as to imagine that others will not repay him with such Ulage as they receive from him: For all true Power arises from a Con-

^a *Marc. Antonin. Lib. vii. §. 74.* Those Actions are profitable or advantageous, which are agreeable to Nature. ^b See *Prov. xx. 17. v. 3, 4. — ix. 17, 18. — xxi. 6.* ^c *Add. D. Cumberland, Chap. ii. §. 29. n. 2.* ^d See *Prov. i. 13, 14, &c.* ^e Which Assertion he afterwards proves at large, and which is much more to the present Purpose than that above-mention'd by our Author.

⁴ As the Objects which are near us are commonly esteemed greater than those vast Bodies that are at a Distance; so in respect of Good and Evil, the present have the Advantage, and, in Comparison of those that are at a Distance, are always the greatest: So the most of Men are like prodigal Heirs, believe a lesser Good in present preferable to the Reversion of a greater; and so for the present Possession of a small Thing, they'll part with a large Inheritance which would certainly come to them. This proceeds from a false Opinion. Every one ought to know, wherein consists his Pleasure, for what is absent now, will one Day be present certainly, and then having the Advantage of Nearness, he'll see Things at their just Proportion, and so prevent in Time the unreasonable Estimate he has set on them by reason of the unequal Measures. *Mr. Locke's Essay of the Understanding, Lib. ii. Chap. xxi. §. 93.* See also, what goes before and follows.

⁵ *Sed inter hominem & belluam hoc maximè interest, quod hæc tantum, quantum sensu movetur, ad id solum, quod adest, quodque presens est se accommodat, paululum admodum sentiens præteritum aut futurum. Homo autem, quod rationis est particeps, per quam consequentia cernit, causasque rerum videt, earumque progressus & quasi antecessiones non ignorat, similitudinibus comparat, & res presentibus adjungit, atque adnectit futuras, facile totius vite cursum videt, ad eamque legendam præparat res necessarias.*

⁶ Of the Word *Inutilius*, see Note 1. on §. 9. of Chap. ii. of this Book.

⁷ This Passage of *Isocrates* is nothing to our Author's Purpose, as any one may discern at the first Sight.

⁸ *Τὸν ἄνθρωπον ἰσχυριαν ἀφελιμωτέραν ἢ κεφάλαιωτέραν εἶναι τῆ πολυπραΐμοσύνης, τὴν δὲ δικαιοσύνην τῆ ἀδικίας, τὴν δὲ τῶν ἰδίων ἐπιμέλειαν τῆ ἀλλοτρίων ἐπιθυμίαν.*

⁹ "There are more Men that poison, steal, and cheat us, than there are against whom we can commit those Crimes. Every one is more liable to be offended, than offend; for among Twenty Persons that are Equals, it is manifest every one of them has less Power against the Nineteen, than they against him." *Bayle's Dict. Hist. & Crit. Tom. iii. p. 2745. Col. 2.*

junction with other Men, whom 'tis impossible to keep together by your single Force. So that if that false and spurious Profit were to be the Measure of all our Proceedings, the Life of the stoutest Mortal would be as often in Danger, as it should seem profitable to any one to rid him out of the Way: And whoever took such a Course, would only set a fatal Pattern, and chalk out the Way to his own Destruction. On the whole Matter then, not Justice, but Injustice is really the highest Folly; which, tho' it may seem to succeed for the present, yet is neither general nor lasting; and tends to the Dissolution and Destruction of human Safety; Men being chiefly guarded and secur'd from Dangers by Society and by Friendliness. Nor will this hold true only of particular Men, but likewise of whole States and Communities; there having never been any Commonwealth so powerful, or so well establish'd, as not sometimes to stand in need of their Neighbours Assistance; since no single Kingdom could long bear up against the united Forces of a strong Confederacy.

Quintilian observes ¹⁰ that an ill Example can never be truly advantageous; for tho' it may give some Delight as the Occasion now stands, yet it afterwards draws on us a heavier Load of Mischiefs. It is impossible, says Demosthenes, Olynthiac. 2. to obtain any firm and durable Power by Injuries, by Perjury, and by Lies. Epicurus himself, in his Notions of Justice, was very honourable and very fair, as Gassendus hath given us this short Representation of them ¹¹. Justice not only never hurts any one, but, on the contrary, always carries along with it something conducing to the Ease and Tranquillity of the Mind; which it likewise further supports with the Hopes of wanting nothing that uncorrupted Nature can desire. A Soul where Injustice hath taken up its Seat, cannot but be in perpetual Disorder and Confusion, whilst when it attempts any thing with never so much Secrecy, yet it hath no Assurance that the Fact will always be undiscover'd. And since Justice is design'd for the Promotion of the common Good, it's plain that nothing can be just which doth not tend to the Advantage of whole Societies, and of each Member in particular. And because every one by the Guidance of Nature, desires and pursues what is good for him, it is necessary, that whatever is just should be according to Nature, and should therefore be call'd natural. And this Justice is nothing else but the Pledge

and Assurance of general Profit; for while it takes Place by the Universal Consent of all Parties, there arises this common Advantage, that Men do not mutually give and receive Injuries, but live in Peace and Quietness together; which as it is good and profitable, so doth Nature incite every Man to embrace and to pursue it. Tho' it must be observ'd by the Way, That what Gassendus afterwards delivers about a different Profit, among different Persons; and about a variable Justice, must not be admitted in regard to Natural Law, but only to Civil Constitutions. Diodor. Sicul. Lib. xxv. Eclog. 1. Epicurus, in the Book which he calls Settled Notions, affirms, That a Life led according to Justice is free from all Trouble and Disquiet; but that Injustice is full of Disturbance and Disquiet. Lucretius, Lib. v. 1151, &c.

*Circumrexit enim vis atque injuria quemque,
Atque unde exorta est ad eum plerumque revertit.
Nec facile est placidam ac pacatam ducere vitam,
Qui violat factis communia fœdera pacis.*

Because diffusive Wrong can spread o'er all,
No State's secure; nay, oft' the Wrongs recoil }
With double Force on the Contriver's Fall.
Nor can those Men expect to live at Ease,
Who violate the common Bonds of Peace.

Mr. CREECH.

In short, any one is able to judge what a Contradiction it is almost to common Sense, to make such a Profit as is opposite to Justice, the Standard of Acting. ¹¹ The Sophist Protagoras in Plato, p. 225. Ed. Fran. Ficin. though a Trifler in other Matters, yet had Wit enough to speak smartly on this Point. In other Habits, says he, if a Man pretend, for Example, to be an excellent Piper, when he doth not understand a Note, he either raises the Laughter or the Indignation of those that hear him; and his Friends admonish him of his Madness and Vanity. But the Case is quite otherwise in Injustice. For suppose some Persons know another to be really unjust, yet should the Man himself confess that he is guilty of that Vice before Strangers, they would take it for granted, that he was out of his Wits; maintaining that such a Wickedness is never to be discover'd, but the contrary Virtue always to be pretended to, whether it be really practis'd, or not. Not to counterfeit Justice therefore they take to be a senseless Extravagance; since

¹⁰ Syntagm. Part III. Ch. xxiv. & xxv. Vide Ciceron, de Fin. Bonorum & Malorum, Book 1. Ch. xvi.

¹⁰ Nunquam prodest malum exemplum, etiamsi in presenti occasione quadam delectat, in futurum tamen altius nocet. Declam. 255. Οὐκ ἔστιν, ἢ ἄλλοις Ἀλλοδατοῖς, ἀδικήσια, καὶ ἐπιτροχῆσια, καὶ ψεύδομαρον ἀναμιν βεβαιῶν κίσησας.

¹¹ Ἐν τῇ ταύτῃ ἀρχαίᾳ ἀρεταίᾳ (ὡς περὶ σὺ λέγεις) εἴαν τις φῆ ἀγαθὸς ἀνθρώπος εἶναι ἢ ἀλλοτρίων ἰσχυρῶν τεχνῶν, ἢ μὴ ἐστὶν ἢ καταλαγῶσιν, ἢ καὶ ταύτῃ, ἢ οἱ οἰκείῳ, προσεντες νετεῖσιν ὡς μαμοῖσιν. ἐν τῇ δικαιοσυνῇ, ἢ ἐν τῇ ἄλλῃ πολιτικῇ ἀρετῇ, εἴαν τις καὶ εἰδῶσιν, οἱ ἀδικῶν ἔστιν, ἐν ἑστῶ ἄνθρωπος κατὰ αὐτὴν τάληθῃ λέγει ἐναντίον πολλῶν, ὃ ἐκείνῳ σωφροσύνην ἔχοντο εἶναι, τάληθῃ λέγειν, εἰ ταῦτα μαρτυρῶν, ἢ φασὶ πάσης δὲ ὄψεσθαι εἶναι δικαίους ἔαν τε ᾄσιν, ἔαν τε μὴ, ἢ μαρτυροῦσθαι τὴν μὴ προσπειρημένον δικαιοσυνῇ, ὡς ἀνιχνεύοντες εἶναι, ὅτι ἄνθρωπος ἀνιστοῦσθαι μετὰ τὴν αὐτῆς, ἢ μὴ εἶναι ἐν ἀνθρώποις. But I do not see how this Passage and the following one of Quintilian make for our Author's Purpose, since they only prove the Maxim of the Duke of Rochefoucault, That, Hypocrisy is an Homage which Vice pays to Virtue. Moreover, there is not any thing that can prove, that Profit may be opposed to Justice, and any Man's private Interest to the Publick. I shall alledge some more pertinent Authorities to this Purpose, out of Seneca and Arrian's Epictetus. Seneca's Words, Epist. 48. are, *Nec potest quisquam beate degere, qui se tantum intuetur, qui omnia ad utilitates suas converterit: alteri vivas oportet, si vis tibi vivere. Hæc societas diligenter & sanctè observanda est, quæ nos omnes omnibus miscet, & judicat aliquod esse commune jus generis humani:* i. e. " 'Tis not possible for any Man to live happily who regards himself only, who minds his own Interest only; we must live to others Profit, if we will advance our own. This Union in Society is carefully and sacredly to be preserved, which intermixes us together, and teaches us, that there is a common Right of Mankind." Arrian's Words in Epictet. Lib. 1. Ch. xix. are, Καὶ οὕτως τε [οὗ Ζεὺς] τοιαύτην φύσιν τῷ λογικῷ ζῷος κατασκευάσασθαι ἵνα μηδεὶς, ἢ ἰδίαν ἀγαθῶν δυνταί τυχεράνῃ, εἰ μὴ τι εἰς τὸ κοινὸν ἀφελίμων προσφέρται, ἕτως ἕκαστος ἀκονώθηον γινεται τὸ πάντα αὐτῷ ἕκαστος ποιῆν i. e. God hath disposed the Nature and Order of reasonable Creatures in such a Manner, that every one of them should advance each other's Interests, so as contributes to the publick Advantage; so that tho' we refer all to our private Advantage, we ought yet to do what in us lies to promote that of others." M. Antoninus has many ingenious Reflections in his Works tending this way.

whoever makes a contrary Profession deserves to be driven out of human Converse and Society^a. No Man is so bad, says *Quintilian*^a, as that he desires to seem bad. And almost every Body speaks more honestly than he either thinks or acts.

But the divine Providence hath sufficiently confuted this pernicious Opinion, by making its boldest Patrons and Assertors feel the fatal Consequences of it. To give an Instance or two. "*Lysander*, that crafty Designer, who manag'd most Affairs by Cheats and Shuffles, who plac'd all Right in Profit, who affirm'd Truth and Lies to be indifferent Things, and either to be most valuable as it was most advantagious; who bragg'd that Men were to be deceiv'd with Oaths as Children with Dice or bounding Stones; as *Plutarch*^b and *Polyenus*^c give his Character; did he build his Fortunes on a sinner Bottom, than if he had made Truth and Honesty the Mark and the Standard of his Proceedings^d? *Agefilaus*^e, who at other Times and in other Speeches, us'd to cry up Justice for the Queen of Virtues, without which, Valour and Fortitude would be of no Use, yet when *Phœbidas* had without Orders possess'd himself of the Fort *Cadmea*, defended that Boldness by such kind of Rhetorick as this, That the Action of *Phœbidas* was to be rated and judg'd of according to the Benefit and Advantage it brought to the State. Since whatever conduc'd to the publick Good of Lacedæmon, was to be done at a Venture; whether Men were empower'd by Commission for such Performances, or not. But was not this very Exploit the Occasion of the Spartans miscarrying in their Design of rendering themselves Masters of Greece?

XI. These Foundations being settled, 'tis easy to solve the Objections of the opposite Party. 'Tis ridiculously weak to conclude, that supposing different States to have set up different Laws upon the Account of Profit, therefore there can be no perpetual or natural Law. For all civil Laws do either presuppose or include the chief Heads of the Law of Nature, those by which the Safety of Mankind is secur'd: Neither are these in the least injur'd or impair'd by the particular Ordinances, which each Commonwealth finds a Necessity of superadding, for its separate Interest and Benefit. Penal Laws, or Sanctions, we acknowledge to have been instituted out of Fear of Justice, or to restrain the Wickedness of Men, when the bare Dictates of natural Law were found insufficient for that Purpose. When *Horace* denies that Nature is able to distinguish betwixt Right and Wrong; we agree with him, if he means only that Nature which Man bears in common with Brutes; whereby

Brutes themselves, through the Information of their Senses, do perceive what is agreeable to their Body, and what not; without the least Apprehension of Honesty or of Dishonesty. But if he means the rational Nature, we deny the Position, as absolutely false. As for *Carneades* his Argument, that if the Romans would be just, that is, if they would restore every one his own, they must return to their primitive Cottages; and that therefore Justice is Folly; in vulgar Esteem this may bear some Semblance of a plausible Truth; but to those who look farther into it, it will appear exceeding empty and trifling. For since whatever Right we assume upon others, they may in like Manner use against us; it can by no Means be profitable for us by injuriously seizing on other Mens Goods, to invite them to make Reprials on our own. And in stating the Nature and the Definition of Profit, we are not to consider what seems advantagious to such or such a Man, at such a particular Time, to the Prejudice of others; but what is of universal and perpetual Benefit and Expediency. Thus, for Instance, let us suppose an Officer to have rais'd a vast Estate, by robbing the publick Treasury: such an one certainly imagines it would be Folly in him, to make an exact Restitution, and so to return to his first Narrowness of Fortune. But when the Prince, upon convicting him of Extortion, hath adjudg'd his Goods to the Treasury, and his Person to the Gallows, do we then think he took a wiser Course to raise himself in the World, than another Person who rests contented with a competent Maintenance, innocently acquir'd? Thus I know not whether it had not been better for the Roman People to have fate down with Satisfaction in the Enjoyment of that moderate Wealth which at first they got together, without the Expence of their Virtue or Honour; than when they had rifled and plunder'd all the whole World, to turn their Weapons upon themselves, and to expose the feeble Carcass of their Empire to be torn in Pieces by the barbarous Nations. Nor do the other Arguments of *Carneades*, as set down by *Lactantius*^e, require any long or any laborious Reply. For if any think it a Piece of Wisdom in the Seller of a House, to dissemble its being infected with the Plague, certainly it must be own'd for Wisdom in the Buyer, if he either give false Money for his false Goods, or to punish the Author of the Cheat by the severest Methods. Lastly, as for those Cases, whether it be fair^a in a Shipwreck for a stronger Man to force a Plank from the Arms of a weaker, or in a Flight, for a found Man to dispossess a wounded Soldier of his Horse, preferring

^a *Institut. Lib. iii. Ch. viii. Ed. Lugd. Bat. b. 251.*
tag. Lib. i. Ch. xlv. ^d Vide *Cornel. Nep. Lysand.*

^b *Plutarch. Apophthegm. Lacon. p. 229. Ed. Wech.*

^c *Strab.*

^e See *Plutarch, in Agefil. p. 608.*

^{**} *Nec enim est quisquam tam malus, ut malus videri velit.*
^{§. 1.} ^a *Bonus vir, inquit, si habeat servum fugitivum, aut domum insalubrem, & pestilentem, que vitia solus sciat, & ideo proscribat, ut vendat, utrumque profitebitur fugitivum servum, & pestilentem domum se vendere, an celabit emptorem? si profitebitur, bonus quidem quia non fallat, sed tamen stultus iudicabitur, quia vel parvo vendet, vel omnino non vendet; si celaverit, erit quidem sapiens, quia rei consulet, sed idem malus, quia fallat. Rursus si reperiat aliquem, qui aurichalcum se putet vendere, cum sit illud aurum; aut plumbum, cum sit argentum; rabebitne, ut id parvo emat, an indicabit, ut magno? stultum plane videtur malle magno.* *Divin. Institut. Lib. v. Ch. xvii. n. 5, 6, 7.*

^a Again, *Lactantius* adds, *Ibid. n. 10, &c. Nempe justitia est, hominem non occidere, alienum proprus non attingere, quid ergo justus faciet, si forte naufragum fecerit, & aliquis imbecillior viribus tabulam cepert? Nonne illum tabula deturbabit, ut ipse conscendat cœq; nixus evadat, maxime cum sit nullus medio mari restis? Si sapiens est, faciet, ipsi nimirum pereundum est, nisi fecerit. Si autem mori maluerit, quam manus inferre alteri, jam non justus ille, sed stultus est, qui vitæ suæ non parcat, dum parcat alienæ. Item: Si acies suorum susa, hostes insequi cœperint, & justus ille fuerit nactus aliquem saucrum equo insidentem, eum parcat, ut ipse occidatur, an dejiciat ex equo, ut ipse possit hostem effugere? Quod si fecerit, sapiens, sed idem malus; si non fecerit, stultus sit necesse est, licet justus.*

his own Preservation to the Safety of his Fellow, we shall hereafter find Occasion to discuss and to determine them^a. It will be sufficient for the present to make this short Remark, that Actions done upon extreme Necessity, and out of Conster-nation of Mind arising from imminent Danger, and which do therefore meet rather with Excuse, than with Approbation; ought by no Means to be establish'd for common Rules of Proceeding^b.

XII. The Author of the Treatise *De Principiis justis & decoris*, in searching after the right Notion of the Law of Nature, follows this Method. In the first Place he lays down this confess'd Principle, *That there is a GOD, and that he created the World in Wisdom*; which no Man in his Senses will dispute. He adds, that *GOD hath declar'd his Resolution of exercising the Virtues of Truth and Justice, in his Government of the World*^c. But here, besides that it scarce seems right to conceive the divine Justice or Truth after the Manner of *Virtues*, it is sufficiently manifest, that the Disposition or the Inclination to Justice which we attribute to *GOD*^d, is very different from that which Men are to exercise towards one another: Inasmuch as the former denotes that Method by which an infinitely great and good Creator is pleas'd to govern his intelligent Creatures; whereas the latter obtains only amongst Persons by Nature equal, and subject all alike to a common and a supreme Lord. Neither can it be at all made out that divine and human Justice are capable of the same Measure, from this Argument, that in holy Scripture we are frequently refer'd to the Example of *GOD*^e: For in those Passages the holy Spirit is pleas'd to follow the usual Way of Reasoning^f, *from a greater to a less*. But from these Principles the said Author, p. 9, 10. concludes, that *in the Creation of the World GOD propos'd to himself some End. That he hath appointed Means sufficient for the obtaining that End. That a Man shall certainly be punish'd, if he deviates from that Order which GOD would have us observe, in the Prosecution of the End propos'd by him to himself, and to Mankind. And on the contrary, shall certainly be rewarded, if he direct his Life according to the Order prescrib'd by his Creator.* In fine, that *the Justice of GOD implies nothing else, but his lawful Distribution of Rewards and Punishments.* In Regard to this Doctrine, I question whether it can be said with any tolerable Sense, that *GOD hath constituted an End, common to Man*

with himself; or that the Order prescrib'd by him to Man, that is, the Observation of the Law of Nature, doth produce the End for which *GOD* created the World. Nor can the Crudeness of the following Aphorism pass with ordinary Digestions: *That the natural Necessity which is in GOD doth lay on Men a Necessity of pursuing Virtue, and of flying Vice.* Yet suppose we should be brought to grant all this, and then should guide our Search after the Law of Nature by some such general Maxim and Rule, *Whatever Things are by Nature so dispos'd, as to hinder the End which GOD propos'd in the Creation of the World; all those Things are prohibited by the Law of Nature: But whatever Things are so naturally order'd, that the End before-mention'd cannot be obtain'd without them, those are certainly enjoin'd or commanded by the same Law:* We shall still be at a loss to understand what necessary Relation every particular Precept of the Law of Nature bears to that End; whilst the End itself is not perfectly discover'd by us. Thus, for Example, there would be need of a Train of Deductions, to make me apprehend, that the End for which the World was created cannot be attain'd without honouring one's Parents, or that Theft is repugnant to the said End. 'Tis meer trifling therefore to stick upon such general Terms, without calling in the Assistance of nearer and more distinct Principles. And the Foundation of the Law of Nature must be always left in the Dark by him who can make no farther Progress in the Question, than to tire us with such Repetitions, that *since the World was made in Wisdom and Order; and since Man hath his Part assign'd him in the universal Harmony; therefore that Order ought necessarily to point out to every Man his Duty, in every Action or Proceeding.*

XIII. Thus far most are agreed, that the Law of Nature is to be drawn from Man's Reason; flowing from the true Current of that Faculty, when unperverted^g. On which Account the holy Scriptures declare it to be written in the Hearts of Men, *Rom. ii. 15.* This we judge to be a most manifest Truth, that altho' the sacred Writings do throw in a more enlarged Light to direct us in the clearest View of Nature's Law^h, yet the same Law may without any extraordinary Assistance be found out and solidly demonstrated, by the bare Force of Reason, such as *GOD* first implanted and still preserves in Man-

^a See Chap. vi. of this Book.
^d Luke vi. 56. *Matth. v. 44, 45.*—*xviii. 33.*

^b Add. *Veltbuisen, de principiis justis & decoris, p. 114, &c.*

^c *Psalms xcvi. v. ult.*

^e §. XII. I do not see that *Veltbuisen* says any Thing that can intimate the contrary. His Notion is, That *GOD* hath dispos'd all Things in a Manner suitable to his Perfections; and this is that natural Necessity of which he speaks a little lower.

^f Our Author says, That in those Places of Scripture the Arguments are drawn, *a minori ad majus*, i. e. from the Less to the Greater; whereas 'tis evident that they are drawn just the contrary Way; for thus the Argument runs, and he himself speaks so in another Place: "If *GOD*, who is the Lord of all the World, and has from all Eternity enjoyed a compleat Happiness, who is self-sufficient, and has no need of Pardon, is very merciful to his Creatures, who have provok'd him to Anger by their Sins, with how much greater Reason ought Men to have Compassion on their Brethren, whose Pardon they themselves often want, and whose Help they can't live without? If a Master hath Pity of his Servant, the Servant ought much more to have Pity on his Fellows. If *GOD* causes the Sun to rise on wicked Men, much more ought Men to do good to their Enemies. Men, I say, who are so subject to offend one another, and who have so great Need of Assistance one from another." *Specimen Controvers. Chap. iv. §. 5.* To call this way of Arguing, *a minori ad majus*, is contrary to the Language of all Orators and Logicians. See *Aristot. Rhet. Lib. ii. Chap. xviii.* and *Top. ii. Chap. x.* as also *Quint. ii. Instit. Orat. v. 10.*

^g 'Tis true, that this is not much to the Purpose, but we must own, that *Veltbuisen* did not much depend on it; and though he does not explain himself so distinctly as our Author, yet he lays down a Principle which reaches to the very Bottom of that which establishes Society, in another Place, which is this, "That which is such in general, and of that Nature that Men can't dispense with the Observation of it, without bringing a great Prejudice to all Mankind, or which if Mankind should permit to every Body, 'twould be to their great Damage, whatever is such, say I, is forbidden by the Law of Nature." *Page 115.*

^h §. XIII. *Νῆρ ὃ ἔχον ψῆχὴν ἀπὸ σαυτοῦ, ὅ, τι σοι προκλεῖν ἐστὶ, καὶ ὅπως.* Being endued with a Soul, you may know from yourself, what and how you ought to act. *Dio Chrysost. Orat. x. De Servis, p. 150. Ed. Morall.*

ⁱ See what I have said in my Treatise of *Games, Lib. i. Chap. iii. §. 2.*

kind. Yet here we by no Means think it necessary to maintain, that the general Principles of natural Law are *innate*, or imprinted, as it were, upon Mens Minds, from their very Birth, in the Manner of distinct and actual Propositions, so as to be readily express'd and utter'd by them, as soon as they arrive at the Use of Speech, without farther Instruction or Meditation. For that these native Idea's or original Characters are no better than unwarrantable Fictions³, any one may discover, who will be so curious as to observe nicely the Steps by which Children make their Progress in Knowledge, clearing themselves by little and little from the Ignorance of their Infant State. Nor is it a Consideration of little Weight in this Point, that the holy Scriptures frequently describe Infancy and Childhood⁴ by the Ignorance, and riper Age by the Knowledge of Right and Wrong⁵. Dr. Cumberland must be our Guide and Master in these Disquisitions, who hath most clearly demonstrated, that altho' we reject the Notion of those innate Propositions, yet the Knowledge of the Law of Nature is truly and really imprinted on human Minds by GOD, as he is the first Mover and Director of them: Whence likewise any one may readily discover, that 'tis his Will and Command we should act according to that Law. That Phrase in *Romans* ii. 15. which is urg'd so hardly by some Authors, is certainly⁶ figurative, and implies no more than a clear and certain Knowledge treasur'd up in the Memory; of which the Persons spoken of are convicted in their own Consciences, by what Means soever those Notions first enter'd into their Thoughts. Thus too those Sins which in *Jeremiah* xvii. 1. are said to be *engraven on the Tables of the Heart*, inasmuch as they are actual Transgressions, could not be discover'd at the Nativity of the Offenders⁷. That Readiness which we see in Children and in the ignorant Multitude, to distinguish Right from Wrong, is owing in a great Measure to Exercise and Use; whilst from their early Years, and the first opening of their Reason, they observe good Things to be approv'd of, and evil Things to be exploded; the former to be attended with Praise, the latter⁸ with Punishment. Their Minds are so fix'd and dispos'd by daily Practice, and by the

whole 7 Series of common Life, that few of them so much as doubt whether they may not proceed by other Methods. Whoever considers this Matter accurately, will discover, that 'tis very hard to give a Reason for many Practices, which yet the common People undertake without Scruple or Hesitation. To borrow an Instance from a late Author^d, *If a Man be found committing a Robbery, the Multitude presently join Hands and Minds to pursue and to seize the Thief: But if upon a Quarrel one Man hath kill'd another, every Body wishes he may get off safe; at least no Body willingly assists in the taking of him.* The Reason of such a Difference the Vulgar understand not, which is this; *Everyone is more in danger from a Thief, who designs to plunder wherever he can meet with Booty; than from an Actor of Manslaughter, who intends Mischiefs to none but to the Person who gave him Provocation.* Therefore when we acknowledge the Law of Nature to be the Dictate of right Reason, our Sense and Meaning is this, that the Understanding of Man is endued with such a Power, as to be able from the Contemplation of human Condition, to discover a Necessity of living agreeably to this Law; as likewise to find out some Principle by which the Precepts of it may be clearly and solidly demonstrated^e. Nor is it any Rub or Prejudice to this Doctrine, that the artificial Method of demonstrating these natural Precepts is not known or apprehended by all Men; and that most Persons both learn and observe the Law of Nature by Custom, and by the common Course and Tenour of living. For we see every Day the common Mechanicks and Artificers performing many Things, either by Imitation, or by the compendious Direction of Instruments, the Proof of which they do not in the least understand: And yet this doth not hinder such Operations from being truly mathematical, or from being founded on solid Principles of Reason. Hence it likewise appears what Rule we are to measure our Reason by, in judging of its Fitness for the Discovery of natural Law: or whence we may be assur'd, whether such a Dictate proceeds from right, or from deprav'd Reason. The Dictates of right Reason are true Principles, which agree with the Nature of Things well observ'd and examin'd; and which

^a Vid. *Jonah* iv. 11. *Deut.* i. 39. *Isaiah* vii. 14, 15, 16.

^b *Prolegom.* §. 5, 7, 8.

^c Add. *Luke* ii. 51. *Proverbs* vii. 3.

^d *De principiis justitiae & decori*, p. 81.

^e Add. D. Cumberland, *De L. N.* Ch. iv. §. 5.

³ Our Author treats more at large of this in his Apology, §. 24. and in his *Specimen Controversiarum*, Chap. iv. §. 23. But Mr. Locke has set it in its full Light in his *Essay upon Man's Understanding*. See also what I have said in my Preface, §. 3.

⁴ Our Author must understand here by Good and Evil, *Recti & Turpis*, Honesty and Dishonesty; but that is not the true Notion of this Expression in the sacred Writers, who, according to the Idiom of their Language, would have us to understand by that Phrase in general, *All that can't be known*, because in Reality all Things that we know are either good or evil, *i. e.* profitable or hurtful; as is judiciously observed by *Lud. Cavellius* in his Notes upon *Gen.* iii. 5. which it would be well to consult; as also Mr. *Le Clerc's* Commentary on the same Place. Nevertheless, if any Consequence ought to be drawn from the Expressions of sacred Writers in Matters of Philosophy, in respect to which they commonly follow the most popular Notions, we might infer, that these Passages very much favour the Opinion of those who deny innate Ideas, since he that says *all*, excepts nothing. In fine, we find this way of speaking among the profane Authors. See Mr. *Le Clerc's Ars Critica*, Part II. §. 1. Chap. ii. §. 26. pag. 153. *Tom. i.* and *Hesiod's Theogonia*, v. 900.

⁵ See *Grotius* in his Notes upon this Passage, and *Le Clerc's Ars Critica*, p. 194, &c. *Tom. i.* 2d Edit.

⁶ See Mr. *Locke's Philosophical Essay*, Lib. ii. Chap. xxviii. §. 10, 11, 12.

⁷ Add to this the manifest Proposition that these Maxims have with the Light of right Reason for it is perceived by the most simple, the very Moment that 'tis propounded, and they understand it, tho' they would never have found it out themselves, nor can they apprehend the Reasons so well as to deliver their Thoughts distinctly about it. Further, it is certain, that no Man at the Age of Discretion, can reasonably pretend an invincible Ignorance for his Excuse; but yet it is no less true that Education, Instruction, and Example, are the ordinary Means by which Knowledge is convey'd into the Mind of Man, and without it either the natural Light would be almost wholly extinguish'd, or we should not attend to it. This Experience shews us, not only among several savage Nations, but even among the more civilized, there being many Men that make good this sad and mortifying Truth. Whence we may conclude, that every one ought to take special Care to contribute as much as may be to the Instruction of others in their Duty, and to establish, confirm, and spread abroad so necessary a Knowledge.

are deduc'd from other true and first Principles, by the Rules of good Consequence. On the contrary, those are Dictates of deprav'd Reason, in which a Man either lays down false Principles, or by a wrong Method deduces false Conclusions. For ^a at the same time as we affirm the Law of Nature to be imprinted on us by the Nature of Things, we imply that it is most true and infallible: Since Nature presents us with nothing but what really exists, and produces no Effect that can be charg'd with Falshood: All Falsity arising from the Mistakes of Men, whilst they either divide such Notions as naturally cleave together, or join such together as Nature hath separated and plac'd at a Distance ^a. And this Course of Judging being duly follow'd, we need not fear that any one shall be able to foist upon us for natural Law, either the frantick Notions of his ill-purg'd Brain, or the irregular Desires of his misguided Mind. For 'tis in vain for that Man to make his Appeal to Reason, who cannot demonstrate his Assertions from Principles of unquestion'd Truth, and such as agree with the Nature of Things; inasmuch as all Truth and all Rectitude consists in the Agreement of Conceptions and of Propositions with the Things themselves, which they are intended to express. And he who hath not Parts enough to frame and unite the Chain of a Demonstration, must supply that Defect by an exceeding Stock of Impudence, if he desires any Regard should be had to his vain Conjectures, when they run alway from the receiv'd Opinions of Mankind. Moreover, it is manifest to all those who understand the Force and the Manner of Demonstrations, that there is not only a Necessity that the Principles made use of be true, and the first or highest that we can ascend to, but likewise that they be proper and peculiar to the Question in Debate, and so very clear, that the Mind apprehending by their Means, the Cause of the Thing asserted, may rest satisfied, and neither desire nor want any farther Proof. Now against this Rule of finding out the Dictates of right Reason, those Authors have not only transgress'd, whose Foundations of natural Law we have already examin'd: But those too who think it sufficient to build that Law on so slender a Bottom as this, *That natural Honesty consists in the Agreement of Reason and Appetite; the Rule of which Honesty is the Excellency and the Dignity of human Nature, and that most noble End for which Providence seems to have given us the Dominion and the Possession of the World.* For tho' we could argue never so fairly, this Action is suitable to the Excellency and the Dignity of Man, and therefore honest and to be perform'd; yet this doth not furnish us with any clear and certain Knowledge, in which our Minds may rest safely without farther Enquiry: But the Question still remains, in what that Excellency consists, and by Virtue of what Cause it comes to agree to Mankind. Thus, if one should say to a Clergy-man, It doth not become you to frequent Taverns and Houses of Debauchery, because such Courses are repugnant to

the Dignity of the sacerdotal Office; he says nothing but Truth, in all this, but he doth not alledge the last and the strongest Reason, so as to set the Matter beyond Doubt and Dispute ^b.

Altho', as hath been already observ'd, it is not in the Power of every Man, to deduce the Law of Nature artificially from its Principle: yet that it may be properly said to be *known* to all Men enjoying the Use of their Reason, it is sufficient, if even Persons of tolerable Heads are able to apprehend the Demonstration when propos'd by others, and clearly to perceive the Truth of it, by comparing it with their own natural Condition. As for the lowest Degree of Mortals who are acquainted with the Law of Nature, chiefly by popular Information and by common Use, they ought to require no farther Proofs of its Certainty, than that first the Exercise of it is maintain'd by their Superiors, by whose Authority they are to be guided; and then, secondly, that they themselves cannot find any probable Reasons by which they might either confute or weaken its Force; and lastly, because they are every Day sensible of its Usefulness, and of the Benefits which it confers upon Mankind. And upon this Account the Law of Nature appears to be sufficiently promulgated; so that no Person of competent Years and of sound Understanding, can by any Means plead invincible Ignorance of it.

For the easy Knowledge of what the Law of Nature dictates, *Hobbes* ^c commends the Use of this Rule, *When a Man doubts whether what he is going to do to another be agreeable to the Law of Nature, let him suppose himself in the other's Room.* For by this Means, when Self-love and the other Passions, which weigh'd down one Scale, are taken thence and put into the contrary Scale, 'tis easy to guess which way the Balance will turn ^d. *Mosebus* Idyll. V. v. ult.

Στήργετε τὲς φιλέοντας, ἢ ἢν φιλήτε, φιλήσθε.
Love those who court, that those you court may love.

Add. *Selden* De J. N. & G. Lib. vii. Ch. xii. *Aristotle* (in *Diogenes Laertius* Lib. v. *Segm.* xxi.) being ask'd how we ought to behave ourselves towards our Friends, answer'd, *As we wish they would behave themselves towards us.* Lib. ii. Tit. ii. *D. quod quis juris in alterum, &c. Senec. De Ira, Lib. iii. Ch. xii. Let us suppose ourselves in the same Circumstances as the Person with whom we are angry: That which now puts us in a Passion, is only the wrong Opinion and Estimate of ourselves: We are unwilling to SUFFER what we are willing to DO.* 'Tis a Saying of *Confucius* (in *Martinius's Hist. Sin. Lib. iv. Ch. xxv.*) *Never do to another what you are unwilling to suffer from him.* The same Precept was made use of by *Yuca Manco Capacé*, the Founder of the *Peruvian Empire*; in order to the reducing his Subjects to a Life of Civility. *De la Vega, Lib. i. Ch. xxi.* And indeed this is no other than that great Rule prescrib'd by our Saviour himself, of *Doing to Men as we would be done by.* *Matth. vii. 12.*

^a *Idem* Ch. x. §. 1.
& *Leviath. Ch. xv.*

^b *Comp. Rachel. Prolegom. ad. Offic. Cicronis, §. 33, &c.*

^c *De Civ. Ch. iii. §. 26.*

^d This Period was not in the first Edition of this Work; and not being exactly fitted to the Coherence of the Discourse, I have changed the Reading in my Translation, but without any Prejudice to the Author's Sense.

^e We find the same Maxim in *Sadder*, or the Collection of the Precepts of *Zoroaster*, made by the *Persian Magi* (*Porta. lxxi.*) in *Mr. Hyde's Book.* See the Passage of *Hierocles* set down in my following Notes.

Dr. *Sbarrock* is of Opinion ^a that this Rule is not univerfal, becaufe if fo, a Judge must needs abfolve the Criminals left to his Sentence, in as much as he would certainly spare his own Life, were he in their Place: I must needs give a poor Petitioner what Sum soever he desires, becaufe I should wish to be thus dealt with, if I was in his Condition: Or I must clean my Servant's Shoes, becaufe I require him to clean mine. But the Rule will still remain unshaken, if we observe, that not ¹⁰ one Scale only, but both are to be consider'd; or that I am not only to weigh and examine what is agreeable to me, but likewise what Obligation or Necessity lies ¹¹ on the other Person, and what I can demand of him, without injuring either of our Duties. Yet we must confess, that this Precept cannot be esteem'd a Fundamental Axiom of the Law of Nature; since it is only a Corollary of that Law which obliges us to hold all Men equal with our selves; and therefore may be demonstrated *à priori*.

XIV. According to our Judgment, there seems no Way so directly leading to the Discovery of the Law of Nature, as is the accurate Contemplation of our ¹ natural Condition and Propensions. Altho' in this Consideration regard must be had to some Things which are extrinsical to a Man, and chiefly to those which are likely to promote his Interest, or to procure his Damage and Inconvenience. For whether this Law was impos'd on Man to advance his Happiness, or to check his Wickedness (which might otherwise break out to his own Destruction) ² we cannot proceed more clearly in gaining a Notion of it, than by examining in what Points and Respects he hath need of Assistance, and in what he hath Occasion for Restraint and controul. In the first Place then, Man hath this in Common with all other Creatures endued with a Sense of their own Being,

that he loves himself as highly as is possible, that he endeavours by all Ways and Means to secure his own Preservation, to obtain what appears conducive to his Good, and to repel what is in his Judgment Evil. And this Self-love, regularly speaking, is so very strong, as to supersede any Inclination which a Man may have for another. Sometimes indeed Men seem to affect others with a more tender Passion than themselves, to be more delighted with their Happiness, and more disturb'd at their Misfortunes than at their own. Thus *Des Cartes* ^c observes, that the Love which a Good Parent bears towards his Children is so very pure, as to make him desire neither the gaining of any thing by them, nor the possessing them in any other Manner than he doth at present, nor the being joined to them by any stricter Engagements than those of the present Union. But considering them as his *other Self*, he seeks their Good equally with his own; or rather with greater Care, in as much as he reckons himself and his Children to make up but one entire Thing, of which not thinking himself the better Part, he frequently prefers their Advantage to his own, and is not afraid to secure their Safety by his own Destruction ^d. But now besides that this Love is not always constant, there are other Reasons why Parents are sometimes willing to have the Misfortunes of their Children transferr'd on themselves, namely, becaufe they think themselves more able to sustain them: or becaufe they cannot but confess, that Persons of those tender Years are more worthy of Life and of Safety. And a Reason why on the other hand Parents are so highly satisfy'd and pleas'd with the Success and Prosperity of their Off-spring, may be, becaufe they are sensible a great Part of the Glory will redound to themselves, for bringing such excellent and worthy Persons into the World ^e. *Qui tanti talenti*

^a *De Officiis*, Ch. ii. Numb. 11. ^b *Cicero de Fin.* Lib. iii. Ch. v. *So soon as any Animal is born, it is inclin'd, and, as it were, recommended to itself for its own Preservation, and for the loving of its own Condition, and of every Thing that tends to the Preservation of it: Being at the same time made averse to Destruction, and to all things which seem pernicious.* *Valer. Flacc.* Lib. v. V. 644.

Est amor & cunctis rerum tutela suarum.

By Nature all love and protect their own.

Add *Diog. Laert.* Lib. vii. In *Zen. Marcus Antoninus*, Lib. xi. §. 8. *Epicletus Enchirid.* Ch. xxxviii Numb. 2. *Cicero de Officiis*, Lib. i. Ch. iv. ^c *De Passionibus*, Art. 82. ^d See 2 *Sam.* xviii. 33. *Euripid. Alcest.* v. 653. *usque ad 705.* ^e See *Luke* xi. 27.

¹⁰ *Hierocles* laying down the same Rule, adds this Restriction, *A Master, says he, ought to think how he would be treated if he were a Slave; and this last, if he were a Master, how he would be serv'd.* *κατα παντος μὴ ἢ εἰπὼν προσώπου ὄρους ὁ λόγος, ὡς σαφὸς. Παντὶ ἐν χρησῆ, ἐν τε τῷ σαυτοῦ ἢ ἐκείνου. ἐκείνου ὃ σαυτοῦ ὑποστῆς. Καὶ ἢ εἰπὼν χρεῶν ἂν τις καλῶς, ἐκείνου πῶς ἂν κείνου ἐκείνου ἀντὶ προσφύρατος, ἕπερ ἐκείνου μὴ ἢ δισποτης, αὐτοῦ ὃ δὲ ἄλλου.* *Apud Stob.* *Serm.* 83.

¹¹ So that, altho' a Judge, if he were in the Place of a Criminal, would undoubtedly wish, as well as he, to escape the Punishment inflicted by the Law; nevertheless he ought to pass Sentence, becaufe otherwise he can't discharge the Duty of his Office, and will bring on himself much Trouble by such an Indulgence. We must relieve the Poor, but not to hurt ourselves much by it, nor satisfy his insatiable Avarice. It is just to use our Servants kindly, but we are not oblig'd to make clean their Shoes; this were to become a Servant instead of a Master. In a great Business, for Example, in a Disease, a Master may and ought, unless by another's Fault, to do such Services for his Servants as they have a Right to require of him; but to go farther, is to reverse the Order of Society, and accustom his Servants to Idleness, or rather to make them insolent in the highest Degree.

§. xiv. ¹ The very Name of natural Right shews us, That the Principles ought to be deduced from the Nature of Man, as many of the Antients have acknowledged. *Natura enim Juris*, says *Cicero*, *explicata est nobis, eam ab hominibus retentam.* *Natura*, *De Leg.* Lib. i. Chap. v. *Παρατηρή τι σα ἢ φυσικὴ ἐπιζητεῖ, ὡς ἐπὶ φύσεως μὲν οἰκονομικῆς καὶ πολιτικῆς, ἢ προσώπου, εἰ μὴ χρεῶν μὲν δὲ διατιθεῖ σα ἢ ὡς ζωῆς φυσικῆς ἐξῆς ὃ παρατηρητικῆς, τι ἐπιζητεῖ σα ἢ ὡς ζωῆς φυσικῆς, ἢ πᾶν ἔστο παρατητικῆς, εἰ μὴ χρεῶν μὲν δὲ διατιθεῖ ἢ ὡς ζωῆς λογικῆς φύσεως ἐπὶ δὲ τὸ λογικὸν εἶδος ἢ πολιτικόν, τῶν δὲ καὶ οἰκονομικῆς, καὶ μὴ δὲ διατηρικῆς.* *Marc. Antonin.* Lib. x. §. 2. i. e. *Consider well what your Nature requires, as if you were governed by Nature only; and do this, if the Nature of the Creature be not any ways disorder'd. Then consider what the Nature of the Creature requires, and do not refuse to do it, if it be not contrary to the Nature of a reasonable Creature; for he that speaks of a reasonable Creature, speaks of a Political one; i. e. one born for Society. If you observe these Rules, you need not be uneasy for any thing.* Further, Our Author speaks only of a natural obligatory Right; he thinks not in the least of the natural Right by simple Permission. See above, *Lib. i. Ch. 6. §. 16. Note 1.* and what is said in the last Note of this Chapter.

² The last of these Periods was added in the second Edition, and is not well placed.

genere Parentes ^a? It is likewise evident, that many Persons have contentedly suffer'd Death for other Persons, whom they either lov'd with an entire Affection, or to whom they devoted themselves with an absolute Service. For these Men fancied themselves to be join'd to such Friends or Masters as lesser Parts of the Whole, and therefore chose to be themselves destroy'd for the Preservation of the greater Part ^b. *Procopius* ^c tells us, that amongst the *Ephalite Humns* the more wealthy Men pick out about Twenty, or perhaps more Persons, for their special Friends; these are constant Guests at their Tables, and have the Use and Command of all their Riches and Possessions, being allow'd a kind of a Common Right over all Things: And when their Patron happens to die, Custom obliges them to be put alive with him into his Grave. And that such Ways of Mens devoting themselves are still practis'd in *Japan*, we are assur'd by the Authors who describe that Country and People ^d. The Truth is, in the Opinion of such Persons, the Boasts of Faith and of Affection with the Glory thence arising, are of more Value than all the Things in the World besides, and are not over-purchas'd at the Expence of Life itself. Some too being depriv'd of a near Friend, or of a singular Benefactor, do cast away their own Lives only out of Impatience and Despair, imagining it is impossible they should be otherwise than very miserable, having lost him on whom alone all their Hopes and Fortunes depended. Certain it is, whatever a Man doth for others, he never forgets himself; and Satan in *Job* ii. 4. well express'd the common Temper and Inclination of Mankind, when he said, *Skin for Skin, and all that a Man hath, will he give for his Life*.

Besides this Self-love, and this Desire of preserving himself by all Means and Methods, there is discoverable in Man a wonderful Impotency and natural Indigence; so that if we should conceive any single Person quite destitute of the Assistance of others, we should conclude his Life was given him rather for a Punishment than for a Blessing. It is farther manifest, that, next to the Support and the Defence of Heaven, Men draw their chief Help and Comfort ^e from one another. For, as the Strength of particular Persons is so unable to compass their Preservation and their Mainte-

nance, that to live happily and conveniently they have continual Occasion for the Works and for the Supplies of their Neighbours, in as much as their own Time, as well as Power, would fail them to procure the most useful and the most necessary Things; so on the other Hand, particular Men have Convenience of furnishing others with many Things, which they themselves do not want; and which therefore would turn to no Use or Account, unless they were thus bestow'd and dispensed ^e. And as Men appear thus to be so vast a Support and Help to each other, so may they likewise, in as eminent a manner, prove a mutual Plague and Mischiefe; and they do often actually prove so, either upon the Instigation of their brutish Passions, or being compell'd by the Necessity of defending themselves from the Injuries and the Assaults of others. The Truth of all which is clear to us from daily Experience, and hath been insisted on more largely by us in the first Chapter of this Book ^f. But we desire it should be well observed, that in seeking out the true Condition of Men, we have assign'd the first Place and Influence to Self-love, not as if each particular Man ought in every Respect to prefer himself to all others, or to measure all Things by his own private Advantage, establishing his separate Interest for his chief End and Design; but because a Man is by Nature sooner sensible of the Love he bears towards himself, than of that which he bears towards others, in as much as it is natural for him sooner to perceive his own Existence, than the Existence of others. And farther, because the Care of me and my Affairs belongs to no body so properly as to my self: For altho' I propose the common Good for the Mark of Acting, yet since I likewise am a Part of Mankind, to the Preservation of which some Care is due, this Care must needs lie more especially and more forcibly on me my self, than on any Person else in the World.

XV. Thus much being granted, it is an easy Matter to discover the Foundation of Natural Law. Man is an Animal extremely desirous of his own Preservation, of himself expos'd to many Warts, unable to secure his own Safety and Maintenance without the Assistance of his Fellows, and capable of returning the Kindness by the Furtherance of mutual Good: But then he is often malicious, insolent, and easily provok'd, and ^g as

^a *Æn.* i. 610. On the other Side, it was a gallant Saying of *Epaminondas*, that amongst all the good and fortunate Accidents of his Life, none struck him with so real a Pleasure, as that he won the famous Victory at *Leuctra*, before he had lost either of his Parents. *Plutarch's* Apophthegm. p. 193. Ed. *Wech.* ^b Vid. *Cartes de Passion.* Art. 83. *Cæsar* de B. G. Lib. iii. Chap. xxii. concerning the *Soldurii.* ^c *De Bello Pers.* Lib. i. Chap. iii. ^d Vid. *Franc. Carron,* in Description. *Japan,* Chap. vii. Of the *Æthiopians,* see *Diod. Sic.* Lib. iii. Chap. vii. ^e *Senec.* de Irâ, Lib. i. Chap. 5. *Men are born to be Helps to each other.* *Marc. Antonin.* Lib. ii. Chap. i. *We are born for mutual Support and Assistance, and have each of us our proper Office to discharge for the General Benefit; as the Feet, the Hands, the Eye-lids, the Teeth, or any Members of the Body.* ^f Add. *Dr. Cumberland,* Chap. i. §. 15, 16.

^g *Cicero* proves at large (*De Offic.* Lib. ii. Chap. iii. iv. v.) that there is nothing that a Man can receive more Good or Evil from, than from his Like. After which he thus concludes, *Cum igitur hic locus nihil habeat Dubitationis, quin homines plurimum hominibus & prosini & obsint, primum hoc statuo esse virtutis, conciliare animos hominum, & ad usus suos adjungere,* Chap. v. Just the same Consequence as our Author draws in §. following.

§. xv. ^h Mr. *Titius* affirms, that the Consequence is not good, but he is certainly mistaken; for our Author deduces Sociableness from all these Characters put together, and not from any single one. But in one Thing Mr. *Titius* seems to speak with Reason, when he says, That our Author in settling Sociableness in that Manner, gives us Cause to believe, that every one's private Advantage is the Foundation of Natural Right; because, according to him, if a Man becomes sociable, 'tis because he can't preserve himself without it, nor enjoy such Conveniences of Life, as are necessary in this World. I own, that our own Interests will engage us to be sociable; but 'tis not therefore a Consequent, that we must raise the Obligation of practising the Laws of Nature directly upon it; for there are Cases in which we must sacrifice our own Interest to others Advantage, and the Good of Society. I may add, that our Author himself, in his *Element. Jurisprud. Univers.* p. 431, &c. makes Self-love and Sociableness two distinct Principles of Duty; and I do not know for what Reason he should change his Sentiments. See what is said Note 5. of this Paragraph, and what the Author says in the Beginning of §. 16.

powerful in effecting Mischief, as he is ready in designing it. Now that such a Creature may be preserv'd and supported, and may enjoy the good Things attending his Condition of Life, it is necessary that he be *social*, that is, that he unite himself to those of his own Species, and in such a Manner regulate his Behaviour towards them, as that they may have no fair Reason to do him Harm, but rather incline to promote his Interests, and to secure his Rights and Concerns ². This then will appear a fundamental Law of Nature, Every Man ought, as far as in him lies, to promote and preserve a peaceful Sociableness with others, agreeable to the main End and Disposition of human Race in general ³. For by *Sociableness* we do not here mean a bare Readiness or Propension to join in particular Societies, which may possibly be form'd on ill Designs, and in an ill Manner; as the Confederacies of Thieves and Robbers; as if it were sufficient only to join ourselves with others, let our Intentions be what they will. But by this Term of *Sociableness*, we would imply ⁴ such a Disposition of one Man towards all others, as shall suppose him united to

them by Benevolence, by Peace, by Charity, and so, as it were, by a silent and a secret Obligation. It would therefore be a Charge most notoriously false, should any insinuate, that the Sociableness which we establish is perfectly indifferent, and hath an equal Regard to good Society and to bad. We said it was the Duty of every Man to promote and to practise Sociableness *as far as in him lies*; because, for as much as it is not in our Power to oblige all other Men to behave themselves towards us as they ought, we have done our Duty when we have omitted nothing which we were able to perform, in moving and engaging them to exercise the like Sociableness towards us. From all which it follows, that since he who obliges us to any *End*, cannot but at the same Time be suppos'd to oblige us to those *Means* which are necessary to the Attainment of that *End*, *all Actions which necessarily conduce to this mutual Sociableness, are commanded by the Law of Nature, and all those, on the contrary, are forbidden, which tend to its Disturbance, or Dissolution.*

This ⁵ Method of Discovering the Law of Nature

² *Nihil est profecto praestabilius, quam planè intelligi nos ad justitiam esse natos, neque opinione, sed naturâ constitutum esse jus. Id jam patebit, si hominum inter ipsos societatem, conjunctionemque perstexeris. Cicero De Leg. Lib. i. Ch. x. "You will see clearly that Right doth not depend on Opinion, but on the Establishment of Nature; if you consider the necessary Union and Alliance of Mankind." Σὺ ἀλλήλους ἔχειν ἀνθρώπους, καὶ ἀνομιὰ διατάξῃ ἐξ ἑοῦ τοῦ νόμου ἢ ἀν' αὐτοῖς ἑνωσίαν ἔστω γίνεσθαι ἐκείνης ἢ κατὰ ἑαυτὸν διέστην. Jamlich. Protrep. Chap. xx. "That Men should live together, and yet without Law, is absurd and impossible; for at this rate, Society would be more dangerous and prejudicial to them, than if they dwelt separately and singly without any Communication."*

³ To explain this Rule more fully, I think this ought to be added: From whence it follows, that whoever is oblig'd to aim at a certain End, is oblig'd at the same time to make use of the Means, without which it can't be obtain'd. Whatever contributes necessarily to an universal Sociableness, ought to be looked upon as prescrib'd by the Law of Nature; and, on the contrary, whatever disturbs it, to be forbidden by the same Law.

⁴ Whenever a Thing appears advantageous or noxious to Society in general, in what State soever Men are, in every Place, and at all Times, we must look upon it as either absolutely commanded or forbidden by the Law of Nature. So altho' Theft or Adultery may in certain Circumstances, and through the Corruption of Manners in certain Countries, have caus'd little or no Trouble in some particular Societies, as some affirm, that Experience hath prov'd in the Kingdoms of the *Massagets* and *Lacedaemonians*, yet these two Crimes are not a whit the less contrary to the Law of Nature: For if they were allow'd always and in all States, there would result from them, without doubt, monstrous Inconveniences and terrible Disorders; and, on the contrary, every Society whatsoever, must be more quiet and happy, where the Members of it religiously abstain from Robbery and debauching their Neighbour's Wife, than where such Attempts are frequently made. Our Author explains himself well enough upon this Subject in several Places of this Book, and in his other Works, viz. his *Spicilegium Controversarum circa Jus Naturae*, Chap. iii. §. 13. So that I am amaz'd that certain Men, who labour to confute him, and pretend to take a new Method in explaining the Law of Nature, make continual Alterations in a Thing so clear.

⁵ Our Author (in the Beginning of the following §. of this Chapter, and in his *Specimen Controversarum*, Chap. v. §. 25. as also in his *Spicilegium Controversarum*, &c. Chap. i. §. 14.) declares, that he designs to explain here the Duties of Men only which properly refer one to another: For, according to him, our Duties toward God belong to natural Theology, and Religion is no other way concern'd in a Treatise of natural Right, than as it is a more strong Cement of human Society. As for the Duties of Man to himself, they are deriv'd partly from Religion, and partly from Society. So that were Man independent on God's Authority, and no way concern'd in Society, we could not conceive how he could be subject to any Obligation from himself. If some had attend'd to this System of our Author, they would not have spent so much Paper in delivering Objections so ill grounded. Nevertheless I own, that he did well to prevent these Cavils by putting out a Treatise containing all the Duties of Man, of which we may know the Necessity by the Strength of Reason only, and which, if we rightly understand the Thing, are contained in the Idea of the Law of Nature, otherwise we must agree, that his Method to prove the Principle of Sociableness is subject to some Inconveniences, as we have observ'd above in Note 1. But all this may be rectified in some measure, by keeping close to the Notions of the Author above quoted. We must consider the Nature of Man, whose Constitution we have originally discover'd to be the Foundation of natural Right, either as it came out of the Hands of the Creator, or as fram'd afterward diversly by some human Acts. 1. From this Principle only, That Men are God's Workmanship, it evidently follows, that they ought to shew towards that supreme Being, all the Sentiments which are comprehended in the Notion of Religion, and of which we shall treat in *Ch. iv. §. 3. Note 2.* following. Moreover, God having consult'd the Preservation and Happiness of Mankind (as it appears plainly) both by the Faculties he has endow'd him withal, and by that strong Inclination which carries us irresistibly to search after Good, and avoid Evil: He also requires, doubtless, that every one should not only preserve and make himself happy, but also contribute his utmost Endeavours to the Preservation and Happiness of others. There are also two other Fundamentals of the natural Law in general, taken in its full Extent, and they are, 1. Love of ourselves, in a true Sense; and, 2. Sociableness. Inasmuch that as Religion contains all the Duties of a Man towards God, so Love of ourselves (for so it may be best express'd to avoid all Equivocation) comprehends all that we are directly oblig'd to do in Relation to ourselves; and Sociableness all that is due to others. See §. 24. Note 3. So that Sociableness is oppos'd to Self-love, and Self-love is no farther a Foundation of Sociableness, than as we are bound to others, because we love ourselves. But these are two distinct Principles, which though they have one great Relation, and equally concur in the Sight of the Creator, do yet differ in the Main, and ought wisely to be managed, so that we must keep an equal Balance, as much as is possible, between them: I say, as much as is possible, for it sometimes happens that we can't at the same time perform all the Duties which flow from these three great Principles of the natural Law; and in such Cases we ought to regulate ourselves by these general Maxims: 1. That our Duties toward God should always be preferred before all others. 2. That when there is a kind of Opposition between two Duties of Self-love, and two of Sociableness, we ought to prefer that which is attend'd with the greatest Advantage, i. e. we must consider whether the Good which shall be procur'd to ourselves or to others in performing either of these Duties is more considerable, than the Good that shall redound to ourselves or to others by the Omission of that Duty, which we can't at present discharge without neglecting some other. 3. If, all Things else being equal, there is an Opposition between Self-love and the Duties

Nature, doth not only appear, upon Examination, to be the most plain and easy, but it is likewise own'd for the most proper and genuine Way, by full Consent of the greatest Part of Learned Men. There's no Need of heaping up Testimonies and Authorities, but we may let *Seneca* speak for all the rest. ⁶ *By what other Means, says he, are we prefer'd, but by the mutual Assistance of good Turns? This Commerce and Intercourse of Kindnesses adds Strength and Power to Life; and, in Case of sudden Assaults, puts it into a better Condition of Defence. Take us all asunder, and what are we, but an easy and an unequal Prey to wild Beasts? Man by Nature is weak on every Side: Society fortifies his Infirmity, and arms his Nakedness. Those two Excellencies, of Reason and of Society, render him the most potent of all Creatures, who would otherwise be obnoxious to Injuries from every Thing about him. Thus, by the Help of Union, he commands the World, who, if divided, would scarce be a Match for any living Rival. And it is Society alone which gives him his sovereign Sway over the inferior Creation. This was the Thing which first restrain'd the Violence of Diseases, which lent Crutches and Supports to Old Age, and administred Consolation to Grief. Take away this, and you cut asunder the Band of Union, the vital String of Mankind.*^a

There are other less principal Causes, or rather Arguments of a sociable Nature in Men. For Example, because nothing is more sad and disagreeable than perpetual Solitude^b: Because otherwise we should have no Use of our Tongue, that most noble Instrument, by the Help of which Mankind have this Advantage above all other living Things, that they are able to express their inward Sentiments in articulate Sounds^c: Because every good and excellent Person is desirous of shewing his worthy Deeds amongst others. A-

mongst these secondary Reasons of Sociality, is that which *Tully* takes Notice of in his first Book of Offices, *Chap. xlv.* *There are some People, says he 7, that fancy all Leagues and Associations amongst Men, to arise from the Need that one Man hath for another, toward the supplying of our natural and common Necessities: Because (say they) if Providence had deliver'd us from this Care of looking after Food and Cloathing, by appointing some extraordinary Way for the Procurement of it; no Man of either Brains, or Virtue, would ever trouble his Head about Business, but wholly deliver himself up to the attaining of Wisdom. But this is a Mistake; for even in that Condition a Man would fly Solitude, and wish for a Companion in his very Studies: He would be willing to teach and to learn, to hear and to speak. He talks to the same Purpose in the Third Book of that Work, *Chap. v.*⁸ *It is more according to Nature, for a Man to undergo all Sorts of Labours and Troubles for the Service and the Conservation (if it were possible) of the whole World, after the Example of Hercules, whom the Gods; than to live in Solitude, and not only free from Cares, but even wallowing in Pleasures and Plenty, with all the Advantages of Strength and Beauty over and above. This it is that makes all great and glorious Spirits prefer the former Kind of Life to the latter. What the same Author observes in his *Laelius*, is rather applicable to particular Friendship, than to common Society: Friendship first arose rather from Nature than from Weakness; rather from the Bent and Inclination of Mens Minds, than from the Consideration of the Profit it would produce.**

We would have it observ'd, that the fundamental Law of Nature establish'd by us, doth not disagree⁹ with that which *Dr. Cumberland* hath laid down in his Work on that Subject^d, concerning the Study and Endeavour after the com-

of Society, whether it happens through the Fact of another, or not, then Self-love ought to prevail; but if there be an Inequality, then Preference ought to be given to that of the two Sorts of Duties, which is accompanied with the greatest Profit. See what is said upon *Chap. v.* and *vi.* of this Book. II. But it often happens, that Men, without lessening the general Obligations, which result directly and immediately from their original Constitution, and the Appointment of the Creator, add thereto by their own Will, or by some Contract and positive Law, divers private Engagements, which are united with the Object of the Law of Nature, as it is a Rule of Action which requires such Engagements. In short, all Men ought to state they are in, as all the Parts of a Clock concur to fulfil the Contrivance of the Artist, although every Wheel move in a Way agreeable to its particular Form. See §. 22, and 24. following.

^a *Ang. sp. d'azgu, &c. Men are the Defeat of Men, Cities of Cities; as the Hand rubs the Hand, and the Fingers wash the Fingers. All Safety is Confederacy.* *Plin. N. H. Lib. ix. Ch. xlv.* Add, *Marc. Antonin. Lib. iv. §. 4. & Lib. v. §. 16, & 29.* where he calls Society the Goal or Happiness of a rational Creature; as it is frequent with him to term Man a Creature sociable by Nature. *Vide & Lib. vii. §. 55. Liban. Declam. xix. p. 499.* Nature appointed Man to be a Companion, and an Assistant to Man. ^b *Cicero De Fin. Lib. iii. Ch. xx. No Man would be willing to lead a Life of Solitude, though in an Infinity of Delights and Pleasures. Whence 'tis easy to apprehend, that we are born for natural Conjunction and Community.* ^c *Vid. Quintil. Institut. Lib. ii. Ch. xvi.* ^d *Ch. i. §. 4.*

⁶ *Ut scias per se expectendam esse grati animi adfectionem, per se fugienda res est ingratum esse, quoniam nihil aequè concordiâ humani generis dissociat & astrahit, quam hoc vitium. Nam quo alio tuti sumus, quam quod mutuis juramur officiis? Hoc uno instructior vita, contraque incursiones subitas munitior est, benevolentior commercio. Fac nos singulos, quid sumus? præda animantium & vitium, & imbecillissimus & facillimus sanguis. Quoniam ceteris animalibus in tutam sui salutem est. Quæ terribilem ceteris fecit; nullam, & in unum societas mittit. Duas res dedit, quæ illum obnoxium, validissimum facerent, rationem & societatem. Itaque qui par esse nulli posset, si selucere, rerum positur. Societas illi dominium omnium animalium dedit; cæci, senectuti adminicula profertur, solatia contra dolores dedit: hæc sortes nos facit, quod nec contra fortunam advocare. Itaque tolle & unitatem generis humani, quæ vita sustinetur, seindes. De Benef. Lib. iv. Chap. xviii.*

⁷ *Nec verum est, quod dicitur à quibusdam, propter necessitatem vitæ, quod ea quæ natura desideraret, consequi sine aliis, neque efficere non possemus, ideoque vitam esse cum hominibus communitatem & societatem; quod si omnia nobis, quæ ad vitam tantum se in cognitione, & scientia collocaret. Non est ita, nam & solitudinem fugeret, & socium statim quæreret, tum docere,*

⁸ *Magis est secundum naturam, pro omnibus gentibus, si fieri possit, conservandis, aut juvenandis maximos labores, molestiasque sustinere, imitantem Hercules illum, quem hominum fama beneficiorum memor, in concilium celestium collocavit, quam vitare in solitudine, non modo sine ullis molestiis, sed etiam in maximis voluptatibus, abundantem omnibus copiis, ut excellas etiam in probitate & virtute.*

⁹ There are several other Authors whose Principles being well understood, may be reduced to this, though there appears some Difference in the Language and Method. See *Mr. Hortius's* Discourse *De Sociabilitate primo Jur. Nat. princip. Sect. II. §. 9, &c.*

mon Good, and the demonstrating all possible Benevolence towards all Men. For we, when we maintain that a Man ought to be sociable, do at the same time intimate, that he ought not to make his own separate Good the Mark of his Proceedings, but the Benefit of Mankind in common; that no Person should pursue his private Advantage, by oppressing or by neglecting other Men; and that none hath Reason to hope for Happiness and Success, who either injures or despises his Neighbours.

From this social Nature of Man, and from the Consideration that every one is born not for himself alone, but for all human Kind, the Lord Bacon, in his Work of the *Advancement of Learning*, Book vii. Ch. i. deduces several excellent Corollaries; as, that an active Life is preferable to a contemplative one; that the Happiness of Man is to be sought for in Virtue¹⁰, not in Pleasure; that the Fear of sudden and unexpected Accidents ought not to deter us either from managing publick Affairs, or from maintaining Society and Commerce with other Men: Lastly, that we ought not to withdraw ourselves from civil Business, out of a tender and scrupulous kind of Humour, or out of an Aversion to the usual Methods of Complaisance. In which place the same noble Author farther observes, that there never was any Philosophy, Religion, Law, or Discipline found out in the World, which so far exalts the publick Good, and debases private Interest, as the Christian Institution appears to have done.

XVI. Let us consider now whether or no the Doctrine asserted by Hobbes, in his Book *De Cive*, Chap. i. §. 2. clashes with what we have been delivering on this Head. Certainly he hath been interpreted with very great Rigour, and with very little Reason by some learned Men, when they censure him for teaching, *that Nature did not institute Society, but Discord, amongst Men*, and, as they hence infer, *that all Kind of human Society is against the Design of Nature*². Which is much the same Thing, as if I should talk thus, *Speech is by Nature actually born with no Man; therefore all Speech which is afterwards learnt, runs against Nature's Intention*. Or thus, *All Men by Nature come into the World little; therefore it is against Nature that they should grow up to larger Dimensions*. Or, *Men are by Nature subject to Diseases; therefore it is against Nature, to make use of Diet, or Physick to prevent or to cure them*. We must confess, that this Notion of Hobbes, looks at first View extremely paradoxical; especially if a Man doth not consider diligently the Ambiguity of the Word *Nature*. But for fear any one should hereafter be cheated by the same doubtful Philosophy, and led fatally into Error; let us first observe, that Self-love and Sociableness ought by no Means to be

made Opposites; but those different Inclinations are in such a Manner to be temper'd, that the former do not overthrow or disturb the latter^b. When by the Enormity of wild Lusts this Temperament is broken, and so all take up a Resolution of seeking each his own Advantage to the Injury of others; then arise those Heats and Contentions which divide and confound Mankind. For the avoiding which, the bare Care of our private Safety commands the Observation of social Laws, since we cannot ensure our own Persons without their Assistance and Protection. As for Hobbes's Demonstration, in which he ingeniously enough deduces those Laws which we call natural, from the Principle of Self-preservation, the first Remark that we shall offer concerning it is this; that such a Way of Proof doth indeed clearly enough make out, how conducive 'tis to the Safety of Men, that they act according to these Dictates of Reason: But it is not an immediate and direct Conclusion to say, a Man hath a Right of using those Means for his Preservation, therefore he is oblig'd, as it were by a Law, to observe and to pursue them: For to give those Dictates of Reason the Force and Authority of Laws, there is need of proceeding on some other Principle, than what he lays down.

In the next Place, great Care is to be taken lest any should conclude from such Arguments and Positions, that when he hath once ensur'd his own Safety, and set himself out of Danger, he need not trouble himself about the Security of other Men; or that he may insult how he please, over such a Person as doth not contribute to his Quiet and Happiness, or hath not Strength enough to disturb it. For we therefore give Men the Name of social Creatures, because they, of all living Things, are the fittest and the most able to promote the Advantage of each other: Neither is any inferior Creature capable of receiving so great Benefit¹ from Man, as Man himself. Again, the Excellency and Perfection of any particular Person rise the higher, the more he deserves of the Community by his publick Benefactions; and Works of this Kind are reckon'd the most noble, being suppos'd to proceed from the greatest Wisdom: Whereas any worthless Wretch, or a meer Fool, may be able to trouble or to hurt his Fellows. Besides, supposing every Man's private Advantage were establish'd for the Mark of his Actions, if many Persons should happen to fix that private Advantage on the very same Thing², there will either be a Necessity of saying that these many Desires, including a plain Contradiction, are consistent with Reason, which is the highest Absurdity: Or, since none can pretend that his Desire would have the Preference of the rest, we shall be forc'd to admit it for a Truth, that no Man

^a *Compt. Couring*, in *Jure Civili*, Ch. xiv. in fin.

^b *Arrian. Epictet. Lib. i. Ch. xix.* God has dispos'd the Nature and Constitution of rational Creatures after such a Manner, that they can't advance their private, without contributing something to the publick Interest. Community doth not exclude the Pursuit of private Advantage.

¹⁰ Virtue is the Cause of Happiness, but it is not Happiness itself. All Happiness consists essentially in Pleasure, although, there being diverse Sorts of Pleasure, every one will not make a Man happy. This might be easily proved, if this were a proper Place. See a fine Passage of *Montagne's* upon this Subject, *Essays, Lib. ii. Chap. xix. Int.*

§. xvi. ¹ Our Author must mean Harm, for to say Benefit would not be agreeable to right Reasoning.

² Again, our Author is guilty of an Inadvertency, for instead of saying, *on the very same Thing*, he doubtless meant to say, *on Things very different from one another*; as appears from his Reasoning afterwards, and from Dr. *Cumberland*, Ch. v. §. 16. whose Notions our Author follows: *If right Reason*, says that English Writer, *dictates to Peter, that all his Happiness, and the End that he aims at, consists in the Enjoyment of the full Right of the Lands which John and James possess, as also of their Persons, and of the Goods of all others in general, right Reason cannot inspire James and John to place their Happiness in the Enjoyment of a full Right in the Lands and Person of Peter, and of all others, for that would imply a plain Contradiction, &c.*

ought so to make his own Profit the Aim of his Proceedings, as not to consider and to regard the Good of others. Farther, whoever attempts to draw every Thing to himself and to his own Interest, without looking towards his Neighbour, will not only labour in vain (it being impossible that all Persons and all Things should be dispos'd according to the contradictory Desires and Wills of particular Men) but he will likewise invite others to plunder and to destroy him. Moreover, if that only can be said to be good to a particular Person, which conduces to his separate Interest, it follows, that in respect of all other Persons it must be evil, inasmuch as their Interest or Profit is not furthered by it: And so what one covets and pursues, all the rest will oppose and keep off, which cannot but raise perpetual Clashing and contending amongst Men^a. Lastly, although another Person hath done me neither Good nor Hurt, and though he hath nothing in him to raise either my Fear or my Love, yet Nature obliges me to esteem even such a one as my Kinsman and my Equal; which Reason alone (had we no others) were sufficient to enforce the Practice of a friendly Society and Correspondence amongst Men. And upon this Consideration, supposing there was a Nation in the World maintaining Peace and Justice amongst themselves, and of such mighty Strength as to be formidable to all others, and so not restrain'd from hurting them by the Fear of a like Return; yet should this Nation or People assault, drive, kill, or drag into Slavery their weaker Neighbours, as often as they thought convenient, we should pronounce them actually guilty of a Breach of the Law of Nature. And yet (as we suppose) these People might preserve themselves, whether they allow'd any Rights to others, or not^b. In the same Manner, none will commend the Life and Profession of Robbers, because they exercise some little Justice towards those of their Gang, because their Captains divide the Prizes equally amongst them, and because he who either openly or secretly robs one of the Crew, is (even by Thieves) adjudg'd unworthy of farther Partnership and Society with them^c. This Rule of extending our Care beyond our own Persons, is so much the more diligently to be attended to, the more evident it is, that a Man of more Strength and Power than ordinary, is likely to be tempted to the Violation of natural Law, by the Thoughts of his own Self-sufficiency; that since his private Safety is abundantly provided for, he need not give himself the trouble of maintaining Peace and Friendship with his Neighbours.

But to conclude this Point, as the Care of our own particular Preservation doth not exclude a Concern for Society, so neither doth a kind Regard for Society suppress our Affection to our Per-

sons, but they are both extremely agreeable and consistent, as appears sufficiently from the Rule propos'd by our Saviour, *Matth. xxii. 39.* when he commands us to love our Neighbours as our selves^d. Indeed Reason plainly informs us, that whosoever hath a hearty Desire for his own Security must not, cannot neglect the Care of his Fellows. For, since our Safety and Happiness depend for the most Part on the Benevolence and on the Assistance of others, and since the Nature of Men is such, that for Benefits conferr'd they expect a Return of Kindness, and when no such Return is made, refrain from farther Favours: No Person in his Wits can stick so close to the Pursuit of his separate Advantage, as to divest himself of all Regard to the rest of the World: But rather the more rationally he loves himself, the more earnest he will be in endeavouring by good Turns to procure the Love of other Men. For no one hath any Reason at all to hope, that Men will voluntarily contribute towards advancing his Happiness, whom they know to be malicious, perfidious, ingrateful, and inhuman, and that these wicked Practices are the Requitals which he will make for their Bounty; on the contrary, it should be expected, that they will all join together in ridding the Earth of such a Monster, or, at least, in restraining him from doing farther Mischief.

XVII. Neither is the following Argument which the *Hobbits* make use of at all conclusive; "Particular Men when they join Society or Company with certain others, have Regard to some peculiar Good or Benefit, which is likely to redound to themselves: Therefore human Nature in general is not determin'd to Society, or, I am not oblig'd to behave my self in a social Manner towards him, from whom I do not expect some particular Advantage." For thus much indeed is evident, that the Reason why certain Men join in any certain Species of Society, is either because they have a peculiar Resemblance and Agreement in Disposition of Mind, or in other Qualities; or else because they think they shall better obtain some End which they drive at, amongst these Persons than amongst others. But (besides that, regularly speaking, no Man hath the Property of belonging to no particular Society) even amongst Men who are united only by the common Tie of Humanity, that general Sociableness and Peace are to be observ'd and cultivated; which implies little more than this, that they abstain from hurting one another unjustly, and that as far as their stricter and particular Obligations leave Room, they mutually promote and communicate their Interests and their Goods.

XVIII. Hence it is clear what Answer should be made to that Objection, if one Man lov'd another naturally, that is, upon account of his being a Man,

^a Self-Interest is a poor Centre of a Man's Actions, says my Lord Bacon, *Ess. xxiii.*

^b Vide *Ciceron. Off. ii. Ch. xi.*

^c *Nec magis vituperandus est proditor patriæ, quam communis utilitatis aut salutis defensor, propter suam utilitatem, aut salutem. Cicero De Fin. Lib. iii. Ch. xix.* "A Betrayer of his Country is not more foully scandalous, than he who deserts the common Benefit or Safety for the Procurement of his own."

^d *Qui stadium currit, eniti contendere debet, quam maxime possit, ut vincat; supplantare eum, quicum certet, aut manu detellere, nullo modo debet. Sic in vita sibi quemque petere, quod pertineat ad usum, non iniquum est, alteri deripere jus non est. Chrysippus apud Ciceron. De Offic. Lib. iii. Chap. x.* In running of a Course a Man may be allow'd, nay, he ought to stretch and contend his Utmost for the Victory: But he must not, on any Account, trip up his Antagonist's Heels, or thrust him out of the Lists by main Force. So in Life, it is very fair and allowable, for every Man to get, by honest Means, whatever makes for Use and Advantage; but 'tis by no Means lawful that he should take it away from others.

then there can be no Reason given, why every one should not love every one equally, all being equally Men: Or why a Man should choose to frequent their Company most, from whom he receives either greater Honour or greater Profit.

In this Fallacy, common Society is confounded with particular and stricter Confederacies, common Love, with such as arises from peculiar and singular Causes. For to deserve that common Affection, no Property is requir'd but barely the being a Man. Nature having, for the Reasons above assign'd, really constituted a general Friendship amongst Men, from which no Person is excluded, unless he hath rendred himself unworthy of it by his monstrous Villanies. Now, altho' by the good Disposal of the All-wise Creator, our Natural Laws are so fitted to human Condition, that the Observation of them is join'd with the Interest and Advantage of the Observers; so that even this common Love is exceedingly profitable to Mankind: Yet in assigning the Cause and Reason of it, we are wont to have Recourse, not to the Benefit proceeding from it, but to the general Nature in which it is founded. For Example, If we are to give a Reason why one Man ought not to hurt another, we do not usually say, because an abstaining from mutual Violence is profitable (altho it is so indeed in the highest Degree) but, because the Person being another *Man*, that is, another Animal related to us by Nature ¹, it would be a Crime to offer him any Harm ².

Yet besides this common and universal Affection, some Circumstances may make a Man love one Person in a higher Degree than another: Suppose, because their Inclinations particularly agree, and their Heads lie the same Way; or, because this Person is more able, or more willing to promote his Advantage; or, because their Race, or Original, makes them allied to each other. As to that Observation about Mens being more willing to frequent such Company, where they find themselves prefer'd to others in Honour and in Profit; the Reason of the Thing is this, because every one must naturally love his own Interest, if he have Wit enough to understand it. But this Love is by no Means repugnant to the sociable Nature of Mankind, if it doth not rise to such a guilty Height, as to disturb the Harmony and Agreement which is universally to be maintain'd amongst Men. For Providence did not for this Reason give us a sociable Nature, that we should therefore ³ neglect ourselves and our own Affairs. But rather we are studious of Society on this very Account, that by a mutual Communication of Assistance and of Goods, our own Concerns may

be manag'd with more Conveniency, and with more Success. And altho' when a Man unites himself to any particular Society, he hath a prime Regard to his own Interest, and but a secondary one to the Interest of his Companions; not being able to carry on his own Matters without such a Conjunction; yet this doth not hinder him from being oblig'd so to pursue his own private Ends and Advantage, as not to injure either the Corporation in general, or any single Member of it, and sometimes to postpone his separate Good, for the Advancement of the common Benefit.

What is urged about the Original of great and lasting Societies, or *States* (it being said that they are not deriv'd from mutual Benevolence, but from mutual *Fear*; by which Word they mean any Kind of Precaution and Foresight) is entirely beside the Purpose. For as the Question doth not at present proceed about the Rise of Civil Society in general; so farther, it is highly agreeable to our natural Condition, that whereas single Persons, or a few join'd in Confederacy, might lie perpetually expos'd to the Insults of such Wretches as pursue their private Ends, without Regard to their Neighbours; many should unite in a Body, and so strengthen their Guard against farther Assaults and Mischiefs. Neither is it indeed absolutely necessary, to the proving any Society agreeable to Nature, to say that it arose entirely from mutual Benevolence. And yet even this Principle must be allowed some little Share at least, in the forming of States, since the Persons who first begin them are commonly join'd on the Account of Kindness and Good-liking, though many others may afterwards engage in the same Union, by the Inducement of Fear. But as for this *Fear*, which is look'd on as the Cement of States, as likewise for that Dispute, whether or no Man by Nature be ζῶον πολιτικόν, we shall examine them more at large when we come to enquire into the Rise and the Original of Commonwealths.

XIX. This Principle which we have establish'd for deducing the Law of Nature, as it is the most genuine and the most clear, so we take it to be in such a high Degree ⁴ adequate and sufficient, that there is no natural Obligation bearing a Regard to other Men, the Reason of which is not terminated here, as in the chief Head and Fountain of Duty. Yet, as we shall hereafter shew, to give these Dictates of Reason the Force and Authority of Laws, there is a Necessity of supposing that there is a GOD, and that his wise Providence oversees and governs the whole World, and in a particular Manner the Lives and the Affairs of

¹ Lucian in *Amoribus*, Tom. i. p. 893. Ed. Amst. We do not, like brute Creatures, affect solitary Meditations, but joining together in a friendly society, we make our Joys to be the greater, and our Afflictions the less, by being mutually communicated: And our Pleasures having many sharers in them, fill us with the truer Satisfaction and Delight. Dio Chrysostom, Orat. xii. tells us, that the Reason why Jupiter hath often the Title of φιλῶν and ἰκανῶν, The Kind and The Friendly, is, because he gathers, as it were, all Mankind into Unity and Society, and would have them prove Friends to each other, without the least Mixture of Hatred or Opposition. In like manner, says he, he is call'd ἡμιῶν, or hospitable, because we ought really to think no Man a Stranger to us.

§. xviii. ² This is what the Roman Lawyers say, *Cam inter nos cognationem quandam natura constituit, consequens est hominem homini insidiari nefas esse.* Digest. Lib. i. Tit. i. De Justit. & Jure, Leg. iii.

³ Seneca has very well observed this, and says, That the highest Point of Friendship is to look upon one's Friend as a Person who ought to be as dear to us, as we are to ourselves; we ought to provide for the Interests one of another. I will, says he, bestow upon him that is in Want, but in such a Measure as not to be reduced to Necessity myself. I will step in to the Assistance of him who is in Danger of perishing, but not so as to perish with him. *Quum summa amicitie sit, amicum sibi æquare, utrique simul consulendum est. Dabo egentis, sed ut ipse non egeam, succurram perituro, sed ut ipse non peream.* De Benef. Lib. ii. Chap. iv.

§. xix. ⁴ See Note 5. upon the 15th Paragraph.

Mankind. For we cannot by any Means subscribe to the Conjecture which ² *Grotius* starts, in his *Prolegomena*, or Introduction, N. XI. *That the Laws of Nature would take Place, should we (as we cannot without the most horrid Impiety) deny either the Being of GOD, or his Concern in human Business.* For, should any Wretch be so horribly senseless as to maintain that wicked and absurd Hypothesis in the rankest Way, and so hold Men to have deriv'd their Being wholly from themselves; according to them, the Edicts of Reason could not rise so high as to pass into a Condition of Laws; in as much as all Law supposes a superior Power. ³ 'Tis a good Observation of *Tully*, *De Naturâ Deorum*, Lib. ii. Chap. ii. *I know not, says he, but that upon taking away Religion, and Piety towards the Gods, all Faith and Society of human Kind, and even the most excellent Virtue of Justice, must be banish'd the World* ². Unless the

Rules would be observ'd out of a bare Regard to Interest, as those are which the Physicians prescribe in the Regimen of Health. *Grotius* seems to have taken the Hint of that Notion from a Passage in *Marcus Antoninus* ^b; *If, says the Emperor, the Gods do not consult about any of our Affairs, which the vilest Impiety can scarce believe; why then 'tis fit that I should consult or deliberate about my own Concerns: And all my Deliberation must be concerning what is most profitable for me. Now that is most profitable to every one, which best agrees with his Nature and Constitution. And my Nature is to be rational, and to be a sociable Member of some City or State. My City and Country, as I am Antoninus, is Rome, as I am a Man, is all the World: Those Things therefore which are profitable to these Communities, are the only Things which are good and expedient for me.*

As to what a certain Learned Man objects, that

^a *Liban. Declam. iii. p. 250. Ed. Paris. Where there is no Honour of the Gods, there can be no Fidelity amongst Men.*

^b See

² *Mr. De Courtin*, the Translator of *Grotius*, explains these Words, but something obscurely, and seems also to mistake him; telling us, that he maintains, That Man's natural Light, without any Star of GOD, would carry a Man in a most efficacious Manner to seek Good and avoid Evil, by all Means possible, in Obedience to that Law only which Reason prescribes, and with the Execution of which Conscience is charged. I suspect that *Grotius* never designed to express himself with so much philosophical Exactness, and that there is little Rhetorick in that Passage, if the Sense being rightly understood, has that Meaning; That the Maxims of the Law of Nature are founded upon the Constitution of Mankind, and necessarily contributing to the Advantage of every one, will not cease to take Place, and be practis'd outwardly in some measure, although no Deity be acknowledged; but then they can't be looked upon as Duties, nor can be put in Practice, but upon the Account of some Interest or Vain-glory. *Mr. Bayle* goes much farther, and maintains, in his *Considerations upon a Comet*, pag. 554. That Reason, without any Knowledge of GOD, may sometimes persuade a Man, that a Thing is honest, and good, and commendable to be done, not for the Advantage coming by it, but because it is suitable to Reason. The famous Chancellor *Bacon* (whose Authority, no more than *Grotius's*, *Mr. Bayle* doth not take notice of) has delivered much the same Thing, in his *Serm. Fidel. 117.* where, making a Parallel between Superstition and Atheism, he reasons much after the same manner in his Consideration on a Comet, though more largely. My Design is not to examine Things thoroughly, and therefore I shall only make some short Reflexions. I own, that Religion is neither the only, nor principal Basis of Society; but then, in my Opinion, we must allow, 1. That the Notions of Honesty being stript of all Relation to the Will of GOD, the supreme Lawgiver, the Author of our Being, the Protector of Mankind, and of Society, are meer Chimera's, or meer barren Principles, pure Speculations, incapable of laying a Foundation for good Morality, or to produce solid Virtue. *If we look upon the Atheist* (says *Mr. Bayle* himself) *in the Disposition of his Mind, we shall find that he, not being aw'd by any Fears of Punishment, nor encouraged with the Hopes of GOD's Blessing, must resign himself to the Government of his Passions.* 2. That, so far as we can judge by Conjecture, a Society of Atheists, all Things else being equal, would be more corrupt, and subject to more Disorders, than any of those who retain some Principles of Religion, although imperfect and incoherent. I say, All Things else being equal. For it would be ridiculous, to compare, for Example, a polite and well-instructed People with a savage Nation, who have not Sense enough to do any Evil. We must besides, if we will exactly distinguish the Effects proper to Atheism, and a good or bad Religion, suppose the Persons so compared together, to be very near furnished with the same Notions, and to be in the same Situation, and under the same Circumstances in general, otherwise we shall be in Danger of attributing to Religion, what really proceeds from Nature, Education, Custom, or the like; which Religion is very little or nothing conducing to; or we may accuse Religion of Impotency, by reason of some invincible Obstacles in them, upon whom it would not fail to produce its Effect, were it not that they are ignorant of the most necessary Point. Upon this Foot I maintain, that Religion, tho' corrupted, would produce better Effects than Atheism, that it would disturb Society less, and that the Good it would do, would be much greater than the Evil it would cause. I will not deny, but there may be amongst these Atheists, Men of Sense and Philosophers, who, reflecting that it is better for Men to subject themselves to certain Rules of Life, than for every Man to follow his Humours only, may observe them outwardly, so far as they are exempt from such Circumstances, as some great Interest present, or some violent Passion forces them upon, such Counsels as are reasonable, calm and aware of the Consequences. But the common Sort of ignorant People, and Idiots, which make up the greatest Part of Society, are not able to make such Reflections. To curb in therefore the Violence of their Passions, and to outweigh Mens private Interests, which often clash with the publick Good, some more obvious Principle, which all the World may be sensible of, and which may make the deepest Impressions upon them, must be found out, and that, in a Word, can be no other than the Fear of a Deity. Experience sufficiently confirms this, that in all Times this Motive has had great Influences upon the Mind of Man; for who knows not, that in the darkest Times of Paganism, it was the Cause of Honesty in many Nations? *Mr. Bayle* proves at large, That Men did not always act according to their Principles, and so it might well happen, that many Pagans did not perceive nor draw the Consequences which followed from the false Notions which they had of the Deity. 'Tis certain, that not only the Philosophers, but the Vulgar looked upon the Gods as the Revengers of the Violation of the Laws of Nature. See what is said in the next *Chap. §. 3. Note 4.* Since then there are among Atheists the same Principles of Disorder, as among Pagans, from which no Man can be restrained but by Religion, it seems plain that Vice must reign with much less Controul and Extent in the Society of Atheists, than in a religious one, altho' their Worship be false and croneous. It may be, perhaps, pretended, that the want of this Restraint is made up by the Disorders created in religious Societies, by Superstition and false Zeal; and I own, that these Inconveniences, which arise from the Abuse of Religion, are great; but the Disbelief of a Deity would produce much greater. As much as the Notions of Religion are perverted, and though they are made use of as an Occasion or Pretence of confirming or engaging many Persons in the Commission of Crimes, yet they fail not to discourage and deter others, and those of a much greater Number. The Notion of a GOD, and of an invisible Judge, who will punish Vice and reward Virtue, are naturally so fast linked together, that the most simple have a Sense of it, notwithstanding their other false superstitious Ideas, as appears from the Example of the Pagans. But, as much as Atheism pleases some Men, as the more pure State, nothing but pernicious Consequences can be drawn from it, tending directly to the greatest Looseness and Debauchery; Consequences which are clear to the Sight of all the World, and can't but bring Destruction to a Society, which is composed of Men endowed with such irreligious Principles. If the Nations which are so barbarous as to have no Religion, be objected, besides that the Histories which give an Account of them are contradicted by more modern and faithful Relations, these People are either not formed into any Society, or are so illiterate and stupid, as there is little Difference between them and the Beasts, as the ingenious Writer of the *Rights of the Christian Church*, has very well observed in his *Preface*, §. 18. See also *Lib. i. Chap. vi. §. 13. Note 7. foregoing*, and *Chap. iv. §. 3. Note 4.* of this Book following.

³ *Tully's* Words are these, *Atque haud scio, an Pietate adversus Deos sublata, fides etiam & societatis humani generis, & una excellentissima virtus, justitia tollatur.* See also *Libanius, Declam. iii. p. 250*

particularly the Virtue of *Fortitude*, cannot be demonstrated from our Principle, unless we farther suppose the Immortality of the Soul; since otherwise there would be no Reward to a Man who should throw away his Life on a good Cause: This will require no great Pains to answer. For altho' really to deny, or so much as to call in Question so certain a Truth be extremely impious; yet without bringing this high Point into the Argument, it is possible to demonstrate, that a Soldier may fairly be commanded to fight to Death, in the Behalf of his Country. For, besides that, there appears yet no clear Reason why we must sacrifice, as it were, every good Action to some external Reward; thus much is univ'rsally agreed on, that 'tis in the Power of the Sovereign to arm the Subjects, and to lead them out against the Enemy, in Defence of the State; and farther, when they find it requisite to forbid every one under Pain of capital Punishment, to quit his Station by Flight. Now of two Evils the lesser is most certainly to be chose. But it is a less Evil to fight with extraordinary Danger, and even to the last Breath, than to suffer unavoidable Death for running away. And therefore that Soldier must be the greatest Fool, as well as the greatest Coward, who would not choose rather to fall honourably by the Enemy's Hand, having first anticipated his own Revenge, than to deliver up himself to be ignominiously dispatch'd by the Executioner ⁴. It seems sufficient that a Man fight with all his Force and Ability, let his Inducement to this Behaviour be what it will. Nor is it requisite to the Preservation of States, or of Society amongst Men in general, that every particular Person should be induc'd with such a Firmness of Mind, as the Terrors of Death cannot shake or overcome; all Souls not being capable of this noble Pitch of Valour. Besides, the Use of Fortitude doth not only discover itself in bearing Death undauntedly upon extreme Occasion; but is chiefly employ'd in vigorously withstanding, and in driving off the Danger of Death, as it presses on us. Many Difficulties are not otherwise to be avoided, than by undergoing others of almost equal Hazard ⁵: And Fate sooner overtakes the Coward, than it masters the Valiant. It is farther observable, that setting aside the Supposition of the ⁶ Soul's Immortality, it doth by no Means appear that the chief End and Happiness of Man ⁷ consists in Pleasure. For besides that in the Doctrine of natural Law, treated of in this Manner, the Immortality of the Soul is by no Means denied, but only abstracted from; it's plain that the Pleasure of the Body, in which *Epicurus* is vulgarly thought to have plac'd his *Summum Bonum*, is so far from promoting, that

it rather contradicts and hinders the Preservation, the Sociableness, the Peace, and the Tranquillity of Mankind. But the Genius and the Scope of Christianity differs vastly from these meer natural Schemes; and the holy Apostle had good Reason to affirm ⁸, that *if in this Life only we had Hope in Christ, we should be of all Men the most miserable.* 1 Cor. xv. 19.

XX. But to make these Dictates of Reason obtain the Power and the Dignity of Laws, it is necessary to call in a much higher Principle to our Assistance. For altho' the Usefulness and Expediency of them be clearly apparent, yet this bare Consideration could never bring so strong a Tie on Mens Minds, but that they would recede from these Rules, whenever a Man was pleas'd either to neglect his own Advantage, or to pursue it by some different Means, which he judg'd more proper, and more likely to succeed. Neither can the Will of any Person be so strongly bound by his own bare Resolution, as to hinder him from acting quite contrary, whenever the Humour takes him. And altho' we should suppose many Persons standing in a natural Liberty, and combining to keep these Precepts, yet the Force of them could then last no longer, than the Agreement from whence they deriv'd it. Nor would the Obligation then only cease, when all the consenting Parties should please to alter their Minds (as is now the Manner of receding from mutual Covenants by common Consent) but even during the general Agreement, the Power of obliging would be wanting to the Compact: Inasmuch as we suppose, that Dictate of Reason which commands us to stand to our Bargains and Promises, not yet to have obtain'd the Authority of a Law; and therefore 'tis at every one's Pleasure to renounce the Covenant, whether the other Persons concern'd are willing, or not. Lastly, the meer Force of human Command seems insufficient to invest these Dictates with the Power of Obligation. For since no such Command could take Place otherwise than by the Intervention of Covenants, and since Covenants owe all their Strength to some Law, it doth not appear how there could arise any human Sovereignty capable of Obligations, unless the Dictates of Reason were before-hand receiv'd for Laws. Or should we grant the Fantasy of some, that human Government depends only on human Consent, and then make these rational Duties be enjoin'd the Subjects like other Laws; yet even thus they would obtain no more Power than positive Constitutions, which depend on the Will of the Legislator, both as to their Original and their Duration ². It is therefore on all Accounts to be concluded and to be maintain'd, that the Obliga-

² Comp. Selden De J. N. & G. Lib. i. Ch. vii.

³ Φίλον μάλιστα ἐπαυξήσαν αὐτῶν εἰ ἀνδραῖσι ἢ στρατιῶσι, ὅταν ἐπαυξήσωσι. *Jamblich. in Protept.* "When the valiantest Men sustain Death, they do it for Fear of greater Evils."

⁴ Horat. Lib. iii. Od. ii. ver. 14. &c. *Mors & fugacem persequitur virum; Nec parcat imbellis juvenca Poplitibus, timidoque tergo.*

⁵ All that the Author says here is true; but we must also declare, that the most effectual Motive to lessen the Fears of Death, and make us out-face, as I may say, the Dangers, which the Defence of a good Cause engages us in, is the Hopes of another Life, and the Prospect of the Reward which shall be given to good Men; the Courage produced by any other Principle is but a false Bravery, in Comparison of the Undauntedness which naturally follows that Persuasion, when it is strong, and the Idea of it is vigorously impress'd on the Mind. See the *News of the Rep. of Letters*. July 1707. p. 79. and *Aug.* p. 178.

⁶ See §. xv. Note 10. above.

⁷ See what is said at the End of §. xxi. with Note 6.

tion of natural Law proceeds from GOD himself, the great Creator and supreme Governor of Mankind; who by Virtue of his Sovereignty hath bound Men to the Observation of it. And thus much may be demonstrat'd by the sole Light of natural Reason. Here then we lay it down as a granted Truth, that GOD Almighty is the Creator and Governor of the World, since it hath been shewn with so much Evidence by wise and learned Men, and since no Person of Sense and Understanding ever call'd it in Question ^r. Now this supreme Being having so form'd and dispos'd the Nature of Things and of Mankind, as to make a sociable Life necessary to our Subsistence and Preservation; and having on this Account indued us with a Mind capable of entertaining such Notions as conduce to this End, and having insinuated these Notions into our Understandings by the Movement of natural Things, deriv'd from him the first Mover; and likewise most clearly represented to us their necessary Connexion and their Truth: Hence it follows, that it is the Will of GOD, Man should frame his Life according to that Disposition and Method which he seems peculiarly to have assign'd him above the Life of Brutes. And since this cannot otherwise be achiev'd and compass'd, than by the Observance of *natural Law*, it must be suppos'd that GOD hath laid an Obligation on Man to obey this *Law*, as a *Means* not arising from human Invention, or changeable at human Pleasure, but expressly ordain'd by GOD himself for the Accomplishment of this Design. For when any Sovereign enjoins his Subject the Pursuit of such an End, he is at the same Time suppos'd to oblige him to make use of those Means, without which the End cannot be attain'd ². Nor is this the only Proof of Man's being oblig'd to a social Life by the Command of GOD, that, as the Condition of Mankind stands at present, we could not support and secure ourselves, unless this Persuasion were firmly rooted in our Minds; and that by Order of the divine Providence it so falls out, that by a natural Consequence our Happiness flows from such Actions as are agreeable to the Law of Nature, and our Misery from such as are repugnant to it: But it is farther confirm'd by this Consideration, that in no other Animal there is discoverable any Sense of Religion, or any Fear of a Deity ^b ^r. To which may be added, that tender Sense of Con-

science inherent in the Minds of Men that are not corrupted and debauched with Vice; by which they are convinc'd, that to sin against Nature's Law, is to offend him, who hath a sovereign Power over Mens Souls, and who is to be fear'd, even when we do not apprehend any Danger from human Punishment ^c.

The Laws of Nature would have a full and perfect Power of binding Men, altho' GOD Almighty had never propos'd them anew in his reveal'd Word. For Man was under Obligation to obey his Creator, by what Means soever he was pleas'd to convey to him the Knowledge of his Will. Nor was there any absolute Necessity of a particular Revelation to make a rational Creature sensible of his Subjection to the supreme Author and Governor of Things. No one will deny but that those Persons who were not acquainted with the holy Scriptures, did yet sin against the Law of Nature: Which we could not affirm, did this Law derive its Force from the Promulgation made of it in the sacred Writings. On this Account we can by no Means admit of that Notion started by *Hobbes* ^d, *Since those Laws, says he, which we call natural, are nothing else but certain Conclusions apprehended by Reason, concerning Things to be done and Things to be omitted; and since Law, in a proper Sense, is only the Speech of him, who by Virtue of his Right commands Men to execute or to abstain from some Performances; therefore they are not Laws as they proceed from Nature, but only as they are enacted by GOD in Scripture.* For we do not take it to be essential to a Law, that it be conveyed to the Subjects Notice in the Form and Manner of a Proposition; but we reckon it sufficient that the Will of the Sovereign be gather'd and understood any way, whether by internal Suggestion of the Mind, or from the Contemplation of our State and Condition, and of the Nature of those Affairs and Transactions which are to engage our Life. And indeed he himself acknowledges as much, in another Part of the same Work ^e, where he observes, that *the Laws of GOD are declar'd three ways; first by the tacit Dictates of right Reason, &c.* Besides, the Laws of Nature, as they are deduc'd by Ratiocination, cannot be apprehended otherwise than in the Manner of Propositions, and therefore in this Respect they may be allow'd to bear that Name. But as in Civil Laws it matters not, whether they be promulgated in Writing, or

Vide *M. Antonin. Lib. ix. § i.* ^b Vide *Protag. De Platon. f. 224. Ed. Wech. Ficin.* ^c 'Tis remarkable what *Tacitus* says, *An. vi. Ch. vi. of Tiberius. His own Crimes and Villanies were by his Conscience turn'd into the greatest Punishments to him. And it was not without Reason, that the greatest Master of Wisdom us'd to affirm, That could we open the Hearts of Tyrants, we should discover the Strokes and Wounds of Guilt: The Body not being more cut and tormented with Stripes, than the Mind is with Cruelty, Lust, and ill Designs.* *Cicero De Finib. Lib. i. Ch. xvi. If there be any who think themselves sufficiently guarded and secur'd against the Discovery of Men, yet they dread the Majesty of the Gods: And judge all these Cares and Disquiets, which Night and Day prey upon their Minds, to be sent from Heaven, as a present Punishment for their Crimes.* *Seneca in Lactant. Lib. vi. Ch. xxiv. I am Madman! what can it profit thee to have had no Witnesses of thy Villany, when thou always carriest a Conscience about with thee?* *Albrius De Deorum. Imagin. Ch. xxii. A wicked Man is never Master of his own Countenance.* *Add. Juvenal. Sat. xiii. 139. The Advantage of a good Conscience Martial hath thus happily express'd, Lib. x. Ep. xxiii.*

Ampliat status spatium sibi vir bonus: hoc est vivere huius, vita posse priore frui.

Add. Philostrat. De Vita. Apollon. Lib. vii. Ch. xvii.

Good Men live twice: It doubleth every Hour
To look with Joy on that which pass'd before.

^d *De Cive, Ch. iii. §. ult.*

^e *Ch. iv. §. iii.*

§. XX. ^r The strongest and most natural Proofs of this fundamental Truth may be found in *Locke's Essay of human Understanding. B. iv. Ch. x. §. 9, 10.* See *Le Clerc's Latin Treatise of Pneumatology, Part. iii. Ch. i.*

² *Ἐπεὶ δὲ ἄνθρωπος θείας μετέχει μοίρας, πρῶτον μὲν δια τῆς τοῦ Θεοῦ συγγενείας. ζῶν μόνον θεῶς ἐόντα σὲ, καὶ ἐπιχειροῦσθαι βαρῆς τε ἰσχυροῦσθαι. καὶ ἀγαλλόμενα θεῶν. i. e. "Man is the only one of all the Creatures, who by reason of the Relation which he has to the divine Being, thinks that there are Gods, and erecteth Altars and Images to them. Plato gathered this Notion from *Socrates*, his Master, as it appears from what *Xenophon* relates, *Memoirs of Socrates, Lib. 1. Chap. iv. Numb. 13.* See also *Cicero De Legib. Lib. i. Chap. viii. and Laclantius De Ira Dei, Ch. xiv. n. 2.**

viva voce 3, so the divine Law is of equal Obligation, whether it is discover'd to Men either by GOD himself in a visible Shape, and with the Resemblance of a human Voice, or by holy Men, peculiarly inspir'd from Heaven; or whether, lastly, it be work'd out by natural Reason, from the Contemplation of human Condition. For Reason, properly speaking, is not the Law of Nature itself, but the Means, upon a right Application of which that Law is to be discover'd. Nor doth the Manner and the Method of promulgating a Law belong to its inward Essence and Constitution. Farther, altho' it seem a more clear and a more compendious Way of revealing one's Will to another, to force it upon his Senses by express Words and Speeches; yet that is likewise reckon'd to be sufficiently reveal'd, which we must unavoidably discover, if we make use of the Occasion offer'd, and keep the Way that we are put into. And thus Man, who, by the Bounty of his Creator, enjoys the Faculty of comprehending both his own and other Mens Actions, and of judging whether or no they are agreeable to human Nature, cannot but take Occasion (supposing there are more Men in the World besides himself) to observe and consider how some of those Actions do really thus agree to the Inclination and to the Condition of Mankind 3.

Although to render a Law obligatory there is a Necessity of making it known to the Subject; and altho' to deduce the Law of Nature from the Suggestions of Reason, and to apprehend its Foundation, and its necessary Connexion with the State of Humanity, be not the Gift of every Person; yet hence it can neither be pretended, that this Law doth not oblige all Men, or that it may not be said to be known by the Light of Reason. For to give a Law a binding Force, a popular and simple Knowledge is sufficient; nor is an artificial Demonstration and Deduction absolutely requisite to this Purpose. And altho' 'tis 4 very probable that the chief Heads of natural Law were expressly deliver'd by GOD Almighty to the first Mortals, and were from them communicated to others by Custom and Institution; yet the Knowledge of that Law may nevertheless be stil'd *natural*, inasmuch as the necessary Truth and Certainty of it may be drawn from the Use of natural Reason. At the same Time, because those Propositions which represent to us the Law of Nature, are insinuated into Mens Minds from the Contemplation of the Nature of Things; on that Account they are justly attributed and referr'd to GOD, the Author of Nature 5.

The wisest of the old Heathens acknowledg'd the Authority of natural Law, and deriv'd it rightly from GOD. Thus *Plutarch* 6 *Γαυρῶν ἐξ*

τὸ ἐπειθεῖν θεῶν, καὶ τὸ πείθεσθαι λόγῳ: To follow GOD and to obey Reason is the same Thing. But Tully hath left the most noble Testimony for our Purpose, as it is cited out of his Books *De Republica* by *Laſtantius* 7: 8 There is indeed, says he, a Law agreeable to Nature, and no other than right Reason, made known to all Men, constant and perpetual; which calls us to Duty by Commands, and deters us from Sin by Threats; and whose Commands and Threats are neither of them in vain to the Good, though they may seem of little Force to the Wicked. This Law we are neither allow'd to disannul, nor to diminish; nor is it possible it should be totally revers'd; the Senate or the People cannot free us from its Authority. Nor do we need any other Explainer or Interpreter of it besides ourselves. Nor will it be different at Rome and at Athens, now and hereafter; but will eternally and unchangably affect all Persons in all Places: GOD himself appearing the universal Master, the universal King. 'Tis he who is the Inventor; the Expounder, the Enacter of this Law; which whosoever shall refuse to obey, shall fly and loath his own Person, and renounce his Title to Humanity; and shall thus undergo the severest Penalties, though he escape every thing else which falls under our common Name and Notion of Punishment. *Sophocles* speaks very honourably on the same Subject in his first *Oedipus*, Act 3d, p. 187. Ed. H. Steph.

————— νόμοι ὑψίστους, &c.

————— The lofty Laws
Deriv'd from Heaven and high *Olympian* Jove,
And not the mean Device of mortal Men.

Mr. *Selden*, in his Discussion of this Point, hath shewn 9, that although the Gentiles did acknowledge the chief Heads of natural Law to be sometimes violated through the corrupt Manners of Men, and to be (as it were) oppress'd and stifled by wicked Ordinances and Constitutions; yet they were at the same Time fully persuad'd that their τὸ ἀυτοδικαιοῖν, or what was really just and fit to be done, did by Order of the Gods perpetually remain the same, and hold the same Force of Obligation. Whence arose that common Opinion amongst them of the Punishment of wicked Men in another State; when they had been guilty of any monstrous Offences against the Law of Nature. And since they thus believ'd the Gods to be the Avengers of its Violation, we may take it for granted, that they thought them too the Authors and Founders of its Authority. On the other Hand, such of them as had any Sense of any Virtue, did as fairly suppose, that good Men exercising Piety, never fail'd of the peculiar Countenance and Con-

3 Add, Dr. Cumberland, *Ch. i. §. 11. & Ch. v. §. 1.*

4 *Lib. vi. Ch. viii.* 5 *De J. N. & G. Lib. i. Ch. viii.*

6 Add, Dr. Cumberland, *Ch. i. §. 10.*

7 *De Auditione.*

8 These Words, which are found a little lower, *Nor doth the Manner* — as far as, *Constitution*, may be more properly added here, as any Man may easily discern.

9 See the Extract of an *English Sermon* of Dr. *Barrow's* in *Tom. iii.* of the *Universal Library*, p. 322.

10 *Cicero's* Words are, *Est quidem vera lex, recta ratio, natura congruens, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando a fraude deterreat: quæ tamen neque probos frustra jubet, aut vetat; nec improbos jubendo aut vetando movet. Huic legi nec obrogari fas est; nec derogari ex hac aliquid licet; neque tota abrogari potest. Nec vero aut per senatum, aut per populum solvi hæc lege possumus: neque est quaerendus explanator, aut interpret ejus alius. Nec enim alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed & omnes gentes, & omni tempore, una lex, & sempiterna, & immutabilis continebit; unusque erit communis quasi magister & imperator omnium Deus, ille legis hujus inventor, disceptator, lator: cui qui non parebit, ipse se fugiet, ac naturam hominis aspernabitur; atque hoc ipso luet maximas pœnas, etiamsi cetera supplicia, quæ putantur, effugerit.*

sideration of Heaven. ⁷ Thus *Jamblichus* ^a, *We must take this therefore for a certain Truth, that nothing properly evil shall happen to a good Man, either in this Life, or after it. Nor are the Affairs and Concerns of such a Person neglected by the immortal Deities.* And *Euripides* ^b says, *Good Men do at last obtain what their Virtue hath deserv'd: But evil Men shall never arrive at any tolerable Degree of Happiness.* But Mr. *Selden* farther shews ^c it to have been a constant Opinion amongst the Primitive Christians, that in the Interval betwixt the Creation and the Publication of the Decalogue, those natural and universal Laws were given to Mankind, which were afterwards inserted in the Mosaical Constitutions. Hence was drawn that most excellent Observation of St. *Chrysostom* ^d, that to the Commandments about the honouring of Parents, about Murder, about Adultery, and about Theft, GOD was therefore pleas'd to add no Reason, because those Duties were already well known and understood, as being main Points of the *natural Law*; whereas to the Ordinance concerning the Sabbath-day, a Reason of the Precept was designedly affix'd, upon account of its being *positive* and arbitrary ^e. To conclude, all Legislators have believ'd that their Laws, of what kind soever, would derive the greatest Strength and Authority from the Succours of Religion: As appears from their solemn Custom of ushering in all their Constitutions with the Worship of the Gods ^f.

XXI. It is well worth our while to treat more distinctly and more carefully concerning the *Sanction* of the Law of Nature. And to this Purpose, besides what we have formerly deliver'd about the Sanction of Laws in general, we will first of all observe, that the Goods and Evils which happen to Man, may be both divided into three Ranks or Classes. And as for the Goods, some of them proceed, either from the free and liberal Donation of the Creator, or from the voluntary Benevolence of other Men, or from the Industry of the Acquirers, to which Industry they determin'd themselves by their own free Choice. And it is plain, that this first Sort are not owing to the Observation of the Laws. Other Goods there are, which flow, by a natural Consequence, from some Ac-

tions which the Laws command: The Creator having been pleas'd to assign to such and such Performances of the Laws such perpetual and natural Effects, productive of the Good and Profit of Mankind. And these are those which Dr. *Cumberland* calls *natural Rewards*. A third Kind of Goods proceed from some certain Actions, either by the Pleasure of the Legislator, or by the Covenant and Agreement of Men; of which the former are call'd, κατ' ἔξοχην, *Rewards*, or arbitrary Returns, the latter more properly *Wages*. In the same Manner may Evils be divided. Some of them follow the very Nature and Condition of Men (if we abstract the first Cause and Original of that Condition) or they happen without the particular Default of him who suffers them. Which we may, in a sound Sense, call *fatal Evils*, opposing the Word Fate, not to the divine Disposal, but to the peculiar Faultiness of the Person on whom these Evils light. Others do, by natural Consequence and Connexion, proceed from Sins; which are by some Authors term'd *natural Punishments*. Lastly, others there are which arise from Sins, by the peculiar Determination and Disposal of the Legislator beyond the Manner of natural Effects: In which the Quality, the Manner, the Place and Time of the Evil depend on the Legislator's free Pleasure. And these are what we would properly call *Punishments*, or (in a looser Sense of the Word) *arbitrary Punishments*.

Thus much being premis'd, we proceed to remark, that altho' the omnipotent Creator might by Virtue of his Sovereign Right have requir'd our Obedience, without making any good Fruit proceed thence to our own Advantage; yet it hath pleas'd his infinite Goodness, so to order and constitute the Nature of Things and of Mankind, that by a kind of natural Connexion some Goods should attend the Observance, and some Evils the Transgression of Nature's Laws. Thus a constant Obedience is follow'd by ¹ Serenity and Security of Conscience, join'd with a good and certain Assurance; by a good Frame and a settled Tranquillity of Mind ²; by the Preservation of the Body from many Evils, not *fatal*: Besides an infinite Number of Advantages, which may be obtain'd by the mutual Benevolence and good Offi-

^a Protrep. Ch. xiii.

ad Pop. Antiochen.

^b Euripid. Ion. v. 1620, &c.

^c Add. Selden, ibid. Chap. ix, and Lib. vii, Chap. ix, x.

^d Orat. xii.

^e See the Form which introduceth Zaleuchus's Laws in Diodor. Sic. Lib. xiii. Ch. xxi.

^f See Archbishop Tillotson's 58th Sermon, Folio, pag 451, &c. See likewise pag. 51 and 74, &c.

⁷ *Jamblichus's* Greek is, "Εν τῷ ἐν τῷ τῷ Διόδοτῳ δὲ ἀληθές, ὅτι ἐκ ἕσται ἀνδρὶ ἀγαθῷ κακὸν εἶναι, ἢ το ζῶντι, ἢ το τελευτήσαντι, ἢ δὲ ἀπολλύμεναι ὑπο θείων τὰ τετα πράγματι. These very Words *Plato* also makes *Socrates* to speak, at the End of his *Apology*, p. 41. and *Cicero* has translated them, *Tusc. Quest. Lib. i. Chap. xli.* *Euripides's* Words also are,

Σέβοντα δαίμονας θάρρειν χρεῖων
Ἐἰς τέλος ἢ δὲ οἱ μὲ ἰσθλοὶ τυγχάνουσιν ἀξίαν
Οἱ καὶ δ', ὡσπερ πεφύκασ', ἔποτ' εὐπράξιαν ἄν'

§. XXI. ¹ "It is certain (says *Montagne*) I know not how to express the Satisfaction that we enjoy in ourselves by well-doing, nor the generous Bravery that accompanies a good Conscience. A Soul courageously vicious may provide for its Security at all Adventures, but it can't have the Pleasure and Satisfaction. 'Tis none of the least Comforts, that it finds itself free from the Intention of a corrupt Age, and can say in itself, If any Man could look into my Breast, he should not find me guilty of troubling or ruining any Man, neither of Revenge, nor Envy, nor Breach of the publick Laws, nor of Disselsin, nor Disturbance, nor ill Language; and tho' the Licentiousness of the Time allows and instructs, yet I have not put my Hands to the Goods or Purse of any Man, nor eat of any Man's Bread but my own, either in War or Peace, nor made use of any Man's Labour without Wages. These Testimonies of Conscience are pleasing, and 'tis our Benefit that this Comfort is natural, and the Reward which we can never want. To expect the Reward of virtuous Actions from the Commendation of Men, is an uncertain and troublesome Foundation." *Essays, Lib. iii. Chap. ii. p. 596.*

ces of other Men * 2. On the other hand, from the Violation of the same Laws arise, by a natural Connexion, Disquiet of Conscience, Disturbance and Degeneracy of Mind, Destruction of the Body, and numberless Evils, which may be occasion'd by the withdrawing of other Mens Assistance, or by the Violence of their provok'd Revenge 3 b.

Now altho' these Rewards, and these Punishments, are by some imagin'd not to proceed with Certainty enough from good and evil Actions; because many Persons in Return for Benefits receive only Hatred, Envy, or Injury; whilst others on the contrary do securely enjoy the Fruits of their Wickedness, without Molestation or Punishment; whence we cannot be infallibly assur'd before-hand that our good Deeds will be equally repaid by other Men (tho the Fruit which arises in ourselves from such honest Practices is not capable of Hindrance or of Interruption) yet thus much is be-

yond Dispute, that more Advantages most surely and certainly follow from good and just Proceedings, than we can in Reason expect from the opposite Vices c. And altho' the whole Train of those Goods do not attend on such a conscientious Behaviour, as in the Nature of Things they were dispos'd to do 4, yet we have a fair Probability that many of them will not disappoint us; at least, that we shall obtain a greater Share than we could have hop'd for from a Course of Dishonesty and Wickedness. And so by this Means we provide much better for our own Security, and have much fairer Grounds to hope that others will, in their Turn, be alike ready to promote our Interests and Concerns, than if, laying aside all Regard to our Neighbours, we directed every Thing towards our own private Advantage; and therefore infinitely better than if, by the Exercise of Violence or of Deceit, we endeavour'd to make our own Gains and Profits out of

* Seneca De Ira Lib. ii. Ch. xiii. calls the unmov'd Tranquillity of a happy Mind, A great Reward. Idem Ibid. The Way to Happiness is plain and easy. For what can be more comfortable to the Mind than Calmness? What more troublesome than Passion? What more at rest than Clemency? What so full of Business as Cruelty? Modesty and Chastity enjoy a perfect Leisure, whilst Lust is ever tir'd with laborious Pursuits. To conclude, the Possession of every Virtue stands us in little Cost or Trouble, but Vices are all chargeable to be kept. Add. De Ira, Lib. ii. Ch. xxx. & ult. and Lib. iii. Ch. v. xxvi. See the Story of Hercules, at the two Ways, in Xenoph. Apomnem. Lib. ii. Prov. viii. 19. x. 9. xi. 3, 5, 10, 18, 19, 25. b Marcus Antonin. Lib. ix. §. 4. He that acts unjustly really injures himself by his Wickedness. 'Tis a Saying of Tully, ad Attic. Lib. ix. Ep. xii. on a profligate Wretch, Ulciscetur illum mores sui, His own Practices will be reveng'd upon him. See Prov. v. 9, 10, 11. vi. 33, 34, 35. xii. 13. xiv. 14, 32, 34. xvii. 13. xix. 29. xx. 1. xxii. 5. xxiii. 20, 28, &c. Sirac. xix. 3. xxxi. 22, &c. c See Prov. xi. 31. Vid. Isocrat. De Permutatione, p. 576.

* Seneca's Words are, Quos tantum premium expectat felicitis animi immota tranquillitas. Nec, ut quibusdam dictum est, arduum in virtutes & asperum iter est; plano adestur. Non vane vobis auctor rei venio. Facilis est ad beatam vitam via, inire modo bonis auspiciis, ipsisque diis bene juvantibus. Multo difficilius est, facere ista quæ factis. Quid enim quiete otiosius est animi, quid ira laboriosius? quid clementiæ remissius, quid crudelitate negotiosius? Vacat pudicitia, libido occupatissima est; omnium denique virtutum tutela facilior est, vitia magno coluntur. We may add to this Montague's Meditation, Essay, Lib. i. Chap. xxv. "Virtue is not, as the Schools speak, placed on the Top of a two-headed Mountain, rough, and not to be ascended. They that pursue it may attain it. On the Reverse, she has her Abode in a fine fertile and pleasant Plain, from whence she beholds all Things below her; and if we labour to find her, our Way lies through shady and green Roads, sweet, flourishing, and pleasant; of an easy and smooth Ascent, like that of the Celestial Vaults. The Price and Excellency of Virtue consists in the Ease, Pleasure, and Profit of the Practice. The Difficulty is so little, that an Infant may exercise it as well as a Man, and the Simple as well as the Wise. The Rule is its chief Instrument, and not Force. Socrates her first Favourite, willingly left his Business to glide along in Ease and Activity in her Paths. She is the nursing Mother of all Pleasures, she makes them suitable, and renders them sure and safe, and moderating them keeps us in Breath and Appetite. Abridging us of what she refuses, she makes us more eager of what she allows us, and she allows us all Things that are suitable to our Nature plentifully, to Satiety, at least, if not to Weariness, like an indulgent Mother, unless we will say that a Regimen of Sobriety and Temperance is an Enemy to Pleasure. If a common Fortune befalls it, she can make her Escape, or pass through it, and make another, not more fleeting and transitory. She knows how to be rich and powerful, and lie in Beds of Roses. She loves Life, Beauty, Fame, and Health, but her peculiar Office is to teach us to use our Goods regularly, and to spend them freely; an Office more noble than severe, without which the whole Course of our Lives is churlish, turbulent, and detormed, and can we do less than confine these Rocks, Thickets, and Monsters?" See also Mar. Antonin. Lib. v. §. 9.

* That is not Vice, really Vice, which offends not, and in a true Judgment does not accuse. For there is such an apparent Deformity and Inconvenience in it, that they speak with Reason who say, that it is principally produced by Bestiality and Ignorance, so hard is it to know it, and not hate it. Malice sucks up the greatest Part of the Venom, and poisons it. Vice leaves an Ulcer in the Flesh, and Repentance in the Soul, which always tears and wounds itself; for tho' Reason extinguishes almost all other Grievs and Sorrows, yet it begets Repentance, which is so much the more grievous, because it is bred within, as the Cold and Heat that affects the Sinews is always more sharp than that which outwardly affects. Montague, Lib. iii. Chap. ii. I could not forbear copying out these fine Thoughts, of which Seneca also hath one, Epist. lxxxi. Quemadmodum Attalus noster dicere solebat, Malitia ipsa maximam partem veneni sui bibit.

* A Passage of Isocrates in Orat. De Permutat. is worth our Notice here, where he says, Θαυμάζω δ' εἰ τις αἰετὸς τῶν ἐπιπέδων καὶ τὴν δικαιοσύνην ἀσκησάτω, καὶ κατὰ τὴν καὶ μὴ ἐν ταῖς ἐπιπέδων, ἐλαττον ἔξω τῆς πομπῆς ἀλλ' ἐξ ἡγεμονίας [for so it should be read, and not ἡγεμονίας] καὶ παραθεσῶν, καὶ παρα ἀνθρώποις πλεονεκτήσῃ ἄλλαν, ἐν δὲ ἡδ' εἶναι, τῶν μόνων, ἃν δὲ πλεονεκτήσῃ, τῶν ἄλλων εἰς ἡγεμονίαν ἐδὲν ἂν βέλτερον εἴη. ὅσα ἢ τῶν μὴ τὴν ἀδικίαν προτιμάσας, καὶ τὸ λαοῦ τι τῶν ἀποστρίων μεγαλοῦ ἀγαθὸν νομιζόντας, ἔμοιρα πάσχοντας τοῖς ἀδικησασίαις τῶν ζῶων, καὶ καταστρέφας ἢ ἀπολαύσοντας ἂν ἂν λάσασιν ἐλπίω δ' ὕστερον ἐν ταῖς μεγάλοις κακοῖς ὄντα. τῶν ἢ μὲν εὐσεβείας, καὶ δικαιοσύνης ζῶντας, εἰ τε ταῖς παρθεῖ χρόνοις ἀσφαλῶς διαγοῦντας, καὶ ἀπὸ τῶν συμπατοῦν αἰῶν ἡδὲ τῶν ἐλπίδων ἔχοντας, καὶ ταῦτ' εἰ μὴ κατὰ πάντων ἔσται εὐδαιμονία, ἀλλὰ τὸ γ' ἄς ἐπὶ τὸ πολὺν τῶτο γίγῃ τ' ἄριστον, καὶ ἢ τῶν ἐν φρονήσας, ἐπιπέδον τὸ μέγαν αἰετὸν ἀσκησάτω καὶ κατὰ τὴν, το πολλαῖς ἀφελῶν τῶτο φαίνοσθαι προαιεμονίας. Πάντων δ' ἀλογάταστον πεποιθασιν, ὅσα κίχλιον ἢ ἐπιπέδον μὴ νομιζόντων εἶναι, καὶ θεοφιλέστερον, τὴν δικαιοσύνην τῶν ἀδικίας; καὶ ἢ δ' εἶον τῶν βίωσας τῶν ταυτῆ ἡγεμονίας, τῶν τὴν πομπῆν προτιμάσας. Which is thus Englished, "I wonder that any one can be persuaded, that they who apply themselves constantly to Piety and Justice should think themselves more unhappy than Sinners, and don't promise themselves more Advantages both from GOD and Man. As for me, I believe that only good Men enjoy most plentifully what is worth seeking, and Sinners, on the contrary, know not their own true Interests. For whoever prefers Injustice before Justice, and supposes his chief Happiness to consist in extorting other Mens Goods from them, is, in my Judgment, like the Beasts that bite at an Hook, who are pleas'd at first with the Sweetness of the Bait, but soon after find themselves embroiled in very great Troubles. But, on the other Hand, they that apply themselves to Piety and Justice, are not only in Safety for the present, but meet with agreeable Hopes, that all their Life shall be happy. I own, this does not always happen, but Experience verifies it to be true for the most part. Now in all Things wherein we can't infallibly foresee the Success, a wise Man will choofe that Side which commonly proves most advantageous. But nothing is more unreasonable than their Opinion, who believe that Justice is something fine and more agreeable to the Nature of the Gods than Injustice, and yet imagine, that they who apply themselves to the first, shall be more unhappy than those who give themselves up to the latter."

the Losses of other Men. By this way of reckoning therefore it appears, that the Value of that Reward which will follow upon a good Action, doth, all Things rightly consider'd, exceed the Gain of the opposite illegal Practice.

We desire it should be well observ'd, that whilst we are here treating about the natural Effects of good and of evil Actions, we do not by any Means reckon amongst these Effects those kind of Goods which we but now rank'd in the first Class, and which our own Prudence and Industry either cannot obtain, or cannot avoid. Such Things both may, and generally do happen alike to virtuous and to vicious Men. Thus a wicked Person may, by the Gift of Nature, possess a vigorous and a healthy Body, while perhaps a Man of Honesty and Piety labours under a weak and crazy Constitution. And thus Death lays hold promiscuously on the Just and on the Vile. But the only Goods we here allude to, are such as it is in the Power of human Reason to provide for us; and which do therefore, in some measure, depend upon our own Act. Now altho' some Part of those Goods which we intend by the Observance of the Law of Nature to obtain from other Men, has a Dependence on their Kindness and on their Probity, and so is not absolutely in our own Power; yet, for as much as in all Probability, they have the same End and Design with our selves, we have at least fair Reason to hope for and to expect such good Usage and Retribution from them, tho' we cannot give ourselves an infallible Assurance of it, before it comes. Scarce any Man hath met with so many Enemies in the World, as not to own himself indebted to some Benefactors. And we see that the Evils which Men procure to one another, have never been able to prevail to the utter Ruin and Destruction of human Race: Which is a plain Evidence, that good Actions have oftner attain'd their just End and Reward, than they have fail'd and been disappointed of it. On the other side, altho' a Person who neglects or disobeys the Law of Nature, may sometimes, by an unaccountable Concourse of external Causes, receive a whole Flood of Goods and Benefits from other Men; yet because in this Case those Effects are, with regard to him, meerly contingent, and do very seldom fall out in such a Manner, we may conclude, that Nature and Reason did not prescribe, much less command the Means by which he attain'd, only casually, to such an End. Reason, on the contrary, most clearly shews us, that we take a much more probable Way to Happiness, by acting on a settled Design, and by applying the best Means we can to the gaining of our Purpose, than if we should throw aside all Coun-

sel and Forecast, and permit ourselves to be driven at random by the blind Guidance of Chance. But this Point is indeed as clear as any Thing in Nature, and hath been made out to full Advantage by Dr. Cumberland.

There remains therefore this only Question farther, whether or no besides the natural Effects of evil Actions, and besides those which arise from the Sanction of Civil Laws, there are still others in reserve appointed by GOD's free Pleasure, and to be inflicted by Virtue of his Sovereign Prerogative; or whether GOD hath not added to the Sanction of the Laws of Nature some arbitrary Punishment: Especially since it is apparent, that the natural Consequences and Effects of evil Actions are frequently interrupted, and that the Wickedness of many Men seems to turn to their Gain and Advantage. Now what the Scripture hath declar'd in this Matter, is plain, and beyond all Dispute. But waving that Authority, the affirmative Side of the Question may be defended from several Considerations: As from that most antient and most universal Tradition, concerning a certain revenging Divinity⁶, and the Pains after Death. Of which Opinion we have two fair Instances in the Cases of *Jonas* and of *St. Paul* (*Jonas* i. 7. *Acts* xxviii. 1. &c.) for there being no natural Connexion and Consequence, either between *Jonas's* Crime and the Tempest, or between the Fact of Murder and the biting of the Viper, the People who were present at both Accidents, immediately suppos'd that GOD Almighty did thus extraordinarily interpose his Hand to punish some heinous Wickedness⁷. Moreover, it being most certain, that it is the divine Pleasure those Laws should be obey'd, and not less manifest, that the natural Effects of them may be (partly at least) eluded; it is highly probable, that GOD will find some other Way of punishing such Offenders; especially since the Gnawings of Conscience, and the Want of Quiet and Security, which constantly attend evil Men, do not always rise to such an afflicting Degree, as to seem a sufficient Plague and Penalty for their Crimes⁸. But because whatever Arguments we can alledge *à priori*, will not amount to a Demonstration, but only to a high Probability; and because this arbitrary Punishment presupposes some positive Determination of the divine Will, which we can hardly come to a Knowledge of without a particular Revelation; and since our Induction and our Experience are at present imperfect, we can scarce avoid confessing, that to those who see only⁹ by the Light of natural Reason, this Controversy must still appear in some measure dark and obscure.

XXII. As

⁴ Add *Grot. De Veritate Rel. Chr.* Lib. i. §. 19, 20, 21, 22. Lib. ii. §. 9.

^b Add Dr. Cumberland, Ch. v. §. 25.

⁵ Our Author expresses himself thus; *Manu velut Regiâ exercendi*; in which he alludes to an Expression of the Roman Lawyer *Pomponius*, speaking of the first Roman Kings, who governed all Affairs as they thought fit, because they had no written Law; *Et quidem initio civitatis nostræ populus sine lege certâ, sine jure certo primum agere instituit, omniaque MANU A REGIBUS GUBERNABANTUR.* Digest. Lib. I. Tit. ii. *De Origine Juris*, &c. Leg. ii. §. 1. See *Tacitus's Annals*, Lib. iii. Chap. xxvi.

⁶ Which was call'd *Nemesis* [or *Δίκη*] and was thought to have the Care of punishing the Crimes which were unpunish'd upon Earth; either thro' Negligence, or thro' want of Power; of this there is a fine Description in *Ammian. Marcellin.* B. xiv. Ch. ii.

⁷ This is true; but not to lessen the Efficacy of the Laws of Nature, so far as they are known by the Light of Reason alone, let us add some Reflexions; and to this End, I think I can't do better, than to make use of the Words of a great Philosopher of this Age, whom I have already quoted in several Places, who thus speaks; "The Rewards and Punishments of another Life, which God has established to give greater Force to his Laws, are of Importance sufficient to determine our Choice concerning all the good or evil Things of this Life, when we consider the Happiness or Misery to come as possible, of which none can doubt. Whoever, I say, agrees that an excellent and infinite Felicity is a possible Consequence of a good Life which he hath

"lived

XXII. As to the *Matter* of the Law of Nature, *Grotius* observes ^a, that many Things are refer'd to this Law not *properly*, but *reductively*, inasmuch as the Law doth not oppose or forbid them. As those Things are term'd Just, not only which are in strict Justice due, but which Justice doth not contradict (tho' it would be better to call such Things *permitted*, than plainly *just*.) But perhaps this Distinction of *Grotius* might be more conveniently applied to those Constitutions which, according to the particular State of Men, the Desire of Peace and Tranquillity hath at any time introduc'd; as likewise to the Actions undertaken in Conformity to such Constitutions. For we shall often hear the Lawyers debating such Cases as these, whether the *Possession of Things*, whether *Prescription*, whether *the making Wills*, and whether *buying or selling*, do belong to the Law of Nature, or not. Which Doubts cannot easily be resolv'd, unless we distinguish between those Things which the Law of Nature determines, by commanding or forbidding them; and those things which Men have been induc'd to ordain for the necessary Promotion of Society ¹, the Liberty of doing which flows immediately from this human Ordinance and Institution: and then we say of these last Things, that they belong to the Law of Nature by way of *Reduction*. Thus the Dominion or the Possession of Things, doth not immediately spring from Nature, nor can we alledge any direct and express Precept for its Introduction: yet it may be said in some measure to be enjoin'd by natural Law, in as much as when Mankind began to multiply in the World, it was requisite to their peaceable Condition, that the primitive Communion of Goods should be laid aside. Thus *Prescription* is not plainly commanded by the Law of Nature; yet upon Supposition of Things being divided into distinct Proprieties, the Peace of Mankind seems to favour it; lest otherwise the Titles to Things should remain always in doubt. Thus, lastly, Nature doth not positively enjoin us to

make Wills, or to buy and sell; yet Proprieties being suppos'd, as in the former Case, it naturally follows, that a Person at his Death shall have the Power of disposing of his own Goods; and that Men, by the Intervention of Bargains and Contracts, shall be at Liberty to alienate such Things as belong to themselves, for the Procurement of those which are in the Possession of others.

Grotius farther observes on this Subject ², that sometimes by Abuse those Things are refer'd to the Law of Nature, which Reason indeed shews us to be honest, and better than their Opposites, tho' they are not properly matter of Debt and strict Obligation. Of which kind are many high and uncommon Acts of Liberality, of Mercy and Clemency; as likewise whenever a Man recedes from any Part of his Right, not being compell'd by Necessity. These Matters *St. Paul* illustrates in his first Epistle to the *Corinthians*, Ch. vi. ver. 12. Ch. vii. ver. 38. Ch. x. ver. 23. ^b

Socrates ^c, when a rascally Fellow had offer'd him an Injury, would not complain of it to the Judge, but reckon'd it (as he said) no more than if an Ass had kick'd him. And *Cato*, as *Seneca* tells us, when he receiv'd a Blow in the Face, was so far from resenting the Affront, and from desiring Satisfaction, that he would not venture so far as to *forgive* it, but denied that any such thing had been done: Thinking it better not to acknowledge the Fact, than to prosecute it.

XXIII. There is still one Question behind, which requires our Determination: Whether or no there be any such thing as a particular and positive *Law of Nations*, contradistinct to the *Law of Nature*? Learned Men are not come to any good Agreement in this Point: Many assert the *Law of Nature and of Nations* to be the very same Thing, differing no otherwise than in external Denomination. Thus *Mr. Hobbes* ^e divides *natural Law*, into the *natural Law of Men*, and the *natural Law of States*, commonly called the *Law of Nations*. He observes, *That the Precepts of both are the same*:

“ lived here upon Earth, and an opposite State a possible Recompense of an irregular Life, such a Man must necessarily own that he judges amiss, if he concludes from thence, that a good Life, joined with a certain Assurance of eternal Felicity which he may attain, is not preferable to a wicked Life, accompanied with the Fear of such horrible Misery, into which it is possible the wicked Man shall one Day fall, and where nothing can be his Comfort but the terrible and uncertain Hopes of being annihilated. All this is very evident, seeing good Men have nothing to receive in this World but Evil, and Sinners are in a perpetual Felicity; which yet often happens otherwise, inasmuch as Sinners have no great Reason to boast of their Estate, in relation to the good Things that they actually enjoy; or rather, if we consider all Things well, they have, I believe, the worst Part, even in this Life; but when we put infinite Happiness into the Balance with infinite Misery, if the worst happen to a good Man, which is that he is mistaken, it is the greatest Advantage that the Sinner can have; but if the contrary happen, what Man would run the hazard, if he be a Person of any Thought? Who, I say, will be so much a Fool, as to expose himself to the danger of being possibly infinitely miserable, whereas he can get nothing by it but a pure Negative, if he escapes the Danger? But, on the contrary, the good Man hazards a Negative only against an infinite Happiness, which he shall attain, if his Expectations succeed. If his Hope be well grounded, he is eternally happy; and if he be mistaken he is not unhappy, because he'll be sensible of nothing. But on the other side, if the Sinner judges rightly, he is not happy; but if he be mistaken, he is eternally miserable. Is not this one of the most visible Irregularities of Thought that any Man can fall into, not to see at the first Sight, which Side ought to be preferred in this Controversy? *Mr. Locke's Philos. Essay upon Man's Understanding*, Lib. ii. Ch. xxi. §. 70. This is the Result of almost all *Mr. Pascal's Reasonings* in his *Meditations*, Ch. vii. The Reader also would do well to read *Mr. Clerc's Pneumatology*, Ch. ix. §. 2, 9. to the end of the Chapter; and *Mr. Bruyere's Characters, or Manners of the Age*, in his Chapter of *Brave Spirits*, Page 560, &c. See also a Passage out of *Arnobius*, quoted above, *Lib. i. Ch. iii. §. 7. Note 5.*

^a Lib. i. Ch. i. §. 10. Note 3. ^b So *Ulpian* (*Lib. iv. §. 1. D. de alien jud. mut. caus.*) *The Prator doth not disapprove of his Proceeding, who chose rather to lose his Right, than to engage in long Suits and Contentions. This Aversion to Strife doth by no means deserve Reproof.* ^c See *Plutarch* of the Education of Children, Page 10. C. Ed. *Wech.* ^d *De Ira*, Lib. ii. Ch. xxxii, &c. *de Constant. Sapientis*, Ch. xiv. ^e *De Cive*, Ch. xiv. 4, 5.

§. xxxi. ¹ There are two sorts of Duties prescribed by the Law of Nature, taken in its full Extent; the one flowing from the natural and primitive Constitution of Man immediately, and the other supposes human Establishment. These last are but the Consequence of the former, or a suitable Application of the general Rules of the Law of Nature to the private Condition, and diverse Circumstances of every one. See §. 15. above, *Note 5.* and the last Paragraph of this Chapter. We may observe the same in all the Duties, of which this Author treats.

² See above, *Lib. i. Ch. ii. §. 8. Note 5.*

But that forasmuch as States, when they are once instituted, assume the personal Proprieties of Men, hence it comes to pass, that what, speaking of the Duty of particular Men, we call the Law of Nature, the same we term the Law of Nations, when we apply it to whole States, Nations, or People¹. This Opinion we, for our Part, readily subscribe to: Nor do we conceive, that there is any other voluntary or positive Law of Nations, properly invested with a true and legal Force, and obliging as the Ordinance² of a superior Power³. And thus we do not really differ in Judgment from those who are more inclin'd to call that the Law of Nature, which consists in a Conformity to rational Nature, and that the Law of Nations, which flows from the Consideration of human Indigence, the Relief of which seems to be the main End and Design of Society. For we, as well as they, deny that there is any positive Law of Nations proceeding from a Superior. And whatever is deducible from Reflections on the Indigence of human Nature, we refer immediately to *natural Law*; only we were unwilling to define and explain this natural Law by a Conformity to rational Nature; because by this means we should establish Reason for the Rule and Measure of itself; and so this way of demonstrating Nature's Laws would run round in a Circle.

Most of those Matters which by the *Civilians*

and others are refer'd to the Law of Nations; as the Ways of acquiring things, the Business of Contracts, &c. do indeed belong either to the Law of Nature, or to the civil Laws of those Countries where they are observ'd: Many People and States agreeing in such Points, which otherwise do not depend on the universal Reason of Mankind. Now it is not proper or fair to constitute these as a peculiar and distinct Species of Law; inasmuch as the Reason why such Constitutions are common to many Nations doth not arise from any mutual Covenant or Obligation, but is wholly to be attributed to the particular Pleasure of the several Legislators, who by Accident agreed in these Ordinances, without the least Regard to one another. And therefore this kind of Customs and Decrees may be, and frequently are, alter'd by one People, or Kingdom, without advising with their Neighbours.

Nor is *Feldenius's* Distinction to be despis'd, who in his Observations on *Grotius*^b tells us, that the *Roman* Lawyers, by the *Law of Nations*^c, understood the Power and Liberty which Strangers and Foreigners were allow'd in transacting Matters in the *Roman* State; and by the *Civil Law*, that which was proper to the Citizens only, all Foreigners being excluded from its Benefit. That on this Account^d *Wills* and *Marriages* were said to be of the *Civil Law*, and *Contracts* or *Bargains*, of the

¹ Add. *Boecler*, in *Grot.* Lib. i. Ch. i. §. 14. and in Lib. ii. Ch. iv. §. 9. ² Lib. ii. Ch. ii. §. 20. and Ch. viii. §. 1. ³ §. xxiii. It is possibly from this Distinction of the Law of Nations from the natural Law, that we are accustomed to judge otherwise of the Actions of Princes, or Commonwealths, than of private Persons, as Mr. *Bernard* has observed in relating Mr. *Budden's* Words, as a good and smart Notion, in his *Elemen. Philosoph. Pract.* Page 236. I shall give you them in the Extract made of them in the *News of the Republ. of Letters*, March 1704. "If one private Person offends another without Cause, we call that Action *Injuste*; but if one Prince encroaches upon another without Cause, by invading his Dominions, by robbing his Subjects, and plundering his Towns and Provinces, it is called *War*, and 'twere too much boldness to call it *unjust*. To break Bargains made and agreed on, is a *Crime* between one Man and another: but among Princes, to break the most solemn Alliance, is *Prudence*, i. e. the Art of Governing. 'Tis true, they always alledge some plausible Pretences, but they matter not whether they are believed just or unjust. Be they called Cheats, Frauds, Lies, Double-dealings, Rapine, Theft, or the like Crimes, which are abhorred in the common Sort, all the World will commend, or at least excuse them, if a Prince or a whole Nation commits them."

² There is neither a Superior nor Inferior. All People are naturally equal, and consequently no one People can impose Laws upon another, much less can they altogether impose Laws upon themselves. But if we ground this pretended Law of Nations upon the Consent or Agreement of the People, we run from our Subject; for besides that there is a Difference between an Agreement and a Law, this would not produce a particular Law distinct from the natural, but it must be referred to that general Law of Nature which obliges us to keep all Covenants. Further, neither all People, nor the greatest and more civilized Part, did ever yet agree together to observe those sort of Customs which are said to belong to the Law of Nations; nay, there is not so much as One, in which they exactly agree in the Practice of it. How they become Obligatory, See Mr. *Titius's* Observat. on *Pufendorf*, xci. Num. 14. Mr. *Budden's* *Elemen. Phil. pract.* Page 206, 207. as also a Discourse de *Lytro*, §. 1, 2, &c. in Tom. I. of the Comment. & Opusc. of Mr. *Hertius*. The second of these Authors had Occasion to observe, after he had treated of the Law of Nature, the Application that People might make of it one to another, so far at least as the thing would permit and require him.

³ 'Tis not exactly the Notion of the *Roman* Lawyers, for they understand by the *Law of Nations*, properly so called, that which the Light of natural Reason has established among all Men, and so is common to all Nations, i. e. as the Definition supposes, to all those that follow the Light of Reason. It chiefly consists of such Things as the Necessities and Business of Life oblige us to establish, for we refer to it civil Government, Propriety of Goods, all Contracts almost, Slavery, and the Freedom of Slaves, the Rights of Wars, &c. *Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos per aequam custoditur, vocaturque Jus Gentium, quasi quo jure omnes gentes utantur* — *Nam usu exigente, & Humanis necessitatibus, gentes humanae jura quaedam sibi constituerunt. Bella etenim orta sunt, & captivitates secuta & servitutes.* — *Et ex hoc jure gentium omnes pene contractus introducti sunt* — *Instit.* Lib. i. Tit. 2. §. 1, 2. *Manumissiones quoque juris gentium sunt* — *Ex hoc Jure Gentium introducta bella: disces & gentes: regna condita: domina distincta: agris termini positi: aedificia collocata: commercium, emptiones, venditiones, locutiones, conductiones, obligationes instituta; exceptis quibusdam, quae [a] jure civili introducta sunt.* *Digest.* Lib. i. Tit. 1. Leg. 4, 5. So that the Law of Nations is near a-kin to those Laws of natural Right which our Author calls *Conditional*, §. 24. and the *Roman* Lawyers sometimes confound it with the *Laws of Nature*, because the Rules of both are founded on natural Reason. See *Grotius* upon that Passage of *Cicero*, where by the Law of Nature, i. e. the Law of Nations, one Man can't promote his own Interest at the Loss of another: *Neque verò hoc solum Natura, i. e. Jure Gentium constitutum est, ut non liceat sui commodi causa nocere alteri.* *De Offic.* Lib. iii. Ch. v. p. 296, &c. See also Mr. *Hertius*, de *Lytro* §. 1, 7.

⁴ The *Roman* Lawyers do not refer *Marriage* to the Civil Law, because, according to them, it belongs not only to the Law of Nations, but Law of Nature; *Hinc [ex Jure Naturali] descendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus.* *Digest.* Lib. i. Tit. 1. Leg. 1. §. 3. They only say, that to make a Marriage-contract valid, which is the Effect of the Civil Law, both the Persons who are to be married must be Citizens of *Rome*. See *Ulpian*, Tit. 5. §. 3, 4. *Seneca*, de *Beneficiis*, Lib. iv. 35. *Boeth.* in *Top.* *Cicer.* Ch. iv. Likewise, altho' a *Will*, to make it valid, requires certain Formalities, and Strangers can neither make a valid *Will*, nor inherit by a *Will* (See *Cod.* Lib. vi. Tit. 24. and *Dion. Gothofred.* upon it) nevertheless, *Wills* were reputed to be from the Law of Nations, as appears from this, That a Soldier might make a Person condemned to Banishment, or condemn'd for all his Life to the Mines or Quarries, his Heir, because they still had a Right by the Law of Nations. *Ut sunt in opus publicum perpetuo damnati, & in insulam deportati, ut ea quidem, quae jure civilis sunt, non habeant, quae vero juris gentium, habeant.* *Digest.* Lib. lxxviii. Tit. 9. De *Pœnis*, Leg. 17. §. 1. See *Lib.* xxix. Tit. 1. De *Testamento Militis*, Leg. 13. §. 2. See also the Law of the Code quoted, *Lib.* iv. Ch. x. §. 4. Note 1.

Law of Nations, because the former were restrain'd to the Citizens, whereas Strangers were admitted to a Share and Right in the latter.

Many Authors do farther rank under the Title of the *Law of Nations*, several Customs mutually observ'd by tacit Consent, amongst most People pretending to Civility; especially in the Affairs and Transactions of War. For after that the most polish'd Parts of the World came to esteem Martial Glory as the greatest of human Honours, and to think that a Man had no such fair way of shewing his Excellency beyond others, as by being able by his Boldness and his Sagacity to destroy many of his Fellows; upon which Account there perpetually arose either unnecessary or unjust Contentions; for fear great Captains, if they us'd the full Liberty of a just War, should bring too much Envy on their Power, and expose themselves to general Hatred: Many Nations found it convenient to temper the vigorous Fierceness of hostile Proceedings, by a Shew of Clemency and of Magnanimity. Hence arose the Customs of exempting certain Things and Persons from Martial Violence; the particular Manners of hurting Enemies to such Degrees, of treating Captives, and the like. *Machiavel* in his *Prince*, Chap. xii. relates one Practice of this Nature, which I question whether it were worthy of the Name and the Profession of Soldiers; he says, it was first introduc'd by *Alberigo de Como* of *Romagna*, and kept up in the *Italian Wars* of the last Age, chiefly by the foreign and mercenary Troops; the opposite Generals endeavour'd with all possible Industry, to rid themselves and their Soldiers of all Trouble and Fear: And their Way was, by killing no one in Fight; only taking one another Prisoners, whom they afterwards dismiss'd without Ransom. When they were in Leaguer before a Town, they shot not rudely amongst them in the Night; nor did the Besieg'd disturb their Camp with the like Incivilities. They made no Intrenchments for their Security whilst encamped; and when Winter came on, never lay at all in the Field. And to behave themselves in this manner was Part of their Discipline and Institution. An Agreement something like this *Strabo* tells us of, *Lib. x.* between the *Eretrians* and the *Chalcidians*, forbidding the Use of missile Weapons against each other. To which we may add the Custom observ'd by the ancient *Indians*, of letting the Husbandman remain safe from all Injury and Molestation, even in civil Wars ².

But altho' these Customs seem to include some kind of Obligation arising from tacit Consent; yet if one who is engag'd in a lawful War, shall neglect them, and profess that he will not be bound by such Restraints; provided what is contrary to them may be rightly done according to the Law

of Nature; he is guilty of no other Sin, but a sort of Unskilfulness, in not adjusting his Proceedings to the nice Models of those who reckon War in the Number of the liberal Studies. As a Gladiator is accus'd of Inexpertness, when he wounds his Antagonist otherwise than by the Rules of Art. Whoever therefore wages War in a just Cause, may slight these Formalities at Pleasure, and govern himself purely by the Law of Nature: Unless he thinks it more for his Interest to observe them, as a Means to render the Enemies less severe towards himself and his Men. On the other hand, he who prosecutes an unjust Quarrel, if he punctually fulfils these Niceties, is so far in the Right, as to appear wicked with some kind of Temper and Moderation. However, these Reasons not being general, cannot constitute any Law of an universal Obligation. Especially since as to any Restraints which depend on tacit Agreement, it seems reasonable that either Party should have the Liberty of absolving themselves from them, by making express Declaration that they will be holden by them no longer, and that they do not expect or require the Observance of them from others. Hence we find many such Practices to be worn out by Time, or overcome by the Prevalence of contrary Custom. Neither have those Men any good Reason of Complaint, who censure this Doctrine as a Notion by which the Security, the Interest, and the Safety of Nations are robb'd of their surest Guards and Defence. For the Ensurance of these Advantages and Blessings doth not consist in the Practice of such mutual Favours, but in the due Observance of the Law of Nature, a much more sacred Support; and which whilst they enjoy, they have little need of inferior Methods of Protection. And sure it shews much more Excellency and Worth in any Custom, to derive it from the Law of Nature, than to establish it only on the Consent of different People.

Amongst the chief Heads of that *voluntary Law of Nations* which *Grotius* maintains, he reckons the Law ³ of Embassies. Now as to this Point it is our Opinion, that the Persons of Embassadors are sacred and inviolable, even amongst Enemies, by the meer Law of Nature; provided they do not come purely as Spies, nor enter into any hostile Design against the Person to whom they are sent; altho' in the ordinary Course of Business, and of Treaties, they prefer their Master's Interest to all others. For inasmuch as such Persons are necessary for the procuring, the preserving, or the strengthening of Peace by Leagues and Covenants; and since the Law of Nature enjoins us to embrace Peace by all honest Ways, it must at the same time be suppos'd to have provided for the Security of those Men, without whose Intervention this good End

² *Arrian*, in *Indicis*, Chap. xi.

³ Custom never obtains the Force of a Law in any State, but by the tacit Consent of the Sovereign, which may easily be presumed: But when one People treats with another, how must it be determined what repeated Acts, and what Space of Time shall render a Custom obligatory? Moreover, great Revolutions often happen, insomuch that not only the Sovereign, but also the Government itself is wholly changed; and in this Case, why should a new State, or a new Prince, be oblig'd exactly to observe a Thing which they never consented to? This is what *Mr. Hertius* has well observ'd. See his Discourse, *De Lytro*, before quoted, §. 2.

⁴ *Samuel Rachelius* is plainly meant here, as appears to me by what *Mr. Hertius* says in the same Discourse, §. 11. where he mentions a Discourse, *De Jure Gentium*, of that Lawyer, who was Professor at *Kiel* in the Province of *Holstern*.

⁵ See what is said Note 1. §. 12. *Ch. 9. Lib. viii.*

cannot be obtain'd^a. To this Right of personal Safety, is join'd another of being exempted from the Jurisdiction of the Sovereign to whom they are sent; at least in all Matters relating to their Office. Since otherwise they would not have full Power and Liberty to promote their Master's Interest, with due Application and Vigour, were they oblig'd to give an Account of their Management to any Authority, besides that which they represent. Other Privileges commonly attributed to Embassadors, especially to those who reside in Courts, not for the settling or the securing of Peace, but chiefly for the diving into the Secrets and Policies of a State, these depend absolutely on the Indulgence of the Prince who entertains them; and therefore, if he sees convenient, he may deprive them of these Favours without the Breach of any Law, provided he will suffer his own Ministers abroad to be treated in the same Manner.

The² Right of Burial, which, according to *Grotius*, seems likewise to make a particular Head of the *Law of Nations*, may be well referr'd to the common Duties of Kindness and Humanity^b. Nor are the other Instances which he offers of Consequence enough to establish a new Species of Law, since they may with Convenience enough be allow'd a Place in the System of the *Law of Nature*. As for those Persons who¹⁰ rank under the *Law of Nations*, the particular Compacts of two or more States, concluded by Leagues and Treaties of Peace, to us their Notion appears very incongruous. For although the *Law of Nature*, in that Part of it con-

cerning the *keeping of Faith*, doth oblige us to stand to such Agreements; yet the Agreements themselves cannot be call'd *Laws*, in any Propriety of Speech or of Sense. Besides, they are almost infinite in Number, and commonly are settled only for a Time. Nor do they any more constitute a Part of Law in general, than the Covenants and Bargains of particular Subjects with each other, do belong to the Body of the Civil Law of the Kingdom: But they are rather to be esteem'd the Subject and the Concern of *History* c.

XXIV. Of all the Divisions of *natural Law*, that seems to us most accurate and most convenient, which considers, in the first Place, a Man's *Behaviour towards himself*, and then *towards other Men*.¹ Those Precepts of the *Law of Nature* which bear a Regard to other Men, may be again divided into *absolute* and *hypothetical*, or conditional. The former are such as *oblige* all Men in all States and Conditions, independent from any human Settlement or Institution. The latter presuppose some publick Forms and civil Methods of Living to have been already constituted and received in the World. Which Distinction *Grotius* hath thus express'd in other Words; *The Law of Nature is concern'd, not only about such Things as exist antecedent to human Will, but likewise about many Things which follow upon some Acts of that Will.* "Whence altho' the Dominion or "the Propriety of Things, as it now stands, is establish'd by the Pleasure of Men; yet such a Settlement being once suppos'd, *natural Law* informs us "that 'tis a Sin to take the Goods of another Man,

^a Add. *Marselaer Legat. Lib. ii. Ch. xiii.*

^b Add. *Ant. Matth. De Crimin. Proleg. Ch. iii. §. 5.*

^c Add. *Selden*

De Mari Clauso, Lib. i. Ch. ii. Concerning unwritten Laws, or Custom, besides others, see Bacler. ad Grot. Lib. ii. Ch. iv. §. 5.

⁹ Altho' after Death whatever Treatment the Corpse of the Dead meets with, is all one to it, the Right of Burial is not a whit the less founded on the Law of Humanity; inasmuch that it is a kind of Punishment to be deprived of Burial, as the Practice of Civil Judicatures shews, and the Uneasiness of such as in their Life-time are troubled at the Thoughts that their Bodies, when dead, shall be cast into the Highway. To this we may add, that, according to the Customs and ordinary Opinions of Men, Burial is a Mark of Honour. Now to deny a Man the Honour that he may lawfully claim, although but by an imperfect Right, is without Contradiction, a Breach of the Law of Nature. It is to no Purpose to object, that a dead Man is not sensible of what is done to his Carcase, yet he may be really wronged for all that, for 'tis not necessary that an injured Person should know or feel the hurt done him, or be in a Condition to obtain his Right. (See *Lib. i. Chap. i. §. 7. Note 4.*) All the World agree, that an Infant in the Cradle may be wronged, and so may an Idiot, although the first knows not what it suffers, and the other does not understand the Hurt done him. Lastly, the Relations and Friends of the Dead, do in some Manner represent his Person, and have a Right to require the Honour of Burial for him. But, by Burial we are to observe, that all the last Duties to be paid to the Dead are understood, whether it be by burning of the Body, or interring it; for this depends upon Custom, which alone determines how the Memory of the Dead is to be honoured. Moreover, as we have intimated, a certain kind of Punishment is sometimes inflicted upon the Bodies of such as have committed enormous Crimes; and this is chiefly practis'd upon such as have killed themselves, and consequently the Magistrate cannot punish them any other way, to affright others and discourage them from the like Attempts. But the Rights of War do not extend so far, as to deny Burial to slain Enemies; this Refusal answers not to the lawful Ends of War, and can have no other Principle than barbarous Cruelty. I have taken this almost all out of *Buddens's Element. Philosoph. Pract.* We may add upon this last Article what *Plato* says, *viz.* That it is a great Piece of Cowardice to treat the Body of him with whom we are at War, as an Enemy; in so doing we act like Dogs, who bite the Stones cast at them when they can't come at him that throws them. *Καὶ γυναικίαις, καὶ σκυμίας θάνατος ἐστὶν, πολεμίων νομίζον τὸ σῶμα τῷ τεθνηκότι, ὅτι παρὰ τὸ ἐχθρῶν, λευκίτιον ἢ ὀϊστολέμιον, ἢ οἷά τι ἀφ' ὀφρον ἔρῃν τὸ τῶ το ποισίνας τ' κινῶν, ἀι ταῖς λίθοις, εἰς ἀν βλητῶσι χαλιπαύουσι τὸ βαλλομένον ἐκ ἀποιδρῆναι.* *De Rep. Lib. v. Tom. ii.* Mr. *Thomasius* nevertheless maintains, that there is no Evil in refusing Burial to Enemies, and he affirms it a Thing altogether indifferent; but I leave it to others to examine whether what he says about it in his *Institut. Jurispr. Divin. Lib. iii. Chap. x.* destroys the Principles I have laid down. He also says, That supposing there be some Obligation to grant a Burial, the Refusal of that Duty of Humanity is no just Cause of War. I own it, but it ought to be considered, that this Refusal in some Cases shews a bloody Disposition, and may be more justly made a Cause of War, than many other Things that are.

¹⁰ 'Tis the same Mr. *Rachelius*, beforementioned, in his Book *De Jure gentium*, in which he follows *Herman Conringius's* Discourse, *De Jure*, as I understand from Mr. *Hertius*.

§. xxiv. ¹ We must add, *towards God*. See what is said above, §. 15. Note 5. and in the next Chapter, §. 3. Note 2. This Division is very natural and ancient. We find it in *Iusc. Quæst. Lib. i. Chap. xxvi. Hac philosophia nos primum ad illorum [Deorum] cultum, deinde ad jus hominum, quod situm est in generis humani societate, tum ad modestiam, magnitudinemque animi eruditum, i. e.* "Philosophy teaches us first of all the Worship of a God, then the Duties of Men one to another, which are "founded upon the Society of Mankind, and then on a Moderation and Greatness of Mind." Every one knows that the Gospel obliges us to respect *God*, our Neighbour, and ourselves, as the three principal Objects, and greatest Originals of our Duty. This Division is clearly deduced from *St. Paul's* Words, *Tit. ii. 12. The Grace of God, which bringeth Salvation* — — — *teacheth us to deny Ungodliness and worldly Lusts, and to live soberly, righteously, and godly in this present World.* We may also here take Notice of that Passage of the Philosophick Emperor, *Τρις χρεός, ἢ μὲ πρὸς το αἰτιον ἀδικημάτων, ἢ πρὸς τῶν θείων αἰτιων, ἢ πρὸς ἡς συμπάντι πᾶσι πάντα, ἢ πρὸς τῶν συμποισινας* *i. e.* "We have three Obligations, the one to the Cause "which is surrounding us, *i. e.* our Body; the other ties us to the supreme Cause from whom all Things come, which happen in this World, *i. e.* *God*, who is the universal Reason; the third and last obliges us to all Men, *i. e.* as joined in Society." *M. Antonin. Lib. viii. §. 27.*

“without the Owner’s Consent ².” That is, there are many Things which as to the Exercise of the Act are arbitrary, or where it is left to the free Pleasure of Men, whether they will perform such an Act, or no: But the Act being once perform’d, there follows upon it, by Virtue of some Precept of the Law of Nature, a moral Necessity or Obligation; or else the Manner and Circumstances of the Act are by the same Law adjust’d and determin’d. Thus, for Example, altho’ the Law of Nature doth not command me to buy of another, yet supposing me to buy at my own Pleasure, it commands me not to seek my own Gain to the Damage of the other Party, nor to cheat him in the Bargain. And many such Precepts of the Law of Nature there are, which cannot take Place, or indeed be understood, unless upon Supposition of distinct Proprieties of Things, and of the Establishment of civil Authority. Yet it cannot hence be prov’d, that even all positive Laws are Part of the Law of Nature, because Nature obliges us to obey the Commands of the supreme Magistrate, tho’ our own Consent gave him his

Sovereignty over us. Thus much indeed is certain, that the Violaters of civil Laws do, by breaking their intervening Covenant, mediately sin against the Law of Nature. And yet there still remains a prodigious Difference between these natural Laws which we call *hypothetical*, and the positive Laws of civil Governments; inasmuch as the Reason of the former is drawn from the Condition of Mankind consider’d in general; but the Reason of the latter is taken from the particular Interest of any Nation or State, or from the bare Pleasure of the Legislator. Therefore our civil positive Laws are not so many Precepts of the natural *hypothetical* Law, but do only borrow their Force of obliging ³ in human Regard, from the Virtue of some such hypothetical Precept of Nature. Now of those human Institutions which serve for Foundations of these hypothetical Precepts, the three chief are ⁴ *Speech*, the *Dominion* and the *Price* of Things, and ⁵ *human Sovereignty*, or Command. And by this Division we shall hereafter guide our Proceedings, when we arrive at that Part of our Design.

¹ Vid. *Leg. i. §. 3. D. De furtis. Leg. xlii. D. De verb. Signif.*

² See above, §. 22. *Note 1.*

³ The last Editions say, *in foro humano*, and the *English* Translator follows them, rendring it, *in human Regard*, whereas the first Editions expressed it, *in foro Divino*, as the Reasoning of the Author plainly requires; and Mr. *Hertius*, in his Edition in 1706, hath suffered this Mistake to pass.

⁴ See *Note* on §. 8. *Lib. iii. Chap. ix.*

⁵ All that our Author says in this Chapter respects only the Obligations of the natural Law, which obliges us to act or not act indispensably, and which hath for its Object such Actions as contain in them an Agreeableness or Disagreeableness to the human Nature; but, as I have already said above, *Lib. i. Ch. vi. §. 16. N. 1.* we must acknowledge a natural Law of simple Permission, by Virtue of which we may do, or not do, according as we judge fit, every Thing which has not a necessary Agreeableness or Disagreeableness with the Nature of Man, unless it be expressly ordered or forbidden by some positive Law, either divine or human. ’Tis upon this natural Law of simple Permission, that all Rights, as well natural as accessory and acquired, are founded, as Liberty, the Right of suffering no Evil from others, Empire or Authority over Persons, and other such like Things, which ordinarily receive divers Changes, according to the Will of Man. For Actions permitted by the Law of Nature may become obligatory, and afterwards return to their natural Indifference. Mr. *Selden* (as is before observed) acknowledgeth this Right of simple Permission. See his Treatise *De Jure Nat. & Gent. secundum Hebræos, Lib. i. Chap. viii.* And if we examine what our Author says hereupon in the Beginning of §. 22, we shall find, that he can’t forbear owning a Right of simple Permission. See *Lib. i. Chap. vi. §. 15. Note 2.*

CHAP. IV.

Of the Duties and Performances of Man towards himself; as well in Regard to the Improvement of his Mind, as to the Care of his Body and of his Life.

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| <p>I. Every Man is to take Care of himself.</p> <p>II. In what that Care consists.</p> <p>III. The Mind is to be instructed in Religion.</p> <p>IV. And all corrupt Opinions to be rooted out of it.</p> <p>V. The Knowledge of a Man’s self is necessary.</p> <p>VI. A Man should know his Soul and its Offices.</p> <p>VII. And how great its Abilities are.</p> <p>VIII. Nothing above its Abilities may be attempted.</p> <p>IX. How much we are to labour after Fame:</p> <p>X. And how much after Riches:</p> | <p>XI. And about Pleasures.</p> <p>XII. Our Passions are to be governed by Reason.</p> <p>XIII. Of our Study for Learning.</p> <p>XIV. Of the Care of the Body.</p> <p>XV. Of the Use of Life.</p> <p>XVI. What Obligations we are under to preserve Life.</p> <p>XVII. How far our Life is to be employed in the Service of others.</p> <p>XVIII. Whether it is to be endangered for them.</p> <p>XIX. Whether Self-Murder is lawful.</p> |
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ALTHO’ this be a Quality common to ¹ Man, with other Animals, that he is concern’d for his own Preservation, and is naturally glad to be in as good a Condition as possible; yet that

Mr. BARB. NOTES on Chap. iv.

§. 1. ¹ This Objection ought first to have been answered, before our Author had entred upon this Subject, viz. How a Man can be under any Obligation to himself? Our Author meddles not with it till he comes to §. 16, where see *Note 2.* This Neglect proceeded from hence, that the fifteen first Paragraphs were not in the first Edition, but being added in the second, the Objection became so far postponed.

his Care of himself ought to be of a much more refin'd, and of a much nobler Strain, than what we can suppose in brute Creatures, there is good Reason to conclude: Not only because he hath receiv'd more Endowments than they, and such as are more capable of fruitful Culture and of useful Improvement; but farther, because he cannot perform the Duties to which he stands oblig'd, unless he brighten and quicken his Faculties by good Exercise, and make them more vigorous and more ready, in the Production of worthy Actions. Besides, the Labour which a Man spends on his own Improvement, is not terminated in himself; but spreads abroad its Fruit to the Benefit of all Mankind; and the better any Person approves himself in the Management of his own Gifts and Abilities, he is justly esteem'd the more excellent Citizen of the World, and the more generous Benefactor to his Fellows. Wherefore Man, in his Endeavours to fulfil the Laws of Society, to which he is by his Creator directed and designed, hath good Reason to imploy his first Pains and Study on himself; since he will be able to discharge his Duty towards others with so much more Ease and Success, the more diligent he hath been in advancing his own Perfection. Whereas he who is unuseful to himself, and idle in his proper Concerns, can give other Men but little Reason to expect Advantage from his Pains.

There is scarce more Necessity for our engaging in this Care, than there is Solitude and Difficulty in the Prosecution of it. For, in the first Place, Men are born in an entire Ignorance of Things, and their Minds whilst yet tender, may be easily so far defiled and tainted with vile Opinions, that it will afterwards be no easy Labour to wash off the Stains. Besides, we bring hereditary and inbred Corruptions with us into the World, which

draw us all, more or less, out of the straight Path of Reason; and unless we bridle and restrain them, pour out a Flood of foul and unworthy Actions, thro' the Course of our whole Lives. And it may, perhaps, quicken our Industry, to consider that we have but one Time allow'd us to act our Part in, and cannot hope for a second Entrance on the Stage, to amend the Faults of our first Performance. For that old Complaint in *Euripides* will ever be as vain and ineffectual as when it was first made³:

Me miserable! that Men should be deny'd
The Gift of springing to a second Youth,
A double Age! The Structures which we raise
If found defective, later Cares reform,
New modell'd: But our own unhappy Frame
Stands without Change, and falls without Repair!

O! might we turn our Steps, and tread again
The Path of Life, what Slips we once had made
We would correct, and every cheating Maze
Avoid, where Folly lost our Way before.

* Now since Man consists of two Parts, a⁴ *Soul* and a *Body*, whereof the former is the great Principle and Spring of human Actions, the latter supplying the Place of a subordinate Instrument, the Care and Improvement of the first and noblest Part, may justly challenge the Precedence in our Endeavours⁵.

II. The Culture of the Mind, which all Men are oblig'd to undertake, and which is absolutely necessary for the Performance of human Duty, consists chiefly in these Particulars; that we obtain true Opinions concerning all such Things as our Duty bears any Reference to, that we set a right Judgment and Price on those Objects which

² Our Author here puts the Care of preserving a Man's self, before that of perfecting himself, which is indeed the more natural Order; for besides that the Idea of Preservation is a Thing more single than that of Perfection, our Being certainly pre-exists our Well-being; and in vain a Man thinks of perfecting himself, if he has not before taken all the Care he can of preserving himself. But if the Author expresses himself well in this first Period, 'tis by meer Chance, for he forgets himself the next Moment, and takes a clear contrary Method in this Chapter; for all he says in this, and the thirteen following Paragraphs, concerns only, the Care of perfecting a Man's self; and he begins not till the fifteenth to speak of his Life and the Preservation of it. Further, we must observe, that according to the Principles I have above laid down to rectify our Author's Notions (*Chap. iii. §. 15. Note 5.*) the Duties of Man to himself directly and immediately flow from Self-love, which obliges him both to preserve himself, and put himself into as good a Condition as possible to attain all the Happiness that he is capable of. *Montagne's* Words may be pertinent here. "The principal Office (says he) which we have here, is for every one to govern himself. 'Tis the chief End of our Being here. He that forgets to live well and piously, and thinks to discharge his Duty by ordering and managing others, is a Fool. He that is careless of his own Health and cheerful Conversation, to serve others, takes, in my Opinion, an ill and unnatural Course." *Essays, Lib. iii. Chap. x. p. 748.* But we must always suppose, that Self-love must be managed according to every one's Condition, and without any Prejudice to Religion or Society. See the general Rules which I have laid down in the Note above quoted.

³ *Euripid. Supplic. 1080. & seqq.* Οἱ μοι τί δὴ βροτείω ἐκ ἐστὶν τόδε
Νέος δὲ εἶναι, καὶ γέροντας αὐτὸ πάλιν;
Ἄλλ' ἐν δόμοις μὲν ἦν τι μὴ καλῶς ἔχει,
Γνώμασι καὶ ὑπεραῖσι ἐξορθεύμεθα.
Ἄϊωνα δ' ἐκ ἔξουσι, εἰ δ' ἡμῶν νόοι
Δὲ καὶ γέροντες, εἰ τις ἐξαμαρτάνει,
Διπλῆ βίβη λαχόντες, ἐξορθεύμετ' αὖτις.

See *Gataker upon Marcus Antoninus, Lib. ii. §. 5. p. 60. Edit. Londin. 1652.*

⁴ So *Salust* speaks, *Sed omnis nostra vis in animo & corpore sita est. Animi imperio, corporis servitio magis utimur; aliter enim nobis cum Diis, alterum cum bellis commune est.* *De Bel. Catilin. Chap. i.*

⁵ Thus *Plato* judiciously reflects to the same Sense, Καὶ μὴ τὸτο ὃ [ἡμολογῆ] ὅτι ψυχῆς ἐπιμελεστέον, καὶ αὐτὸ τὸτο βλαπτότερον ἢ τῶν χρημάτων ἢ τῶν χρημάτων τ' ἐπιμελεῖσθαι ἐπιτοίχοι παραδοτέον, i. e. We must all confess, that the Soul is to be chiefly taken Care of, and above all Things to be looked after. *The Care of our Bodies and Estates we may commit to others.* In *Alcib. i. p. 448.* See also his Book *De Legib. Lib. v.* in the Beginning; and *Cicero De fin. Lib. v. Chap. xii, xiii.*

§. 11. This Paragraph and the following afford an Example of the Corrections and Additions which I have made of the Lemma's in the Margin, to fit them to the Subject treated on. The Author shews in what this Care consists, as if he were speaking in general of the Care a Man ought to take of himself, whereas this Paragraph treats only of the Care of the Soul in Opposition to that of the Body. In the following Paragraph he distinguishes, and explains more distinctly the different Duties, which make the Parts of the general Duty.

commonly excite our Appetites, and that we temper and regulate our Passions by the Direction of sound Reason ².

III. Amongst the Opinions then which it highly concerns all Men to settle and to embrace, the Chief are those which relate to Almighty GOD, as the great Creator and Governor of the Universe. That there is really existing a supreme Being, from whom all other Things derive their Original, and the Principle of their Motion; not as from a dull and senseless Power (as the Weight, for Example, in a Clock) but as from a Cause endu'd with Understanding and with Freedom of

Choice. That this eternal Being exercises a Sovereignty not only over the whole World, or over Mankind in general, but over every individual human Person: Whose Knowledge nothing can escape: Who, by Virtue of his imperial Right, hath enjoin'd Men such certain Duties by *natural Law*, the Observance of which will meet with his Approbation, the Breach or the Neglect, with his Displeasure: And that he will for this Purpose require an exact Account from every Man, of his Proceedings, without Corruption and without Partiality ¹.

Now as the main Parts ² of human Duty turn on

² *Seneca* hath a fine Passage to this Purpose, which begins thus, *Epist. lxxvi. Edit. Gronov. Animus intuens vera, peritus fugiendorum ac petendorum, non ex opinione, sed ex natura pretia rebus imponens* — — — *pu. cherrimus, ordinatissimus, cum decore, cum viribus sanus & siccus, imperturbatus, &c. i. e.* "The Mind looks into the Truth, is skilful in knowing what is to be avoided and desired; sets a Price on Things, not according to the common Opinion, but according to its Nature — — — is most beautiful, orderly, graceful, and tho' of great Force, yet is found, uncorrupted, and undisturb'd, &c.

§. III. ² *Primus est Deorum cultus* (says *Seneca*) *Deos credere, deinde reddere illis majestatem suam, reddere bonitatem, sine qua nulla majestas est. Scire illos esse, qui president mundo, qui universa vi sua temperant, qui humani generis tutelam gerant, interdum curiosi singularum. Hinc dant malum, nec habent; ceterum castigant quosdam, & coercent, & irrogant penas, & aliquando specie boni puniunt. Vis Deos propitiare? bonus esto. Satis illos coluit, quisquis imitatus est.* *Epist. xcv. i. e.* "The Worship of God consists, first of all in believing that they are, and then in acknowledging their Sovereignty and Goodness, without which there can be no real Greatness. We must also be thoroughly persuaded, that they govern the World, and by their Power order and dispose all Things, who take Care of Mankind in general, and sometimes concern themselves in private Affairs. They neither are evil, nor do any, yet they correct some Persons to restrain their Malice, yea, and sometimes punish them whom they seem to favour. Would you have them propitious and kind to you? Be good. They honour them most, who imitate them." See *Cicero De Legibus, Lib. ii. Chap. vii.* and *Epictet. Enchirid. Chap. xxxvii.*

² Our Author, in his *Abridgment of the Duties of a Man and Citizen, Lib. i. Chap. iv.* hath given us a System of natural Religion; *i. e.* the Duties of Man to GOD; which, because I have said, *Chap. iii. §. 15. Note 5.* ought not to be excluded our Knowledge of the Law of Nature, I shall here give an Extract of what he there says, which is, These Duties, so far as they can be discovered by the Light of Reason only, may be referred in general, to such as concern, 1. The Knowledge, and, 2. The Worship of GOD. So that the System of natural Religion comprizes Propositions, 1. Speculative, and, 2. Practical. The speculative Propositions are, I. That we must believe, 1. That there is a GOD. See §. 20. of the foregoing Chapter. 2. That this GOD created the World. See his *Abridgment of the Duties of a Man and Citizen, Lib. i. Chap. 4. §. 3.* 3. That he governs all Things by his wise Providence, which takes particular Care of all Mankind. And indeed it is the same in respect to Morality, to deny the Existence of GOD, as his Providence, as the Pagans themselves did acknowledge. See the Passages quoted *Chap. vi. Lib. i. §. 11. Note 3.* 4. That nothing can be attributed to GOD that implies the least Imperfection. For, since he is the first Cause of all Things, he can't be supposed, without a manifest Absurdity, to have any Imperfection, nor want any of those Perfections, of which we, who are his Creatures, can form to ourselves any Notion. See the *Abridgment* above mentioned, §. 5. and what is said in the next Paragraph of this Chapter. The practical Propositions of natural Religion contain all the Parts of, II. Divine Worship; which is either outward or inward. The inward consists in the Honour that is given to GOD. Now Honour being nothing else but the Opinion which we have of the Power or Goodness of any Thing, we honour GOD, when with regard to his infinite Power and Goodness, we conceive of him all the Sentiments of Respect and Reverence we are capable of. From whence it follows, that we must love him, as the Fountain and Author of all good Things, hope in him, as the Being upon whom all our Happiness depends, both now and for ever; submit entirely to his Will, having a Persuasion that he will do all Things for our Good, and that he knows better than ourselves what is convenient for us; to fear him, as a Being of infinite Power, by which he is able to inflict the most terrible Evils upon those that offend him; lastly, to obey him in all Things with the most profound Submission, as our Creator, and Lord, Almighty, and of all Goodness. Outward Worship consists principally in the following Duties. 1. We must give GOD Thanks for all the good Things we receive from him. 2. We must, as far as in us lies, regulate our Actions according to his Will, *i. e.* actually obey him, so far as Ignorance and human Frailty will permit. 3. We must admire and celebrate his Greatness. 4. We must address ourselves to him by Prayer, to obtain all the Blessings we stand in need of, and to deliver us from all the Evils which threaten us. Indeed, Prayer is a Sign of our Hope and Confidence, and Hope implies a special, though tacit Dependence upon the Goodness and Power of him in whom we trust. 5. When we are obliged to take an Oath, we ought to swear by the Name of GOD, and afterwards observe religiously what we have engaged ourselves to, by taking GOD to Witnesses, as his infinite Knowledge and Power does require. 6. We should never speak of GOD, but with the greatest Care and Circumspection, for it is a Sign of Fear, and that is a tacit Regard to the Power of him whom we fear. From hence it follows, that we must not use the Name of GOD lightly and without Necessity in our common Discourse, for this shews want of Circumspection; that we should never take an Oath, but upon Necessity; that we should never curiously and nicely search into the Nature of GOD, and the Acts of his Providence; for that were to confine the divine Nature within the narrow Bounds of our own feeble Reason. 7. Whatever we do in relation to GOD, ought to be most excellent in its Kind, and proper to shew our most profound Respect to him. 8. That we must honour him, and serve him, not only in private, but publick, and in the Sight of Men. For what a Man does only in private, looks as if he were ashamed to do it. Whereas publick Worship is a Testimony, not only of our Zeal, but is also an Example to others, and often induces them to join in the same Actions. 9. And lastly, We must apply ourselves as close as possible to the Practice of such Duties as the natural Law prescribes, both in respect to ourselves and others; which some call an *indirect Worship*. Indeed, as the Contempt of GOD's Commands is the greatest Affront we can offer to him, so, on the contrary, there is no Sacrifice so agreeable to him as Obedience to his Laws. Now the Law of Nature is a divine Law, as we have before proved. This is what our Author has delivered in short. I might alledge several Passages of Heathen Authors to this Purpose, but this Note is already too long: Nevertheless we will add what *Mr. Thomajus* (*Instit. Jurisp. Divin. Lib. ii. Chap. i. §. 11, &c.*) has said, *viz.* That the Law of Nature indispensibly requires a direct outward Worship, so far as is necessary to shew that we do not condemn the Deity, and not so far as it consists in giving a positive Honour to the Deity, by some exterior Acts, the Omission of which is no Sign of Contempt to him. This able Lawyer grounds this Assertion upon this, That GOD has no need of our Service, and that as he is the Searcher of Hearts, the inward Worship, without which all outward Acts of Piety are of no Worth, is sufficient to discharge us of the Obligation we owe to the supreme Being, on whom we depend. As to what concerns other Men, *Mr. Thomajus* says, That the Omission of the outward Worship does not hurt either human Society in general, nor civil Society in particular, provided there be an inward Worship paid. But it does not from thence follow, in my Opinion, that there is no Necessity of worshipping GOD outwardly, and that this Necessity is not sufficiently known by the Light of Reason; for how can we conceive that there is a true Piety contain'd in the Heart, unless it shew itself by some outward Acts of Religion? Men are made in such a Manner, that they do not think that they shew a sufficient Respect one to another, if they do not give some

on this Belief, so is it the only Foundation of that sweet Tranquillity and Acquiescence of Mind, which Men inwardly enjoy, and the very Fence and Bulwark of all that Probity which we are to exercise towards our Neighbours; without which no Man can seriously and heartily do a good Action himself, or give sufficient Caution and Security of his honest Intentions to others^a. And although it appears from the Ordinances of the Christian Religion, that GOD is not so far pleas'd with every Kind of Worship which Men pay him,

as to embrace them with peculiar Favour, and to give them a Title to eternal Life, which good Effects do follow only that Institution and Way of Service which he hath reveal'd in a singular Manner to the World: Yet a serious Persuasion concerning the divine Existence and Providence, under whatever particular Apprehensions, or particular Worship, hath however thus much of Force and Efficacy, as to render Men more observant^d of their Duty. To prove this Assertion we need only consider, that there have been of old,

Proofs of it by Word of Mouth, or some significant Action, seeing they can no ways be assur'd of the Sincerity of each others Intention. But if the inward Worship of GOD is necessary for the Welfare of Society, as Mr. *Thomasius* supposes it, I can't see how such a purely spiritual Religion can be of any great Use; unless we will suppose that all Men are equally capable of knowing their Duty to GOD, and as careful to practise it, so that none need to be instructed or exhorted by others. Meer Talk is not sufficient for the ignorant and common People, which are the greatest Part of Mankind; there must be something that will affect their Senses, and rouse their Attention, without which they'll forget the Being of a GOD. So that though I might enlarge upon the Obligation to outward Worship, of which we shall speak more afterward, *Chap. vi. §. 2.* we must grant, 'tis absolutely necessary. And though Mr. *Thomasius* declares that he was always of that Opinion, yet I see him ordering, in his *Fundament. Jur. Nat. & p. 150.* that outward Worship is necessary for the Regulation of Honesty and good Order, which, as he explains these Terms in the general Reformation of his System, lay an Obligation, if not so binding, yet at least as true and indispensable, in my Judgment, as that he calls just.

^a *Grotius in Lib. Sapientie, Chap. xiii. §. 1.* How high soever some People talk about Honesty's being desirable merely on its own Account; yet so great is the Force of these outward visible Things upon our Mind, that without a full Persuasion of the divine Providence and Retribution, and without some System of Law to guide Men in the true Way of Acting, it is impossible but that they should wander into most grievous and fatal Dangers. For, as human Reason is loose and giddy, when the Passions have overcome the Judgment, and the Manners are suited to the Passions, it easily finds out a Colour and Disguise for Sin, and so long obstinately refuseth to hear, till it grows quite deaf. Therefore the wise Man pronounceth those to be miserably vain, who are so far from having a careful Regard to the Knowledge of GOD and of his Providence, as to let those great Points depend on every Man's Fancy and Choice: Than which nothing can be contriv'd more destructive, I do not say to good Manners, but to Government and Society.

^b *Beethius de Consolat. Philosoph. in fin. Magna vobis est, si dissimulare non vultis, necessitas indicta probitatis, cum ante oculos agitis iudicis cuncta cernentis, i. e.* "Your living under the Eyes of an All-seeing Judge, lays a kind of a Necessity upon you to be good and virtuous."

^c *Lucian De Imaginib. "Ὅς ὅσοι το θεῶν μὴ ἐν παρεργῇ σέβουσιν, ἔσται καὶ τὰ πρὸς ἀνθρώπων ἄριστοι ἀν τῶν, i. e.* "Those who are most strict and conscientious in their Duty to GOD, are the most honest and regular in their Dealings with Men." It is certain that religious Motives are of great Force to wean Men from Vice, and engage them to Virtue, however confused and imperfect Mens Notions of the Deity are. This may appear something difficult to conceive in respect of the Heathens, but we have some Proofs of Fact. I don't speak of Philosophers, who had more clear Notions of Religion than the Vulgar, although they dared not deliver them openly. Mr. *Selden* (in his Treatise *De Jure Nat. & Gent. secundum Hebræos, Lib. i. Chap. viii.*) has collected several Authorities to make it evident, that most of them looked upon the Laws of Nature as derived from GOD, who will punish the Transgression of them, and reward their Practice. And 'twould be no hard Thing to add to them many other Passages. Nay, the very People, notwithstanding the prodigious Superstition into which they were plunged, yet preserved some Tincture of this important Principle, either by reason of that natural Relation there is between the Ideas of GOD and Sanctity, which hindered such Men as had not wholly given themselves up to Vice, from attending to the Consequences of the received Opinions, or because there remained some Footsteps of the ancient Tradition of the only true GOD, the Creator of the World, and the Author and Protector of human Society. This seems plainly to arise from the common Opinion amongst most of the Heathens concerning the Rewards and Punishments of another Life. (See what our Author has said, *Chap. iii. §. 20.*) We may also find some express Words relating to this Matter in the Poets, who, as every one knows, accommodated themselves to the common Opinions. *Selden* has alledged many in the Place above quoted; we shall produce some others, *viz.* in the *Oedipus of Sophocles, Act. iii.* the Chorus saith,

Εἰ μοι ζυεῖται φέρωντι μοῖζα τὰν
 Εὐσεβῶν ἀργεῖαι λόγων
 Ἔργων τε πάντων, ἂν νόμοι πρόχρηται
 Ὑψιπέδες, ἐρασίην δὲ αἰδέεσθαι
 Τεκνώδιντες ἂν Ὀλυμπῶ
 Πατὴρ μόνου, ἃδὲ νῦν θνατῶ
 Φοβῆς ἀνέρον ἐπιβλεν, ἃδὲ
 Μὴν ποτε λάθρα κατακοιμάσθαι.
 Μίγας ἐν τέστοις Θεοῖς,
 Οὐδὲ γηράσθαι.

Let th' Gods be so propitious to me
 As I preserve my self in Sanctity
 In Words, and Deeds, by th' Laws unto us given
 Not by poor Mortals, but the GOD of Heaven,
 Which Laws no Mortal can abolish quite
 For GOD's in them, and by his Pow'r and Might
 Will triumph over all that is not right,
 For he can ne'er grow old

See also the *Antigone* of the same Poet, *§. 455.* *Euripides* in his *Jon. §. 440, &c.* and a Passage in *Hesiod*, which our Author hath quoted in the foregoing Chapter, *§. 2. Note 3.* to which we may add *§. 321, &c.* in the Work of this last Poet. I will conclude with *Cicero*, who was not less superstitious (*De Legib. Lib. ii. Chap. vii.*) *Utiles autem esse opiniones has, quis neget, cum intelligat, quam multa firmentur jurejurando, quantum salutis sint fœderum religiones? quam multos divini supplicii metus a scelere revocavit? quamque sancta sit societas civium inter ipsos, diis immortalibus interpositis tum iudiciis, tum testibus? i. e.* "Who can deny the Usefulness of these Opinions [*viz.* of the Gods and Providence] when he considers, how many Things are confirmed by Oaths? How much the Security of Leagues and Alliances depend on Religion? How many the Fears of divine Vengeance keeps from Wickedness? And how careful Citizens are to discharge their Duties to each other, because they believe the immortal Gods are not only the Witnesses, but will be Judges of their Actions?" See what I have said, *Lib. i. Chap. vi. §. 12. Note 7.* and *Lib. ii. Chap. iii. §. 19. Note 2.*

I spoke in this last Note something touching a Comparison between a Society of Atheists, and another, of such as have some Notion of a God, though imperfect and incoherent; but since that Note was composed and printed, Mr. *Bayle* hath put out (in 1704) a Continuation of diverse Meditations upon Comets, where he speaks something that may serve to strengthen and explain my Assertion; but I shall first begin with what Mr. *Le Clerc* has said upon this Subject, in his *Biblioth. Choisie, Tom. v. p. 302, 303.* in Answer to this Question, Whether Atheism is to be preferred to Pagan Idolatry? To which he says, "We must, in my Opinion, distinguish first of the Societies, consider their Opinions abstractly, and then on the one Side describe Atheism, and on the other Idolatry. 'Tis possible we may find one sort of Idolatry better than Atheism, and another worse; and so I can neither say Yea nor Nay to Mr. *Bayle's* general Question. In the second Place, when we come to consider, not only the Opinions in general, but the Societies in themselves, which profess the Pagan Idolatry or Atheism, we must make also some curious Distinctions, and divide the Question into several Propositions, according to

old, and still are, Men professing Religions which we must own to be destructive to Salvation, as suppose *Mabometans*, or *Pagans*; who nevertheless by Virtue of their Persuasion of GOD'S Providence, have shewn no inconsiderable Care and Concern for Honesty and Justice; so as not to be outdone by many Christians, at least as to external Performances. Nay, there are not wanting Persons,

who from the Experience of long Travels, pretend to affirm, that Christianity hath not been able to alter the common Dispositions of some Nations towards particular Vices; and that 'tis not easy to discover the Truth of that holy Religion, from the Manners and the Practices of those who profess it. Though I should imagine the Reason of that Unhappiness to be chiefly this, because the Christian

“ the different Cases which are put, and to which we must answer negatively or affirmatively, according to their Nature.” Mr. *Le Clerc* gives us an Example in the same Volume, speaking of the History of the *Incas*, written by *Garcilasso de la Vega*, pag. 380, 381. These are his Words, “ If what *Garcilasso de la Vega* says of the Opinions, Laws, and Manners of the Subjects of the *Incas*, be true, there is no Idolatrous Nation in the World, not excepting the most polite and learned, where there are such good Laws, or so well observed. Their Religion, which chiefly consists in worshipping the Sun, whom they believe to be the Father of the *Incas*, not with human Sacrifices, as they do in the other Parts of *America*, but with Beasts and other Things, is the least corrupted of any among the Idolaters. Besides the Sun, they hold there is another Deity, which they call *Pacha-carnic*, a Word that signifies, in their Language, *The Soul of the World*. They speak of this God as a Being invisible, whose Nature is incomprehensible, and who created the Sun and the Stars. They believe the Immortality of the Soul, and have some confused Notion of a Resurrection. Supposing that all this that *Gar. de la Vega* says is true, we may say, that such an idolatrous Society as this, is incomparably better than a Society of Atheists, and, in some Respects, may be preferred to some Societies, that otherwise have better Principles.” Tho' this Question in itself be not very important, because a Society of iner Atheists is a Thing no where to be found, at least, not in any Country; yet I doubt not, but many Persons wished that Mr. *Le Clerc* had descended to more Particulars.

I supposed in my Note, to which this is only a Supplement, that I did not intend to speak of the Opinions of the Atheists or Idolaters, considered in themselves and abstractly, but only of the Effects they are able to produce in respect to Societies. I supposed also, that in the Parallel between a Society of Idolaters and Atheists, we might conceive an Idolatry which did not destroy the principal Fundamentals of Religion, *i. e.* the Essence and Providence of some Deity. For it is certain, that Faith in the Existence of a GOD, without Faith in his Providence, is at the Bottom indirect Atheism, as to Morality Upon which Foot I think, that all Things being otherwise equal, a Society of Atheists, *i. e.* a People composed of Men learned and unlearned, Persons of all Orders and Conditions, bearing that Character; such a Society, I say, will be more corrupt than another which preserves the fundamental Principles of Religion, though mixt with Errors, and Things inconsistent with the Truth. And since in this Question we have chiefly an Eye to the antient Heathens, let us suppose, for Example, that the Commonwealth of *Greece*, or some *Roman* Province, were on a sudden turned Atheists, and no Man had any Sense of Religion; I say, that after such a Change, that Commonwealth or Province could not keep up any tolerable Order in Civil Society, but there would be among them many more Disorders than were before. And my Reasons are these, Among the Heathen, the People were not ignorant of the Agreement there is between Religion and the Laws of Nature. The Poets, who principally dealt with the People, have delivered many Things (as Mr. *Le Clerc*, in his *Bibliotheq. Choisie*, Tom. iii. shews) that prove the true Notion of GOD was not quite blotted out of their Minds. For Example, the most antient of them, *Homer* and *Hesiod*, speak thus of the Gods, That they are *Almighty, Immortal, Good, Omniscient, Wise, Happy, Lovers of Virtue, and Enemies of Vice, &c.* Moreover, the Unity of the Godhead itself was not altogether unknown to the Poets, although Mr. *Bayle* seems to think that all the Heathens were ignorant of that Truth. Nothing can prove this better and more fully, than these Verses of *Sophocles*, in a Tragedy now lost, but preserved to us in *Grotius's Excerpta*, pag. 149.

Εἰς τοῖς ἀλλοδαίσιον, εἰς εἰς ἑθεῖς,
Ὅς ἄρανον τ' ἐτόξε, καὶ γαίαν μακρῶν,
Ποτῶ τε χάρσπον οἶδμα, κἀνέμων βίας·
Θητεῖ ἢ ποθοὶ καρδίαν πλανῶμενοι
Ἰδρυάμωδα πημάτων παρψυχίας,
Θιῶν ἀγάλημῶ ἐκ λίθων, ἢ χαλκίων,
Ἦ χρυσοτεύκτων, ἢ λιφαντίνων τυπῶς
Θυσίας τε τῶτοις, καὶ καλίας πανηγύρεῖς
Τεύχοντες, ἔτως εὐσεβῶν νομίζομεν.

In Truth there is no more Gods but one,
Who made the Heaven, far extended Earth,
The blue swelling Sea, and fierce Winds.
Yet many Men being grossly deceived,
Have erected, to comfort themselves in Trouble,
Images of the Gods, of Gold, and Stone, and Brass;
And offer Sacrifices to them in their Assemblies,
And think that they are religious.

Several other Passages, besides, what are alledged above, might be produced, to prove that the Practice of Virtue was well-pleasing to the Gods; on the contrary, Vice odious, notwithstanding the Crimes attributed to them in their Fables. Mr. *Bayle*, in the *Continuation of diverse Meditations*, pag. 654.) says, “ That single Theft, for Example, and Lying, were not contrary to the Ordinances which their Gods had expressly delivered, and so they believed that their Gods did not regard them.” I own, that Priests spake very little of Morality to the People, but this hinders not but that the principal Duties of the Law of Nature were known among the People, who looked upon them as Laws to which the Gods required their Observation, although their Notions of them were very obscure, and corrupted by ill Customs. This is what the Poets always supposed, who contributed more to their entertaining the Notions of Virtue and Vice, than the Priests, who, as wicked as they were, durst not openly contradict them. We find in *Euripides* this fine Sentence, which he makes a Woman to speak, and say, *That the Gods abhorred all Oppression, Extortion, and every unjust Way of enriching ourselves.* The same Poet also says, that every Crime is A GREAT IMPIETY, as well as a great Folly, in these Words,

Τὸ δ' αὖ κακροῦν ἀσεβῆα μεγάλην,
Κακοφροῖον τ' ἀνδρῶν παράνοια. *Orest.* ὕ. 821, 822. Ed. *Cant.*

See *Hesiod. Oper. & Dier.* ὕ. 180, *etc.* 219, *etc.* and 238, 239. Ed. *Cler.* and Mr. *Baron Spanhemius's* Comment on *Callimachus, Hymn. in Jovem.* ὕ. 3. and in *Cerer.* ὕ. 19. Many more such Passages might be collected out of the Poets; but there is a remarkable Place in *Plato* that may not be passed over. That Philosopher, treating of *Incest*, says, That it was looked upon with such Horror, that Men of no Honesty, yea, and the common People, would not entertain such wicked Desires, for a Sister (for Example) though she were never so fair. And that which extinguished those impure Thoughts was this, That Incest PASSED FOR AN UNLAWFUL AND ABOMINABLE ACT WITH THE DEITY. *No Body*, says he, *contradicts it, every one knows this from his Cradle, and all the World keeps to it in both jocular and serious Discourses.* The Stage represents *Thyestes's*, *Oedipus's* and *Macareus's*, who slew themselves for the incestuous Commerce which they had with their Sisters. His Words are, *Σμικρὸν ῥήμα κατασβένουσι πάσας τὰς τοιαύτας ἰδοῦσας — τὸ ταῦτα εἶΝΑΙ ΦΑΝΑΙ ΜΗΔΑΜΩΣ ΟΣΙΑ, ΘΕΟΜΙΣΗ ΔΕ, καὶ αἰσχρῶν αἰχίσια. τὸ δ' αἰτίον ἀρ' ἔ τῶτ' εἰσι, τὸ ΜΗΔΕΝΑ ΑΛΛΩΣ ΔΕΓΕΙΝ ΑΥΤΑ, ἀλλ' ἐνθὺς ἡνέμωρον ἡμιῶν ἕκασον, ἀκέρῃ τε λεγόντων αὐ καὶ πανταχῶ ταῦτα, ἐν ἡλίσις τε ἄμα, ἐν πάσῃ τε σπαδῇ πραγματῇ λεγόμενῃ ποδάκι, ὅταν ἢ Θυέστας, ἢ τῶσ' Ὀδιποδῶς εἰσαγάσωσιν, ἢ Μακαρίας τῶσ' ἀδελφῶν μυχθέντας λαβραίας, ἢ Φθελίας, ἢ ἰταίμωσ' ἴαντων ἑαυτοῖς ἐπιτιδύτας δίκην τ' ἁμαρτίας.* *De Legib. Lib. viii. p. 838. Ed. Steph.* So that it was a common Opinion, that even in this Life Crimes do not go unpunished always, but whoever violates the Law of Nature, hath great Reason to fear the Effects of divine Vengeance. *Plautus* has a fine Passage to this Purpose, sufficient to shew how great Impression such a Persuasion makes upon the Minds of the common People. *Arcturus*, one of the Constellations, is introduced, saying, That *Jupiter* the King of Gods and Men, had sent him and other Constellations, *i. e.* inferior Deities which pre-
fided

Christian Doctrine and Worship, being received by most Men, not upon their own Choice and Judgment, but from the Custom of the State in which they happen to be born, resides rather in their Mouth than in their Heart; whence it comes to pass, that so few are seriously inclin'd to reform

sided over the Stars, he sent them, I say, into all Parts, to be Witnesses of the Actions, Manners, Piety and Fidelity of Men, and to see how every Man enriched himself. "We wrote down distinctly (says *Arcturus*) the Names of those who made use of false Witnesses, to carry their unjust Causes, or who deny their Debts upon Oath before a Judge, and carried them to *Jupiter*, and by this he knows every Day who they are, that by their Crimes pull down his Judgments upon their Heads. He knows them that are ready to take an Oath to get their Cause, and such as get it unjustly by the Favour of the Judges. He reviews their Cause, and judges it anew, condemning the Offender to so great a Punishment, that the Gain they have made by it is inconsiderable. He hath the Names of good Men written in another Book. These wicked Men flatter themselves, that they can appease *Jupiter* with Offerings and Sacrifices, but they lose both their Labour and Cost, for he regards not any of the Prayers or Services of perjured Persons. A good Man will be easily heard, and obtain Favour of the Gods, but the Sinner cannot. This I advertise you of, O ye Virtuous, who live in Piety and Integrity: Continue in them, that ye may receive the Benefit of your good Conduct." The Poet thus expresses himself,

*Is nos per gentes aliam alia disparat,
Hominum qui facta, mores, pietatem & fidem
Noscamus, ut quemque adjuret opulentia:
Qui falsas lites falsis testimoniis
Petunt, quique in jure abjurant pecuniam:
Eorum referimus nomina exscripta ad Jovem.
Cotidie ille scit, quis heic querat malum,
Qui heic litem apisci postulant perjuræ,
Mali res falsas qui impetrant apud judicem:
Iterum ille eam rem judicatam judicat,
Majore multa mulctat, quam litem auferunt.*

*Bonos in aliis tabulis exscriptos habet,
Atque hoc scelesti in animum in lucunt suum,
Jovem se placare posse donis, hostiis:
Et operam & sumptum perdunt: ideo fit, quia
Nihil ei acceptum est a perjuris supplicii.
Facilius, si qui pius est, a dis supplicans,
Quam qui scelestus est, inveniet veniam sibi.
Itcirco moneo vos ego hæc, qui estis boni,
Quique aetatem agitis cum pietate & cum fide,
Retinete porro, post factum ut loquimini.*

Rudent. Proleg. §. 10, &c.

I do not know what Mr. Bayle thought, when reciting exactly what the Constellation asserted upon the *Roman* Theatre, he added thereupon, (*Resp. ad Provincial. Tom. iv. p. 320.*) "This was not to teach Men, but only in this, that they should not offend the Deity personally in abusing Oaths, which they have taken to bear Witness with the greatest Formality, which if they do, they need not fear his Anger." But, on the contrary, it is very evident, that the Poet speaks of Honesty and good Manners in general, without which all outward Acts of Religion are no ways acceptable to God; and if he mentions other Crimes joined with Perjury, it is only to give an Example of the most enormous Wickedness, and such Circumstances as aggravate the Heinousness of it. Nor is Mr. Bayle more happy in Criticism than he is in Reasoning, "So that (adds he) common Lies, evil Speaking, Lewdness, Drunkenness, and an hundred other Disorders may promise themselves Impunity in Respect of the Gods." Be it so, yet it will be always true, that Religion will be of Force to keep Heathens from Fraud, Cheating, Double-dealing, &c. in which it has much the Advantage of Atheism; and we know that many Heathens were faithful in their Dealings, for fear of bringing down Vengeance upon them in this World, and, on the contrary, to obtain Success of the Gods in their Affairs. As to the Rewards and Punishments of another Life, we know that an ancient Tradition, which is much inculcated in the Writings of the Poets, made the Opinion common almost every where. But can we think that those Punishments were only designed for them who neglected the outward Worship of God, or directly offended his Majesty? Read the Description of Hell written by *Virgil*, and you'll see that not only the *Titans*, *Giants*, *Salmeoneus*, *Tityus*, *Ixion*, and *Pirinthus*, are punished, but Brethren that are Enemies, and they who bear their Father; those who deceive their Clients and Dependants, hoard up their Riches, and will neither impart them to their Fathers nor Friends; those who have been slain in the Act of Adultery; who have engaged in unjust Wars; such as make no Conscience of breaking their Promises made to their Masters. Another cries out, as loud as he can, "Learn by my Example, to do Justice, and not to slight the Gods." Another hath sold his Country, and betrayed it to a Tyrant. Another adds *Sibyll*, an hundred Tongues, and as many Mouths, with a Voice that would never fail, it were impossible for me to reckon up all the different Sorts of Crimes which are punished in that Place, or the Names of all the different Sorts of Punishments which the Wicked suffer." These are his Words,

*Hic, quibus invidi fratres, dum vita manebat,
Pulsatusve parens, & fraus innexa Clienti;
Aut qui divitiis soli incubuere repertis,
Nec partem posuere suis, quæ maxima turba est;
Quique ob adulterium casti, quique arma secuti
Impia, nec veriti dominorum fallere dexteras;
Inclusi panam expectant
_____ magna testatur voce per umbras:*

*Discite justitiam moniti, & non temnere divos.
Vendidit hic auro patriam, dominumque potentem
Imposuit, fixit leges pretio atque refixit.*

Hic thalamum invasit nata vetitosque hymeneos.

*Non mihi si lingua centum sint, oraque centum,
Færea vox, omnes scelerum comprehendere formas,
Omnia panarum percurrere nomina possim. Æneid. Lib. vi. §. 603.*

He, on the contrary, represents good Men in a Place by themselves, viz. in the *Elysian Fields*, enjoying the Happiness of another Life, and being, as it were, under the Conduct of a wise *Cato*:

Secretosque pios, his dantem jura Catonem. Æneid. viii. §. 670.

There are, I own, many ridiculous Fables mixed with these Descriptions of the Gods, and another Life, and the blockish Multitude did apparently depend more upon the Chimera's of the Poets than on the Truths which they had interspersed in their Works. But is it credible, that among the People themselves, which comprehends the illiterate Part of Mankind in general, there should be many who have acknowledged, at least, in part, the Abuse, and gave great Attention to the true Principles of natural Religion, tho' mixed with many Falsities? These Notions easily enter into the Mind of any Man that will make use of the Light of Nature; and Men without Study are sometimes better disposed to receive the Truth, and less prejudiced, than such as profess themselves learned (See *Parrhasiana*, Tom. ii. p. 103, &c.) The Poets might here also shew the People the Way, and give them Occasion to think that they did not themselves believe the Absurdities which they attributed to the Gods, as *Hercules's* Words in *Euripides* may prove:

*Ἐγὼ δὲ τὰς θεὰς ὅτε λεπτρὰ, ἀ μὴ δέμεις,
στέρησιν νομίζω, δέσματ' ἑξάπλην χερσῶν.
οὐτ' ἠξίωσα πάποι, ὅτε πείσομαι,
οὐδ' ἄλλων ἄλλῃ δεσπότῃ πεφυκέναι.
δαίται γὰρ ὁ θεός, εἴπερ ἐστὶν ὅπως θεός,
οὐδένος ἀοιδῶν οἷός τις ὄνθηναι λόγῳ.*

I don't believe the Gods love unlawful Beds,
Or that they put one another in Fetters and Chains;
Nor can I persuade my self to believe
That one of them is Master of the other.
God, who is really such, can stand in need
Of nothing. These are the false Accounts of the Poets,

See also Mr. Baron *Spanhemius* upon *Callimachus's* Hymn. in *Jovem*, §. 60. & in *Iphigenia Taurica* the Chorus thus speaks, §. 385, &c. Ed. *Cambr.*

reform their Mind by its Direction. For I doubt not, but that at least the external Acts even of national Vices, might be repress'd, would Men but apply themselves in earnest to the leading a Life

Ἐγὼ μὲν εἶν
τὰ Ταντάλη θεῶν ἐσιγάμαλα,
Ἄπισα κρίνα, παῖδες ἕδναι βορᾷ.
Τὸς δ' ἐνθάδ', αὐτὸς ὄντας ἀνθρώποκτόνας,
Εἰς τ' εἶν τὸ φαῦλον ἀναφερῆν δόξω.
Οὐδένα γὰρ αἶμαι δαιμόνιον εἶναι κακόν,

'Tis incredible to me that *Tantalus* should feast the Gods,
And that they should eat the Flesh of Children,
I rather think, that the Inhabitants of that Country
Were accustomed to Homicide, and to justify their Crimes
They attributed them to the Gods; for I can't persuade my
That any God can be guilty of such a Wickedness. (self

Pindar had before said much the same Thing, reflecting upon the same Fable,

Ἔμοι δ' ἄπορα, γαστήραργον
Μακάρων τιν' εἶπών,
Ἄφισαμαι, Ἀκέρδεια λέλογχεν
Θαμνία κραιναρέας.

To me it is absurd to say, that God's a Glutton,
I must withhold Assent. They that thus abuse
Those happy Beings shall surely be punished.

Olymp. l. 82.

The same Poet, as Mr. *Le Clerc* observes (*Biblioth. Choif. Tom. vi. p. 269.*) shews a little higher that he was sensible of the Falshood of these Fables, saying, "Romantick Stories and Fables, set out with divers Fictions, do more easily gain Entertainment in Mens Minds, than true Histories. A flourishing Rhetorick which pleases Men, setting off a Thing makes a Thing almost incredible to be believed. But Length of Time certainly discovers the Truth. Men should always speak well of the Gods, for they run the least Hazard."

Ἡ δαιμόνια πολλὰ,
Καὶ πᾶσι καὶ βροτῶν φρένας
Ἰπὲρ τ' ἀληθῆ λόγον
Δεδαιδαλῶδες ψευδοῖσι ποικίλοις
Ἐξυπατάσσει μύθοι,
Χάρης δ' ἄστες ἅπαντα τέτυ-
χθ' ἐπὶ μέλιχα θνατοῖς,
Ἐπιφέροισα τιμῶν,

Καὶ ἄπιστον ἐρήματο πωτὸν
Ἐμῆραι το πολλακίς,
Ἄμρσαι δ' ἐπίλοιποι,
Μάρτυρες σοφώτατοι,
Ἔσι δ' ἀνδρὶ φάμαρ
Ἔοικος ἀμφὶ δαιμόνων
Καλα, μέλιαν γὰρ αἰεὶ,

These Reflections may easily come into the Minds of the most simple Persons, that will but make Use of their natural Sense. For 'tis probable that the Poets did not hatch them in their own Brains, but here, as in other Things, followed the Dictates of Nature. We have always observed these Things to happen among Christians, and doubtless the same Things happened among the Heathens. Among the Papists, in some Countries especially, one Word from a Priest will raise the Mob against an Heretick, as they call them; but yet there are many honest Men, who abhor such a diabolical Madness, and do not believe that any Man may be persecuted for his Religion; though the Clergy inculcate that Doctrine with all the Earnestness possible, to satisfy their Ambition, Pride, and Avarice, and to engage the People in their Interests, who suffer themselves to be led blindly by their Harangues, especially when they suggest Things agreeable to their brutish and irregular Inclinations. We may also say the same of diverse Opinions, which are received by the several Parties of Christians. The Doctrines of Transubstantiation, Impanation, and the Ubiquity of Christ's Body, are such gross Contradictions, that none can believe them, and though some Men make a Profession of that Faith, they no more believe them than such as deny them. (See what I have said in my *Preface to Tom. III.* of Archbishop *Tillotson's* Sermons.) But there are other speculative Opinions and moral Maxims, either entirely or very unsound, which the Preachers deliver from the Pulpit, without convincing many Men, who by the Strength of meer natural Reason perceive the Absurdity of these Doctrines and Maxims, or explain them in a clear different Sense from the Preachers, as appears when they are question'd about them in familiar Terms. The Pagan Fables were in like Manner absurd, and why may we not also believe that many among the People looked upon them as false, and kept to the Fundamentals of natural Religion, though with some Mixtures of Error and Imperfection. Did not Men then make Use of their Reason? Or were those Truths so obscure that they could not be found out by long and profound Meditation? We may with much greater Reason suppose, that they, whose Education has been above the common Sort, in going to the Schools of the Philosophers, and carefully reading their Books, should be happily freed from the Superstitions and gross Notions of Heathenism. With what Liberty did the Philosophers insult the Religion of the Vulgar several Ways? "We may believe (says Mr. *Fontenelle*, in his *History of Oracles, Dissert. i. Chap. viii.*) "that among the Pagans Religion was a sort of Practice, whose Speculation was a Thing indifferent. Do as others do, and you may believe as you please." This is a wild Notion, but the People, who saw not the Weakness of it, were contented with it, and the Philosophers submitted readily to it, because they got by it. Mr. *Bayle* (also in his *Diverse Meditations, p. 367.*) owns, That there were, among the Heathen, Men of Ingenuity and good Sense, who, without Philosophy, had sometimes tolerable Notions of the Deity. It is true, that, according to him, they were not to be regarded, because when they had heard the Reasonings of the Philosophers about the Nature of the Gods, as soon as they were gone, they did as others did. But it is no ways necessary in the Question we are debating, to find such Men among the Pagans as had the Courage to oppose the common Errors or Worship establish'd by publick Authority. 'Tis sufficient that several did acknowledge the more gross Abuses of Superstition and Idolatry, and acquire such Notions in Religion as were able to produce such a Degree of Honesty, as they could not have had, if they had been Atheists. The Descriptions of the Pagan Corruptions, made by Mr. *Bayle* (in his *Continuation of diverse Meditations, p. 702, &c.*) do not prove the contrary. These sort of Descriptions ought not to be taken in a Metaphysical Generality, 'tis sufficient that, according to the Rules of good Criticism, they agree to the greatest Number. Farther, the Men of whom I am now speaking, not daring, for fear of incurring a general Odium, to openly oppose those strange Abuses of the Vulgar, deserve certainly to come under that Description as well as the Philosophers, as having suppressed the Truth which they knew, according to the Reproof given them by *St. Paul, Rom. i. 18.* But you'll say, we must not attribute the Honesty of these Men to the religious Notions they had received: It was caused by a Principle of Honour, Fear of Laws, the crossing of Passions, and several other Interests proceeding from Self-love. That this is all the Virtue which most Men have, as we see among Christians, can't be deny'd, but doth it thence follow, that no Heathen was inclin'd to Virtue by a religious Motive, or with a Respect to the Punishments and Rewards which are distributed by the Deity, either in this Life or the next? "I can't deny, saith Mr. *Bayle* (in his *Diverse Meditations, p. 439, 440.*) "but there have been some Heathens, who making a good Use of their Knowledge of the Nature of GOD, have by that Motive subdued the sudden Force of their Passions. But then (says he) 'tis most probable, that when this Motive was so prevalent, their Passions were so moderate, that they might have been reduced by Reason, without that "Help." So we may as well believe, that among Christians no Man is virtuous purely through his religious Principles, because there are Laws and Disgrace attending every Crime; nay, in a Word, all the other Motives which have Place in Heathenism. Moreover, what we may have said of the Laws may suggest a Reflexion not to be slighted. These wise Lawgivers of Antiquity so much esteemed and respected by all the World, at the same time that they appointed that the Gods should be worshipped in their several Countries, forbid, under the most rigorous Punishments, most of those Crimes which the Vulgar attributed to their Deities. And is it not natural to infer from thence, that they looked upon the Fables as absurd Relations of the Poets, which the People pleased themselves with? At least, this is the Reasoning of *Lucian*, in his *Necromancy, Tom. i. p. 327. Ed. Amstel.* Ουτε γὰρ τὸς θεοὺς ἂν ποτε κηρύξῃν μοιχεύσαι, κἢ φασάν-σαι πρὸς ἀλλήλους, εἴ μὴ ὡς πᾶσι καλῶν τῶν ἠγνοῶσιν, ἔτ' αὖ τὸς νομοθετὰς πάναντα τέτοις παρανοίᾳ, εἴ μὴ λυσίτελῆν ἑπελάττουσιν &c. "On the one Side I can't imagine that the Gods commit Adultery, or that there are among them Divisions,

Life suitable to their Profession^s.

IV. As this Persuasion, and whatever else we are able to learn concerning the Worship of GOD, either from Reason or from Revelation, is first of all to be implanted in a rightly cultivated Mind.

So are the Opinions contrary to these Truths most carefully to be barr'd off and excluded. And here we would not only be understood of Atheistical and Epicurean Principles, but of those numerous Notions which appear to be destructive of true

“ or at least that they think these Things just and honest; and on the other side I see, that the Lawgivers have ordained the contrary, which they would not have done, had they thought them profitable.” But you'll say again, The very Notion of Honesty, considered without any respect to Religion, might incline the Heathens, for Example, to render Men their Dues, tho' they might keep them without any Apprehensions of Punishment from the Laws, or Disgrace otherwise. But I'll leave it to any considering Man, if the Reasonings which Mr. Bayle attributes to an *Atheist*, can come into any Man's Mind but some subtil Philosophers, who are exercised in deep and abstruse metaphysical Meditations. 'Tis not conceivable that any Philosophers, whether Atheists, or not, should be inclined to practise the Maxims of Virtue, by no other Motive, but its own Beauty, whether inward or outward.

It is very evident, that all that is said about these Notions of Honesty, is in the Mouth of most Men, especially Atheists and Epicureans, meer empty Talk and pure Declamation, of which the Mind is not persuaded. Nor are we more sure, that all those who say, *That Honesty is natural to Virtue, and Dishonesty to Vice, that Virtue is worthy to be loved for itself, and is its own Reward* (Continuation, &c. 61.) have by that means excluded all Relation between Honesty and the Will of GOD, as the Example alledged by Mr. Bayle out of *Cicero*, gives us Reason to believe. It is true, that he maintains, That unless we could escape the Eyes of GOD, as well as Men, we should not suffer ourselves to hearken to any Motions of Avarice, Intemperance, Debauchery, or Intemperance. But does not the same Author declare positively elsewhere, that GOD is the Author of the Law of Nature (*Lib. iii. De Repub. apud Lanctantium, Lib. vi. Ch. viii.*) in these Words, *Unusque erit communis quasi magister, & imperator omnium Deus; ille LEGIS illius [viz. RECTÆ RATIONIS, NATURÆ CONGRUENTIS] INVENTOR, DISCEPTATOR, LATOR, &c.* See the whole Passage quoted above, *Ch. iii. §. 20. Note 5.* What do I say? In the same Book of Offices from whence this Passage is taken, which Mr. Bayle quotes, do we not find, that the Law of Nature is both an human and divine Law? *Atque hoc multo magis exigit ipsa nature ratio, quæ est lex divina & humana, Lib. iii. Ch. v. Edit. Græv.* And a little lower, *Ch. vi.* he explains himself better, *Qui autem civium rationem dicunt habendam, externorum negant, hi dirimunt communem humani generis societatem: quæ sublata, beneficentia, liberalitas, bonitas, justitia funditus tollitur: quæ qui tollunt, etiam adversus Deos immortales impii judicandi sunt, i. e.* “ They that hold, that the Rights established among Citizens are to be regarded, yet will not allow them to “ Strangers, and these last destroy the general Society of all Mankind, with which Bounty, Liberality, Humanity, “ and Justice must fall. Now to attempt this is an Impiety against the Gods themselves, since it is the Destruction “ of that Society they have established among Men.” The same thing appears in many other Passages of that famous *Roman*. Whoever then will consider what I have said, will perhaps agree, that notwithstanding the Pagan Blindness, Religion hath won from Vice and inclined to Virtue many Men, who without that had never been virtuous, especially such of the People as were not able to make or understand all the Reflections which the Prospect of Interest, or Fame, and the Notion of Honesty might suggest to the Philosophers. As for others, they would not be less corrupted, supposing they were Atheists. Generally speaking, we may say, in my Opinion, that the false Notions of Religion abate the Evil of an Action rather than produce any; they serve for an Excuse or Pretence, but never invite into any Crimes of themselves, even those who are otherwise inclined to them. For the most part, those whom we think to be seduced by Superstition, or by false Consequences drawn from the true Principles of Religion, act altogether by another Motive, which is, if not the only, the chief Cause at least of their Conduct: These are ordinarily the downright Hypocrites, Men without any Religion, and false Devoto's, who (as Mr. *de la Bruyere* speaks, *p. 478.*) under a King that is an Atheist will be Atheists, or who, if they have not quite extinguished all Sense of a Deity, and a Providence, yet at least look upon these great Truths as some indifferent Problems. *Montagne* speaking of a great Number of Christians, says, That some fallily make the World believe, that they believe what they do not; others, and those a great Number, cheat themselves with a false Notion of Faith (*Essays, p. 316. Edit. Paris.*) And how much greater Reason have we to think, that Paganism affords Men that Character? I do not deny but there are some Men which engage themselves in evil Actions out of a Principle of Religion; but if Idolatry and Superstition seduceth them, in some Respects, 'tis because what is otherwise good and true in Paganism had no Influence upon them to keep them from Vice, and incline them to certain Virtues; insomuch, that the Evil that Religion produces on the one side, is compensated by the Good it doth on the other; for we must not imagine, that the greatest Bigots to Paganism did only draw, or observe all the Consequences which naturally followed those things, which they attributed to their Gods. What I have said above proves to the contrary, and no Man but must as readily agree to it, as Mr. Bayle, who has taken great Pains to prove it, That Men do not reason and act always according to their Principles; and perhaps has much deviated from his Subject. A *Pagan* may, for Example, prostitute his Daughter upon some Festival in Honour of the Gods, and for all that be honest in his Business, a religious Observer of his Promises, serviceable, charitable, &c. for Fear of the Gods. They are usually some special Notions of Religion which make Impressions upon Men, and which determine to do Good or Evil; but the general Notion of a Deity, that he punishes Vice and rewards Virtue, works more effectually upon them; a Notion to affecting Mens Minds, that it often hinders the Effects that bad Principles would have upon such as profess Religion. But I shall say little more in this Matter; yet tho' I have enlarged myself beyond the Bounds of a Note, I can't but add something more about it; Mr. Bayle who has quoted that Passage of *Grævus*, upon which our Author criticizes, explains it thus (*Continuat. &c. p. 768.*) We should be obliged to follow the Law of Nature, if we supposed that there were no GOD nor Providence; but his way of expressing himself, viz. *Hæc locum aliquem habent, etiam si dæremus, &c.* shews, that he means no more than what's expressed in my Note. I know not what Mr. Bayle means by these Words, *Law and Obligation*; but in the Language of the Philosophers, a *Law* supposes a Superior, and *Jus* comes from *Jubeo*, because Right and Law proceed from the Authority of a Superior. Our Author, as I think, has very well proved in the foregoing Chapter, §. 20. and *Lib. i. Ch. vi. §. 7, 8.* That Man's Will cannot impose any Obligation, properly so called, upon itself, and that Maxims of Reason are not sufficient of themselves to determine the Will necessarily this Way or that Way. All that Mr. Bayle says, proves only, 1. That an Atheist knows that Thankfulness and Ingratitude are two different Things, as are also Faithfulness and Deceitfulness, a Circle and a Triangle. 2. He can perceive that the Maxims of Virtue are not purely arbitrary, but that they have a Foundation in the Nature of Things, and imply a certain Convenience. But can that alone make him certainly follow those Maxims contrary to his private Interest, and the Bent of his Desire? I can't think it can ever come into an Atheist's Mind, much less, that he shall have Courage to sacrifice his earnest Passions to those fine Notions. He may think it becomes a reasonable Creature to conform to Reason; but from the Moment that these Maxims of Reason are opposed by the Enjoyment of any Pleasure, in which he promises himself more Satisfaction than he at present enjoys, he'll silence his Reason, and follow the Allurements of Sense. Let us speak the Truth, supposing the Impiety of the Atheist, he does not act unreasonably in following the Voice of Nature, those Words, according to Mr. Bayle, are (*Continuat. &c. p. 31.*) “ We must “ eat and drink well, enjoy all the Pleasures of Sense, prefer our own Interest before another's, accommodate ourselves to every Thing that is agreeable, to do a Wrong rather than suffer any, to revenge ourselves, &c.” See more against Mr. Bayle in Mr. *Bernard's Extract* of his *Continuation*, &c. in his *Nævus from the Rep. of Letters, March 1705.* and in his Dispute against Mr. Bayle, *April 1707. Art. 3. May, Art. 4. June, Art. 3. August, Art. 3. and September, Art. 4.*

5 We may add to this, That tho' the Christian Religion be not observed as it ought, insomuch that there is little or no Difference between the Manners of *Christians* and *Pagans*, yet Christianity has divers great Advantages above Paganism, as Mr. *Le Clerc* has made it appear, in his Treatise of *Indelicity, Part ii. Ch. v. p. 222.* To the Examples that he has produc'd, to shew the good Effects of the Christian Religion, we may add this very remarkable one, that by it the Custom of exposing Infants is utterly abolished, which was to much used by the *Greeks* and *Romans*, as Mr. *Noël* in his *Julius Paulus* shews.

Religion, of good Manners, and of human Society, which it is in an high manner the Interest of Mankind, to see absolutely rooted up, and banish'd out of the World. Such is that Fanfy of the *Stoical Fate*, or the unchangeable Courfe and Wheel of Things and Actions; by which Men are made only the Tools or Engines of their own Operations, it not being in their Power to manage them with any Freedom of Choice, or with any Direction of Counsel. For admitting this Hypothesis, it doth not appear, why the Actions of a Man should be morally imputed to him, rather than the Motion of a Clock to the Wheels by which it is perform'd, or what would be the use of Religion, what the Equity of Laws and of Punishments. *Seneca Oedip. ver. 1028.*

Fati ista culpa est; nemo fit fato nocens.

The Fault is Fate's; and Fate can fix no Guilt.

Vid. ibid. v. 980, &c. Homer Il. T. 86.

Ἐγὼ δ' οὐκ εἰπὸς εἶμι,
Ἄλλὰ Ζεὺς, καὶ μῦθος, καὶ ἠέροφῶιτος
Ἐερινός.

—The Fault's not mine, but *Jove's* and Fate's,
And the Night-wandering Hag's.—

Zeno (in *Diog. Laert. l. vii.*) retorted this Objection very pleasantly, tho' he did not refute it: As he was correcting his Slave who had been catch'd in a piece of Thievery, the Fellow in way of Excuse told him, *Truly 'twas his Fate to steal: Yes, says Zeno, 'twas your Fate too to be beat for it.* *Marcus Antoninus* gives a more serious Judgment on the Point ², *The Gods* (says he, *l. ii. c. 11.*) *have put it into every Man's Power and Choice, to avoid whatever is truly Evil.* There is an Opinion nearly allied to this, which supposes the Consequences of Causes and of Effects, or the great Chain of Things establish'd by the Creator, to stand by such an immovable Decree, that GOD hath left himself no liberty of interposing in particular Cases. Thus all Miracles, all extraordinary Assurances of Heaven, all Effects of Prayers, of Repentance, and of Amendment, seem to be entirely cut off at one Stroke. To this we may join that ancient and wildly receiv'd Persuasion, that the Positions of the Stars laid an indispenfable necessity on human Actions and Events; or that the Hour of Nativity determin'd the whole Proceedings of Life. Which *Mamilius*, one of the Assertors of it, thus delivers, *l. iv. c. 79, &c.*

————— *Furit alter amore,*
Et pontum tranare potest, & vertere Trojam.
Alterius fors est scribendis legibus apta:
Ecce patrem nati perimunt, natosque parentes,
Mutuaque armati cocunt in vulnere fratres:
Non nostrum hoc bellum est: coguntur tanta movere,
Inque suas ferri pœnas, lacerandaque membra.
Hoc quoque fatale est, sic ipsam expendere fatum.

One, mad in Love, to *Troy* will carry War,
Or swim the Flood, and view the Torch from far; }
Another is determin'd to the Bar.

A Son his Father, Father kills the Son,
On mutual Wounds two headlong Brothers run.
These Combats prove the force of ruling Powers:
For they are too unnatural to be ours.
Nay, this Opinion's settled by Debate,
'Tis *Fate*, that we should thus dispute of *Fate*.

Mr. Creech.

And this Superstition still bewitcheth a great part of the Eastern World, where no Business of Moment is undertaken without consulting the Astrologers, that they may read, as the Phrase is, *what is written in Heaven.* ³ To which purpose *Father Bernier* tells a pleasant Story of a Gardiner of *Abas* King of *Persia*, who rooting up some Trees which the King, by Direction of his Astrologer, had planted in a *fortunate Hour*, and being thereupon rebuked, turning to the Astrologer, *Sure*, says he, *you was out in your Calculation: For these Trees could never have the benefit of lucky Stars*, which were set at Noon, and unfortunately pull'd up at Night.

Another Relation like this, he gives us of a certain Slave, a Run-away from *Goa*, who set up in the City *Dehli* for an expounder of the Stars, and foretold many strange Events with good Confidence to the People: Every now and then looking upon his *Mariner's Compass* and his *Hour Book*, as the noble Instruments of his Art. When some who had formerly a Knowledge of him, declar'd their Wonder at his new Profession and Equipment, his Reply was, *A tal Bestias, tal Astrologer, For such Beasts, such an Astrologer.* But all this kind of Astrology is really nothing else, but a specious way of cheating ignorant People of their Money, undertaken by some confident Knaves, who in their talk of future Occurrences are not so much supported by their own Arts, as by the Credulity of their Hearers: If Things fall out as they boldly guess'd, they presently rise in Honour and Credit with the Multitude; if Matters go otherwife, their Predictions are easily forgot, and so their Mistakes make no noise. *Tacitus*, *Hist. l. i. c. 22.* calls the Pretenders to Astrology, *Gentes hominum potentibus infidum, sperantibus fallax:* "A Pack of Men unfaithful to the great, and disappointing to all of eager Hopes and Desires. Add, *Hobbes de Homine, c. 14. f. 12.* *Agathias, l. i. c. 1.* *I cannot believe that the Cause of Evil is fix'd in the Course of the Stars, and in the fatal Appointment of unconceivable Necessity. For if the power of Fate every where prevails, all free election of Man's Will is destroy'd; and with it, all Precepts, all Arts, all Discipline must come to nothing; and those who have led pious and virtuous Lives, will be depriv'd of their future Expectation. Nor do I think it allowable to ascribe mutual Wounds and Slaughter to the Deities.* *Vid. Grot. de Veritate Rel. Christianæ, l. iv. f. 11.* Now besides the other numerous ill Consequences of such a Superstition, this Mischieff follows of Course, that whilst Men are continually gaping at the Stars, they have neither Leisure nor Inclination to guide their Lives by the Rules of sound Reason. *Helen* says wisely in *Euripides, Hel. ver. 763.*

Γνώμην δ' αἰεὶ μάλιστα, ἢ ἐσοουσία.

Prudence and good Counsel are the best Prog-
[notificators,

² The Greek is, καὶ τοῖς μὲν καὶ ἀλήθειαν κἀκείναι, ἵνα μὴ ἀειπάτην ὁ ἀνθρώπος, ἐπ' αὐτῷ τὸ πᾶν ἔδειπτο οἱ θεοί.

³ Our Author might have spared himself the Pains of reciting these two Stories.

Statius, Theb. iii. 562. 4.

Quid crastina volveret etas
Scire nefas homini. Nos pravum ac debile vulgus
Scrutamur penitus superos: hinc pallor & iræ,
Hinc metus, infidæque, & nulla modestia voti.

What future Years shall bring to pass
'Tis Sin to know. We a weak, puny Race,
Examine Heav'n, and ransack Jove's Decrees,
Wisely to antedate our Miseries.
Hence all our Mischiefs spring, our Rage, our Fears,
Our treach'rous Wiles, and our immodest Prayers.

Most pernicious likewise is that Conceit, which makes GOD to allow a kind of Market of Sins, so as to let them be bought off with Money or other Presents, or perhaps with some vain Ceremonies and set Forms of Speech, without Amendment of Life. No less absurd is it to imagine, that GOD Almighty is delighted with such Inventions of Men, such Institutions and Ways of Living, as are disagreeable to human and civil Society, as it is temper'd by the Dictates of Reason and the Laws of Nature. Such may we reckon the greatest part of the Monastical Orders, which we find in vast Numbers, not only in Christendom, but amongst the Turks and the Heathens. We should also carefully avoid all such unworthy and superstitious Notions, as debase and dishonour the Divine Nature or Worship. Every sensible Man ought to be as ^s Antoninus says his Father was, Θεοσεβής χωρίς δεισιδαιμονίας ^a, Devout without Superstition ^b.

'Tis another wicked Opinion, that the bare Exercise of Piety towards GOD is sufficient, without any regard had to Honesty, and to those other Duties which are to be practis'd towards our Neighbours: As if the External of Divine Worship, when exactly perform'd, were able to make amends for a Course of Injustice toward other Men: Or, as if it were lawful to scrape up Money in our Life-time, by all Means and Methods, good or bad, provided at our Death we leave somewhat to be spent in pious Uses ^c. Nor less unreasonable is the Fausy, that a single Man should be able not only to fulfil his own Duty to GOD, but to transfer some of his Merits on others; as if one Person's Negligence in his Duty was to be supplied by the over Righteousness of another. Of the same Stamp is that vain Conjecture, that upon account of the Satisfaction and the Merit of CHRIST, we have a less Obligation lying on us to Probity and Sanctity of Manners; and that the Hope of those Blessings furnishes us

with a Security of sinning. He who believes that his own Offences shall be forgiven him for the sake of another's Deserts, can scarce be hinder'd from sinking into the basest Dissoluteness, unless he be at the same time fully persuaded, that there is still an Obligation incumbent on him, to apply all his Endeavours to the Practice of a most holy Life.

Farther, It is no less a pestilent than brutal Opinion, to pretend that the Wickedness of some Actions is excus'd with GOD, upon account of their Dexterity or Humour; and that some Sins pass only for Jest in the Cognizance of Heaven. As the old Poets feign'd their Deities to take no notice of the Perjury of Lovers, and to forgive their Thefts and treacherous Intrigues ^d. Nay, their Madnes proceeded so far, that they were not afraid to introduce their heavenly Powers as the Actors of detestable Villanies; assigning so many Tutelar Gods to have the Care, as it were, and the Guidance of so many particular kinds of Wickedness. Now the Argument which Fulgentius ^e draws hence is right and conclusive: *If there were any Deities* (says he, meaning Mercury and Laverna) *presiding over Robberies, how could those Actions be criminal before human Judges, which had Divine Authors and Patrons to defend them?* Euripides disputes as well on the same Point, *Ione*, ver. 449, &c.

Οὐκ ἔστ' ἀνθρώπων κακῶς
Λέγειν δίκαιον, εἰ παρ' ἑὸν Θεῶν κακῶς
Μιμέμεθ', ἀλλὰ τὸς δεισιπνοῦτας ταυτε.

If Human Vices are but Transcripts drawn From Deeds Divine, and Copies set in Heaven, Should Men be blam'd who act what they are taught, Or those immortal Guides who teach 'em wrong?

Nor was the poor *Indian* much out in his Inference, who when a *Spaniard* boasted to him, that he was a Christian, a Son of the great Creator of Heaven and Earth, whose Laws he came there to publish and proclaim, answer'd him to this effect: *If 'tis by Command of your God, that you thus invade other Mens Dominions, and there spoil, burn, kill, and commit all other Wickedness at pleasure; you may rest assur'd, that we will not on any account believe in such a God, or receive his Ordinances amongst us.*

It is wicked likewise to believe, that those Prayers can please GOD, by which a Man desires that others may suffer an undeserv'd Evil, for the promoting or the occasioning of an Advantage to himself. As suppose, if the Inhabitants of a Sea-coast should pray, that many Shipwrecks might happen on their Shore. Nor do I take those solemn Sup-

^a L. 6. f. 30. Add. Bacon, Essay 17. lib. 2. c. 5. f. 10.

^b See Plutarch's Treatise of Superstition. Item, Charron of Wisdom, lib. 2. c. 5. f. 25, &c.

^c Add. Charron de la Sageffe, l. 2. c. 5. f. 25, &c. ^d Tibull. l. 3. el. 7.

^e Mytholog. l. 1. c. 18. ^f Senec. Hypolit. ver. 195. Deum esse Amorem, turpis & vitio favens Finxit libido; quoque liberior foret Titulum furori Numinis falso addidit.

Jove laughs to hear Love's harmless Perjury, And bids the Winds go lose it as they fly.

Love was first deify'd by Lust and Vice: When Men to gain a Patron to their Sin, And free pursuit of Pleasure, fix'd the Stamp Of Heaven on Hell, a Fury made a God.

^g Benzo. Hist. Nov. Orb. l. 2. c. 13.

⁴ Euripides, in another Place, gives a Description of all such Persons as pretend to Divination, in these Words:

Τίς ἢ μάντις ἐστ' ἀνὴρ;
Ὅς ὀλίγα ἀληθεῖα, πολλὰ δ' ἰδέσθην λέγει
Τυχῶν, ὅταν ἢ μὴ τύχη, δοίχεται.

What's an Astrologer? I thus reply,
A Man that speaks few Truths, but many a Lye,
Which, when found out, he takes his Heels to fly.

Spoken by Iphigen in Aulid. v. 956. Edit. Cant.

⁵ See what Mr. Bayle speaks about this Matter in his Meditations upon a Comet.

plications to contain much more Holiness, which are perform'd, either upon the engaging in an unjust War, or upon any Success obtain'd in it. Those Persons too must needs lie under a great Mistake, who fancy the Breach of some Precept of Natural Law to be a part of Divine Worship. As they who are for treating in a hostile Manner, all such as differ from them in Persuasion; who assert that Religion is to be propagated by the Sword; that no Faith is to be kept with Men of a contrary Profession, no political Friendship (as they call it) and no Offices of Humanity to be exercis'd towards them, but that they are to be avoided even in common Conversation, as unholy and unclean; that Violence, Wickedness, Treason, Perfidiousness, Sedition and Rebellion, are not only lawful, but commendable, if undertaken on a religious Account⁷. To conclude, the following Opinions are not of less fatal Effect, than those which we have already mention'd: That it imports nothing to solid Felicity, whether a Man apply himself to a virtuous or to a vicious Life, and that good Men are⁸ entitled to no better State or Condition than the Wicked. That the highest Pleasure a Man can expect or obtain, is the present Gratification of his Senses; and that the Soul perishes with the Body. Lastly, that all Law, even that which we call *natural*, is a meer human Device, not referable to GOD as the Author of it, nor deriving from him its Force and Sanctity. These therefore, and such like Notions, are entirely to be rooted up out of human Minds, in as much as they destroy our Duty to Almighty GOD, and prevent or intercept all Endeavours of conforming our Life and Manners to the Guidance of good Reason.

V. When this principal Care is over, the main Concern behind is for a Man accurately to examine his own Nature, and to study to *know himself*. An Enquiry which Antiquity so much valued as the Forerunner of true Wisdom, that *Γινώσι σεαυτόν* was thought an Inscription worthy to be set in Letters of Gold, and consecrated in the *Delphian Temple*.² On which *Tully* hath given us this Comment, *The Precept of Apollo*, says he, in

*which he enjoins us to know our selves, doth not mean, that we should be careful in knowing our Limbs, our Stature, or our Figure; for our Bodies indeed are not our selves. But when the Oracle says, Know your Self, it says in Effect, Know your own Mind and Soul. For the Body is no more than the Soul's Vessel or Receptacle. And no Action is properly done by your self, but what proceeds from your better and nobler Part³. Now from this Knowledge of himself rightly pursu'd, a Man is brought to understand his Condition, and the Office he is to bear in the World: Whilst he apprehends, that he did not exist of himself, but ow'd his Original and Being to a much Sublimier Principle; that he is endow'd with far more noble Faculties, than he sees enjoy'd by the Beasts about him; lastly, that he was not born by himself, nor purely for his own Service, but that he is a part of human Kind, and is oblig'd to behave himself sociably towards other Men. And from these Fountains may easily be drawn the compleat Knowledge of human Duty. Vid. *Marc. Antonin. l. x. s. 6.* ³ *Perf. Sat. iii. 71.**

————— *Quem te Deus esse
Jussit, & humana qua parte locatus es in re
Disce.*

Study thy self: Learn in what Rank and State,
The wise Creator hath ordain'd thy Fate.

It belongs likewise to our understanding our selves⁴, to know our own Power, and how far it extends, either in exerting our Actions, or informing our Designs^b. And farther, what is the true Effect and Consequence of every Practice; and what Respect and Use the Things without us have to our selves and to our Happiness.

VI. From this Knowledge it follows, that a Man must apprehend his Subjection to Almighty GOD, and the Obligation which lies upon him, according to the Measure of the Gifts he hath receiv'd, both to celebrate the Divine Majesty, and to shew himself a sociable Creature in his Transactions with his Fellows. And in as much as GOD hath bestow'd on him the Light of Understanding, he

² Add. *Casaubon ad Perf. Sat. 3. v. 67.* and *Plato in his first Alcibiades p. 448. Edit. Francofurt. Ficin.* ^b See *Socrates's* Explication of that noble Sentence in *Zenophon Apomnem. l. 4.* Add. *Bacon Eff. 36.*

⁷ See *Mr. Bayle's Philosophick Commentary* upon these Words, *Compel them to come in, &c. Part 1. Chap. 4. &c.*
⁸ *Cicero de Naturâ Deorum, l. 3. c. 35. Ut enim nec Domus, nec Respublica ratione quadam, & disciplina designata videntur, si in ea nec rectè factis præmia essent ulla, nec supplicia peccatis; sic mundi divina in homines moderatio, profecto nulla est, si in discrimen nullum est bonorum & malorum. i. e. Heaven is certainly not at all concern'd in the Government of Men, if it doth not make a Distinction between the Good and the Wicked.*

§. V. ² *Tully's* Words are, *Nimirum hanc habet vim præceptum Apollinis, quò monet, ut se quisque noscat; non enim, credo, id præcipit, ut membra nostra, aut staturam, figuramve noscamus; neque nos corpora sumus.——Cum igitur Nosce te, dicit, hoc dicit, nosce animum tuum. Nam corpus quidem quasi vas est, aut aliquod animi receptaculum. Ab animo tuo quicquid agitur, id agitur à te.*

³ *Perfusus's* preceding Words are elegant and pertinent:
*Discite vos, miseri, & causas cognoscite rerum,
Quid sumus, & quidnam vitæuri gignimur, ordo
Quis datus, aut metæ, quàm mollis flexus & undæ;
Quis modus argento, quid fas optare, quid asper
Utile nummus habet, patriæ, charisquis propinquis
Quantum elargiri deceat, quem, &c.*

Learn, wretched Men, and know the Cause of Things
What 'tis we are, and why we have our Beings;
What is the Order, and what Nature's Courie,
What we may wish for, and what Money's Force,
What Profit it doth yield; what to bestow
Upon our Country, and our Kindred too.
Study, &c.

⁴ “ This great Precept is often alludg'd in *Plato, Mind thy own Business, and know thy Self.* Each of these Sentences contains in general our whole Duty, and seems to include the other. He that will do his own Business, must learn this Lesson first, to know himself, and he that knows himself, will not undertake any Business as his own, that he is not acquainted with; for if he loves and takes care of himself, he'll refuse needless Employments and unprofitable Thoughts and Proposals ”
Montaigne's Essays, l. 1. c. 3.

ought certainly to conclude, that he is not to do every thing at Random, and ¹ without End or Design, but that whatever he undertakes, he should first weigh the Matter in hand, and regulate his Method of proceeding about it ^a. And consequently, that he propose an End ² agreeable to his Nature, and rightly moderate and direct both his own Actions, and all other due Means towards the Attainment of that End. And this in such a Manner, that he neither proceed in the Application of the Means, before the End is fix'd and determin'd; nor settle such an End as he must afterwards want Means to arrive at. Another Inference closely ally'd to this is, that since Truth and Right are always uniform and without Alteration, so he ought always to form the same Judgments of the same Things, and when he hath once judg'd truly, to be always constant in his Mind and Resolution. Farther, that his Will and his Appetite do not get the Start of ³ Good Judgment, but follow and obey it; never making Resistance to its Decrees ⁴. For he who observes this Course of Proceeding, will be sure to act with Prudence, with Constancy, and with Moderation. He will make it his chief Aim and Rule, as *Lucan* describes *Cato*, ii. 381.

—*Servare modum, finemq; tenere,
Naturamq; sequi, patriæq; impendere vitam:
Nec sibi, sed toti genitum se credere mundo.*

To keep a *Mean*, to eye the chief Design;
To follow *Nature*, as a Guide Divine,
To pay his Country's Ransom with his Blood,
And private Pleasure quit for publick Good:
To raise his Soul to universal Cares,
And in his Pains give all the World their Shares.

He that acts otherwise, instead of keeping a decent Pace in the Journey of Life, seems to rowl and tumble through the World ⁵: His Proceedings are perpetual Contradictions; and 'tis impos-

^a Ταῦτον πᾶσι ἰδὲν χαρακτῆρα σαυτῶ, καὶ τύπον ἐν θυλάξις ἐπὶ τε σεαυτῷ ὄν, καὶ ἀνθρώποις ἐντυγχάνειν. *Epist. Ench. Chap. 40.*

§. VI. ¹ *Seneca* has a fine Passage relating to this Subject, *Epist. 71. Idè peccamus, quia de partibus vitæ omnes deliberamus, de totâ nemo deliberat. Scire debet, quid petat, ille, qui sagittam vult mittere, & tunc dirigere, & moderari manu telum. Errant consilia nostra, quia non habent quo dirigantur. Ignoranti quem portum petat, nullus suus ventus est. Necessè est multum in vitâ nostrâ casus possit, quia vivimus casu. i. e.* "The Original of our Errors is, that no Man contrives seriously to draw up a Scheme of his whole Life, but contents himself to deliberate occasionally upon some particular Actions. The Gunner should know his Mark, before he take his Aim to shoot. Our Counsels are disappointed, because we keep not the End in our Minds. The Wind can never blow well for him, who don't know the Port he is sailing to. Fortune must do much among us, who leave so much to Chance in our Lives." See *Cicero's Paradoxes, Chap. 5.* with *Grævius's Notes*, and *M. Antoninus with Gataker's, Lib. 2. §. 16. and l. 11. §. 21.* See also *Plato de Repub. l. 7. p. 695. Ed. Weob. and Montagne's Essays, Lib. 2. Chap. 1.* at the End.

² All the World knows that famous Principle of Morality laid down by the *Stoicks*, who say, That we must live agreeable to Nature. See *Seneca, M. Antoninus, Epictetus, &c.* but chiefly *M. Antonin. Lib. 5. Chap. 16.*

³ *Cicero* has very well observ'd, *Efficiendum autem est, ut Appetitus rationi obediant, eamque neque præcurrant, nec propter pigritiam, aut ignaviam deserant; sintque tranquilli, atque omni perturbatione animi careant. Ex quo elucebit omnis constantia, omnique moderatio. i. e.* "We must bring all our Affections into Subjection to our Reason, and not suffer them either to outrun it, or thro' Sluggishness to desert it. They must also be calm, and not disturb our Minds. And then we shall be eminent for Constancy and Moderation." *Off. l. 1. c. 29.*

⁴ *i. e.* Never to enquire into them, but after mature Deliberation, and never to act against our own Conscience.

⁵ These Words are *Horace's, Epist. 1. Lib. 1. v. 99. Et vitæ disconvenit ordine toto.*

⁶ *Lipsius*, in his *Politicks*, translates the Words thus, *Lib. 1. Chap. 7. Longe Prudentia felicitatis primas tenet, i. e.* "That Prudence that makes a Man happy, is certainly the chiefest by much." But Wisdom is incomparably much more advantageous and valuable than Happiness or Prosperity: So that this Sentence makes nothing to our Author's Purpose, who is proving, That Wisdom is the Means to arrive at Happiness. Nevertheless I thought fit to observe, that this Passage of *Sophocles* is explained, as I have understood it, in the *Greek Comment of Triclinius*; for others follow an Explication which to me seems not true, and which they embraced, without being aware that *πρωτων* has sometimes a comparative Signification.

sible for him to arrive at any comfortable Condition: Since, ⁶ as *Sophocles* observes, *Antig. ver. 1348.*

Πρωτὸν τὸ φρονεῖν εὐδαιμονίας
Πρωτων ὑπάρχει

True Wisdom is the Spring of Happiness.

VII. If a Man thus rightly apprehend and consider his own Strength and Power, he will discover that it is of a *finite* Nature, having certain Limits, beyond which it can never extend itself; and therefore, that there are many Things in the World which we cannot manage or compass, as many that he cannot hinder or resist. Other Matters there are which do not absolutely exceed human Power, but which may be intercepted and prevented by the Opposition of other Causes. And a third Kind of Things we cannot compass by our bare Strength, nor assisted by Dexterity and Address. Applicable to these Reflections is the famous old Distinction of the *Stoicks*, dividing Things into τὰ ἐφ' ἡμῖν, and τὰ ἔκ ἐφ' ἡμῖν, those *in our Power*, and those *without or beyond it*. What seems to be most under our Command, is our own Will, and the Power of that Faculty in exerting Actions proper to our Species of Being. For although the Will hath some cross and stubborn Principles adherent to it, which bend and ply it continually from its due *Equilibrium*, yet hath a Man nothing in his whole Nature more nearly and closely tied to him, nothing which is less capable of being hindred by external Powers, and therefore nothing, the Motions of which do more properly belong to his Person, and may accordingly be *imputed*. Hence it follows, that every Man ought to make it his main Care and Concern, rightly to employ his Force and Abilities, in conformity to the Rules of Reason: At least to settle a constant Resolution of discharging, as far as in him lies, every thing which seems agreeable to his Duty, and to the Design of his Being. For this is the Test by which we are to rate the Worth of e-

very Person, and to measure his intrinſical Goodneſs and Excellency. ¹ *Arrian. Epiſt. l. i. c. 1. What therefore, on the whole Matter, are we to do? To improve, and to put to the beſt uſe thoſe Things which are in our Power, and to deal with other Things as their Natures ² require.*

VIII. As to the other Matters which lie without us, we are ſo far to employ ourſelves about them, as they do not ſurpaſs our Strength, as they tend to a lawful End, and are worth the Labour which we ſpend in the Purſuit. For Things above us, a wiſe Man will not loſe his Hopes and his Pains upon them; he will reckon it folly to endeavour with vaſt Toil the Attainment of ſuch an End, which he knows his own Force, together with the Aſſiſtances he expects, unable to compaſs: Or unleſs he be at leaſt certain that the very Probability of obtaining the End is of more Conſequence than any other Effect, which he could without queſtion have produced at the ſame Time, and with the ſame Labour. ¹ Other Things he will leave to the Direction of Providence, and will compoſe his Mind as well as he is able, ² for a peaceful Acquieſcence in every Event. He will not ³ vainly diſquiet himſelf on the Account of Evils which either have already happen'd, or may hereafter fall out without his Fault: And ſo he will cut off the greateſt Part of human Troubles which are wont to be produced either by vain Hope driving us on ill Deſigns, or by the more violent Motions of Grief, Anger, or Fear ⁴.

From theſe Conſiderations this farther Conſequence may be drawn; that Man, as he is guided only by the Light of Reaſon, ought not to frame to himſelf, or to aſpire after any other Happineſs in this World, than ſuch as ariſes from the prudent Government of his Faculties, and from thoſe Aſſiſtances and Supports, which we are ſure the Divine Providence will afford us in the univerſal Adminiſtration of Things. From the ſame Principles we may infer, that as we are not to leave Things to meer Hazard and Chance, whiſt there

is any room for human Caution and Foreſight; ſo when we have done all that lies in our Power, we cannot enſure an Event which doth not depend on our Direction, and of which ⁵ we have no certain Knowledge till it actually happen. As *Iphierates* us'd to ſay, 'twas unworthy of a General to ſay, *I did not think it*; ſo 'tis below a wiſe Man to make the like ſorry Reflection. It was a good Wiſh of the Poet, *Ov. Ep. ii. 85.*

————— *Careat ſucceſſibus opto
Quisquis ab eventu facta notanda putat.*

————— Ne'er may Succesſes bleſs
The Man who meaſures Actions by Succesſ.

Yet this abſurd Opinion is ſo ſtrong and ſo univerſal among the *Mahometans*, that they take good Succesſ to be an infallible Argument of the Juſtice of a Cauſe, and an open Sign of the Approbation of Heaven. Whereas ſuch a Notion is indeed to be rank'd amongſt the ridiculous Follies of the loweſt and moſt ignorant Vulgar. For 'tis evident to any Perſon of common Senſe ⁶, that as *Juvenal* ſays, *Sat. xiii. 103.*

————— *Multi
Committunt eadem diverſo crimina fato;
Ille crucem pretium ſceleris tulit, hic diadema.*

That Sins alike unlike Rewards have found,
And whiſt *this* Villain's hang'd, the *other's* crown'd.

Hence likewise we learn, that as it is the Part of a wiſe Man, not to bound his Sight at the Things before him, but to extend his Conſideration and his View to Things to come, and to drive on his well-form'd Reſolution with his whole Strength, without ſuffering either the Threats of Fear, or the Flatteries of Pleaſure to turn him aſide: So is it as ſure a Mark of a Fool to drive directly againſt the Stream, and not rather

¹ *Arrian. Epiſt. l. 2. c. 7. What can be better for us than that which hath the Approbation and the Appointment of GOD himſelf?*

§. VII. ¹ *Arrian's* Words are, *Τί ἐν δεῖ; τὰ ἐφ' ἡμῖν, βέλπιστα κατασκευάζειν, τοῖς ἢ ἄλλοις χεῖρῃ, ὡς πέτυχε.*
² *M. Antonin. l. 6. 32. Τῆ ἢ διανοία ἀδιάφορον, ὅσα μὴ εἶν αὐτῆς ἐνεργήματα, ὅσα ἢ γὰ αὐτῆς εἶν ἐνεργήματα, ταῦτα πάντα ἐπ' αὐτῆ εἶν.* *ἢ τῶτων μὲν πρὶ, ἢ πρὸ μόνον τὸ παρὸν πραγματεύεσθαι τὰ γὰ μέλλοντα, ἢ περιωχνοτα ἐνεργήματα αὐτῆς, ἢ αὐτῆ ἡδὴ ἀδιάφορα.* *l. c.* "All Things are indifferent to my Soul, except its own Operations. For all its Operations depend upon it. But only thoſe about which it is busy at preſent are dear to it; ſuch as are paſt and to come are equally indifferent." See alſo §. 50. of the ſame Book.

§. VIII. ¹ *Permites iſtis expendere Numinis, quid
Conveniat nobis, rebusque ſit utile noſtris.
Nam pro jucundis aptiſſima quæque dabunt Di.
Carior is illis homo, quam ſibi* -----

Let's leave it to the Gods to do what they
Think agreeable and profitable for us.
We aſk what pleaſes us, they give what's fit and beſt.
They love Man better than himſelf.

Juv. Sat. 10. v. 347, &c.

² 'Twas a Maxim of the *Pythagoreans*, That wiſe Men are prepared for all Events which may happen to Man, and whoſe Management depends not on himſelf. *Καὶ ὡς αὐτῆς* (ſays *Jamblicus*) *ἡδὴ γ' ἔλεγμα, ὡς ἐβῆν δεῖ, τ' ἀνδραπέπων συμπλομαίων ἀπεστέκοντων ἢ ὡς τῆς νῦν ἔργων, ἀλλὰ πάντα ἀεσσοκᾶν, ὧν μὴ πυχάνεσκον αὐτῆ κέραιο ὄντες.* *De Vita Pythag. Chap. 31. n. 196. Edit. Kuſter.* See alſo numb. 224.

³ "Repreſent to yourſelves in your Minds all the Evils that can befall you, yea, the moſt intolerable, ſuppoſe yourſelves certain to ſuffer them; and on the contrary is it not more eaſy and natural to baniſh ſuch Thoughts? They'll happen ne'er the ſooner, nor continue e'er the longer. We may enlarge and prolong them by our Thoughts, yea, ſo incorporate them beforehand in ourſelves, and entertain them, tho' we have not truly any Senſe of them. They diſturb us enough whenever they come (ſays one of the Leaders, not of the tendereſt, but hardeſt Sects) therefore favour thyſelf. Believe what thou loveſt beſt. Recolleſt thyſelf, and uſe all Means to prevent thy ill Fortune. Don't loſe thy preſent Eaſe for fear of future Evil, and be not now miſerable, becauſe thou ſhalt be ſo at ſuch a time." Theſe are the Words of Mr. *Montagne*, *Eſſays, Lib. 3. Chap. 12.* See alſo *Seneca, Epiſt. 13, 24, 74, 98, &c.*

⁴ *Liban. Declam. 21. Ὁ ρησὶς ἢ συνεδαίῳ ἀνὴρ τῆ γνῶμῃ, ἢ οἷς περιεληπτο, κείνεθ'· καὶ μὴ τὸ πῆρας ἀκολουθήσῃ ἢ βεβουλομένων ἀξίον, ἐβῆν ἢ πρὸν εἶσι συνεδαίῳ, i. e.* "A good and diligent Man proceeds according to his Judgment, and to the Notions which he hath form'd of Things: And although the Event doth not anſwer the Worthineſs of his Deſign, he is not leis induſtrious for the future." See *Marc. Antonin. Lib. VI. 50. VII. 38. VIII. 47.*

⁵ See Mr. *Montagne's* *Eſſays* upon this Subject, That 'tis not reaſonable to judge of Actions by the Event, *Lib. 1. Chap. 31. and Lib. 3. Chap. 8.*

⁶ So *Terence* ſpeaks, *Illuc eſt ſapere, non quod ante pedes modo eſt
Videri, ſed etiam illa, quæ futura ſunt.* *Adolph. Act. 3. Scen. 4. Verſ. 23, 24.*

to accommodate his Inclinations to the Events, when they will not conform themselves to his Inclinations^a. Lastly, since human Foresight is so weak in discovering future Things, and since they are very far from being under our Guidance, though they frequently fall out well beyond our Hopes and Expectations^b; hence it is plain, that we ought neither too securely to trust our present Condition, nor to spend too much Care and Anxiety on what is to come. And for the same reason Insolence in Prosperity, and Despair in Adversity, are to be both avoided as equally dangerous and equally absurd. 'Twould be easy to illustrate this Doctrine with endless Testimonies of Authors. Take the following for a Specimen. *Arrian. Epist. l. ii. c. 1.* In Things which do not depend upon our Election, let us be bold and venturous, but in Things which are capable of Choice and Counsel, let us be timorous and cautious^c. *Juvenal, Sat. x. 365.*

*Nullum numen abest, si sit prudentia, sed te
Nos facimus, Fortuna, Deam, caeloque locamus.*

All Heav'n stands ready to assist the Wise, but we
Make Fortune a celestial Deity.

Horat. Carm. iii. 4. 65.
*Vis consilii expers mole ruit sua:
Vim temperatam Dii quoque probent
In majus —————*

Force, without Wisdom for its Guide
Sinks with its own unweildy Weight,
But with deliberat Art apply'd
The Gods advance it to a nobler Height.

Lucret. l. iii. 1011.
*————— Petere quod inane est nec datur unquam,
Atque in eo semper durum perferre laborem;
Hoc est adverso nixantem trudere monte
Saxum, quod tamen à summo jam vertice rursus
Volvitur, & plani raptim petit æquora campi.*

For, still to seek, and still in hopes devour,
And never to enjoy desired Power,
What is it but to roll a weighty Stone
Against a Hill, which strait will tumble down?
Almost at Top, it must return again,
And with swift Force roll thro' the humble Plain.
Mr. Creech.

Hor. Carm. ii. 3.
*Æquam memento rebus in arduis
Servare mentem: non secus in bonis
Ab insolenti temperatam
Letitia.*

Learn, Friend, to keep an even State,
Whatever Scene your Cares employs,
Amongst the Smiles or Frowns of Fate.
Nor mean in Grief, nor insolent in Joys.

^a *Cedere majori virtutis fama secunda est.* Mart.

^b 'Tis next to conqu'ring, wisely to submit.

^c *Ὁμίχλη ἄσκησις ἐσωμένων, the dark Mist of Futurities.* Tryphiodor. ^c *Plutarch de Superstitione.* Ἄρετος ἢ ἐλπίς ὁ πρὸς ἐστί, ἢ δειλία περὶ φρασίς, i. e. GOD is the Hope of Courage and Virtue, not the Plea and Excuse of Weakness and Cowardice. Indeed Self-love is the Cause that we are ashamed to own that the Evil that befalls us happens through our own Fault, and so we charge Fortune, as *Mr. La Fontaine* speaks suitably, *Fab. 11. Lib. 5.*

Nothing happens here below
But she may us answer so,
We do make her rule our Fate,
She is the Author of our Adventures.

Ibid. Od. 10. 21.

*Rebus angustiis animosus atque
Fortis appare, sapienter idem
Contrabes, vento nimium secundo,
Turgida vela.*

The more you are oppress'd, bear up the more,
Weather the Tempest, till its Rage be o'er.
But if too prosp'rous and too strong a Gale
Should rather ruffle than just fill your Sail,
Lessen 't, and let it take but so much Wind
As is proportion'd to the Course design'd.
Dryd. Miscel. 2. p. 422.

Lib. iii. Od. 29.

*————— Ille potens sui
Lætusque deget, cui licet in diem
Dixisse, Vixi; cras vel atra
Nube polum pater occupato,
Vel sole puro.*

He lives in true Delight,
And Master of himself appears,
Who strange alike to Hopes and Fears,
Can boldly say each Night,
To Morrow let my Sun his Beams display,
Or in Clouds hide them, I have liv'd to day.
Mr. Cowley.

Idem l. ii. Sat. 7.

*Quisnam igitur liber? Sapiens, sibi qui imperiosus,
Quem neque pauperies, neque mors, neque vincula terrent.
Respondere cupidinibus, contemnere honores
Fortis, & in seipso totus teres atque rotundus,
Externi ne quid valeat per læve morari.*

He's Free, who wisely can himself controul,
And challenge Fate and Death to shock his Soul.
Brave to resist the Tide of wild Desire,
And Proof against Ambition's cheating Fire.
All round and smooth, that no external Load,
May fix a Rub, to check him in his Road.

Juvenal. Sat. xiii. 20.

*————— Dicimus autem,
Hos quoque felices qui ferre incommoda vitæ,
Nec jactare jugum vita didicere magistra.*

As Happy those, tho' not so Learn'd, are thought,
Whom Life instructs, who by Experience taught
For new to come from past Misfortunes, look,
Nor shake the Yoke, which galls the more 'tis shook.
Mr. Creech.

Idem Sat. x. 347.

*Permites ipsis expendere Numinibus, quid
Conveniat nobis, rebusque sit utile nostris.
Nam pro jucundis aptissima quæque dabunt Di;
Carior est illis homo, quam sibi.*

Intrust thy Fortune to the Powers above,
Leave them to manage for thee, and to grant

What their unerring Wisdom sees thee want;
In Goodness as in Greatness they excel:
Oh, that we lov'd ourselves but half so well!

Mr. Dryden.

IX. Another necessary Part of human Improvement, is to be able to set a just Price on those Things which are the chief in moving our Appetites. Because from the exact Worth and Value of them we are to judge how far we may justly labour to be concern'd about them. Amongst these, that which appears with most Figure and Splendor, and which is most capable of soliciting elevated and noble Souls, is the Opinion of Worth and Excellency, the Foundation of Glory and of Praise. Now as to this Concern, we are in such a manner to form and dispose our Mind, as to endeavour as far as possible the procuring and the preserving that kind of *Esteem* which is ² simply so call'd, being the bare good Opinion of good Men: Inasmuch as this regularly flows from the Observance of the Law of Nature, and of our Duty: And because the Want of it may lay open an Occasion to a thousand Mischiefs and Inconveniences³. And if this good Reputation be assaulted by the Lies and Calumnies of wicked Men, we are to spare no Labour in restoring it to its Primitive Purity. But when it is not in our Power to overcome Slander, or to stifle the false Conceptions that the World may entertain about us, we are to comfort ourselves³ with the Testimony of a good Conscience, and with the Assurance that our Integrity is still known to God^b.

As for that *Esteem*, which we usually term *Intensive*, as Honour and Glory, we are so far to pursue it, as it redounds from worthy Actions, agreeable

to Reason, and promoting the Good of human Society; and as far as it opens a wider Field for such generous Undertakings. But how large a Share soever we obtain of these Favours, and even by honest Means, good heed is to be taken that our Mind doth not swell with Arrogance and Vain-glory⁴. Much more foolish and ridiculous is it to boast of, and to value ourselves upon, what is empty and vain, and gives no solid Proof of our Worth. Therefore *Demonax*es in *Lucian*, when he saw a Fellow priding himself in the Wideness of his Purple, *Hark you, Friend* (says he) *a Sheep us'd to carry this fine Burthen before you, and yet was still but a Sheep.* But when we want Occasions and Opportunities of shewing our Worth, and are not able to procure them, we must bear this ill Fortune with Patience, since there is nothing in it that can be charg'd upon our Default⁵. On the other hand, it appears to be at the same time wicked and foolish, to affect and usurp the external Ensigns of Honour, when the inward Foundations of it are wanting: As it is detestable Madness to aspire to Fame and to Honours by evil Arts, and by Deeds repugnant to Reason; and to desire the shining above others, only to be able to insult over them, and to make them obnoxious to our Pleasure. Lastly, Since we are not always allow'd the Liberty of building our Fortune as we please, since it must sometimes depend on external Causes; our Mind is to be put into such a Temper, as when we have once done our best, to rest satisfied with the Lot that falls to our Share; and to look on those Things which we are not able to compass and to obtain, as Matters which do not concern us, and which therefore are not worthy our Grief or our Anger⁶.

X. For

² See 2 Cor. viii. 21. Vide *Essais de Morale par Mr. Placete, Vol. 4. Discours. 6, & 7.*

^b Add. *Le Grand*

Philos. Part VIII. p. 420.

§. IX. ¹ *Negligere quid de se quisque sentiat, non solum arrogantis est, sed etiam omnino dissoluti.* Cicero de Off. Lib. 1. Chap. 28. *To be careless what others think of us, is a Sign not only of great Pride and Presumption, but also of entire Impudence.* See *Grævius's Notes.*

² See the Explication of this Division of Esteem into simple and distinct, *Lib. 8. Chap. 4. §. 2.* and what I have said upon the last in my *Treatise of Games, Lib. 1. Chap. 3. §. 6.*

³ *Seneca* has very well observed, That no Disgrace ought to discourage us from doing good. *Si gratum esse non licebit, nisi ut videar ingratus, si reddere beneficium non aliter quam per speciem injuriæ potero, æquissimo animo ad honestum consilium, per mediam infamiam tendam. Nemo mihi videtur pluris aestimare virtutem, nemo illi magis esse devotus, quam qui viri boni famam perdidit, ne conscientiam perderet, i. e.* "When I can't shew my Gratitude unless I expose myself to the Disgrace of being thought ungrateful, and I can't be thought to do a Kindness, but it will be taken for an Injury; I will still persist sincerely in my honest Design to execute it, though I wade through Disgrace. For no Man seems to have a greater Esteem for Virtue, or to be more devoted to it, than he, who to save his Conscience, has lost the Reputation of a good Man." *Seneca Epist. 81. See Marc. Antonin. Lib. 5. §. 3.*

⁴ *Plin. Panegy. Chap. 71. Nam cui nihil ad augendum fastigium superest, hic uno modo crescere potest, si se ipse submittat, securus magnitudinis suæ, i. e.* "He who hath already arriv'd at the noblest Pitch of Eminence, hath this only Way left of improving his Height, by stooping to the Arts of Humility and Condescension, as secure of his own Greatness.

⁵ Hor. Carm. III. 2. *Virtus repulsæ nescia sordidæ
Intaminatis fulget honoribus,
Nec sumit aut ponit secures,
Arbitrio popularis auræ.*

Claudian. de Consulatu. Mall.
*Ipsa quidem Virtus pretium sibi; solaque latè
Fortunæ secunda nitet, nec facibus ullis
Erigitur plausuæ petit clarescere vulgi;
Nil opis externæ cupiens, nil indigna laudis,
Divitiis animosa suis, immotaque cunctis
Casibus, ex alta mortalia despicit arce.*

⁶ *Seneca Agamemni. ver. 102.*

*Modicis rebus longius ævum est.
Felix mediæ quisquis turbæ
Sorte quietus,
Aura stringit littora tuta
Timidusque mari credere cymbam,
Remo terras propiore legit.*

On its own Worth true Majesty is rear'd,
And Virtue only is her own Reward;
With solid Beams and native Glory bright,
She neither Darkness dreads, nor covets Light.
True to herself, and fix'd to in-born Laws,
Nor sunk by Spite, nor lifted by Applause.

Mr. Prior.

Virtue the Tribute scorns of vulgar Eyes,
And in herself her richest Portion lies.
With native Rays she shines, nor owes a Beam
To glittering Honour, or to glossy Fame.
Unmov'd at earthly Storms, to Heaven ally'd,
From Heaven she looks, and laughs at mortal Pride.

Excess of Fortune kills, or cloyes,
But *Temp'rance* is the *Health* of Joys.
Happy the Man whose middle State,
Fearing to tempt the Tide of Fate,
Securely guides with wary Oar
His humble Bark along the Shore.

X. For the better maintaining and preserving himself in the World, a Man hath likewise need of external Goods and Possessions; as it is frequently a Part of our Duty to provide them for others. Concerning which, it is the Command of Reason and Nature, that we endeavour the Procurement of them, so far as is consistent with our Strength, our Opportunities, and our Honesty. The *Ant* which *Virgil*^a makes so prudent a *Pro-vider* for Old Age, is even in the Divine Writings propos'd amongst the Examples of harmless Industry^b. But because our Wants are not infinite, but lie in a very little Compass, therefore we must moderate our Desire and our Pursuit of these Things, according to the just Occasions of Nature, and the Measure of Sobriety. *Socrates* in *Diogenes Laertius*, when he us'd to see the prodigious Quantity of Goods expos'd to Sale in the publick Places, would cry out, *Πόσων ἐγὼ χρείαν ἐν ἔργῳ;* *What a number of Things are there here which I do not want!* *Juv. Sat. v. 6.*

Ventre nihil novi frugalius. —————
 ————— The Belly is a frugal Guest.

Idem. *Sat. xiv. 316.*
 ————— *Mensura tamen quæ*
Sufficiat census, si quis me consulat edam:
In quantum fitis atque fames & frigora poscunt.

If any ask me what would satisfy
 To make Life easy, thus would I reply:
 As much as keeps out Hunger, Thirst, and Cold.
 Mr. *Dryden*, *jun.*

³ *Apuleius* Apolog. *I would choose my Fortune as I would my Coat, rather neat and fit, than too long or too full. Inasmuch as in all Things which we apply to the Service of Life, whatever exceeds Convenience and Moderation, turns more to Burthen than to Use. Unweildy Possessions, like vast and monstrous Rudders, will sooner drown than guide us: They clog with Plenty, and surfeit with Excess.*

Lucan. iv. 377.
Discite quàm parvo liceat producere vitam,

Idem *Herc. OEtæ, ver. 691, &c.*
Malè pensantur magna ruinis;
Felix alius, magnusque colet;
Me nulla vocet turba potentem;
Stringat tenuis littora pappis.
Nec magna meos aura phaselos
Jubeat medium & scindere pontum.
Transit tutos Fortuna sinus,
Medioque rates quærit in alto,
Quarum feriunt suppara nubes.

Add *OEdip. v. 882, &c.* See also *Val. Max. Lib. 7. Chap. 2. §. 1. exter.*

^a ————— *Inopi metuens Formica senectæ.* *Virg. Georg. l. 1. v. 186.*

§. X. ¹ See my Treatise of Games, *Lib. 1. Chap. 3. §. 7.*

² *Eurip. Electr. v. 80, 81.*

Ἄρπυιες γὰρ ἔδειξες, θεῶν ἔχων ἀνά σῶμα,
βίον δὲ βίαιον ἀν' ἑλληγγεῖν ἀνδρῶν πόνον.

³ *Apuleius's* Words are, *Fortunam, velut tunicam, magis concinnam, quàm longam probare, quippe etiam ea si non gestetur, & trahatur, nihilominus quàm lacinia præpendens, impedit, & præcipitat. Etenim in omnibus ad vitæ curâ nutria utendis, quidquid aptam moderationem supergreditur, oneri potius, quàm usui, exuberat. Igitur & immodicæ divitiæ, velut ingentia & enormia gubernacula, facilius mergunt quàm regunt: quod habent irritum copiam, anxiam nimietatem.* Our Author in this Paragraph heaps together a great Number of Quotations confusedly.

Et quantum natura petat. —————
 ————— *Satis est populo fluxiusque Ceresque.*

True Bliss is frugal, every Brook and Field
 A full Supply for Life and Nature yield.

Lucret. v. 1116.
Quod si quis vera vitam ratione gubernet,
Divitiæ grandes homini sunt, vivere parçæ
Equo animo.

Would Men but once live up to Reason's Rules;
 They would not scrape and cringe to wealthy Fools.
 For 'tis the greatest Wealth to live content
 With little ————— *Mr. Creech.*

Claudian. in Rufin. 1.
Vivitur exiguo melius; Natura beatiss
Omnibus esse dedit, si quis cognoverit uti.

Life runs the best on little: Nature's Store
 Can make all happy that will use their Power.

Horat. Carm. III. 16.
Contracta melius parçæ cupidine
Velligalia porrigam,
Quam si Mygdoniis regnum Halyattici
Campis continnem: multa petentibus
Desunt multa, bene est cui Deus obtulit,
Parçæ quod satis est manu.

Thus paraphras'd by Mr. *Cowley.*
 A Field of Corn, a Fountain, and a Wood,
 Is all the Wealth by Nature understood.
 The Monarch on whom fertile Nile bestows
 All which that grateful Earth can bear,
 Deceives himself if he suppose,
 That more than this falls to his share.
 Whatever an Estate doth beyond this afford,
 Is not a Rent paid to the Lord;
 But is a Tax illegal and unjust
 Exacted from it by the Tyrant Lust.
 Much will always wanting be
 To him who much desires. Thrice happy he
 To whom the wise Indulgency of Heaven
 With sparing Hand but just enough has given.

Falls are the sad Rewards of Height:
 Let others burst in swelling Great.
 Give me no Title from the Crowd,
 But let my gentle Bark be row'd
 Close to the Bank, whilst fluttering Gales
 Court me in vain to hoist my Sails.
 When angry Vengeance puts to Sea
 She leaves in Peace the silent Bay;
 At the tall Masts her Thunders fly,
 Whose blazing Streamers strike the Sky.

————— The Wretch that hopes
 To help his idle Hands with idle Prayers,
 And will not work to live, should fairly starve,
 By Gods and Men un pity'd. —————

Idem l. 1. Epist. 10. ver. 32.

*Licet sub paupere tecto
Reges, & regum vita præcurrere amicos.*

A Cottager may match in true Delights
Kings, and their more luxurious Favourites.

Idem l. 1. Ep. 12. ver. 4.

*Pauper enim non est, cui rerum suppetit usus.
He's never poor that holds enough for Use.*

Quinctil. Declam. 13. *It is Wealth enough to de-
sire no more. Turpilius in Priscian. The happiest
Livers are the contented Masters of little Fortunes.*

We must not then on any account give too loose
Reins to our desire of getting; much less must
we invade the Wealth of others by Injuries and
evil Designs^a. And those Things which we
have fairly made our selves Masters of, we are to
account no otherwise, than as Helps to our Necessi-
ties, and Instruments to make us deserve well of
Mankind. But the Mind must by no means fix
and enslave itself, to possess and to preserve them
merely for their own Sake: or to be perpetually
employ'd in the endless Labour of increasing them.
^{'Tis} downright Frenzy, as *Juvenal* says, *Syl.* xiv. 137.

Ut locuples moriaris, egenti vivere fato.

Living, to suffer a low starving Fate,
In hopes of dying in a wealthy State.

On the other side, 'tis a very good part of the
Character which *Statius* gives of a wise Man, *Syl.* ii. 2.

^a *Hor.* Sat. 1. 1. 92. *Denique sit finis quærendi, cumq; habeas plus,
Pauperiem metuas minus; & finire laborem
Incipias, parto quod avebas.*

Eumen. Panegy. *Those who make not Reason the Bounds of their Desires, are never satisfied with any Profuseness of Fortune; and thus Happiness ever slides by them, whilst being full of Hopes, and void of real Enjoyments, they lose the present in gaping after the future.* Add. *Charron de la Sageffe*, l. 1. c. 21. ^b *Hippodamus de Felicitate: The Possession of good Things contributes nothing to Happiness, without the Use.* Add. *Theocrit. Idyll.* 16.

Horat. Epod. 1. 32.

*Haud paravero
Quod aut, avarus ut Chremes, terra premam,
Discinctus aut perdam ut nepos.*

Idem Carm. IV. 9.
*Non possidentem multa vocaveris
Recte beatum: rectius occupat
Non beati, qui deorum
Muneribus sapienter uti
—Callet.*

Idem L. 1. Epist. 2.
*Semper avarus eget; certum voto pete finem:
Quod satis est cui contingit nil amplius optat.*

Idem L. 2. Epist. 2.
*Ut ar, & ex modico, quantum res possit, acervo
Tollam: nec metuum quid de me judicet hæres,
Quod non plura datis invenerit.*

Add. *Gell.* l. 10. c. 17.

^c *Arrian. Epictet.* l. 3. c. 24. *No Man is properly an Orphan; we have a common Father, who is constantly busied in providing for us.* ^d *Horat. Carm.* III. 16. *Crescentem sequitur cura pecuniam.*

Care in proportion swells with every Bag.

^e *Bion. Idyll.* 5.

*Ἔς πόσον ἄ δειλοὶ χαμᾶτος κ' εἰς ἔργα πονεῦμεν,
Ψυχὰν δ' ἄχρει τίνῃσ' ἀπὸ κέρδεα καὶ ἀπὸ τέχνας
βάρησιν, ἡμείροντες αἰεὶ πολλὴν πλῆθον ὄλεθρον;
ἀσπόμεθ' ἢ ἄρα πάντες, ὅτι θνατοὶ χροόμεθα.*

*Non tibi sepositas infelix strangulat arca
Divitias, avidiq; animum dispendia torquent
Fœnoris: expositi census & docta fruendi
Temperies.*

In stifling Chests your Wealth is not confin'd,
Nor, lent on greedy Use, torments your Mind;
But nobly spreads, on decent Ends employ'd,
By Moderation, and with Art enjoy'd^b.

We are farther to consider, that Nature is not wanting in a plentiful Provision for the Necessities of her Sons^c. That the Riches which we hoard up for future use, are expos'd in the mean time to a thousand Dangers, and sometimes give us more trouble in keeping them, than they gave us Labour in getting them^d. Lastly, that whatever we leave heap'd together, at our Death, must fall to an Heir, who may not only be unworthy of the Gift, but may despise and deride the Giver^e. As therefore an honest Occasion of acquiring Riches is not to be neglected, so the Mind ought to be put into so even a Temper, as not to lose it self, if it should happen to lose them. *Horace* hath taught us the best way of dealing with Fortune: *Od.* iii. 29.

*Laudo manentem; si celeres quatit
Pennas, resigno que dedit, & meâ
Virtute me involvo; probamq;
Pauperiem sine dote quero.*

Which a great and noble Wit hath thus most happily paraphras'd:
Let her love whom she please, I scorn to woo her;
Whilst she stays with me, I'll be civil to her;

Stop then your swelling Riches as they grow;
And let base Want with its Retinue, show,
At greater Distance, a less dreadful Foe.
Cease your vain Care, let all your Labours cease,
When your large Wish is crown'd with full Success.

I would not labour to abound
In what I might with no less Care,
Like a base Miser or a Spendthrift Heir,
Squander above, or bury under Ground.

The wide Possessor vainly claims
Amongst his Titles and his Names,
The Term of Happy, which should bless
The Man that wisely lives on less.

The Miser's ever poor: Thy Wish should fall
On some fix'd End: who has enough, has all.

I'll use my little Store, and freely take
Without Concern, what fair Occasions lack.
And let my greedy disappointed Heir
Rail when I'm gone, and curse my want of Care.

How vainly wretched do we spend our Years
In useless Labour and in idle Cares?
The Chase of Wealth unwearied we pursue,
And lose the present, for a future View.
But not one thinks how soon his mortal Line
Must sadly break, and end his wild Design.

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But

But if she offers once to move her Wings,
I'll fling her back all her vain Gew-gaw Things,
And, arm'd with Virtue, will more glorious stand,
Than if the Bitch still bow'd at my Command.
I'll marry Honesty, though ne'er so poor,
Rather than follow such a dull blind Whore ^a.

As to Expences, we are to use such a Moderation about them, as most willingly to undertake such as our Duty requires of us, and yet not squander our Fortune at a venture, without Necessity and without Reason ^b. For 'tis equally foolish and absurd, not to apply our Riches to the Ends for which they are given us, and vainly to throw them away on inferior Uses and Designs. The former Vice including numerous Breaches of our Duty; the latter leading the direct way to Debt, Poverty, Rapine, Deceit, and a thousand other Enormities and Mischiefs ^c.

XI. In Reference to Pleasure and Pain, 'tis not only the Permission, but the Advice of Reason, that we avoid as much as possible all unnecessary Trouble and Disquiet; and not only endeavour to keep ourselves free from Grief and Disgust, but likewise to entertain our Senses with such Objects as are agreeable and delightful to them ^d. But to a singular and exquisite Gratification of Sense, the Mind is by no means to be accustomed; in as much as this Kind of Epicurism either weakens and enervates a Man, equally oppressing the Vigor of Body and of Soul, and rendering them both unfit for any serious Business; or steals our Time from better and more necessary Employments; or wastes and consumes our Wealth, and our Conveniences of Life; or often, being join'd with some criminal Practice, draws after it no

other Train, than Trouble, Danger, Damage, and Disgrace. As therefore 'tis the next degree to Madness, to invite Uneasiness and Torment without use or occasion: So it is very rational to allow ourselves a moderate Taste of lawful and innocent Pleasures, without suffering them to overwhelm and to drown us. But this is to be fix'd as an inviolable Rule, That no Pleasure must be purchas'd at so dear a rate, as the Neglect or the Transgression of our Duty.

XII. The last Care which lies on us in the improving and well-ordering of our Mind, is with our utmost Diligence to maintain its Sovereignty over its own Motions and Affections; the greatest part of which do not only impair the Health of the Body and the Vigor of the Soul, but cast such a Cloud on the Judgment and Understanding, as to wrest them violently from the ways of Reason and of Duty. So that a *Coldness of the Passions* is, as it were, the natural Principle of Prudence and Probity amongst Men ^e. It may not be amiss to run with some light Remarks through the Particulars. *Joy* is in itself a Passion most agreeable to Nature. But strict Care is to be taken, that it do not break out on improper Occasions, as upon the Misfortunes of other Men: And likewise, that it do not drive us on any thing that is vain and trifling, or base and indecent. *Sorrow* ^f is a Canker that wastes alike the Body and the Mind. This therefore is, as much as possible, to be remov'd and expell'd; unless so far as the Offices of Humanity oblige us to express our Concern and Pity at the Misfortunes, or at the Deaths of others; and as it is requisite to the great Business of Repentance. *Love* is a friendly Motion to Mankind; yet this is so wisely to be manag'd and mo-

^a Add. *Charron de la Sageffe, l. 1. c. 39. n. 2. f. 9.*
Distat enim spargas tua prodigis, an neque jumptum
Invitus facias, neque plura parare labores.

^c *Lucan. l. 1. ver. 181.*
Hinc Ujura vorax, avidumq; in tempore scenus,
Et concussa fides, & multis utile bellum.

Ovid. Epist. 15. 76. Quasq; male amisit, nunc male quaerit opes.
What Vice has spent by Vice he would repair.

^e Vide *Charron de la Sageffe, l. 2. c. 6. n. 1, 2.*

^b *Horat. l. 2. Epist. 2. ver. 195.*
You may be gen'rous, and yet not profuse;
Vain squandering differs wide from cheerful Use,
Which neither fears to break the present Store
Nor labours in the needless Search of more.

Hence greedy Usury, hence Trusts betray'd,
And War, to Wickedness a gainful Trade.

§. XI. ¹ Mr. *Montagne* has some curious Thoughts on this Subject, which are worthy our Observation. "Nature, says he, like an indulgent Mother, has enjoined us no Actions for our Necessities, but what it is a Pleasure to perform; being invited to them, not by our Reason only, but by our Appetite, so that it is Injustice to corrupt those Rules. When I see *Cesar* and *Alexander* in the midst of their great Employments, enjoying human and bodily Pleasures so fully, I can't think it was for the Refreshment of the Mind, but to strain it, by introducing those violent Actions and laborious Projects, through greatness of Courage, into an ordinary Course of Life. If they had been thought wise Men, what had been their ordinary Calling? This last. The Extraordinary——That the Soul assists and favours the Body, and does not absolutely refuse to share in its Pleasures, but seems to be delighted with them, it is to preserve a Moderation, as the wiser Part, for fear through Indiscretion Men should turn them into Trouble; for Intemperance is the Bane of Pleasures, and Temperance is so far from being any Abridgment of them, that 'tis a sweetning of them. I direct my Soul to look upon both Grief and Pleasure with a View equally regular and firm, but on the one pleasantly, and on the other sowrely; and, according to its Ability, to be as careful to shorten the one, as enlarge the other. The clear sight of good Things is always attended with a distinct Knowledge of Evil, and Grief hath something unavoidable at the beginning, as Pleasure hath something unavoidable in the end, which may cut off all Excess. *Plato (De Legib. Lib. 1. Tom. 2.)* couples them together, and will have it the Duty of Courage to encounter Grief and the charming Delights of Pleasure, with equal Bravery. These are the two Fountains at which whoever draws, where, when, and how he ought, whether he be Citizen, Man, or Beast, he is happy. The first he must take as a Medicine, merely for Necessity, and sparingly; the other to satisfy his Thirst, but not to Drunkenness. Grief, Pleasure, Love, and Hatred, are the first Things an Infant feels. If Reason happens to guide them, they follow it, and that is Virtue." *Essays, Lib. 3. Chap. ult.* There are many other curious Thoughts both before and after. See *Porphy. de Vit. Pythag. §. 39.* and what I have said in my Treatise of *Games, Lib. 1. Chap. 4. §. 8.*

§. XII. ¹ *Quintilian Declam. 296. Magni affectus Jura non spectant, i. e.* "Great Passions are above Laws." See *Lib. 1. Chap. 4. §. 7.*

² "I neither love nor value this Passion (saith *Montagne*) although the World set a peculiar Esteem upon it, and gives it a particular Honour. They call it Wisdom, Virtue, and Conscience. Foolish and vain Commendations! The *Italians* have given it a much properer Name, calling it, a *corroding Humour*. It is a Quality always noxious, always foolish, and the *Stoicks* maintain it to be base and cowardly, as their wise Men have ever esteemed it." *Essays, Lib. 1. Chap. 2.* See also *Charron of Wisdom, Lib. 1. Chap. 33. and Lib. 3. Chap. 29.*

derated by Reason, that it does not throw itself away on an ill Object; that it does not procure base and unworthy Fuel to its Flame; that it does not hinder the Exercise of other Duties, nor degenerate into Disquiet and Disease: That if it settle on a Thing subject to Loss, or to Corruption, it stick not so closely to it, as upon the Failure of it, to make the Soul unable to recollect and to recover its Force³. ⁴ *Hatred* is pernicious as well to the Person who employs it, as to him against whom it is employ'd. This therefore is to be diligently quench'd and stifled, lest it betray us to Injuries and Breach of Duty against our Neighbours. And if some Persons do really deserve our Aversion, yet 'twould be still Folly to create, on their account, Uneasiness and Disquiet to our selves. *Envy* is a most deform'd Monster, sometimes producing ill Effects in others, but always in the envious Person; who like Iron, o'er-run with Rust, not only defiles, but destroys himself continually⁵. *Hope*, altho' a Passion more easy and mild than others, yet it is to be guided with such a Temper, that it do not *make the heart sick*; nor, by aiming at Things either vain and⁶ uncertain, or beyond its Strength and Reach, tire itself to no purpose, and become as *Aristotle* terms it *ἔγρηγορότης ἐνύπνιον*, a *waking Dream*: And that we do not fall under *Lucretius's* Censure and Character;

— *Dum abest quod avemus, id exsuperare videtur Cætera; post aliud, cum contigit illud, avemus; Et sitis æqua tenet vitæ semper hianteis, &c.* l.iii. 1095.

— *Absent Pleasures seem the best; With wing'd Desire and Hastè we those pursue; But those enjoy'd, we straitway call for new. Life, Life we wish, still eager to live on, &c.* Mr. Creech

Fear, as it is a dangerous Enemy to human Minds, so is it a Motion⁸ altogether usefess and unserviceable. For that good Caution which some make to be the Product of it, may arise without its Assistance from a wary Circumspection, and from a Prudence alike untouch'd with Anxiety, or with Consternation. *Anger* is a most destructive as well as a most violent Passion; which is to be resisted with our utmost Strength and Endeavour. And whereas⁹ some alledge in its Favour, that it excites our Valour, and confirms our Constancy in Dangers; its Effect is indeed directly contrary, for it binds a Man's Spirit and Courage, and drives him headlong to his Ruin¹⁰; ¹¹. *Anger*¹², is the most improvident Thing in the World: and seldom acts but what we afterwards repent of. Nearly related to *Anger* is the¹³ *Desire of Revenge*, which when it exceeds a moderate Defence of ourselves

³ Sophocles *Antigone*, ver. 663.

Μὴ νῦν πῶτ', ὦ παῖ, τὰς φρενας ὕφ' ἡδονῆς
Τυναϊκῶς ἔνεκ' ἐκβάλης. —

Euripid. *Hippol.* Coron. ver. 258.

Χρὴν γὰρ μέτρια εἰς ἀλλήλους
Φιλίας θνητῶς ἀνακίρνασαι,
Καὶ μὴ πρὸς ἄκρον μιν ἐλθὼν ψυχῆς
Εὐλύσια δ' εἶδ' ἑργηθεῖα φρενῶν,
Ἀπό τ' ἄσπαδαι, καὶ ξυνθεῖναι.

Never let Woman rob thee of thy Wits.

Men should be mod'rate when they fix their Love,
And ne'er give up their Freedom and their Soul.
The Bands of Passion should be loosely ty'd,
Fit for a wider or a closer Knot.

Our Author here affirms, that the Maxim of *Euripides* agrees exactly to a Subject contrary to what he applies it to, I mean Hatred and Enmity, and that it ought rather to be looked upon as a Precept, not to make too great a Number of Friends. Whereas the Poet only condemns such an Excess of Familiarity as causes us to carry our Kindness beyond the Bounds of Duty, and makes the Loss of the Thing loved intolerable. This is evident from the Verses following, which are an Explication of the foregoing:

Οὐτὸρ τὸ λίαν γ' ἦσαν ἐπαυθῶ
Τῆ μηδὲν ἄγαν.
Καὶ ξυμφήσουσι σοφοί μοι.

⁴ "Anger and Hatred (says *Montagne*) also, are above the Duty of Justice, and are Passions of Use only to them who can't be kept to their Duty by plain Reason. *Utatur Motu animi, qui uti ratione non potest.*" *Essays*, Lib. 3. Chap. 1.

⁵ Ovid. *Metamorph.* l. 2. 781.

— *Videt ingratos, intabescitque videndo
Successus hominum, carpitq; & carpitur una,
Suppliciumque suum est.*

Add. *Bacon's Ess.* 10.

⁶ Horat. Lib. 1. *Epiſt.* 2.

*Invidia Siculi non invenere Tyranni
Majus tormentum,*

⁸ See *Montagne*, Lib. 1. Chap. 17.

⁹ *Aristotle* says that Anger serves instead of Arms to Courage and Fortitude. This is very probable, but they that oppose (*Senec. de irâ*, Lib. 1. Chap. 16.) answer in Drollery: "Tis a kind of Arms of a new Invention, for if we take away other Arms, that will fail us, our Hands can't weild that, but that guides our Hands, that holds us, and we do not hold it." *Montagne's Essays*, Lib. 2. Chap. 31. in the End; read the whole Chapter, which is very fine and instructive.

¹⁰ *Ira furor brevis est*, Anger is a short Phrenzy. *Hor. Lib. 1. Ep. 2.* Add. *Liban. Progymn. Vituper. Iræ.*

¹¹ Statius, *Theb.* 10. 697.

— *Ne fræna animo permittè calenti,
Da spatium tenuemq; moram: male cuncta ministrat
Impetus.*

Pale Envy with pernicious Joys furveys
Others Success; and in Reflection preys
Upon her self; her Sin's her Punishment.

Envy's a Torment that no Art can reach,
Of Cruelty improv'd

¹² Horat. Lib. 1. *Epiſt.* 2.

— *Qui non moderabitur iræ
Infectum volet esse, dolor quod suscipit & mens,
Dum pœnas odio per vim festinat inulto.*

Give not the Reins to Passion in its Course,
Let Silence cool, and Leisure break its Force:
Fury does all things ill

The Man of Rage, whose Mind is not his own,
Must often grieve, and often wish undone
What pass'd when Rashness, deaf to wise Debate,
Prompted the speedy Vengeance of his Hate.

¹³ *Marcus Antoninus* says, "Αἰεὶ τὸ τὸς ἀμύνασαι, τὸ μὴ ἐξομῶσαι." The best way of revenging ourselves is, not to resemble him that has done us an Injury." See what is said in the following Chapter. *Seneca* has a proper Passage for our Purpose, of which our Author quotes a part elsewhere: *Non enim ut in beneficiis honestum est, merita meritis repensare, ita injuriis injuriis; illic vinci turpe est, sic vincere. Inhumanum verbum est, & quidem pro justo receptum, Ultio, & à contumelia non differt, nisi ordine. Qui dolorem regerit, tantum excusatus peccat. Magni animi est, injurias despiciere, ultionis contume-*

and of our Dependents or Concerns, and a just Assertion of our Rights against the Invaders of them, turns, beyond dispute, into a *Vice* ^a.

XIII. In such Duties then, as we have already reckon'd up, doth that culture of the Mind chiefly consist, which all are obliged to undertake, and in the implanting and enforcing which those Persons ought to employ especial Care and Concern, who have the Information and Institution of others committed to their Care. For the want of this Improvement, or the Disposition directly contrary to it, are both repugnant to human Duty, and lay such a Rub in our Way, as it is not easy to get over. And therefore whoever is found destitute of such a necessary Perfection, justly falls under common Censure and Reproach.

There is still behind ¹ a more peculiar culture of the Mind, consisting in the various Knowledge of Things, and of Arts and Disciplines. This cannot be absolutely necessary to the Discharge of our Duty in general: And therefore every one is to moderate his Pursuit of them, according to his own Capacities and Occasions, according to the Causes which drive him on such Searches, and the Fruits which he may fairly hope to obtain from them. Now as for those Arts which administer to the Necessities and to the Conveniences of human

Life, no Man can raise a Doubt about their Excellency and Use. But concerning the Study of Letters, many have been so bold as to maintain, that Learning is not only useless, but destructive to Mankind; and that for this Reason we find it to have been forbidden in so many Commonwealths, above the degree of reading, writing, and managing Accompts. Every one knows the common Reproaches that are cast on Scholars: Of their unfitness for Business, their weakness of Courage, and of civil Prudence, their awkwardness in Gesture, and in Converse; with a thousand more Reflections of the same Nature, which some Men have thought themselves very eloquent in setting out ^b.

Now to come at the Truth of this Question, and to know how to set a just Value on such Attainments, let us first lay this down for an undoubted Principle, that to the acquiring of Wisdom and Prudence, bare Letters are by no means sufficient, without a native Excellency of Soul. If this Happiness be wanting, we can no more produce Wisdom by scholastic Institution, than we can procure a rich Harvest of Corn by ploughing on the barren Sands. For 'tis one thing to be a great Reader, and another to be a prudent Man^c. And *Quintilian's* Judgment is right, when he ob-

liosissimum genus est, non esse visum dignum, ex quo peteretur ultio. Multi leves injurias altius sibi demiserunt, dum vindicant; ille magnus & nobilis est, qui, more magna fera, latratus minorum canum securus exaudit. Minus, inquit, contemnemur, si vindicaverimus injuriam. Si tanquam ad remedium venimus, sine ira veniamus, non quasi dulce sit vindicari, sed quasi utile. Saepe autem satius fuit dissimulare, quam ulcisci, i. e. "We must not behave ourselves under Injuries as under Benefits. These 'tis good to requite, but the other dishonest; there 'tis a Shame to be overcome, here to overcome. Revenge is an inhuman Word, though the Thing which it signifies is looked upon commonly as just and innocent. It differs nothing from an Injury, but in Time. The Aggressor does the first Injury, and he that revenges himself does another in his Turn; this last is but little more excusable than the former. A great and generous Soul contemns Injuries. The most injurious Revenge, and most mortifying to the Aggressor, is to be judged unworthy of Revenge. Many Men in revenging a small Injury, have gained nothing but an Affront more smarting and hard to be forgotten. A Lion hears the Barkings of little Whelps without Regard. But you'll say, By revenging ourselves we prevent others Contempt of us: Very well. But if you use Revenge as a Remedy, do it without Passion and Anger, and behave yourselves, not as if you delighted in it, but as a thing profitable. Nevertheless we must own that it is more advantageous often to dissemble an Injury than to revenge it." *De Ira, Lib. 2. Chap. 32.* See *Justus Lipsius's* Notes on it.

^a Add. *LeGrand. Philosoph. p. 8. c. 12, &c.* ^b *Erasmus (Epist. 12. l. 17.)* giving a Character of a learned Man, adds, *He was skill'd in common Prudence and Knowledge of Affairs, which is generally wanting to Scholars.* *Procop. Hist. Goth. l. 1. Learning and Virtue are different Things; and good Dispositions are most commonly broken and codd'd by rigorous Institution.* *Theodorick us'd to say, 'Twas impossible that they who had been bred up in the fear of the Rod, should ever arrive to such a Degree of Courage, as to contemn Swords and Spears.* *Plato de Repub. l. 7. No free-born Subject ought to be instructed in a servile Manner.* *Seneca Hippol.*

*Ingenia melius recta se in laudem ferunt;
Si nobilem animum vegeta libertas alit.*

Great Souls move straightest in the Paths of Praise,
When left to follow their free native Bent.

Plato Gorg. When they (the Philosophers) apply themselves to the Management of publick or of private Business, they are most contemptibly ridiculous. *Arrian. Epictet. l. 1. c. 11.* calls a meer Scholar, *an Animal that all the World laughs at.* *Add. Montagne l. 1. c. 24. Charron l. 1. c. 39. l. 3. c. 14. n. 19, &c.* ^c 'Tis the saying of an old Poet, *ὄς ἐδέν ἢ μάθησις, ἀν μὴ νῦν παρῆ, i. e. Learning signifies nothing without a Mind, or Genius.*

§. XIII. ¹ We may find several curious Remarks upon this Subject in *Mr. Buddeus's* Discourse, entitled, *De cultura Ingenii*, which is the fifth among his *Selecta Jur. Nat. & Gent.*

² Among the Passages here collected together by our Author, there are two nothing to the Purpose; *viz.* The first is of *Plato*, whom our Author makes to say, That a young Man of honest Condition ought not to apply himself to any Science in a servile Way. His Words are, *Nullam disciplinam ingenium serviliter oportet discere.* In which he seems to mean, That the Study of Philosophy is only agreeable to Slaves. But this is not the Sense of *Plato* in that Place: He only speaks of the Manner of teaching Youth the Sciences: He will not have any Constraint or Force to be used with Children, or have them treated like Slaves, but to be instructed with pleasure; because, as he says, what is put into them by Force can't remain long; besides he adds, by alluring them, their Dispositions are better known. *Ὅτι (ὡς δ' ἐγὼ) ἐδέν μάθημα μὲ δουλείας ἢ ἐλεύθερον χρῆμα δάσκει, οἱ μὲ γὰρ τὰ σώματα πείσοι, βία πειθήσοι, χεῖρον ἐδέν τὸ σῶμα ἀποχρῆζονται. Ψυχὴ δὲ βίαιον ἐδέν ἔμμενον μάθημα - - - Μὴ πείσοι βία - - - τὰς παῖδας ἐν τῆς μαθήματι, ἀλλὰ παίζοντας πέσοι, ἵνα καὶ μάλλον οἴσθαι τὴν καθεσθῆναι, ἐφ' ᾧ ἔχασθαι πέσοιεν, De Rep. Lib. 7. Tom. 2.* This is the very Notion which *Mr. Locke* has so well maintain'd in his *Treatise, Of Education of Children*; see chiefly §. 73, &c. and §. 131. of the last Edition at *Frankfort* in 1708. *Plato* is so far from discouraging any from the study of the Sciences, that he tells us particularly in that Book, what those are that Children ought to learn early, and says, with Reason, that they that cry down Philosophy, as of no Use to the Vulgar, never understood it; and that most of those that meddle with it are not well qualified for it. We will also rehearse some Words of the same Philosopher, and so the Heedlessness of this Author will give an Opportunity to produce some Quotations, which contain some remarkable Thoughts, *viz.* *Τὸ γὰρ νῦν ἀμάχημα (ὡς δ' ἐγὼ) καὶ ἡ ἀίμα φιλοσοφία. δια ταῦτα προσπέτωκεν (ὁ καὶ) ἀρετῆς ἐπιπέτωκε ἐπὶ καὶ ἀξίαν αὐτῆς ἀπένονται, καὶ γὰρ νόθος ἐδέν ἀπένεται, ἀλλὰ γινώσκεις.* The other Passage unforcly applied is, *Seneca's Hippol. c. 459, 460.* where we may plainly see that he is speaking of a clear different Thing, than of a Mind not adorn'd with the Study of Philosophy.

erves,

serves^a, that *Prudence can do more without Learning, than Learning without Prudence.* Therefore that Persons naturally foolish and stupid are not turn'd into great Sages by the Application of liberal Studies, doth no more detract from the Excellency of solid Learning, than it doth from the Efficacy of Medicines, that they are not able to recover dead Men. *To him that bath shall be given,* Matth. xxv. 29⁴. And Learning, as *Horace* says, *Vim promovet instita*⁵; and where that *vis instita*, that *natural Vigor* is wanting, the other Gift is vainly bestow'd.

We may observe farther, that as Learning cannot alter native Folly, so neither can it reform a native Disposition to Wickedness and to Impiety; which, on the contrary, grow more incurable by its Application, drawing thence a Supply of Arms for their open Defence. 'Tis a Remark of *Hobbes*^b, that *without Learning it is impossible for any Man to become either excellently wise, or (unless his Memory be hurt by Disease, or ill Constitution of Organs) excellently foolish*^c.

But the whole Course of those Pursuits which pass under the Name of Learning, is not all of the same Nature, and therefore should not be all rated at the same Price. We may divide Learning then into three Kinds, such as is *Useful*, such as is *Elegant and Curious*, and, lastly, such as is *Vain and Insignificant*⁶. *Useful Learning* may be again divided into three Classes, *Morality, Physick, and Mathematicks.* For *Divinity* stands on its own Bot-

tom, and maintains a separate and a superior Esteem: Tho' if it condescends to enter the common Division of Sciences, it must be placed under this first Head. ⁷ *Morality* is concern'd about the Improvement of Mens Minds, and the Advancement of a social Life; *Physick* hath the Health of the Body under its peculiar Care; and *Mathematicks* are of apparent Use and Benefit in the Invention of so many Arts for the Profit and for the Conveniency of human Life. By that Learning which we term *Elegant and Curious*, we understand such as is not indeed of so necessary Use, as to render the Life of Man less sociable or less convenient upon the Want of it; and yet is worthy of the Enquiries of ingenious Persons, because it either leads us deeper into the Discovery of the secret Works of Nature, or shews the singular Excellency of human Wit and Cunning, or preserves the Memory of Things and Actions, and the Records of Mankind. And such may we reckon the Knowledge of various Tongues, natural Experiments and Speculations, the more fine and subtle Parts of Mathematicks, History of all kinds, Criticism (as it preserves Authors correct and entire) Poesy,⁸ Oratory, and the like. Which are all in themselves excellent, and worthy of Praise, and serve for the Garniture and Ornament of human Improvement; according to which Measure both the Practice and⁹ the Value of them are to be stated and determined.

Vain Learning we call, not only such as is made

^a *Quintilian* Instit. 1. 6. c. 6. *Plus sine Doctrina Prudentiam, quam sine Prudentia facere Doctrinam, certum est.*

^b *Leviath.* c. 4.

^c Add *Bacon*, Essay 48.

³ *Montagne's* Words are, "The most learned are not the less foolish. I love and honour Knowledge as much as they that have it, and if it be rightly used, it is the most noble and powerful Acquirement of Men. But as to those (and there are a vast Number of them) who place their chief Excellency and Worth in it, and refer their Understanding to their Memory, *Sub aliena umbra Latentes* (as *Seneca* speaks, *Epist.* 33.) and can do nothing without a Book; I hate them, if I may so speak, almost as much as a Blockhead. In my Country and Time Learning has done much Service to the Purse, but little to the Soul. If it meets with dull Men, it loads and chokes them, becoming a crude and undigested Mass; if with airy Minds, it purifies their Wills, and so subtilizes their Notions as to turn them into nothing. 'Tis a Thing of almost an indifferent Nature; a very useful Addition to a generous Mind, but pernicious and hurtful to any other: Or rather 'tis a Thing of a precious Use, which can't be attain'd at a cheap Rate. In one Man's Hand 'tis a Scepter, in another's a Fool's Bauble." *Essays*, Lib. 3. Chap. 8.

⁴ This Maxim of the Gospel, which our Author applies in the Stile of a Preacher, is meant in another Sense.

⁵ *Lib.* 4. *Od.* 4. *ver.* 33, 34.

⁶ See *Seneca de Brevitate Vitae*, Chap. 13. and his *Epistle* 88. where there are also many other fine Reflections on Study.

⁷ I wonder our Author hath spoke nothing of Logick, which is absolutely necessary, whatever Science we pursue, if we will do it with Benefit. See Mr. *Clerc's* Preface to his *Latin Logick*, and *The Art of Thinking*; as also the second Volume of *Parrhasiana*, Art. 2.

⁸ This Science though of no great Use, yet is often pernicious, because 'tis very subject to be abused. Let us hear *Montagne* about this Matter: "An Orator of old said, That it was his Work to make small Matters appear great. He is a Cobbler that makes great Shoes for a small Foot. They were whipp'd in *Sparta* who professed any Art of Cheating or Deluding. We may believe that *Archidamus* King of *Sparta* could not hear without Astonishment the Answer of *Thucydides*, when he was asked, Who was best at Wrestling, *Pericles*, or He? He said, *This is very hard to determine, for when I have thrown him to the Ground, he'll persuade them that saw it, that he did not fall, and so win the Prize.* They that mask and paint Women do less Evil, because 'tis no great Matter whether we see them in their pure natural Shapes, or no; but these make it their Business to deceive, not our Eyes, but our Judgments, and to bastardize and corrupt the very Essence of Things. Those Republicks who maintain'd a regular Order and Polity, as the *Cretans* and *Lacedemonians*, set no Value upon Orators. *Aristotle* defined Rhetorick wisely, calling it, *An Art to persuade the People*, but *Socrates* and *Plato* called it *An Art of Soothing and Deceiving*; and those that deny this in the general Description, verify it fully in their Rules. It is an Instrument invented to manage and stir up the Multitude and disorderly Societies, which is never made use of but as a Medicine. Where the Vulgar or the Ignorant, or both, have the Power, as they had at *Athens*, *Rhodes*, and *Rome*, or Things were in mighty Confusion, there Orators were plentiful." *Essays*, Lib. 1. Chap. 51. Where we may find many other fine Things about this Matter. To these we may add the Judgment of a modern Author, whose Authority is of great Weight. "In Discourses by which we seek rather to please and divert, than to instruct and compleat the Judgment, we can't blame such sort of Ornaments as are taken from Figures. But ——— except Order and Elegancy, the whole Art of Rhetorick, all its neat Applications and figurative Expressions according to the Rules of Eloquence, serve only to beget false Notions in the Mind, and corrupt the Judgment; so that in effect they are nothing but perfect Cheats, and consequently ought to be avoided in all Discourses which are designed to instruct; for they must be esteemed great Defects, either in the Language or Person that uses them, so far as Truth is concerned. Hence it may appear how little Regard and Concern Men have for the Truth, since these fallacious Arts have so great Esteem and Reward given them. ——— But Eloquence, like the fair Sex, hath Charms too powerful to admit of any Contradiction, and 'tis in vain to discover any Faults in these Arts of Deceiving, since Men take pleasure in being cheated." Mr. *Locke's Phil. Essay*, &c. p. 642. See also what I have said upon this Subject concerning the Pulpit, in my Preface upon *Tom. II.* of *Archbishop Tillotson's* Sermons. As to Poetry, there is an excellent Discourse in *Art. 1.* of the *Parrhasiana*, *Tom. I.* which 'twill be a pleasure to read.

⁹ We must observe here, that some of these Sciences are necessary, if not in themselves, yet in respect to others, in which no Progress can be made but by their Help; such, for example, is History in respect of Politicks, and Criticism in respect of History and Divinity. See Mr. *Clerc's Ars Critica* in the Preface.

up of false and erroneous Notions; but likewise all those Inventions of crafty or of idle Men, set up to amaze our Minds, and to hinder us from the Pursuits of solid Knowledge. Amongst which, as we must needs reckon many Opinions of the old Philosophers, so very disagreeable to the apparent Nature of Things; so we think it will not be over-severe to join to them the greatest Part of that barbarous Cant, which went under the Name of *School Learning* in the Ages preceding the Reformation of Religion; and which is still resolutely maintain'd by some Men, either because they know no better, or because they are ashamed to unlearn what they have made themselves Masters of with such prodigious Labour, or because 'tis the manifest Interest of the *Papal Monarchy* to keep Mens Wits employ'd on Trifles, for fear they should make some very dangerous Discoveries². Now the greater Proficiency any Person hath made in solid Knowledge, the more he despises these empty and unprofitable Enquiries.

Another Thing to be consider'd by those who dispute about the Usefulness of Learning is this; that the Faults of bad Institution and of hot-brain'd Pedants, are not to be charg'd on the Sciences themselves^b. Is it likely, that sound Knowledge and Wisdom should be learnt in such a School as *Agathias* describes under the Philosophaster *Uranus*? *At their Meetings*, says he, *every one talks as he pleases about the sublimest Matters, and Points of Divine Science; and tho' they are perpetually canvassing these Questions, yet they neither persuade others, nor will ever lay aside the Notion they themselves have taken up, but whatever they be, defend them Tooth and Nail against all Opposers. When the Disputations are over, they depart mutually incens'd, and vent their Rage against one another, like quarrelling Gamesters, in the most abusive and foulest Ribaldry*¹⁰. Thus the Contention ends, without the least Profit given or re-

ceiv'd; and those who went to the Engagement very good Friends, come away most violent and spiteful Enemies^c.

But supposing Things rightly order'd, can any one doubt whether a Person endow'd with good natural Abilities, and instituted in solid Learning, will not discharge the greatest Affairs with more Accuracy and with more Dispatch, than if he depended on the bare Strength of Nature, and neglected other Assurances^d? But then all those who apply themselves to Study, should be exactly careful, first that they direct their Enquiries to a good End, the Service of Life, or the Improvement and Perfection of their Minds; and not make use of them for idle Amusements, or pleasant Methods of passing away Time. *Aristippus*¹² in *Dionogenes Laertius*, being ask'd what Things ingenious Children should be taught, answer'd, *Such as they may use when they come to be Men.* 'Twould not be only shameful, but wicked, if those whose Heads are fill'd with brave Notions and Sentences should do no more good than common Ideots¹³. The *Egyptians* call'd their Libraries *Physick Shops for their Souls*, intimating their Use as well as their Excellency^f. And *Arrian's Epictetus*^g thought he could not give a worse Character of Mens being falsely and insignificantly learn'd, than to say that they were *Lions in their Schools, but meer Vermin out of them.*

They are likewise to take heed, that they do not resolve all Science¹⁴ into bare Authority^h, and Custom of Speech, and an unintelligible Set of Terms; but that they search into the solid Foundations of Things, and build their Schemes on evident Reason. As for those Things which they cannot yet bring to clear Demonstration, there must be no Stubbornness or Obstinacy in maintaining them; but a former Opinion must be willingly quitted, upon a better and a more certain Information; because 'tis very likely another

^a See *Hobbes's Leviath.* c. 46, 47. *Plutarch* (in *Alexand.*) has left this Censure of *Aristotle's* Metaphysicks, that they can afford no real Advantage to the Teacher or the Learner. *Martial.* II. Epig. 86.

*Turpe est difficiles habere nugas,
Et stultus labor est ineptiarum.*

^c 'Tis shameful Men should needless Knots invent
To prove laboriously impertinent.

^b Vid. *Charron*, l. 3. c. 14. n. 21, &c. ^c The Master is describ'd very agreeable to his Scholars, *Bearing above the rest only by Impudence, and Volubility of Tongue*, he appear'd the first Fool of the Herd, and conquer'd those that knew nothing, by knowing just as much. The like Form of Disputation is ridicul'd by *Lucian*, in his *Accusato*, and in *Charron*. ^d *Plutarch* de *Educat.* *The Life of Contemplation is of no Use, unless Action be added. And the Man of Action cannot but mistake and miscarry, without the Assistance of Study and Contemplation.* *Salust. Jugurth.* *The more reason have we to wonder at the Perseverance of those who suffer their Parts and Genius, the best and the noblest Advantage of a Mortal Nature, to rest in Idleness, and to grow dull and barren through want of Culture.* *Ælian.* V. H. l. 7. c. 15. *When the Mitylenians were Masters of the Sea, they impos'd this Penalty on their revolted Allies, that they should not teach Children Letters or Music: Thinking it the most grievous Punishment that could be inflict'd, to live in utter Ignorance of the Liberal Arts.* Add, *Cic. Off.* I. where he speaks of the Study and Search of Truth.

^e *I hate Men* (says old *Pacuvius*, in *Gell.* l. 53. c. 8.) *that are Philosophers in Opinion, and Drones in Business.* *Isocrates* *Encom. Helen.* *The Sophists ought to have instructed their Scholars in Things which are of use in common Life, and to have exercis'd them in the skilful Management of civil Affairs; taking this for a certain Truth, that a competent Knowledge of profitable Points is highly preferable to the most exquisite Attainments in unnecessary Speculations; and that it is much better to excel others a little in great and important Things, than to go far beyond them in small Matters, especially in such as contribute nothing to the Assistance of Life.* *Lucian* in *Conviv.* 'Tis to no Purpose to be wiser, unless we are better. ^f *Diodor. Sic.* l. 1. c. 49. ^g *L.* 4. c. 5.

^h *Horat.* l. 1. Epist. 1. ver. 14. *Nullius addictus jurare in verba Magistri.* Vide *Ciccon.* de *Nat. Deorum*, l. 1. c. 5. *Seneca* de *Vita beata*, c. 1.

¹⁰ See about the Abuse of Disputes, a fine Passage in *Montague's Essays*, *Lib. 3. Chap. 8.* which is copied out with some small Alteration of Words, by the Author of the *Art of Thinking*, *Part 3. Chap. 19. §. 7.*

¹¹ *Plutarch's* Greek is, Ὁ ὅ σοφιστικὸς [εἶ] τὸ περὶ τὴν διανοητικὴν ἀναγωγὴν, ἀναγωγὴν τὴν φιλοσοφίαν, ἀναγωγὴν ἢ πληρωμένην. The Author also quotes here the Saying of an antient Greek Poet, Γεγμματα μαθεῖν δεῖ, καὶ μάθοντα τὸν ἕχεν, He that affects Learning should grow wise by it.

¹² The Greek is, Ὁ ὅ ἐν Ἀείσειππῳ ἐρωτηθεὶς, τίνα ὄντιν αἰ δεῖ τοὺς ἄλλους παιδάδας μαθεῖν; ἔφη, Ὅτις ἀνδρες γενόμενοι χεῖρονται.

¹³ *Isocrates's* Words are, Οὐδὲ [σοφιστὰς] ἐχρῶ ἀρετικῶς ταύτης τὴν περὶ τὴν ἀρετὴν, τὴν μὲν τῶν λόγων ἐξελέγχειν περὶ σοφιστικῶν, ἐν ὅ τῶν ἔργων πόλιν ἢ τὸν χρόνον ἐξελίξασθαι, τὴν ἀλήθειαν διακρίνειν, καὶ περὶ τὰς ἀρετὰς, ἐν αἷς πολιτικῶν ἀρετῶν, τὸν σωφρονιστικῶν ἀρετῶν, καὶ περὶ τὴν ἐμπειρίαν τὴν τῶν γυμνασίων, ἐνδομηρικῶν ὅτι πολλὰ κρείττον ὄντι περὶ τὴν χρησίμων ἐπεικῶν ἀρετῶν, ἢ περὶ τὴν ἀρετῶν ἀρετικῶν ὅτι περὶ τὴν ἐμπειρίαν, καὶ μικρὸν σπεύχειν ἐν τοῖς μεγάλοις, ἢ πολλὸν διαφέρειν ἐν τοῖς μικροῖς, καὶ τοῖς μὲν περὶ τὴν εἶον ἀρετικῶν. *Lucian's* Greek is, Ὅτις ἔδεν ὄρεται ἢν ἀρετῶν ὅτι περὶ τὰ μαθηματικά, εἰ μὴ τις ἀρετῶν καὶ τὴν εἶον ἐννομεῖται περὶ τὸ βέλπον.

¹⁴ *Tully's* Latin is, *Obest plerumque iis, qui discere volunt, auctoritas eorum, qui docere profitentur, desinunt enim suum iudicium adhibere: id habent ratum, quod ab eo, quem probant, iudicatum vident.*

Man may have more quick and more piercing Parts than ourselves; and because every new Day may correct some Mistake in the former. And this teachable Disposition is a most infallible Mark of a generous Mind^a. Lastly, Care is to be us'd, that they do not in such a Manner bury themselves amongst their Books, as to neglect other Duties, and render themselves¹⁶ unfit for the Genius of a civil and sociable Life. For *Pedantry* of Mind is a¹⁷ Vice not peculiar to Scholars, but runs in some Measure through the whole World, and infects Men of all Orders, Professions, and Conditions.

XIV. But although the principal and the most laborious Part of human Improvement is concern'd about the Mind, we must not in the mean time neglect the Body; since² the Mind makes use of its Supports, and can never rise to any great Atchievement, if this Inferior be ill affected. We are oblig'd therefore, as much as in us lies, to secure³ a *sound Body* for our *sound Mind* to lodge in^b; and rather to harden our Limbs and Constitution by long Endurance of Labour, than to soften or break their Strength by Effeminacy and Idleness^c. *Pyrrhus* is said to have made this only Request to the Gods in his daily Devotions, *ὕγιάνων, to be well in Health*, judging this Blessing to contain under it all Degrees of Happiness. Care is likewise to be taken that our bodily Force and Vigor be not weaken'd by Intemperance in Meat or Drink, or by unseasonable and unnecessary

Labours, or any other way. Upon this Account *Gluttony, Drunkenness*, immoderate Use of *Women*, and the like Excesses are to be avoided. 'Tis a famous⁵ Saying of *Democritus* in *Plutarch*⁶, *If the Body should bring an Action of Damage against the Soul, the Soul would be sure to be cast.* Though to this it might be replied, that the Mistakes of the Mind in reference to Food, and Pleasure, and other Things which concern the Preservation of the Body, do all proceed from its yielding to the corporeal Appetites and Affections, contrary to the Admonitions of Reason: So that the Mind is never of itself the Cause of bringing the Body into a worse Condition than ordinary. And therefore to *Democritus's* Saying on one side, we will oppose the no less renown'd Sentence of⁶ *Theophrastus* on the other; *The Soul* (says he) *pays large Rent to the Body for its Dwelling.*

XV. Our Life is given us by our great Creator, as a kind of Course or Race, in which we might exercise our Strength and Abilities by the Direction of Reason: And therefore it is not to be measur'd by so many Times drawing Breath, but by a constant Succession of good Actions. Every one is therefore to take care, that he be not *ἄχρηστος ἀνθρώπος*^c, an *useless Burden to the Earth*; unprofitable to himself, and troublesome to others,² born only to increase the Number of Mankind, and to devour the Provisions of Nature,³ and that he do not only live for the sake of his Palate⁴. Farther, since human Industry com-

^a *Plin. N. H. l. 3. Proem. 'Tis not to be look'd upon as a Wonder, that mortal Creatures should be incapable of knowing all Things. Idem l. 11. c. 3. By my frequent Contemplations on Nature, I have been instructed never to call any Thing incredible that she performs. Diog. Laert. l. 10. In natural Enquiries we are not to proceed according to strict Method and Rules, but according as the various Appearances offer themselves to our Observation, and incline our Judgment. Cicero de Nat. Deor. l. 1. The Authority of those who pretend to teach, often proves a hindrance to those who desire to learn. For by this Means they neglect to apply their own Judgment, and to take every Thing for fix'd and certain, which they bear deliver'd by those whom they admire. Quintil. Instit. l. 3. c. 1. They love the Path which they first trod in, whatever it be. And you will find it a most difficult Task to make Pe sons change such Opinions as they imbi'd when they were Children; because every one rather wishes to have his Trouble over, than to continue it; to have learn'd formerly, than to be a Learner now. Idem. l. 7. c. ult. No body is willing to see a Thing lessen'd, in which he once appear'd great. Yet, as Plato observes, De Repab. l. 5. 'Tis very unjust to be angry with the Truth. And all farther Study would be in vain, if it were unlawful to improve the Discoveries of those that went before us.*

^b To this End it may be useful to read that incomparable Book, *Medicina Mentis & Corporis*, by Mr. *Tebernhausen*. Vide *Diodor. Sic. l. 1. c. 45.* ^c *De Sanitate tuenda. Add. Bacon Eff. 30.* ^d *Homer. Il. Σ. ver. 104.*

^e *Ovid. de Pont. l. 1. El. 6. ——— Mors nobis tempus habetur iners.*
 ——— To be Idle's to be dead.
Sil. Ital. l. 3. ——— Quantum etenim distant à morte silentia vita?
 ——— A silent Life is an untimely Grave.
Theocrit. Idyl. 14. ——— Ποιείν τι δέει οἷς ῥένυ χλωρεῖν.
 ——— Business should be ply'd whilst Age is green. Add *Gell. l. 19. c. 10.*

¹⁵ *Sophocl. Antigone. ver. 725. Ἀλλ' ἀνδρα κήτις ἢ σοφός, τὸ μὴ δαμεν* True Wisdom is not stiff or positive,
Πόλλ' ἄχρηστον εἶδεν, καὶ τὸ μὴ γίνεσθαι ἀγαν. Nor thinks it a Disgrace to be inform'd.

¹⁶ "A Learned Institution leads aside from right and plain Reason, those who keep their Eyes and their Thoughts continually fix'd upon their Books." *Lucian Conviv.*

¹⁷ Here is a Fault in the Original that quite spoils the Sense, *viz. Initium* for *Vitium*; and 'tis surprizing that Mr. *Hertius* did not correct it in his Edition of 1706. Indeed all this is taken, Word for Word, out of the *Art of Thinking, Disc. 1.* and the Author ought to have referred us to the Original where he had it.

§. XIV. ¹ See *Plato* (in *Charmid. p. 464. Ed. Weck.*) *Seneca Epist. 14.* in the beginning, and *Hierocles* upon *Pythagoras's* Golden Verses, p. 153, 182. Edit. Lond.

² *Corpori vaco, cujus futuris animus sustinetur. Plin Epist. Lib. 1. Epist. 9.* The Author alludes to this and the following Passage, though he does not quote them; nor are they distinguish'd by the *Italick* Letter,

³ *Orandum est, ut sit mens sana, in corpore sano, i. e. We must pray for a sound Mind in a sound Body. Juv. Sat. 10. v. 356.*

⁴ *Juvenal. Sat. 11. ver. 34. ——— Buccæ* Fools only make Attempts beyond their Skill;
Nescenda est mensura tuæ ——— A wise Man's Power's the Limit of his Will.

This Verse does not reflect upon an Excess in Eating and Drinking, but upon such exorbitant Expences as Men are at, not considering whether they are rich enough to bear them. For 'tis a Proverb signifying, That Men ought in all Things to examine themselves, what they are capable of, and able to do. Our Author more fitly refers us to *Socrates* his Words about Intemperance, in his *Memoirs* collected by *Xenophon, Lib. 1. Chap. 3.*

⁵ *Plutarch's* Greek is, *Ὅς εἰ τὸ σῆμα διασσωπὲ τῆ ψυχῆ, κακώσεως ἐκ ἀν αὐτῷ σπουδῆν.* The Reflection which our Author makes upon these Words, is not altogether proper, for though Briskness of Spirits, and other Motions of the Body have great Influence upon the Soul, there are other Passions purely spiritual, as Covetousness, &c. which are not less violent, and do much hurt to a good Constitution of Body. See my *Treatise of Games, Lib. 3. Chap. 4. §. 6. and Chap. 5. §. 11, &c.*

⁶ His Greek is, *Πόλλ' τῶ σῆμα πλεῖν ἐνοίκιον ἔ ψυχῆ, in Plur.*

§. XV. ² *Nos numerus sumus & fruges consumere nati. Hor. Lib. 1. Ep. 2. v. 27.*

³ *Juvenal* is refer'd to without Quotation, *Aut quibus in solo vivendi causa palato est. Sat. 11. v. 11.*

⁴ *Cicero. de Nat. Deor. l. 2. c. 16. Mihi enim, qui nihil agit, esse omnino non videtur. i. e. He that doth not shew himself in Action, seems to me to have lost his very Being." But this is nothing to our Author's Purpose. For by these Words one of the*

monly exercises itself one of these two Ways, either in procuring Things necessary for the Preservation of Life, or in discharging the Offices of a social and a civil Condition; which admit of great Variety, and do not all suit alike with all Mens Capacities and Abilities^a; it is manifest that every Man ought with early Care to choose out and undertake such a Course of Life as is honest, profitable, and comporting with his Parts and Strength. In which Choice^b Men are usually determin'd, either by Impulse and Inclination of Genius and Fancy, or by some peculiar Aptness of Body or Mind, or by Condition and Quality of Birth, or by the Goods of Fortune, or by the Authority of Parents, and sometimes by the Command of the civil State; or lastly, by the Invitations of Opportunity, or by the Compulsion of Necessity. ⁵ *Isocrates in Areopagit.* gives us this Account of the old Athenians: *Under so great an Inequality of Fortunes, they could not prescribe to all the same common Exercises; and therefore they put them in different Ways, according to their Circumstances and Condition. The meaner Sort they engag'd in Agriculture and in Trading; well knowing, both that Idleness was the Cause of Poverty, and Poverty a Temptation to Injury and Mischief. So that by removing this Fountain of Vice they thought they should prevent the Evils which us'd to flow from it. As for the more wealthy, then they compell'd to apply their Minds to Horsemanship, Feats of Body, Hunting, and Philosophy: Apprehending that such Employments and Amusements must needs have this good Effect, to make some excel in Virtue, and to keep others from being notorious in Vice.* It was an Ordinance amongst the Egyptians and Indians, that every Man should follow his Father's Trade. *Diodor. Sic. l. i. c. 74. and l. xii. c. 41.* ⁶ The Reason of which Institution is given by *Isocrates,*

in *Laud. Busir.* The like Custom was receiv'd amongst the *Peruvians*, under their antient *Incas*; the Nobility alone being allow'd to improve themselves by the Study of Letters. *De la Vega. l. iv. c. 19.* 'Tis a true Observation of *Xenophon, Cyropæd. l. ii.* *Those Persons arrive at the greatest Height and Perfection in particular Attainments, who have given themselves wholly to some single Pursuit, avoiding Multiplicity of Business and of Enquiry.* As he says well in another Place, *Lib. viii.* *'Tis impossible that a Man who professeth many Arts together should excel in all.* Hence it appears, that not only those Persons do live in a State repugnant to sound Reason, who maintain themselves by Robbery or Villanies; but those too, who withdraw themselves unnecessarily from the common Duties and Offices of Life; such are many of the modern Hermits and Monks, as well as some of the antient Philosophers. But those who chiefly fall under this Censure, are the sturdy and able *Vagrants*, who abuse the Divine Name into a Trade of getting Money, and make GOD, as it were, their Tributary. The Wickedness of these Varlets is the greater, if they voluntarily maim or distort any of their Limbs, so as to render themselves incapable of doing the World any Service, though they should afterwards desire it. 'Tis a Custom very remarkable amongst the *Chinese*, that no Person of sound Strength is permitted to beg, although he be *blind*; such unfortunate Wretches being employ'd in turning Mills, from which Service they earn their Subsistence^c.

Again, since Time runs on with such swift Steps, since Death surprizes Men so often when they least expect it, and is always beyond their Power to avoid; thence it follows, that 'tis our Duty to make an early ⁷ Use of Life, not to begin too long a Thread of Actions, not to lay

Dialogists labours to prove a Providence against the *Epicureans* that denied it: for, says he before, *To maintain that there are no Gods, and to deprive them of all Care and Action, is much the same Thing; for he that doth not, &c.* So that this Passage could not be fitly applied to the Idleness of Man, but by a Preacher: He might much better have quoted *Salust's* Words, who says, "That they only live truly, who are busied in doing good; the idle Man's Life is Death." *Sed multi mortales dediti ventri, atque somno, inuolâ, incultique vitam, sicuti peregrinantes, transiere, quibus profecto contra naturam corpus voluptati, anima veri fuit. Eorum ego vitam, mortemque juxta existimo, quoniam de utraque filetur. Verum enimvero is demum mihi videtur, atque sui anima videtur, qui aliquo negotio intentus, preclari facinoris, aut artis bonæ famam querit.* *De Bell. Catilin. c. 2.* *Maximus Tyrinus* also says, "That Idleness belongs to none but a dead Man, τὸ ἄλογον, ἀπερυσμωσμένη τὴν ὄψιν ἀλλὰ εἴη πλὴν νεκρῆ." *Dissert. 5.* *Mr. Bruyere* also has a fine Passage, which may perhaps agree better than all these Quotations of old Authors. "There are such Creatures made by GOD as are called Men, who have a Soul, which is a Spirit, whose Life is wholly employed, and all their Thoughts taken up in sawing Marble: This is very silly, and a Thing of little Worth; and there are others that wonder at it, but are nevertheless usefess, and spend their Days in doing nothing; this is worse than sawing Marble." *Character of the Manners of this Age, Chap. of Judgments, p. 450, 451.* See what I have laid in my *Treatise of Games, Lib. 1. Chap. 1. §. 1. and Lib. 4. Chap. 6.*

^a Vide *Essais de Morale, Vol. 3. p. 44, 202.*
^b Vide *Mr. Ostervald's Causes of Corruption, Engl. Ed. p. 227, &c.*
^c *Mart. Hist. Sin. l. 1. c. 34.*

⁵ *Isocrates's* Greek is, "Ἀπαντες μὲν ἔν ὅτι πᾶς ἀπὸ τῆς ἀγῆν διατριβῆς ἔχ' οἶοντ' ἰσῶ, ἀνομάτως τὰ πλεῖστ' ἔχοντες ὡς ἢ πρὸς τὸ εὖ εἶναι ἠρησῆεν, ἕως ἐκείσεως προσέταλλον. τὸς μὲν γὰρ ὑποδέεσσαν ἀρίστοντας, ὅτι τὰς γαργύρας καὶ τὰς ἐμπυρίαις ἔβροπον εἰδότες, τὰς μὲν ἀργίας, διὰ τὰς ἀργίας μισομένης τὰς δὲ κερυργίας, διὰ τὰς ἀπορίας ἀνασφέντες ἐν τῷ ἀρχῶν τ' κερῶν, ἀπαλ, ἰάξεν ὄντο, καὶ τ' ἀλλαν ἀμαρτημάτων τ' μὲν ἐκείνων μισομένων. τὸς δὲ βίον ἔχον κερημένους, πλεῖτε ἰππικῶν καὶ τὰ γυμνάσια, καὶ τὰ κωνογέσια, καὶ τ' φιλοσοφίαν, ἠνασκασαν, διαβίβειν ὄρωντες ἐκ τέτων, τοῦ μὲν διαφέροντας μισομένους, τοῦ δὲ τ' ἀλείψων κερῶν ἀποκλήμενους."

⁶ *Isocrates* only says, that *Busiris* would have no Man have more than one Trade or Profession, because 'tis not possible to excel in several. Ἄει πᾶς ἀπὸ τῆς πᾶς ἀπὸ τῆς ἀρχῆς μεταχειρίζεσθαι προσέταξεν εἰδὼς τοῦ μὲν μεταβαλλομένους τὰς ἐργασίας, πρὸς ἐβέν τ' ἐργῶν ἀκριβῶς ἔχοντες τοῦ δὲ ὅτι τ' ἀπὸ τῆς ἀρχῆς σιωπῆς δπιμένοντες, εἰς ὑποβολὴν ἔχασεν ἀποτελεῖσθαι. So that he had better have joined this with what he quotes out of *Xenophon's Cyropæd. Lib. 2. Chap. 1. §. 8. and Lib. 8. Chap. 2. §. 4*

⁷ "The most glorious and principal Work of Man is to live well. All other Things, as to reign, get Estates, build, are but Appendages and Helps for the more ——— They are mean Souls who are buried in Business, and do not know how to disentangle themselves, nor to leave them, and resume them." *Montagne's Essays, Lib. 3. Chap. ult.*

too vast a Train of Designs^a. We ought likewise to have the Accompts of our Life always drawn up in a Readiness, and to harden our Minds betimes against the Terror of *Dying*; that without a trembling Reluctancy, without repining at our Creator's Pleasure, we may resign, when he demands it, what he lent us of his free Bounty, under no Terms of keeping^b.

XVI. How passionately every Man loves his own Life, and how heartily he studies the Security and Preservation of it, is evident beyond Dispute. But it will admit of a Debate whether the bare natural Instinct, which he enjoys in common with Beasts, inclines him to these Desires? or whether he is not engag'd in them by some superior Command of the Law of Nature? For, in as much as no one can, in a legal Sense, stand *oblig'd* to himself, such a Law seems to be of no Force or Significancy which is terminated in my self, which I can dispense with when I please, and by the Breach of which I do no one an Injury. Besides, it looks like a needless thing to establish a Law about this Point, since the anxious Tenderness of Self-love would beforehand drive us so forcibly on the Care of our own Safety, as to render it almost impossible for us to act otherwise^c. If then^d a Man were born only for himself, we confess it would be convenient that he should be left entirely to his own Disposal, and be allow'd to do whatever he pleas'd with himself. But since by the universal Consent of all wise Men it is acknowledg'd that the Almighty Creator made Man to serve him, and to set forth his Glory in a more illustrious manner, by improving the good Things committed to his Trust; and

since *Society*, for which a Man is sent into the World, cannot be well exercis'd and maintain'd, unless every one, as much as in him lies, takes care of his own Preservation (the Safety of the whole Society of Mankind being a thing unintelligible, if the Safety of each particular Member were an indifferent Point) it manifestly appears, that a Man by throwing aside all Care of his own Life, tho' he cannot properly be said to *injure* himself, yet is highly injurious both to Almighty God, and to the general Body of Mankind^e.

It was not rightly infer'd in the Argument we just now mention'd, that the Law of Nature did not concern itself with this Matter, because Instinct did before drive us on the like good Resolution. We should rather imagine, that the Force of Instinct was superadded (as an able Second) to the Dictate of Reason; as if this Help alone could scarce make a Tie strong enough to keep Mankind together. For indeed, if we reflect on the Troubles and Miseries that constantly wait on human Life, and do so far outweigh that little and mean Portion of Pleasure^f, which through a perpetual Repetition grows every Day more flat and languid, so that we must needs loath it in every Enjoyment; and if we consider farther, how many Men have their Days prolong'd only to make them capable of more Misfortunes and Evils; who is there, almost, who would not rid himself of the Burthen of Life, as soon as possible, if Instinct did not render it so light and so sweet; or unless so much Bitterness or so much Terror were join'd to our Notion of Death? And yet who is there almost who would not break through the bare Opposition of Instinct, had not the Com-

^a *Martial*, l. 1. Epigr. 16.

*Non est, crede mihi, sapientis dicere, Vivam :
Sera nimis vita est craftina : vive bodie.*

Horat. l. 1. Epist. 4.

*Inter spem curamque, timores inter & iras,
Omnem crede diem tibi diluxisse supremum ;
Grata superveniet, quæ non sperabitur, hora.*

Sil. Ital. Lib. 3. ver. 141.

*Brevitasque vetat mutabilis horæ
Prolatare diem.*

Horat. Carm. i. 4.

*Vitæ summa brevis spem nos ætat inchoare longam.
The shortness of our mortal Line
Forbids a longer Thread in our Design.*

^b *Sil. Ital.* ix. 376.

*Virtus futile nomen,
Ni decus adfixerit patiendo, ubi tempora leti
Proxima sint.*

Ars longa vitæ brevis. Hippocrat.

The Future is the Tense of Fools. Delay
May make to Morrow late; be wise to Day.

Whilt Hopes, Cares, Fears, and Frets to plague you join,
Think every Day your last that is to shine,
'Tis not expecting makes a Blessing dear :
An Hour's Reprieve is worth a vulgar Year.

Time, ever on the Post and on the Change,
Forbids us to delay.

Plin. N. H. l. 7. c. 40. *One Day passeth Judgment on another, and the last on all.* *Arrian Epictet.* l. 1. c. 1. *Τὸν ὥραον ἐλθόντα, εἴτε τὸτε τεινύξουαι πῶς ; ὡς περὶ ἡμῶν ἢ τὰ ἀλλότρια προδίδουσα.* *When my Time is come, I will be prepar'd immediately to leave the World. After what manner? Why, like a Person who is restoring what was lent him.* *Add, M. Antonin.* l. 12. f. 12. and *Bacon*, Essay 2. See also *Montagne's* Essays, Lib. 1. Chap. 19.

^c Compare *Ant. Matth. de Crim. Prolegom.* c. 3. f. 4.

§. XVI. ¹ *Senec. de Benef.* Lib. 4. Chap. 17. *Supervacuum est enim, in quod imus, impelli : quemadmodum nemo in amore sui cobortandus est, quem adeo dum nascitur trahit.* 'Tis needless to drive us, whither we are going of our own accord. No one wants an Exhortation to be persuaded to love himself, since he drew in that Principle with his first Breath. See also *Xenophon's* Memoirs of *Socrates*, Lib. 1. p. 423. *Ed. Steph.*

² The Obligation of preserving and completing a Man's self, proceeds directly from Self-love plainly, which we have proved, §. 15. Note 1. of the foregoing Chapter, to be one of the principal Fundamentals of all our Duties. Indeed Instinct alone cannot always so forcibly conquer our own Idleness and Negligence, as to make us know sufficiently, what is really profitable, or hurtful, to our own Self-preservation, as Experience teaches. On the other side, 'tis sometimes too fierce, and sometimes too blind, to leave to its Direction entirely, a thing that requires so much Circumspection, as the Care of ourselves, and our true Interest does, which ought to be managed in such a manner, as not to be prejudicial to Religion, the Rights of others, or the good of Society.

³ *Mr. Bayle* has over and over prov'd in his *Hist. and Crit. Dictionary*, that the Miseries of Life are more and greater than its Comforts. The places are marked in his Index. See also my *Treatise of Games*, Lib. 3. Chap. 1. §. 3.

mand of our Creator secur'd us with a much stronger Bar and Restraint? "Nature, says *Quintilian*, hath invented this chief Device for the "Preservation of Mankind, to make us die unwillingly, thus enabling us to bear so vast a Load of "Misfortunes as falls to our Share, with some Patience and Quiet." And *Socrates* in *Xenophon* declares it to be *σφδ̄ δουρατῶν τεχνικῶν*, the Artifice of a wise Workman, or Builder, "to have implanted in Men a Desire of producing Offspring; "in Women a Desire of nursing and bringing them up; and in all, when brought up, a vast "Desire of Living, and as great a Fear of Death." And this last Motive is the main Security of every Man from the Violence of others. For how easy were it to kill, were it not so hard to die? Hence he presently becomes Master of other Mens Lives, who hath once arrived at the Contempt of his own. And the Regard that others have to their own Safety, is the best Defence of mine.

XVII. 'Tis a Question of more Difficulty, whether at all, or how far a Man hath Power over his own Life, either to expose it to extreme Danger, or to consume it by slow Means and Degrees, or lastly, to end it in a sudden and violent manner. Many of the Antients allow'd a Man an absolute Right in these Points, and thought he might either voluntarily offer his Life as a Pledge for another's, or devote it freely, without any such Design of preserving the Life of his Friend; or whenever he grew weary of Living, might prevent the Tardiness of Nature and Fate. *Pliny* calls the Ability to kill one's self, the most excellent Convenience, in the midst of so many Torments of Life. Whom we can by no means excuse from flat Impiety, for daring to think so abjectly of the greatest Gift of Heaven. It is our Business to examine what seems most agreeable, in this Case, to the Law of Nature. And here we may take it first of all to be true beyond Dispute,

^a *Quint.* Declam. 4. *What Satisfaction, O wretched Mortals, can it prove, to keep the Soul for so many Years, or, if Nature allow'd it, for infinite Ages, in the unpleasant and wearisome restraint of the Body? If we diligently weigh and examine all our Joys, all the Pleasures, which in this universal Scene of the World, either attract our Sight, or flatter our Senses, we shall find the whole Life of a Man to be no more than a single Day. They must be low and abject Minds which are not tired with this poor Circulation of Actions. So that he who by Application to honest Arts is able to understand what is the Perfection of Goodness and true Happiness, will think no Death untimely: and those who refer the Design of our Being chiefly to the Mind and Soul, must every Day be forfeited of Life. Ye expect I should now give an account how many things there are in this short Stage, which we ought to avoid and decline; that I should set our Fears and our Calamities against our Joy and our Success. Let us then weigh those dear Comforts for which we weary the Gods with vain Petitions, and on the account of which we complain of the Shortness of Life: And what are they, but Vanity, Greediness, Luxury, and Lust? And shall not we be asham'd for the sake of such scandalous Privileges, to bear Weakness, Grief, and tedious Discontents; and even to court their stay, when we have an opportunity of throwing them off and escaping?* ^b *Xenophon* Apomn. l. 1. ^c *Add. Charron*, l. 2. c. 11. n. 8. ^d See *Montagne's* Essays, l. 2. c. 3. ^e *N. H.* l. 2. c. 7.

^f 'Tis the Expression of *Seneca*, *Ita dico, quisquis vitam suam contempserit, tuæ Dominus est.* Epist. 4. and *Mr. Corneille*, in his *Cinna*, makes *Æmilius* speak thus of *Augustus*;

Whatever Care or Order thou dost take,
He that despises his own Life, doth make
Himself master of thine.

Act. 1. Scene 2.

This Verse is also found in *Seneca's* Tragedy, *Hercul.* Oct. v. 443.

Contempserit omnes ille, qui mortem prius.

He contemns all Men that contemns Death.

§. XVII. ' Mr. *Montagne's* Words are here remarkable: After he has alledged the Reasons of such as hold it lawful to kill themselves, he goes on and says, "Several hold, that they may not leave this World without the exprefs Command of him that sent them into it; and that God hath placed us in it, not for ourselves only, but for his own Glory, and the good of others, and he is to release us when he pleases, and not we ourselves; that we are not born for ourselves, but for our Country; and therefore the Laws call us to an account of Ourselves, for their Interest, and have an Action of Murder against us. Nay, we are in another World punished as Deferters of our Stations, as *Virgil* (in his *Æneids*, Lib. 6. v. 434, &c.) speaks:

*Proxima deinde tenent mæsti loca, qui sibi lethum
Insontes peperere manu, luccique perosi
Projecere animas*

Those doleful Souls in the next Rooms of Hell,
Who, without Guilt, did slay themselves, do dwell.

'Tis an Argument of much Bravery and Courage, rather to lug the Chain that clogs us, than break it. *Regulus's* Constancy is more commendable than *Cato's* Despair. 'Tis Indiference and Impatience that hastens our Pace; Virtue will not turn its back upon any Misfortunes, it rather seeks out Trouble and Affliction, as its Nourishment. The Threatnings of Tyrants, Fires, and Executioners, rather invigorate and enliven it. (See *Horace*, Lib. 4. Ode 4. v. 55, &c.) And *Seneca's* *Theb.* or *Phœnix*. Act. 1. ver. 190, &c.

*R-bas in adversis facile est contemnere vitam,
Fortiter illè facit, qui miser esse potest,*

Mart. Lib. 11. Epigr. 57.

"It is a Sign of Cowardice, and not of Courage, to cast a Man's self into the Grave, under an heavy Tombstone, to avoid the Strokes of Fortune. Courage will not be beat out of its Way, or Course, by any Tempest that attends it.

Horat. Od. iii. 3. *Si fractus illabatur Orbis,
Impavidum ferient ruinæ.*

If the World falls about his Ears,
The Ruins will not raise his Fears.

"Most commonly, when we are flying from other Troubles we fall into this. By avoiding Death we sometimes run headlong to it.

Hic rogo, non furor est, ne moriari, mori? *Mart.* Lib. 2. Epigr. 80.

"As those who, for fear of a Precipice, throw themselves headlong from it. (See *Lucan.* Lib. 7. ver. 104, &c. and *Lucretius*, Lib. 3. v. 79, &c.) Contempt of Life is ridiculous, for our Being is our All. Things which have a more noble and excellent Being, may slight ours, but 'tis against Nature for us to despise it ourselves, and bring ourselves to neglect it. 'Tis a particular Disease, which no other Creature is troubled with, to hate and despise ourselves. 'Tis a like Folly to desire to be another Thing than we are. The Consequence of such a Wish does not concern us so much, as contradict and hinder itself. He that desires to be made an Angel, does nothing for himself, he desires nothing better; for having no Existence, how can he be sensible of, or rejoice at that Amendment? The Security, Indolence, Impassibility, and Privation of the Evils of this Life, which we purchase by dying, bring no Profit to us. In vain he avoids War, that can't enjoy Peace; and in vain he flies from Pain, who has no way to get Ease. All Inconveniences are not so heavy, as to make us desirous to die to avoid them; for since there are so many sudden Changes in human Affairs, it is hard to judge when we are come to the full end of our Hopes. *All Things*, says an antient Proverb, are full of Hope to a Man as long as he lives. *Essays*, Lib. 2. Chap. 3. *Madam Desboulivieres* has some fine Verses to this purpose:

*In greatness of Courage Men do not know
When they are got to the Rank of the Hero's,
Those Greeks and Romans who themselves slew,
That they might make themselves famous,*

*But Disgrace follows them hard, as they deserve.
By one Death they have escaped a thousand.
How sweet it is to troubled Hearts to sigh!
It is more noble, more difficult*

*What great Thing have they done? They're departed this Life;
To bear a Misfortune, than to be delivered from it.*

Diversè Reflex Stanza x. Tom. 1.

that since Men both can and ought to apply their Pains to the Help and Service of another; and since some certain kinds of Labour, and an overstraining Earnestness in any, may so affect the Strength and Vigor of a Man, as to make old Age and Death come on much sooner, than if he had pass'd his Days in Softness, and in easy Pursuits; and one may, without Fault, voluntarily contract his Life in some degree, upon account of obliging Mankind more signally, by some extraordinary Services and Benefits^a. For since we do not only live to our selves, but to GOD, and to human Society; if either the Glory of our Creator, or the Safety and Good of the general Community require the spending of our Lives, we ought willingly to lay them out on such excellent Uses^a. *Pompey the Great*, in a time of Famine at *Rome*, when the Officer who had the care of transporting the Corn, as well as all his other Friends, intreated him not to venture to Sea in so stormy a Season, nobly answered them, *That I should go 'tis necessary, but not that I should live.* And *Achilles* in *Homer*, when his Fate was put to his Choice, prefer'd a hasty Death in the glorious Adventures of War, to the longest Period of Age, to be pass'd idly and ingloriously at home.

XVII. Farther, in as much as it frequently happens, that the Lives of many Men cannot be preserv'd, unless others expose themselves, on their behalf, to a probable Danger of losing their own; this makes it evident, that the lawful Governor may lay an Injunction on any Man in such Cases, not to decline the Danger, upon Pain of the severest Punishment. And on this Principle is founded the Obligation of Soldiers, which we shall enlarge upon in its proper place. 'Tis a noble Saying of *Socrates* in *Plato's Apology*, *In whatever Station a Man is fix'd, either by his own Choice, as judging it the best, or by the Command of his Superior; in that he ought resolutely to continue, and to undergo any Danger that may assault him there; reckoning neither Death nor any other Evil so grievous as Cowardice and Infamy.*

Nor doth it seem at all repugnant either to *natural Reason*, or to the *Holy Scriptures* (which com-

mand us to *lay down our Lives for our Brethren*) that, without any such rigid Injunction of a Superior, a Man should voluntarily expose himself to a Probability of losing his Life for others; provided he hath good hopes of thus procuring their Safety, and that they are worthy of so dear a Ransom: for it would be silly and senseless, that a Man should venture his own Life for another whom 'tis impossible to preserve; and that a Person of Worth and Excellence should sacrifice himself for the Security of an insignificant *paltry Fellow*^b. We conceive it then to be lawful, that a Man may either give himself as a Surety for another, especially for an innocent and worthy Person, or as a Hostage for the Safety of many, in the Case of Treaties; upon pain of suffering Death, if either the accus'd Person doth not appear, or the Treaty be not observ'd. Tho' the other Party, to whom he stands bound on either of these accounts, cannot fairly put him to Death upon such Failure; as we shall elsewhere make out. But that those vain Customs of Mens devoting themselves out of Foolhardiness and Ostentation (such as we observ'd to be in use amongst the *Japonese*) are contrary to the *Law of Nature*, we do not in the least doubt. For there can be no Virtue in an Action where there's no *Reason*. Nor do we pretend to maintain, that the *Law of Nature* obliges a Man to prefer the Lives of others to his own; especially supposing the Cases and Circumstances to be equal. For besides that the common Inclination of Mankind is an Argument to the contrary, we might alledge the Testimony of Witnesses beyond all Exception, allowing a Man to be always *dearest to himself*, and *Charity* still to *begin at home*^c.

XIX. It remains that we examine, whether or no a Man, at his own free Pleasure, either when he grows weary of Life, or on the account of avoiding some terrible impending Evil, or some ignominious and certain Death, may hasten his own Fate, as a Remedy to his present or to his future Misfortunes^d. On this Point we have a famous Saying of *Plato*, in *Phædo*, frequently mention'd with Honour and Commendation by

^a *Statius* Theb. X. 609.

Felix, qui tanta lucem mercede relinquet.
Happy, who at a Price so noble sells
A fleeting Life!

Horat. Carm. III. 2.

Dulce & decorum est pro patria mori.
Mors & fugacem persequitur virum,
Nec parcat imbellis juvenæ
Poplitibus, timidoque tergo.

How sweet, how glorious is the parting Breath
With which our injur'd Country's Peace we buy!
In vain the Coward flies: whilst swifter Death
Hangs on his Back, nor spares the quivering Thigh.

^b *Grotius* ad *Jonab*, C. 1. v. 12. *If one Man does well in offering to die for the Preservation of many (as Phocion told Demosthenes) how much more is he in Justice oblig'd to this, who apprehends himself to be the Cause of the common Danger?*

^c See 2 *Corinth.* viii. 13, 14. 1. 14. *Prin. D. præscript. verb.* l. 6. C. *de servit.* l. 2. f. 9. D. *de aqua plus. arc.* Nor can any Argument for the contrary be drawn from L. 5. f. 4. D. *Commodati*, L. 1. f. 28. D. *de Sancto Silan.* Add, *Tract. de Principiis Justi & Decori*, p. 122, &c. ^d Vid. *Lipsii* Epist. Cent. 2. Ep. 22. Dr. *Donne's* *Biaðvãð*, Ess. *de Morale*, Vol. 1. p. 50.

² In fine, We may observe with Mr. *Titius* (*Observ.* 115.) That the effect of these great Undertakings is not always so certain, that we need believe that they thereby infallibly shorten their Days. Moreover, the equal Poise between *Self-love* and *Sociableness*, doth not consist in an indivisible Point, but contains a considerable Extent. Lastly, *Sociableness* sometimes prevails more than *Self-love*. See what I have said in the foregoing Chapter, §. 15. Note 5.

§. XVIII. ¹ The Greek. *Ὁυ ἀν τις ἐαυτὸν τάξει, ἢ γνησίω βίη, ἢ ἑσθ' ἀρχοῖ τυχῆ, ἐνλαῶσα δέη, ὡς ἐμοὶ δοκεῖ, μὴ οἷα κινδυνώσεται, μηδὲν ὑπολογιζόμενον, μήτε δάνατον, μήτε ἀλλό τι μηδὲν πρὸ τῶ ἀσχεῖ.*

² There would be not only Folly, but great Injustice in it; for the Law of Nature positively ordains, That all other Things being equal, every one should love himself better than others, and prefer his own Interest before theirs, in a thing of that great Consequence as Life is, which is the Foundation of all the good Things of this World. By a much stronger Reason, he that runs the hazard of his Life, can't endure that a Person of Merit and Worth to Society, should sacrifice himself to save his.

§. XIX. ¹ *Plato* plainly treats here of the private Instructions which the *Pythagoreans* gave their Scholars, just admitted into their Schools, and in which they discover the Reasons of the most abstruse and private Doctrines of their Philosophy. These secret Instructions they call'd their *Ἀπόρρητα*, about which see *Scheffer, De Not. & Constit. Phil. Ital. Chap.* 10. What *Plato* says before of *Philolaus*, a *Pythagorean* Philosopher, will not allow us to doubt, that the Reason which he sets down here, as very obscure and hard to comprehend, is no other than what the *Pythagoreans* give, to prove that *Self-murder* is not allowable. And 'tis the same exactly which *Cicero* attributes to *Pythagoras*, *De Senec. Chap.* 20.

Christian Writers: *ὡς ἔν πνευματι ἐσμὲν οἱ ἀνθρώποι, καὶ ὁ θεὸς ἐπιτέθεικεν ἐκ ταύτης λύειν, ἢ δ' ἀποδιδοῦσκειν.* We are plac'd, as it were, upon the Guard, in Life; and a Man must not rid himself of this Charge, or basely desert his Post. Which Lactantius hath express'd more fully in his *Divine Institutions* ^a; As, says he, we did not come into the World upon our own Pleasure or Choice, so neither must we quit our Station otherwise than by the Command of him who gave it us; who put us into this Tenement of the Body, with Orders to dwell here, till he should please to remove us. It is worth while to hear how Plato ² describes the Self-murderer, whom he hath condemn'd to a disgraceful Burial: He that kills himself, preventing by Violence the Stroke of Fate, being forced to his End neither by the Sentence of the Judges, nor by any inevitable Chance, nor on the account of defending his Modesty in extreme Danger; but thus unjustly condemning and executing himself, out of Cowardice and Unmanliness of Spirit. Aristotle hath well seconded his Master: To die, says he ^b, either to get rid of Poverty or of Love, or of any other Trouble or Hardship, is so far from being an act of Courage, that it rather argues the meanest degree of Fear. For 'tis Weakness to fly and to avoid those things which are hard and painful to be undergone^c. Grotius^d hath observed, that Persons guilty of Self-murder were excluded from decent Honours of Burial, both amongst the Gentiles and the Jews. But amongst the latter, one Case is commonly excepted, and allow'd as a just Reason for killing one's self; and that is ³ when a Man finds he shall otherwise be made a Reproach to GOD, and to Religion. For acknowledging the Power over our Lives not to be in our own hands, but in GOD's, they took it for granted, that nothing but the Will of GOD, either manifest or presumptive, could excuse the Design of anticipating our Fate. As Instances of this excepted Case, they alledge the Examples of

Sampson, who chose to die by his own Strength, when he ⁴ found the true Religion expos'd to Scorn in his Person and Misfortunes: And of *Saul*, who ⁵ fell on his own Sword, lest he should have been derided and insulted over by GOD's and his Enemies; and lest, if he should have yielded himself Prisoner, the Slavery of his Country and Kingdom should inevitably follow. For the Jews are of Opinion, that *Saul* recover'd his Wisdom and Honour, as to the last Act of his Life; in as much as after the Ghost of *Samuel* had foretold his Death in the Battle, yet he refus'd not to engage for his Country and for the Law of his GOD; whence he merited eternal Praise, even by the Testimony of *David*; who likewise commended so highly the Piety of those Men, who honour'd their Prince's Relicks with a decent Burial.

Some extend this Exception and Allowance to many other Cases which bear a Resemblance to the former. And the Foundation they build upon is this, that as no Man can be properly bound or oblig'd to himself, so no Man can do an Injury to himself, when he takes away his own Life. As for a Man's being engag'd by the Law of Nature to preserve himself, they say the Reason of this is, because he is constituted and appointed by GOD for the maintenance of human Society, which he must not by any means forsake, like an idle Soldier, who runs away from the Post assign'd him in Battle: And that therefore my Obligation to save my own Life, is not a Debt to myself, but to GOD, and to ⁶ the Community of Mankind. So that if that Respect to GOD and to Mankind be taken off and be remov'd, the Care of my Life is recommended to me only by *Sensitive Instinct*, which not rising to the Force of a Law, an Action repugnant to it cannot be accounted sinful. On these Considerations, they think the Case of those

^a Div. Instit. l. 3. c. 18.

Senec. *Phaniss.* ver. 190.

*Non est Virtus
Timere vitam; sed malis ingentibus
Obstare, nec se vertere ac retro dare.*

Martial, l. 11. Epig. 57.

*Rebus in angustiis facile est contemnere vitam;
Fertiter ille facit qui miser esse potest.*

Virgil assigns a Place in Hell to Self-murderers:

*Qui sibi lethum
Injunctes peperere manus, Lucemque perossi
Projecere animas.*

Procop. Hist. Goth. l. 4. To throw away our Life when there can be no Advantage, is precipitate Madness: And tho' such a blind Fierceness hath some vain Shadow of Courage, yet it will always pass for Folly, in the Judgment of wise Men. Ammian. Marcellin. l. 25. c. 4. If we consider right, it is just the same Fearfulness and Cowardice, to desire Death when we ought not, and to refuse it on a proper Occasion. Add, Roger de Bramin. p. 2. c. 19. Nicol. Trigan. de Regno Chinæ, l. 1. c. 9. Charron, l. 2. c. 11. n. 18. ^d L. 2. c. 19. §. 5.

² De LL. l. 9. "Ὁς ἂν ἑαυτὸν κτείνῃ, ἢ ὅ τι ἐμαρτυρίας βία ἀποσερῶν μοῖραν, μήτε πόλεως ταξάσῃς δίκην, μήτε πατριωτῶν, καὶ ἀντικρὺ παρορῶσῃ πύχνη ἀναγκασθεῖς, μηδὲ ἀιγόνης πνός ἀπόρου, καὶ ἄβῃο μετ' ἀλαχθῶν, ἀργίας ἢ καὶ ἀνανδρίας δειλία ἑαυτῶ ἀνὴρ ἀδίκον ἐπιπέθῃ ——— πένες δ' ἔδ) πῶς ἔπω φθαρῆσι, πρῶτον ἢ καὶ μόναι, &c. See a Passage of Mr. Montagne's quoted §. 17. Note 1. where you'll find an Abridgment, and a lively Representation of the principal Reasons which can be alledged against those who believe that Self-murder is allowable, and some other Passages which our Author puts in the Margin here.

³ This Reason does not excuse Self-murder at all. Supposing that we do not any thing to dishonour GOD on our part, 'tis not our Fault, if profane Persons take an occasion unjustly to ridicule their Creator; and this does not at all authorize us to violate the express Prohibition both of the Natural Law and Revelation, in departing out of this Life without his Leave.

⁴ 'Twas done rather out of Revenge against the *Philistines*, and GOD punished him by hearing his Prayers. See Mr. Le Clerc on Judges, xvi. 28. 30.

⁵ See Mr. Le Clerc upon 2 Sam. i. 14.

⁶ Aristotle observes (Ethic. l. 5. c. 15.) that those who are guilty of their own Deaths, are more properly injurious to the Commonwealth than to themselves; and that therefore they deserve the Ignominy commonly inflicted on their Relicks.

Persons

^b Ethic. l. 3. c. 2.

Valour is not, to be afraid of Life,
But bravely to resist impending Woes,
And never to submit or to retire.

Cowards in Misery may court their Fate;
He's brave that dare persist Unfortunate.

————— They
Who prodigally throw their Souls away;
Fools, who repining at their wretched State,
And loathing anxious Life, sullen'd their Fate.

Mr. Dryden.

Persons deserves a favourable Judgment, and at least a kind Pity rather than a rigorous Censure, who lay violent Hands upon themselves, when they see that they shall otherwise infallibly suffer a Death of Torture and Ignominy from their Enemies; since it cannot be for the Interest of the Publick, that they must needs die in so infamous a manner: Or else, when they see such an Injury likely to be offer'd to them, as if they undergo, they shall be ever after scorn'd and derided by the rest of Mankind. Of the former sort are those who seeing themselves condemn'd to Death, either by cruel Enemies abroad, or bloody Tyrants at home, have wilfully prevented the Stroke; either to avoid the Tortures and the Shame of a publick Execution, or to procure some Benefit to their Friends or Families by this Expedient. Thus *Tacitus*, *Ann. VI. 29.* giving an Account of some of the *accus'd Persons* under *Tiberius*, who made themselves away, observes, that *the Fear of the Executioner render'd these Acts very frequent.* And that *whereas such as suffer'd Death in publick were denied the Privilege of Burial, and had their Goods confiscated; those who died by their own Hands were decently interr'd, and their Last Wills stood good with full Effect; these Indulgences serving as a Reward for their Haste.* And here, by the way, we may remark, that *Martial's* Censure doth not always hold good,

———— *Furor est, ne moriari, mori;*

———— 'Tis mad to die for fear of Death;

For, as *Æschines*^a hath well distinguish'd, *To die is not so terrible, as to bear the Infamy that attends some kinds of Deaths.*

The other sort of Persons whose Death we observ'd to be so favourably interpreted by some Casuists⁹ are those Women and beautiful Boys, who have kill'd themselves to avoid the Violation of their Chastity^b. And in their Behalf they urge this plausible Excuse, that being assaulted with such a Danger as they could not otherwise, unless by a Miracle, escape, they might well conclude, that their Almighty Sovereign and General now gave them a Dismission, and that

they might well presume on the Consent and Leave of Mankind, to whom they were already lost: It being no one's Interest that they should not anticipate their Death for so little a time, to avoid the feeling of such Tortures and Abuses as might, perhaps, tempt them to yield to a more grievous Sin: And inasmuch as it seem'd unreasonable to condemn generous Souls to such a Necessity, as that they must wait for the Sword of Villains, who would enhance the Bitterness of Death, by their foul and ignominious Usage^c.

But to leave this particular Point without venturing at a Determination; thus much we take to be evident, that those who voluntarily put an end to their own Lives, either as tired out with the many Troubles which commonly attend our mortal Condition; or from an *Abhorrence* of Indignities and Evils, which yet would not render them disgraceful Members of *human Society*; or through Fear of such Pains and Torments as by resolutely enduring, they might have become useful Examples to others; cannot be well clear'd of the Charge of *Sinning against the Law of Nature*. *Sir Thomas Moor* seems to be of another Opinion in his *Utopia*, but his Reasons do not prevail with us to alter our Judgment.

But those are, on all Accounts, to be exempted from the Crime of Self-murder, who lay violent Hands on themselves, under any Disease robbing them of the Use of Reason. Many Persons likewise who have run into voluntary Destruction, upon an exceeding Fright and Consternation, have on that Account been excus'd by moderate and candid Judges^d.

It ought to be observ'd farther on this Head, that it makes no Difference whether a Man kill himself, or force others to dispatch him. For he who at such a Time, or on such Occasion, ought not to die, is by no means excus'd, if he makes use of another Man's Hands to procure his Death; since what a Man doth by another, he is suppos'd in Law to have done himself, and must therefore bear the Guilt or *Imputation* of the Fact. *David* was guilty of the Death of *Uriah*, tho' he got it effected by the Hands of the *Ammonites*. So

^a Orat. de fals. Legat.

^b Vid. *Paul. Diac.* l. 15. & *Euseb.* H. E. l. 8. c. 24, 27.

^c *Cicero* *Tusc.* Qu. I. 30.

Cato left the World rejoicing that he had met with an Opportunity of Dying. For that *Divine Power* which dwells in us, forbids us to depart without his Leave. But when Heaven presents a fair Occasion, as formerly to *Socrates*, now to *Cato*, and offers to other Persons, I dare engage, that a truly wise Man will quit with Joy this Vale of Darkness, to enter into Happiness and Light. And yet such an one will not violently break the Chains of his Prison; for this the Laces forbid him; but he will go out quietly and fairly, when God is pleas'd to give him his Enlargement; as if his Release from the Restraint were sign'd by the proper Magistrate and Power. Compare *L. 3. f. 6. D. de bonis eorum qui ante sententiam.* L. 45. f. *D. de jure fisci.* Add, *Quintilian*, *Declam.* 4. *Ant. Matthæ:* de *Crim.* ad l. 48. tit. 5. c. 1. f. 9. *Grot.* ad *Judic.* c. 16. v. 30.

^d *2. Curtius*, L. 4. c. 16. *When Fear hath once got Possession of the Mind, Men grow desperate, and dread nothing but the first Object of Terror.* *Lucan.* L. 3. ver. 684.

Mille modos inter, lethi mors una timori est,

Qua cœpere mori —————

Amongst a thousand Ways of Death, they fear

That only which in part they feel —————

Mors timore appetita, *Death desired thro' Fear*, is a Phrase with *Sueton.* Add, *L. 14. f. 3. D. quod metus causa*, and *Montaign's* *Essay*, L. 1. c. 17.

⁹ *Tacitus's* Words are: *Nam promptas ejusmodi Mortes, metus carnificis faciebat; & quia damnati, publicatis bonis, sepultura prohibebantur; eorum, qui de se statuebant, humabantur corpora, manebant testamenta, pretium festinandi.*

⁹ This is not a sufficient Reason to justify Self-murder, for they ought to comfort themselves with the Testimony of their own Conscience, which can't blame them in that Respect, and bear patiently the unwarrantable Censures of Men, and the other Inconveniences which may redound from such a Violence. True Chastity, as *Mr. Thomajus's* speaks very well (*Instit. Jurispr. Divin. Lib. 2. Chap. 2. §. 76.*) is a Thing which no Man can take away by force, and 'tis without Reason that they are less esteem'd so, who have been obliged to yield to a greater Power.

were *Pilate* and the *Pharisees* guilty of that of our Saviour, tho' they did not themselves fatten him to the Cross, but order'd the Soldiers to do it. Altho' the Person who lends his Hands to such a Service, may likewise bring himself in for a Share in the Fault. For this Reason we don't admire the Reflection which *Florus*^{a 10} makes on the Deaths of *Brutus* and *Cassius*; *Who*, says he, *doth not wonder, that these wise and great Persons did not employ their own Hands in their concluding Strokes? Perhaps it was part of their Persuasion, that they ought not to defile themselves by such Attempts, but that in delivering their most holy and most pious Souls from the Confinement of their Bodies, they should make use of their own Judgment, in the Intention, and of other Mens Wickedness in the Execution.* For if it were unlawful for them at that time to end their Lives, it was indifferent whether they fell by their own, or by others Violence. But if it were lawful, how can any Wickedness or Guilt be imputed to the Servants who assisted them? Tho' the Historian might, in some measure, be excus'd, if the same Custom were practis'd in his Country, which *Æschines* mentions amongst the *Grecians*, that if a Person murth'rd himself, the Hand that perform'd the Deed was buried apart from the rest of the Body^b.

To conclude, since we deny that a Man hath absolute Power over his own Life, it is plain that

we cannot approve of those Laws, which in some Countries either command or permit People to make themselves away. Such a Law *Diodorus Siculus*, L. ii. c. 57. reports to have been in force amongst the Inhabitants of the Island *Ceylan*, ordaining, "That the People should live only to such a Number of Years, which being run out, they eat a certain Herb that put them into their long Sleep, and dispatch'd them without the least Sense of Pain." *Add*, L. iii. Ch. 33. And thus too amongst the *Ceans*, all Persons above Sixty Years old, were obliged by the Laws to poison themselves, to supply Food for the rest^c. Though *Ælian* gives this better Reason for the Practice; "That having arriv'd at such an Age, they were conscious to themselves, that they were no longer able to promote their Country's Interest by their Service; growing now towards Stupidity and Dotage^d." *Procopius*, Hist. Goth. L. 2. relates a Custom of the *Heruli*, by which those who were weaken'd and disabled, either by Disease or Age, voluntarily sent themselves out of the World: The Wives hanging themselves at the Tombs of their Husbands, if they lost them in this manner. *Ælian*, L. iv. C. 4. reports somewhat to the same purpose of the *Sardi*, and the *Bebrycei*; and *Strabo*, Lib. ii. and *Herodotus*, *Clio* in fin. of the *Massagetæ*, who may be consulted at Leisure.

^a Lib. 4, 7.

^b Orat. contra Ctesiphont.

^c *Strabo*, L. 10. *Heraclia*. de Polit. Vide, H. Lib. 3. Chap. 37.

^d *Add*, *Valer. Max.* Lib. 2. Chap. 6. f. 7, 8.

¹⁰ Thus *Deianira* speaks in *Seneca* (*Herc. Oct.* ver. 996.)

————— *Dextera sternar tua,*
Sed mente nostra.

————— *Yours shall be the Hand of Fate,*
And mine the Will.

C H A P. V.
Of SELF-DEFENCE.

The CONTENTS of every Paragraph of the fifth Chapter.

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|---|--|
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TO Self-preservation, which not only the tenderest Passion, but the exactest Reason recommends to Mankind, belongs *Self-defence*, or the warding off such Evils or Mischiefs as tend to our Hurt, when offer'd by other Men. This Defence of ourselves may be undertaken two Ways, either without *hurting* him who designs the Mischief against us², or else by *hurting* or *destroying* him. As to the former Expedient, no sensible Man can question, but that it is altogether lawful and blameless. But concerning the latter, many have entertain'd a Scruple; inasmuch as by putting it in Practice, we hurt or destroy a Man like ourselves, with whom we are oblig'd to live in a *social* manner, and whose Death seems to be as great a Loss to Mankind as our own. And besides, because a forcible Repulse of an Aggressor may cause more Disturbances and Outrages in human Society, than if we should either decline the Mischief by flight, or patiently yield our Body to it, when an Escape is impossible. Yet that the Defence of ourselves may not only be undertaken the first of these Ways, but³ when that proves ineffectual, even with the Hurt of the Assailant, we are inform'd, as well by the Judgment of Reason, as by the concurring Testimony of the learned and unlearned World. 'Tis true, Man was created for the maintaining of Peace

with his Fellows; and all the Laws of Nature, which bear a Regard to other Men, do primarily tend towards the Constitution and the Preservation of this universal Safety and Quiet. Yet Nature is not backward in giving us an Indulgence to fly even to *Force*, when we cannot by other Means secure ourselves from Injuries and Assaults. For the Obligation to the Exercise of the Laws of Nature and the Offices of Peace, is *mutual*, and binds all Men alike; neither hath Nature given any Person such a distinct Privilege, as that he may break these Laws at his Pleasure towards *others*, and the others be still oblig'd to maintain the Peace towards *him*. But the Duty being *mutual*, the Peace ought to be *mutually* observ'd. And therefore when another, contrary to the Laws of Peace, attempts such Things against me, as tend to my Destruction, it would be the highest Impudence in him to require me at the same time to hold his Person as sacred and inviolate; that is, to forego my own Safety for the sake of letting him practise his Malice with Impunity⁴. But since in his Behaviour towards me he shews himself *unsociable*, and so renders himself unfit to receive from me the Duties of Peace, all my Care and Concern ought to be how to effect my own Deliverance from his Hands; which if I cannot accomplish without his *Hurt*, he may impute the Mischief

Mr. BARBEYRAC'S NOTES on Chap. V. § I.

¹ This is well stated by the Roman Lawyers, for they lay it down as a Maxim of the Law of Nations (which we call *The Law of Nature*) *Ut cum atque injuriam propulsemus: Nam jure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, jure fecisse existimetur*, Digest. Lib. 1. Tit. 1. De Justit. & Jure, Leg. 3. See also Lib. 9. Tit. 2. *Ad Leg. Aquil. Leg. 4. in princ.* Indeed, as Mr. Titius observes (*Observ. CXX.*) there may be some Opposition between Self-love, and the Duties of a Community, either in respect to the good Things which can't be possessed by two Persons at the same time; and in this Case Self-love ought often to shew itself; or in respect of Evil, which equally threatens others and ourselves. Our Author, in this and the next Chapter, treats of this last Opposition, which happens either by the Act of him towards whom we ought otherwise to observe the Laws of the Community, or without any Act on his part. He explains the first Case in this Chapter, and clears the other in the following; for the Fact of the other, which produces this Opposition, is either malicious, or not. He treats of the first in this Paragraph, and will speak of the other in §. 5.

² We may add this Explication here, which our Author uses in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 12. *i. e.* Taking good Heed that he shall not gain his Ends in insulting us; or that he may have Reason to fear the ill Success of his Attempt.

³ We ought to observe this Limitation well; how unjust soever the Attempt of the Aggressor may be, the Community obliges us to spare him, if we can do it without Prejudice to ourselves. By this just Temper we may, at the same time, preserve the Rights of Self-love, and Duties of Community. The Roman Lawyers have owned this Truth, *Injuria autem* (say they) *occidere intelligitur, qui nullo jure occidit. Itaque qui latronem [Insidiatorem] occiderit, non tenetur, utique SI ALITER PERICULUM EFFUGERE NON POTEST, Institut. Lib. 4. Tit. 3. De Leg. Aquil. §. 2.* See Mr. Nood's excellent Treatise, *Ad Legem Aquilianam*, Chap. 4. p. 15, 16.

⁴ *Herodian*, Lib. 4. c. 10. Οὐκ ἔστι βύλορον, ἢ ἀναρχῆσιν, ἢ μέλλοντα πίστευαι δευδρ, ἀρμόσσει μᾶλλον, ἢ ὑπομῆσαι, τῆ μὲν γὰρ συμφορᾷ τῆ πρὸς ἑαυτῶν, ἢ ἀποσυνδείας λόγῳ παρεμποδισθῆναι. In extremum Danger, not only Necessity, but Reputation obligeth us rather to avenge an Injury than sustain it. Since should we fall by such a Mischief, at the same time that we are pity'd as unfortunate, we should be reproach'd as Cowards.

to his own Wickedness, which put me under this Necessity^a. For otherwise, all the Goods which we enjoy either by the Gift of Nature, or by the Procurement of our own Industry, would have been granted us in vain, if it were unlawful for us to oppose those in a forcible Manner, who unjustly invade them. And honest Men would be expos'd a ready Prey to Villains, if they were never allow'd to make use of Violence in resisting their Attacks. So that upon the Whole, to banish *Self-defence* though pursued by Force, would be so far from promoting the Peace, that it would rather contribute to the Ruin and Destruction of Mankind. Nor is it to be imagin'd that the *Law of Nature*, which was instituted for a Man's Security in the World, should favour so absurd a Peace, as must necessarily cause his present Destruction, and would in fine produce any Thing sooner than a sociable Life.

II. But now, whether a violent *Self-defence*, and such as is join'd with the Hurt or the Slaughter of the Assailant be an obliging and a necessary Duty (as we have already shewn it to be a lawful and an allow'd Practice) is a Question not so easy to be determin'd. In stating which Point we do not speak of Soldiers, or of the Guards hired by Travellers, who whilst they defend themselves with the Slaughter of the Enemies or the Robbers, at the same time protect and deliver their Country, or the Men who have put themselves under their Care. But we confine ourselves to the Case of those who are excited to make such Defence by their own particular Danger^b. Now there are some who will have this Defence to be so strict a Command, that it cannot be taken off even by Civil Constitutions; and consequently that he who suffers himself to be kill'd, when he might have violently resisted, ought to be look'd upon as guilty of *Self-murder*^c. Which is something like the Custom in *Sparta*, where the *Ephori* punish'd a Man for having suffer'd many Persons to injure him^d.

The Author of the Treatise, *De Principiis Justitiae & Decori*, declares in favour of this Opinion; and the Argument he proceeds on is to this Purpose,

^a Hor. 2. Sat. 1. v. 44.

*Nec quisquam noccat cupido mihi pacis: at ille
Qui me commorit (melius non tangere, clamo)
Flebit.* ———

Hurt not a peaceful Man; but if you try
My Patience far (You'd best keep off, I cry)
You may repent your Boldness. ———

^b Plutarch in Phocion: 'Ο δὲ Φωκίων, ἐπὶ τὸ προσέειπαι ἄνδρα [Νικάνωρα] μὴ μὲν χαλαρῶν ἐγκαλέμεν, ἔφη πιστεύειν μὲν πρὸς Νικάνωρα, καὶ μὴ δὲν ἀπ' αὐτῆς προσδοκᾶν δεινόν. εἰ δὲ μὴ μάλλον ἐθέλειν ἀδικεῖν, ἢ ἀδικῶν φάνερον γένεσθαι. τὸ τοῦ ὑπὲρ αὐτοῦ μὲν ἂν τινι σκοπεῖν εἰ δίκαια χαλοκαγαθῶς κελύχθαι, καὶ γενναίως. ὁ δὲ εἰς παρρησίαν ὑπεκινδυνεύων σωτηρίαν, καὶ ταῦτα στρατηγὸς καὶ ἄρχων, καὶ οὐδὲν μὴ μείζον πρὸς θανάτου, καὶ προσεβύτηεν τὸ πρὸς τοῦ πολιτείας δίκαιον. When he was censur'd by some for letting Nicanor, the Ambassador of Cassander, enjoy his Liberty, he answer'd, that he did not distrust the Man, nor apprehend any Danger from him: But if Things should happen otherwise, he would be glad to let the World see how much more willing he was to receive an Injury than to offer one. This, if he look'd no farther than his own Person, was spoke with Honesty, as well as with Bravery. But if a Man by such an Act of Generosity endangers the Safety of the State, especially being himself in a publick Trust, I question if he does not violate that greater and more sacred Law, his Obligation to his Country.

^c Vid. Zeigler ad Grot. Lib. 1. c. 3. f. 3.

^d Plutarch Lacon. Institut.

^e Isocrates advers. Callimach. Is it not ridiculous and absurd, that he should petition you for Mercy in such a Danger, as purely depended on his own Will; which he freely run into at first, and from which he has still Means of being deliver'd?

§. II. ¹ Add Grot. Lib. 1. c. 2. & c. 3. f. 3. To whom we may apply that Saying of Seneca (Phœniss. 294.)
Vitam tibi ipsi si negas, multis negas.
By choosing Death yourself you hazard the Lives of many.

² In general, no Man can release his own Rights, or renounce his private Interests, when they are intermixed with another's, who will not allow us to do it. To this add the Example of Phocion alledged by our Author. See Letter^c.

³ Mr. Veltbuisen does not say this, 'tis our Author's Comment.

⁴ Liban. Declam. 23. Ἄ γδ ἂν ἐπαθεν, καὶ ἀδικῶν, ταῦτα αὐτὸν ἔδρασαν ἡδίκηκός. He who unless he had offer'd one Injury, had not suffer'd another, is equally the Cause of both.

old Maxim might be so well apply'd to this Case, *that any Man may renounce his own Privilege, provided he doth not thereby injure a third Person:* Which *Quintilian* hath thus express'd and illustrated, *This, says he, is the Nature of all Benefits, that they do not impose a Necessity, but grant a Power. Whatever Expedient you invent to procure the Honour or Safety of another, loses the Name of a Privilege, if you compel him to make use of it. Run over all the Institutions and all the Rights of Mankind, and you shall never observe that the Law is so fondly solicitous for our Good, as to extort that from us, by which it intends only to do us a Favour.*

III. But in order to more exact Judgment of *Self-defence*, and to know by what Rule it should be moderated, and how far it may rightly proceed: First of all we should examine, whether the Defendant live in a *State of Nature*, or of *civil Society*; since the Bounds of this Practice are much narrower in the latter than in the former Condition. Which Difference not being observ'd by many Authors, hath been the Occasion of their delivering such Things in general concerning *unblameable Self-defence*, as will hold true only under one particular State. But now if we first distinctly explain what Right we have to such a Practice in a *State of Nature*, it will appear with great Ease and Evidence, how far, and on what Grounds

this Liberty is stinted, in Persons living together under a civil Government.

It is then a good Rule of Prudence, that a wife Man ought to try all other Expedients, before he proceed to Arms or Violence¹. For inasmuch as all Combat and forcible Contention is of uncertain Issue, it would be advisable first to make Experiment of safer Remedies and Redresses, e'er we enter the Lists, and come to a formal Engagement². Thus if I can cut off the Invader's Access to me, I am a Fool if I unnecessarily meet him hand to hand. And if I can defend myself with a Wall or a Gate, 'tis absurd in me to expose my Breast³ to my Foe. Farther, Wisdom advises us to put up a small Injury, if we can with convenience, and so rather to recede in some degree from our *Right*, than by an unseasonable Defence, to expose ourselves to a greater Danger: Especially if that Thing or Concern of ours, upon which the Attempt is made, may be easily made amends for, or repair'd³. Thus a Man who hath a Debt owing him from another, suppose to the Value of ten Pounds, would act more wisely, in my Judgment, if he made up the Business by any kind of Composition, than if he engag'd in a troublesome Suit, where the Lawyers Fees might exceed the main Sum which he endeavours to recover^b.

⁵ Declam. 7. *Omnium beneficiorum ista natura est, ut non sit necessitas, sed potestas. Quicquid in honorem alicujus inventum est, desinit privilegium vocari posse, si cogas. Coacta, si videtur, jura percurrere, nusquam addo pro nobis sollicita lex est, ut quod prestat, extorqueat.* See Mr. *Daumal's Civil Laws*, Tit. 1. Sect. 4. But we ought here to observe, contrary to our Author's Hypothesis, That *Self-defence* is not so inseparable a Right, that we may use it or not, at all Times as we see fit. The Law of Nature does not allow us to defend ourselves only, but it positively orders us thereby to love ourselves, and do all we can for our Preservation. See Mr. *Vander Muelen's Commentary on Grotius*, Lib. 2. Chap. 1. §. 8, & 9. and Mr. *Titius's Observat.* 121. If we were not under this Obligation, it would follow, that any Man might suffer himself to be kill'd as often as he was attack'd, and no Man need to be concern'd for his Preservation. Now, who sees not that this tends to the Destruction of a Community, and to deprive it of the most honest Men? Besides, such as survive would have a fair Occasion to leave the World. It is true, that the Creator hath provided by a natural Instinct, that every one should defend himself, inasmuch that we are more apt to offend on the other side than this; but this shews, that *Self-defence* is not a Thing absolutely indifferent in its own Nature, or barely permitted, so that it is always at our Liberty to suffer ourselves to be slain. All that has been said, tends only to this, that a Man may, yea, ought sometimes to renounce his Right of defending himself, as we shall shew below. And that in these last Cases, the Fear, into which the Greatness of Danger, and the Force of our Natural Instinct throws us, may excuse or free them from Blame, who save their own Lives by the Loss of theirs whom they ought rather to have spared with the Expence of their own. We may also believe on the other hand, that if one sacrifices his Life through great Kindness, or some other weighty Consideration which he has for the unjust Aggressor, who does not of himself deserve such a Sacrifice, he is excusable, for yielding to a Motive of that Nature, as to be of Force enough to overcome Self-love and Fear of Death. See §. 5. Note 1. following.

§. III. ¹ *Omnia prius experiri verbis, quam armis, Sapientem docet.* Ter. *Eunuch. Act. 4. S. 7. v. 19.*
² Terent. *Eunuch. Act. 4. Sc. 6. Tu quod cavere possis, stultum admittere est, i. e.* "Tis extreme Folly to meet a Danger that you may avoid."
³ *Plautus Amphitr. Act. 2. Sc. 2. v. 71.*
Bacchæ bacchanti si velis adversarier,
Ex insanâ insanio rem facies, feriet sapius:
Si obsequas, una resolvas plagas.
Oppose the raving Gypsy in her Fit,
She'll get more Fury, and you'll get more Blows.
Be gentle, and her consecrated Wand
May then excuse you with a single Stroke.

See also *Trucul. Act. 4. Scen. 2. v. 55.*
Martial, Epig. 64. L. 6.
Sed miserere tui, rabido nec perditus ore
Fumantem nasum vici tentaveris urfi.
Have Pity on yourself, and, tho' you'r stout
As Mastiff Breed, don't take a Bear by th' Snout.

² *Liban. Declam. 1. Πρώτων μὲν γὰρ τὰ δίκαια τῷ λόγῳ περιεῖναι λαμβάνειν, ἀλλὰ μὴ τοῖς ὅπλοις ὀπίστησάν, ἀνθρωπινῶ-
 πειν δὴπότεν, It is a more worthy and more manly Way of Proceeding, not to run presently to Arms and Violence, but to try first if our Right may not be recover'd by fair Means.*

³ *Martial. l. 7. Epig. 64.*
Ab miser & demens! viginti litigat annis
Quisquam, cui vinci, Gargilliane, licet?
Theocrit. Idyll. 22. v. 180.
Ὁ ἰγὼ τοῖς ἔοικε χακῶ μέγα νέκθ' ἀναίρειν.

Pindar, Olymp. Od. 10. v. 47.
Νέκθ' ὃ κρείσσων ἀποδέδ' ἀπεισν.
And Isthm. Od. 4. v. 52.
*Ἔστιν ἀγάνεια τύχη; καὶ μαρνα-
 μένων, πῶς τὴν τέλθ' ἀρεῶν ἰκέσθαι.*
 It was very wise Conduct that which *Isoocrates* reports of himself (*de Permut.*) *These*, says he, were the Arts I made use of; never to offer any Damage or Trespass: And, in case I receiv'd any Injury from others, not to make myself my own Redresser; but to refer the

Would any Wretch prolong his Suit, a Score
 Of doubtful Terms, that might be cast before?
 _____ 'Tis wise to close
 A great Contention with a little Loss.
 'Tis hard to end a Quarrel with the Great.
 War is as blind as Chance: The doubtful Day
 Oft cheats the Fighter, e'er it end the Fray.

At the same time it may be observ'd, that the injur'd Party doth not owe this Patience and Moderation to the Person from whom he receiv'd the Damage; who, as far as lay in his Power, hath broke off all Duties of Humanity and Commerce with him; but to his own Security and Quiet. And therefore if a Man provok'd by Anger or Pain should happen to exceed these Bounds, he does no Injury to the Provoker, but can only be said to have⁶ acted imprudently, or without sufficient Temper and Discretion.

But when by the Application of these moderate Expedients, I cannot secure myself from the impending Danger, I am then to oppose Force with Force, and am compell'd to enter the Combat. During which, if the injurious Party continue to push on his malicious Designs against me, and do not declare his Sorrow and Repentance for his Fault, and his Willingness to renew the Peace, I am at liberty to kill him. And although he do not directly attack my Life, as suppose he only attempts to load me with a great Number of Blows, or to maim me by the Loss of some Member not vital, or to rob me of my Goods; yet since he hath once broke the Peace with me, and since he gives me no Caution or Security, that he will not from these lesser Injuries proceed to much greater, I may even in these Cases make use of *Extremities* for my own Deliverance. For at the same Instant, as a Man professes himself my Enemy (which he doth while he injures me without shew of Repentance) he gives me, as far as 'tis in his Power to give it, an⁷ infinite Liberty of proceeding against him. Some indeed there are who do not approve of this Liberty of resisting in infinitum: For (say they) there can be no natural Right of Defence and of Resistance against Injuries, but such as is consistent with that Order, which is the chief End and Design of a social Life. Therefore in resisting by natural Right, this Exception is always understood, unless the social Order be infring'd by my present resisting, to which Order Nature hath the first and chiefest Regard. And if this Caution were not interpos'd, upon our failing to

maintain that necessary and natural Order, we should render Society itself unfociable^a. But we do by no means assert, that this infinite Liberty of resisting is to be actually made use of in all Cases; because several intervening Considerations may prevail with the injur'd Party not to proceed to Extremities: But only that the injurious Person cannot complain of hard Measure, though he be repell'd with the utmost Violence and Severity. The Life of Men would be then indeed most properly render'd unfociable, if, in a natural State, any Bounds were set to the Liberty of Resistance. For what an Age of Torments should I undergo, if another Man were allow'd perpetually to lay me on only with moderate Blows, whose Malice I could not otherwise stop or repel, than by compassing his Death? Or if a Neighbour were continually to infest me with Incurfions and Ravages upon my Lands and Possessions, whilst I could not lawfully kill him, in my Attempts to beat him off? For since the chief Aim of human Sociableness is the Safety of every Person, we ought not to fancy in it any such Laws, as would make every good and modest Man of necessity miserable, as often as any wicked Varlet should please to violate the Law of Nature against him. And it would be highly absurd to establish Society amongst Men on so destructive a Bottom as a Necessity of enduring Wrongs. Wherefore he is to be reckon'd a foolish and base Traytor to his own Safety, who whilst an Enemy persists in the Exercise of Hostility, vainly spares his Life, and chooses rather to perish than to destroy. For the Law of Nature obliges me thus far only to be mild and merciful towards my Enemy, as that if he shall express a Sorrow for what is past, and an Inclination to desist from farther Injury, shall make Retribution for my present Damage, and give Security for his not offending hereafter, I may entirely spare and pardon him, and, renewing the Peace, may perform all friendly Offices towards him, as he shall towards me⁸. For *meer Revenge*, which proposes no Aim but the Grief or the Destruction of

Controversy to the Decision of Friends. Lucian. Eunuch. *This is highly ridiculous, that Men who pretend to Philosophy, should engage in Suits and Quarrels; whereas they ought to compose, in a Friendly Manner, their Differences of the greatest Consequence.* Add. l. 4. f. 1. *D. de alienat. jud. mut.* That which Polybius (in Excerpt. Pieresc.) applies to the Achæans, proves a Truth in many other Cases, εἰ μὴ ταχέως ἀπολωμένοι ἔκ ἀν' ἐσώθημεν: Unless we had been quickly lost, we had never been sav'd. Seneca, de Irâ l. 2. c. 14. Reason often prescribes Patience, when Anger calls for Revenge: And when we might have escap'd smaller Evils, we sink ourselves into greater. Some upon the Resentment of one affronting Word have been cast into Banishment: They have incur'd the severest Troubles, by not being able to digest a slight Injury; and been made arrant Slaves, by their disdain of a petty Encroachment on their Liberty. See Stobæus, Serm. 19. To this may be apply'd, the * Interpretation of Matth. v. 25. offer'd by Gratius, l. 1. c. 1. f. 8. Though others will have that Saying to relate to Men who are under Oppression, and who cannot obtain Justice. (Comp. Lamentat. iii. 28, 29, 30.) Whereas in a well-ordered Commonwealth every one is oblig'd to apply himself for Redress of Injuries to the Judge (Levit. v. 1.) not for the sake of Revenge (Levit. xix. 17, 18.) but with a good Design of defending the Laws and Justice of his Country, and to hinder wicked Men from reaping any Gain, or any Pleasure from their Crimes. Lyfias, Orat. contrâ Theomnest. I take it to be a Sign of a most litigious and a most ungenerous Temper, to sue a Man for an affronting Word. It was a Law amongst the Cyrenians, that the Ephori should bring the litigious Citizens before the Court of Justice, and impose a Fine on them, with the Addition of a Disgrace. Arrian, Epictet. l. 1. c. 28. Suppose I stand as deaf as a Stone when I am abus'd; what Advantage can the Slanderer reap from his Calumny? Seneca de Irâ. To despise Injuries is a Mark of a great and generous Mind. 'Tis one of the most grating Ways of being reveng'd upon a Man, by seeming not to think him worthy our Revenge. He is truly brave and noble, who like some Princely Beast, can hear the puny Dogs barking about him with Scorn and Security.

* This Explication does not give us the true Meaning of CHRIST's Words, whose Sense is certainly this, as Mr. Le Clerc expresses it: "JESUS CHRIST would not have us to go to Law for small Matters, lest having suffer'd one Injury, we bring upon us another. Moderation much gains and sweetens Mens Minds, and sooner makes an end of Quarrels than the Penalties which the Magistrates inflict according to Law. The Revenge which is exercised by their Means, is often the Cause of irreconcilable Animosities between Families."

⁶ These are a confused Heap of Citations.

⁷ Antiphon. Orat. 11. Οὐ γὰρ πῦτα, ἀλλὰ μείζονα καὶ πλείονα δίκαιοι οἱ ἀρῶντες ἀπιπέθαι εἰσὶ, i. e. "The first Aggressors in an Injury not only deserve to suffer the same, but much greater Evils."

⁸ It is a Rule of Hesiod's, Oper. & Dier. l. 1. v. 710.

Ἡγήτ' ἐς φιλότῳτα, δίκην δ' ἐθέλεισι παραγαῖν,
Δέξασθαι.

But if the injurious Friend the Wrong repair,
And beg a Re-admission to thy Care,
Reject him not _____

him who hath hurt us, is detested and discarded by Nature, as falling under the Vice of Cruelty. Whence it follows, that the Remembrance of Enmities and Contentions ought as soon as possible to be defaced out of our Minds. On this Account, as we find the Story in Tully, the Thebans were accus'd in the General Dyet or Council of Greece, for setting up a Brazen Trophy of their Victory over the Lacedemonians; inasmuch as it did not become one Grecian State to fix an eternal Monument of their Quarrel with another. For it seems, the Custom was to raise their Trophies only of Wood, to prevent their long and reproachful Continuance⁹.

But further, Persons in a natural State may not only repel a present Danger that threatens them, but having got rid of that Fear, may pursue their Success against the Assailant, till such time as, upon sufficient Caution given, they shall think themselves secure of him for the future. Concerning which Caution this is to be observ'd; if a Man having injur'd me, shall presently after, repenting of what he had done, desire my Pardon, and offer Reparation of the Damage, I am then oblig'd to be reconcil'd to him, and cannot fairly demand any farther Security than his Faith and Promise. For his voluntary Repentance, and Application to me for Pardon,¹⁰ are a sufficient Argument of his firm Resolution to offer me no Wrong for the future. But he who must be brought to Repentance by main Force, and who then only thinks of begging Pardon, when his Strength fails him in prosecuting his Violences; such an one is not safely to be trusted on his bare Promise: And therefore in order to our farther Security, we must either cut off from him all Power of doing mischief, or we must lay some such Bond or Confinement on him, as shall hinder him from appearing ever after formidable to us: Inasmuch as his Malice having been once express'd, and never rightly purg'd or amended, hath render'd him a just Object of our perpetual Suspicion.

IV. But that which is a lawful Practice in Men living under a natural Liberty, who are to work out their Safety by their own Strength, and according to their own Judgment, can by no means be indulg'd in the Members of Civil States; and

especially in regard to their Dealings with their Fellow Subjects. For against these who live under the same Government and Laws (either perpetually, or only for the time being) they ought to be so moderate in the Use of this violent Self-defence, as then only to betake themselves to it, when the Time and Place will not admit of any Application to the Magistrate for his Assistance in repressing such an Injury, as puts either their Life, or something as valuable as their Life, or some Good which can never be repair'd, into present and manifest Danger. And even in such a Case we are, by our own Strength only, to rid ourselves of the present Mischiefe, leaving both the Punishment, and the Caution for future good Behaviour, entirely to the Magistrate's Determination. Cicero² tells us, that nothing is so contrary to Rights and Laws, as the using Force in a well-order'd Commonwealth: But then 'tis his own Observation in another Place, that these Laws are silent, when Arms appear bent against us; and do not command us to wait for their Help and Protection, when we should most certainly suffer an unjust Violence, before we could procure a just Redress.

By these Rules and Foundations which we have laid, may be decided most of those Disputes, which are usually bandied in Authors, concerning the Measure and the Moderation of unblameable Self-defence.

V. Some Men have rais'd a Doubt, whether, supposing a Person assaults me by mistake, without any evil Design against me, and intending to employ his Force against another, I may in such a Case kill him in my own Defence. For the clearing of which Point Grotius³ lays down this Principle to proceed upon, That the Right of Defence doth primarily and absolutely arise from that Favour of Nature, by which she hath recommended every Man most strongly to himself, whence no one can refuse to apply all his Endeavours for the Procurement of his own Safety; and not from the Injustice or the Sin of the Aggressor. It will therefore be sufficient to render my Defence innocent, if the Assailant have no Right to invade or to destroy me, and I lie under no Obligation of taking Death at his Hands, without Reluctancy or Resistance. Farther, since in the

² L. 2. c. 1. f. 3. Add, Gell. 1. 4. c. 14. Quintilian Declam. 13. 'Twas on this Account we receiv'd Laws and Magistrates from the Institution of our Ancestors; that no Man might be the Redresser of his own Grievances: And lest, if private Revenge should pursue every Crime, there should be a constant Succession of Injuries, and all Parties prove alike guilty.

⁹ De Invent. 1. 2. See Flor. 1. 3. c. 2. in fin. Seneca Herc. Fur. v. 362, &c.

*Si aeterna semper odia mortales agant,
Nec ceptus unquam cedat ex animo furor,
Sed arma felix teneat, infelix paret;
Nihil relinquunt bella.*

Should Men maintain immortal Hate,
Nor quell the Fury rising in their Breast;
But still the Fortunate their dreaded Arms
Shake, and th' Unfortunate new Force prepare,
To try another Field; the General War
Would clear the World, and drive a common Spoil.

¹⁰ See a Passage of Arrian quoted a little lower, at §. 19. Note 1.

§. IV. ¹ Some Good.] In all the Editions of the Original, not excepting that of 1706, there is a gross Fault, which spoils the Sense, i. e. *Dammum* for *Bonum*; but it is corrected in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 16. where this Sentence is word for word.

² De LL. Lib. 3. c. 18. *Nihil est enim exitiosius civitatibus, nihil tam contrarium juri, & legibus, nihil minus civile, quam composita Republica, quicquam agi per vim.* Pro Milone, c. 4. *Silent enim leges inter arma, nec se expectari jubent, cum eis, qui expectare velint, ante injusta pœna luenda sit, quàm justa repetenda.* See Mr. Noodt, ad Leg. Aquil. C. 4.

§. V. ¹ We ought to observe these two Conditions, for upon them depend some Cases which our Author makes no mention of, as that of a Person being assaulted by his Prince. What we are to think of this, is this, in my Judgment: I suppose, that he that defends himself resolves to free himself of the unjust Aggressor, by killing him, otherwise he had better suffer himself to be kill'd than come under the Hand of the Executioner, and suffer cruel Torments. This being premis'd, the Prince who would kill me, does it either maliciously, and with Deliberation, or else in a Passion, which he can't govern. In the first Case, I may as lawfully defend myself against him as against my Equal. See my *Comment on the Abridgment of the Duties of a Man and*

Case propos'd the Love of our own Persons and Lives must needs gain an easy Conquest over all other Considerations, it is impossible but that a Man who finds himself expos'd to equal Danger with another, must, if he follow Nature, give his own Deliverance the Preference in his Regard: And since such a Danger as we are speaking of is brought on me without my deserving it, my Fact is, for that Reason, the less odious, if I turn the Mischief on the Author. All this being taken for granted, 'twill be very easy to decide all those Particulars and Cases which may happen about the Point in hand. As suppose a mad Man, or a Person walking in his Sleep and affrighted with some terrible Dream, should make an Attempt upon my Life; inasmuch as he hath no Right of assaulting me, and I have good Reason to prize myself above all Things, it doth by no means appear why I should prefer his Safety to my own. But here it must necessarily be suppos'd, that I could not decline the threaten'd Danger any other way: Which is not so scrupulously to be observ'd, when a Man attacks me upon a Grudge, or upon a manifest ill Design. The same Decision will hold, in case a Soldier, fighting with good Intentions, assaults me, whom he mistakes for one of his Enemies. For if even an Enemy had a Right of resisting him, there's no reason why I, who am in no such State of Opposition, should patiently run upon his Sword: But he ought to impute it to his own Folly and Heedlessness, that he thus drives a Friend on the Necessity of an hostile Act; since he ought to have known against whom his Force was to be employ'd. The same is to be said, when a private Man, lying in wait for one with whom he hath a particular Quarrel, sets upon me, instead of him, by mistake. For why should I, upon account of the Aggressor's Blunder, be brought under a harder Condition than that other Man, whom perhaps he had some Reason to hate? Such an Assailant is indeed by the ² *Cornelian* Law of *Rome* guilty of Murder. For though there was an Error in the Person, yet there was no Error in the Design; but the Will and the Attempt of committing Murder were both manifestly declar'd^a.

VI. To render the Defence of ourselves entirely innocent, it is commonly thought a necessary Condition, that, as to the Time, the Danger be just upon us, or, as it were, in the very Point of

feizing us: And that no Suspicion or Fear, whilst yet uncertain, is sufficient to justify our assaulting another. But this Assertion too will prove very unaccurate, unless we relieve it with our Distinction between a *Natural* and a *Civil State*. For as in neither Case the Point of Danger, which these Men speak of, can be understood without some Latitude, so is it most certain, that Persons plac'd under a *Natural Liberty* are allow'd a longer Space in making their Defence by Violence, than those who live under the Protection and Assistance of a Government.

Inasmuch as Nature obliges us to maintain Peace with others, it may and ought to be *presum'd* that every one will fulfil this Obligation, unless he give manifest Evidence of contrary Designs, and unless it be apparent that he quits his Obedience to sound Reason, which advis'd him to this Duty. But considering how prone the greatest Part of Mankind are to violate this Precept of Reason, whoever hath a true Concern for his own Safety, will fortify himself betimes by all innocent Methods of Defence; as suppose by shutting up the Avenues against such as are plotting any hostile Design; by providing Arms and all other Necessaries for offensive or defensive Force; by entering into Confederacies and Alliances; by keeping a watchful Eye upon the Motions and Attempts of others, and the like. Thus we justly esteem it Wisdom in a Commonwealth, to think of War during the full Enjoyment of Peace. And altho' Innocency will always find a strong Guard and Support in the Divine Providence, yet is it most senseless Vanity for that Man to expect Miracles from Heaven for his Deliverance, who lies still in a drowsy Idleness, and neglects all Care of his own Affairs. And even in Civil States, where our Goods are in some measure secur'd against Thieves and Ravagers, by the Severity of Penal Sanctions, he would be reckon'd a very ill Husband, who should forbear to secure his Doors in the Night, or to lock up his Closets and his Chests. To this purpose we are inform'd, that the old *Romans* us'd to seal their meanest Utensils and Household Goods with their Rings, to secure them from pilfering Slaves; over whom, at the same time, they had the free Power of Life and Death^b.

But now, though my providing thus far for my

Citizen, L. 1. c. 5. §. 20. In the latter Case, I ought to spare him, and rather sacrifice my own Life than take away his, provided that he did not by his own Fault put himself into a Condition where he could not command himself; for if a Prince, knowing himself subject to such violent Transports of Anger, and Lion-like Fury, gives himself up to his Temper, without any Restraint, and takes no Care to avoid Provocations, at least in certain Circumstances, and to keep himself from Drink, he deserves to be had in no Regard, and we have as much Right to defend ourselves against him, as if he acted in cold Blood. He had a Design to hurt us, if not formally, yet interpretatively, at least, and the Interest of a Society is so far from requiring us to suffer ourselves to be slain by such a Sovereign, that it ought itself to fear him. After all, there is nothing more easy for Princes, since few of them are good Men, than to keep themselves from such Extravagances. If a Society loses by a Change, it also gets sometimes by it, and perhaps it would be better for it, if Men would not allow Princes so great a Liberty to satisfy their Passions, and if Successors had before their Eyes some sad Examples of an unhappy Fate, which their Predecessors had brought upon themselves by thinking all Things lawful for them. What I have said, will, by a much stronger Reason, have place in respect to the Ministers of a Prince, and his inferior Magistrates, for whom, doubtless, there is much less Regard to be had than to the Person of the Sovereign himself. I shall speak something, §. 14. *Note ult.* of the Case, where the unjust Aggressor is a Father.

^a Add. L. 18. f. 3. *D. de Injuriis*, & *Grot. in Sparf. Flor. ad l. 14. D. ad L. Cornel. de Sicar.* ^b Vide *Tacit. An. II. 1.*

² The *Cornelian* Law, which is treated of in the *Digest. Lib. 48. Tit. 8.* punished Murders committed designedly, and with full Deliberation, whereas the *Aquilian* Law punished Murder committed thro' some Imprudence and Fault, tho' very small, and without any Design. See Mr. *Noodt, ad Leg. Aquil. Chap. 4, 5.*

§. VI. ¹ Such are principally in relation to States, Fortresses built on the Borders of Kingdoms. See Mr. *Thomasius's* Discourse upon this Subject, entitled, *Non-Ens actionis Forensis contra ædificantem ex æmulatione*, §. 18, &c.

Security can be injurious to none, yet before I can actually assault another under Colour of my own Defence, I must have Tokens and Arguments amounting to a moral Certainty, that he entertains a Grudge against me, and hath a full Design of doing me a Mischief, so that, unless I prevent him, I shall immediately feel his Stroke. Amongst these Signs and Tokens, giving me a Right to make a violent Assault on another Man, I must by no means reckon his bare Superiority to me in Strength and Power; especially if that Happiness deriv'd its Increase from harmless Industry, or from the Bounty of Providence, without the Oppression of others. For 'twould be inhuman Malice, to envy another, and to endeavour to take from him a Blessing which he came so fairly by. 'Tis a very gross Knack of philosophizing which some Men have got, when they tell us, by way of Advice, *He that is able to hurt you, undoubtedly is willing; and therefore, without farther Warning, down with him, as you love your own Safety.* This kind of Doctrine is manifestly destructive of all sociable Commerce amongst Men; and the Authors commonly cited in Defence of it, either are such whose Character prevents their Authority, or else in the Passages alledg'd from them, they speak only of Precaution in our dealing with those Wretches, who have given us sufficient Tokens of their Resolution to hurt us ^a ². And whereas some Men bring Examples instead of Arguments for so base a Practice, this is to make another's Sin the Rule and Standard of my acting ^b. Yet because any Man may abuse his Strength to ill Purposes, therefore, as we said before, we ought to fence against Danger, by timely and by harmless Methods.

Nay, although such a mighty Neighbour hath shewn himself to have the Will of hurting as well as the Power, he doth not yet give me directly a

just Cause of setting upon him, because he doth not yet express this ill Will towards me in particular. For it is not sufficient Proof that a Man designs to hurt me, because he hath already hurt others; in as much as he might be provok'd to his Attempt on them by some particular Reasons, which he doth not find against me. An Injury then done to another, gives me no License of falling on the Aggressor, whilst I am tied to both Parties only by the common Band of Humanity. But I may happen to be united by a more peculiar Obligation to the injur'd Person; as if, upon his Desire, I have promis'd and engag'd to assist him. For it is very agreeable to *Social Nature*, that a Man who hath himself receiv'd no Wrong, should yet join Forces on Covenant with another, to help him to drive off an unjust Assault, as being allied to him by those general Ties which hold together all Mankind. Because, supposing the two Parties to be otherwise indifferent to me, yet it is a standing Rule, that an Injury receiv'd ought to incline me to Favour, and an Injury offer'd ³, to Hatred and Aversion ^c. But farther, if on good and probable Grounds I suspect that this *powerful* Aggressor, when he hath dispatch'd his first Prey, will turn his Force upon me, and use his former Conquest for the Instrument of another; I may then more readily assist the distress'd Party, because his Preservation is likely to ensure my own Safety. As a wise Man will lend his best Help towards quenching a Fire in his Neighbour's House, when his own is the next in Danger.

More than this, if it appear by clear Tokens that a Man is at present under a real Design of hurting us, though he doth not yet proceed to the open Execution of it, supposing us to live in a *natural State*, we may immediately enter on our own Defence by violent Methods, and prevent the Foe, provided that either upon a friendly Admo-

^a And as for that saying of Cicero (*Epist. Fam. 11. Ep. 28.*) *Even Slaves have been always allow'd this Liberty to fear according to their own Judgment, not another's*; we may oppose to it the sharp Return of *Vibius Crispus* (in *Quintilian. l. 8. c. 5.*) *Who ever gave you Permission to fear so unreasonably?* Nay, Cicero himself hath sufficiently overthrow'n this Opinion, *Who, says he, ever made such an Ordinance as this, or to whom can this be granted, without the manifest Danger of the whole Community, that a Man may lawfully kill him, by whom he shall pretend to fear being hereafter kill'd?* *Orat. pro Tull. in Quintil. l. 5. c. 13.*
^b Add. *Alberic. Gentil. de Jure Belli, l. 1. c. 14.* ^c For that of *Exodus ii. 14.* only holds in a Civil State.

² Our Author quotes these Words of Cicero, as favouring the Opinion which he confutes: *At hæc etiam servis semper libera fuerunt, timerent, gauderent, dolerent suo potius, quam alterius arbitrio.* But if we consider the following part of the Discourse, we shall find that the Words will not bear the Sense which he gives them. The Latin of the following passage in *Quintilian* is, *Quis hoc statuit unquam, aut cui concedi sine summo omnium periculo potest, ut cum jure potuerit occidere, à quo metuisse se dicat, ne ipse posterius occideretur?*

³ That the Laws of Nature, which tend to the Preservation of Mankind, may be observ'd, without which they are useless, and that no Man may offer an Injury to his Neighbour, Nature has given every Man a Right to punish the Violation of its Laws, both in respect to all Mankind, and to private Persons. The Laws of Nature, as well as all others, which are imposed upon Men here below, would be altogether useless, if no Body in the free State of Nature had Power to execute them, by protecting and preserving the Innocent, and restraining the Insolent. For all Men being naturally equal, it follows, that if in that Estate every one have Right to punish the Breach of the Law of Nature, there is no Man but hath it in as large an Extent as another. These are the Principles of the illustrious Mr. Locke, in *Part I.* of his excellent *Treatise of Civil Government, Lib. 2. Chap. 2.* We shall elsewhere observe the Consequences which he draws from it in Relation to other Matters of Importance. *See Lib. 8. Chap. 3. §. 4. Note 3.* Hence it appears, that our Author is mistaken, when he affirms, That unless we are under some particular Engagement to help a Person that is wronged by another, we are not obliged to oppose this latter, unless he insults us directly. Much rather, we not only have a Right to espouse the Quarrel of the Injured, but also, according to the Laws of Humanity, we are indispensibly engag'd to defend him, if we find our selves able to do it. This is the Consequence of the Principle of Sociableness, as Mr. *Titius*, with much Reason maintains, *Observ. 131.* And I wonder our Author did not mind it, since, in *Lib. 1. Chap. 5. §. 14.* he approves of that fine Maxim of Cicero, *Qui non defendit, nec obstitit, si potest, injuria, tam est in vitio, quam si parentes, aut amicos, aut patriam deserat, i. e.* "He that does not prevent or resist an Injury, if he "be able, is as much to blame, as he that forsakes his Friends, Parents, or Country." *Menander* also has a fine Sentence relating to this Matter, saying, "If any one would be as much concern'd for the Injuries done to another, as if he receiv'd them "himself, and vigorously undertake the Defence of them that are oppress'd, there would not be so many Evil-doers, and those "that are would not be so daring.

Εἴπερ ἢ ἀδικεῖς ἀσυνήτως ἡμῶς: το
 ἔχεις ἢ ἡμῶν, ἢ σωματικῶς ἴσους το
 ἴσως νεμίζαν ἰδιονεῖν τὸ ζερονδς

Οὐκ ἂν ὀπὴ πλεῖον τὸ χεχὸν ἡμῖν ἡυξᾶτο
 τὸ ἄν' πονηρῶν, εἰλλὰ ὡρεσπρῶμοι,
 Καὶ πυρρᾶνοντες, ἡς ἔδρεε πικαρία
 Ἥπεισπανοισσὸδ' ἄν ἦσαν, ἢ πεταυμῶμοι.

In *Stobæus Tit. 43.* See Mr. *Le Clerc's* Note on this Fragment, p. 3.

Ed. Amyt. 1709.

dition he is not likely to be driven from his hostile Intentions, or that the giving such an Admonition would prove of ill Consequence to our Affairs. For no Man is oblig'd to expect patiently the Insult of another, that he may thereby build the Justice of his Violence on the absolute Necessity of his Defence. And therefore, in this Case, he is to be accounted the *Aggressor*, who made the first Motion towards hurting his Neighbour, or who conceiv'd the first Design of Mischief, and was preparing to accomplish it, though the other Party using greater Expedition, may have surpriz'd and oppress'd him before he could bring his Plot to Perfection. For it is not absolutely necessary to the Notion and Business of Defence, that a Man receive the first Stroke, or that he only ward off or elude the Blows that are aim'd at him; but he too shall be interpreted to act by way of *Self-defence*, who, taking his Foe tardy, hath prevented the Mischief that was hatching against him⁴.

VII. But we must by no means allow an equal Liberty to the Members of *Civil States*. For here, if the Adversary be a Foreigner, we may resist and repel him any way at the Instant when he comes violently upon us: But we cannot (without the Sovereign's Command) either assault him whilst his Mischief is only in Machination, or revenge our selves upon him after he hath perform'd the Injury against us¹, lest we should, by this rash and unwarrantable Proceeding, involve our Country in an unnecessary and unseasonable War. And a much greater degree of Caution must be us'd in our Dealings with our Fellow Subjects. For though I understand that such an one is now coming to do me a Mischief, or that he threatned me desperately in Publick, this will on no Account bear me out in assaulting him; but I am to inform against him before the common Magistrate, who is to require Security for his good Behaviour. But if the Magistrate refuse to interpose, I may then consult² my own Safety by what Means I can, with the same Freedom as if I were plac'd under a *natural State* and Condition.

Those Moralists are widely mistaken, who, as *Grotius*^a says, maintain, "That I may lawfully kill, not only the Man who offers me present Violence, but him too whom I shall have discover'd to plot and conspire against me; as by Poison, by false Accusation, false Witnesses, the Procurement of an unjust Sentence, or the like." Nor is the Absurdity at all lessen'd by that Restriction which they add³, *if either the Danger cannot otherwise be avoided, or if we are not sufficiently assur'd that it cannot*. Because such a Delay of Time as is here suppos'd, how short soever, may put us on many good Ways of Redress and Relief; besides⁴ the Variety of Accidents which may perhaps work our Deliverance. It is manifest, that these Authors suppose a *Civil State*, because in that only we can conceive such Things as unjust Judgments, Accusations, Witnesses, &c. For the Suppression of which Injuries, if we permit the Subjects to inflict Death, what occasion have we for Magistrates or for Laws? No Man is in Danger of being condemn'd, if he can prove the Accuser guilty of Calumny and Forgery. Yet, if being unable to make this out, he assaults his Life, 'twill be hard to excuse him from the Legal Censure and Penalty of Murther. But when a Man is already actually set upon, and reduc'd to such Streights, that he hath not Power or Opportunity to implore the Assistance of the Magistrate, or his Neighbours, he may then make use of Extremities in repelling the Assailant: Yet the Reason and Ground of his proceeding to such Violence must not be, that he may thus *revenge* himself for the Injury offer'd; but only because he could not otherwise secure his Life from the imminent Danger. And therefore supposing that Danger to be more easily driven off, he cannot lawfully pursue the Aggressor, so as to strike or harm him in his Flight⁵.

VIII. It appears then from these Considerations, that under the Civil Governments the *Time* of making an *unblameable Self-defence*, is set within very narrow Bounds, and indeed reduc'd almost

^a L. 2. c. 1.

^b Vide l. 3. f. 9. D. de vi & vi armata.

⁴ *Demosthenes, Philip. 3.* 'Ο ὃς ἐὰν ἐγὼ λησθῆναι, πῶς τὴν παροικίαν, ἢ κατασκευάζωμαι, ἢ πρὸς ἐμοὶ πολεμεῖ, καὶ μὴ πρὸς ἀλλῶν, μὴ δὲ πρὸς ἐμῶν, i. e. "He who is preparing and contriving Wiles for my Destruction, is most certainly engag'd in a hostile State with me, though he has not yet attack'd me with his Darts or his Spears." *Thucyd. l. 6.* "We ought, not only to chastise the open Actions of our Enemies, but to prevent, by due Punishments, their secret Counsels and Designs: For they will be before-hand with us, if we neglect to be so with them." *Procop. de Bel. Persic. l. 2. c. 3.* Λύσθη γὰρ ἢ ἐπρωῶν ἐγὼ εἰ ἐν ὁπλοῖς γένωμαι πρόσω, ἀλλ' εἰ δὲν ἐπρωῶν ἐν σπονδαῖς τοῖς πῆλαι ἀλλοῖον, τὸ δὲ ἔγκλημα τὸ ἐγκραχρησῆναι, καὶ ἀπὸ τῶν κατὰ τὸν ἄνθρωπον, πέπρακται, i. e. "Those break the Peace, not who first take up Arms, but who are discover'd in any Plot against their Neighbours and Friends. For whoever attempts and designs Mischief, hath really committed the Crime, though his Endeavours prove unsuccessful." *Phil. Jud. de Leg. Special.* "We do not only reckon them our Enemies, who assault us with Fleets or Armies, but them too who by Sea or Land make Preparations against us. See *Alberic. Gentil. advoc. Hispan. l. 1. c. 9. Leges Wisigoth. l. 6. tit. 4. c. 6.*

§. VII. ¹ See what this Author says, *Lib. 8. Chap. 17. §. 8.*

² We may add, *and that of ours*. So *Moses* seeing one of his Brethren, an *Israelite*, suffer Wrong, he defended him; and in vindicating the Person injured, slew the *Egyptian*, *Exod. ii. 11, 12.* and *Acts vii. 24.* for, as *Mr. Le Clerc* says upon this last Passage, "*Moses* knew very well that the *Israelites* could obtain no Justice of the *Egyptian* Judges. And when Power is arrived at that height, that Justice can't be had, and the Foundations of Civil Society are destroy'd, we return again to the State of Nature, in which 'tis lawful for every one to defend himself and his Friends, against all Force, without seeking Help, in vain, from them who will not assist us. But this Right can't be made use of but in extreme Confusion, as *Egypt* was, where any Injuries might be done the *Israelites*, without any Fear from the *Egyptian* Judges."

³ *Grotius* reads it thus, but carelessly. He maintains that all the Reasons which he mentions there, are not sufficient to prevent a Person who has ill Designs against us, and kill him, altho' he can find out some way to escape the Danger, or is not sure that he can otherwise escape it; which Determination he founds upon the Remedies and Accidents which a little Space of Time may produce. But he adds, that there are some Divines and Lawyers, who extend this Favour farther, i. e. as any one may see, who grant to the Person against whom any thing is attempted, a greater Liberty, believing that he hath a Right to prevent his Enemy, although he could avoid the Danger some other way. So these Moralists do not perplex themselves in any manner with the Restriction of which our Author speaks. *Grotius* embraces the Exception in the Negative, and maintains it against them. Nevertheless I assert, That if you examine the Thing in itself, he doth not sufficiently distinguish between the State of Nature and Civil State, as will appear by what our Author says afterwards.

⁴ See *Aul. Gellius, Noct. Attic. Lib. 13. Chap. 17.* and *Erasmus* upon the two Proverbs taken from thence.

to a *Point* or Instant, yet such as admits some small Latitude, and in which a slight Excess will escape the Magistrate's Censure. And therefore altho' an understanding Judge will be best able to settle the Innocency of any Defence, from the Circumstances of the particular Facts: Yet we think it may be asserted in general, that the exact Time when a Man may fairly destroy another in his own Defence, begins at the Instant, when the Aggressor shewing plainly his Design upon my Life, and being furnish'd with Strength and Weapons for the Execution, is already got into a Place whence he may perform his Mischief; Allowance being only made me for just so much *Space* as is necessarily requir'd for me to attack him in, before he attacks me. For Example, if a Man is making towards me with a naked Sword, and with full Signification of his Intention to stab me, and I at the same time have a Gun in my Hand, I may fairly discharge it at him whilst he is at a Distance, and cannot yet reach me with his Weapon, because, should he get too near me, my Arms would be of no use. And the same holds more strongly in relation to Bows, and Instruments of that nature, which signify nothing at all, unless we give them full Room and Space to exert their Force in. Again, suppose a Man approach me with full Design upon my Life, and is only arm'd with Pistols, or the like, whilst I am furnish'd with a longer Piece, I am not oblig'd to wait till he comes within Pistol-shot, but may prevent him with my Arms before he can use his own. For this is what the Laws call ¹ *to meet a Danger in time, which is esteem'd much better, than to revenge it after it hath taken Effect.* The continuance of this *Time for innocent Defence* is so long as till the Aggressor either is repuls'd, or hath retreated of his own accord, whether repenting of the mischievous Design in the very Moment that he was performing it, or else because he sees he is like to lose his Aim; as suppose his Sword is broke, or his Piece hath mis'd fire, or shot beside us; so that at present he can hurt us no farther, and we have an Opportunity of retiring into a Place of Safety. For the *Revenge* for past Injury, and the *Caution* for future Security, belong to the Care of the Magistrate, whom we are to address on those Accounts ². Whoever, enjoying the Protection of a Civil Government, shall kill another beyond these Bounds and Conditions, under the Notion of *Self-defence*, cannot be acquitted as entirely guiltless. Whence we may perceive how unreasonable the Assertion of old *Baldus* is, when he declares, *If a Man chance to say to me, I'll kill you where ever I find you from hence forward, I may, without incurring any Penalty, take away his Life by way of Prevention, either in the midst of his Threats, or whenever I can do it with most Convenience.* For though I be not oblig'd to wait till he performs his Threats, yet in a Commonwealth I ought to pursue other ways of Safety than by killing him: Even when it appears from the former Course of his Life that he is not backward in making good such bold Resolutions;

which Condition is by some Authors added to mitigate *Baldus's* Opinion.

IX. As to the common Determination; that this killing a Man in our own Defence is then only innocent, *when we cannot possibly escape the Danger by other Means*; this is not to be interpreted in too strict a Sense, but admits of a reasonable Latitude, upon account of that Perturbation of Mind which arises from so surprizing and so imminent a Mischief. For it is scarce possible that a Man under so terrible Apprehension should be so exact in considering and discovering all Ways of Escape, as he who being set out of Danger can sedately deliberate on the Case. Hence, as it is meer Rashness for me to come out of a safe Hold to him who challenges me, so if another assault me in an open Place, I am not strictly oblig'd to betake myself to Flight, unless there be near at hand a Place of most secure Refuge; nor am I always bound to draw back from the Onset. Because I then turn my defenceless Parts to the Danger, and there is great Hazard of tripping or falling; and besides, when I have once quitted my Posture of Guard, 'tis not very easy to recover myself. Neither doth it render my Defence blameable, if I chose to run the Hazard of such Accidents, rather than omit such Business, which was either a part of my Duty, or which however I had a Liberty of acting: As suppose, whilst I am going to any publick Place, about my Affairs, I kill a Man that sets upon me in the Way, I am not the less innocent, because if I had staid at home the Thing had not happen'd. For the publick Security would be ill guarded, and our Liberty would stand us in little stead, if we might not make use of it in opposing those sudden Violences which others offer us, out of pure Malice and wicked Design.

There is no need of proving *Balsamon's* Distinction ^b to be ridiculous; *A Man* (says he) *who kills another in his own Defence, is free from all Guilt, if the other Person had first given him a Mortal Wound, or the like Mischief; but if the Hurt that was first offer'd him be slight and cureable, the Slaughter of the Aggressor is then unjust, and he must answer for the Fact.*

Much more pleasant is their Nicety, who make it a Question, *Whether an Equality of Weapons be necessary to the rendering a Defence innocent?* As if the Aggressors were so generous, as constantly to give Notice to the other Party of their Design, and of the Arms they purpos'd to make use of; that they might have Leisure to furnish themselves in like manner for the Combat. Or if in these Rencontres we were to act on our Defence by the strict Rules of the common Sword Plays, and Tryals of Skill, where the Champions and their Weapons are nicely match'd and measur'd for our better Diversion.

But it must be observ'd on this Head, that the Plea of *Self-defence* shall not excuse or indemnify him, who being challeng'd to meet in the way of *Duel*, doth by so appearing put himself into such a Condition, that he must either kill or be kill'd.

² Vide l. 45. f. 4. D. ad L. Aquilam. Can. 43.

* Mention'd by *Sichard ad C. Cod.*

^b Ad *Epist. Basil. ad Amphiloeb.*

¹ The Words of the Code are, *Melius enim est occurrere in tempore, quam post exitum vindicare.* Cod. Lib. 3. Tit. 27. *Quando liceat unicuique sine iudice se vindicare, &c. Leg. 1.*

For in the Estimation of such a Fact, the Danger will not be consider'd, since the Laws forbid him to meet it; and therefore he will not only be guilty of *Manſlaughter*, but will ſtand obnoxious to thoſe other Penalties which are particularly ordain'd againſt the Cuſtom of Duelling.

X. There is one Enquiry commonly made farther on this Point, and that is, Whether it be lawful for a Man to kill another, who comes upon him, not with a Deſign to take away his Life, but only to *maim* him; provided the Danger cannot be otherwiſe avoided? And here, as to a *Natural State*, we may ſafely hold the affirmative Side of the Queſtion. For Nature hath inspir'd us with ſo tender a Care to preſerve our Bodies whole and entire, that we cannot but make uſe of all Ways and Methods for that purpoſe; and the Loſs of one Member, eſpecially if it be of the moſt noble Kind, is reckon'd almoſt equal to the Loſs of Life itſelf. Beſides, Death is frequently the Conſequence of ſuch barbarous Treatment; and I have no Security but that the Villian will proceed to greater Miſchief. Laſtly, as we have heretofore hinted, ſuch an Attempt declares a Man my open Enemy, and conſequently gives me a Licence in *infinitum* of acting againſt him.

Nor do the Laws, even in Civil Governments, ſeem to engage the Subjects to ſuch hard Conditions, as that they muſt rather ſuffer themſelves to be *maim'd*, than uſe Extremities in repelling the Aſſailant: For ſince ſuch a degree of Patience ſurpaſſes the ordinary Strength and Conſtancy of Mankind, 'twould look very rigid to require it, only in favour of a malicious Rogue. But when ſuch an Injury is once actually receiv'd, the Proſecution of the Malefactor is to be left entirely to the Magiſtrate.

XI. The Defence of *Chaſtity* is in almoſt all Nations eſteem'd equal to the Defence of Life, and doth in the ſame manner excuſe the Slaughter of thoſe who attempt it. The Reaſon of this Favour is grounded on the natural Conſideration, that the *Honour* of Women is their chief Treafure and Ornament; together with the Reſpect had to the Weakneſs of the Fair Sex, which 'twas convenient ſhould be guarded by all poſſible means from Violence and Abufe^a. Even in Civil States, as the Legislators might very reaſonably appoint

Capital Punishments for Offences of this kind, ſo they might farther give a Liberty to all honeſt Women, to uſe *Extremities* in their own Defence, upon danger of loſing what 'tis impoſſible for them to recover, and for which no Reparation can be made them. Amongſt the *Jews*, as Mr. *Selden*^b tells us, a Man was allow'd to kill another, not only in his own Defence, but in the Defence of a third Perſon, if unjuſtly aſſaulted, whether with regard to Life, or to Chaſtity of either kind^c. And thus the Sentence of *C. Marius* was highly applauded amongſt the *Romans*, when he not only abſolv'd, but crown'd the Soldier who had kill'd his Nephew, a *Tribune*, or Colonel in the Army, for ſoliciting him to an unnatural Debauch^d. *St. Auguſtine*^e hath a Saying, that *the Holineſs or Purity of the Body is never loſt, whiſt the Purity of the Mind remains, tho' the Body ſuffer Violence*^f. But it follows no more from hence, that forcible Ravishers are not to be repell'd with Extremities, than that becauſe a good Man is tranſlated to eternal Happineſs by *Death*, therefore he ought not to defend himſelf with Violence againſt a Villain who attempts his Life.

'Tis^g obſervable what *Lyſias*^h reports, that the *Attick* Laws decreed a ſeverer Punishment againſt him who *perſuaded* a Woman to an unchaſt Compliance, than againſt him who compell'd her by mere Force. The Reaſon we find ſubjoin'd, *Becauſe* (ſays he) *a Man who commits a violent Rape is ſuppos'd to be hated by whom he abuſes. Whereas thoſe who by Flattery and Inſinuations tempt Women to their Deſires, do by this Means gain a greater Intereſt and Authority with them than their own Huſbands, and conſequently have the whole Family in their Power and Diſpoſal: beſides the Inconvenience of confounding the Childrens Birth, and hindring all Diſtinction between thoſe who came lawfully, and thoſe who came unlawfully into the World*ⁱ.

XII. 'Tis another famous Queſtion, Whether the Danger of receiving a *Box on the Ear*, or ſome ſuch ignominious, though ſlight Injury, will excuſe the killing of a Man in our own Defence. And *Grotius's* Deciſion^j makes it *not to be repugnant to expletive Juſtice*. The Senſe of which Expreſſion is this, that ſince expletive Juſtice is equally violated by denying one that which he had a *perfect Right* to poſſeſs, or by bringing ſomewhat

^a *Quinſtil. Declam.* 349. *You have drawn a Virgin into as great an Injury, as War it ſelf could have offer'd.* ^b *L. 4. c. 3.*
^c *Lex Wiſigoth.* l. 3. tit. 3. c. 6. *Conſtitut. Sicul.* l. 1. tit. 22. ^d *Plutarch in Mario.* *Plato de LL.* l. 9. *He that hath debauch'd a young Perſon of either Sex, ſhall be lawfully kill'd, not only by the abuſed Party, but by the Father, Brothers, or Children.* ^e *De Civitate Dei.* l. 1. c. 18. ^f *Add. Gratian. Cauſ.* 32. qu. 5. c. 1, 2, 3, 4. *Plautus Amphitr.* Act. 5. Sc. 2. *Haut promeruit quamobrem vitio verteres; mea vi ſubacta eſt facere: You can't lay to her Charge, what ſhe did upon my Compulſion.* *Senec. Hippolit.* v. 727.

Mens impudicam facere, non caſus, ſolet _____ Not on Chance, but on the Will

Unchaſtity depends. _____

^g *Orat.* 1. ^h *Liban. Declam.* 2. *It is a much greater Wickedneſs to tempt and entice a Maid to be conſenting to her own Abufe, than to injure her by mere Force.* ⁱ *L. 2. c. 1. f. 10.*

§. XI. ¹ The Affront is ſo much the greater, becauſe a Woman of Honour may be reduced to that hard Neceſſity, to raiſe up, from her own Blood, a Child to an Enemy, *Duties of a Man and Citizen.* *Lib.* 1. *Chap.* 5. §. 22. See what I have ſaid upon that Place of this Author's *Abridgment*, and Mr. *Thomasius's* *Juriſprud. Divin.* *Lib.* 2. §. 114. Mr. *Bayle*, in his *Answer to the Queſtion of a Provincial.* *Tom.* 4. *Chap.* 28. p. 412. affirms, That if that Law of the Decalogue, *Thou ſhalt do no Murder*, doth not oblige a Woman, who breaks it to ſave her Life or Chaſtity, it follows, that the other Laws of the Decalogue include the ſame Condition in obſerving them, provided it be no Damage to my Life or Honour; and ſo often as the Obſervation of any of theſe Articles of the Decalogue expoſe us to any certain Danger of loſing our Life or Honour, we may excuſe our ſelves from it, as well as from the Obſervation of this Precept, *Thou ſhalt not Kill*. To me the very Recital of ſuch an Argument is its own Confutation. And I ſhould wonder that Mr. *Bayle* ſhould ſuffer himſelf to be blinded with ſuch weak Reaſons, if I did not plainly ſee, that he has eſpouſed the falſe Notions of ſuch as pervert the Moral Doctrines of the Goſpel, by ſuch Explications as are contrary to the Rules of good Senſe and Criticiſm.

² See *Digeſt. Lib.* 11. *Tit.* 3. §. 3. where is the like Deciſion in the Caſe of Slaves. See alſo what is ſaid *Lib.* 6. *Chap.* 1. §. 21. *Note* 2.

on him which he had likewise a *perfect Right* not to suffer; when a Person is kill'd for offering an Injury of this Nature, there can be no Complaint made that a Breach of *expletive Justice* hath been committed upon him. For he who first makes an Attempt of any Mischief against another, retains no Right why the other should not proceed to Extremities in returning it; or (what comes to the same thing) gives the other an *infinite Right* of opposing him; though other Considerations may frequently hinder the injur'd Party from a full and rigorous Use of this Right. Nor will it signify any thing to object, that in such Returns that *equality* is neglected which Justice commonly requires. For that *Equality* is chiefly concern'd with the Exchanges of Things, and the Distribution of common Goods. But Evils, which by way of War are mutually offer'd, cannot be exactly reduc'd to any such Measure, nor is it necessary they should. As for *Grotius's* Remark, that *the degree of hurting in War should be stated according to the Manner of Restitution and Reparation in Civil Damages*; there is good Reason for this Limitation to it, *as nearly as we can*: And then that Moderation doth not arise from any Right inherent in the Enemy, but from the Generosity and Courage of the Victor. *Grotius* adds, that *Charity doth not of it self require our patiently suffering such an Affront, in favour of the Person who offer'd it; tho' the Doctrine of the Gospel doth indeed forbid the Repulse of such Attempts by violent Means.*

For our Parts, we have already shewn, that in a *natural State* a Man cannot be requir'd to bear even a slight Injury (especially if it be continued) without endeavouring, even by the utmost Violence, to keep it off. And we read, that the most holy King *David*, for an Affront put upon his Ambassadors, rais'd a War, to almost the utter Ruin of a Nation^a.

But 'tis very doubtful, whether in Members of a *Civil State* the same violent Procedure is excusable. It is indeed in common Judgment a most high Affront to receive a *Box on the Ear*, and the Reason of this Opinion amongst many of us *Europeans* seems to be, because we treat our Servants in this Manner, and other Inferiors plac'd under our Discipline. And hence 'tis a Custom in some places, when Persons are first allow'd the Use of Arms, or come out of their Apprenticeship, and the like, to give them a *Box on the Ear*, in formal Manner, to put them in mind of their former Condition, and to let them understand, that they are above such Treatment for the future. Therefore to offer such an Affront highly disgraces the Sufferer, and supposes him to be unworthy of bearing Arms, or of being reckon'd amongst free and grown Men. But here we must observe, that such a Blow never appears ignominious and disgraceful, but when it is given before the other Party prepares for Resistance: For thus Slaves and Children are beaten without the Liberty of Opposition. Therefore those who fall by

mutual Consent to Fifty-Cuffs, and deal freely with each others Face and Head, can on neither side complain of an Injury of this affronting Nature. Nor is it easy to conceive how a Man that bears Arms, and is preparing to use them for his Defence, can be capable of receiving a Blow under the same Notion and Aggravation of Contempt. Beside, 'tis a great Mistake to fancy that a Man's Honour is really impair'd by such a Trifle; for² Honour would be a most fragile and a most precarious Good, if 'twere in the Power of every saucy Fellow to diminish and to infringe it. And as for the Contempt which is shewn in such an Action, this may be either quite taken off, or however easily repair'd by the Magistrate, by setting a heavy Fine on the Offender, and by enjoining him farther to perform in publick some Marks of Honour and Respect to the Persons whom he hath injur'd. Nor is the Vulgar Notion of any Weight, which fancies the Courage of Men, and especially of Soldiers, to be indamag'd in its Character, by the receiving these kinds of Affronts, and that therefore their Credit must be vindicated by Sword and Duel. For that Man shews sufficient Testimonies of his Courage, who bravely maintains and discharges the Office assign'd him by the State. And there are much more noble and more shining Occasions of exercising Valour, than, contrary to the Laws of Reason and of our Country, to pursue an immoderate Passion, or to engage in the Hazard of an unnecessary and unprofitable Combat. Yet if, as it commonly falls out, upon the offering of such an Injury, Swords are immediately drawn, and the Man who thus began the Fray happens to be kill'd, or desperately wounded, 'tis reasonable that the other Party should have his Penalty mitigated, upon account of the high Provocation. But 'tis an intolerable Paradox which some maintain, that a Man may fairly kill another, not only to avoid an Affront of this kind, but for the Recovery of his Honour, after the Affront has been actually given, and the Party who offer'd it is fled.

We may add to these Observations, that though the Rate and Estimation of Things is not to be determin'd by the Multitude, but by the Judgment of wise Men, yet if in any State the Receipt of some particular Injury is attended with extraordinary Scandal and Disgrace, there ought to be a most severe Punishment ordain'd against Delinquents in this Point; in as much as all Men have not Philosophy enough to put up those provoking Indignities; and because it would be inconsistent with the Characters and Stations which some Men are to maintain in the Commonwealth, should they be expos'd to the Contempt and Derision of the meanest Subjects. The Magistrate then hath little Reason to be angry, if he neglecting or refusing to give Redress in Complaints on this Score, a Man asserts his own Honour by what Means he can, though only in Regard to the Opinion of the Vulgar, since the same Opinion

^a 2 Sam. x. 4, &c.

¹ These Words of *Grotius*, as our Author expresses himself, ought to have been found in the same place with the foregoing and following, but I can't find them either in those Places, or in the Third Book, where *Grotius* treats expressly of the Disposition which Men ought to observe in War.

² See *Lib. 8. Chap. 4. §. 8.* following.

would otherwise load him with so much Reproach. Therefore those Governors who would effectually suppress all Duels and private Combats, ought to enact the most grievous Penalties against those who shall offer such a Blow or other Affront as is reckon'd ignominious in the Opinion of the particular Country. For the Course and Manner of Civil Life will not bear that refin'd Philosophy of *Grotius*; since Honour is no more than an Opinion of Excellence, and the Sufferer of such an Injury shows himself excellently patient, his Honour is rather increas'd than impair'd^a.

XIII. From what hath been said it may likewise be understood, whether in Cases of Assault, a Man is oblig'd, if he can conveniently, to betake himself to Flight, so as that the Slaughter of the Assailant is never justifiable under a Possibility of running from him? Now here 'tis plain, that in a State of Nature the Aggressor hath no Right, by which the other Party is bound to decline his Violence in this Matter, rather than oppose it. And the Reason why a Man (under this Natural Condition) sometimes chooses rather to fly than fight, is not out of any Favour to him who sets upon him, but because he thinks it most convenient for his own Affairs¹. Distinct Nations and Kingdoms are set, we know, in this natural State towards each other: And who will ever maintain, that when one King unjustly invades the Realm of another, the injur'd Prince is oblig'd to save himself, if possible, by flying; for fear he should kill some of his Enemies by making Resistance?

But under Civil Governments, we are to fly, if we can with Convenience, rather than take away the Assailant's Life. Nor can such a Flight be at all base or unworthy of a Man at Arms; in as much as it is not undertaken out of Cowardice or Neglect of Duty; and because Reason can never think this a fit Occasion of exerting my Valour, when I only kill a Fellow Subject without any Necessity, from whom the Magistrate could have sufficiently secur'd me. We added this Restriction, if we can with Convenience, because (as hath been already hinted in part) we are not always oblig'd to retreat and to turn our Backs, since we thus expose ourselves to a greater Danger of Wounds and Mischiefs, as well as to the additional one of falling; and since a Man who hath once betaken himself to his Heels, if he meet with a Stop, or if the Aggressor happen to overtake him, cannot easily recover himself into a Posture of Defence. Therefore in case there be not a Place of safe Refuge near at hand, he doth not transgress the Bounds of *innocent Self-defence*,

^a Vide *Act* xvi. 37.

§. XIII. ¹ ——— Πόδες ὄπλα λαγῶων, says *Oppian*, *Cyneget. Lib. 4. v. 35. Hares have their Armour in their Feet. A needless Quotation.*

² *De Legib. Lib. 9.* Ἐάν τις δ' ἄλλον κλείνη μηδὲν ἀδικήσῃα, εὐθεὶ ἢ μὴ μλυσιπῆς αἰχρῶν ἔργων καὶ κακῶν αὐτῷ γίγνηται, ἢ πνῶ εἶνεκα ἄλλο τοῖα, καὶ ἄπειρ' αὖ εἰ πολίτῳ κλείνας ὑπεῖχε φόβος δίκαια, ὡσαύτως καὶ τὸ τοῖατε δέλεα καὶ τὰ αὐτὰ σποθάνοντος, ἔπως παρεχέτω.

§. XIV. ¹ Mr. *Fortescue* Professor of Divinity at *Tubing*, undertakes to defend *St. Ambrose*, and some other Fathers, who maintain'd, that Christian Charity would not allow a Man to slay an unjust Aggressor, and that he ought to suffer himself to be slain. But if we examine the Words of this Divine, *Dissert. 1. in Offic. Ambrosii*, we shall find, that after he has discoursed long, he does not touch upon the Reasons of our Author. I find only one thing reasonable, which I have observed above, §. 2. Note 5. viz. That in following the Principles of Mr. *Pufendorf*, he asserts, That he that slays his unjust Aggressor, ought to have more than a simple Permission.

² *De Re Rusticâ. Lib. 1. Chap. 1.* Annus enim Octogesimo admonet me, ut sarcinas colligam, antequam proficiscar de vitâ.

³ *Plin. l. 2. Epist. 10.* Parum est providum sperare ex aliis, quod tibi ipse non præstes, i. e. "You are very improvident, if you expect that from others, which you will not do your self. This Passage does not make the least to our Author's Purpose.

who opposes an Assailant Breast to Breast, rather than he will lay himself open to his Violence, by running off on a Disadvantage.

Lastly, *Grotius* hath done well to censure those Authors, who allow that *we may lawfully kill a Man who hath said any such Thing of us, as we think will injure our Repute and Character with good Men.* For, if the Man hath spoken false, have we not many more convenient ways of wiping off the Calumny? And if he hath said nothing but Truth, must we study the Concealment of one Sin by the Commission of another? How much better is *Plato's Law*², *If a Man kill a Slave who hath not injur'd him, only out of Fear he should discover some base Action, or on the like account; he shall undergo the same Penalty as if he had murder'd a free Subject or Citizen?*

XIV. All this seems plainly enough deducible from Reason. But many raise a Scruple about these Doctrines, in regard to the peculiar Temper and Genius of Christianity, asserting that although it be indeed lawful to kill a Man who unjustly attempts our Life, yet 'tis an Action³ more praise-worthy to lose our own Life in such a Case, than to take his. Because he thus dying in the Commission of a Mortal Sin, incurs the Danger of Damnation: And that it is not consistent with Justice to rid our selves of a less Evil, by bringing a greater on another Man. Now, tho' the Solution of this Difficulty doth not properly fall under our Business; yet we think the Maintainers of this high Notion would do well to consider, that in the Consternation of Danger, and in the Heat of Fighting, a Man hath little Leisure for a nice Reflection on such Reasons; in as much as all his Thoughts and Faculties are taken up with consulting how to save himself from present Death. Again, the Person who is thus assaulted, is not always so well prepar'd, as not to need some farther Time for composing his Mind and Conscience, and for *making up his Bundles*, before he takes his long Journey, as *Varro*² speaks. Besides, it doth not appear very probable, that I ought in this Case to be more solicitous for the Soul of the other Man, than he himself is. And therefore if he, neglecting this great Concern, invade my Life, ought I to pay so precious and irrecoverable a Ransom, for rescuing him from the Danger of incurring so sad a State³? For it is very doubtful whether, if I should now spare him, to my own Ruin, he will not, for all my Charity, still deserve, and still meet with the same terrible Sentence. 'Tis a Maxim vulgarly known, that no Regard is to be had to such a

Danger as a Man throws himself into by his own Default, and from which he may deliver himself if he pleases. Now in the Case before us, provided he draw off or forbear to treat me in this injurious Manner, the Danger to which he exposes his Soul, ceases as to the present Matter. And doth not this Opinion allow greater Favour and Indulgence to Wickedness, than to Goodness, whilst it makes the former, as it were, sacred and inviolable? For according to such Rules, the most holy and virtuous Men would be always oblig'd to yield their Throats to Villains and Murderers, lest, by resisting, they should send them immediately on their Road to Hell^a. That saying of our Saviour, in which he commands us to *love our Neighbour as our selves*, Matt. xxii. 39. seems not so fitly to be interpreted of the degree of Love, as of the Truth and Sincerity; in as much as no Man dissembles or counterfeits a Passion towards himself. And that Phrase, *As thy self*, looks like a proverbial Speech, importing a sincere and hearty Kindness^b. But should we take the Expression in the highest Sense^c, it would scarce follow, that supposing the Love of our selves and of our Neighbour not capable (in some Instance) of being answer'd both together, the former ought to yield to the latter^d. Nor are the Proofs which we find sometimes alledg'd from *Exodus* xxiii. 4, 5. and *Deuteronomy* xxii. 4. sufficient to evince, that the Love of our Neighbour ought to take place before our own real Advantage: For it cannot thence be gather'd, that we are first to help our Neighbour's Beast out of the Ditch, if our own be in the same Condition; or that we are oblig'd to give such an

Assistance, when the Business we must neglect for that good Office is of more Consequence, than the Thing we thus endeavour to save or rescue for another. And besides all this, it may very fairly be question'd, whether a Person who assaults us in a violent manner, ought to keep the Title of a *Neighbour*, as the Word seems to be meant in our Saviour's Command^e.

Lactantius^a hath censur'd *Tully*^b for describing a Good Man to be one that doth good to as many as possible, and that hurts no Body, unless provok'd. O what a most excellent and most true Sentence (says^c the Father) hath he spoil'd by the Addition of two Words! For what occasion had he to say, unless provok'd? If a good Man may thus hurt another when provok'd, the very offering that Hurt will make him lose his Character and Name: It not being less Evil to return an Injury, than at first to give it. For whence arise all the Contentions and the Combats which we behold amongst Men, unless from this Miscarriage, that Impatience opposing Wickedness, occasions so many Tempests in the World? Whereas, if in opposing the same Wickedness we should make use of Patience, than which there is no truer Virtue, and none more worthy of human Nature, we should as effectually extinguish the ill Design, as if we were pouring Water upon Fire. But indeed, as the Impatience of the injur'd Party is frequently the occasion of unnecessary Combats, which might with Convenience have been avoided; so, on the other hand, Patience is not always infallible in the Cure of Malice and Villany. Nor doth the Virtue which, under that Name, is so highly recommended to Christians, equally oblige us to the putting up^d all Injuries promiscuously, without Difference

^a Comp. *Grotius*, L. 1. c. 2. s. 8. & c. 3. f. 3.
by the Term of *Neighbour*, we are to understand every Man who hath need of our Help, and whom we have opportunity of benefiting.

^d Institut. L. 6. c. 18.

^b Vid. 1 *Sam.* xviii. 1, 3.

^c See *Luke* x. 29, &c. where,

⁴ If as often as a Man finds himself in the same Danger as another, he ought indispensibly to resolve to perish to save him, he is obliged to love his Neighbour better than himself. Moreover, this Command of CHRIST is a general Maxim, which can't be of use to determine a particular Case, and invested with the Circumstances of all Particulars, such as this, when a Man finds he can't at the same time satisfy the Love of himself and Neighbour; for, all things else being equal, the Love of a Man's Self ought to be preferred, as appears by *St. Paul's* Words, 2 *Cor.* viii. 13. The Determination of that Case, in which there is an Opposition between the Love of a Man's Self and Sociableness, depends upon other Principles, from which it may be inferred, That as there are some Cases in which the Love of a Man's Self is to be preferred before every other Thing, so there are other Cases, when the Preservation of another may be preferred before his own. This is taken out of the Apology of our Author, which is in the *Eris Scandinica*, §. 32.

⁵ *Præclarum illud est, & si quæris, rectum quoque, & verum, ut eos, qui nobis carissimi esse debeant, æquè ac nosmet ipsos amemus; at verò plus fieri nullo pacto potest; nè optandum quidem est in amicitia, ut me ille plus quam se, ego illum plus quam me. Perturbatio vitæ, si ita sit, atque officiorum omnium, consequatur, i. e.* "Thus much indeed is brave, and right, and true, that we should love those who ought to be most dear to us, as well as our selves. But to love them better, is absurd and impossible. 'Twould be ridiculous for me to wish, that my Friend and I should each of us prefer the other's Person and Interest to his own; because such a change of Hearts could not but be follow'd with a Confusion of all Offices of Life." *Cicero Tus. Quæst.* l. 3. c. 29.

⁶ *Tully's* Words are, *Eum virum bonum esse, qui profit quibus possit, nocet nemini, nisi laceffitus injuriâ.* Our Author might here have oppos'd to this Censure of *Lactantius* other Words of *Cicero*, which will shew, that that Orator believed, that a good Man ought to spare his greatest Enemies, when he can do it without Danger to his own Life. *Jugulare civem, nè jure quidem quisquam bonus vult. Mavult enim commemorare se, cum possit perdere, pepereisse, quam cum parere potuerit, perdidisse. Hæc in homines alienissimos, denique inimicissimos, viri boni faciunt, & hominum existimationis & communis humanitatis causa: ut cum ipsi nihil alteri scientes incommodarint, nihil ipsis jure incommodi cadere possit, Orat. pro Quintio, c. 16.*

⁷ *Lactantius's* Words are, *O quam simplicem, veramque sententiam duorum verborum adjectione corrupit! Quid enim opus fuerat adjungere, Nisi laceffitus injuriâ? — Nociturum esse dixit bonum virum, si fuerit laceffitus; jam ex hoc ipso viri boni nomen amittat, necesse est, si nocerit. Non minus enim mali est, referre injuriam, quam inferre. Nam urde certamina inter homines, unde pugnae, contentionesque nascuntur, nisi quod improbitati opposita impatientia, magnas sæpe concitat tempestates? Quod si patientiam, quâ virtute nihil verius nihil homine dignius inveniri potest, improbitati opposueris, extinguetur protinus, tanquam igni aquam supersuderis.*

⁸ This may be infer'd from the Words of CHRIST, *Matth.* v. 39, 40. in which Patience is most earnestly recommended. For that divine Teacher says not, *If any one will slay, wound, or smite you mortally, bear it patiently*, but, *If any one smite you on the right Cheek, turn to him the other also*, for a Blow on the Cheek is a small Injury in it self, and easy to be born. Moreover, in these Words there is a Proverbial Expression, which imports thus much, That rather than revenge our selves of them that have done us any personal Wrong, we should suffer our selves to receive some new Injuries. Nor doth JESUS CHRIST say, *If any Man will take away all your Goods, or the greatest part of them, do not resist the Spoiler, nor oppose his Injustice, neither by your own Act and Deed, nor by seeking Protection from the Magistrate*; but, *If any Man sue you at the Law, and take away thy Coat, let him take thy Cloak also*, i. e. rather than engage thy self in a Law-suit for so small a Matter, be ready to undergo a fresh Loss. See *Grotius*, and *Mr. Le Clerc* on this Place. The Heathens also acknowledge, that we ought sometimes, though not always, to depart from something of our Right. See *Cicero De Offic. Lib.* 2. Chap. 18.

and Distinction. He that defends himself in a lawful manner, doth not act directly for the Hurt of another, but for his own Preservation: And he who repels a Wrong is not injurious, but he who offers it. 'Tis one thing to exercise an unblameable Defence, and another thing to prosecute an unmerciful Revenge. The latter may be as great a Sin as the first offer of an Injury, but the former can never fall under so hard a Censure.

But farther, those who maintain that in Cases of this Nature it is more commendable *to be kill'd* than *to kill*, add this Exception, *Unless the Party assailed be a more useful Person than the Assailant*. As if it were always possible for me, under the Apprehension of so imminent Danger, to weigh my Abilities nicely with those of the other Man, and to determine, whether the World would have more occasion for his Service than for mine! This is beyond Dispute, that he on whom the Safety of many depends, and whose Office or Duty it is to keep off Violence from others, ought not to resign his own Life for the sparing an unjust Invader; tho' he should be of so mild a Disposition as with *Piso* in *Tacitus* ⁹, *to think it as great a Misery to kill another, as to die himself*. And the Reason is evident, because by throwing himself away, he betray'd the Safety of so many other Persons. This is the Case of those who accompany Travellers by way of Guards; as likewise of Princes, of Generals, and other Commanders, whose Deaths are usually attended with so wide a Ruin, and to whom we may apply that Saying of *Lucan*, v. 685.

*Cum tot in hac anima populorum vita salusque
Pendeat, & tantus caput hoc sibi fecerit orbis,
Sævitia est voluisse mori.*————

Since one dear Life ensures and guards us all,
And with the World's great Head, the World
must fall,

'Twere Cruelty to court your Fate ².

² And that of *Alexander's* Friends in *Quintus Curtius*, L. 9. c. 6. *What God can secure to us a long Enjoyment of this Light, this Bulwark of Macedon; when you so often, with a kind of Greediness, expose your Person to certain Danger; not reflecting how many Thousands of Lives you hazard in one?*

⁹ *Tacitus's* Words are, *Si nobis aut perire hodie necesse est, aut quod æquè apud bonos miserum est, occidere*. Hist. Lib. I. Chap. 29.

¹⁰ *De LL. Lib. 6.* Οὐδ' ἀμυνόμενον θάνατον, μέλλοιεν ἄπο τῶν γονέων τελευτᾶσαι, παρέξει νόμος ἔδεις κτείνει ἢ πατέρα, ἢ μητέρα, τοῦ εἰς φῶς τῆς ἐκείνου οὐσίαν ἀγαθόντας, ἀλλ' ἄπομεινάντα τὰ πάντα πύργον, πρὶν τι δεῖν τοῦτον. Ἀδελφός ἢ ἀν' ἀδελφὸν κτείνει, ἐν πάσει μάχῃ γενόμενος, ἢ πρὸς πῶ τούτου ἀμυνόμενος ἀρχοῦσα χερσὶν πέτερον, καὶ ἄπειρ πολέμιον ὑποκτείνει, ἔσω καὶ πατρίδα. Ἐὰν ἢ αὐτὸν δ' ἄλλο ἐλεύθερον ἀμυνόμενος ὑποκτείνῃ καὶ ἑαυτὸν ὀκτείνῃ πατέρα, πῶς αὐτῷ ἔνοχος ἔσω νόμος.

To treat of this Question more exactly, I observe, That in Truth the Laws may by reason of some Inconveniences, punish all Children, who shall slay their Father or Mother, though in Defence of their own Persons; because we may suppose the Case so very rare, that it would be to no Purpose to make such an Exception, which might be an Occasion of suffering a real Parricide to go unpunished. But if the Thing be considered as it is in itself, without any relation to Civil Tribunals, we must, in my Judgment, thus think of it: 1. If a Father be hurried by his Passions, which he can't master, to kill his Son, and knows not what he is doing, as I have spoken, in the Case of one attacked by his Sovereign, *Note 1.* of §. 5. so I say here, that he ought to suffer himself to be slain, rather than imbrue his Hands in his Father's Blood. 2. But if we have reason to fear, that a Father is inclined with some Knowledge and Deliberation to put us in Danger of our Life, we ought to avoid the least Occasions to provoke him, and abstain from doing many of those Things which we have Right to do, if we were concerned with any other. 3. But if, after we have done all on our Part, we see ourselves infallibly in danger to lose our Life by the Hand of him, who, above all Men, is bound to preserve it, though in this Case we may, if we will, suffer our selves to be slain, out of Excess of Love and Kindness, and in Regard to him from whom we have derived our Being, yet I do not believe him guilty of Murder and Parricide, if, in defending himself, he slays the Aggressor. The Right of defending our selves is prior to any Obligation we have to another; and a Father, if he so far forgets himself, as to fall into such an extravagant Passion against his own Son, deserves not to be looked upon as a Father.

§. XV. ¹ Of which see *Lib. 20, 22, 24. 32. D. ad L. Jul. de Adulter.* and *Lyfias Orat. 1. pro cæde Eratibhen.* where he shews, that by the *Attick* Constitutions it was allowable to kill, if catch'd in the Fact, the Abuser, not only of a Wife, but of a Concubine; and as *Demosthenes* extends it, of a Mother, a Sister, or a Daughter. And the Reason he gives is this; *Because whatever Persons we fight for against our Enemies, to rescue them from Injury or Affront, for the sake of the same Persons the Law permits*

But it cannot be hence inferr'd, that supposing a Man to have the Lives of none, or of very few depending on him, such an one may not fairly kill an Assailant, who is perhaps of more Service to the Publick, or in whose Life the Interest of more Persons are concern'd. For at this rate, a Man who is either unmarried, or without Children, must in no Case kill an Invader, who hath a Family, for fear his Wife and Children should be left Desolate and in Want. But if the Affection and Concern for these Relations could not hinder the injurious Party from attempting his Villany, what Reason hath the other Person to give his own Life for the Prevention of their Misfortune and Trouble?

Plato ¹⁰ in his System of Laws hath been very nice and exact on this Point: *If the Life of a Son, says he, be attempted by his Parents, did ever any Law allow him in such a Case to kill those who gave him Being, although in his own Defence? So far from this, that he is obliged and commanded to suffer all Extremities, rather than to engage in so unnatural a Deed. But if upon account of Tumult, or Sedition, or the like occasion, a Brother kills his Brother, to preserve himself from his Violence and Assault, he shall be equally guiltless as if he had slaughter'd an Enemy.* As for the Additional Clause, *If a Slave in his own Defence kill a free Man, he shall be obnoxious to the same Penalties as a Parricide*, this was not the Fault of the Lawgiver, but of the Age.

XV. From what hath been observ'd on this Head, it appears, that a Slaughter committed within the just Bounds of Self-defence, doth not taint the Author with any real Blemish or Guilt, and consequently doth not render him obnoxious to any Punishment: and that it is not to be rank'd amongst those Actions, which, tho' they are in themselves sinful, yet human Laws favour with Impunity, upon account of the violent and almost unavoidable Transports of Passion: As when they allow the Husband to kill the Adulterer ¹. If therefore in any Places some Penalty

nalty or Expiation hath been enjoin'd the Actors of just Slaughter, it either belong'd not to the Case of *innocent Defence*, or it was introduc'd without any true Ground or Reason; or, lastly, it might be apply'd for the making Men understand how heinous a Crime it was to kill unjustly, when the killing even upon a just Account, stood in need of some Satisfaction. ² *Pbilo* the Jew, in his *Life of Moses*, *Lib. i.* tells us, *He commanded the Priest to perform a solemn Purgation, on those who return'd fresh from the Slaughter of their Enemies; because tho' the Laws did by no means forbid such Attempts, yet he who kills a Man, tho' by Compulsion, and in repelling an Injury, seems to contract some Stain, upon account of the near Relation which Mankind bear to one another, being all deriv'd originally from the same Head. And this therefore was the reason of the Ceremony to take off the very Appearance and Shadow of Guilt.* As for the Benefit of the *Asylums* or Places of Refuge and Sanctuary, a Man who preserv'd his own Life by the Death of an Assailant, seems to have had no occasion for these Reliefs; but only he who had been the Author of another's Death by an involuntary Stroke, yet such as upon exact Care and Diligence he might have forborn and avoided. That Place in the First of the *Chronicles*, Chap. xxix. ver. 3. doth not belong to the Case of *Self-defence*; and * the Building of a Temple seems to have been forbidden *David*, not so much because he had gather'd any Pollution by his Slaughters in War, as because he who had acquir'd sufficient Honour to himself by martial Achievements, ought not to have robb'd his Son of such an Occasion of growing glorious by the Works of Peace. The Scholiast on the *Orestes* of *Euripides* informs us, that 'twas an antient Custom amongst the *Grecians*, for those who kill'd any one upon a just Reason, immediately to shew their Weapons to the *Sun* for a Token of their Innocence; as desiring him to be Witness of the Fact, who, in their Opinion, overlook'd and overheard all things. And besides this Formality, they apply'd some Means of Expiation, and were oblig'd to undergo one Year's Banishment: Which Banishment is likewise mention'd by *Plato de LL. l. ix. Vid. l. xvi. f. 8. D. de Paenis, & Grot. in flor. Sparf. ad loc.* And we learn farther from *Demosthenes*, and from the Scholiast on *Aristophanes*, that at *Athens* when a Man had kill'd another, and pleaded to have done it justly, the Cause was try'd in a peculiar Court, call'd the *Delphinian*, with Allusion to the Oracle of *Apollo* at *Delphi*. Amongst the *Ethiopians*, who-

ever had slain a Man involuntarily, quitted his Country till such time as the *Gymnosophists* had purg'd him by their Ceremonies³. And we find *Aeneas* in *Virgil* declaring in reference to the holy Reliques,

*Mc bello è tanto digressum & cæde recenti
Attrectare nefas; donec me flumine vivo
Ablucro.*

In me 'tis impious holy Things to bear,
Red as I am with Slaughter, new from War:
Till in some living Stream I cleanse the Guilt.

Mr. Dryden.

In the 18th Canon of the Council of *Nantes*, held under Pope *Formosus*, we have this nice Injunction; *If a Man by accident, and unwillingly, hath been Author of another's Death, let him repent forty Days with Bread and Water; when this Course is over, let him for two Years be separated from the Congregation of the Faithful, and let him neither communicate nor offer. After the space of two Years, let him offer with the Congregation, but not communicate. At the end of the five Years let him be receiv'd to full Communion, but let his Abstinence from Meats continue at the Discretion of the Priest.* Yet neither doth this Canon touch the Case of Defence, nor can it well be vindicated from too much Rigor. Thus too what we meet with in the Laws of the *Lombards*^b, seems not capable of being extended to the Business in hand, or if it be, may deservedly fall under the Censure of unreasonable Severity. *De Mornay*^c tells us, that 'tis religiously observ'd by the Judges in *France*, scarce ever to absolve Persons in Causes of this Nature, without enjoining them at the same time to bestow peculiar Largesses upon the Poor, and sometimes to be at the Charge of *Christian Sacrifices, or Propitiations for the Soul of the Party kill'd.* And tho' the latter Part of this Custom smells too much of Superstition; yet every good Man hath reason to be deeply afflicted and concern'd, when he is put under the Necessity of depriving another of Life, by any such unfortunate Means.

XVI. Indeed, the Defence of Life, of Limbs, and of Chastity, as of irreparable Goods, admits so large a Degree of Favour, as to stand exempted from one of the positive Divine Laws, and to be construed as no Breach of the Sabbath. *Viac 1 Maccab. i. 32, &c. Joseph. Antiq. L. xii. c. 8.* For those who maintain'd the contrary Opinion, are not without Reason scouted by *Plutarch* and

mits us to kill even Friends, if they offer them any unjust Violence. For since Enemies and Friends are to be judg'd and distinguish'd by their Actions, those that practise Hostility, we may prosecute in an hostile manner. Amongst the *Persians*, he that kills the Adulterer and the Adulteress at the same time, is presented with a new Garment as a Reward of his Service to the State. *Add, Olear. Itin. Persic. L. 5. c. 22. Val. Max. L. 9. c. 1. f. 13. Ant. Matthæ. de Crimin. ad L. 48. D. tit. 3. c. 3. f. 13, &c.*

^a Vid. *Philost. de Vit. Apolon. l. 6.*

^b L. 1. tit. 9. l. 19. & capit. *Carol. l. 4. tit. 27. & lib. 7. tit. 295.*

^c Ad. Leg. 3. *D. de Just. & Jure*, in which there appears but little Superstition.

² *Porphyry*, as Mr. *Hertius* observes, speaks very well, That the Reason why Lawgivers command, that Murthers committed without any Design, and upon Necessity, should not be wholly exempted from Punishment, is, for fear it should be a Pretence to any to attempt it on set Purpose. *Ἐπι κ' τὸν ἀκούσαν φόνον ἐκ ἕω πεισῆς συνέλας καλέσσαν οἱ νόμοθέται, ὅπως ὑπερβαῖν ἐνδὸν πέλοσιν τῆς ἐκείνης τὰ τῶν ἀκρίως δεινῶν ἔργα μισῶσαι περιουσιώδεις.* De Abstinēt. *Lib. 1.*

³ The Historical Remarks made here by the Author had better have been placed under a Note. See *Numb. xxxv. 10, &c. Deut. xix. 1, &c.*

* See Mr. *Le Clerc* upon that Place, who gives another Reason more apparent.

§. XVI. ¹ I may add, That as Mr. *Le Clerc* observes, *Jesus Christ* alludes to this Opinion of the *Jews*, when he says to them who were offended because he did Cures upon the Sabbath-Day, *Is it lawful to do good on the Sabbath-Day, or to do evil, to save Life or to destroy it?* Mark iii. 4.

Agatharchides, as *Josephus* observes in his *Antiquities*^a. And therefore 'tis strange that the same Author, in his first Book against *Appion*, should celebrate, as worthy of all Commendation, that Act of the *Jews* which we read of in the History of the *Maccabees*, whilst refusing to make Resistance on the Sabbath-Day, they prefer'd this Command of GOD to their own Lives, and to the Liberty of their Country: Unless he is to be understood as rather praising the good Intention than the Deed itself.

But in reference to the Defence of Things or Goods, which as they may be restor'd or compensated, so they seem not all of them absolutely necessary to Man's Happiness, it will bear a Dispute whether *these* may be preserv'd and secur'd by the Use of Extremities. Especially since many are very ready to approve of what *Taxilles* said to *Alexander* in *Plutarch*, *What occasion is there, Alexander, that you and I must needs quarrel and fight; since you neither came to rob us of our Water nor of our Food, which are the only two Things that Men in their Wits think worth contending for?*

Euripid. Supplic. ver. 775.

Τὸ πρῶτον μόνον ἔστιν, &c.

For, Life alone's th' irreparable Loss;
Breaches of Fortune have an easy Cure.

The Judgment and the Custom of all Nations is manifest in this Point, whilst they allow Men to fight for their Goods and Possessions, even to the Slaughter of those who wrongfully invade them. It is plain likewise, that most War is engag'd in, not for the sake of destroying Mens Lives, but of winning their Lands or their Wealth. And it would be reckon'd a very pleasant Humour in an Enemy, if to hinder himself from being oppos'd by violent Means, he should make Protestation that he came not to kill but to rob. Thus much therefore is certain, that he who is kill'd in the Attempt of plundering or of wasting another Man's Goods, hath no Injury done him: Tho', in other respects, those Goods do not bear an equal Proportion to the Life of a Man. For in a natural State, he who offers any kind of Injury with a malicious Intent, immediately becomes an Enemy; and then he can have no Right inherent in himself to forbid the Use of the utmost Extremities against him. And since another hath no more Right to invade my Possessions than to assault my Life, I have certainly an equal License and Power to defend them both. Besides, since Life cannot be preserv'd without a Competency of Goods, he that goes about to rob me of *these*, doth, by consequence, endeavour to deprive me of *that*. And indeed, it is clearly evident, that the Security and Peace of Society, and of Mankind, could very hardly subsist, if a Liberty were not granted to repel by the most violent Course, those who come to pillage our Goods, for which Men have commonly a very hearty Love and Concern.

Those who have tormented themselves in maintaining the more rigid Side of the Question, build chiefly on two Suppositions; first, That a just Punishment ought always to be so equal to the Crime, that the guilty Person be not depriv'd of a greater Good than what he attempted to hurt or to destroy in another². The Falseness of which we shall elsewhere make out. Secondly, That the Hurts which we offer to an unjust Invader, in defence of ourselves and our Possessions, are *Punishments* in a proper Sense, and consequently ought to be stated by the Rules of vindicative Justice. But this Hypothesis is no truer than the former. For all Punishment proceeds from a Superior against a Subject, by virtue of his Sovereign Right; and the Degree of it is measur'd with respect to the publick Good. But Defence is a Thing of more antient Date than any civil Command, and chiefly takes place amongst those, neither of whom are subject to the other; and is moderated with regard to our own Safety, and to the Necessity of Self-preservation. Indeed amongst those who live under the same civil Government, the Liberty of natural Defence is very much restrain'd. Because the inward Tranquillity of a State could not subsist, if the Subjects were to return Hostilities to each other for every Injury or Affront. The Members then of a Community may so far only make use of violent Defence, as it is not taken off or forbidden by the Genius of civil Society, or by the Laws of the State. And the Laws of most Places, tho' they allow one Subject to repel another who invades him, by offering a greater Evil, than the Invader design'd against him³; yet according to the regular Course of Proceeding, they would not have private Persons apply Extremities, in opposing such Injuries as are levell'd only against Things that may be restor'd or repair'd. Inasmuch as such Reparation or Restitution may easily be procur'd by the help of Government; whereas when there is no Government to interpose, Men cannot be forc'd to make Requitals, but by War. There is no need then of being so solicitous with *Grotius*^b to make up the Inequality between the Thing invaded and the Life of the Invader, by our Favour to the Defendant, and our Hatred and Rigor against the guilty Party. Unless we join with *Baclar* in his Explanation of the Place, and say no more than this, that since in a Cause or Action of this kind it is generally very difficult to determine what was done within, and what beyond the due Bounds, it is not repugnant to Nature that we turn our Favour on the side of the Person who suffer'd, or was likely to suffer the Damage, and our Hatred upon the Plunderer or Thief; that is, when the Case is doubtful, we may fairly pardon in the former the Death of the latter. In civil States therefore it is sufficient, that a Man do not exceed the Limits of Defence appointed by the Laws of his Country. And yet if he should transgress these Measures he doth no Injury to the Invader, but only is guilty of a Breach of *Civil Law*. But it may be

^a L. 12. c. 1. Add. *Grot. ad 1 Maccab. ii. 37.*

² See *Lib. 8. Chap. 3. §. 23, 24.*

³ Such was the *Athenian* Law mention'd by *Demosthenes* (advers. *Aristocrat.*) ordaining, *That he who kill'd another in defence of Goods, which this other Person was taking or carrying off by Violence, should not be chargeable with any Guilt.* The Greek is, Καὶ εὖν φέροντα, ἢ ἄροντα εἰς ἀδικίαν, εὐθὺς ἀμυνόμενοι κτείνει, νηπινοὶ πηδᾶναι κελύσει.

ask'd farther, whether it is not at least a Sin against Charity to kill one who comes to plunder us of a repairable Good? In answer to which, it is our Judgment, that Charity towards one who professes Hostility against us, takes place only so long as we have probable Hopes of bringing him, by this means, to Repentance and to Peace. But when these Hopes appear fruitless, he that spares his Enemy betrays himself. Or if at any time my Reason persuades me, that a Thing of little and despicable Value is not to be defended with the same Eagerness and Violence, I forbear, in this Case, not for the sake of the Robber or Invader, but partly because I would not give myself so much Trouble about a Matter of so slight Concern, and partly because I would not seem narrow-spirited and covetous, by resenting to so desperate a height so inconsiderable a Damage.

XVII. It may be proper for us, on the present Occasion, to reflect on that most noble Law giving License to kill a Night Robber, but not one that comes in the Day-time¹; which we read in *Exod.* xxii. 2. and which hath been so often imitated in the Grecian and the Roman Constitution. Thus the Law of *Solon* recited by *Demosthenes* (contra *Timocrat.*)² *If any one, in the Day-time, steal above fifty Drachmæ, all Persons are empower'd to bring him before the Court of the Eleven. But if he steal in the Night, whatever the Value be, it shall be allowable either to bring him before the Judges, or to pursue, and wound, or kill him.* For which *Ulpian* the Rhetorician gives this Reason, * *In the Day we may call for Assistance, which in the Night cannot so well be had.* So *Plato* de LL. l. ix. *He that kills a Thief entering his House in the Night shall be blameless.* The same we find in the Roman Twelve Tables. Tho' as to this, *Caius* (L. iv. f. i. D. ad L. Aquil.) affirms, *That the Roman Law doth indeed permit a Man to kill the Night Thief; but then it obligeth him to give notice of it by crying out.* The latter Part of which Assertion, *Jac. Gothofredus* (ad LL. vi. Tali) observes to be a Specimen of *Tribonian's* mild Disposition, inasmuch as that there was no Clause originally in the Twelve Tables, appears from *Cicero* Orat. pro *Milon.* *The Twelve Tables, says Cicero, allow the killing of the Night Thief by any means possible; but the Day Thief only if he defend himself with his Weapon.* *M. Senec.* l. x. Controv. ult. *The Law which permits the killing of the Night Thief any way possible, doth not speak of him as condemn'd, but as surpris'd in the Fact.* *A. Gell.* l. xi. c. ult. when he reports that *Draco* made Theft capital, and *Solon* only double Restitution; adds, that the Roman Decemviri took the middle way between the Severity of the former, and the Mildness of the latter; then only

permitting a Thief, taken in the Act, to be kill'd, if either the Thing happen'd in the Night, or if being in the Day-time, he defended himself with his Arms against the Discoverer. As for the Sign of Crying out, the Twelve Tables requir'd it only in the Case of the Day Thief when he fought in his own Defence. *Si luci furtum faxint, si se telo defensint, quiritato, endoque plorato: Post deinde si cæsi esint, se fraude esto.* Comp. l. iii. S. D. ad L. Aquil. where the Term *Æque* is mollified by *Tribonian.* Yet it is not improbable, that in course of Time, and upon the Authority of wise Men, that antient Law was plainly mitigated, as *Cujacius* allows, L. xiv. *Observ.* 15. This appears from *Ulpian*, L. v. ad *Edict.* whose Words are fully recited in the comparison of the Jewish and Roman Laws, first publish'd by *Peter Pitheus.* Which are main'd, as we have them in L. v. D. ad L. Aquil. (Add. L. ix. D. ad L. *Cornel. de Sicar.*) The reason of which Alteration perhaps might be, that it was a Practice sometimes with Villains to rush out of their Houses and murder Persons, and then pretend that they found them in the Act of Thievery: As likewise, because Houses which are strongly built, and stand thick together, cannot easily be robb'd without the Master's Negligence; or at least cannot afford Rogues so frequent Opportunities. Compare *Justin*, L. ii. c. 2. s. 9. Whence *Cujacius* conjectures, that the said Law as by L. i. C. *quando hic unicuique*, was abrogated in Towns and Cities, and only allow'd to hold good in the Country. Tho' indeed this Order which he cites, doth not speak of Thieves who make their Attempts in Privacy and Silence, but of violent Robbers and open Assailants; as appears from the Reason subjoin'd, *That they may meet the Death which they threaten'd, and incur that which they design'd against others.* *Sextus Cæcilius* in *Gell.* L. xx. c. 1. explains this Law of the Twelve Tables falsely, when he makes it relate to the insidious Violence of nightly Murderers³. Now the Reason of such Distinction we take to be this, that in the Day we may easily seize the Thief and recover our Goods; whereas in the Night he may slip from the House undiscover'd; it being difficult to know him in the dark; or if one Person should chance to have a Knowledge of him, yet this would not convict him, unless, which cannot be done without great Trouble, more Witnesses are call'd out of their Beds. But in this Opinion there is one Thing which startles most Men, and puts them to some Loss and Difficulty; for they are apt to argue thus: Since the Laws which make this Allowance do not decree a capital Punishment against Robbers, it looks like an Absurdity, that private Persons should be indulg'd with a License of proceeding farther in these Cases, than

¹ The Words are, *If a Thief be found breaking up [an House] and be smitten that he die, there shall no Blood be shed for him. But if the Sun be risen upon him, there shall be Blood shed for him, for he should make full Restitution; if he hath nothing, then he shall be sold for his Theft, [to make Satisfaction.]*

² The Greek of *Demosthenes* is, 'Εἰ ὅ τις νύκτωρ ὄπῳ κλέψῃσι, τῶπυ ἐξείναι, καὶ ἀποκτείναι, καὶ πρῶσαι δώκουτα. * *Ulpian's* Greek is, 'Εν νύκτῃ μετίζονα πῖν πτωχείαν ἐδέειξεν, ἐπιδιδόντες μείζον ὅτι τὸ ἐγκλημα τῆ νυκτὸς, ἐν τῷ ἡμέρᾳ δύναιται πῖς καὶ βοηθὸς καλέσαι ἑαυτῶ, ἐν ὅ νυκτῇ, ὁ κλέπ.

Plato's Words are, Νύκτωρ ὄπῳ εἰς δικίαν εἰσιόντα ἐπὶ κλοπῆ χρημάτων, ἐὰν ἐλθὼν κτείνῃ τῆς, καθ' αὐτῆς ἕσται.

³ Mr. *Noodt* has shew'd in §. 1. of *Law IV. ad Leg. Aquil.* that there was no Addition of *Tribonian's*, nor any thing contrary to the Law of the Twelve Tables. He treats there of Restitution, not Punishment. The *Cornelian* Law, as well as that of the Twelve Tables, allows an absolute Impunity to them who slew a Thief in the Night, whether they cry'd out or no, whether they might have avoided killing of him or no; but the *Aquilian* Law did not exempt them from paying Damages and Fines, unless when there was an absolute Necessity of slaying the Aggressor to save their own Lives. *Observat. Lib. 1 Chap. 15.* and his *Probabil. Juris Lib. 1. Chap. 9.* as also *ad Leg. Aquil. Chap. 5.*

the Sovereign Power thinks proper for itself to do. In answer to which it may be observ'd, that all those Laws concerning the Punishment of Thieves, do suppose the Things stolen to be restor'd or compensated, upon the Apprehension of the Felon. And in order to this they judg'd the giving of two-fold, or sometimes of four-fold to be sufficient; according to the different Custom of particular Commonwealths. But it doth not hence follow, that therefore the same Laws, in Cases where Reparation was not to be had, could not furnish the Subject with some larger Power taken out of the Stock of natural Liberty. For the Lawgivers of Kingdoms and Republicks have not always thought it necessary, in ordaining Penalties for Offences, to take their Standard from what in a State of Nature the Right of War allow'd to be done. Thus there are some States in the World where Adultery is not a capital Crime; and yet the Husbands are indemnified if they kill the Adulterers upon surprising them in the Act. Now supposing Men to be plac'd in a *natural Liberty*, the Performance, or the very Offer of an Injury to their Bed, is plainly a sufficient Cause of War, and how far the License of War extends every one is sensible. And yet these Laws would not stretch the Punishment of Adultery when once actually committed, to such Violence as might be allowable in a War undertaken upon that Score. But for their Indulgence to private Persons of farther and severer Methods, we may borrow this very good Reason from Dr. Cumberland^a; that inasmuch as Offences of this kind escaping the Cognizance of the Civil Magistrate, do frequently pass unpunish'd, therefore whenever their Circumstances make them capable of receiving Punishment, it hath been thought proper to allow the most rigorous and extreme; that the Boldness of wicked Men, as much as it increases by common Impunity, so much it may be lessen'd and kept under by the Fear of meeting sometimes with so grievous and so terrible a return. That Clause in the Roman Law giving Authority to kill a Day Thief, *Si telo se defenderit, If he defends himself*⁴ with his Weapon, plainly intimates, that I am hereby permitted to

kill him, tho' barely for the Preservation of my Goods, and not then only when he first assaults me with his Weapon, but when upon my endeavouring to recover my Things from him, he employs it against me for his own Security.

XVIII. And therefore it is clear, that they are in the wrong who make the Reason of the fore-said Law to be only this, *Left if the Robber escap'd in the Night the Crime should pass unpunish'd*. As to Grotius's^b Discussion of this Point, there are many Things in it to which we cannot subscribe. He makes the Laws we have been speaking of to be founded on this Bottom, that the *Legislators hereby intimated, that no Man ought to be kill'd directly for the sake of our Goods*. Which is more than we can discover in those Laws which treat of such Thieves as creep into Houses with design to carry Things privily away. 'Tis true in the Case of the nightly Thief, it may happen that whilst I endeavour to save my Goods, my Life too may be in danger: And then the Slaughter of the Thief is permitted me upon a double Account. Nor here will it be an Objection against my Innocence, that I seem to throw myself into this Danger, by attempting to retain or to recover my Matters. For I am then engag'd in a lawful and almost a necessary Act; from which no Effect that arises without my Fault, can be imputed to me. But were it not lawful to kill another purely on the Account of Goods, how can we utterly clear him from all Guilt, who for the Preservation of those Concerns casts himself deliberately into such a Condition as makes it necessary for him either to kill, or to be kill'd? As we do not allow him the Plea of *Self-defence*, who kills a Man in a Duel voluntarily undertaken.

The other Reason which Grotius assigns for the Hebrew Law seems not of sufficient Strength and Solidity. *Inasmuch* (says he) *as by Night Witnesses of the Fact are difficult to be procur'd, therefore more easy Credit is given to him who shall affirm* that he kill'd the Thief in defence of his own Life; as having found him with an Instrument that might have done hurt*. For granting that the Hebrew Word in the Text cited by him signifies an² Instrument of Digging or Stabbing, yet if the Intent of the Law

^a L. 5. f. 26.

^b L. 2. c. 1. f. 12.

* If the Affirmation or Word of every Particular stood for a legal Evidence in this Case, this great Inconvenience would follow, that any malicious Person (tho' his Credit be no better than his Temper) might, with Impunity, destroy his Neighbour, if he would but give his Word his Neighbour first assaulted him.

⁴ See the Authorities alledged in the first Note of this §. and chiefly Cicero's *Orat. pro Milone*, Chap. 4. and the Commentators on it.

§ XVIII. 'Then (says Gronovius the Father in his Notes upon Grotius) here is only a bare Fiction of Law, as in the Case of Prescription and *Postliminium*. But can such a weak Foundation be of Force sufficient to give one Right to slay a Man whose Life he ought to have preserved? We ought rather to hold, that he ought to call for the Assistance of his Fellow Citizens against the Attempts of an unjust Aggressor, and more, that the Laws grant us an extraordinary Protection and special Privileges. Among the antient *Scythians*, as Justin relates, *Lib. 2. Cap. 2.* Robbery was a Crime punish'd with the greatest Severity and greatest Reason, because if that had been permitted, what could they have enjoy'd whose Goods consisted in Herds of Cattle, which could never be shut up? For this Reason the driving away of Cattle (*Abigeatus*) is punish'd more severely even by the Law of God, than Theft, *Exod. xxii. 1.* altho' the Thing stole be of much greater Value than the Beast. (See Mr. Le Clerc's Notes upon that Text.) So that in the Night, while Men sleep, the Law's awake, as we may say, and when the Proprietors of Goods are less able to take care of themselves and defend their Goods, it deters Thieves by making them apprehensive of a greater Punishment than if they rob in the Day-time. Moreover, 'There is a great Presumption that a Night Thief comes arm'd, and Lawgivers suppose it as a Thing undoubted; for all Things being commonly made fast in the Night, can a Thief be supposed with his Hands only to break thro' a Wall, force open Gates, Chests, and Cupboards? Wherefore for this Reason, because all Things are shut fast, we can't believe that a Thief will come in the Night without Arms and Engines to enter by force a Place which he ought to look upon as a Thing sacred. See Cicero's *Orat. pro Domo*. Chap. 41.

² Our Author hath reason to doubt, whether במיחורו *Bammabbtereth*, signifies, with an Instrument to break thro', 'tis more probable it means, in breaking thro', as the LXX and Vulgar translate it. But Mr. Le Clerc has very well observ'd, that it comes much to the same, since none can break thro' a Wall but with an Instrument. We may add with the same Commentator, that this Expression is founded upon the easiness of breaking thro' Walls; for it appears, that heretofore, as well as at this day, that most of the Houses in the East, as well in the Country as Cities, were built with Clay, struck upon Laths placed across, and whited over with Lime. Hence Job, Chap. iv. 19. alludes to it, when he says, *That Men dwell in Houses of Clay*.

had been as he makes it, 'twould have been much plainer to have said, *If he be found with a Weapon*. Nor indeed is it, after all, a good Consequence to say, that because the Thief was found arm'd with a Weapon, therefore he came certainly to assault the Life of the Person who kill'd him. No more doth it follow, that because by the Law of the Twelve Tables the Day-thief could not be kill'd, unless he defended himself with his Weapon, therefore there lies a fair Presumption against the nightly Thief that he actually made use of his Weapon in the same manner. For that Law gave Commission to kill the nightly Thief³ without Conditions, and by any Means possible. In after Ages indeed, ⁴ this farther Clause was added to it, *Si parcere ei sine periculo suo non potuit, dum rem servare conatur*^a: *If whilst he endeavours to save his Goods he cannot spare the Robber's Life without manifest Danger*. But before this Addition it cannot be prov'd, that a Person stood guilty of Homicide, who had kill'd a nightly Thief, tho' there were Witnesses to prove that the Party slain never brought him into danger of his Life. The Example of a Maid ravish'd in the Field, which *Grotius* here alledges, is nothing at all to his Purpose: For in that Case, the Law expressly commands us to *presume* that Violence was offer'd her. But in the Matter we are now concern'd about, we cannot discover that any *Presumption* of mortal Danger is made or suppos'd by the Laws. As indeed it is not the Business of these purloining Rascals to fight, but to run. Yet after all, we are ready

to confess, that a Man who in defence of his Goods only lays hold on the Night-robber (if he can with Safety and Convenience) and carries him before the Magistrate, acts much more generously than if he had unnecessarily depriv'd him of Life^b.

XIX. The last Point usually disputed on this Subject is, whether the Party who first gave and begun an Injury, may fairly resist the other Man when he endeavours to return or to revenge it? Many here take the affirmative side, upon this Reason, that whilst Men undertake to right themselves by their own Pleasure and their own Force, they are seldom very exact in proportioning the Punishment to the Crime. But we conceive the Question ought to be determin'd with more Caution and with more Distinction. The Law of Nature then commands, that he who has injur'd another should offer him Satisfaction: And at the same time it obliges the other Party to pardon the Offender, when he intreats him with Signs^c of Penitence, offering Reparation for past Damages, and Security for his future good Behaviour^e. He therefore that refuses to make Satisfaction, and hereupon *resists* the Person demanding it, manifestly heaps one Injury upon another. But when a Man refuses to accept fair Satisfaction, when offer'd him, and resolves to prosecute his Revenge by open Arms, in this Case he practises *unjust Force*, and consequently it can be no Fault to make Resistance against him^d.

^a In l. 9. D. ad L. Cornel. de Sicar.

^b Add. *Groeneveegen de Leg. abrogatis*, ad L. Aquil. where he observes, that the Dutch Laws do not require the Sign of *Crying out* in the dispatching of a Night-thief. *Comp. Leg. Wisogoth. l. 7. tit. 2. cap. 16. Leg. Burgundion. addit. 1. tit. 16. c. 1. 2. Leg. Frifiorum, Tit. 5. Constitut. Sicul. Tit. 13. Capital. Carol. & Ludovic. L. 6. c. 19.*

^c *Quintilianus* Declam. 5. *There's nothing more honourable than the Conclusion of a Quarrel. But whilst the Parties are hot with secret Desires of Mischief, 'tis in vain to pretend an outward Reconciliation.* M. Antoninus, L. 1. f. 7. *rejoiceth in this Happiness of his own Temper, that he was easily placable, and willing to be reconciled to those who had given him any Cause of Offence, so soon as they desired it.* Add. & L. 9. f. 8. & *Senec. de Ira, L. 2. c. 34. L. 3. c. 26, 27, 42.* *Amongst the Chinese, who prefer moral Philosophy to all other Parts of Knowledge, there is scarce any one so cruel as to desire to revenge an Injury with the Death of him that offer'd it: And they reckon it a true Mark of a brave, and wise, and worthy Man, to put up the Hurts and Affronts he receives, without any Inclination to harm the Author.* *Neuhof. Descript. Chin. c. 1.*

^d *Comp. Liv. L. 9. & Grot. L. 2. c. 1. f. 18. & Bæcler ad loc.* See the Story of the private Combat in *Davila*, l. 15. p. 1027.

³ *Duodecim Tabulae nocturnum furem, quoquomodo; diurnum autem, si se telo defenderit, interfecti impune voluerunt.* Cicero pro Milone, cap. 3.

⁴ *Furem nocturnum si quis occiderit, ita demum impune feret, si parcere ei sine periculo suo non potuit.* Digest. Lib. 48. tit. 8. ad Leg. Cornel. de Sicar. Leg. 9. But Mr. *Noodt* hath shewed very well, that that Law is ill placed, and that *Tribonian* had taken no more Care than *Ulpian*, from whom 'tis taken. *Lib. 37. ad Edictum*, where he speaks of the Reparation of the Damage to which the *Aquilian* Law condemned him, and not of the Punishment ordered by the *Cornelian*. See his *Probabil. Jur. Lib. 1. c. 9. §. 6.*

§. XIX. The Philosopher *Arrian* says, That the only way to atone for a Crime, is, in his Opinion, to confess it, and shew Repentance; for, adds he, the Fault appears not so great to him that has received it, when the Offender acknowledgeth that he hath done ill, and he hath reason to hope that he will do so no more, because he seems so much troubled for what he has done. *Μὴν γὰρ ἐμνηστὸν δεκτὴ ἴασις ἀμαρτίας, ἀμολογεῖν τε ἀμαρτίαν, καὶ δῆλον εἶν ἐπ' αὐτῷ μετάνοια, ὡς τοῖς παθόντων πᾶρα ἔστι πάντη χαλεπὸν τι παθόντων φανόμενα, εἰ δὲ δρῶντος αὐτῷ ἐνυγχαρίη, ὅτι κατὰ ἔθετα, αὐτῷ τε πινυῖς τὸ μέλλον ταύτῳ ἐπιτελεῖ ἀγαθῶν ὑπολειπόμενον, μὴ ποτε ἀν' ὀρθοπλήσιον ἢ ἀμαρτίην, εἰ τοῖς περισσὺν τλημελεθῆσιν ἀχρεῖα σοίσι, De Exposit. Alexand. Lib. 7. cap. 29.*

² This hath place chiefly in the Quarrels that happen between two Sovereigns, or two States, only we must observe; that they will not take a slender Reparation for a sufficient Satisfaction, or some Signs of Repentance for Recompence. But as to those Damages which Fellow-citizens do one to another, and for which the Laws prescribe a Satisfaction, it is more easy to determine which of the Contenders shall pay for the Aggressor. *Titius Observ. on Pufendorf, CXL.* But before I end this Chapter, we shall supply a considerable Omission of our Author, which neither he nor *Grotius* have taken notice of, and that is, the Right which every one hath to defend his Liberty. Mr. *Locke* hath proved the Justice and Extent of that Right which all have to defend themselves; *However*, says he, *endeavours to usurp an absolute Power over any one, puts himself into a state of War with him; so that this last can't look upon the Proceedings of the former but as a plain Attempt against his Life.* Indeed, from the Moment that a Man labours to bring me into Subjection to him against my Will, I may presume, that if I fall into his Hands, he will treat me as he pleases, and make no scruple to slay me in his Humour. Liberty, if I may so say, is the Bulwark of my Preservation, and the Foundation of all Things that belong to me; so that he that will make me his Slave, authorizes me to repel him all manner of ways, that I may secure my Person and Goods. But here we must carefully distinguish the State of Nature from the Civil State; for 'tis upon this that the extent of our Right, that we have to defend ourselves against them who would bring us into Subjection to them, depends. Man's natural Liberty consists in acknowledging no superior Authority upon Earth, and following the Laws of Nature, without any Dependence upon any other Man. Liberty, in a Civil Society, is not submitting to any Legislative Power but that which is established by the general Consent of the whole Body, nor to any other Government than what they acknowledge, nor to any other Laws than those which the same Legislative Power may make according to the extent of the Right which it hath received. But of this I shall speak more largely elsewhere. See that *English* Author's Treatise of *Civil Government*, whose Notions I have mentioned *Lib. 2. Chap. 3. & 4. §. 17 & 22.*

C H A P. VI.

Of the Right and Privilege of Necessity.

The CONTENTS of every Paragraph of the sixth Chapter.

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| <p>I. <i>How many kinds of Necessity there are.</i></p> <p>II. <i>Wherein the Right and Privilege of Necessity consists.</i></p> <p>III. <i>What Right it gives every one over himself, and directly over others.</i></p> | <p>IV. <i>And what indirectly.</i></p> <p>V, VI, VII. <i>What Right it confers over other Mens Goods.</i></p> <p>VIII. <i>What we may do to others Goods to preserve our own.</i></p> |
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THE *Case of Necessity* is a thing in every Body's Mouth, and the force of it generally acknowledged in the World: Hence we commonly say, that it *hath no Law*, that 'tis a *suppos'd* or *presumptive* Exception to all human Ordinances and Constitutions; and that therefore it gives a Right of doing many things otherwise forbidden^a. Now whence this Force or Power arises, and how far it extends, we ought with the more Accuracy to examine; because some Casuists seem to allow it none, or very little Efficacy, as to the Morality of human Actions. But before we proceed to this Enquiry, we may observe in general, that ¹ *Tully* in his second Book of *Invention*, c. 57, 58. makes a twofold *Necessity*, the one *simple* and *absolute*, which can by no possible means be resisted, alter'd, or abated; and the other *conditional* or *respective*. This again he divides into three kinds, with regard either to *Honesty*^b, to *Safety*, or to *Convenience*. Of which, he says the first is by many degrees the highest, the second of next Moment and Consideration, and the third very much inferior, and not able to stand in Competition with the rest. He proceeds to give it for a Rule, that altho' *Honesty* be better than *Safety*, yet in some Cases we may give the Preference to the latter; when what we take from *Honesty* in the consulting our present Safety may be recover'd and made up by our future Virtue and Integrity: When this cannot be done, *Honesty* is absolutely to be prefer'd and embrac'd. Others choose to say, that when the *Necessity of Safety* is prefer'd to the *Necessity of Honesty*, such a Fact cannot be defended in a direct way, and by any Prescription of Right, but leans wholly on

the Excuse which we allow to human Infirmary, and on the Indulgence of our Mercy and Pity. But that *Necessity of Convenience* is still much weaker, and weighs very little either in the defence or the excuse of Actions; unless when the Cause comes before such a Judge, as hath more regard to his own partial Inclination, than to the Suggestions of Wisdom and to the Demands of Right.

Now our Business on this Subject lies chiefly in examining and stating the *Necessity of Safety*, and in considering what force it hath to exempt any Action from the Obligation of common Laws: that is, whether we may not sometimes do things forbidden, and omit things commanded by the Laws, when we are (not by our own Fault) cast into such Streights, that we cannot otherwise secure our own Preservation²? And here it is apparent, that the *Favour*, the *Right*, the *Leave*, or whatever it is that in such Cases we attribute to *Necessity*, doth spring from this single Principle, that it is impossible for a Man not to apply his utmost Endeavour towards preserving himself; and that therefore we cannot easily conceive or suppose, such an Obligation upon him, as ought to outweigh the Desire of his own Safety.

II. No good and pious Man can question, but that GOD Almighty, who is the absolute Master of our Lives, and whose free Bounty gave us the precarious Enjoyment of them, may impose on us so severe a Law, that we ought rather to die, than to recede the least degree from it. Of which kind the *Jews* took their Law against eating Swine's Flesh to be; as we find in the History of

^a *M. Senec. L. 4. Centrov. 27. Necessity is the great Patronage and Shelter of human Infelicity. Callimach. Hymn. in Del. Necessity's a mighty Goddess. ——— Add. Orat. Lentul. in Liv L. 9. c. 4.*

^b To which belongs the saying of *Pliny, L. 1. Epist. 12. The best and highest Reason passeth for Necessity with wise Men.*

Mr. BARBEYRAC'S NOTES on Chap. VI.

§. I. ¹ *Tully's* Words are; *Atque etiam hoc mihi videor dicere, esse quasdam cum adjunctione necessitudines, quasdam simplices & absolutas. ——— Puto igitur esse hanc necessitudinem, cui nullâ vi resisti potest; quæ neque mutari, neque leniri potest. ——— Quod adjungitur ——— omni tempore, id pertinebit ——— aut ad honestatem ——— aut ad incolumitatem ——— aut ad commoditatem. ——— Ac summa quidem necessitudo videtur esse honestatis; huic proxima, incolumitatis; tertia, ac levissima, commoditatis: quæ cum his nunquam poterit duabus contendere. Hæc autem inter se sæpe necesse est comparari, ut quamquam præset honestas incolumitati, tamen utri potissimum consulendum sit, deliberetur. ——— Quâ in re fieri poterit, ut cum incolumitati consuluerimus, quod sit in præsentia de honestate delibatum, virtute aliquando & industriâ recuperetur, incolumitatis ratio videbitur habenda: cum autem id non poterit, honestatis.* Farther, we must observe, that Necessity which we must suppose always happens without his Fault who is reduced to it, begets a Contest not only between Self-love and Sociableness, but also between Self-love and Religion; as also between the divers Duties of Self-love. The Contest between Self-love and Sociableness happens, when the Persons with whom we ought to have dealt otherwise, have no part in the Necessity to which we are reduced: For our Author hath spoken in the foregoing Chapter of the Contest produced by the Reason of another's Fact, whether malicious, or not. See the Notes on the following Paragraph.

² Either in our Persons or Goods, as it appears from the following part of this Chapter.

the *Maccabees*. And their Judgment was then indeed right; because as the Case stood with them, to eat that sort of Flesh was look'd on as an open Denial of the true Religion. Whereas, were they under no such hard Circumstances, it was no Sin for a Man to keep himself from starving by feeding on this forbidden Meat, when no other could be procur'd. Sometimes too by the Authority of a Civil Sovereign, Men may receive so strict and rigorous Commands, that they must rather part with their Lives, than omit the Duty enjoin'd them. But the Obligation of *Positive Laws* is not always presum'd to be so harsh and severe. For in as much as the Authors of these, or of any other Rules and Constitutions in the World, chiefly design'd by them to promote the Safety or Convenience of Mankind, we may suppose them, generally speaking, to have had before their Eyes the weak Condition of human Nature; and to have reflected on the Impossibility which every Man lies under, not to avoid, and to drive off, all things that aim at his Destruction. Upon this account then, ' most Laws, especially those which we call *Positive*, are judg'd to except the *Cases of Necessity*; that is, not to *oblige*, when the Obervance of them must be attended with some Evil, destructive of our Nature, or exceeding the ordinary Patience and Constancy of human Minds: Unless when this very *Case* is included plainly in the Injunction, either by express mention, or because the Nature of the Business cuts off all Exception and Reserve. Hence it is clear, that no such Power ought to be attributed to *Necessity*, as that it should give us the Privilege of directly violating a Law, or of committing a Sin; but we only presume from the favourable Intention of Legislators, and from the Consideration of

the Nature of Man, that the *Case of Necessity* is not comprehended under the general Terms of a Law. An Instance of this our Saviour himself hath been pleas'd to give us, in *David's* eating the *Show-bread*^a, intimating, that the Matter and the Reason of the Law which forbid that Action in general, could not be suppos'd to have any such rigorous Design, as that a Man ought rather to die with Hunger, than to touch the consecrated Food^b.

It is plain then, that as to *positive Laws* this Privilege of *Necessity* is admitted and allow'd: But 'tis a Point much more difficult to determine, whether the same Favour can take place in^c the Laws of Nature; that is, whether in *necessary Cases* we may fairly omit what is *naturally* commanded, or perform what is *naturally* forbidden? As for the first Question, it appears from the Nature of *affirmative* Precepts, that whenever they oblige a Man to the actual exerting of such a Performance as is enjoin'd, they at the same time suppose him to have Opportunity, Subject, and Power of acting: But now we may fairly judge these Conditions to be wanting, when I cannot do a thing without the Loss of my Life. Since to throw off the Love and Care of ourselves, is justly rank'd amongst impossible Attempts; or however amongst such as surpass the common Strength of Mens Souls. Therefore, unless it either be expressly and particularly provided by the Law, or deducible from the Quality of the Business to be undertaken, that I must rather lay down my Life than omit the Duty, all affirmative Edicts of Nature may be understood to except the Case of extreme Necessity: Especially when a Man hath not fallen under such Necessity through his own Neglect and Default. Thus I

^a See *Matt.* xii. 4. *Add. Casaubon Exercitat. ad Baron.* 1. n. 9.

§. II. ¹ Otherwise, as Mr. *Thomasius* observes, the publick Good redounds from the Good of private Persons; and for the most part, the Preservation of a private Person is more advantageous to the State, than the Observation of any human Law. *Instit. Jurispr. Div. Lib. 2. Chap. 2. §. 131.*

² We must say the same thing of Injunctions to keep Days of Festival, to which our Author's Words refer, *Necessitas ferias caret*, out of *Pallad. de Re Rustic. Lib. 1. Chap. 6.* Necessity makes no Holidays.

³ These Principles are most exact, and proper to decide all Questions which can be propos'd in this Matter; they are borrow'd from *Titius's* Observ. CXXI. and partly from *Thomasius's Instit. Jurispr. Divin. Lib. 2. Chap. 2. §. 130. &c.* For we must distinguish between the Laws which concern God, and those that relate to Men. As to the first of these, we may lay down these two Rules; 1. That always when in doing or not doing a certain Action, we shew directly, or indirectly, some Contempt of the Divine Majesty; the Law which forbid, or orders this Action otherwise, admits of no Exception in Cases of Necessity; for in this last Case, the Nature of the Thing itself makes it evident, that no Man ought to preserve his own Life by any thing whereby God is dishonour'd. 2. But if in doing, or not doing a certain Action, we do not directly, or indirectly, shew any Contempt of the divine Majesty, the Law which forbids, or orders that Action otherwise, does not indispensibly oblige, in a Case of extreme Necessity; for then the Glory of God not suffering any Affront, his infinite Goodness will not allow us to presume, that he will not oblige us to expose our Lives needlessly, or our Goods. So that when we cannot commit any Action positively by the Law of Nature, without shewing at least indirectly some Contempt of the Supreme Legislator, these sort of negative Laws admit of no Exception in the Case of Necessity; and so much the more, if we do not find ourselves reduced to this Dilemma, either to die, or break some negative Maxim of the natural Law, which thro' the Violence of him that proposes it, either formally, or by Interpretation, may make us condemn the Authority of the Supreme Legislator. Wherefore we must resolve rather to die, than lie (for Example) with our Mother, or slay a Person whom we know to be innocent. See what we have said upon *Lib. 1. Chap. 5. §. 9. Note 2.* But we may, to avoid a great Evil, with which we are threaten'd by an unjust Aggressor, promise something, even with an Oath, without Intention of swearing, or contracting by such a forced Act, any valid Obligation; for in that Case 'tis neither a true Oath nor Promise; and he that forces us unjustly, does it only because he thinks we have a greater Respect to the Deity, otherwise he would not value it; so far is he from engaging us to violate our Duty, that he would be much troubled that we should. See what is said *Lib. 4. Ch. 2. §. 8.* As for such Actions as are forbidden by some positive divine Law, as they are otherwise indifferent in themselves, the Exception of the Case of Necessity hath place, or not, in that respect, according as in doing of them we shew, or not, some Contempt of the divine Majesty, which must be judg'd of by Circumstances. The first is seen in the Example of *David*, and the other in the seven Brethren spoken of in the History of the *Maccabees*, upon which our Author reasons well. As to the natural affirmative Laws, which concern the Divinity, Mr. *Titius* believes with Mr. *Thomasius*, that they do not indispensibly oblige to an outward positive Worship, whose Omission may be a sign of such a Contempt. See what is said upon *Chap. IV. of this Book, §. 3. Note 2.* But altho' some Acts of outward Worship are expressly commanded by some positive Law, we are not oblig'd to practise them in the Case of extreme Necessity, unless the Omission passes for an open, or tacit Abjuration of the Religion which we esteem true, as in the Case of *Daniel, Chap. vi. ver. 10.* or when it shews a Contempt of the Divinity directly or indirectly, which does not commonly happen. I shall speak in *Note 5.* of the Privileges of Necessity, with relation to the Duties which concern Men themselves.

am not bound to furnish an hungry Person with Bread, when I want it for my own Sustainance^a; or to help a Man that is drowning, when I cannot save him without losing myself. *Seneca's* Resolution is good in both Cases, *I will give* (says he)^b *to those that are in need; but so as not to put my self in the same needy Condition: I will succour those who are ready to perish; but so as not to expose my self to certain Ruin.*

As for the *negative* Precepts, or the Prohibitions of natural Laws, this in the first place is most certain, that no *Necessity* can make it allowable for us to undertake an Action directly dishonouring Almighty GOD, as suppose to blaspheme or to deny him, and renounce his Worship and Service, tho' for the avoiding of present Death. For in as much as GOD is able to inflict on a Man a much more grievous Evil than *natural Death* can be imagin'd to be, our Reason doth with good Probability assure us, that he will requite us with a much more noble Happiness, when we part with our Lives for his Sake: On the other hand, it would be absurd, as well as impious, to sin against the Divine Honour for the escaping of a lesser Evil, than what he incurs by such an Offence^c. Yet the unhappy Case of those who yield to the Force and Violence of Tortures, is not altogether unworthy of our Pity.

Concerning those Laws which contain the mutual Duties^d of Men, it may be first observ'd, that some of these natural Precepts do presuppose some Human Deed or Institution; which, as may be gather'd from its End and Purport, not extending to the Case of extreme Necessity, the same Exception may be fairly understood in the Law. And then we may remark farther, that a Man cannot be said by his own Act *immediately* to have

violated a Law, unless the Act can be rightly *imputed* to him. Now an Act may proceed from a Man two ways, either as he is the *Principal*, or as he is the *Instrumental Cause* of it. And this *Instrumental Cause* is again of two kinds, either as it exercises no Motion but what is impress'd on it by the *principal Cause*, and against its own natural Inclination, if it have any; or, as it applies itself upon its own proper and internal Impulse to such a Performance, tho' the Influence and the Direction of the first Cause do likewise assist in the Operation. If then a Man be, according to this latter way, *Instrumental* in an Act, the Act may not only be *imputed* to the *principal Cause*, but also to him, as his true and proper Work. But if he be *instrumental* or concurrent only in the former manner, the Act shall not be *imputed* to him, but only to the *principal Agent*. What farther Conditions are requisite to this Case shall hereafter be^e more largely explain'd.

III. Thus much being premised, we may go on to discuss the particular Cases and Questions usually disputed on this Head. In reference then to a Man's self, tho' otherwise he hath no such Right and Power over his Members, as to destroy, to distort, or to maim them at his Pleasure; yet it shall be lawful for him to cut off a Limb, that is either possess'd by an incurable Gangrene, or that is rendred useles by a Wound; in the former Case^f, to keep the whole Body from perishing, or the sound Parts from being infected, and in the latter, that the use of the other Members be not hindered by the Clog of an unserviceable and cumbersome Appendage. Whether the extreme Necessity doth farther give a Man any Right over his own Life, that is, whether for the escaping a

^a See 2 Corinth. viii. 13.

^b *De Benef. L. 2. c. 15.*

^c *Carpylid. in Antholog.*

Ἡ εὐθιμία ἀπὸ λαλεῖ χάρις.
Ἄνδρα ἔστιν εὐσεβείης ἀπόλαυε χάρις.

Good Men, whatever Scenes of Fate they see,
Shall ne'er be Losers by their Piety.

^d This Passage is quoted *Chap. III. §. 18. Note 2.* of this Book.

^e First, as often as in doing any Action otherwise forbidden, with relation to another, or ourselves, we find a sure way to avoid some great Danger, without falling into some greater Evil, or equal to that from which we keep ourselves, the Law permits an Exception of the Case of Necessity. 2. But if the Performance of the like Action is no surer way of escaping the Danger, and the Evil which may redound from it, appears greater, or equal, the Law does not allow the Exception of a Case of Necessity. By *sure means* we understand those which have a natural and necessary Power to remove the Danger wherewith we are threaten'd, and not a pure arbitrary Force, which depends upon the Fancy of him who has brought himself into that Necessity; for in the first Case 'tis divine Providence which affords Means to deliver out of Danger, whereas in the other 'tis the Malice of Man, and such a Malice as intends either directly, or indirectly, to oblige us to disobey the Magistrate. We may add, that the Certainty of the Means of which we are speaking, is not an absolute and infallible Certainty, and such as ought to be understood in a negative Sense, rather than a positive, *i. e.* in such sort, that without such a Means we are lost, and are not sure we shall escape if we put them in practice. A Man, for Example, who is pursued, may be at length convicted, but to make his Escape, runs in haste upon a Cripple who stands in his Way, this is no hindrance but that he might make his Way, altho' he did some great Damage to him who was not able to retire, for Nature allows every one to maintain his Ground as long as he can. As for the great Injury which may arise from that to which Necessity leads us, it ought also to be measured physically, for we neither can, nor ought to compare the moral Evil which may be on the one side, or the other, because that's the Thing in question. Provided therefore that there be no Fault in him who is in danger, which must always be supposed here, the Circumstances observed are sufficient to enable us to make a probable Conjecture of the Will of GOD; for the Law of Nature without Contradiction tends to the Happiness of Mankind, and when we can be probably delivered from a great Evil by exposing ourselves to a lesser, we have Reason to choose the latter. But if the Evil which we embrace, is equal to that from which we fly, and we cannot otherwise promise ourselves any Certainty of avoiding the Danger by that means, in this Case nothing can dispense with our Obedience. See Mr. *Titius's Observ.* CXLII. As to the Affirmative Precepts of the Law of Nature, which refer to another, our Author has treated of them well enough.

^f See *Lib. VIII. Chap. 1. §. 6.* and what I shall say upon it contrary to our Author's Notions.

§. III. ! We may in this place apply the Principles laid down in *Note 4.* of the precedent §. Indeed the loss of a Member is without Contradiction a lesser Evil than the Loss of Life, and is also a sure Means to keep ourselves from Danger. The same Thing hath place, as any one may see, in the Cases where to save a more noble and necessary Member, we are contented to be deprived of one less considerable and useful. But we ought to observe, 1. That it is sufficient here to suppose a bare Permission, there being but few Men who have Courage sufficient to bear such a painful Operation as the cutting off a Member dangerously affected is, and therefore had rather die of their Wounds in ease. 2. That Necessity to which we were reduced ought not to be understood in its utmost rigor. So that when we have in some manner contributed by our own Fault to put ourselves into such an Extremity, we may not lawfully, to retrieve our Affairs, resolve upon a thing otherwise unlawful. See Mr. *Titius's Observ.* CXLII.

Death of Ignominy or of Torture, he may lay hold on more gentle Means of leaving the World, we have enquir'd and stated in the preceding Chapter. We may proceed therefore to examine what Right *necessity* can give us over others. To feed on Man's Flesh in the desperate Extremity of Famine, when no other Suttenance can be procur'd, is a lamentable, indeed, but not a sinful Expedient. But as for those Instances, when in distress and want of all Provisions, Men have been kill'd to preserve their Fellows, either by Compulsion and against their Consent, or else by the Determination of Lot, the Decision of them is a Point of some Difficulty and Uncertainty. Inasmuch as whatever the Law against Murthier suggests on one side, the sharpness of Hunger pleads as loud on the other, and the Belly, that Advocate without Ears: Especially, considering that unless this *unhappy* Means was made use of, the whole Company must have inevitably perish'd. This is one of those Cases in which a Man ought to die rather than commit the Fact, it being directly contrary to the Laws both of God and Nature²². To this purpose we have a Story of seven *Englishmen*, who being toss'd in the main Ocean without Meat or Drink, kill'd one of their Number, on whom the Lot fell, and who had the Courage not to be dissatisfied, assuaging, in some measure with his Body, their intolerable and almost famish'd Condition: Whom when they at last came to shore, the Judges absolv'd of the Crime of Murthier. *Ziegler* upon *Grotius*^b, giving this Relation, is of opinion, That *the Men were all guilty of a great Sin, for conspiring against the Life of one in the Company, and (if it should so happen) every one against his own; thus regarding bodily Peril more than the Danger of their Souls: That no one ought to have set so little a Value on his Life, as to lose it for satisfying the Hunger of the rest: And that the rest ought not to have been so cruel to their Fellow, in compliment to their own Stomachs.* But to this it might be answer'd, that 'tis too harsh and rigorous a Censure, to say that those Men *conspire against the Life of another*, who agree to take the Chance of dying one of them, for preserving the Lives of all the rest^c. And consequently they could put their Souls into no danger by this unfortunate Resolution. Nor is the Charge of *undervaluing their Lives* any better grounded; since he only can fall under this Imputation, who throws himself away without Necessity. Nor, in the third

place, doth there lie any Objection of Cruelty, when the Person dying for the Safety of his Companions, receives the Instrument of Death with less Grief and Reluctancy than the others apply it. There is another Case worth examining,³ suppose in a Shipwreck more Men leap into the little Boat than it is able to carry, and the Boat belongs to no one by a more peculiar Right than to the rest; whether they may not fairly draw Lots who shall be cast over-board; and whether if any one refuse thus to take his Chance, he may not be thrown out without farther Deliberation, as one that seeks the Destruction of the whole Company? But these Cases being such as very rarely fall out,⁴ we choose at present to suspend our positive Judgment concerning them.

IV. This may more frequently happen, that two Persons being under imminent Danger of their Lives, both must unavoidably perish, unless one of them, for his own Deliverance, hastens, by some Act, the Fate of the other, which would however have soon arriv'd: Or, that upon necessity we may bring on another, indirectly, the danger of Death, or of some grievous Hurt; not designing to harm him, but only to exercise such an Act as may probably prove mischievous to him; at the same time desiring any other way to get rid of our Necessity and Streights, and endeavouring, as far as lies in our Power, to make the Damage fall light on the Suffering Party. Now this kind of hurt, as we judge it not to cause any Sin in the Giver, so we think the Receiver ought to look on it as purely an accidental Evil, upon account of which he has no reason to be angry at the Author. Let us consider an Instance or two of both Cases. If I, being a skilful Swimmer, fall into deep Waters with another utterly ignorant of that Art, and he, as the usual way is, clings fast about me, who am not able to drag out both Burthens; who will blame me for using all my Strength to get rid of him, and so to prevent my own Death, tho' perhaps I could, with hard shift, have held him some few Minutes above Water? So in a Wreck⁵, if I have taken Possession of a Plank which will not hold two, and another swimming towards me, shall endeavour to throw himself upon it, to the Destruction of us both; there seems to be no Reason why I should not apply the utmost Violence in keeping

^a *Homer Odyss.* vii. 216. Οὐ γὰρ πρυγῆς, &c.

^b *Ad Grot. L. 2. c. 1.* from *Nich. Tulpius Observat. Medicin. L. 1. c. 43.*

^c See *Jonah, c. 1. ver. 7, &c.*

²² Mr. *Titius*, *Observ.* CXLIV. thinks it neither unlawful, nor of an indispensable Obligation, but he says, "That they who are reduced to this Extremity, ought not nevertheless to resolve upon a Thing so sad and inhuman; for altho' commonly the Affections of Men one to another, especially such as are neither Parents nor Friends, are very cool, yet when they are involved in any common Danger, the Sense of that naturally awakens our Thoughts of Humanity and Compassion, which make us choose rather to die ourselves, or wait the unforeseen Events of Divine Providence, than have recourse to such an irksome and barbarous Expedient, by which we are not yet sure that we shall save our Lives."

³ In truth, the Master of the Shallop doth not seem to be obliged to draw Lots with the others, which he permitted lovingly to come into it, and consequently he might make them cast Lots to save himself.

⁴ Our Author determines it by saying, *It seems so to me*, in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 22.

§. IV. ¹ But if that other being stronger than I, drive me from my Plank, the Necessity of saving his Life will not excuse him, because he brings upon me as great an Evil directly, as that he saves himself from. Moreover, I am here the first in time, the Plank belonged to me by the Right of the first Occupant, and so he could not drive me from it without Injustice. We must say the same Thing of a Man, who, when an Army is routed, will seize upon an Horse which belongs to a wounded Person, and leaves him infallibly expos'd to the Fury of the Enemy, to save his own Life the more certainly. These are the two Cases mention'd by *Lactantius*, in the Place above quoted, *Chap. 3. §. 11. Note 2.*

him off. And thus likewise if two Men are pursued hard by an Enemy, bringing Death in his Hand, if both cannot be saved, one of them may, for his own Security, either by breaking down a Bridge, or shutting a Gate after him, leave the other in imminent Danger of being kill'd. This kind of Necessity often happens in War; where 'tis a Rule, that at any time some few are to be left in distress for securing the main Body. *Arrian de Expedit. Alex. Lib. vi. c. 25. It was necessary to set aside the Care of single Persons, in prosecution of the Common Safety. Virgil Æn. ix. v. 722, &c.*

*PANDARUS, ut fuso germanum corpore cernit,
Et quo sit fortuna loco, qui casus agat res;
Portam vi multa converso cardine torquet,
Obnixus latis humeris: multosque suorum,
Mœnibus exclusos, duro in certamine linquit.*

When *Pandarus* beheld his Brother kill'd,
The Town with Fear and wild Confusion fill'd:
He turns the Hinges of the heavy Gate, (Weight.
With both his Hands, and adds his Shoulders to the
Some happier Friends within the Walls inclos'd;
The rest shut out to certain Death expos'd.

Mr. Dryden.

And again, *Lib. xi. ver. 884, &c.* after the Defeat of the *Latin* Horse,

————— *Pars claudere portas,
Nec sociis aperire viam, nec mœnibus audent
Accipere orantes.*

Then in a Fright the Folding Gates they close,
But leave their Friends excluded with their Foes.

Mr. Dryden.

Compare *Livy, Lib. xxvi. 15.* Where the *Thurini* made a wicked and treacherous Use of this Pretence. *Florus (Lib. ii. c. 18.)* says of the *Numantines*, *At length they enter'd into a Resolution of Flight: But this their Wives prevented, by cutting in pieces the Harness of their Horses; committing a base Cruelty thro' an Extremity of Love. Tacitus (Ann. xiv. c. 32, 33.)* censures it as the Effect of ill Conduct, or of Treachery, that when the *Romans* were besieg'd in *Camolodunum*, *Non motis senibus & feminis juvenus sola restiterit*; the young and able Men did not throw out the Women, and Persons useless through Age, and so clearing the Place make it more capable of Defence. (Add. *Livy, Lib. v. c. 40.*) On the contrary, he tells us in the same Story, that *Suetonius* resolv'd to hazard the Loss of one Town for the Security of the whole Province; and therefore he would not be mov'd by the Cries and Intreaties of those who begg'd him to stay and protect them: But giving the Sign for marching, he receiv'd all into his Troops that were willing and able to follow him; and as for those whom either the Weakness of their Sex, or the Burthen of their Age hinder'd from stirring, they were left to the Mercy of the Barbarians. Yet *Darius* in

Quintus Curtius, Lib. iv. c. 16. when Things were not brought to desperate Extremity, bravely refus'd to break down the Bridge of the River *Lycus*, which he had pass'd with some part of an Army in a Retreat; making this generous Declaration, *That he had rather give a Passage to those that pursu'd, than take it from those that fled.*

An Instance³ of the other Case which we mention'd in general, may be this: Suppose a Person of more Strength than myself follows me close with Intention to kill me, and I meet one in a narrow Passage, thro' which I must take my Flight; if upon my Request he will not get out of the way, or if he has not Time or Room to stand off, I may throw him down and run over him, tho' the Fall, in all probability, will be very grievous and hurtful to him: Unless he be such an one as, by virtue of some peculiar *Obligation*, I am bound at any time to serve voluntarily with my own Danger. And if the Person who thus stops my Flight be not able to look to himself upon my calling to him, as suppose a lame Man or a Child, I shall certainly deserve excuse, if I attempt to leap over him (either being on Horseback or a foot) rather than to fall into my Enemy's Hands by my Delay. As for that other Example, which some give, it plainly appears not to be without Fault: The Case is this, ⁴ *A Captain flying from a Battle, and being closely follow'd by the Enemy, one of his Men happening to be got just before him in the Crowd, he runs him thro' to get off with the more Expedition.* Now here the Captain was strong enough to have made his way only by pushing down the Fellow that stopp'd him, and therefore ought not to have us'd so violent Means. Yet if in getting by him he had undesignedly hurt him with his Arms, the Mischance would have been very pardonable. But in case a Man either out of a frolicksome, or a cruel and barbarous Humour, stops me on purpose, and refuses to make room for me to escape, I may presently use him as an Enemy, and thrust him down by any means I can, how much soever he is like to suffer by the Bruise². To conclude this Point, as the declining Death any way admits of much Favour and Excuse, so if the Danger offer'd be no more than a Maiming, or a grievous Wound, and we fly from it with the Hurt of those that chance to stop us, the Fact will bear much the same Apology or Defence. For he who offers such a Violence may be resisted, as much as if he directly attempted to murder us; and when we are compell'd to consult our Safety by Flight, the Consternation we must needs lie under vindicates our Innocence, as to any sudden and unfortunate Accident that we chance to trespass in.

V. Let us enquire in the next place, whether the Necessity of preserving our Life can give us any Right over other Mens Goods; so as to make it allowable for us to seize on them for our Relief, either secretly, or by open Force, against

² Comp. *Laëtant. Institut. l. 5. c. 17.* which some have vainly oppos'd to the Opinion here deliver'd.

³ These sort of Cases have no Difficulty in them, for he treats of the Affirmative Precepts of the Law of Nature, which oblige not when there is no occasion of practising them, and much more in a Case of Necessity, in which we can't practise them, but at the Expence of our own Preservation. See Mr. *Titius, Observ. CXLV.*

⁴ It is easy to see, that the Action here alledged is not innocent. This Officer might have made way for himself forcibly, by thrusting the Soldier aside, but if he had hurt him with his Arms undesignedly, he was excused.

the Owner's Consent. For the more clear and solid Determination of which Point, we think it necessary to hint in short on the Causes upon which distinct *Proprieties* were first introduc'd in the World; designing to examine them more at large in their proper Place^a. Now the main Reasons on which *Proprieties* are founded, we take to be these two, that the Feuds and Quarrels might be appeas'd which arose in the *Primitive Communion* of Things, and that Men might be put under a kind of Necessity of being industrious, every one being to get his Maintenance by his own Application and Labour. This Division therefore of Goods was not made, that every Person should sit idly brooding over the share of Wealth he had got, without assisting or serving his Fellows; but that any one might dispose of his Things how he pleas'd, and if he thought fit to communicate them to others, he might at least be thus furnish'd with an Opportunity of laying Obligations on the rest of Mankind. Hence when *Proprieties* were once establish'd, Men obtain'd a Power not only of exercising Commerce to their mutual Advantage and Gain, but likewise of dispensing more largely in the Works of Humanity and Beneficence; whence their Diligence had procur'd them a greater Share of Goods than others: Whereas before, when all Things lay in common, Men could lend one another no Assistance but what was supply'd by their corporal Ability, and could be charitable of nothing but of their *Strength*^b. Farther, such is the Force of *Propriety*, that the *Proprietor* hath a Right of delivering his Goods with his own Hands; even such as he is oblig'd to give to others. Whence it follows, that when one Man has any thing owing from another, he is not presently to seize on it at a venture, but ought to apply himself to the Owner, desiring to receive it from his Disposal. Yet in case the other Party refuse thus to make good his Obligation, the Power and Privilege of *Propriety* doth not reach so far as that the Things may not be taken away without the Owner's Consent, either by the Authority of the Magistrate in *Civil Communities*, or in a *State of Nature* by Violence and hostile Force. And tho' in regard to bare *Natural Right*, for a Man to relieve another in Extremity with his Goods, for which he himself hath not so much occasion, be a Duty obliging only *imperfectly*, and not in the manner of a *Debt*, since it arises wholly from the Virtue of *Humanity*; yet there seems to be no reason why by the additional Force of a Civil Ordinance, it may not be turn'd into a strict and perfect Obligation. And this *Selden* observes to have been done among the *Jews*: Who, upon a Man's refusing to give

such Alms as was proper for him, could force him to it by an Action at Law. 'Tis no wonder therefore, that they should forbid their Poor on any account to seize on the Goods of others, enjoining them to take only what private Persons, or the publick Officers, or Stewards of Alms should give them on their Petition. Whence the stealing of what was another's, tho' upon extreme Necessity, pass'd in that State for Theft or Rapine. But now supposing under another Government the like good Provision is not made for Persons in want, supposing likewise that the covetous Temper of Men of Substance cannot be prevail'd on to give relief, and that the needy Creature is not able, either by his Work or Service, or by making Sale of any thing that he possesses, to assist his present Necessity, must he therefore perish with Famine? Or can any human Institution bind me with such a force, that in case another Man neglects his Duty towards me, I must rather die, than recede a little from the ordinary and the regular way of acting? We conceive therefore, that such a Person doth not contract the Guilt of Theft, who happening, not through his own Fault, to be in extreme Want, either of necessary Food, or of Cloaths to preserve him from the Violence of Weather², and cannot obtain them from the voluntary Gift of the Rich, either by urgent Intreaties, or by offering somewhat equivalent in Price, or by engaging to *work it out*, shall either forcibly or privily relieve himself out of their Abundance; especially if he do it with full Intention to pay the Value of them, whenever his better Fortune gives him Ability. Some Men deny that such a Case of *Necessity*, as we speak of, can possibly happen. But what if a Man should wander in a Foreign Land, unknown, friendless, and in want, spoil'd of all he had by Shipwreck, or by Robbers, or having lost by some Casualty whatever he was worth in his own Country; should none be found willing either to relieve his Distress, or to hire his Service, and should they rather (as it commonly happens) seeing him in a good Garb, suspect him to beg without Reason, must the poor Creature starve³ in this miserable Condition? It may be objected indeed, that in *Proverbs* vi. 30, 31. he is call'd a Thief, and pronounced obnoxious to the Penalty of Theft, who steals only to satisfy his Hunger. But whoever closely views and considers that Text, will find that the Thief there censur'd is neither in such extreme *Necessity*, as we are now supposing, nor seems to have fallen into his needy Condition merely by ill Fortune, without his own Idleness or Default: For the Context implies, that he had a House and

^a Lib. 4. c. 4.

^b See *Ephes.* iv. 28.

§. V. ¹ *Aut qui divitiis soli incubuere repertis,
Nec partem posuere suis, &c.* Virg. *Æn.* VI. 610, 611.

² If in a Case of Necessity a Man may innocently do some Wrong to another in his Person, so far as to put him in danger of his Life to save his own, by a much stronger Reason will he be permitted, in like Cases, to take away or destroy the Goods of another, which are of much less Value than Life and Members. *Thomas. Instit. Jurisprud. Div. Lib. 2. Chap. 2. §. 168. Note 1. and Titius's Observ. CXLVII.*

³ Mr. *Hertius* has alledged an Example here, which is this; when the Magistrate, in a great Scarcity of Provisions, conspires with those that will not open their Granaries, that they may sell their Corn the dearer, or at least he neglects to hinder Monopolies, and punish the barbarous Cruelty of those, who to enrich themselves, care not how many Men they bring to Beggary.

Goods sufficient to make ⁴ sevenfold Restitution; which he might have either sold or pawn'd; a Chapman or Creditor being easily to be met with in Times of Plenty and Peace. For we have no Grounds to think, that the Fact there mention'd is suppos'd to be committed, either in the Time of War, or upon account of the extraordinary Price of Provisions. Besides, this Thief was faulty on another Account: For if he had not wherewithal to maintain himself, the Laws oblig'd him to sell himself for a Slave ^a.

VI. *Grotius* ^b proposes another way of solving the Difficulty under our present Debate: He says, that the first Introducers of distinct *Proprieties* must be understood to have done it with this Exception and Limitation, that the Right of this Propriety excluding others from the Use of every Man's proper Goods ought then to expire and to give place, when another cannot possibly without making use of them, be sustain'd or preserv'd: And consequently, that in such a Case of *Necessity* a Thing possess'd in *peculiar*, when another Man's Life cannot be sav'd without it, is turn'd again into *common*. Or, what amounts to the same Purpose, that when Men originally instituted separate Proprieties, they agreed by mutual Covenant, to forbear using the particular Goods of each other, any farther than the Owner should give leave: Yet so as to make it allowable in extreme Necessity, for a Man to seize on any Thing absolutely requisite for his Preservation, as if it still lay in its primitive Indifference and Community. For since in *written Laws*, that Interpretation is to be follow'd which recedes the least from natural Equity, he presumes this will hold more strongly in regard to Customs, which obtain only by tacit Agreement. And surely it must be in the highest Degree equitable, that a Man be permitted to save his Life, by using any thing at hand, when all other Means fail him.

But this Exposition lies open to several Exceptions and Difficulties: For if *Necessity* gives a Man a Right of seizing on the Goods of others, as if they lay in common, what hinders but that, if he have sufficient Strength, ^c he may take them from the Owners, when they themselves are at the same time pinch'd with the like

Necessity? Yet this *Grotius* doth by no means allow. Again, *Grotius* requires *Restitution* to be made in these Cases: But I am oblig'd to no such Duty, when I take a Thing by virtue of my Right. Besides, he forgot to mention how different the Case is, when a Man falls under such Necessity by his own Sloth or Negligence, and when it comes on him without his Fault. Which Distinction being omitted, a Right seems to be given to idle Knaves, whose Vices have brought them into want, to seize forcibly for their own Use the Fruits of other Mens honest Labours; and so continuing their Poverty and their Laziness together, to put a Necessity on industrious Persons of feeding such useless Bellies for nothing. But all wise Men, as they allow such as are innocently miserable to deserve Assistance and Relief; so they advise us to pack off mendicant Drones and Lubbards, with the old Answer that the Ant gave the Grasshopper in the Fable ^e. Since then it is lawful for every Proprietor to distinguish between such as are indigent out of Misfortune, and such as are reduc'd to the same Condition by their own Demerit and Neglect; 'tis plain, that he has such a Right over his own Goods, as shall in some measure prevail even against a Person in extreme Necessity: So far at least as that he shall have the Privilege of judging, whether the Man be an Object worthy of his Relief, or not; that it may be in his Power to oblige and win a necessitous Person by his seasonable Succours: For nothing raises the Value of a Kindness so much as its being done for the Removal of an extreme Distress. But all this Merit and Obligation is cut off, when we give another only what he might otherwise, as his own Right and Due, violently take from us.

We think therefore, that this Point of Dispute will be more clearly determin'd by the Principles and the Method which we have laid down; that is, by saying, in short, that the wealthy Person is bound to relieve him who innocently wants, by an imperfect Obligation; to the performing of which though regularly no Man ought to be compell'd by Violence, yet the Force of *extreme Necessity* is so great, as to make these Things recoverable by the same Means as those which are truly and rightfully due: That is, by making complaint ² to the Magistrate, or when the

^a See *Levit. xxv. 39. Selden L. 6. c. 7.* Nothing can be drawn to the contrary from *Prov. xxx. 9.* Other Authors give this Example of extreme Necessity: *A Man being in an unknown Country, is attack'd by an unjust Assailant, and cannot otherwise save himself than by speedy Flight. He find ready at hand a Horse belonging to some Person of the Country, but which he sees no means of restoring, as well because he is ignorant of the Owner, as because he may be oblig'd to ride far to escape the Danger.*

^b L. 2. c. 2. f. 6. ^c And thus in *Estarch* (Apophthegm) when a Captain of Coast-robbers made an Inroad into the Territories of *Lacedemon*, and being taken, urg'd in his own Defence, *That he was neither able of himself to pay his Companions, nor could prevail with those that had Money to supply him; and therefore he ventur'd to take it by Force.* *Cleomenes* call'd this Proceeding, *ὄντ μὲν ἡρώδης, A very compendious Wickedness.* Add. *Pandulf. Collenut. rer. Neapolit. l. 5. p. 373.*

^d *Grotius* in his Notes upon this Text affirms that it ought to be render'd, *If he be taken in the Fact, he shall restore sevenfold. i. e.* He shall not be oblig'd to any Thing but Restitution, according to the Law prescribed, which supposes always, that the Thief hath something, since he must restore out of it what he has taken. See *Exod. xxii.*

§ VI. I do not perceive how this can follow from *Grotius's* Hypothesis. It is certain, that when a Proprietor can't spare the Bread, for Example, or Corn, which he hath for his present Use himself, 'tis not permitted to any other, tho' he be in ever so great Necessity, to take them away from him by Force. But yet the Maxim is no less true, which supposes, that in these last Cases all Things become common, as they were at first; for Community does not at all hinder, but that all which every one is possess'd of for his own Use, should not belong to him only who is in actual Possession of it, altho' the Property is his, and we can't take any thing from him out when he hath an Overplus, and we can't otherwise find any Means to supply our Wants. See what is said *I. 5. 4. Chap. 4. Note 2.* So that our Author has done well to depend upon other Reasons, which he alleges afterward, and which are sufficient for his Purpose.

^e This is the only Refuge that they have, who believe that the greatest Necessity cannot authorize any Man to take another Man's Goods of himself; but as *Mr. Thomasius* has observ'd, *Instit. Jurisp. Div. Lib. 2. Chap. 2. §. 171.* they acknowledge tacitly, that he that is reduced to that troublesome Necessity, has a full Right to require what he wants; for only those Things which are due by virtue of a compleat Obligation, can be the Subject of the Magistrate's Decision.

Urgency of the Distress cannot allow time for such an Expedient, than by seizing what is ready at hand, either in a secret or in an open manner. Now the chief reason why we affirm those things which proceed purely from the Virtue of *Humanity*, to be owing only by an imperfect Right, is that Men may be allow'd both an occasion of shewing their voluntary Propension to the Discharge of their Duty, and likewise of endearing others to them by their voluntary Benefits. But now if a Man should despise these Considerations, must a poor necessitous Creature be famish'd because he cannot prevail on the unmerciful Miser? Certainly such an inflexible Churl ought rather to be depriv'd of his Gift and of his Merit together; since he had not Heart enough to venture on an Act of common Humanity.

From what has been hitherto offer'd, it is easy to gather the Reasonableness of those Exceptions which *Grotius* subjoins to his and our main Assertion. For since nothing but inevitable Necessity can justify the taking by force what is owing only upon an *imperfect Obligation*, in the first place it is clear, that all fairer Courses are first to be tried, as complaining to the Magistrate, begging and intreating, promising Restitution, if we are ever able, or offering to discharge the Debt by equivalent Labour and Service. *Secondly*, This License can by no means take place, when the Owner of the Thing which we want, lies under as great a Necessity as we ourselves: On the contrary, we suppose the Owner to *abound*. This Caution or Exception may be extended farther, and we may say, that a distress'd Person cannot fairly take a thing from the Owner without his Consent, if it be only manifest, that upon the Loss of that thing the Owner will hereafter fall into the like indigent Condition. For in these Cases 'tis fit *Charity should begin at home*. That Rule of the *Civil Law* which *Grotius* applies to the present Business, that *when the Considerations on both sides are equal, the Case of the present Occupant is to be preferr'd*: doth not seem so exactly to hit the Purpose. For that Maxim only imports, that Judgment ought to be given for the *Possessor*, whilst the *Claimant's* Title and his are alike disputable. But in the Matter before us, the Possessor's Right and Title are granted, and the only Question is, whether I am oblig'd by the bare Law of Humanity, to perish myself for the sake of preserving another? which is a Paradox that no Man will pretend to maintain. The other Sentence which *Grotius* applies out of *Curtius* ^a,

is much more proper and more agreeable to the Point; *Melior est causa suum non tradentis, quam poscentis alienum*. He who refuses to deliver what is his own, has a fairer Cause than he who demands what is another Man's.

Thirdly, We lay it down as an indispensable Condition, that Restitution is to be made if possible; especially if the Thing taken were of great Value, and such as the Owner could not well part with without some Consideration. But if the Thing were small and inconsiderable, and the Loss so light, that the Owner's Fortune could not feel it, 'twill be sufficient, when opportunity serves, to shew that we should not have been wanting in Gratitude, if his Greediness would have given us leave to be obliged to him. As for *Grotius's* requiring ⁴ Restitution, it seems not to suit with his Hypothesis. For if upon a Case of Necessity the Right of *Primitive Communion* returns, so as to give a Man a just Title to the Goods of others, then Restitution can on no account be desir'd or demanded. But since this is necessarily to be made, it appears that the Right of the Owner doth not expire thro' the Necessity of the Petitioner; but that he ought voluntarily to have given Relief, either *gratis*, or upon receipt of the Price of the Thing, or any other Compensation. Which Duty when he neglects to perform, then indeed the Necessity of the distress'd Person gives him a Right of taking the Thing by Force, but still with the same *Burden*, or under the same Condition which the Owner might have impos'd on him; that is, either to refund the Value hereafter, or at least to make a grateful Acknowledgment of the Benefit.

VII. If we look on other Authors, we shall find them much divided about this difficult Point. The fourth Chapter of the fifth Book of the *Decretals* ^b, enjoining *Penance* to *Thieves who steal out of Necessity*, is by the *Gloss* expounded of *little and indifferent Necessity*, not of such as is extreme and insupportable. *Covarruvias* ^c delivers his Opinion almost to the same purpose as *Grotius*: *The Reason* (says he) *why a Man in extreme Necessity may, without incurring the Guilt of Theft or Rapine, forcibly take the Goods of others for his present Relief, is, because this Condition renders all things common. For it is the Ordinance and Institution of Nature itself, that inferior things should be design'd and directed to serve the Necessities of Men. Wherefore the Division of Goods afterwards introduc'd into the World, doth not derogate from that Precept of natural Reason, which*

^a L. 7. c. 1.

^b *Cap. Si quis*, Lib. 5. tit. 18. *De furtis*.

^c P. 2. f. 1. n. 3.

³ But this is only an Accommodation which *Grotius* makes of a Maxim of the *Roman Law*, *In pari causa possessor potior haberi debet*. Digest. Lib. 50. Tit. 17. *De diversis Regulis Juris*, Leg. 128.

⁴ Mr. *Van der Muelen* (in his Commentary, Tom. 2. p. 88.) affirms, that *Grotius* pretends to speak of the *Right of Usage*, and not of the *Right of Property*, which, according to him, are two distinct things; so that a Man may have a Right to use a Thing, which for all that may properly belong to another. But this doth not take off the Difficulty; for the Question is to know upon what the *Right of Usage* is founded? *Grotius* delivers himself fully (num. 2.) "That the antient and original Right which every Man hath to the use of all Things, revives in the Case of extreme Necessity, as if they remained in common; for so long as a Community of Goods continued, no Man was obliged to restore what he had taken for his Use, because nothing belonged to one more than to another, and every Man had an equal Right to use every thing; inasmuch that if a Man were seized of a greater quantity of Things than he had an absolute need of, by himself, every other Man had a full Right to take from him by force whatever was superfluous, and necessary for his Support in extreme want." On the contrary, *Grotius* also openly rejects the Opinion of them who establish the Right of taking the Goods of another in the like Case, upon this Foundation, "That every Proprietor is obliged, by the Rules of Charity, to impart to such as are in Necessity." (num. 4.) So that I see not how the Hypothesis of that great Man can be made good, and preserve itself from falling in with the Principles of our Author, who has produced a Solution more natural and coherent.

suggests, that the extreme Wants of Mankind may be in any manner remov'd by the use of temporal Possessions. There is alledg'd a Passage of St. Ambrose from Gratian, Decret. c. Sicut. ii. §. 4. dist. 47. *It is the Bread of the Hungry which you detain: It is the Raiment of the Naked which you lock up.* Peresius^a, arguing on the same side alledges, that in this Case a Man is compell'd to the Action by a Force which he can't resist; and then, that the Owner's Consent may be presum'd on, because Humanity obliges him to succour those who are in Distress. Besides, he observes, that the necessitous Person doth not properly take the Goods which were another Man's, but which lay in common: And yet he is bound, when he has obtain'd deliverance from his Want, to make fair Restitution. Anton. Matthæus^b is of Opinion that a Distinction should be made in this Case between the Crime and the Punishment; the Crime of the Theft, he says, is not taken off even by extreme Penury, but he would have the Punishment either wholly remitted, or considerably mitigated and abated. Now that the Crime of Theft is committed even under these Circumstances, he endeavours to prove from the Definition of Theft in the Civil Law, which he makes to reach this Action: *Theft, the Emperor Justinian tells us, is a fraudulent seizing on the Goods of others, for the sake of making a Gain of them.* But we may fairly plead (in Opposition to Matthæus) that neither of these Imputations can fall on the Fact which we defend. For how can this be term'd a *fraudulent seizing on another Man's Goods*, when both the Owner lay under an imperfect Obligation of giving the Thing desir'd, and the other Person had a Right, by Virtue of his present Condition, to possess himself of it by the most convenient means he could? Nor can he well be said to take a thing of another Man's for the sake of making a Gain of it, who designs it purely for the Relief of his extreme Distress, with full Wishes and Resolutions to restore, or to repay it as soon as possible. That part of his Argument is meer Bravado, where he tells us, that no Violence can compel a wise and a good Man to defile himself wilfully with any uncomely Action: And that in these Cases every one should, as Tully^c advises, *rather patiently endure his own Inconvenience, than trespass on the Conveniences of others.* Now besides that 'tis an easy matter to talk Philosophically, whilst we do not ourselves feel the Hardship any farther than in Speculation^d; the Fact under Debate can, according to our way of

determining it, include no other Turpitude or Indecency, than such as Persons of Breeding and Quality are guilty of, when the severity of Famine compels them to feed on the basest and most filthy Meats. And then the Rule about Conveniences and Inconveniences is beside the Question, which only supposes some little Matter to be taken from a wealthy Person, who doth not feel the Loss, to keep another from perishing by the Extremities of Hunger or of Weather. The same Author observes, on^e the *Lex Rhodia de jactu*, that tho' for the publick Benefit, in a time of Scarcity, every Man is oblig'd to bring what Corn he has by him into the common Market, yet People are not hereupon impower'd to carry off what they please, because they are in want, and others abound; but the whole Business is to be left to the Care and to the Direction of the Magistrate. But must the Poor therefore be content to starve, when the Magistrates neglect to make due Provision for their Sustainance?

As to what some urge, that there doth not appear any *Dispensation of the Law in this Matter*, 'tis an Objection that may be easily spar'd. For sufficient Reasons have been given why we may well presume, that the Law which forbids Theft is not to be extended to the present Case.

VIII. *Lastly*, The Danger and Necessity of our own Goods seems to allow us the Privilege of destroying or of invading those which belong to other Men: Yet with these Proviso's, that the Danger did not happen thro' our Fault; that we cannot find a more convenient way of¹ removing it; that we do not ruin a more valuable Thing of our Neighbour's, for saving one of our own, inferior in Price and Consideration; that, in case the other Thing had not been lost but for our sake, we pay the Price of it; and lastly, that if what belong'd to our Neighbour must have otherwise been destroy'd, together with ours, if we had not preserv'd² the latter by making away with the former, that then we consent to bear a part in the Damage. On this Foundation is grounded the Equity of the *Rhodian Law de jactu*, by³ which it was provided, that *if for the lightning of a Ship the Men were compell'd to throw any Goods overboard, the Loss should be made up by general Contribution, since it happen'd upon account of the general Safety*^e. Thus too if my Vessel be driven upon the Cables, or the Nets belonging to another, I have Liberty to⁴ cut them in Pieces,

^a Ad. Tit. Cod. De furtis, f. 3.

^b Ad. l. 47. D. tit. 1. f. 7.

^c Offic. l. 3. c. 5.

^d Vid. Oppian Halieut.

l. 3. v. 197.

^e Vid. Tot. titul. together with the Commentators on that and on the Naval Laws.

§. VII. ¹ Tully's Words are; *Suum cuique incommodum ferendum est potius, quam de alterius commodis detrahendum.*

² The Digests have also another Law, commanding, that if Provisions fail at Sea, every one should bring out their Store and leave it in common, *Ed magis quod, si quando ea [cibaria] defecerint in navigatione, quod quisque haberet, in commune conferret.* Lib. 14. Tit. 2. De *Leg. Rhodiâ de Jactu.* Leg. 2. §. 2.

§. VIII. ¹ We must take care that the Way appear sure. *Titius's Observ.* 148.

² We may add, That the Proprietor not foreseeing, or before he foresaw that Necessity, did not consent to the Loss of his Goods.

³ The Words of the Digests are, *Leg. Rhodiâ cavetur, Ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est,* Lib. 14. Tit. 2. De *Leg. Rhodiâ de jactu,* Leg. 1. See the Treatises of divers Authors, De *Legibus Nauticis*, as also Mr. Daumat's Civil Laws in their natural Order, Part 1. Lib. 2. Tit. 9. Sect. 2. §. 6, & c.

⁴ *Item Labeo scribit (say the Digests) si cum vi ventorum navis impulsâ esset in funes Anchorarum alterius, & nautæ funes præcidissent, si nullo alio modo, nisi præcisiss funibus explicare se potuit, nullam actionem dandam. Idemque Labeo & Proculus, & circa Retia Piscatorum, in quæ navis inciderat, æstimarunt. Plauti si culpâ nautarum id factum esset, Leg. Aquilia agendum.* Lib. 9. Tit. 2. Ad *Leg. Aquil.* l. 29. §. 3. See Mr. Noodt's excellent Treatise, Ad *Leg. Aquil.* Chap. 18. in *fin.* and Chap. 29.

if I cannot otherwise get clear. And if my own Neglect did not bring me into that Trouble, I am to answer but for half the Cost. Thus in a Fire, I may pull down my Neighbour's House for the Security of mine, if I am willing to make good all that he suffers by the Mischief. For tho' in ⁵ one of the *Roman Constitutions*³, it is determin'd, that in case the Fire had actually reach'd to the House that was pull'd down, the Person who procur'd it shall not be responsible; yet the common Opinion inclines more to Equity^b, which asserts, that upon such Demolishment of one House for the Security of many, the Damage shall be repair'd by those neighbouring Inhabitants who thus escap'd the Danger; though the House which they in this manner ruin hath not been touch'd by the Flames. For it would be indeed unreasonably hard, that when ⁶ I have sav'd my own Concerns by destroying those of another Man, the whole Loss should be thrown upon him, whilst the whole Advantage lights on me. From the same Rules and Principles the *Roman Lawyers* deduce most of their Doctrine concerning that kind of *Damage* which they call *Dammum Insectum*⁷. Thus, for Example, if my next Neighbour has a ruinous House, very likely to tumble to the Prejudice of my Effects, he shall be oblig'd to give me Security for answering all Damages that I sustain; and if he refuse this Condition, upon applying myself to the *Prætor*, I obtain ⁸ an Edict, empowering me to enter the ruinous Place. On the same Account they assert, that ⁹ in case a Man has a Field surrounded in such a manner on all sides, by the Lands of others, that he cannot get to it without seemingly committing a Trespass; the Borderers shall be compell'd by the Judge to grant him Passage, at least upon the offering of a reasonable Consideration.

Grotius^d makes this farther Deduction from the Doctrines we have been now laying down,

that it is lawful for him who wages a *just War* to possess himself of a Place seated in a Country that is at Peace with him; if there be certain (and not only imaginary) Danger, that the Enemy will otherwise surprize it, and from thence annoy him with irreparable Mischief: Provided he take nothing but what is necessary to his own Security, as the bare *Custody* of the Place, leaving both the Jurisdiction and the Profits to the right Owner; and fully purposing to restore the *Custody* too, so soon as the Necessity that brought him thither shall cease. To these Conditions it should be added, that the Lord of the Place is first to have frequent Notice given him, and to be desir'd that he would himself secure and defend the Place, upon a Promise from the other Prince to defray the Charges; or that he would demolish and render it untenable, if he thinks that the most proper Method. And another equitable Caution is, that in case the new Possessor has expended any Sum in raising Works and Fortifications, the proper Lord is not oblig'd to refund, unless he intended to have built the same Defences himself; inasmuch as the other did not make it his Aim purely to improve the Place, but chiefly to secure his own Territories. *Bæcker*, in his *Notes* on this Passage of *Grotius*, well observes, that it is apparent from the Usage of all Ages and of all Nations, that no one thinks himself oblig'd to allow another thus to seize on any Fort or Place of his¹⁰, if he be able to hinder his Attempt. And that therefore if the other do actually take Possession, the Fact is such as may admit of easy Pardon, but not such as can be fairly and strictly defended on the Grounds of *Natural Law*. To which Purpose we may consider farther, that 'tis very probable the Enemy may hence entertain a Suspicion, that the Lord of the Place is in secret Confederacy against him; and so the whole Burthen of the War may be easily devolv'd on the third Party. And tho' the Enemy be well

^a L. 7. f. 4. *D. quod vi aut clam*. vid. *Digest.* XXXIX. tit. 11.

^b Add. L. 49. f. 1. *D. ad L. Aquil.*
^c L. 2. c. 2. f. 10.

^c *De Damno Insecto*.

⁵ The Words of the *Digests* are, *Si percussisset [ignis, eo usque] absolvi eum oportere quoniam nullam injuriam aut damnum dare videtur, æquè perituris ædibus*. Lib. 43. Tit. 24. *Quod vi aut clam*, Leg. 7. §. 4. See Lib. 9. Tit. 2. *Ad Leg. Aquil.* Leg. 49. §. 1. and what Mr. *Titius* says in his *Observations in Compens. Jur. Lauterbach.* Observ. 420. as also Mr. *Noodt ad Leg. Aquil.* Chap. 19.

⁶ Mr. *Titius* hath reason to say, that these Rules are good in Speculation, but the Application is very hard, and almost impracticable in Civil Societies. Indeed, we can't for the most part be assured, that he who hath beat down his Neighbour's House, had reason to think that he could save his own that way, and that he was obliged to it by Necessity; for without this how can we determine, whether he ought to make good the Damage? Moreover, Burnings almost always happen by some Fault, or at least by Imprudence and Negligence, and very often we know not whom to charge them on, or how they began; and if the Author be sometimes discover'd, 'tis found usually that he is unable to make up the Damages of such as have suffer'd. Lastly, When the Fire is come by meer Chance, we can't exactly tell how the neighbouring Houses can be preserved from the Fire by the demolishing of one already beat down, and so 'tis impossible to state exactly who are bound to make good the Damage, and how much each shall contribute. Experience also proves, that upon these sad Occasions, they who received the Damage are constrained to bear it themselves, unless the way of Reparation be fixed beforehand by some Agreement, or Order of State, or the Bounty of others affords them a voluntary Relief. The Order therefore establish'd in some Places, that the Damages that come by such Accidents should be satisfied by the Publick, and so every one is obliged to contribute to the Relief of the Miserable, is highly commendable, *Observ. on Pufendorf* CL. and on *Lauterbach* CCCCXX. It is also a wise Establishment, and will be of excellent Use, if it be well managed, which has been lately made in *Prussia*, where all such as have Houses are obliged to pay some small Annual Rent to the Directors of the Fire-Office, where there is a Bank made up of such Contributions, which are design'd to make good the Damages of such Owners of Houses as are burnt, according to the Valuation made of them, and according to which they pay their Rent.

⁷ See Mr. *Daumat's* Civil Laws in their Natural Order, Part I. Lib. 2. Tit. 8. Sect. 3.

⁸ So the *Digests* say, *Si intra diem à Prætoris constituendum non caveatur, in possessionem ejus rei mittendus est*. *De Damno Insecto, &c.* Leg. 4. §. 1. See *Titius's* Observat. on *Lauterbach.* 939.

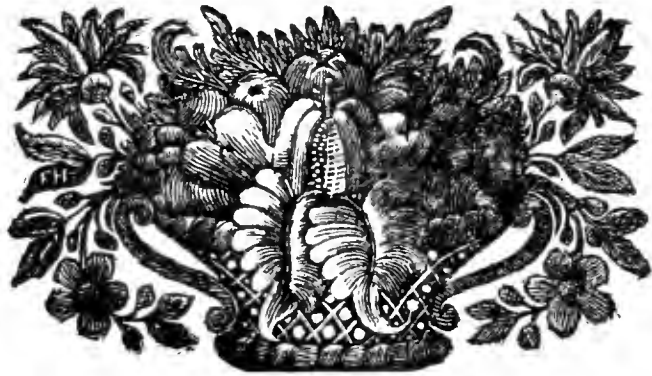
⁹ They build upon this Law, to which I have elsewhere referred, Lib. 3. Chap. 3. §. 7. *Si quis sepulchrum habeat, viam autem ad sepulchrum non habeat, & à vicino ire prohibeatur Præses compellere debet, justo pretio ei iter præstare*. *Digest.* Lib. 11. Tit. 7. *De Religiosis, &c.* Leg. 12. init.

¹⁰ This has place no less, when the Owner of the Place has no Power to defend himself; for if he can, and doth not, 'tis the same as if he gave Passage to his Neighbour's Enemy; so that this last may look upon him himself as a new Enemy.

fatisfied that the Place was seiz'd without the Leave or Concurrence of the Lord, yet if he resolve and endeavour to dispossess those who hold it, the innocent Prince cannot but feel some Part of the Calamities of Arms; which if he keeps off by any Means, he cannot justly fall under Reprehension. And thus too in a lesser

Case, it can never be advisable for a Man to admit more Strangers into his House, than he can conveniently get rid of when he pleases: Since otherwise he is under a Necessity of being at their Disposal; and must perhaps be content to walk out of Doors, and to leave all to his new Masters¹¹.

¹¹ There is not the least Difficulty in the Example alledged by *Grotius*, in the same Place, concerning them who having need of a Vessel to save themselves, or defend themselves, take the first they meet, and use it upon the Conditions required. See *Xenophon de Expedit. Cyri, Lib. 5. Chap. 1.* and *Mr. Hertius's Discourse de Collisone Legum, Sect. II. §. 14.* in *Tom. I.* of his *Opusc. and Comment.*



OF THE

LAW of NATURE

AND

NATIONS.

BOOK III.

CHAP. I.

*That no Man be hurt ; and if a DAMAGE be done to any Man,
that REPARATION be made.*

The CONTENTS of every Paragraph of the first Chapter.

- | | |
|---|---|
| <p>i. <i>That no Man ought to do any Damage to another, or his Concerns.</i></p> <p>ii. <i>That if any be done, it ought to be repaired.</i></p> <p>iii. <i>What a Damage or Hurt is.</i></p> <p>iv. <i>Who are they that do an Hurt.</i></p> <p>v. <i>How such as hurt others are obliged.</i></p> | <p>vi. <i>How many ways a Damage may be done.</i></p> <p>vii. <i>An Example of Reparation in a Murderer.</i></p> <p>viii. <i>In one that has maimed another.</i></p> <p>ix. <i>In an Adulterer.</i></p> <p>x. <i>In a Ravisher.</i></p> <p>xi. <i>In a Thief.</i></p> |
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WHAT Duties the Law of Nature enjoyns a Man to exercise towards himself; and what Indulgence, what License, or Favour it allows him in the Preservation of his own Person or Goods, we have hitherto endeavour'd to explain (*). We may now pass on to those other Natural Precepts which contain the Duties we are to practise towards other Men. These we have formerly divid- ed into *Absolute*, and *Hypothetical* or *Conditional*.

In the Series of *absolute* Duties, or such as oblige all Men antecedently to any human Institution, this seems with Justice to challenge the first and noblest Place, *that no Man hurt another*²; and that in case of any hurt or damage done by him, he shall not to make Reparation³. For this Duty is not only the widest of all in its Extent, comprehending *all Men*, on the bare account of their being *Men*; but it is at the same time the most easy of all to be perform'd, consisting for the most part purely in a negative Abstinence from acting; except that its Assistance

Mr. BARBEYRAC'S NOTES on Chap. I. §. 1.

§. 1. Not that they are always independent upon every human Act or Establishment. Our Author intimates the contrary clearly at the end of this Paragraph, in numbring up the Things to which this Maxim extends. No Man can be ignorant that we ought not to neglect such Duties of Humanity, as concern Bargaining, as for Example, to refuse to sell any Man what he stands in need of. But the Reason why he calls those Duties, which he treats of in this and the following Chapter, *absolute*, is because they are the natural Consequence of the universal and original Constitution of Mankind, and ought to be paid to all Men, though they have no other Relation to us, but a bare Similitude of Nature. Whereas conditional Duties always suppose some human Act, Agreement, or other Accident, and oblige only under certain Circumstances, and with relation to certain Persons.

² *Nefas est nocere Patria*, &c. It is a Crime to injure one's Country, and consequently a Citizen, who is a Member of it. Then we mult injure no Man, because every one is our Fellow-citizen of the great City of the World. Do the Hands endeavour to hurt the Feet, or Eyes the Hands? As therefore the Members of the Body keep a fair Correspondence with one another for the Preservation of the whole: So Men ought to deal friendly one with another, because they are born for Society, which can't be preserv'd, unless all the Parts, of which it is compounded, love one another, and endeavour mutually their own Preservation. *Sen. de Ira*, l. 2. c. 31. Besides this Passage, which our Author refers to a little lower, please to read, *Epiſt.* 95. p. 464, &c. *Edit. Lugd. Bat.* 1672. and *Epiſt.* 103.

³ All Duties which relate to Society may be compriz'd under these three generals: 1. To do Evil to no Man. 2. To hinder others from doing the Mischief which they threaten to do. 3. To do all the good we can sincerely. These three Principles yield an infinite Number of particular Consequences, according to the difference of Subjects. Our Author speaks here of the first, and of the other two together in Chap. III. of this Book. *Titus Obs.* 151.

is sometimes necessary in restraining the Lusts and Passions, when they fight and struggle against Reason; amongst which rebellious Desires, that boundless Regard which we sometimes shew to our own private Advantage, seems to be the Principal, and the Ringleader. Besides, it is the most necessary of human Duties, inasmuch as a Life of Society cannot possibly be maintain'd without it. For suppose a Man to do me no good, and not so much as to transact with me in the common Offices of Life, yet provided he do me no harm, I can live with him under some tolerable Comfort and Quiet. And indeed this is all we desire from the greatest Part of Mankind; a mutual Intercourse of good Turns lying only between a few. But what Possibility is there of my living at Peace with him who hurts and injures me; since Nature has implanted in every Man's Breast so tender a Concern for himself, and for what he possesses, that he cannot but apply all Means to resist and repel him, who in either respect attempts to wrong him? Now as the Strength of this Precept is a Guard and a Fence to those Things which we receive from the immediate Hand of Nature, as our Life, our Bodies, our Members, our Chastity, our Reputation, and our Liberty; engaging Men to keep them sacred and inviolable: So must it be supposed to spread itself thro' all those Compacts or Institutions, by which the Propriety of any Thing is made over to us; since without it they could obtain no Force or Effect. Whatever therefore we can on any good Title call our own, Men are by this Precept forbidden to take away, to enslave, or to impair, or any way to withdraw it from our Use, in whole or in part. The same Duty is virtually contain'd in many affirmative Commands, which enjoining some one positive Practice, remove and restrain the contrary Enormities. How plainly the Necessity of this Law insinuates itself into the Minds of all Men, let *Seneca's* Observation inform us. *Ask a common Rogue (says he) whether he had not rather obtain by honest Means, what he now gets by Theft and Villany? He who makes it his Gain to assault and pil-*

lage all he meets, would be more willing to find the Money by Chance, than to take it by Violence. There is no one who would not be better pleas'd to enjoy the Fruits of his Wickedness without the Practice of it⁴. *Tully* says excellently to the same purpose, that for a Man to rob and injure another to promote his own Advantage, is more against Nature than Death, or Poverty, or Pain⁵.

II. Farther, it follows from this Precept, that in case a Man be hurt or injur'd by another, in any respect, the Person who stands justly charg'd as Author of the Wrong, ought, as far as it lies in his Power, to make Reparation¹. For otherwise it would have been a vain Command not to harm another, if the Party who actually suffers such a Harm, must be content to put it up without farther Notice, and leave the Offender to enjoy in Peace the Fruit of his Injury, never obliging him to refund, or to restore. Furthermore, were not Restitution made a necessary Duty, neither would wicked Men ever abstain from wronging others; nor would those who have been injured, find it an easy Task to compose their Mind in such a manner, as to maintain Peace with the other Party, so long as they have obtain'd no Recompence or Consideration for their Sufferings.

III. The Word *Damage*¹ which seems properly to refer only to Goods and Possessions, we here use in an extended Sense, so as to make it take in likewise all manner of Harm that may be offer'd to a Man's Body, his Chastity, or his good Name. In this Latitude then, it implies all Hurt, Spoil, or Diminution of whatsoever is already actually our own; all Interception of what by a perfect and absolute Right we ought to receive, whether such Right be the original Gift of Nature, or whether it be allow'd us by human Institution and Law. And lastly, all Omission or Denial of any Duty, or Performance, which others by a perfect Obligation stand bound to pay us². We say by a perfect Obligation; because if the Obligation in the other Party be only imperfect, and we consequently have only an imperfect Right, the with-holding of any such Due cannot really be esteem'd a Damage.

¹ *Seneca* of Anger, B. II. C. 31. It is a Sin to injure one's Country; and therefore to injure a Fellow Subject, inasmuch as he is a Member of our Country. The Parts ought to be held sacred, if the whole deserve our Veneration. And hence likewise the Person of every Man ought to be inviolable, because every Man is our Fellow Citizen in the great and universal Society. What a Distraction would arise, should the Hand practise Mischief against the Feet, or the Eyes prove treacherous to the Hands? As all the Members conspire in an exact Union and Agreement, because the Safety of each in particular is the Interest of the whole Body; so particular Men ought to spare each other, because we are all born for Society. And no Society can remain secure, without a firm Love and Concord amongst the Members of which it is compos'd.

² Nay, *Cicero* further says, That there is no Man, who had not rather satisfy his Desires without incurring any Guilt, though he were sure to go unpunished. For, says he, *Lib. 3. de fin. c. 11.* who is there, or ever was of that covetous Temper, or extravagant Desires, who had not much rather obtain that which he is resolv'd to get by some wicked Means, without making use of them, though he were assur'd of Impunity?

³ *Sen. de Benef. l. 4. c. 17.*

⁴ *De Offic. l. 3. c. 5.*

MR. BARBEYRAC'S NOTES on §. II.

¹ That a Man be oblig'd to make Satisfaction for any Wrong done to another, it is necessary, 1. That the Injury done be forbidden by some Law, either Natural or Positive. 2. That it was done through our Fault, and that the Will did either directly or indirectly concur in that Action, by which the Injury is done. 3. Lastly, That he who has suffered the Damage, is no way consenting to it. For if he give his Consent, either directly or indirectly, though with some Restrictions, the Prohibition of the Law ceases, and consequently so does the Obligation to Restitution. Our Author ought to have taken notice of these Three Conditions distinctly, because they are the Foundation and Key of all the Chapter.

MR. BARBEYRAC'S NOTES on §. II.

¹ In the *Roman* Law the ordinary Signification of *Damage* is this, some Hurt done to our Goods or Possessions, produced immediately by the Person, who is the Author of it. This Supposition is founded entirely upon the *Aquilian* Law, and serves only to distinguish the different Sorts of Actions, which are brought to Justice by their several Circumstances. *Titius Obs. 155. Justin. Inst. & Digest. l. 39. tit. 2. leg. 3.*

² From hence it appears by this first Law of Natural Right, *viz.* That we ought to do evil to no Man, that all sorts of Actions in general are forbidden, by which any Wrong or Injury is done to our Neighbour in respect to all Things to which he has an undoubted Right, *viz.* Murder, Wounds, Blows, evil Words, Affronts, Calumnies, Rapine, Extortion, Theft, Pillaging, Fraud, and Force, either direct or indirect, mediate, or immediate, &c. as this Author expresses himself in his Abridgment of the Duties of a Man and Citizen, l. 1. c. 6. §. 3. It ought also farther to be observed, that a Damage or Hurt may be done to the Soul by neglecting to inform the Mind, or regulate the Passions of such as we are oblig'd to instruct or reform, and much more by leading them on purpose into any Error or Vice, from which we ought to restrain them.

For since all Performances of this kind ought to proceed from the voluntary Motion of some virtuous Principle in the Giver, and since I have no Power or Licence to exact the Payment of them by force, it would by no means be convenient that I should think my self damaged, in not receiving such things as I could not otherwise expect, than in the way of free Gift and Benefit. And as I cannot reckon those things amongst my own, which I have only a *Fitness* or *Capacity* to possess; so I have no reason to complain of injurious Practice, if they happen to be kept from me. *Aristotle* says elegantly to this Purpose, *he who out of a narrowness of Spirit refuses to assist another with his Wealth, doth not hereby increase it*, Eth. v. 4. and since *he* has not more, the Person whom he thus sends away unreliev'd has not less. On the same Principle is founded the Argument which *Cicero* makes use of in his Defence of *Plancius*, that altho' the other Gentleman *Laternensis* might perhaps be the more worthy Competitor, yet it was in the Power of the People to pass him by, and to choose *Plancius* into the Office of *Ædile*, in as much as neither of the Candidates had a perfect Right to that Honour. *It is a Privilege*, says he, *belonging to the very Condition and Constitution of free States, that they be able by their Votes, to give to a Person, or to take from him what they will.* Yet in the same Place the Orator distinguisheth between what People could do, and what they ought to do; the Term *ought* implying that *less perfect Obligation*, by which we stand engaged to the Exercise of every Virtue. But here **Grotius* well

* Lib. II. advises us to take heed of confounding c. 17. §. 3. Points which belong not to the same Head. For the People in a Commonwealth, who are obliged to confer Honours on the most deserving, only by the Rules of State-prudence, yet in case they intrust any person with this their Power of choosing Officers, if we prefer those who are less worthy, the others who are past by, cannot bring an Action of Injury or Damage against the Elector³. Yet the People, by whose Deputation he acted, have a Right of calling him to an account for his Proceedings, and may require *Reparation* for any Damage which the Commonwealth hath sustain'd by his unworthy Choice⁴. And thus to a Citizen endued with Arts and Abilities sufficient for the discharge of an Office, tho' in reference to obtaining it, he has no Right which will hold good against the State; yet he has an equal Right with others to sue for it: in which Right if any Person by Force

or Fraud shall prejudice or obstruct him, he may demand Satisfaction; tho' not the full Value of the Office desired, yet to the value of his reasonable Expectation⁵. And now we are settling our Notion of *Damage*, we are farther to remark, that it affects not only the thing itself, which being either our Possession or our Due, is hurt, deliv'd, or intercepted; but likewise the Fruits or Profits accruing from the thing, whether they have been already received (though then indeed they may be valued as particular Goods or Things) or whether they are yet only in Hope and Prospect, if the Owner had a Right of receiving them⁶; provided still a Deduction be made of the Expences he would have been put to in securing and gathering in such Fruits⁶; lest he enrich himself at the Charge of the other Party. Now the value of Fruits in Expectation rises and falls according as the time of receiving them is more or less distant, and consequently the Issue more or less uncertain. Thus the losing a Field of Corn in the *Blade* will not be rated so high, as if it had been destroy'd in the *Ear*. Some Consideration too is allow'd for what we call *Civil Fruits*. Thus he who sets on fire another Man's House^b, is not only bound to rebuild it, but likewise to make good the Rent, which it would in the mean time have brought to the Owner. *Philo Judeus*^c informs us, that in his Nation, when a Man had any way damaged his Neighbour, and done Penance for the Fact, he was obliged, besides paying to the full value, to add one fifth part more, as a Comfort to the Person who had sustain'd the Wrong.

Lastly, it is a clear Point, that all Evils or Mischiefs following by a natural Consequence from any *Damage* given, ought to be adjudg'd Parts of it^d. *Strabo*^e relates of King *Ariarathes* of *Cappadocia*, that having stop't up the little Passages, by which the River *Melas* emptied itself into the *Euphrates*, that so covering the greatest part of the neighbouring Plain, he might divert himself with the childish Play of making little *Islands*; at length the Damms all giving way on a sudden, the Flood pour'd it self so violently upon *Euphrates*, as not only to make it carry off part of the *Cappadocian* Country, and some of their Houses, but to cause great Waste and Mischief in the Lands of their Neighbours, the *Galatians*: Whereupon the matter being refer'd to the Arbitration of the *Romans*, they condemn'd the King in Damages of thirty Talents^f.

³ That is to say, as *Grotius* expounds it, he doth nothing contrary to Justice, properly so called. See l. 1. c. 7. §. 11, 12. above.

⁴ See *Justinian's* Novels, 128. c. 16. *in fine*, & 124. of *Julian's* Abridgment, c. 556. which is quoted and corrected in *Gronovius's* Notes upon *Grotius*.

⁵ *Grotius* maintains (§. 3.) that the same thing takes place when any one hinders another from giving a Legacy, either by Violence or Fraud; for it being a kind of Right to be capable of a Legacy, it is a real Injury to deprive a Testator of the Liberty or Will which he hath to give any Person a Legacy, which he is in Expectation of.

⁶ *Grotius* adds, or for the Improvement of the Thing. See for the Distinction of Fruits, what is said, l. 4. c. 7. §. 3.

⁷ So *Libanius Progymn.* says, he that gives the Occasion, must be answerable for all the Consequences. See *Exod.* 22. 6.

Digest. l. 9. t. 2. *ad leg. Aquil.* leg. 7. §. 7. leg. 27. §. 8. leg. 30. §. 3.

⁸ The Lawyers here distinguish between *damnum emergens* and *lucrum cessans*, (i. e.) an emergent Damage, and a ceasing Profit. The first is the Loss which one suffers by the diminishing his Goods at present. The other is the Damage one receives by the Loss of that Gain which he might make. But we ought also to observe, that there are some Events which are the direct and immediate Consequents of the Action, from which the Damage proceeded, in so much that it may be said, it was the cause of it, others there are that have a particular Cause independent on that Action, that was the Occasion of it, or at least had no relation to it, but by some mere Accident. See concerning this the Civil Laws drawn up in their natural Order by *Daumatius* part 1. lib. 3. tit. 5. where you'll also find in the Prefaces to those Titles, some Observations very important about the difference there is between the Damage that arises from stoppage of Payment, and other sorts of Damages and Interests.

^a *Vid.* l. 6. t. 1. *D. de rei vindic.* ^b *Vid.* l. 3. *C. de rei vindic. Add.* l. 22. f. 1. l. 23. *princ. D. ad L. Aquilian.* ^c *De Victimis.* ^d See *Exod.* XXII. 6. l. 27. f. 8. l. 30. f. 3. *D. ad L. Aquil. M. Seneca*, l. 5. *Excerpt. Controvers.* 5. ^e *L. 22.*

^f *Liban. Progym.* τὸ παρόχον τὴν ἀπορρωμὴν καὶ τὸ ἀκολυβήσαντων κενύεται τὸν λόγον. That which gave the Occasion, is esteem'd the Cause of all Accidents that follow. *Add.* l. 7. *D. ad L. Aquil. Lex Wisigothorum*, l. 7. *Tit.* 2. c. 1, 2, 3. *Et tit.* 3. c. 3.

IV. In stating who are to be esteem'd Authors of *Damage*, it will be necessary to recollect from our first Book, *Chap. 5.* how many ways the Act of one Man may be imputed to another. A Person then may damnify his Neighbour, not only immediately by himself, but likewise by the Ministry of others. And farther, a Damage immediately done by one Man, may be chargeable upon another (who is consequently obliged to make Reparation) inasmuch as he contributed somewhat to the Action, either by doing what he ought not, or by omitting what he ought to have done^a. He may stand guilty of this Charge in three Ways and Degrees; for he may either be the principal Cause, or he may be equally concern'd with the Actor; or lastly, he may be only an Accessary, and an inferior Cause. Of all which Cases this may in general be observ'd, that the Persons thus chargeable are bound to *Restitution*, according as they were either the real Cause of the Damages, or contributed to it in whole, or in part. For it often happens, that Persons may concur less principally to the Fact of another Man, by some Omission or Commission, and yet that he would most certainly have done the same Damage, whether they had thus concurr'd or no; so as to render their Concurrence altogether superfluous. Now here tho' they are justly punishable for the Will and the Endeavour, yet since no Part of the present *Damage* flow'd from them, they cannot be required to make *Restitution*. Some indeed are for bringing off all Accessaries at a venture; because say they, if these had not lent their Counsel or Assistance, there would not have been wanting others to help forward with the Mischief, and consequently the Damage had been done without their Means. But this Argument is of no Weight, 'tis sufficient to make them guilty, if their Aid had any real Efficacy in producing the Trespas; and had those other Persons join'd their Hands to the Business, they too would have been proportionably responsible. This Rule then may be fix'd as an universal Standard, to know who are bound to make Repa-

ration, and who are not; that when any one did not give real Assistance in the Act of Damage, nor by any antecedent Motion or Default, caus'd it to be undertaken, nor came in for any Part of the Advantage, such a Person tho' by giving any the least Occasion to an ill Action he contracts a Sin, yet shall not be obliged to Restitution^b. And hence 'tis easy to conclude on the other side who shall be oblig'd. Those who insult over their afflicted Neighbours, and rejoice in their Calamities brought on them by wicked and injurious Men, are sinful no doubt in an heinous manner^c; and yet it would be absurd to affirm, that they are bound to repair such Damages as they delight to see. The same must be said of those who defend, excuse, or praise a Trespas already committed, provided they do not hereby hinder the Duty of Restitution; as likewise of those who either wish Success to such a Fact before it is committed, or entertain a silent Joy and Satisfaction during the Performance. There is no ground to build a contrary Opinion on the Passage of *Cicero*^d, which some would make use of to that Purpose^e. *What Difference is there, says he, between him who persuades a Man to an ill Action, and him who afterwards approves of it? Or what signifies it whether I would have a Thing done, or whether I rejoice when it is done?* For the Orator employs this Sentence, not to express his Mind seriously^f, but to refute an impertinent Objection. And had it been spoken never so gravely, it could not be strain'd so high, as to assert the Necessity of Reparation in these Cases. And therefore *Ammianus Marcellinus*^g seems not very properly to apply this Saying of *Tully* to the Business of *Probus*, *Præfectus Prætorii* to the Emperor *Valentinian*, who, as he relates, *did indeed never command any of his Clients or Servants to undertake an unlawful Action; yet if he found them to have committed any Crime, he protected and defended them in spite of Justice itself, without ever enquiring into the Fact, and without the least regard to Honesty or Truth.* For here the Dependence on so great a Patron added Strength and Boldness

Mr. BARBEYRAC'S NOTES on §. IV.

¹ This seems to be contrary to what our Author proves in other Places, *viz.* lib. 4. c. 13. §. 6. For though one does not what he ought to do, he does not do any such real Damage, as to be obliged to Restitution. It is sufficient that a Man have a Right to do a Thing to secure him from a just Imputation of any ill Consequences that may result from it to another. The *Roman* Lawyers maintain the Truth of this Maxim, that no Man does wrong to another, unless it be he that does that which he has no Right to do. *Digest.* l. 50. Tit. 17. *De diversis reg. Jur.* Leg. 151. If in these Cases any one receives a Damage through our Means, 'tis his Misfortune; but since 'tis none of our Fault, it can't be reasonably expected that we should make any amends.

² By the *Roman* Law the Approvers and Authors of any Mischief are liable to the same Punishment. *Imo Et si erat servus, &c.* If a Servant be about to run from his Master, or rob him, and another commends his Design, he is guilty, for he ought not to encourage his Wickedness by Commendation. *Digest.* l. 11. Tit. 3. *De servo corrupto*, leg. 1. §. 4. Mr. Bayle in his Discourse about Defamatory Libels, and *Grotius* before him, approve of this Law, which they say is built upon this sure Maxim, That they who approve an Action, 'tis very likely, would do it if they could, *i. e.* if some reason of Self-love did not hinder them from engaging in it. The first also approves of the Law of *Valentinian* and *Valens*, which make those Men liable to a Capital Punishment, who accidentally meeting with a Libel, disperse it, whereas they ought to have torn it, or burnt it. *Vide Cod.* l. ix. Tit. XXXVI. *De famosis libellis.* For (he adds) I can't conceive, but he who in the like Case disperses a Libel, has as great a Desire to injure, as he that composed it, and consequently deserves as great a Punishment as the Author. For certainly in this last Case there is something more than a meer Approbation. To disperse a Libel, which might and ought to have been suppressed, either altogether or in part, is to do an Injury directly to the Party defamed, and join with the Author of the Libel. As to the Law of *Ulpian*, if a Slave is sully resolved to rob his Master, or get away from him, the Approbation given to these Actions, which he is about to do, since it neither encourages nor confirms him in this unlawful Action, does not seem sufficient to oblige to any Satisfaction, as Mr. Bayle infers. For though a Man would do a Thing with Pleasure, were it not against his Interest, yet in my Judgment he is not punishable, unless he do it, by any human Laws (of which he is speaking) especially if he never desired to do it, and his Approbation did not determine, nor encourage the Actor.

³ The *Latin* is, *Quid interest inter suaforem facti, Et probatorem? aut quid refert, utrum voluerim fieri, aut gaudeam factum?* *Cic.* Philip. ii. c. 12.

⁴ *Cicero* does not seem to speak any otherwise than he does, who speaks his Thoughts seriously. 'Twere better to answer, as this Author does afterwards, that he speaks not of a Reparation of Damages, but only of the Vitioufness of the Intention of such as approve others Crimes.

^a *Nemo damnus facit* (say the *Roman* Lawyers) *nisi qui id fecit, quod facere jus non habet,* *Digest.* lib. 50. Tit. 17.

^b See *Psal.* cxxxvii. v. 7.

^c *Philip.* II. c. 12.

^d *L.* 27.

to their Enormities; and his Protection interposing, hindred them from making good the Damages they had been guilty of ⁵. As to the Point of counselling or advising, this is most certain, that he who suggests to another the way and manner of committing a Trespas, is bound to Reparation. Whereas the same Obligation doth not seem to lie on those who either persuade a Man in general Terms to apply himself to an ill Course, as to Theft or Robbery, for instance, or join their Approbation and Consent ⁶ to his Resolution, when already fixt and settled; as is often the Case with timorous Counsellors, or base Flatterers of Princes ^a. Lastly, concerning those who concur to an injurious Action, by omitting somewhat which they ought to have perform'd, this may be observ'd, that their Omission doth then only bind them to repair the Damage, when it is of a Duty, to which they stood engag'd by a *perfect Obligation*; not if the thing was only a Matter of Charity and Humanity. For, since what is owing to me in this imperfect Manner, I cannot yet account my own, neither if it be intercepted, can I go about to recover it ⁷, whatever *Ziegler* in his Observations on *Grotius* ^b alleges to the contrary.

V. Where therefore many Persons have concurr'd to one Act of Damage, in making Reparation this Order shall be observ'd; those shall be in the first place chargeable, who set forwards the Mischief ^c, either by their Commands, or by some other powerful Means, amounting almost to a necessary Influence. And the immediate Actor of the Crime, or he who was thus forced to lend his Hands for its Performance, shall, in these Cases, be esteem'd only as the *Instrument*. Where any one appears to have engag'd himself in the Enterprize, without being driven on it by Necessity, he shall be first obnoxious, and then the rest who contributed their Assistance; yet so, that if the former of these Parties concern'd shall have made good the Damage, the others shall be then clear, as to Reparation, tho' not as to Punishment. But what if an Act proceeds from many Persons, who are all Authors or Causes of it in the very same degree; shall each Party be responsible for the whole, or only for an equal Share of the Damage? *Grotius* ^c pronounces in this Case, that each *Person is to answer for all, if the whole Fact proceed from each, tho' not from each alone*. Which Rule is somewhat obscure, unless we illu-

strate it by an Instance. Here are three Men then, who at the same time, tho' perhaps in different Parts, all set fire to an House. This Fact of burning the House seems to have proceeded from each Man entire, and in whole, although not from each alone; in as much as the same Mischief would have follow'd, had *one only* applied the Fire. But suppose several Persons join in beating or cudgelling a Man, one of whom perhaps gives him a Wound in the Head, another breaks his Arm, and a third strikes out his Eye; here each Person shall not answer for the whole Hurt, but only for that part of it, which he himself effected. Though in Case one of them escape, it is usual to condemn the rest who are taken in the whole, especially when it appears, that they combined together to execute the Mischief. We may still set this Matter in a clearer Light, by distinguishing between *divisible* and *indivisible Acts*. The latter which we are concern'd with, are such in which many Persons concur, but in such a manner that the whole Act would have follow'd from the Endeavours of one only; and therefore cannot conveniently be divided into Shares amongst them all; of this kind are the fring of Houses, the breaking down of Banks and Damms, or the like. For the same Damage would have ensued, had one only of the many Parties set his Hand to the Exploit; so that it is impossible to define and settle what part of the Fire, or of the Flood, proceeded from each in particular. When many join in an Act of this Nature, each Person shall be thus far responsible for the whole, that in case they are all apprehended, they shall contribute equally to the Reparation; but if upon the Escape of the rest, one only be taken, he shall then be charg'd with the entire Sum. After the same manner, if some of the Persons apprehended prove insolvent, the whole Burthen shall be laid on those who have more Substance and Ability. In this too the *Reparation of Damage* differs from the *Exaction of Punishment*, that in the former, if full Payment or Restitution be made by one of the Parties concern'd, the rest are cleared and excus'd; since it is not consistent with Equity, that the same Damage should be twice made good (though by way of Punishment, this is frequently practis'd) but on the other hand, in penal Cases, nothing is more usual, than that every particular Accomplice in a Crime be made to suffer all that the Law inflicts ^d.

⁵ The French Translator here adds, *So that there was something else besides a mere Approbation, or Defence of the Wrongs done to others*, which seems to make our Author's Reasoning more clear.

⁶ That this Restriction ought to be added, especially if by the fundamental Laws of a Kingdom, the Ministers are obliged to deny their Consent to their Prince, as it is in *England*. See the Passage cited out of *Dr. Bates's Elench. Mot. Nap. Angl.* Part I. compar'd with our Author, l. 1. c. 5. §. 14.

⁷ Certainly of the Person himself, who has refused to do any of these Duties; but if he was hindred by some other Person, he has a Right to require Damages of this latter, if not before humane Tribunals, which often suffer many Wrongs, yet by the immutable Rules of Justice and Equity. See §. 3. above, Note 8.

MR. BARBEYRAC'S NOTES on §. v.

¹ For the Rule of the Law is this: He does the Wrong, who commands it to be done, but he is in no Fault, who is under a Necessity to obey. *Digest. Lib. L. Tit. XVII. De diversis Reg. Jur. Leg. CLXIX.*

^a Compare *Ant. Matthæus de Crimin. Proleg. c. 1. f. 7, 8, 9.* ^b *L. 2. c. 17. f. 9.* ^c *Ibid. f. 11.* ^d Such a Case we have in *Quintilian Institut. l. 7. c. 6.* Two Thieves had stolen together Ten Thousand *Sesterces*, they were sued in Court, and Forty Thousand demanded of each Man, according to the Law enacting, that every Thief shall pay *Four-fold*. They petition that each may pay no more than Twenty Thousand. Here the Judgment ought to go against the Thieves, in as much as by the Roman Laws, these *Actions of Restitution* are reckon'd under the Head of *Punishments*, *s. ult. de Oblig. quæ ex delict. nasc.* l. 7. f. 5. l. 8. *D. de Jurisdictione*, l. 6. *prin. D. arborum furtim cæsarum*: l. 34. *D. de injuriis. Add. l. 11. f. 2, 4. D. ad L. Aquil. l. 5. 1. f. 2. ibid. l. 15. f. 2. D. quod vi aut clam. l. 2. f. 9. D. de furtis, Hotoman. illust. Quæst. 33.*

VI. Now whenever we hurt or endamage another, we do it either out of full Purpose and premeditated Guilt, or by a Fault of Negligence only, and not of Design (and this Negligence, as it is more or less gross and supine, is more or less culpable) or lastly, we may do it by *meer Chance*, so that the Injury cannot rightly be *imputed* to us^a. Among some People, those *Damages* are not only *imputed* to a Man, which are committed with his Assistance or Concurrence, but those likewise which are caused by his Servants or Cattle, without his positive Influence. It is beyond doubt, that he who offers Damage to another out of an *evil Design*, is bound to make Reparation, and that to the full Value of the Wrong, and of all the Consequences flowing from it. But those likewise stand responsible, who commit an Act of Trespass, tho' not designedly, yet by such a Piece of Neglect as they might easily have avoided¹. For it is no inconsiderable Part of social Duty to manage our Conversation with such Caution and Prudence, that it do not become terrible or pernicious to others; and Men under some Circumstances and Relations are obliged to more exact and watchful Diligence^{b2}. Indeed the slightest Default in this Point is sufficient to impose a Necessity of *Reparation*, unless under one of these Exceptions, either that the Nature of the Business was such as disdain'd a Care more nice and scrupulous, or that the Party who receives the Wrong is no less in fault than he who gives it; or lastly, that some Perturbation of Mind in the Person, or some extraordinary Circumstances in the Affair, leaves no room for accurate and considerate Circumspection; as suppose a Soldier in the Heat of an Engagement should hurt his next Man with his Arms, whilst he brandishes and employs them against the Enemy. To this purpose the Story in *Ælian*^c is remarkable; "A young Man travelling towards *Delphi*, as he defended his Companion from the Robbers, hap- pen'd to kill him by an unlucky Turn of his Weapon; and upon Application to the Oracle receiv'd his Pardon in this comfortable Answer:

Ἐκλενας ἢ ἑταῖρον, ἀμύνων, ἢ σ' ἐμάνηεν
Αἷμα πύλαις ἢ χεῖρας καθαρώτερον ἢ πάρος ἦεναι.

*Striving to save your Friend, you have him slain;
His Blood will cleanse your Hands, it ne'er can stain^d.*

But in Cases of pure Chance, where the hurtful Action is not mix'd with any Fault of ours³, it is evident we are not oblig'd to Reparation. For when I have done nothing that can be fairly laid to my Charge, there seems to be no Reason why the Misfortune, and the Damage of a Harm which I unwillingly caus'd, should rather fall on me than on the Person who receiv'd it^e. Yet if a Person of Wealth hurt a poor Man, though meerly by Chance, it will become him by some Act of Liberality to support and comfort the Sufferer. As for those *Actions* which lie against us for any Trespass or Hurt committed by our Cattle or Slaves, and the like, **Grotius* is of opinion, that they owe their Rise to Civil and Positive Laws; inasmuch as the Master or Owner being innocent of the Fact, is not by any natural Obligation made responsible for it. Yet others hold that *Actions* of this kind are most agreeable to natural Equity, although they are not precisely suggested by the Law of Nature. It is one of *Plato's*^f Constitutions, "If a Man or Woman being a Servant, shall injure the Goods of another Person, either by an unskilful, or by an im- moderate Use of them, the Person who receives the Wrong, not being himself the Cause of it; the Master shall either make him Satisfaction for the Damage sustain'd, or shall deliver the offend- ing Servant into his Power and Pleasure." And the same way of proceeding is observable in the old *Roman* Story of *Evander*, delivering up his Servant *Cacus* to *Hercules*, who had convicted him of stealing his Cattle⁴. But why the Owner of a Beast should rather suffer Damage than he who upon provoking a Creature⁵ not violent by Nature, has without the Owner's Fault receiv'd a Hurt, the Reason seems

Mr. BARBEYRAC'S NOTES on §. VI.

¹ See the Civil Laws drawn up in their Natural Order, by Mr. *Daumat*. Part I. l. 2. *Tit. 8.* where you will find a great Number of these sorts of Cases decided, wherein it appears, that there is nothing but the indirect and interpretative Will of him that causes the Damage.

² Among the Laws of *Moses*.

³ This Restriction ought carefully to be observed. For when the accidental Case is an Effect of some Fault, which produced it, we are indispensibly required to make good the Damage, the Obligation to repair being the Effect of the Fault, and not of the Chance. See Mr. *Daumat*, Civil Laws, Part I. *Lib. 2. Tit. 9.* We ought to remember that we may be engaged by some Agreement to answer for some accidental Cases, and then, as any one may see, the Obligation to make good a Damage is an Act of our Will, and the Accident gave us only an Opportunity to fulfil our Promises. See l. 5. c. 9. following. Mr. *Thomasius* goes farther, and maintains, that a Man is bound to make good any Damage, of which he is only the Physical Cause, altho' he does not do any wilful Injury; but the Welfare of human Society does not seem to require, that our Obligation to satisfy a Damage should extend so far. Human Society will be happy enough, if every Man carefully abstains from endamaging others, not only out of a formal Design, but thro' the least Negligence.

⁴ The Author in his last Edition, which this Translation follows not, places the next Paragraph, and that most properly, here, but then it must be render'd, *it is clear*, instead of, *much more is it clear*.

⁵ This Restriction is made by the Civil Law only, for according to Natural Right, it imports not, whether a Beast follows the Disposition of those of its own Kind, or not, provided that it carries itself in the usual Way when it does the Hurt. Nevertheless, since it often happens through Man's Default, that a Beast does mischief, though it follows its own Natural Inclination, and those Damages which happen by its extraordinary Motions, could not else so easily happen, the Distinction must not be neglected. *Tit. Obf. 261.* To this we may add also the Damages that are caused by an Infant, a mad Man, or one seized with a Fit of a Frenzy. Mr. *Thomasius* maintains, with Reason, that the Damage ought to be repaired out of the Infant's or mad Man's Goods: For though neither of them are capable to do a Wrong knowingly, it is sufficient that they are the Physical Cause of a Damage, which they have no Right to do: For the Obligation to Restitution arises from the Thing itself, and Natural Equity, and not from any Agreement or Crime. For if we may oppose a mad Man, when he does us any Wrong, why may we not expect Satisfaction out of his Goods, when he has done it? We must suppose such a Restriction here. This Satisfaction is the more just, because it is commonly the Fault of such as are to take care of such Child or mad Person.

^a *Lyfias* Orat. xxx.

Ὀυδενὶ ὁδὲν ἐγένον δυσόχμα γίγνεται.

No Misfortune happens to any Man by his good Will.

See *Exod. xxi. 28, &c. 33, &c.* & *Grot. ibid.*

^b *Vid. l. 6. f. 7. l. 14. D. de Offic. Præsidis. l. 27. f. 9. in fin. f. 29, 34, 35. l. 27, 29. f. 2, 3, 4. ad L. Aquil. Deuteron. xxii. 8.*

^c *Var. Hist. l. 3. c. 44.*

^d *Add. Epictet. Enchir. c. 39. & Simplic. in eum circa fin. 8. L. 44. l. 52. f. 4. D. ad*

L. Aquil. & ibi Interp.

^e *Add. l. 5. f. 2. l. 7. f. 3. ad L. Aquil.*

^f *De Leg. l. 11.*

to be this, that the Settlement of *Proprieties* does not impair or prejudice this antecedent natural Precept of Reparation. And therefore, since supposing Things to lie in their primitive Community, in case I had been hurt by a Beast, I had the Power of requiting, or satisfying myself upon the Beast, by any means I thought fit; this Power or Liberty of proceeding is not suppos'd to be taken from me by the Introduction of distinct Proprieties. And inasmuch as the Owner of such a Beast makes a *Gain* of him, and I suffer'd *Loss* by him, the Reparation of Damage taking place in Equity and common Favour before the Procurement of Profit, it hence appears, that I can rightly demand of the Owner, either to make good the Loss sustain'd; or in case such a Charge would rise higher than the Value of the Beast, then to deliver him up as a Criminal, to be destroy'd⁶. The same Rule holds much stronger in the Case of a *Slave*, since he is by Nature made liable to answer for any Damage he shall give. But now, since he has no Goods of his own to repay or requite the Loss, and since his very Body is his Master's, it follows in Equity, that the Master either repair the Wrong, or give him up to the Sufferer. Especially since without this Provision, a Slave would be empower'd to act what Hurt and Mischief he pleas'd; whilst neither he (who is Possessor of nothing, nor indeed of himself) nor his Master, could be oblig'd to Restitution. Nor should the Master by the severest Course of Blows, or of Imprisonment, punish the Offender, would this be any real Satisfaction to the injured Party⁷.

Much more then is it clear beyond the least Doubt or Dispute, that the Owner stands respon-

sible for those Damages which his Beasts commit, either by his own Fault or Instigation, or by their natural and accustom'd Violence, and the common Force of their peculiar Instinct. For the Owner ought either not to keep such Creatures, or carefully to restrain them from doing Mischief⁷.

Of Reparation in general, we have this farther to observe, that when the Hurt or Wrong is done by an evil and criminal Act, there to make good the Damage is not sufficient to take off the Punishment⁸. Though the voluntary Offer of Requitall, as a Sign of Penitence and Sorrow, frequently lessens the Severity of farther Prosecution^{8c}.

It is time now to illustrate this Doctrine by such Instances and Examples as *Grotius* chiefly will supply us with.

VII. An *unjust Slayer* is obliged to defray the Charge of Physicians and Chirurgeons, and give to those Persons whom the Deceas'd was by full and perfect Duty bound to maintain, as Parents, Wife and Children (not to any whom he kept out of Charity and Pity) so much as the Hope of their Maintenance shall be fairly valued at; Regard being had to the Age^d, both of the Deceas'd, and of themselves^{e2}. As to *Ziegler's* Opinion on this Place of *Grotius*, that some Consideration is to be allow'd for the Gain which the Deceas'd might have acquired, had he lived longer, which consequently would have made their Portions the larger, we think it will scarce hold good, inasmuch as all Advantage of this kind being yet uncertain, cannot be reckon'd amongst our Possessions; and since future Time lies equally open to loss as to gain; and lastly, since it cannot clearly be made

⁶ Besides this, we may observe with Mr. *Hertius*, that it may be commonly presumed, that the Master of such a vicious Beast knows its Fault, and if when it has done a Mischief, he will neither resign it, nor pay the Damage, he may be thought to approve it.

⁷ If a Slave or Beast be put on by any other Person than the Master of it, 'tis plain that such a Person is obliged to make good the Damage. But we must then suppose, that the Person hurt has not through his own Fault occasion'd the Damage done him by the Slave or Beast; for in this Case he can blame none but himself, and the Slave did nothing but what he might do in his own Defence. In a word, no Proprietor is obliged to satisfy a Damage, where he is guilty of no Fault, unless his Slave or Beast have done a Mischief of their own Accord. *Vid.* The Civil Laws in their Natural Order, by Mr. *Daumat.* Part I. l. 2. *Tit. 8. §. 2.*

⁸ But there can be no true Repentance without Restitution.

MR. BARBEYRAC'S NOTES on §. VII.

¹ But it may be objected, How can it be known how long the Person slain might have lived? Mr. *Placette* in his Treatise of Restitution, l. 3. c. 4. thus answers, That the Length of no Man's Life can certainly be known, but it may be probably guessed at two ways: As, 1. By what the Law has determined about it, which fixes it to 60 Years, and so if the Person slain was 40 Years old, the Persons interested must be satisfied for the Gains of 20 Years, but then he must not be much above, and all Deductions must be considered. 2. But the best way seems to be to refer the Matter to the equitable Judgment of one or more Arbitrators, who are wise and prudent Men, who considering the Constitution, Health, and Frugality of the dead Person, may determine best what is most reasonable to allow.

² The manner of computing the Value of their Maintenance is set down in *Digest.* l. 35. *Tit. 2. ad Legem Falcidiam, Leg. 68.* But *Titius* upon this Author observes, that no exact Estimation can be made of a Damage by this and the following Examples, and therefore in this Case we ought to submit to an Accommodation. I may add, that every one ought to consult his own Conscience well, and consider, that it is better always to make such a Reparation as may seem something more than the Damage done, than expose himself to be thought not to have done enough, for the Cause of the Person damag'd is always more favoured, than of him that did it.

^a *Vid. Interp. Jur. Roman. ad Tit. Si quadrupes pauperiem, & ad L. Aquilianam, & De damno infra. fo.* ^b *Vid.* l. 48. *D. de*

furtis. The French Translation puts the following Citation into the Text after ^c, and 'tis so in the Original. See *Luc. xix. v. 8.* 'Tis remarkable, what *Glycas* tells us, in his *Annals of Michael the Paphlagonian.* But the Emperor *Michael*, says he, "Did not forbear all his Life-time to lament his Villany towards *Romanus III.* and endeavour'd by building Monasteries, by Charity to the Poor, and other good Works to appease the Anger of God. And this Method might have prov'd beneficial to him, had he laid down the Empire (for the sake of which the Fact had been committed) and throwing off the Adulteress, the Empress, for the Love to whom he had done that Wickedness, bewail'd his Sin in a private Condition. But he neglecting such Means of Repentance, and still using *Zoa* as his Wife, still holding fast the Imperial Dignity, and only making a shew of doing good at the publick Charge, thinking thus to obtain his Pardon, betray'd an impious Opinion of God Almighty, as if he would suffer us to buy our own Forgiveness at the Loss of other Men. *Valer. Max. l. 2. c. 8. f. 4.*" So much Difference there is, whether you really add any Thing to another, or whether you only restore what you had taken from him, as there is between the Beginning of a Benefit, and the End of an Injury.

^d See Mr. *Placette's* Treatise of Restitution, l. 3. c. 4. ^e The way of reckoning the Maintenance we learn from *L. 68. D. ad L. Falcidiam.*

out, how much the deceas'd would have spent of any such Gain, had he been suffer'd to live and to procure it³.

Now he is an *unjust Slayer* that kills a Man, who had a Right not to be kill'd by him, and who therefore by the Act that caus'd his Death was truly injur'd. And this Right appears to belong to every individual Person, since Nature by a general Command binds all Men to live like sociable Creatures, and to abstain from mutual Hurt. Which Right a Man may, as far as in him lies, renounce; at least so as to make it fair and just for him to be hurt by such or such particular Persons; and this may be done either *tacitly* or *expressly*. He *tacitly* disclaims this Right, who in a violent manner sets upon another without just Cause. For since the other has a Right of repelling the Violence by any Means he can, the Assailant is to accuse himself only for any harm he suffers in the Repulse of his own unlawful Force. The same Right is *expressly* renounced by him who enters into *War* with another upon mutual Appointment and Consent. For 'tis a Law of War, that every one have fair Liberty to use his full Endeavours for the Defeat and Suppression of his Enemy⁴. And though in such War the prevailing Person may perhaps sin against Charity, yet the Violation of Charity only will not oblige to repair the Loss he has thus occasion'd.

The Life of a Freeman does not admit of any Rate or Valuation; and had it any, there is no Person to whom the Debt should be paid. For his Life does not properly belong to his near Relations, it is only their Interest that he should live; and therefore the Value of that Interest or Advantage being paid to them, they can demand no such farther Recompence as the full Worth of his Life. The Case is otherwise with a Slave or Vassal, who being entirely the Propriety of his Master, and falling under Exchange and Commerce, in the manner of other Goods, has really a Price set upon him, which, if he be wrongfully kill'd, the Master has a Right to demand. If it seem hard and somewhat like Inhumanity to rate our Slave thus, in the same manner as we would our Beast, it may be answer'd, that we do not make this *Valuation* of his Person, but only of the Work and Service which he would have done us.

Those in like manner stand bound to *Reparation*, who kill another in their Sports or Recreations, which is esteem'd equal to deliberate Mischief⁵.

And those also who commit the same mortal Violence, through their own Unwariness and Neglect. Examples of which Case we find set down in the *Institutions*⁶. As if a Soldier practising with his Arms in another place, than what is set apart for those Exercises, should slay a Man who was casually passing by; or if one who is not a Soldier shall happen to do the same; though in the place ordain'd for the publick training of Military Men. But if a Soldier in the same place of common Duty shall undesignedly take away a Man's Life, he shall stand excused; for he was performing his proper Business, and the other Party was in the fault for throwing himself into the Danger⁷. If a Feller of Wood shall with the Limb of a Tree which he is cutting down, kill a Servant passing by in the high Road, or in a Way near a Town; without having first cried out to give Warning. But in Case he did thus cry out, and the Servant neglected to save himself upon timely Notice, the Feller shall not be charged with his Death. No more shall he if the same Misfortune happen'd at a distance from the Highway, or in the middle of a Field, although he did not give the usual sign of crying out; because there the Stranger had no Right of passing, and consequently ventured at his own Peril⁸.

If a Physician destroy his Patient, either by plain Neglect and Desertion, or by administering through Ignorance, improper, and dangerous Medicines⁹.

If a Muletier, through Weakness or Unskilfulness, shall have suffer'd his Mules to run over any Person; provided he undertook this Business of driving at his own Choice, or made it his Profession; not if he was press'd and compell'd to the Service, protesting at the same time his want of Art or of Strength¹⁰.

In the *Alcoran*¹¹, he who shall ignorantly kill a Musulman, is enjoin'd to make good to his Relations the damage they sustain'd by his Death; and to redeem one Person of his own Religion from Slavery.

It seems probable that those likewise were oblig'd to some such Method of Reparation, who by the Favour of the *Jewish* Law enjoy'd the Privilege and Protection of the *Asylums*, or Cities of Refuge¹². Since in the Case there specified, of a Man's killing his Neighbour by the fall of the Head of his Ax from the *Helve*, the Man is not entirely blameless, in as much as he ought to have strengthened his Instrument better, for the Prevention of such a sad Mischance¹³. But how it came to be

³ Mr. *Van Meulen*, in his Commentary upon *Grotius*, l. 2. c. 17. §. 16. believes that the Nature and Certainty of the Gain which the dead Person might have made, ought to be examined. If his Gain were altogether uncertain, so that it depended more upon Chance than the Industry of the dead Person, no Satisfaction ought to be made; but if his Gain were morally certain, and would have in all appearance been produced by the Labour and Industry of the dead Person, as the Gain of some Traders, Merchants, and Artificers is, then he ought to satisfy the Persons concerned for the Gain lost, according to the equitable Estimation of an Arbitrator, who shall make as exact Deductions for all Expences which the dead would have been at, as possible, and consider the Circumstances our Author mentions.

⁴ See that excellent Treatise upon this Subject, compos'd by Mr. *Noodt*, *Ad Legem Aquilianam*.

⁵ Our Author observes a little higher, that the *Alcoran* in the Chapter of Women, appoints, that if a Person against his Will, kills a *Musulman*, he must not only make Satisfaction to the Parents of the Person slain, but also redeem a captive *Musulman* at his own Charge.

⁶ To this purpose we have a Story in *Plutarch's* *Laconian Apophthegms*; that two Boys, one of them with a Sickle, gave the other a mortal Wound; when the Companions of the wounded Boy, who had hasten'd to part the Fray, promis'd him to revenge his Death on his Murderer; By no means, says he, this would be to act unjustly: For what he hath done to me is no more than I had done to him, had I been strong enough to have prevented him. *Add.* l. 4. §. 7. f. 4. l. 52. f. 1. *D. ad L. Aquil.*

⁷ *Vid.* l. 4. f. 1. *D. ad L. Cornel. de Sicar.* & *ib. Gotthofred.* l. 10. *D. ad L. Aquil. Digest.* l. 48. Tit. 8. ⁸ *D. de L. Aquil.* f. 5. & c. ⁹ *Add.* l. 9. f. 4. *D. ad L. Aquil.* & *Antiphan. Orat.* VII. ¹⁰ *L. 31. D. ad L. Aquil. Add. Leg. Burgundion.* Tit. 46.

¹¹ *Vid. Plin.* l. 29. c. 1. *Leg. Wisigothor.* l. XI. Tit. 1. c. 6. ¹² *Add.* l. 5. f. 3. l. 7. f. 2. 5, 6, 8. l. 8. l. 9. *princip.* l. 31. l. 52. f. 2. *D. ad L. Aquil.* & *confer cum c.* 8, 9. *Se. X. de Homicid.* ¹³ In the Chapter of *Wicci.* ¹⁴ *Nam.* XXXV. & *Deuteron.* XIX. allow'd

allow'd, that the ⁶ *Revenger of Blood* should dispatch such an *innocent Slayer*, if taken without the Bounds of his Sanctuary, which seems not altogether consistent with a regular State of Government, we have this only Reason to assign, that God was pleas'd to grant some little Instances of Indulgence to the cruel and implacable *Genius* of that People^{a 7}.

VIII. He that has maimed a Man, shall be oblig'd to pay the Charges of the Cure, and to make up what he now gains less than before, by his Labour or Calling^b. On this Head the *Jewish* Constitutions are very worthy of Remark, as we find them deliver'd in *Constantine l'Empereur*^c. He that hurts his Neighbour is responsible on five Accounts; for the *Damage*, for the *Pain*, for the *Cure*, for the *Cessation of Work*, and for the *Affront* or *Disgrace*. The *Damage* they compute in this Method: If, for example, he has beat out the other's Eye, or cut off his Hand, or broke his Leg, they then consider the suffering Party as if he were a Slave to be sold in the Market, and so reckon how much he would have yielded in Sale before the Hurt, and how far his Price is now fallen. For they judg'd there would be no certain Way of settling these Rates and Accounts, should they in this Case distinguish between the different Qualities and Conditions of Men; since the Professions of Life, and the States of Persons admitting so endless a Variety, the Sufferer would be always throwing in some new Reason to enhance the Damage, and aggravate the Hurt, and consequently to enlarge his Demands of Compensation. They thought it convenient therefore to set all Men, with regard to this Business, in the one general Condition of Slaves, the just Value of whom was discoverable beyond dispute. So that if the maim'd Person, suppos'd to be a Slave, would before the Hurt have brought fifty *Shekels*, and could be sold afterwards for no more than thirty, the Maimer was enjoin'd to pay him twenty *Shekels*.

As to the Point of *Pain*, if a Man, for instance, had *burnt* another, although in the Nails, where no Blister follows, they consider'd how much a Person of that State and Fortune would have taken to suffer voluntarily such a Pain. For one may find a wealthy or a nice and delicate Person, who would not be hired at any rate to endure a slight and moderate Smart; and at the same time one may light on a poor and hardy Labourer, who would be content to undergo some sharp Degree of Torture for the earning of a Penny. Farther, in rating the Pain, they proceeded thus; they suppos'd, for instance, that a Person of that Condition was condemn'd to have his Hand cut off, and then they consider'd how much he would give to lose his Hand, rather by some easy consuming Application, than by the violent Stroke of a Sword; and so much the Party, from whom the Hurt was receiv'd, was bound to give him on Account of the *Pain*^d.

Concerning the *Cure*, they observ'd these Rules: If after the Cure perform'd, any Sores or Tumours arose, in case it appear'd that the former Wound

was the real Occasion of them, the Person who gave it stood farther bound to pay for his second Cure; if they proceeded from any other Cause, he was not responsible. As often as the Wound being imperfectly heal'd broke out again, he was still charged with the Expences, but not after it had been once brought to a perfect Cure. It might be added, that his Obligation continued only in case the Wound thus broke out *of itself*; not if the Thing happen'd thro' the Fault of the Patient, or thro' the Unskilfulness of the Chirurgeon.

In rating the Allowance to be made the Sufferer for the *Cessation of his Work*, they consider'd him as a *Keeper of Cucumers*. The *Jewish* Doctors thus enlarge on the Point; they suppose him already to have receiv'd Satisfaction for the Defect or Damage sustain'd in his Body, and likewise for the Pain he has endured. And therefore supposing him (for instance) to have lost the Use of a Hand, or a Foot, they do not now consider what Gain he would have made, had those Limbs remain'd entire; but because he hath been already paid for the disabled Part, they only compute what Damage he suffers during his Sickness in respect of such Work, as he could have perform'd, though maim'd in Body, if well in Health. And they think he may fairly demand so much for every Day of his Sickness, as his daily Wages had been for watching a Cucumber Garden. But because it is a different Thing, whether a Man loses a Hand, or a Foot; whether only lying some time sick of his Wound, he afterwards recovers without prejudice, or whether he is actually depriv'd of a Limb, *Maimonides* proposes a nicer and more exact Way of rating the *Cessation of Work*, according to particular Cases. If the Sufferer shall not be maim'd, but only cast into a Sickness, and confin'd to his Bed, or if the affected Limb only swell for a time, and afterwards regain its Soundness and Use, the other Party shall allow him daily for the Loss of his Work, according to the usual Wages or Hire receiv'd by Men of the same Calling. But if he is maim'd in a Limb, or has lost a Hand, Satisfaction being already made him for that Loss, or what they call *Damage*, being before discharged, as to the bare *Cessation of his Work*, they then consider him as a *Keeper of Cucumers*, and computing the Pay generally allowed for this Work, order him so much for every Day of his Illness. In like manner, if he has lost a Leg, they consider him as a Centinel or Watchman at a City Gate; if an Eye, they suppose him to work at turning a Mill; and so agreeably of all other Hurts and Mischiefs.

Lastly, In rating the *Affront*, or *Disgrace*, they consider the Condition and Degree of both Parties. Since an Affront is much more provoking from a mean and vile Person, than from one of Quality or Power; and since the same Piece of Disrespect may be light and inconsiderable to one of vulgar Condition, and yet be heinous and intolerable, if offer'd to a Man of Honour. And here we may by the bye observe the Distinction added, concerning the *Place* or the Scene of the Action, which some-

⁶ The Revenger of Blood was evidently the next Heir, or nearest Relation of the dead Person. See Mr. *Le Clerc's* Notes. The Author quotes *Hom. Odyss.* l. 15. l. 272. & *Tacit. German.* c. 21. See also Mr. *Hertius's* Dissertation, entitled, *De Hærede Occisi Vindice*, in Tom. III. of his Comments, and small Tracts, &c.

⁷ Certainly such a Permission can't be allowed under the Gospel. See the Interpreters of *Matth.* v. 38, &c.

^a Compare *Tacitus German.* c. 21. *Homer. Odysses*, O. v. 272.

^b In *Babakama*, c. 8. f. 1.

^c *Confer.* l. 13. *prin. D. ad l. Aquil.* l. 7. *D. de*

his qui dejec. vel effud.

^d *Conf.* l. 5. *prin. & f. 1. D. De injuriis.* Where since there is this Difference made between *Verberatio* and *Pulsatio*, that the former is *with*, and the latter *without Pain*, it seems to follow that even *Pain* may fall under Valuation.

times very much varies this Point. Thus if a Man sliding down from the Roof of a House, shall hurt one that passes by, and at the same time affront him, for instance, by making the Dirt fall on him, he shall be responsible for the *Damage* or *Mischief*, not for the *Ignominy*. Thus much we have gather'd from the *Jewish* Laws; and on the same Head the Reader may consult the *Roman*; particularly, *l. ult. D. De his qui effuderint vel dejec. & l. 3. D. Si quadrupes*. Where we must take notice, that when 'tis said *Scars* and *Deformity* are not capable of being prized or rated, the Rule¹ will hold good only in the Case of Freemen. For since the debauch'd Manners of that Nation set a higher Price than ordinary on handsome Slaves, they might consequently claim a pecuniary Satisfaction from those who should rob a Slave of this Advantage, by a Wound in the Face, or any Injury of that kind. So the disfiguring the Face of a Virgin or unmarried Woman, whose Beauty sometimes is the best part of their Fortune, may be reckon'd amongst Hurts requiring Compensation. And indeed Deformity, if very remarkable, is in general a sad Unhappiness, rendring us disagreeable to others, and exposing us to the Contempt and Derision of proud and of satyrical Men. Yet Scars receiv'd in War pass for Marks of Honour and Valour by the common Vote of Mankind².

As to the Compensation after an Act of *Maiming*, this is farther observable, that in such Cases the Limb itself is not properly rated or valued, it being a Thing really incapable of a pecuniary Price; but the Design of these Proceedings is only to repair the Damage sustain'd by the Loss, or by the Disuse of such a Part, with regard to the Difference of Times, of Persons, and of Abilities; and whilst the Judge is settling these Points, 'tis necessary he should speak of the Members themselves^b.

IX. The next Instance produced by *Grotius*¹ of the Adulterer and the Adulteress, who he says are bound not only to save the Husband harmless, as to the Maintenance of the spurious Issue; but likewise to make good to the Legitimate Children any Damage which they shall sustain, in case so false a Sharer should be admitted with them into

the Inheritance, falls under that *kind of Damage*, which Men are said to cause only *indirectly*, and by *Consequence*. For as to the *direct* Crime of Adultery, that does by no means belong to *pecuniary Damage*. On this Point *Ziegler* observes that *Grotius* is indeed in the right, when he asserts, that the Husband ought to be secured from the Burthen of keeping the adulterous Offspring: But that it will bear a Dispute, whether Restitution should be made to the Legitimate Children for what they suffer by such a Partner in the Inheritance. For he says the Question here is concern'd only about the Mother's Estate, to which the adulterous Children cannot be admitted, but by the Ordinance and Prescription of Law. And therefore when the Law of any Nation does thus actually allow them to share in the maternal Inheritance with the Legitimate, the Damage here given proceeds from the Law itself, and not from the Adulterers. To which might be added, that the Adulterers are not obliged to such Reparation for this farther Reason, That Children have not a *perfect Right* to the Goods of their living Parents; and no Necessity of Reparation can arise but from the Breach of a *perfect Right*. Thus a Parent cannot be said properly to *injure* the Children by passing to a second Marriage, though their Hopes of Inheritance may sink considerably by such a Proceeding. But the Truth is, the Instance alledged by *Grotius* abstracts both from the Provisions made by Civil Laws, about the Succession of adulterous Children to the Goods of their Parents, and also from the Penalties decreed against the Adulterers, if convicted; and 'tis but reason to affirm with him, that the Adulterers, tho' unconvicted or undiscover'd, do really owe such Reparation both to the Husband and to the Legitimate Children². For by the End and Design of the matrimonial Covenant, the Children had a perfect Right, that no one should thrust new Coheirs amongst them, besides the lawful Husband of their Mother. And by the same Covenant the Husband had a Right of refusing to maintain, not only out of his own proper and separate Goods, but likewise out of his Wife's Dowry, the base Progeny of his polluted Bed.

Mr. BARBEYRAC'S NOTES on §. VIII.

¹ And the Reason, which the *Roman* Lawyers give, is, because *Liberum corpus nullam recipit aestimationem*, i. e. the Body of a Freeman is not capable of any Valuation, as the Body of a Slave is; but Mr. *Titius* as well as this Author disapproves of this Reason, and says, that though Freemen are not commonly bought and sold as Slaves are; it is not a good Inference, that a Freeman that is hurt may not reasonably require a Reparation by a certain Price of the Scars and Deformities, which are the necessary Consequents of the Wounds he has received. His Reputation, for example, is as little capable of a Valuation as his Scars; yet we allow, that a Man that is injured by Calumnies may demand, that the Offender be obliged to make a pecuniary Satisfaction for his impaired Honour. Some Men indeed through a Greatness of Soul, either real or affected, think it below them to take Money in Compensation of the Blows and Hurts they have received, but this hinders not, but that they have right to require such a Satisfaction, if they please, and that it may be made by Money; for as *Grotius* says, *Lib. 2. Chap. 17. §. 22.* Money is the common Measure of all Things, which are profitable to Man.

Mr. BARBEYRAC'S NOTES on §. IX.

¹ See upon this Head concerning the Satisfaction for the Damage done by Adultery, Mr. *Placcette's* Treatise concerning Restitution, *l. 3. c. 12, 13.*

² Mr. *Thomasius* in his *Instit. Jurispr. Div. l. 2. c. 5. §. 50.* says, that the Reason produced here by our Author, taken from the Contract of Marriage, is far fetched, and agrees not with the Nature of Contracts in general; for (as he adds) all Contracts of Marriage are made between the Man and Woman only, and no ways include the Children (*sunt extra pacta*) but our Author affirms not that Children are not comprehended in the Engagement of Marriage from whence they proceed, and which were made before they were brought forth into the World, but says only, that by virtue of the End of Marriage-Contracts the Children have a Right to believe that no Person may disappoint them of their Hopes. Now it is certain, that if the Father or Mother had not committed Adultery, the Portion of the Legitimate Children out of the Goods already gotten, had been much greater; so that all the Difficulty which remains is about the Goods which the Father or Mother may get after the Birth of an Illegitimate Child. But however uncertain the Gains are, the lessening of the Inheritance of the lawful Children is not less real, nor a less necessary Consequent of Adultery, seeing they are already gotten; for the Reparation of the Damage must be made first. And it imports, that the Damage proceeded immediately from the Will of the Father (which is another Reason of *Thomasius's*) for the Father's Will could not have acted without an Objection propounded to it.

³ See the Example of *M. Servilius* in *Livy, l. 45. c. 39. Add. Senec. de Benefic. l. 5. c. 24. l. 13. Princ. D. ad l. Aquil.*

^b *Baclar. ad Grot. l. 2. c. 1. f. 6.*

X. If a Man has either by Force or Fraud defiled a Virgin, he is oblig'd to pay her so much as she appears to be damnified in her hopes of Marriage, by the Loss of her Honour. For pure Virginity is a very valuable Possession, and as it were the common Portion which Nature gives her Daughters^a. And therefore he who robs a Maid against her Will of this Treasure, ought so largely to refund to her, that the Improvement of her Fortune may hide the Blemish of her Body. Though indeed the true Way of proceeding is, that he marry her himself; unless hinder'd by the Disparity of their Conditions, or some other extraordinary Circumstances^b. But she who by a lustful Compliance, voluntarily parts with her Chastity, is to thank herself for the Loss. Yet commonly speaking, the Man in these Cases is presum'd to be more faulty than the Woman. He who shall entice a Virgin to prostitute herself on the Promise of Marriage, should be bound to make good that Engagement. Nor will the Objection hold here, that Covenants about base or dishonest Things are invalid. For since the Law of Nature requires no Interval betwixt the Covenant and the Completion of Matrimony^c (all such Distance being introduc'd by Civil Customs and Constitutions)^d with regard to that Law, we can scarce call this a *base Condition*, "You shall be my Wife^e, provided you consent, that I shall immediately use you as such." Or if there be any Thing which seems foul in so over-hasty a Match, it is not judg'd sufficient to invalidate the Contract; because Marriage is, in this Case, the more *favourable Side*.

XI. A Thief or Robber is bound to restore the Thing taken away, with its natural Increase or Improvement^e; and to make good, not only the Damage^f actually ensuing to the Owner, but likewise the surceasing of his Gains; and this, although he be compell'd to suffer the just *Punishment* of his Crime. For 'tis the injur'd Party who demands Reparation, and it is the Commonwealth which requires Punishment for the publick Good; and the Judge can by no means reckon this as a Satisfaction to the private Person, so as to make him

lose his Goods, without Remedy and Restitution. Therefore 'tis an absurd way of proceeding in some States, where^g the Magistrate claims the Goods found on the Robber, and commands the true Owner of them to content himself with seeing the Villain brought to publick Justice^f. Nor is it more agreeable to the Law of Nature, that the Charges of punishing the Thief should be laid on the Person he has robb'd, since the inflicting due Penalties belongs entirely to the Government; to effect which, if more Expences are requir'd, than the Estate of the Criminal amounts to, the Remainder is to be made up by the Publick; especially since at other Times the Treasury gains so considerably by Forfeits and Confiscations. For instance, if a State engage in a War, upon account of some private Members who have been injured, all are obliged to contribute to the Charges, as well as those whose Defence is particularly undertaken. The Case is otherwise, if the Judge puts it to the injured Party's Choice, whether he had rather recover his Goods, or see the Thief executed; for here if he prefer the latter Condition, he can lay no Claim to farther Satisfaction. Though the Judge cannot fairly propose such Terms, since the Punishment of Malefactors ought not to depend on the Pleasure or Humour of private Men, but on the publick Advantage of the State.

If the Thing stolen be spent and embezzel'd, *Grotius* will have it to be paid for according to a middle Valuation; not to the full Worth, nor yet considerably less. Which Direction *Ziegler* does not without reason dislike. For what Title has the Thief in this case to favour? If I can demand the full and highest Price, when, to oblige a Person, I sell a Thing otherwise not *vendible*, why should I here make any Abatement to the Thief, who seizes my Goods against my Will, and is my Chapman only upon Compulsion^g? And in this Case too Reparation is due from the Thief, or from his Heirs^h, yet not beyond the Value of the Inheritance, although he has suffer'd the corporal Penalty of his Crime. For it does by no means look

Mr. BARBEYRAC'S NOTES on §. X.

¹ From henceforth the Marriage is made and consummated, in a State of Nature, says *Thomasius*, *ubi supra*, §. 51.

Mr. BARBEYRAC'S NOTES on §. XI.

¹ See §. 3. Note II. above.

² See *lib. 4. c. 13. §. 4.* following near the end, and what *Mr. Hertius* says upon it there, and his Discourse *De Superioritate territoriali*, §. 56. Nevertheless *Mr. Thomasius* in his Treatise *De Stat. Imper. potest. Legislat.* §. 41. maintains, that such a Claim, Seizure, or Confiscation, although it is esteem'd by some People to be contrary to all natural Right, may be justified by very good Reasons, if long Custom, and express Law has settled it in that Country. As for example, The Intention of the People, or Legislator may be to make the Proprietors more watchful to preserve their Goods, or they may appoint such stolen Goods as they have recovered to bear the necessary Charges of the Officers of Justice, who are to punish Thieves, which otherwise must be born by the Publick. We will not enquire how far these Reasons may avail in Conscience, but shall only observe that it hath nothing contrary to natural Equity, among such People as have consented to submit to such a Law or Custom, which equally affects all. Yet when the stolen Goods fall into the Hands of a Stranger, the Maxims of pure Natural Right ought to take place, and then such an Usage can be no ways authorized. *Mr. Thomasius* pretends here to make use of the Opinion of such as are of a contrary Judgment, who acknowledge that stolen Goods may be confiscated, and given to such Subjects of the State to whom they are of use, for he says, in the Opinion of all our Doctors, the Right of Reprisals is not contrary to Law or Nature: Hereupon he alledges the Example of Theft and Adultery. But it is here much the same to put a Man to Death, or seize his Effects by way of Reprisal, which otherwise would be contrary to the Law of Nature, we do but defend ourselves against one kind of Enmity.

³ The Roman Law on the contrary will have that which is stole or lost to be valued at the highest Rate, for so it speaks. *Placet tamen id tempus spectandum, quo res unquam plurimi fuit, Digest. l. 13. Tit. 1. De condit. ex causa furti, Leg. viii. §. 1. but lib. 9. Tit. 2. ad Leg. Aquil. Leg. ii. adds, quanti id in eo anno plurimi fuit, and lib. 12. Tit. 3. De in litem Jurando, Leg. 9.*

⁴ See *lib. 4. cb. 11. §. 19.* following.

^a *Apuleius* in *Apolog.* A beautiful Maid, though in the Condition of Poverty, hath a sufficient Portion, she brings her Husband Sweetness of Spirit and Disposition, fair Charms and honest Purity. And indeed Virginity alone is commonly, and ought to be esteem'd by the other Sex, a full and just Recommendation.

^b See *Exod. xxii. 16, 17. Deuteron. xxii. 28, 29.*

^c See *Tobit vii. 10, 18.* ^d *Vid. Gratian. Caus. 27. Quæst. 2. cap. 39.* ^e *Vid. l. 4. c. 7. §. 3.* ^f *Vid. Caroli V. Ord. Crim. Art. 218. Add. l. 3. f. 12. D. De Peculio. l. 56. f. 1. D. De furtis l. 7. princ. D. De incendio, ruina.*

^g *Add. l. 9. D. de in litem jurando, l. 2. princ. D. ad L. Aquil. verb. quanti id in eo anno plurimi fuit, l. 8. f. 1. l. ult. D. de Condit. furtiv.*

like Injustice or Cruelty, that the Offender after he thus satisfied the Law, either by Death, or other bodily Pain, should likewise recompense the Person he has endamaged. The trite Objection of *Mors omnia solvit*^a, *Death pays all*, has no manner of Force in the present Business. Death indeed discharges personal Performances, but not proper

Debts, which cleave as it were to the Goods and Possessions, and follow them to any new Master. And such is this Debt for Damage given.

The other Species of *Hurt* are more easy to be settled and decided; and some of them will hereafter be particularly insisted upon in their proper Places^b.

⁶ Our Author has collected several Examples more particularly in his Elements of the Civil Law, p. 453, &c. but before we end this Chapter, let us in a few Words after the Example of *Buddens*, make an Application of these Maxims, which we are about to establish for the Right of Nations, taken in the Sense our Author intends it, l. 1. c. 3. §. 23. People then may do ill to, or offend each other in respect either of the Body, or the Estate, which answers to the Life of Man, or of the Government, or of his Reputation, or perfect Rights; or lastly, some of the Members, or Citizens, who may be damaged either in their Persons, or their Goods, or Reputation, or their Rights. Moreover, one People may offend another, either directly, when by the Order of their Sovereign, who reigns in Chief, they cause a Damage to be done to another in any manner; or indirectly, when a Sovereign does not punish the Mischiefs done by his Subjects to another People, or if he could hinder them, doth not; as for example, If he does not use the best Means he can and ought to prevent or restrain Robberies and Pyracies; if instead of paying his Troops, he reduces his Soldiers to a Necessity of pillaging both Friends and Enemies; if he affords a Reception to those who have wronged and injured the State. (See *Grotius*, l. 2. c. 17. §. 20.) In all these Cases he is obliged to Restitution. And the other State has not only Reason to take Arms, if the Thing be troublesome, but to continue a War, till it can gain itself a Security for the future, which is not allowed to one Citizen against another. But of this we shall treat more largely, when we come to speak of the Rights of War.

^a *Ex. Novell. 22. c. 20.*

^b As for the Trespasies done by Beasts, which the *Roman* Lawyers term *Pauperies*, consult their Observations, *ad Tit. D. Si quadrupes.*

CHAP. II.

That all Men are to be accounted by Nature equal.

The CONTENTS of every Paragraph of the second Chapter.

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|---|---|
| I. Every Man is to account another his equal. | VI. Men offend against it by Pride. |
| II. What is a Natural Equality. | VII. And by Affronts offered to others. |
| III. The popular Reasons for it. | VIII. Whether any be Servants by Nature. |
| IV. The Opinion of such an Equality makes Men helpful to one another. | IX. Whence has proceeded that Inequality that is found among Men. |
| V. How Things are to be divided by it among many. | |

BESIDES that Affection which every Man maintains for his own Life, and Body, and Possessions, by which he cannot but resist and repel whatever threatens Destruction to those dear Concerns; we may discover likewise deeply rooted in his Mind, a most tender *Esteem* and *Value* for himself; which if any one endeavour to impair, he is seldom less (and sometimes much more) incens'd, than if a Mischief had been offer'd to his Person, or to his Estate. This Passion, though it may be heighten'd and improv'd by various external Causes, yet seems to lay its first Foundations in

the very Constitution of human Nature. The word *MAN* is thought to carry somewhat of *Dignity* in its Sound; and we commonly make use of this, as the last and the most prevailing Argument against a rude Insulter, *I am not a Beast, a Dog, but I am a Man as well as yourself*^a. Since then human Nature agrees equally to all Persons, and since no one can live a sociable Life with another, who does not own and respect him as a *Man*; it follows as a Command of the Law of Nature, *that every Man should esteem and treat another as one who is naturally his Equal, or who is a Man as well as he*¹.

MR. BARBEYRAC'S NOTES on Chap. II. §. I.

¹ This is a Consequence of the Maxim which was to be explained in the preceding Chapter; for every one having a perfect Right to expect that he be regarded and treated as a Man, he that doth otherwise with another does him a real Damage. This Duty being founded on an immoveable Condition, *viz.* That Men should be used precisely as Men, is not only general, but of perpetual Obligation; inasmuch, that notwithstanding all the Inequality by the Changes and Diversity of additional Titles and Degrees, the Rights of Natural Equality always remain unmovable, and agree to every one in relation to another, whatever Condition he is in. There are nevertheless some Superiors so insolent that they plainly violate this Duty, treating their Inferiors after an inhuman Manner, by exacting of them excessive Labours, slaying them, or exposing their Lives to danger without necessity, as if they were Beasts; for though it be common for Men to contemn each other, yet we ought to look upon such contemptible Persons, as of the same Nature with ourselves. We ordinarily content ourselves to account others as foolish and inconsiderable Persons, in a word, as Persons of no Merit or Accomplishments, in comparison of ourselves. *Titius Obs.* 172.

^a *Statius, Thebaid. 12. ver. 565.*

*Hominum inclyte Theseu,
Sanguis erant omnes, eademque in Sydera, eosdem
Sortitus animarum, alimentaque vestra creati.*

Brave *Theseus*, they were Men like all before,
And human Souls in human Frames they bore,
With You to take their Parts in earthly Feasts,
With you to climb to Heaven, and sit immortal Guests.

II. For the better understanding this *Equality* amongst Men, we may observe, that Mr. *Hobbes*^a restrains it to a Parity of Strength, and of other human Abilities which attend a ripe and perfect Age; and would from hence infer, that all Men have good cause naturally to fear each other¹. For he indeed can strike no Terror into me, whose power reaches not far enough to hurt me. But now amongst Men, he who is inferior to another in bodily Strength, may either by treacherous Contrivance, or by Art and Dexterity, take away the Life of the stoutest Mortal^b. Since therefore the greatest of natural Evils which can proceed from human Power, is Death, which any grown Person is able to bring upon another; since those may be term'd *Equal*, who can do equal Mischief to each other, and since to kill is equally (because in the highest degree) to mischieve, it follows hence that Men are by nature equal^c. When he subjoins that *the present Inequality has been introduc'd by Civil Law*, he seems to me very much to have forgotten himself. For he had been speaking before of the natural Equality of Mens Strength, to which it is a great Impropriety to oppose the Unequalness arising from politick Institutions, which does not affect or regard the Strength of Men, but their State and Condition; does not make one Man stouter than another, but greater in Quality and Honour. Nor has the same Author much better Success, when he pretends^d to discover *in the Faculties of the Mind a greater Equality than that of Strength*. He says indeed, that *all Prudence is but Experience, which Nature in equal time equally bestows on all Men, in those things they equally apply their Minds unto*. But do not we see one Man piercing more deeply than another into the Consequences of things^e, applying more dextrously what he observes, and distinguishing with more Perspicacity the likeness or unlikeness of Cases and Circumstances? And hence it frequently comes to pass, that of two Men who have been employ'd an equal Time in the same Business one shall grow eminent for Management and Address, whilst the other's natural Heaviness shall be little amended by so long a Course and Experience of Affairs. Nor does the great Disparity of Mans Prudence arise only from *their own false and overweening Conceit of their particular Worth; every one thinking himself to have a higher degree of Wisdom than the Vulgar; that is, than all, except a few, whom by Fame, or for concurring with himself, he is wout to approve and admire*. For this Disparity appears

not only when a Man compares himself with others, but when he compares others amongst themselves, and is not concern'd as to his own Interest, which side carries the Advantage. Nor do we always favour and commend him, who conspires with our own Thoughts and Desires; but whom the fair Contrivance and the good Success of his Project, entitles to our Approbation. And although such is the natural Temper of Man, so greedy is he of Esteem and Applause, that every one disdains to be upbraided with Folly or² Imprudence, and is exceedingly incens'd against those who boast of much larger Talents, much higher Attainments than his Neighbours; yet it does not follow hence, that no one allows another to be wiser than himself. For what if we fancy two Men falling together into the same danger, one of whom by his dexterous Management comes cleanly off, whilst the other is basely hamper'd, and escapes not without considerable Hurt or Prejudice; will not the latter here acknowledge his Fellow to have had a better Head-piece than himself? This is indeed a part of that Freedom which Men equally enjoy, that a wiser Person shall have no Right to challenge the Government of one more simple, unless with his Consent; especially if the latter profess himself to be contented with his own little Sagacity, and not desirous of the Controul and the Direction of others.

But although the Consideration of *equal Strength* is thus far serviceable to our present Purpose, that it may restrain one Man from rashly insulting over another, in as much as all Contention with an Equal is of dubious Issue; and because it is extreme Folly to desire the hurting another by undergoing our selves the same Proportion of Mischief: Yet the³ Equality which we are now treating of is of a different Species, and the inviolable Observation of it is in the highest degree conducible to the common Benefit and Interest of Mankind. And here, as in all other things, may we justly admire the wise Contrivance of Nature, that whilst she distributes amongst Men the Goods of the Body and of the Mind, by unequal Parcels and Measures, she introduces this general *Equality*, to form an agreeable Harmony amongst all the other Varieties and Disproportions. For as in well order'd Commonwealths, one Subject may exceed another in Riches or in Honour, but all are equal Sharers in the common *Liberty*; so under this Regulation of Nature, how much soever a Man may surpass his Neighbours, as to bodily or intellectual Endowments, he

Mr. BARBEYRAC'S NOTES on §. 2.

¹ In the Original this Paragraph is full of Mistakes, Omissions, and Superfluities, which sometimes render the Discourse very intricate; I have endeavoured to unfold it, and rectify it, as well as I can, by following the Notions both of the Author, and Mr. *Hobbes*, whose Principles he recites with all Exactness.

² The *Latin*, even in the last Edition in 1706 hath, *impudentiam*, but doubtless it is a Fault in the Print, for *imprudentiam* seems to be the true Reading.

³ Mr. *Titius* makes our Author say that the natural Equality of Men, or the natural Equality which they have one to another, shews it self in three Things: 1. Their Equality of Strength. 2. Inequality of the Goods of Nature, and Fortune. 3. The same natural Obligations; but he mistakes our Author's Sense, for after he has rejected the Opinion of Mr. *Hobbes*, who insists upon an Equality purely physical, *viz.* of Strength and natural Faculties, he confines himself to the Consideration of our moral Equality, which he calls an Equality of Right, and he supposes to arise from our Conformity of Nature; which is made clear by these Words of our Author: "Although Nature has bestowed some excellent Qualities of Body and Mind upon some, which she denies to others, yet all are obliged to observe the Maxims of the natural Law one to another."

^a *De Cive*, c. 1. s. 3.

^b *Seneca de Ira*, l. 1. c. 4. There is no Man so contemptibly weak, who may not hope some way or other to wreck his Revenge on the bravest Person breathing. We are all strong enough to do Mischief. ^c It is the Argument of *Pallas* in *Virgil's Æn.* 10. ver. 376.

————— *Totidem nobis animæq; manusq;*

Our Hands are equal, and our Lives the same.

^d *Leviathan*, c. 13.

^e See the Earl of *Clarendon's* Survey of the *Leviathan*. *Lectures* on the Nature of Man, cap. 5.

is still obliged to pay all natural Duties, as readily and as fully as he expects to receive them; nor do those Advantages give him the least Power or Privilege to oppress his Fellows. Nor on the other side, does the bare unkindness of Nature, or of Fortune, set a Man in a worse Condition than others, as to the Enjoyment of common Rights. But whatever one Man requires or expects from others, the same may others (all Circumstances being alike) demand from him; and the same Judgment one decrees against another, he is obliged in like Case to submit to *himself*^{a 4}. On this Account we can by no Means admit of *Cicero's* Rule, which he lays down in his third Book of *Offices*; *Lex ipsa nature, &c. The Law of Nature it self, which preserves and holds together the common Profit of Mankind, does decree, That things necessary for Life and Sustenance may be transferr'd from an idle and useless Person, to a Man of Wisdom, Goodness, and Valour, who, should he be suffer'd to perish, would exceedingly prejudice the Publick by his Death*⁵. Much more unworthy of Approbation is that Saying of the *American*, recorded by *Montaigne*^b, who coming to *Roan* in the Reign of *Charles IX.* and being ask'd what he observ'd that was singular in *France*, answer'd that amongst other things, he could not but wonder to see some Persons abounding in all manner of Plenty, and others oppress'd with the most grievous Want, begging at their Doors, and not rather choosing to invade and pillage them for their own Support. For as those who excel in the Goods of the Mind, of the Body, or of Fortune, ought not to treat Men of lower Condition with Haughtiness and Insolence; so neither ought these to envy or to rifle their Superiors.

And this *Equality* we may call an *Equality of Right*; the Principle from which it springs is this, that the Obligation to a social Life *equally* binds all Men, in as much as it is the inseparable Companion of human Nature, consider'd simply as *such*. Where we may observe farther, that between Obligations enjoy'd by a Superior, and those which arise from mutual Compact, there seems to be this Difference, that the latter immediately cease to a Man, when the other Party hath broken the Agreement; whereas the former may still engage us to some Performances towards a Person who is wanting in a natural return of Duty. And the Reason of this is, because the Author and Imposer of the Ob-

ligation is able to make up to us some other way what we lose by being more just than our Neighbours. But our Obligation to the Practice of natural Duty and Right, although imposed by the supreme Lawgiver, does thus far agree with Obligations of common Bargains and Covenants, that so soon as one Person recedes from it⁶, he can no longer require the same Offices from another; and besides, the other Party does hence acquire a Right of compelling him by Force to make Satisfaction. Though the *Genius* of Civil Society makes it necessary to abridge and allay this Liberty adhering to a State of Nature, for the support and maintenance of Government and Peace.

III. Other Reasons there are popular and plausible, which might give us no little Assistance in discovering, and in illustrating this Equality. Amongst which this is not the least considerable, that we all derive our being from one Stock, from the same common Father of human Race. On this Consideration *Boetius* checks the Pride of insulting Nobility: *l. iii. metr. 6.*

*Quid genus & proavos strepitis?
Si primordia vestra,
Autoremq; Deum spectas,
Nullus degener extat,
Ni vitiiis pejora fovens,
Proprium deserat ortum.*

Fondly our high Descent we boast;
If whence at first our Breath we drew,
The common Springs of Life we view,
The airy Notion soon is lost.

Th' Almighty made us equal all:
But he that slavishly complies
To do the Drudgery of Vice,
Disowns his high Original.

Mr. Itchiner.

Farther, that our Bodies are all composed of the same Matter, frail and brittle, liable to be destroy'd by a thousand Accidents of Mischief. We all owe our Existence to the same Method of Propagation, we are all by the same Degrees fashion'd and compacted in the Womb of our Mother; and the Noblest Mortal, in his Entrance on the Stage of Life, is not distinguish'd by any difference of Pomp or of

⁴ Here we may apply the Determination of the *Roman* Lawyers. *Quod quisq; Juris, &c.* The same Law which we use against others, we should submit to our selves, *Digest. Lib. II. Tit. II.* for the chief part of Equity is Equality, *Sen. Ep. XXX.* as also *de Ira*, lib. 1. c. 14. *Phædr.* 1. 1. Fab. 26. *Diod. Sic.* 1. 13. c. 30. *Eurip. Phæni.* v. 538. *Quint. Declam.* 3. *Cumberland de leg. Natur.* c. 2. §. 7.

⁵ Our Author seems not sufficiently to have attended to the Connexion of *Cicero's* Discourse, if he imagines that the Orator lays it down for a general Maxim, That we may always take the Goods of Fortune from them who are not so worthy to enjoy them as we are, as if a Person of great Merit had a sufficient Title and Right to strip a Proprietor of the Goods he is lawfully possessed of; whereas *Cicero* speaks only of an extraordinary Case, *viz.* in extreme Necessity, and then, as rigid as he seems to be, builds his Determination not upon that Right which every one has to preserve himself, but upon the good of Society, whose Interest it is to preserve such a Person; for he says, that out of such a Case, the most honest Man in the World, tho' he be almost famished, may not take a Morfel of Bread from any Man, which may be of use to others. In a word, *Cicero* had taken such great Care to prevent any such loose Interpretation of his Words, that it is astonishing, how our Author could so strangely pervert his Meaning.

⁶ See Book II. c. 5. §. 1. above.

^a As *Phædrus* says, 1. 1. Fab. 26. *Sua quisque exempla debet æquo animo pati.* Every one ought to bear it patiently, when his Example is turn'd upon himself. *Diod. Sic.* 1. 13. c. 30. 'Tis but just that a Man should himself submit to that Law which he hath prescribed to others. *Quintilian Declam.* 3. We must needs think that every one when he passeth Judgment on Matters, approves of that which he himself wou'd have done in the like Case. *Add. Cumberland de Leg. Nat.* c. 2. f. 7. *Senec. Epist.* 30. Equality is the first part of Justice. *Euripides Phæni.*

'Tis best my Son to keep Equality;

The mighty Band which Friends unites to Friends,

^b B. 1. C. 30.

And States to States, and links confederate Wars.

Passage, from the lowest of Mankind ^a. Our Growth and Nourishment is perform'd alike, and the gross Remainders of our Food are carried into the same *Common Shore*. Lastly, our Life hastens to the same general Mark; Death observes no Ceremony, but knocks as loud at the Barriers of the Court, as at the Door of the Cottage ^b; and after Death, our Bodies are resolv'd into the same Dust and Corruption ^c. Besides, wise Men are ever pressing it upon our Consideration, that we are alike obnoxious to the Sports of Fortune, to the endless variety of Dangers or Mischances; or rather, that the divine Disposer of all Things ensures no Man in his present State, or in the Possession of unshaken Felicity: But according to the secret Counsels of his Providence, exposes divers Men to various Changes and Troubles, as if he pleas'd himself in raising the Poor out of the Dust, and casting the High down to the Ground. (See (*) at the bottom of the Page.) Our Christian Profession suggests many Motives to the same Purpose; as that God does not esteem Men according to their Nobility, their Power, or their Wealth, but according to their sincere Piety and Goodness. And that at the last Day of Judgment, of the Distribution of Rewards and Punishments in another Life, no regard will be had to those who swell in Port and Figure, beyond their Neighbours of this World.

IV. This Equality being admitted, there flow from it several Precepts, the Observation of which bears a very great Force in the maintaining of Peace and Friendship amongst Men. And this in the first place is most manifest, that he who would use the Assistance of others in promoting his own Advan-

tage, ought as freely to be at their Service, when they want his help on the like Occasions. *One good Turn requires another*, is the common Proverb. For he must certainly esteem others *unequal* to himself, who constantly demands their Aid, and as constantly denies his own. And whoever is of this insolent Temper, cannot but highly displeas'd and provoke those about him, and soon give occasion to a Breach of the common Peace ¹. It was a manly and gallant Reproof which *Caractacus* gave the *Romans*, *Num si vos omnibus imperitare vultis, sequitur ut omnes servitutem accipiant? Because you desire to be Masters of all Men, does it follow that all Men must desire to be your Slaves* ²? And indeed, it as much implies a Contradiction to determine differently in my own Case, and another's, when they are exactly parallel, as to make contrary Judgments on things really the same. Since then every Man is well acquainted with his own Nature, and as well, at least as to general Inclinations, with the Nature of other Men, it follows that he who concludes one way as to his own Right, and another way as to the same Right of his Neighbour, is guilty of a Contradiction in the plainest Matter; an Argument of a Mind unfound in no ordinary degree. For no good Reason can be given, why what I esteem just for myself, I should reckon unjust for another in the same Circumstances. Those therefore are most properly sociable Creatures, who grant the same Privilege to others, which they desire should be allow'd themselves; and those who on the other hand, are most unfit for Society; who imagining themselves a degree above vulgar Mortals, would have a particular Commission to do whatever they please; they give themselves a free Pardon for all

MR. BARBEYRAC'S NOTES on §. 4.

¹ The French Translator in this place goes on thus: "For according to the Remarks of a judicious ancient Christian Doctor, (viz. Lactantius Inst. Div. l. 3. c. 23.) *Nihil sapienter fit, &c.* Nothing is conformable to the Rules of Wisdom, which being practis'd by every one, becomes hurtful and evil.

² The Author here sets down a Speech of *Caractacus*, a great Commander of the *Britains*, the ancient Inhabitants of *England*, which he spoke with much Courage to the *Romans*. *Num si vos, &c.* but this Passage were better placed elsewhere, since he doth not here treat at all of the Right of commanding others, but only of requiring a Duty.

^a See *Wisdom* VII. 5. ^b *Horat. Od. i. iv. 13.* ——— *Mors aequo pulsat pauperum tabernas* ——— *Regumque turres.*
 Θανάτω πάντες ὄνεικόμεθα. The World owes us all to Death.

^c *Claudian. in Rufin. l. 2. ver. 473.*
 Huc post emeritam mortalia secula vitam,
 Deveniunt, ubi nulla manent discrimina fati,
 Nullus bonos, vaniq; exutum nomine regem
 Proturbat plebeius egens. ———

Hither as to the grand retiring Room,
 From Earth's wide Stage, the mortal Actors come,
 And here partake an undistinguish'd Doom.
 Aside their Honours with their Robes they throw;
 The Herald and his Trade are lost below.
 The King depos'd, forgets the Dust he made;
 And the rude Peasant crouds the *Royal Shade*.

Phocylides, Πάντες ἴσοι νέκυες, the Dead are all upon a Level. *Ἰσομίαι δὲ ἐν ᾄδῃ καὶ ὁμοιοὶ ἀπίστες*, the Grave admits no difference in Title or Degree. *Cicero de Leg. l. 2. c. 23.* It is most agreeable to Nature, that Death should take off all Distinction of Fortune. *Statius Theb. X. 712.* ——— *Titulique in morte latentes.*

Titles hid in Dust. *Add. Sirach. X. 9, &c.*
^a *Qui ne tuberibus propriis offendat amicum
 Postulat, ignoscat verrucis illius: aequum est
 Peccatis veniam poscentem reddere rursus.*

He that would have his *Botches* not offend,
 Must wink at *puny Pimples* in his Friend.
 Indulgence should be mutual; they that want
 The largest Pardon, should the largest grant.

(*) ——— *Valet ima summis* *Hor. l. Sat. 3.* *Mutare, & insignem attenuat Deus.*
Obscura promens, Hor. l. 1. Od. 34. God can quite change the Conditions of Affairs, and the Stations of Men. *Idem*
 l. 2. Od. 13. *Quod quisque vitet nunquam homini satis cautum est in horas.* No Man is provided against the Accidents of the
 next Hour. *Manil. lib. 3. ver. 521.*

*Tanta est rerum discordia in aëvo,
 Et sub tanta malis bona sunt, lacrymaeq; sequuntur
 Vota, nec in cunctis servat fortuna tenorem,
 Usque adeo permixta fluit, nec permanet unquam,
 Amisitq; fidem variando cuncta per omnes.*

Hence there springs
 That various Discord which is seen in Things:
 In one continued Stream no Fortune flows,
 Joy mixes Grief, and Pleasure's urg'd by Woes:
 Inconstancy in every Part appears,
 Which Wisdom never trusts, but Folly fears.

A most noble Strain we have to the same Purpose in *Seneca's Thyestes*, ver. 597. *Ille qui donat diadema fronti, &c.*
Arrian (in Epiet.) tells a Story of a poor Shoemaker, whom his Master *Epaphroditus* sold off as a Slave of little use. In
 some time the Man got the Honour of working at his Trade for the Emperor; and then 'twas pleasant to see how *Epaphrodi-*
tus made his Court to him.

Mr. Creech.

things, and vouchsafe not to others the least Indulgence; they demand the principal Share of common Honours, and of common Goods; though their Right and Title is not distinguish'd by any peculiar Excellence or Advantage. For as in raising an Edifice, a Stone which by reason of its rough and angular Figure, robs others of more room than it fills it self, and upon account of its exceeding Hardness, cannot conveniently be cut into Regularity, and so hinders the whole Frame of Building from closing together, is thrown aside by the Workman, as unfit for all Use and Service; so those *πλεονέκται*, those greedy Churls, whose rough and savage Temper inclines them to heap Superfluities on themselves, and to deprive others of mere Necessaries, and whose violence of Passion makes them incapable of being reclaim'd, are indeed the great Impediments of Society, and the Plagues of Mankind. Hence it is a Command of Nature's Law, that no Man who has not obtain'd a particular and especial Right, shall arrogate to himself a larger share than his Fellows; but shall admit others to an Enjoyment of equal Privileges with himself^a. Therefore the Commissioner in *Livy*^b, who came to treat with the common People in Sedition, was guilty of Insolence, when he told them, *Satis superq; humilis est, qui æquo jure in civitate vivit, nec inferendo injuriam, nec patiēdo. He is humble enough, and indeed too humble in a State, who is content to live upon equal Terms and Rights, neither doing an Injury, nor taking one.* As if it were a hard Case, that the Privilege of Nobility should not be strong enough to dispense with that fundamental Law of Equity, *Do as thou wouldst be done by*^c! On this Principle is built that gallant Compliment of * *Pliny* to the Emperor *Trajan*, *Unum ille se ex nobis, & hoc magis excellit atque eminet, quod unum ex nobis se putat: nec minus hominem se quam hominibus præesse meminit. He thinks himself one of us, and 'tis this makes him more our Superior, that he passes in his own Judgment for our Equal, and remembers himself to be no less a Man than the meanest Subject whom he governs.* For that excellent Prince, when he accepted the supreme Command, had promised that private Men should find him such an Emperor, as he himself desired to find, whilst a

private Man³. *Galba* in *Tacitus*^d, gives *Piso* an admirable piece of Advice to the same Purpose. *Utilissimus idem ac brevissimus bonarum malarumq; rerum delectus est cogitare, quid aut volueris sub alio principe, aut nolueris. The best and the shortest Rule to obtain the true Art of good Government, is to consider what you would your self approve, and what you would condemn in another Prince; and accordingly to practise the former, and to avoid the latter.* And *Seneca*^e joins in the same wise Direction; *This* (says he) *is the Sum of my Advice, shew such Behaviour towards an Inferior, as you would have a Superior shew towards you*^f.

V. The same Equality teaches a Man how to carry himself, in case he be appointed Arbitrator of any Right betwixt others, namely, that he treat them as Equals, and give no Favour or Indulgence to one above the rest, except such as can claim by virtue of some peculiar Right. For he that by a partial Preference of one Person to another, violates the Rule of natural Equality, is at the same time guilty of an Injury, and of an Affront, by denying a Man what is his just Due, and by detracting from that Worthiness, which Nature gives him in common with his Fellow¹. It follows as a Corollary from this Doctrine, that if the thing which is to be distributed amongst many, admit not of a Division, the Persons who have an equal Right to it, use it in common, and without stint, if the Quantity of the thing will allow it; if not that they then use it in a certain and limited manner, and with proportion to their Number. For it is not possible to find out any other way of observing an Equality in these Cases. But if the thing can neither be divided, nor possess'd in common, then the use of it shall either be taken by turns², or if this Course too fail of Success, and if likewise one of the Contenders cannot give the others an Equivalent to secure to himself the whole Enjoyment of the thing desired, then one shall carry it from the rest, by the fair Decision of a Lot; which is the most proper Remedy that can be applied to all Differences of this kind, in as much as it takes away the Notion of Contempt, by setting all the Parties on a Level; and if it does not favour a Man, yet does it not in the least disgrace him^h.

³ The excellent Saying of *Seneca* to this Purpose is very remarkable, *Sic cum inferiore vivas, quemadmodum tecum velles superiorem vivere, Deal so with your Inferiors, as you would have your Superiors deal with you. Epist. 47. & de ira, l. 2. c. 28.*

MR. BARBEYRAC'S NOTES on §. 5.

¹ For as an antient Author (*viz. Livy*, l. 34. c. 4.) speaks, *Quod ut alii liceat, tibi non licere, aliquid naturalis aut pudoris aut indignationis habet.* That what is lawful for another, should not be lawful for you, creates a natural Shame, or a natural Indignation.

² When Things are enjoyed by turns, the Lot must decide who shall have the first Turn. *Hobbes*, c. 3. §. 17.

³ Thus the *Tribune* of the *Commons* speaks in *Dionysius Halicarnassensis*, *Antiq. Rom.* lib. 7. c. 41. "With regard to the underwritten Laws of Nature, O ye Senators, we demand that the People may thus far enjoy the same Rights with you. We grant that those of your Number who excel in Virtue and in Fortune, ought to possess the chief Offices and Honours of the State: But this Privilege we presume may be fairly challeng'd by every Member of a Commonwealth, to be secured from Injuries, and to obtain Justice against those who offer them. *Lastant. Div. Instit.* l. 3. c. 22. He that would bring Men to an Equality, must take off all the vain Humour of Arrogance and Pride; and shew those who swell with Power and Grandeur, that they are indeed on the Level with their most needy Vassals. *Add. Sen. de Ira*, l. 2. c. 28. ^b Book III. Chap. 53.

^c See the arrogant Manner of the Satisfaction given by the Duke of *Joinville* to *Marscote* in *Gramond. Hist. Gal.* l. 8.

^d *Hist.* l. 16. ^e *Epist.* 47. ^f Hence appears the intolerable Insolence of that Saying in *Lucan.* l. 5. v. 340.

— *Nunquam sic cura Deorum*

Se premit, ut vestrae morti vestraeque salutem,

Fata vacent; procerum motus hæc cuncta sequuntur,

Humanum paucis vivit genus.

— Heaven thinks not on the vulgar Herd,

Their Deaths to hasten, or their Lives to guard;

Fortune disdains to court so mean a Care,

Nor less than *Cesar* is a Mark for her.

The Fate of Subjects on their Lords must turn,

And little Mortals for the great are born.

This my Lord *Bacon* calls a *Gygantean* Temper of Mind, possessing those great Disturbers of the World, who seem to aim at nothing less than to render all Men happy or miserable, according as they appear their Friends or Foes; and as it were to make all Nature bear their own Image; which is properly fighting against Heaven. *De Augment. Scient.* l. 7. c. 2.

^c *Curtius*, l. 7. c. 6. In this hot Contention between the two Parties of Horse and Foot, for the Honour of carrying their Prince, *Alexander* finding it would be difficult for him to make the Choice, and that he could not satisfy one Order without disgracing the other, commanded they should bear his Litter by turns. ^b *Proverb.* XVIII. 18.

^a *Plin. Panegyri.* c. 2. n. 4.

Hobbes^a has divided *Lots* into two sorts, *arbitrary* and *natural*. The former is such as the Competitors agree upon, engaging to stand to the Event, whilst they cannot by any Art govern or foresee it; and therefore this kind of Lot, with regard to Men, depends entirely on meer Chance and Fortune. *Natural Lot*, he says, is either *first Seizure*, by which a Thing, which can neither be enjoy'd in common nor divided, passes to him who shall first lay Hands on it with a design to keep it; or *Primogeniture*, by virtue of such paternal Goods as can neither be divided nor possess'd in common by many Children, and are adjudg'd to the First-born. Yet if we accurately consider Things, there will appear to be no proper Lot but what we may call *arbitrary*. For 'tis not easy to assign a Reason why such an Event as a Man cannot procure by his own Industry, should give him a Right which should hold good against his Equals, unless this *Right* was assign'd or adjudg'd to this particular *Event*, by the *arbitrary* Appointment and Agreement of Men. Thus a Thing which no one has a particular Right to claim, belongs³ by Compact to the first Seizer; because when distinct Proprieties were introduced, there seems to have pass'd this tacit Agreement amongst Men, that those Things which were not peculiarly assign'd to any Owner, and yet could not without a Prejudice to Mankind be always left in common, should be the Right of the first Possessor. And thus too the Right of *Primogeniture* owes its Original to human Constitution and Compact. For otherwise, why should the younger Brothers, born of the same Parents, be placed in a worse Condition than the eldest, barely upon account of an Accident or Circumstance, which it was not in their Power to hinder^b? Now the Reason why these two Claims by *Primogeniture*, and *first Seizure*, are sometimes, tho' improperly call'd *Lots*, is this, because they cannot be foreseen or directed by any Power of human Industry, and because it reflects no real Disgrace on a Man to lose the Preference, for want of these Advantages⁴.

VI. This Rule of Equality is likewise transgress'd by ¹ *Pride*, when a Man² for no Reason, or without sufficient Reason, prefers himself to others, bearing a lofty Carriage towards them, as base Underlings, unworthy of his Consideration or Regard. How vastly distant this Temper is from the Virtue of Generosity and true Greatness of Mind, *Des Cartes* has most elegantly shewn in his *Treatise of the Passions*. He lays it down as a Principle, "that it is one of the chief Parts of Wisdom to know how and on what Accounts every one

"ought to esteem or disesteem himself; and then he makes out, that the only just Cause of esteeming ourselves, arises from the lawful Use of our Power of free Choice, and from the Command and Authority which we exercise over our Wills; since besides the Actions which depend on that Faculty, there is nothing in us that can properly merit Praise or Dispraise. Hence he concludes, the true Notion of Generosity, which prompts a Man to value himself as highly as in reason he ought, to consist in this, that he acknowledge nothing to be truly his own, but this free Disposition of his Will; that he be sensible he cannot purchase Blame or Commendation, otherwise than by the ill or the good Use of this Power; and that at the same time he feel within himself a full Purpose and Resolution of using it well. He proceeds to observe, that those who have such a true Sense of themselves are easily inclin'd to think, that every Man judges of his own Worth in the same manner, since there is nothing in this Notion which hath any Dependence on external Things or Persons. That for this Reason they never despise others, but are ready to excuse their Faults, as proceeding rather from Mistake than Design. That as they think themselves not much inferior to those who exceed them in Wealth, Honour, Beauty, Wit, or Learning, knowing that these Advantages ought not to come into the Account; so when they find themselves possess'd of the like Goods, they do not fancy they are much superior to those who want them. Hence, he says, there is discoverable in the most generous Spirits an honest Humility; a Virtue consisting in the Reflection which we make on the Infirmary of our Nature, and upon the Miscarriages which we either have formerly been guilty of, or may be hereafter, these being no less than we see committed by others; whence it comes to pass, that we prefer not ourselves to any Person living, wisely considering that all Men have the same Faculty of Free-will, and may all employ it to as good Use. He remarks farther, that those who entertain a good Opinion of themselves for any other Cause, are not endued with real Generosity, but puffed up with empty Pride, which as it is always vitious, so it is aggravated the more, the more unjust the Cause is on which the Self-conceit is founded. And the most unjust Cause of Pride is the being proud without Cause; that is, when a Man being conscious to himself, that he has no real Merit which should entitle him to Esteem, imagines Glory to belong to

³ We shall make it appear in its proper Place, that this is a false Supposition. See *Lib. 4. c. 4. paragr. 4. Note 2.*

⁴ This Point is more largely discours'd of, *Lib. 4. c. 11. §. 8. & Lib. 5. c. 9. §. 2. & Lib. 7. c. 7. §. 11.*

MR. BARBEYRAC'S NOTES on §. VI.

¹ Pride taken in its most extensive Meaning does not always directly oppose the natural Equality of Men, as may appear from §. 1. Note 1. All that our Author says here refers only to Mens Reputation in general. For Pride in general signifies nothing else than a very high Opinion of a Man's self. See *Titius, Observ. 179, &c.* and *Thomasius's Instit. Jurispr. Div. l. 2. c. 4.*

² When any one has lawfully gotten a Right which gives him a Preheminence above others, he ought to value and maintain it, provided that he avoid all vain Ostentation, and all Contempt of his Inferiors. And on the other side Inferiors ought not in this Case to refuse them a Preference, but pay them the Honours which they may lawfully require, as our Author says in his *Treatise of the Duties of Men and Citizens, Lib. 1. c. 7. §. 5.* Our Author cites at the bottom of this Paragraph a Passage out of *Euripides*, shewing us, that if any one is arriv'd at a Degree of Distinction, he ought not to be proud, but on the contrary have the greater Affection for his Friends, by how much he sees himself in a better Condition to do them Service. *Iphig. in Aulid. v. 343.* He also recites a Passage out of *Lucian, Tom. II. p. 14. Ed. Amst. Of Images. Οὐδὲν γὰρ εἰς θουσιότης, &c.* No Man will envy Persons in Authority, if they use their Power with Moderation. 'Tis the Abuse of Power that begets Envy. Mr. *Ablancourt* delivers the same. What goes before, and what follows after, deserves Reading.

^a *De Cive c. 3. f. 18, &c. Leviath. Engl. p. 78.*

^b Therefore *Aristotle* says, Brothers are equal, except they differ in Age, *Ethic. 8. c. 12.*

“ every one that pleases to usurp it, and that the
 “ greater share a Man claims of it, the greater he
 “ really enjoys³. A Vice so extremely absurd, that
 “ ’tis scarce credible any should prostitute them-
 “ selves to such a Baseness, were there not a Pack
 “ of idle Flatterers in the World, who, by their
 “ false Praises, swell Men of heavy Parts into this
 “ most stupid Degree of Folly, which the Poet^a
 “ calls a kind of Madness.

Nor does a Man’s Advancement to Honour, or
 Power, give him any just Reason to be proud; on
 which Point *Menelaus* in *Euripides*^b, thus admirably
 expostulates with *Agamemnon*:

Ἦϊδ’ ἔτ’ ἐσπέδαζες ἀρξεν Δαυίδαίς, &c.

*You know when with ambitious Aim you strove,
 To lead the Greeks to Troy, and rule the War,
 How meek you look’d, how low you stoop’d to reach
 The meanest Hand; your hospitable Gate,
 Free of Access, let in the vulgar Tide;
 You, as in order thro’ the Ranks you pass,
 With courteous Arts of popular Address,
 Saluted, Man by Man, the gaping Crowd,
 And forc’d your Honours on unwilling Crowns:
 That low Compliance might advance your Pride,
 And in the common Market purchase Praise.
 But Master of your Wish, and voted Chief
 Of our united Force, lofty you grew
 In Manners, as in Place; your Doors were barr’d,
 Four Friends (once Friends, but now intruding Slaves)
 Drove back with Scorn; yourself, like some rich Gem,
 Deeply encas’d, and veil’d from vulgar View.
 But a good Man, if Wealth or Dignity
 Exalt his State, should keep his Soul unmov’d
 From Virtue’s Centre, and elude the Charms
 Of swelling Insolence; should freely smile
 On Friends beneath, and serve them with more Will,
 When his improv’d Condition gives more Power.*

Lucian^c has left an excellent Observation to the
 same purpose; *No Man*, says he, *will envy one ad-
 vanced to Eminence and Grandeur, if he see him bear
 his Fortune with Moderation.*

VII. A much heavier Breach of this Equality is
 it, for a Man to shew his Contempt of others by
 outward and open Signs, whether by Actions or
 Words, by a Look or a Laugh, or any such Af-
 front; one kind of which is often express’d by
 troubling another with a ridiculous or a disagree-
 able Present^d. Which Sin is to be reputed so much
 the more heinous, as it gives the highest Provoca-

tion imaginable, and inflames the Sufferer with the
 greatest Violence of Anger and Revenge. For we
 find many Persons who will expose their own Life
 to present Danger, and much more break the Peace
 with others, rather than put up such a grating In-
 dignity: Inasmuch as every Act of this Nature is a
 Wound to a Man’s Glory or Reputation, of which
 Goods we are more proud, and more tenderly fen-
 sible, than of any Thing else we possess; and in
 the safe and flourishing State of which, almost the
 whole Pleasure of our Mind consists.

VIII. From what has been offer’d on this Head,
 it is easy to discover the Absurdity of that Opinion,
 derived from the ancient *Greeks*, of some Mens be-
 ing Slaves by Nature. Which if taken in the same
 Crudeness of Sense, as it bears in the Expression, is
 directly repugnant to that *natural Equality*, which
 we have been endeavouring to establish^e. Thus
 much indeed is most evident, that some Men are
 endued with such a Happiness of Wit and Parts, as
 enables them not only to provide for themselves and
 their own Affairs, but to direct and govern others.
 And that some again are so extremely stupid and
 heavy, as to be unfit to govern themselves, so that
 they either do mischief, or do nothing, unless others
 guide and compel them. And farther, that these
 last being commonly furnish’d by Nature with
 strong and hardy Bodies, are capable of bringing
 many notable Advantages to others by their Labour
 and Service. Now when these have the Fortune to
 live in Subjection to a wise Director, they are with-
 out doubt fix’d in such a State, as is most agree-
 able to their Genius and Capacity. If therefore
 these two Parties of Men voluntarily consent to the
 Establishing of some common Government a-
 mongst them, it is consonant to Nature, that the
 former be invested with the Power of *Commanding*,
 and the latter with the Necessity of *Obeying*, by
 which Method the Interests of both will be best
 promoted and secured. And in this Sense we may
 without Danger admit of *Aristotle’s* Aphorism, laid
 down in his first Book of *Politicks*, c. 2. τὸ μὲν
 συνάμεινον τῇ διαύσια προωξάν, &c. which according to
² *Heinsius* his Paraphrase runs to this purpose; *No-
 thing is more suitable to Nature, than that those who ex-
 cel in Understanding and Prudence, and are able to
 judge of Things at a Distance, should rule and controul
 those who are less happy in these Advantages; on the o-
 ther hand, those whose bodily Strength and Vigor enables
 them to put the Commands of wiser Men in Execution,
 are by Nature framed and designed for Subjection and
 Obedience. From this Constitution of Things the So-*

³ This Vice is not only ridiculous in itself, and with relation to him that is guilty of it, being so foolish as to value himself without any Ground, but is very injurious to others; since he must at least imagine, that the rest of Mankind are such Sots and Fools, as to pay their Respects to Persons of no manner of Merit.

MR. BARBEYRAC’S NOTES on §. VII.

¹ There is a Passage in Mr. *De la Bruyère’s* Characters in the Chapter, *Of Man*, worthy of our reading, because it confirms and illustrates the Notion of our Author. ’Tis this: They who take away our Goods by Force or Injustice, and rob us of our Honour by Calumny, shew their Hatred to us sufficiently; but yet they do not equally prove that they have no Esteem for us. On the contrary, Mockery is an Injury, which least of all deserves Pardon; it is the Language of Contempt, and such an one as is casiest understood; it attacks a Man in his last Entrenchments, i. e. the Opinion of himself; it renders a Man ridiculous in his own Eyes, and convinces him that he has the worst Disposition to him possible, and so renders him irreconcilable.

MR. BARBEYRAC’S NOTES on §. VIII.

² There is a Letter of *Dan. Heinsius’s* in the various Readings of *Janus Rutgersius*, l. 4. c. 3. wherein he shews, that *Aristotle* did not speak of the natural Condition of such as are naturally disposed to be Slaves, but of their natural Servitude. And he endeavours to reconcile the Maxims of Philosophy with the Civil Lawyers, who say, that Slavery is contrary to Nature. See Note 6. following, and *Lib. 6. c. 3. §. 2.*

^a *Pindar. Olymp. 9.* τὸ χανχάδαίς ἰδέχεται μανίαιον ὑπεκρέκει. To boast unseasonably is the Character of Madmen.

^b *Iphigen. in Aul.*

^c *De Imaginibus.*

^d *Add. l. 5. f. 1. D. qui satisfare cogantur, Matt. v. 22.*

^e And therefore *Strabo*, l. 1. speaking of those who advised *Alexander* to treat all *Grecians* as Friends, and all *Barbarians* as Enemies, wisely observes, that the Distinction ought rather to have been founded in the Goodness or Badness of the Persons, many *Grecians* being wicked and cruel, many *Barbarians* virtuous and obliging.

sovereign and the Slave receive equal Advantage, the Benefits and the Conveniencies are alike on both Sides^a. Yet it would be the greatest Absurdity imaginable to believe, that Nature actually invests the Wife with the Sovereignty over the Weak and Imprudent, or with a Right of forcing them to submit and obey against their Wills. For no Sovereignty can be actually establish'd, unless some human Deed or Covenant precede. Nor does a natural Fitness for Government presently make a Man Governor over another, who is as naturally adapted for Subjection; nor, supposing a Thing to be profitable for another, is it therefore lawful for me to force it upon him against his Inclination. For all Men enjoy a *natural Liberty* in the same Measure and Degree, which before they suffer to be impair'd or diminish'd, there must intervene either their own *Consent*, Express, Tacit, or Interpretative, or some Fact of theirs, by which others may obtain a Right of abridging them of their Liberty by Force, in case they will not part with it by a voluntary Submission. 'Twas therefore well urged by *Quintilian's* Declaimer^b: *What hath Nature produced amongst all her Works which she hath not set in a State of Freedom? I forbear to speak of Slaves, whom the hard Chance of War hath deliver'd up as a Prey to the Conquerors, though they were born by the same Laws, by the same Necessity, by the same Accidents contributing to their Original. They draw Breath out of the same free and common Air; and 'twas not the Decree of Nature which gave them Masters, but the Unkindness of Fortune.* 'Tis a Maxim of *Ulpian*, that all Men by a natural Right are born free^c; which *Grotius* interprets, "To be such as is only a Privation of Servitude, not a Contradiction to it; that is, it provides that a Man shall not be by Nature a Slave; but it gives him no Right that he shall not become a Slave afterwards; for no Man is in such a Sense free, as that it shall be impossible for him to lose his Liberty." The same Truth may be thus explain'd in other Words; since Nature hath produc'd all Men equal, and since Servitude cannot be conceiv'd without Inequality (for Servitude necessarily brings in a Distinction of Superior and Inferior; whereas in the Notion of Liberty, it is not requisite that we should have an Inferior; but 'tis sufficient that we are subject to no Superior) it follows that all Men naturally, and antecedently to any human Deed, are conceiv'd to be free. But natural Ability, or the Possession of such Qualities as are requisite for any State, do not immediately set a Man in that State. Every one who hath Capacity enough to rule a People, or to command an Army, is not without more ado a King or a General. Nor can such an accomplish'd Man as *Horace's* *Lollius* presently challenge to himself the *Consular Fasces*; tho' he fully answer that fine Character,

— *Est animus tibi
Rerumque prudens, & secundis
Temporibus dubiisque rectus,
Vindex avaræ fraudis, & abstinentis
Ducentis ad se cuncta pecuniæ;
Consulque non unius anni, &c.* Lib. iv. Od. ix.

A Soul with sage Experience fraught,
Whose generous Worth and steadfast Thought,
Nor Frowns of adverse Fate could grieve,
Nor smiling Happiness deceive.
A mortal Enemy to Knaves,
And Gold that makes them: Gold enslaves
The wicked World, but owns its Charms
A Match too weak for *Virtue's* Arms.
Not Consul of a single Year, &c.

And what *Plutarch* reports of *Pelopidas*, that he held the Supreme Command longer than the Laws allow'd of, lest his Successors, thro' Idleness or Mismanagement, should prejudice the Affairs of the State, must be look'd on as an Instance, not of any standing Right, but of an extraordinary Indulgence^d.

And here too we have an Opportunity of interpreting that Saying of *Albutius* in *Seneca*^e, which is commonly cited on this Subject. *By Nature a Man is neither Bond nor Free; 'twas Fortune that afterwards introduc'd these Names:* That is, so long as all Men were equal, they could not be distinguish'd in our Mind by such a State as is opposite to their natural State of Equality. But afterwards, when those who lost or quitted that natural State, got the Appellation of *Bondmen*, in like manner those who retain'd it did now entirely engross the Title of *Free*. The Thing may be explain'd by this familiar Instance in a like Case; so long as there are no military Men in a State, the Subjects all keep the same common Name and Condition; but when part of the Subjects are list'd into armed Troops, the Distinction of the *Soldiery* and the *Country* immediately arises. And according to this Explication may we admit of that Notion, which *Aristotle*^f cites and rejects, that *Bondage and Freedom owe their Original to Law*. For were not *Servitude* introduced by human Compacts and Constitutions, such a Difference would be unintelligible, all Men being placed by Nature in the same equal State; as the Emperor speaks in the Institutions^g, *Whereas before all Men enjoy'd the same general Name, the Law of Nations brought in three kinds of Men, Liberti, Servi, and Libertini; Men that are born Free, Men that are Slaves, Men that being at first Slaves have obtained their Freedom.* Or it may be enough to justify that Saying, which *Aristotle* dislikes, to give it this Sense, *the Rights of Liberty and Servitude, as they are consider'd in Men living under settled Governments, are defined by Civil Laws.*

Many other Considerations there are of sufficient Strength, to overthrow that vain and gross Opinion of *Slaves by Nature*. For there is scarce any Man so dull and stupid, but he fancies it will be more proper and convenient for him to live according to his own Inclinations, than to submit himself to the Command, and to the Pleasure of another. This natural Desire appears more evidently in whole Nations, none of which are ever so low-spirited, as to prefer a Foreign Governor to a Prince of their own Country and Race. Lastly, Since Nature does not actually constitute any Superiority or Government, and since those *natural Slaves*, whom *Aristotle* speaks so much of, are commonly Men of strong

^a *Apuleius* in *Philosoph.* delivers the same Opinion. It is most agreeable, says he, that a Man who is neither by Nature nor Industry prepared for a right way of living, should not govern, but be govern'd; should be a Servant, not a Master; should upon account of his own Weakness and Incapacity be under the Controul of others; should sustain the Part of Obeying, not of Commanding.

^b *Declam.* 13.

^c *Utpote cum jure naturali omnes liberi nascerentur, &c.* *Digest.* l. 1. *De Justitia & Jure.*

^d *Add. Cornel. Nep. in Epaminond.* c. 7. & *Liv.* l. 26. c. 2.

^e *III. Controvers.* 21.

^f *Polit.* l. 1. c. 3.

^g *Lib.* l. tit. 5. f. 1.

Hands and able Bodies, there would be a hard Scuffle betwixt them and their wiser Neighbours for the Mastery; in which Contention the latter Party with all their Sagacity could not promise themselves any infallible Success. *Aristotle's* Argument borrow'd from the Poets, deserves likewise to be thrown out as most arrogant and unreasonable. *Therefore*, says he^a, *the Poets tell us, 'tis just* ^b *the Greeks should rule the Barbarians; as if to be a Barbarian, and to be a Slave were naturally the same Thing*^b. For according to this Doctrine, if we had a mind to destroy any Nation differing from us in Customs and Manners, it were only to brand them with the reproachful Name of *Barbarians*, and then to invade them without farther Colour or Excuse. It is manifest, that this absurd Notion of the *Grecians* arose chiefly from hence, that they were wholly inclin'd to a Democratical Government: Whereas their mighty Neighbours the *Persians* were constant Maintainers of a Monarchy, whom for this and other Reasons they mortally hated beyond all Bounds of Justice or Humanity. On this account *Isocrates*^c calls the *Persians* *ἔχθροι πολέμιοι*, *Enemies by Nature to the Greeks*, "and says, that in the general Councils or Assemblies, before any Business was transacted, a solemn Curse was denounced against those who should desire Peace or Friendship with the *Persians*;" and that at the great Feast of the *Mysterics*, the publick *Heralds* forbid all of that Nation, as *Murderers*, to be present at the holy Ceremony.

As for *Aristotle's* whole Discourse on this Subject, we shall put a more respectful and a more favourable Construction on his Words, if we say that by making two kinds of Servitude, natural and legal, he means the former to be when a Man of more Strength than Wit, serves another, whose Parts and *Genius* dispose him for Command; in which Case both enjoy a Condition most agreeable to their Nature and their Necessities. And that the legal Servitude which he speaks of, is when a Person of good Endowments and Abilities of Mind, is, thro' the Meanness of his Birth, or the Hardness of his Fortune, compell'd either by his own Fear, or by publick Constitutions, to serve a Master inferior to himself in those Accomplishments of Mind; and whenever this happens, 'tis scarce possible but that the Vassal should hate his Lord; whereas on the other hand, these Relations produce a firm Love and a kind of Friendship, when each Party bears that Character which is most suitable to his Disposition and to his Power. But still this must be fix'd as a

most undoubted Principle, that the bare Force of such a *natural Aptitude* does neither give the one a Right of imposing a Condition of Servitude, nor oblige the other to receive it.

IX. It will be proper to add somewhat in short, concerning the other kind of *Equality*, which differs from the former, in that it is rather a Consequent, than an Ingredient of the State of Nature; we may call it an *Equality of Power*, or of *Liberty*, by which all Men are reckon'd *naturally equal* in this respect, that antecedently to any Deed or Compact amongst them, no one hath Power over another, but each is Master of his own Actions and Abilities. This *Equality* is taken away, when Men enter into a *Civil State*, where whilst one or more are invested with the Power of Commanding, and all the rest enjoind the Duty of Obeying, there arises the greatest Inequality imaginable between the Sovereign and the Subject. But since there still appears some Inequality, even between the Fellow Subjects, not only with regard to Honour and Esteem^d, but likewise as to the Power which one obtains over another; we may observe that Part of this Inequality proceeds from the *State of Fathers of Families*; who being the chief Rulers before the Institution of publick Governments, brought into such Governments the Power which they before held over their Wives, their Children, and their Servants^e. So that this Inequality being more antient than the Erection of *Civil States*, can by no means owe its Original to them; nor do they give this Power to the *Fathers of Families*, but leave it in their Hands as they found it; though in some Places it is thought convenient very much to abridge, and to restrain it. If any further Inequality, as to Power, be discoverable amongst Fellow Subjects, it is plain the Fountain and the Occasion of it must be the supreme Civil Authority. For those whom we suppose to have pass'd into a publick State, did at their Entrance on it, make over to their common *Sovereign*, so much of the Power which they before possess'd, as was necessary to support this new Constitution. And therefore in case any Person had before this Change transferr'd to another, any Right over himself, that Right would either cease and be extinct in the present Regulation, or it must submit to the Pleasure and Disposal of the superior Authority. But after a Man hath once join'd himself as a Member to any Civil Community, he cannot on any Account give another such Power over himself, as shall hold valid against the Right acquired by the chief Ruler; since this would be to ad-

³ This Notion proceeded partly (as our Author observes) from hence, that the *Greeks* were passionately in love with the Liberty of a Democracy, whereas the *Persians* were devoted to Monarchy; partly from the excessive and inhuman Hatred which the *Greeks* had to the *Persians*. Hence it is that *Isocrates* says in his *Panathen.* that the *Greeks* are by Nature Enemies to the *Persians*. We may also observe, that the *Greeks* in their publick Assemblies, before they made any Decrees, pronounced an Anathema or Curse against all those Citizens who should seek to make Peace, or have any Friendship with the *Persians*; and in the Celebration of their *Mysterics*, the *Eumolpides* and publick *Heralds* excluded from that Ceremony, in hatred to the *Persians*, all other *Barbarians* as *Murderers*, *Panegy.* In fine, the illustrious *Algernoon Sidney* says, that the natural Liberty of Man is a Principle received by *Greeks, Romans, Spaniards, French, Germans, Britains*, and in a word, by all Nations, who profess'd any Generosity, long before the Nativity of our Saviour; inasmuch that the *Asians* and *Africans*, a lazy and effeminate People, because they never attempted to preserve their Liberty, nor were able to govern themselves, deserved the Name of *Slaves* by Nature, a Name given them by *Aristotle*, and the Philosophers of his Time, who made a very little Difference between them and Beasts. See §. 1. in the Notes. Nevertheless, 'tis hard to excuse *Aristotle* altogether for those false Notions which he had about the manner how those Nations ought to respect and treat one another. See the Place cited in my *Preface* out of *Plutarch, Strabo*, and *Aristotle* himself at the Letters (*kkk*) and (*lll*.)

^a *Polit.* 1. c. 2.

^b *Euripid. Iphig.* in *Aulid.* ver. 1400. Βυρκαζων δ' Ἐλλήνας, &c.

'Tis fit *Barbarians* own the *Grecian* Sway,
And not that *Greece* should serve a barbarous Lord.

Wife Nature made the Law; 'twas Nature form'd
Them to obey, and us to be obey'd.

^c *Panegy.* & *Panathenaeic.*

^d Of which see *Book VIII. Chap. 4.*

^e See the first Chapter of the Author's

Introduction to the History of *Europe*.

mit two independent Masters, whom'tis impossible to serve both at once. Whatever Inequality therefore amongst Fellow Subjects commences, after the Settlement of the Civil State, must take its Rise, either from the publick Administration, on account of which the Sovereign conveys by Delegacy, to some of the Subjects, a command over others; or from some certain Privilege granted by the same supreme governing Power. But disparity of Riches does not of it self cause any In-

quality amongst Fellow Subjects; only as great Wealth affords Men matter of actual Hurt or Benefit to others, on which Score the poorer sort are wont to seek the Favour of the rich, by the most submissive Methods of Address, either to obtain Advantage, or to secure themselves from Injury^a. But there is nothing in this *Civil Inequality* any ways repugnant to those Precepts, which we have before deduced from a *natural Equality*^b.

MR. BARBEYRAC'S NOTES on §. 9.

^a People are obliged the more to respect one another as Equals, because they are always in an estate of natural Liberty, and consequently in a perfect Equality of Right one towards another; whereas if we come to Particulars, there are divers civil Inequalities, which set Bounds to our natural Liberty and Equality. Nevertheless, we may observe some Inequality among People in respect to their Reputation, either simple, or with distinction. Simple Reputation is lessened, or entirely lost, when any People violate the Maxims of Civil Right with a wilful Design, and thereby render themselves worthy to be treated as the Enemies of Mankind. For a People that deals in such a manner must be looked upon only as a Body of Thieves and Pirates. See Lib. 8. c. 4. §. 5. As to our Reputation with distinction, see what is said in the same place at §. 15, &c.

^b Compare *Luc. Antist. Constant. De jure Ecclesiast. tit. 3.*

CHAP. III.

Of the Common Duties of HUMANITY.

The CONTENTS of every Paragraph of the third Chapter.

- I. Every Man ought to promote the Interests of others.
- II. And that either indefinitely,
- III. Or definitely by common Humanity.
- IV. A lesser sort of Example, viz.
- V. Of allowing a way through another's Land,
- VI. And for Carriage of Goods.
- VII. Whether Toll may be required for such a Passage.
- VIII. Of our touching upon a strange Shore.
- IX. Of entertaining Strangers.
- X. Of allowing a Settlement to Foreigners.

- XI. Of granting a Market.
- XII. Whether a Man be bound to buy a Stranger's Goods.
- XIII. Of permitting Marriages.
- XIV. Whether any single Person may be denied what is common to all.
- XV. Of Beneficence.
- XVI. Of a grateful,
- XVII. And ungrateful Mind.

IT is but a poor thing not to have hurt another, or not to have robb'd him of his just Esteem^a: This negative Kindness to a Man will barely hinder him from having any fair Reason to hate, but can give him little Encouragement to love us. To knit Mens Minds more strongly together, it is necessary to add to this Forbearance of mutual Evil, the real Practice of mutual Good. The Debt which I owe upon account of my being a sociable Creature I have not yet discharg'd, whilst I have not estrang'd a Man's Affection from me by any mischievous or distastful Deed; but I ought farther to promote his actual Profit and Benefit, that I may shew it is a Pleasure to me to see others Partners of my Nature, and Sharers with me in the Goods which we possess. The near Relation which Men naturally bear to one another, is lost, unless it be cherish'd and kept up by a constant Commerce of kind Of-

fices betwixt them^b. It was a noble Saying of Plato^c. *Ἐκείνος ἡμῶν ἔχ' αὐτὸν μόνον χέρονεν, ἀλλὰ τῆς γενέσεως ἡμῶν τὸ μὲν πῖ ἢ πατεῖς μερίζει, τὸ δὲ πῖ οἱ γονήσαντες, τὸ δὲ οἱ λοιποὶ φίλοι.* Which Passage Tully has thus borrow'd and enlarg'd upon in his Offices: *Non nobis solum nati sumus, &c. We are not born for our selves alone; our Country, our Parents, and our Friends have all a Share and an Interest in our Being. 'Tis a Maxim with the Stoicks, that as the Earth and all the Productions of it were created for the Use of Men, so Men themselves were, for the sake of Men, brought into the World, that they might assist and benefit each other. In this we ought to follow the Guidance of Nature, to bring common Goods together, and freely lay them in common, and by an Intercourse of giving and receiving kind Offices, by Art, Industry, and by all our Faculties, to cement the Society of Mankind^d.* Now

^a *Quantulum est ei non nocere, cui debeas prodesse? Seneca, Epist. 95.* ^b *Seneca, ut supra.* What a poor thing is it not to hurt him whom you ought to benefit? ^c *Epist. 9. ad Archyt.* ^d *Off. i. 7. & iii. 5. Magis est secundum naturam, &c.* It is more agreeable to Nature, for a Man to undertake all sorts of Labour and Trouble, for the Service and Conservation (if it were possible) of the whole World, than to live in Solitude, not only free from Cares, but in the midst of the greatest Pleasures. *Add. Laert. Infr. 1. 6. c. 10, 11. Phil. Jud. Quod Deus est immutab.* Those Wretches are worthy of the utmost Detestation, who regard only their private Interest, and neglect the common good of Mankind; as if they were born for themselves alone, and not for an innumerable Society, for their Parents, their Wife, their Children, and in general for all the World. *Heliodorus Æthiop. ii. 6.* acquaints us that it was one of the *Maxims* amongst the *Gymnosophists*, never to neglect a Soul, when once entered into a human Body, should it fall into danger of Distress. *Liban. Declam. 19.* When I do but speak the Word Man, I imply Mercy, Courtesy, and Kindness. *Add. Philost. de Vit. Apol. 1. 5. c. 1. Marc. Anton. 1. 3. f. 4.* The good Person considers, that whatever partakes of Reason is of Kin unto him; and that to care for all Men generally is agreeable to the Nature of a Man. *Idem 1. 4. f. 3.* Men are born for the sake of each other. *Add. id. 1. 4. f. 4. Seneca Epist. 95.* We are all Members of a great Body. Nature produced us under a mutual Relation, from the same Principles, and for the same Designs. This inspired us with a Love one for another. She taught us the Lessons of Equity and Justice; it is upon account of her Constitutions, that

Now if the Law of Nature engages us to concern our selves with so much earnestness for the good of our Fellow-creatures, it must on the contrary condemn it, as a thing vile and unworthy of a Man, to rejoice in the Afflictions and Calamities of others, especially of innocent Persons; or on the other side to grieve and repine at the Prosperity of his Neighbours.

II. Now we may promote the good of other Men, either indefinitely, or definitely, and this either so as to part with somewhat of our own, or not. A Man indefinitely advances the common Benefit, when he so polishes and prepares his Mind or his Body, as to render them useful to the publick; particularly by Sagacity of Parts and Judgment, he discovers such *Inventions*, as may serve the Necessities or the Conveniencies of human Life. *Columella*^a observes with great Wisdom, "That it would be a thing of the highest Value and Advantage in the World, if every one were sensible of his own Ignorance, and always desirous to learn what he knew himself at present to be defective in."

Hence it appears, that those Persons are guilty of a Sin against Nature's Law, who neglect to exercise themselves in some honest Art or Employment, by living unprofitable to themselves, and troublesome to others, use their Soul only for Salt, to keep their Body from stinking.

— *Numerus tantum, & fruges consumere nati;*
Born only to increase the Number of Mankind, and to help to rid and devour the superfluous Fruits of Nature. For the rooting such useles Animals out of their State, the *Egyptians* had a Decree, obliging all Men to give in their Names to the Magistrates, and withal to intimate by what Calling or Profession every one got his Livelihood. He that brought in a false Account, or practis'd an unlawful way of Gain, was punish'd with Death^b. In the same Rank we may justly place those, who having a sufficient Fortune left them by their Ancestors, think their own Industry would be an unnecessary Trouble, since they have gain'd so fair a Subsistence by the Industry of others; and accordingly sacrifice their Time and Thoughts to Sottishness and Sloth. Nor does *Virgil* without good Reason assign a Station in Hell, to those useles and unmerciful Wretches,

— *Qui divitiis soli incubuere paratis,
Nec partem posuere suis*^c.

— Who to *Lucre* fold,
Sit brooding on unprofitable Gold;
And dare not give, and ev'n refuse to lend
To their poor Kindred, or a wanting Friend.
Mr. Dryden.

we ought to esteem it a greater unhappiness to do Hurt than to receive it: It is by her Orders that our Hands move so readily to the Assistance of our injur'd Neighbour. Let that good old Verse be ever in your Mind and in your Mouth:

Homo sum, humani nihil à me alienum puto.

I am a Man, and I esteem nothing a Stranger to me, which is of kin to Humanity. Let us lay our natural Powers in common. Human Society is built like an Arch of Stones, which is by this means only supported and upheld from Ruin, that each part hinders the fall of the other. Add. *Bacon's* Ess^d 13.

MR. BARBEYRAC'S NOTES on Chap. 3. §. 2.

¹ The People of *Sardis* had a Law to the same effect, as *Ælian* relates in his *Var. Hist.* l. 4. c. 1. where see also *Perizon*. To this we may add, that the Senate of the *Areopagus* was obliged by *Solon* to enquire how every Man got his Livelihood, and punish them who had no Business. The same Lawgiver also made a Law, that no Son should be obliged to maintain his Father, who had not in his Youth took care to bring him up to some Trade. See the Life of *Solon* in *Plutarch*.

² These Verses have no known Author, but they are found in the *Anthologia*.

^a *De re rustic.* l. 11. c. 1. ^b *Diodor. Sic.* l. 1. c. 77. *Ælian. Var. Hist.* l. 4. c. 1. mentions such a Law amongst the *Sardians*.

^c *Æn.* vi. 610.

^d *Diog. Laert. in Democrit.*

^e *Lib.* 4. *ver.* 535.

^f *Ephes.* IV. 28.

It was a Law amongst the *Milesians*, that he who had spent his Father's Estate, should be denied the Benefit of his Father's Sepulchre^d. Such an extravagant *Spendthrift Manilius* describes:

*Ille patri, natisq; reus, quas ceperit ipse,
Non legabit opes, censumq; immerget in ipso.
Tanta fames animumq; cibi tam dira cupido
Corripit, ut capiat semet, nec compleat unquam,
Inque epulas funus revocet, pretiumq; Sepulchri*^e.

————— Who minds himself alone,
He wrongs his Father, and he cheats his Son:
His Race in vain with Expectation wait,
For in himself he buries his Estate.
So vast his Gluttony, his Lust so wild,
That he devours himself, yet is not fill'd;
And whilst his Appetite proceeds to crave,
He eats his Funeral, and he spends his Grave.
Mr. Creech.

The *Apostle* amongst the Reasons obliging a Man to Labour, sets down this as no inconsiderable one, "ἵνα ἔχη μεταδίδουαι τὰ χεῖρα ἔχοντι, that he may have to give to him that needeth^f. And *Horace* could ask the covetous Man,

Cur eget indignus quisquam, te dicite?

Why should any one undeservedly reduced to Poverty, continue to want, whilst you abound? Such great Churls are like Swine, good for nothing till they are dead. The old *Greek Epigram* rallies them very pleasantly, and represents them very justly:

^a Πλαστὴν θαρσύνει πάντες, ἐγὼ δὲ σε φημι πένετος,
Χρήσις γὰρ πλάττει μάστιγος, Ἀπολλόφρατες.
^b Ἄν μετέχης αὐτῶν σὺ, σὰ γίγνεθ' ἄν τ' ἐφελάπτης
Κληρονομίαις, ἀπὸ νῦν γίγνεθ' ἀλλόβρια.

The World may think you rich, I'll say you'r poor;
None e'er was rich, but he who us'd his Store.
Use it, and 'tis your own; but if you spare
Till Death, you're only Steward for your Heir.

In my Opinion we ought not to judge more favourably of those useles Burthens to the Earth, who under the Pretence of Religion study only the Improvement of a fat Carcase, and in a lubberly Laziness consume the Fruits of other Mens honest Labour. *Zozimus* the Historian, though in other things as Profane as *Paganism* could make him; yet has pass'd a Censure just enough on some of these *Monastick Brethren*; they abstain (says he)

from lawful Wedlock^a, and fill City and Country with numerous swarms of Men, useful neither for War, nor for any other Service of the Commonwealth. Yet they have pursued their Designs with so much Success, from those times to the present Age, that they have engross'd to themselves the greatest part of the Lands and Estates, and under Colour of communicating all things with the Poor, have almost reduc'd all others to Poverty. To these we may add such begging Strollers, as they tell us are found amongst the Chinese, who fight with their Heads like Rams, till you part them with some piece of Bounty; or such as threaten to lay violent Hands on themselves, unless you give them what their Laziness craves^b. *Valerius Maximus* justly commends the Custom of the old *Massilians*, who as he reports the Matter, "used to shut up their Gates against all such who made the Plea of Religion a Cloak, and Shelter for Idleness; thinking it highly worth their Care to remove by all the Methods of Discouragement, such a false and drone-like Superstition. (*Lib. II. Cb. VI. §. 7.*)^c

On the other hand, those worthy Persons have been ever celebrated with the highest Praises, whose happy Parts and Study have invented new Arts, and Advantages of living; and then have not kept the Benefit of them to themselves, but communicated them freely to all Mankind. For as *Horace* observes,

*Paulum sepulchæ distat inertie
Celata virtus, L. iv. Od. 9.*

Conceal'd Virtue, or Worth, has little Advantage above the dullest Idleness.

Virgil has wisely placed in his *Elysian Paradise*,
*Inventas—qui vitam excoluere per artes,
Quiq; sui memores alios fecere merendo*^c.
Æn. vi. 663.

Those who by Arts invented, Life improv'd,
Or by deserving made themselves remember'd.
Sir William Temple^d.

Thus *Antiquity* advanced many^e to divine Honours, who had rendered human Life more commodious, by being the Authors of useful Discoveries, or of wise and wholesome Institutions^d⁶. Hence the Retirement of great Men, whilst they are

capable of serving their Country in publick Employments, is an Humility not altogether commendable. And therefore it was too high a Strain of Philosophy in *Similis*, chief Minister to the Emperor *Adrian*, when quitting all his Honours and Offices, and spending his last seven Years in the Country, he left this Sentence for his *Epitaph*: *Here lies Similis, whose Life was so many Years long, but he lived only Seven.* Xiphilin.

By these and the like Methods then may we promote the good of others indefinitely, and in general; or without proposing to serve particularly such or such a Person; but by laying, as it were, our Benefits in common, and offering them to the publick Use⁷. But some on this Point will have the Curiosity to enquire, whether, supposing a Man to find such a famous secret, as what they call the *Philosopher's Stone*, the Art of changing, with little Trouble, the meanest Materials into the richest Metals; whether I say, he ought to communicate so rich a Discovery? And if any one ask so nice a Question, we may venture to resolve it in the negative, since were it possible to bring this grand Invention into ordinary Practice, Trade would be ruin'd, Inheritances and all kind of Riches would lose the good Force and Authority which they now bear in the World; and the whole Method and decent Orders of Life would be changed into endless Tumults and Confusion⁸.

III. We may be said to serve or benefit others, more *definitely* and expressly, when we confer on particular Persons any thing that may be useful and profitable to them. And this we may often perform, not only without our own Loss and Prejudice, but likewise without giving our selves any Labour or Trouble. To deny, or to grudge another a Kindness of this easy Nature, is justly censured as most detestable Malice and Inhumanity. For such a Power, by which we may oblige others, and not injure our selves, unless it be on due Occasion, put into Action and Effect, appears to be *Vain*, and only turns to the Reproach of him that has it. Hence it is usual to compare such unreasonable Churls to the Dog in the Fable, who refused that Provender to the Oxe's Hunger, which was so improper to satisfy his own. Therefore when we dispense this kind of Benefits, we regard only *Man* in general, or the common *Nature* which we all enjoy. Thus *Aristotle*, when some reproved him for bestowing an Alms on a vicious Person, wisely answer'd, *ὃ δὲ τρέφου*

³ See also *Erasmus's* Letter to *Serapius*, inserted in his Life, which is also at the beginning of his Letters. *Edit. Lond. 1642.*
⁴ So *Cicero* speaks, *Impellitur autem natura*, &c. We are vehemently inclined by Nature to endeavour the Profit of many, chiefly by teaching them. and laying before them the Rules of Prudence, and Reasons of Things. *De fin. bon. & mal. l. 3. c. 8.*
⁵ See what *Diodorus Siculus* alledges at the Reasons why the *Egyptians* worshipp'd *Isis* and *Osiris* as Gods. *Lib. I. c. 13, 14, 15,* as also c. 43.
⁶ Here the *French* Translator confirms our Author's Judgment from *Cicero* and *Seneca*. Of which the former says, Nature herself stirs us up to do all the Service to Mankind which we are able; and above all, to teach Men some new thing, and instruct them in the manner how they ought to govern themselves. *De Nat. Deor. l. 1. c. 14.* To which the latter adds, The most curious and profitable Knowledge would be no Pleasure to me, if I should keep it to my self. If any one would communicate to me any thing, be it Wisdom it self, upon Condition that I must keep it secret and impart it to no Man, I would refuse it without further thought. The Possession of nothing is pleasing, which we must enjoy alone. *Epist. 6.* See *Sophocles Oedip. Tyran. p. 164.* *Ed. H. Steph.* as also *Salmasius* upon *Spartian in Adrian. c. 9.*
⁷ On the other side, when any one labours to make himself a general Benefactor to Mankind, others ought, as much as in them lies, to encourage such a noble Attempt, or at least not hinder his Success by putting a Bar in his way thro' Envy. And if Men can't make any other better Acknowledgement, they should not forget to publish their Commendations, and make their Memory immortal, which is indeed the principal Reward of such as devote themselves to the Service of the Publick, and for which others are encouraged to imitate their Example, as our Author speaks in his Duties of a Man and Citizen, l. 1. c. 8. § 3.
⁸ See the Discourse of Mr. *Buddens*, intitled, *Whether Chymists may be suffer'd in a Kingdom*, §. 26, &c. where you'll find besides many curious and diverting Things. 'Tis compos'd in the Form of a Dialogue, and was printed at *Hall in Saxony. A.D. 1702.*
^a L. 6. 5. ^b Cf whom see *Neubof. in Leg. p. 267.* ^c Those who instructed, and adorned Life by the Invention of Arts. He means those Philosophers that advanced any useful Improvement in the World. *Serapius in loc. Lucret. L. 5. in init.*
^d Vid. *Diodor. Sic. l. 1. c. 13, 14, 15, &c. 43.*

ἀλλὰ ἢ ἀνθρώπων ἠλέησα^a. *I did not relieve the Manners, but the Man; or as some report it, ἐμ ἀνθρώπων, ἀλλὰ πρὸ ἀνθρώπων. Not the Man, but Humanity.*

But supposing me to be unwilling to keep a thing any longer; either because I am overstock'd, or because the Possession of it is some way troublesome, how barbarous would it look in me, not rather to leave it safe and entire, that it might prove serviceable to others, than to embezzle and destroy it? The case indeed is otherwise in War, where we ruin what we cannot keep, lest the Enemy should employ it to our Prejudice.

In like manner we are to allow freely to others, those things which they call *res innoxie utilitatis*, things of *innocent Profit*, or of *harmless Use*. Let us hear Tully settling this Point: *As to those things, says he, which Men ought to hold in common, we may apply to many Cases the Instructions which Ennius gives us in one Instance:*

*Ut Homo qui erranti comiter monstrat viam,
Quasi lumen de suo lumine accendat, facit:
Nihilominus ipsi luceat, cum illi accenderit.*

To set a wandering Traveller in his way,
Is but to light one Candle with another:
Yet put not out your own; let that no less
Shine clear, and not be loser by its Bounty.

From this one Example we may sufficiently apprehend, that whatsoever we can part with to another, without any Damage to our selves, this it is our Duty to give, though to a Stranger. Of which kind are these cheap and common Benefits, to afford Water from a River, Fire from Fire, good Counsel¹ to a Man that is in Doubt or Distress. All these things are profitable to the Receiver, without any Loss or Trouble to the Giver. Wherefore we ought both to use them our selves, and likewise to exhibit them to the common Good. But in regard, that particular Persons have not much to give, whereas the number of those that want it is almost infinite, in exercising this Duty of common Bounty we must have a respect to Ennius's wise Caution, NIHILOMINUS IPSI LUCEAT; that is, we must keep enough to have the Means of being liberal to our own Relations and Dependents^b.

Of these Favours then none is to be debar'd, unless such an one, as by his abominable Villany has rendred himself detestable to Mankind, and unworthy the common Privileges of his Nature. Thus

MR. BARBEYRAC'S NOTES on §. III.

¹ Plato says truly, that Counsel is a sacred thing, λέγεται γὰρ συμβουλὴ ἱερὸν χρῆμα εἶναι. *In Theagen.* Tom. I. The Pythagoreans also held the same Maxim, and obliged those of their Sect to give their best Advice they could to such as desired it. See *Jamblich. de Vit. Pythag.* c. 18. §. 85.

² For according to the Maxim of *Terence, 'tis by no means the part of an ingenuous Man to expect our Acknowledgements without his Merit. Nor ought we to think that we lay a great Obligation upon others by such a Present as the Latin Poet † Horace ingeniously banters. The *Calabrians* when they present their Fruits to such as come to visit them, say, *Eat, spare not.* If their Friends answer, *We have eat enough,* they say, *Take them, put them into your Pockets, they'll be an acceptable Present to your Children.* If they reply, *We are as much obliged to you as if we carried them all away.* They again say, *If you will not take them, we'll give them the Hogs.* Who sees not that they can't tell what to do with what they so prodigally give? Such Prodigality has and does make many Persons ungrateful.

(*) *Ego, Charine, neutiquam officium liberi esse hominis puto,
Cum is nihil promereat, postulare id gratiæ apponi sibi.*

Ter. Andr. Act. II. Scene I.

(†) *Non quo more pyris vesci Calaber jubet hospes,
Tu me fecisti locupletem; vescere jodes.
Jam satis est. At tu quantumvis tolle. Benigne
Non invisa feres pueris munuscula parvis.*

*Tam teneor dono, quam si dimittar onustus.
Ut libet; hæc porcis bodie comedenda relinques.
Prodigus & stultus donat, quæ spernit, & odit,
Hæc seges ingratos tulit, & feret omnibus annis.*

Horat. Lib. 1. Epist. 7. v. 14, &c.

^a *Diog. Laert.* l. 5. ^b *Offic.* i. 16. & 13. Amongst the *Athenians*, a publick Curse was denounc'd against him who should refuse to set a Man in the right way. ^c *De Invid. & Odio.* ^d *Vid. Orat. Dinarch. contra Aristogit. Add. Sophocl. Oedip. Tyrant.* c. 244, &c. *Euripid. Orest.* v. 46, & 513. ^e *Quæst. Sympos.* l. VII. Q. 4.

their Service, whilst going to our Repose, we for some time lose the Use of them ourselves^a.

Prometheus, in Lucian, chargeth the Gods with Envy, and Narrowness of Spirit, that they should resent so highly his Action of communicating Fire to Mankind: "Since this could not be the less for being made publick, nor be itself extinguish'd by lending its Light to others.

To the same Head belongs the Use of running Water, for the ordinary Occasions of Life. For tho' Rivers may be the Property of whole States, or of private Persons, yet Humanity enjoins us to allow the Privilege of drinking, or of drawing for other Uses to any one, not actually engag'd in Hostility against us. We think the Point is settled with more Clearness this way, than if we should say with Grotius, that the River¹, as a River, is the peculiar Right of such a People, but as running Water² it remains in common. For it seems less agreeable to call the same Thing in different Respects, Proper and Common, than to affirm that the Use of a Thing ought by the Laws of Humanity to lie freely open to all, tho' the Thing itself may be really a Propriety or Peculiar³. Now to impute this as a Loan, which would otherwise be lost, and will be immediately repair'd by the Springs, would look most ridiculously fordid^b. Thus Latona argues with the Lycian Clowns in Ovid. *Metam.* VI. 349.

Quid prohibetis aquas? usus communis aquarum est, Nec solem proprium natura, nec aera fecit; Nec tenues undas: ad publica munera veni.

What Rudeness Water for my use denies,
Whose endless store the common World supplies?
Nor Light, nor Air did Heaven create for one;
Nor gentle Streams: I crave a publick Boon.

For tho' the Use of Water is common, yet the Possession of them may no doubt be turn'd into a Propriety. On this Account we find the Israelites offering to pay for what Water they or their Cattle should drink, in passing through the Country of Edom^c. However, if the Waters are in great Plenty, what the Current throws out at random, we ought freely to afford to all; so far as our Indulgence brings no Trouble or Inconvenience on ourselves^d.

We see then that Duties of this kind do originally belong to the Law of Nature; yet 'tis not unusual to have many of them further confirm'd and enjoin'd by Civil Constitutions. It may not be improper to set down an Instance or two. Solon's Law about Wells we find thus recorded by Plutarch: *Because the Country hath but few Rivers, Lakes, or large Springs, and most use Wells, which have been dug, he made a Law, that where there was a publick Well within four Furlongs, all should draw at that; but when it was farther off they should search after a private Well. And if upon digging ten Fathoms deep they could find no Water, that then they should fetch from their Neighbours to the quantity of about ten Gallons every day. For he thought it prudent to make Provision against Want, yet not to encourage Idleness.* "The same Author tells us, that Plato in his Laws, permits none to borrow Water from their Neighbours, but such as having first dug in their own Ground as deep as the Clay, could find no Spring." *For he would have those only come in for a share with others, who could not provide for themselves.* And the Spartan Legislator Lycurgus, allows a Person in necessity to make use of the Servant, the Beast, and even the Food of another Man^d.

Mr. BARBEYRAC'S NOTES on §. IV.

¹ *i. e.* Considering in general the whole Extent of the Shore, which is contained in the Lands of any Person.
² Which changes every Moment, and properly belongs to none but him who takes it up to drink.
³ The French Translator places the following Period from the word *Now* to *Boon*, because he thinks it improperly placed here, at the End of this Paragraph, and adds, This Chapter is one of those which wants divers Amendments, as may be discern'd by comparing his Translation with the Original. See *Lib. 4. c. 5. §. 2.*
⁴ The Laws of divers Nations prescribe also sometimes the same Offices. By the Law of Moses the Proprietor, *Lev. xix. 9, 10. xxiii. 22. Deut. xxiv. 19, 21.* was obliged to leave the Corners of his Field unreaped, and not to glean up the Ears scattered by the Reapers. He was to leave them for the Poor and Strangers. The same Thing he was to do with the Grapes that remain'd after the Vintage upon the Tree, or were fallen upon the Ground; as also the Olives that did not fall from the Tree when it was shaken. It was also allow'd to Travellers to pick a bunch of Grapes in the Vineyard, or an Ear of Corn in the Field, provided they eat only to satisfy themselves, and carried nothing away. *Selden. de Jur. Nat. & Gent. l. 6. c. 6. Jof. Arch. Jud. Lib. 4. c. 8.* So also in the Roman Law it is forbid Fishers to kindle a Fire upon the Shore in the Night, for fear that such as are sailing on the Sea should take it for a Signal of a safe Port, and so run the hazard of being cast away. *Digest. l. 47. De incendio, ruina, &c. Tit. 9. Leg. 10.*
^a *Idem Quæst. Rom.* Or doth this Custom teach us, that we ought not to lose any of those Things which we have in plenty, as Fire, Water, or other Necessaries; but when we have serv'd our own Occasions, to leave them for the Use of others? *Theocrit. Idyl. 26.* Mercury of all the Gods resents it most, When we deny a Stranger what is just. Mr. Creech. It is one of Pythagoras's Aphorisms in *Diog. Laert.* Not to cut down nor to hurt a Tree capable of bearing Fruit. See Menage's Notes upon it.
^b *Plautus Trucul. ii. 7.* *De fluvio qui aquam derivat sibi,* Nisi derivetur, tamen omnis ea aqua abeat, in mare.
Ovid. A. A. iii. 1. 93. *Quis evet adposito lumen de lumine sumi;* Atque cavo vastas in mare servet aquas?
^c *Numb. xx. 19.* compared with *2 Chron. xxxii. 3.* See likewise *Gen. xxvi. 20, 21, 22.*
^d *Xenophon de Rep. Lac.* A Stranger travelling alone, or with one Companion only, ought to have the Liberty to taste the Fruit which he meets with in his way, by the common Law of Hospitality. *Add. Lex Burgund. Tit. 28. f. 1. It. Selden. l. 6. c. 6. Phocylides, Ἀστρον εἰς οἶκον δέξει, &c.*
 Receive the Banish'd, and conduct the Blind;
 And let the shipwreck'd Sailor move thy Mind,
 For Sailing is uncertain; kindly run
Add. l. 10. D. De incendio ruina. Quinfil. Declam. 5. GOD hath made us for mutual Support and Succour; and that each Man should endeavour to defend others from what he fears himself. This is not properly Love, or any personal Esteem and Reverence; but a provident Fear of the like Accidents, and a religious Apprehension of common Dangers. When we relieve a famish'd Wretch*, we do but as it were pity ourselves. Hence in a Siege we lay our Provision in common. Hence in a Distress at Sea the Food of one Passenger hath supported the whole Company. And hence too ariseth that Affection which puts us on covering with Earth † the dead Body of a Stranger; and how hasty soever our Journey be, we never fail stopping to perform, in some sort or other, this pious Office.
 * This is well express'd in the antient Verse of Publius Syrus: *Homo, qui in homine calamitose est misericors, meminit sui.*
 † See the Notes above on *Chap. 3. Lib. 2. §. 23.* Note 9.

V. Amongst the same *Duties of Humanity*, *Grotius*, L. ii. c. 2. “reckons the granting *free Passage* thro’ any Lands, Rivers, or Parts of the Sea, which have fallen under our Propriety, if any have just Occasion to desire it; as suppose when any People expell’d out of their own Country, are going to find a new Seat; or when they desire to trade and correspond with a Nation which we divide from them; or when they are marching to recover what is their own in a just War; or when, being at a distance from home, they are hastening to the Defence of their Country, at present under some extraordinary Danger or Distress.” But we ought to allow this Point a fuller Discussion. Thus much then is clear beyond all doubt, that in case the Request be made by a small Number of Men unarm’d, and willing to live at their own Charge, Passage is to be granted them, provided they ask it upon an honest and necessary Account. But the Case of great Armies is not so easily to be decided; since the admitting of them may create just Fears and Suspicions in us, not only on their own Account, but in respect of the *People* whither they are bound. *Grotius* maintains, that notwithstanding any such Fear, their Petition is to be complied with for this Reason; “Because in that grand Division of Things, by which the Primitive Community was abolish’d, and distinct Proprieties introduced, all may be suppos’d to have reserv’d to themselves so far the use of each other’s Possessions, as should be serviceable to their Wants, and not injurious to the Owner; and that therefore when any stand in need of such a Use, they have a *Right* to demand it.” If any dislike this Argument, a plainer Reason may be thus offer’d, that the Law of Humanity obliges every Man to allow another the *harmless use* of his Goods or Possessions; which upon urgent Necessity may be challeng’d in a forcible manner, inasmuch as the Denial of it is presum’d to spring, either from groundless Diffidence, or from wicked Perverseness of Mind. Yet in such Cases, Leave is first to be ask’d fairly and peaceably, and Violence must not force a Passage, whilst it is yet uncertain, whether the Lord of the Place grounds his Refusal on any just Reason, or acts only out of a barbarous and inhospitable Temper. When *Cimon* the *Athenian* General going to assist the *Lacedaemonians*, with his Troops, broke thro’ the Territories of the *Corinthians*, without giving notice to the State, *Lachartes* the *Corinthian* gave him that handsome Reproof, *καὶ ὃ ἕρσαν κώφαντας ἀλλοτρίαν, ἐκ εἰσέναι πρότερον ἢ τὸν κύριον κελεύουσι*^a, *That when a Manknock’d at another’s Door, he forbore in Civility to enter, till the Master had him come in*^b.

Those who take the same Side of the Question with *Grotius*, add, that a Fear upon account of the

Numbers of those who would enter, doth not seem a sufficient Reason to deny Passage; since a Multitude as well as a few Persons may inoffensively use this Privilege, and not trespass against the Law of Nature. However, the same Law empowers us to take Security of the Men whom we admit, to engage them to do no Damage, or to repair what they do. For the common Proverb tells us, that *Opportunity makes the Thief*; and he is a very unwise Matter of a House, who lets in so many Strangers, as to be turn’d out himself. Nor are there wanting Instances of several Cities, which have lost their Liberty, by unwarily receiving too great a Number of armed Guests. And what should make us more cautious is, that few Generals deserve the *Encomium*, which *Tully*^c on this score hath given of *Pompey the Great*, *that he march’d his Legions thro’ Asia, in such a manner, as to keep not only the Hands, but even the Feet of so vast an Army, from committing the least Trespas on any peaceful and friendly Person*. When the *Helvetians*, or *Swiss* in the *Gallick War*, sent Deputies to *Cesar*, to beg a Passage thro’ the *Roman Province*, we find *Cesar* rejecting their Petition on this very good Account, “He remember’d how the same People had formerly defeated and kill’d *L. Cassius* the *Roman Consul*, and forced his Soldiers to pass ignominiously under the Yoke; and he imagined it scarce possible, that Men who were Enemies in their Hearts should pursue their Way fairly, and without launching out into some Injury or Disorder^d.”

Many ways of taking *Caution* or *Security* in this Case are propos’d; as first, that they shall pass thro’ without their Arms; but ’tis very hard to get this Condition accepted of by military Men; ask them *to part with their Weapons*, and they take it as if you desired *Leave to cut off their Hands*^e. It may be a more proper Expedient, that the Forces make their Passage in small and separate Bodies, or that Hostages be given for their peaceable Behaviour. For what some propose, that those who grant the Passage, shall hire sufficient Guards at the Charges of those who desire it, would take up too much Money as well as too much Time.

It is farther said on the same side, that it will not justify us in denying this Favour, to alledge, that Passage may be had elsewhere, upon taking a larger Circuit; because should this pretence always be used, the Request would never be granted, tho’ in the most reasonable Case, and so the *Right* would utterly cease and come to nothing. It is sufficient therefore, in their Opinion, if without any fraudulent Design, Passage be there desired, where it lies most ready and convenient.

Some there are who maintain the *Right of free Passage*, on this Argument^f, that *Highways* are common to all Mankind, and do not come under

MR. BARBEYRAC’S NOTES on §. V.

¹ The *Carthaginians*, to shew that they had a Right to a Country which *Massinissa* King of *Numidia* contested about with them, alledged among other Reasons, that *Massinissa* himself had granted it; because when he pursued *Cipbircs*, who had escaped out of his Kingdom, and took his Rout round *Cyrene* with a Party of *Numidians*, he begged leave of the *Carthaginians* to pass thro’ that very Country, as then depending upon *Carthage* without Contradiction. See farther about this Right of Passage, as about a Right of Trading where we please, *Selden’s* Tract, entituled, *Mare Clausum*, Chap. 20.

² As *Florus*, l. 2. c. 18. says, That the People of *Numantia* are said to have looked upon such a Proposal, when it was offer’d them, as a Condition of Peace. See *Freinshemius’s* and *Grævius’s* Notes upon the Place.

³ Mr. *Hertius* cites here a Treatise of *Adrian Beier* upon this Subject, *An & quatenus transitus pro exercitu per territorium alterius postulari & denegari possit*, i. e. How far Passage for an Army thro’ another Prince’s Territories may be desired, or denied.

^a *Plutarch in Cim.*

^b And thus *Telephus* in *Ditys Cretensis* rightly accuseth the *Greeks*, that professing to come as Friends, they should give no notice of their Visit. *Lib. 2. c. 5.*

^c *Pro Lege Manil. c. 13.*

^d *Cæsar Comment de B. G. l. 1. c. 7, 8.*

the

the Propriety of those, in whose Territories they lie. As if at the first Creation of the World, the Roads had been chalk'd out immediately by the divine hand, and left as universal Benefits. A Notion too ridiculous to deserve a serious Refutation.

On the other side there have been good Arguments offer'd, to evince that this ⁴ *Liberty of Passage* for an Army of Strangers is not owing to a mere natural Right, without any Compact or Concession intervening; especially when the Case is, that an Enemy to some of our neighbouring States desires leave to carry his Troops against them, thro' our Territories. For it seems to be part of the Duty, which we owe to our Neighbours, especially such as have been kind and friendly, not to suffer any hostile Power to march along our Country to their Prejudice, provided we can hinder the Design with no great Inconvenience to our selves ². And it is indeed one express Article in most Leagues, that neither Party shall grant Passage to the Foes of the other ^b. Nor will it solve the Difficulty, to say that we ought to allow *Passage*, if the War which is undertaken be *just*; not, if it be *unjust*. For there is commonly much Time and much Thought requir'd to make such a Judgment; and besides it is look'd upon as a piece of Rashness, to thrust in our Arbitration between two armed Parties, without their desiring it, and to constitute ourselves Judges of so great a Cause. But farther, supposing we grant the Request, it is very possible, we may by

this Means fix the Seat of the War in our own Country. For what if the other Party should meet and stop his Adversary, whilst yet in our Borders? And I do not see how we could blame him for this Proceeding, since he is by no means oblig'd to receive the Foe into his own Dominions, on purpose to rid us of the Burthen and of the Trouble. It seems therefore the safest way of acting in this Case, if we can without any considerable Prejudice to our own Affairs, to deny the Enemy Passage, and actually to oppose him, if he endeavour to force it without our Consent. But if we are either too weak to hinder his Progress, or must on this Score engage in a dangerous War; the Plea of Necessity will fairly justify us to our Neighbour ^c.

Ziegler in his Observations on *Grotius* asserts, that in this Case no one can naturally have a Right of passing through the Lands of another, but all such Right must be obtain'd by Compact; just as no Man has the Liberty of going through the Fields of a private Person, unless such a *Service* is imposed on the Fields by Virtue of their particular *Tenure*. He says this will especially hold good, when we have just reason to apprehend Danger from such a Concession ⁶. And this Point too he illustrates by a parallel Case between private Persons. You may have a Right of making a Thoroughfare of *Titius's* Yard; but if you appear there often with Fire and Torches, so as to endanger the Buildings, *Titius's* Fear cannot indeed in this Case

⁴ In this Case the Benefit desired is not a Service without hurt: for there is a present Damage, and a great hazard of a future. For if an Army in its march causes sometimes Waste and Disorder in an Allies Country, and among their own Countrymen themselves, what will it do in a strange Nation? History, both antient and modern, and present Transactions furnish us with many Examples. See *Tacitus's* Hist. l. 2. c. 12. §. 87. *Plin. Panegy.* c. 20. numb. 4. *Phil. de Comines* l. 6. c. 2. Farther, a great number of Men, which pass through a Country, must of necessity make Provisions dearer, by which means the greatest part of the Natives suffer; but the Consequences, which may be apprehended, are far more burdensome, which we shall hereafter discourse of, when we come to supply the Defects of the Author, according to the Sense of *Gronovius* in a large Note upon *Grotius*, l. 2. c. 2. §. 13. numb. 1.

⁵ This is not the only Danger. For he to whom Passage is granted, may be overcome, and put to the worst; and if so, let the Cause of making War be just or not, he will certainly revenge himself upon those who did not keep his Enemy from invading him. But supposing there be nothing to fear from the strange Troops which are suffered to pass, the Abettors of the contrary Opinion agree, that many Precautions ought to be observed. The Men that are always in Arms are easily tempted to abuse them, and commit great Outrages. Moreover, if they are very numerous, and find an Opportunity to seize on a considerable Prey, how often have we seen Armies of Strangers ravaging or seizing to their own Use the Estates of a People who have called them to their Succour? nor have their solemn Oaths and Treaties been able to deter them from this foul Perfidiousness. See *Just.* l. 4. c. 4. n. 5. & l. 8. c. 3. *Tit. Liv.* Lib. VII. chap. 38. and what *Wittikind* says concerning the Saxons, l. 1. *Annal.* What then may we expect from such as are under no such strict Engagements, but only barely promise to do us no Injury? Furthermore, as in the Bodies of living Creatures the most tender Parts, and subject to be dangerously affected, are the inwards called the Vitals; so all States almost have this in common, that the further Men advance into the heart of a Country, they find it more weak and unarmed. The *Carthaginians*, otherwise invincible, were conquered near *Carthage* by *Agathocles* and *Scipio*. *Hannibal* said he could never beat the *Romans* but in *Italy*. It is then a very dangerous thing, considering the Covetousness of Men, which are never satisfied, to lay open these Secrets to Strangers, who having Arms at hand, may make an Advantage of our Weakness, and punish our Imprudence. To this we may add, that in all States there never want Men turbulent and disaffected, who are ready to stir up Strangers either against their Fellow-citizens, Sovereign, or Neighbours, as we are told by *Francis Beaucaire* in his Commentaries on the *French* Affairs; and *Phil. de Comines*, l. 7. c. 7. speaking of the Inhabitants of *Pisa*, to whom King *Charles VIII.* gave Liberty, when he passed through the Kingdom of *Naples*, to conquer it; and by *Tacitus* about the People of *Lyons*, *Hist.* l. 1. c. 65. These Precautions are always necessary to be observed, unless where such a Passage can't be prevented, for we may be often deceived, tho' we use all imaginable Circumspection. And whoever allows a Stranger to enter his Country, he gets either a Master or an Equal. But if we have no Reason to fear any thing either from him that would pass, or from him against whom he marches; yet he certainly deprives his Subjects of the Advantage of the Commerce, which his Subjects might have with that Neighbour, upon whom they let in an Enemy. See what is farther spoken according to *Gronovius*, Note 9.

⁶ If a Prince may forbid the Inhabitants of his own Country to go armed in all Parts of his Dominions, with much more Reason may he hinder Strangers. See *Cicero*, Lib. V. in *Verrum*, c. 3. Moreover, a private Person has a Right to keep any from coming upon his Ground to hunt so much as Birds, *Institut.* l. 2. Tit. 1. de *Rerum Divis.* §. 12. And shall not a Sovereign have Power to deny Passage to an Army of Strangers? See *Just.* Lib. 9. c. 2. *Tit. Liv.* l. 37. c. 7. *Cæsar de Bell. Gall.* l. 1. c. 8. *Jo. Fred. Gronov.* As also the Discourse of Mr. *Bynkerhoek*, De *Domino Maris*, c. 4. publish'd A. D. 1703.

^a And therefore 'twas unreasonable for the *Romans* in *Livy*, B. 21. c. 20. to desire the *Gauls*, that they would not grant the *Carthaginians* a free Passage into *Italy*, because they would thereby turn the War upon themselves, and expose their own Country to be wasted for the Security of another, to which they had no Obligation. We have not (say they) received any Advantage from the *Romans*, nor Damage from the *Carthaginians*, which may oblige us to take up Arms for the one, or against the other. ^b See the League of the *Romans* with the *Carthaginians* in *Livy*, B. 38. c. 38. and with the *Etolians*, *Polyb. Excerpt. Legat.* 28. ^c 'Tis remarkable what *Plutarch* reports in his Life of *Lysander*, that when the City of *Athens* was oppress'd by the Thirty Tyrants, the *Thebans* pass'd a Law, that whoever should carry Arms through *Boeotia* against the *Athenian* Tyrants, should be free from the Notice of the *Theban* Eyes or Ears.

absolutely take away your Right; but he may hinder you from going in so dangerous a manner, and consequently may abridge your Privilege, though he cannot annul it. But as to this way of arguing we must observe, that in the Question now before us, we do not by the Liberty of Passage understand any settled and constant Service; but only an occasional, and as it were a momentary use of another's Territories or Possessions, to which we are driven, either by Necessity, or by the Prospect of some extraordinary Advantage, when it would be Inhumanity in the other Party, not to comply with our Wants, and with our Request.

Examples, which are of so great Weight in determining other Questions, have little Force as to the Decision of this. For generally as People have been stronger or weaker, they have required *Passage* with Modesty, or with Confidence, and have in like manner granted, or refused it to others⁷. “*Agefilaus* in *Plutarch*, when the *Trallians*² demanded an hundred Talents, and as many Women for the Price of his Passage through their Country, ask'd them pleasantly, *Why the Commissioners were not there ready at hand to receive them?* and without further Delay march'd forward, encounter'd, and routed them. He sent to the King of *Macedon*, to desire the same Favour, who answering, that he would take time to consider of it; Let him consider of it, says *Agefilaus*, and in the mean while we will go forward. The *Macedonian* admiring, and fearing such Spirit and Reluctation, humbly requested him to pass at his Pleasure.

But the chief Example produced on this Point, is that of the *Israelites*, when desiring to pass thro' the *Edomites* Country, they voluntarily offer'd the following Conditions: “That they would march along the King's Highway, without turning into the private Fields or Vineyards, and would immediately tender Money for every thing of theirs which they should have occasion to use.” The *Edomites* rejecting these Terms, and endeavouring in a hostile Manner to hinder their Passage, they did not think it justifiable to obtain it by Force, but took a large Compass round

about their Borders; and when at length they were oblig'd just to touch on⁸ some part of their Coasts, they did not take occasion from the former most inhuman Treatment, to commit any Violence or Trespas in their march^b. As to the same People, when *Sibon* King of the *Amorites*, not only refused them the like Privilege, but came out arm'd to oppose them, probably before they had reach'd his Coasts, and therefore set upon them without any Reason or Provocation, we find he was overthrown in the Combat; but he seems to have suffer'd this Fate, not so much for denying them Passage, as for rashly encountering them upon so little Colour or Pretence. For otherwise it would have seem'd too hard to punish the Neglect of a piece of Humanity with the ruin of a whole Nation; since it appears that these *Amorites* were seated without the Borders of the⁹ *Land of Promise*, the Inhabitants of which God Almighty had by a special Decree adjudg'd to utter Extirpation and Destruction. “Nor will it alter the Case to say with some that the *Amorites* here, to make their Fear justifiable, ought not to have rejected so fair Conditions, but should have immediately treated about accepting and regulating them; but that now by refusing all peaceable Conference and Commerce, they had rendred themselves liable to be dealt with as the most unjust and most unfaithful of Men:” For by the common Right and Privilege of Mankind, a Breach¹⁰ of the Law of *Humanity* does not deserve the utmost Rigor and Extremity of Proceeding.

VI. Amongst these Matters of *harmless Profit*, which Nature engages us to allow freely to all Men, *Grotius* reckons the permitting Goods and Merchandise to be carried through our Dominions. *Ziegler* accuses *Grotius* of a Contradiction on this Point, whilst in one place he says, That *no one can have a Right of hindering any Nation from maintaining Traffick and Commerce with any other¹ Nation that is remote from them*; and yet in another place of the same Chapter he grants, That *it is lawful for one Nation to contract with another for all the Goods of one kind not to be found elsewhere; so that no other People shall have the Liberty of buying them*. But

⁷ To these Examples, which rather prove what was done, than what ought to be done, we may oppose some Examples more remarkable, *viz.* of some People who have been badly rewarded for their Easiness in granting Strangers Troops to pass their Country. So it was that *Phabidas* got possession of the Castle *Cadmæa*, *Diod. Sic. Lib. 45. c. 20.* And the City of *Messina* was taken by the Captains of *Agathocles's* Army, *Polyb. Hist. Lib. 1. as Gronovius* observes. See the Discourse of *Buddeus* about these Expeditions among his *Selecta Jur. Nat. & Gen. § 30.*

⁸ They never entred into *Ilumea*, but marched upon the Borders of it, and bought their Provisions of the *Idumeans*. See *Mr. Le Clerc* upon *Deut. 2. 9.*

⁹ It is a wonder that our Author, contrary to several expres Passages in Scripture, should exclude the *Amorites* from the Number of the Seven Nations which God had ordered to be destroy'd, *viz. Deut. 7. 1. and 20. 17.* Nevertheless, it is true, that those whom he here speaks of were not in the *Land of Promise* properly so called, which contained all the Country between *Jordan* and the Mediterranean Sea; and consequently if King *Sibon* had granted the *Israelites* a quiet Passage, they had not executed the Sentence which God had pronounced upon that part of the *Amorites*. See *Mr. Le Clerc* upon *Gen. 10. 16. and Numb. 21. 22.*

¹⁰ See *Mr. Thomastius's Institut. Jurispr. Div. Lib. 2. c. 6. §. 16. in fine.* *Mr. Buddeus* in his *Elements, Phil. Praet. Part II. c. 4. §. 8. §. 3, &c.* maintains, that supposing the War which that Prince, who desires a Passage through our Country, makes, is just and necessary; and on the other side we have no reason to fear any thing either from him that is to pass, or him against whom he marches, we are under an indispensable Obligation to allow him a Passage; and his Reason is, because the Law of Nature obliges every one to assist those who are unjustly oppress'd; and with much greater Reason ought we to be no hindrance to such as undertake their own Defence. See *Lib. 2. c. 5. §. 6. Note 3. above.*

MR. BARBEYRAC'S NOTES on §. 6.

¹ *Grotius* seems to understand, either *mediately or immediately*. This appears from the Restraints that he puts upon the Traffick which he supposes to be allowed between the two Estates, of which the one engages to sell the other a certain sort of Wares which grow no where else; it being meant, as he adds, that the People who have obtained the Privilege of buying these Wares only, are ready to sell them again to others at reasonable Rates. For granting that we have Necessaries of Life sufficient to satisfy Nature, it matters not of whom we have them. So that our Author's Distinction might have been spared.

² Or the *Troades*, as we find them called in the *Lacon. Apophthegm.* of the same Author.

^b See *Deut. ii. 6, 34. Numb. xx, xxi.*

now by this Contract of Engrossment it is plain other Nations are thus far hinder'd from trading in the same Country. Yet it is easy to bring off *Grotius*, by saying, that in the former Passage by *binding* he understands, not hindering them by virtue of some precedent Bargain or Covenant, but *binding* them by open Methods of Violence. Yet on the Whole it must be confess'd, that he has not brought the present Question to a full and clear Decision. For truly speaking, the Law of Humanity does not seem to oblige us to grant Passage to any other Goods, except such as are absolutely necessary for the Support of their Life to whom they are thus convey'd. But as for those who import such Commodities as improve and encourage Luxury, or from which those who deal in them do not seek any Supply of real Wants, but rather an excessive Gain, and an Indulgence to covetous Desires, I do not see what Right they have to demand Passage thro' our Coasts for this kind of Traffick, or on what Pretensions they can claim such a Privilege as their *Due*. I confess, there scarce appears any probable Colour on which we should deny unarmed Vessels the Liberty of an open Sea, which we are Masters of, whilst they are bound to a third People, with whom we are at Peace. And to this Point, chiefly relate all those Authorities and Testimonies of Authors usually produced in the main Dispute. But thus much we may reasonably do, we may stop the Vessel in such a Case, and force them to leave their *Cargo* in our Territories, that we may have the Benefit of the first Purchase. For besides that the frequent Passage of Strangers may some time create Danger, or at least may give Suspicions to our State, what should hinder us from deriving that Profit on our own People, which would otherwise be made by Foreigners? since in Matters of Favour we ought constantly to prefer the former to the latter. And tho' in Strictness it be indeed no *Damage* to us, if we permit the free Transportation of these Commodities, and tho' the third Party who receives them, does not properly *injure* us by making a Gain, which 'twas in our Power to have secured before him; yet since he has no Right of excluding us from such a Gain, why ought we not to love ourselves best, and to be before-hand with

him in the Advantage? Which we shall be, if whilst we lie thus in the midst between two People, we take care not to let such Goods pass from one to the other, without going first thro' our own Hands². And unless this be admitted for fair and equitable Dealing, I see not on what Grounds we can defend those *Staples*, and other Rights which we find in some Countries, by virtue of which Foreign Commodities are stopp'd, and carried to the publick Place of Sale; and Strangers are permitted to traffick, not immediately betwixt themselves, but at second-hand with the natural Subjects.

VII. From what has been said, there may well arise this farther *Question*, Whether the Law of Humanity will permit us to require *Toll*, or *Custom* for Goods transported thro' any Land, River, or narrow Sea, subject to our Dominion? For at first Sight it seems inhuman, not to grant such a Privilege without *Price*, which the Law before-mention'd allows freely to all Mankind

Now why *Custom* should be imposed on Goods carried over *Land*, there is this manifest Reason, because such heavy Conveyance sometimes trespasses on the Fields adjoining to the common Roads; and because the Sovereign of the Country is put to charge, both in repairing the Ways, and in securing the Passengers¹. And farther, if it be necessary to erect Bridges for this Purpose, it is plain in Equity that the Sovereign may set up a Toll to reimburse himself for those Expences; and at the same time, he who does require such Toll, is oblig'd not only to let the Bridges stand, but likewise to keep them in constant Repair. *Grotius* on the 1 *Kings* x. 19. observes, that a great Toll was paid to *Solomon* for the Horses brought thro' *Judea* from *Egypt*, to the *Syrians*, or to the *Hittites*; and thus too no *Frankincense* was transported without *Custom*. The like *Impositions* are reasonable in those Places, where by the Industry of the Natives, the Roads are render'd more short or more easy; as by the filling up of Pits and Ditches, or by other useful Labours, for the Convenience of Passengers and of Goods. Thus of old, had any one cut thro' the *Isthmus*, and join'd the *Ionian* and *Egean* Seas, he might fairly have required some moderate Toll of the Merchants and Sailors; which they would

² As the Duties of Humanity are reciprocal, and he that has received a Benefit ought to make some Acknowledgment of it, Strangers have no just Reason to complain that they are obliged to put their Goods to Sale in the Country, provided they'll buy them at a reasonable Price, because by that means they will get by them, tho' perhaps not so much as they would have done, if they had carried their Merchandizes farther. But if the Merchandizes or Wares be such as we are well stored with, or trade with ourselves, we may positively refuse them coming in; because 'tis evident, that so much Profit as these Traders make in passing thro' our Country, 'tis so much Loss to ourselves. But if in refusing a Passage, we deprive the Strangers that demand it of that Profit they might make, without any Advantage to ourselves, 'tis inhuman to envy others the Benefit which we can't obtain ourselves; and so much the more, if the other People to whom they would carry these Merchandizes, can't have them any where else, but at an exorbitant Price. See *Mr. Buddeus*, as above, §. 4. 5. *Mr. Hertius* in his Note upon this Place of our Author agrees, that nothing hinders but the Right of *Staple* may take place among Citizens of the same State, either with relation to Strangers, who come to sell their Merchandizes and Wares in their Country, *i. e.* they may not allow them to set them to Sale but in a certain Place; but he does not see why such Persons as bring Foreign Commodities, whether of their own Growth or Manufacture, to carry them into a third Country, should be obliged to put them to Sale; especially if the People thro' whose Country they are carried, have no great need of them. For my part, there seems to me to be no Injustice in it, provided we are willing to furnish these Strangers with such Things as they are seeking elsewhere, when they have passed our Country, whether of our own Growth or Manufacture, at a reasonable Rate. For why should they go far for what they may have near at hand? And why should they not accommodate themselves among us, who are nearer than others? So long as they may make a tolerable Gain, tho' not so great as if they were suffered to go farther. So that in this Case it is at our Liberty either to allow Passage, or not, for Foreign Commodities; all that we are to beware of is, that in denying we do not prejudice the Commerce of the Inhabitants of our own Country, or bring some other Inconvenience on them; but this is a matter of Prudence only.

³ *Stapula*, this word comes from the *German*, *Stapelen*, which signifies, to put into an Heap or Pile. See *Mr. Menage's Etymolog. Diction. & Marquard. de Jur. Mercat. Lib. 2. c. 6.*

MR. BARBEYRAC'S NOTES on §. VII.

¹ In some Countries, they who received these Tolls were obliged to make the Roads safe. So that if a Man was robbed in the Day-time, they were bound to make good what he had lost. Some say, that this Custom is used at this Day in some Places of *England* and *Italy*. See *Faretiere's Diction.* in the word *Peage*, and the *Saxon Laws, Lib. 2. Art. 27.*

not have been unwilling to give, the Voyage being now perform'd with more Expedition and more Security. And tho' this Project was never set on foot, *Strabo* informs us, "That the Merchants of *Asia* and *Italy*, rather than pass out of one of these Seas into the other, by the tedious and dangerous Coast of *Malea*, were extremely well satisfied to put in at *Corinth*, and so carry their Effects over Land; notwithstanding the Duties to be paid there for all imported or exported Goods." Another Reason which some bring to assert the Equity of Impositions on Land-Carriage, is this, that by so perpetual Confluence of Strangers the Price of Provisions is exceedingly rais'd. To which we may add in Conclusion, that a Sovereign, on this account, requires some Acknowledgment from the Goods of *Foreigners*, because he suffers them by passing thro' his Territories, to receive such Goods *immediately* from a third People; whereas should he erect a *Staple*, the Gain and Benefit would be fairly intercepted by his own Subjects.

As to the *River Tolls*, this amongst other Arguments may be offer'd to justify them, that since the Water by continually preying on the adjoining Lands, and sometimes by overflowing them, is the Cause of no inconsiderable Damage, for the prevention of which it is often necessary to secure them with Banks and other *Works* of great Charge and Labour; it seems by no means unreasonable, that towards the making up of these Losses, some moderate Consideration should be allowed by those who gain Advantage by the River, without being concern'd in its ordinary Mischiefs. It is true in the Capitularies of *Charles the Great*^a, one Order forbids to take Toll in those Rivers, *Ubi nullum adiutorium præstatur itinerantibus, Where no Assistance is given to the Passengers*^b; but this Constitution seems to have been made in favour of the natural Subjects, and there is no Necessity of extending it to *Foreigners*^c.

It is a more difficult Point, to state the Equity of Tolls demanded in *Seas*. This indeed is beyond dispute, that the Sovereign of a Sea may impose Duties answerable to the Charge which he bestows about it; as for the setting up of Marks

near Rocks and Quick sands, for the keeping of Fires to direct Vessels in the Night, or for scowring the Coasts of Pirates. But whatever is demanded farther than upon these Accounts, will not admit of so good Defence; inasmuch as the Passage of *unarmed Ships* is plainly one of those harmless Benefits which *Humanity* lays in common. Yet where such Pretensions are made, the Pleas which support them do not seem altogether absurd; as that no one ought to be blamed for making the best of his Dominions, or for raising such Profits from his Waters as others do from their Land. That, since he who enters the Territories of another, is for that time his *Subject*, we may compel the Ships of *Foreigners*, whilst they pass thro' our Sea, to let our Subjects have the first Purchase of their Goods; and that if we give up this Claim, we may require some reasonable Consideration in lieu of it. That altho' we cannot perhaps set up a *Staple* in such a Sea, because the third Nation whither those Ships are bound, may not have the Use of Sailing, and therefore cannot fetch the Goods from us, neither have we, it may be, the Liberty of carrying them thither; yet it ought not to be thought hard, if we put in for some little share in the Gain; since we permit Strangers to sail thro' our Water, with so much Expedition and Convenience. But upon the whole, it must be confess'd, that since this Toll by *Sea* is, for I know not what Reason, accounted more odious than what is demanded by *Land*, it ought to be exercised with great Prudence and Moderation, and without the least Appearance of Extortion or Avarice. And after all there may, 'tis very likely^d, be a Sovereign or two, who shall claim an Exemption from the common Duty, and build his Pretensions on good Reason; as that his Dominions bordering on the same Sea^e, inclose it so at both Ends, as to give him a fair Title to its Use; or that on such a Use of it, his Commerce with *Foreign Nations*, and consequently the Good and Safety of his own People almost entirely^f depends. For in these Cases it would be unreasonable, that to obtain the Liberty of a harmless Passage by *Sea*, he should be reduc'd to a kind of^g tributary Condition; nor will any

² Either in taking care that the Commodities be not endamaged, or for the Safety of their Persons.

³ Our Author has a principal Respect here to the Streight of the *Sound*, for he was at that time Professor at *Lunden* in the Province of *Schonen*, belonging to the *Suedes* since the Peace of *Roschild*.

⁴ This Reason proves nothing. The Subjects of this Prince trade together by Land, but if they will transport their Merchandizes by an Arm of the Sea, why should they refuse more than other People to pay an Impost to the Master of the Streight, either as a Satisfaction for the Charge he is at to secure them a commodious Navigation, or as a small Acknowledgment of the Profit they reap themselves from an open Passage, which shortens their Course, and makes their Trade more flourishing? And tho' there be no other Communication between the Countries of that Prince, which are above and below the Streights, this does not at all lessen the Right of him that has the Possession of it. Otherwise it would follow, that he that hath a Country surrounded with another's States, such, for example, as are *Avignon* and *Orange* in the Kingdom of *France*, hath a Right to assert, that the Lord of that Country which incloses his must suffer all Merchandizes and Goods to pass backward and forward without paying any Tax or Imposition, which our Author will never grant. And I can't see what Privilege Navigation can pretend to more, since the Gulphs and Streights of the Sea, according to our Author's own Principle, *Lib. 4. c. 5. §. 8.* belong no more to any Prince, whose Country they border on, than the Highways taken out of his Lands. See Mr. *Bynkershoek's* Discourse, *De Dominio Maris. c. 4. p. 28.*

⁵ Suppose that the People be so poor, that a moderate Tax laid upon their Goods and Merchandizes which they transport, would disable them from trading, and providing themselves the Necessaries of Life. In this Case the Master of the Streight will be obliged to suffer the Vessels of that People to pass without exacting any Customs of them. But yet he may take them of *Foreign Merchants* for their Passage; because, tho' it seems to be lessening their Profits, yet they know how to indemnify themselves in selling their Merchandizes, without which their Fellow Citizens, to whom they sell them, must either want some of the Necessaries of Life, or buy them at an exorbitant Price. And tho' perhaps, if the Master of the Streight should altogether refuse them a Passage, they would be in great Want of several Things, yet it does not follow, that they must therefore be exempted from such Customs, because that open Passage procures a flourishing Trade, and a great Abundance of all Things they have need of, and much more.

⁶ That Prince is no more tributary to the Master of a Streight for paying a Custom, than a Traveller in a strange Country, paying the Toll of a Bridge or River is tributary to the Lord of the Country who receives it. It is not (as an *English* Author, *viz.* Mr. *Molesworth* in his *Memoirs* affirms) a servile Acknowledgment of the Sovereignty of that Prince over the Seas, of which the Streight is a Key. We may as well say, that by paying the Toll over a Bridge or River, which are on the Border of a Prince's Country, we attribute to him the Sovereignty over all the Country.

^a *Lib. 3. c. 12.*

^b *V. Lex Longobard. lib. 3. Tit. 1. Leg. 21.*

one be much inclin'd to censure him, if upon so odious a Provocation he endeavour by any possible Means to free himself from such Exaction and Oppression. Nor will it render his Resentments less justifiable, to alledge on the other side, that other Nations have agreed to pay the Imposition: because their Support and Safety is not so immediately concern'd in the use of such a Sea, and therefore they may afford to allow the Sovereign of the Sea a share in their Gains, without grudging or repining. As the Case is very different ⁷, whether a Man desires Way through my Grounds, because without this Privilege, he would be as it were excluded from the World, and confined to Solitude, or because he could not otherwise carry off the Fruit of his own Land; and whether he makes the same Demand, purely to shorten his Passage, and imposes a Burthen on my Estate, not to relieve his own Necessity, but to promote his Convenience and Ease.

They tell us, that the King of *Abyssinia*, or *Ethiopia*, pretended of old to a certain Tribute from *Egypt*; upon account that the River *Nile*, to which that Country owes its Fruitfulness, took its Rise in his Dominions; and that afterwards when the *Turks* had seiz'd on *Egypt*, and used great Severities towards the *Christians*, the *Abyssinian* Prince made an Attempt to have turn'd the Channel of the *Nile* into the Red Sea, but without Effect. These Pretensions and these Proceedings, which bear some Relation to the Case before us, we cannot but look upon as unjust ⁸.

Some would determine this whole Business by the means of Compact and Covenant, which Method we think not to be altogether accurate and decisive. For it remains still in Question, what was the original Reason of these Covenants; and whether the Master of the Sea may deny Passage to others, until such time as they shall enter into the same Articles of Agreement. Though indeed when such a Covenant has once pass'd without any natural Flaw or Weakness, which might render it invalid, both Parts are obliged strictly to observe it; so that the People who use the Passage desired, ought on no account to deny the settled Imposition, and the Master of the Sea shall not raise the Duty higher than what has been thus establish'd by joint Consent ⁹. *Nicephorus Gregoras* ^b reports, that the *Caliph* of *Egypt* obtain'd by Covenant of the Emperor of *Constantinople*, Licence for the Merchants of his Country to pass through the *Thracian Bosphorus*. Which Privilege was therefore so easily granted at first, because it seem'd a Matter of little Importance. But when in course of time it appear'd to be a Point of very considerable Consequence, it was found impossible to revoke the *Grant*, after it had been by long Custom enforced and establish'd ².

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⁷ But our Author himself, reciting the same Example above, l. 2. c. 6. §. 8. says, according to the Sense of the Interpreters of the *Roman Law*, that he is obliged to grant a Passage, especially if he make some Acknowledgment. See *Digest*. l. 11. Tit. 7. de *Relig. & Sumpt. fun. &c.* Leg. 12. Let any Man then consider, whether the Consequences which our Author draws from the Circumstances he supposes in favour of his Prince, be well grounded; and if this Prince has any way to oblige the Master of the Streight to let him carry his Merchandises free of all Toll, since other People pay it willingly.

⁸ This Instance, tho' our Author passes a true Judgment as to the Pretensions of the *Abyssine* Prince, yet has little or no relation to the Custom or Toll which a Master of a Streight exacts of the Merchandises which pass through it.

⁹ What does this prove?

¹⁰ But our Author elsewhere acknowledges, viz. Lib. 4. c. 5. §. 8. that whoever has settled himself first upon one of the Coasts of the Streight, and has taken possession of the whole Streight, he that comes afterward to inhabit on the other side is Master only of his own Ports and Shore. So that in this Case the first Occupant has a Right to require Customs of the Vessels of the other, as if he had both sides of the Streight, unless he be dispensed with by any Agreement.

^a *Add. Bacler. ad Grot. L. 2. c. 2. f. 14.*

^b Lib. 4.

^c L. 2. c. 2. f. 15

^d *Æneid*. 1. ver. 542.

But in Case the opposite Shore is possess'd by another People, so that the Sea is either held in common by both, or else as a middle Point divides the Confines of the two Dominions, though here perhaps one of the States only may by Compact or Concession require Toll of Passengers, yet the Subjects of the other State shall by no means stand liable to the same Imposition, since they sail in their own Water ¹⁰.

VIII. Under the same Head of common and innocent Privileges *Grotius* ^c likewise reckons the liberty of Sailors, to touch and to rest a little on any Shore, for the sake of Health, or of fresh Water, or on any other just Account. Thus the *Trojans* complain in *Virgil* ^d:

Quod genus hoc hominum? quæve hunc tam barbara morem

Permittit patria? hospitio probibemur arcæ,
Bella cicut, primâq; velant consistere terrâ.

Si genus humanam & mortalia temnitis arma,
At sperate Deos memores fandi atque nefandi.

What Men, what Monsters, what inhuman Race;
What Laws, what barbarous Customs of the Place,
Shut up a desert Shore to drowning Men,
And drive us to the cruel Seas again?

If our hard Fortune no Compassion draws,
Nor hospitable Rights, nor human Laws;
The Gods are just, and will revenge our Cause.

Mr. Dryden.

But 'tis observable that they profess'd before,

Non nos aut ferro Libycos populare Penates
Venimus, aut raptas ad littora vertere prædas;
Non ea vis animo, &c.

We come not with design of wasteful Prey,
To drive the Country, force the Swains away:
Nor such our Strength, nor such is our Desire.

Mr. Dryden.

Whence we are taught that the Party who desires this Favour, ought to appear on such Coasts with most innocent Intention, so as neither to create any Danger to the Inhabitants, nor any probable Grounds of Fear. And therefore *Dido's* Answer to this Speech is exceedingly wise and proper:

Res dura, & regni novitas, me talia cogunt
Moliri, & late fines custode tueri:

—————My cruel Fate,
And Doubts attending an unsettled State,
Force me to guard my Coasts.—————

Mr. Dryden.

For before we grant any thing of this kind, we ought to be well assured whether the Persons approaching come as Friends, or as Enemies, what Appearance the Fleet makes, what Force and Figure the Men bear who are to land; and farther, whether they are free from all contagious Distempers^a. When there arises no Obstacle on either of these Accounts, as it would be then most barbarous Inhumanity, to deny the Liberty of harmless Access to Shore, so that Favour being once granted, calls for one more, altogether as reasonable, the Privilege of erecting little *momentary* Huts for present Shelter, which is neither any prejudice to the Shore, nor any Abridgment of our Right and Property. Indeed Reason forbids that any one should raise a *lasting* Structure or Edifice on the Strand, without express Allowance from the Sovereign^b, especially if it could not be done but by endamaging others^b.

Altho' some Nations have by formed Compact settled the Point of Access to Shores and Ports², yet this does not hinder the like Kindness from being due by natural Right; since many Duties arising from those Virtues which impose only an *imperfect* Obligation, are frequently strengthen'd and confirm'd by civil Covenants and Laws³. Besides, our present Assertion regards chiefly this extraordinary Case, when Persons contrary to their Intentions, are driven by some Violence on a foreign Coast; whereas these Covenants which sometimes pass betwixt Nations, usually have for their Subject the Point of constant and continual Access on common Occasions. Therefore for this latter Indulgence, it is on no account absurd to require some moderate Consideration. But in the former Case it would be extremely base and fordid, to charge as a Debt so small a Relief of Persons in Distress, and as it were to set a Price upon our Charity.

IX. Another Duty of *Humanity* is the Admission of Strangers, and the kind Reception and Entertainment of *Travellers*. Some of the Antients carried this Point to the height of Ambition and Ostentation, conceiving the Right of Hospitality to

found the strictest Relation, and the most sacred Friendship^c. But to give a natural Right to these Favours, it is requisite that the Stranger be absent from his own House on an honest, or on a necessary Account; as also that we have no Objection against his Integrity, or Character, which might render our Admission of him, either dangerous or disgraceful; and farther, that he cannot at present hire Lodgings for his Money. And therefore in antient Times, when publick Inns either were not in use, or else accounted scandalous, and unworthy to receive a good and virtuous Guest, the Necessity of this Duty was greater and more strictly binding, than it is now in most parts of *Europe*; where we meet with so many of these Houses exactly fitted and furnish'd, not only for all Use and Convenience, but even for Ornament and Splendor.

Now although *Inhospitality* be commonly, and for the most part justly censured, as the true Mark of a savage and inhuman Temper, yet the Point will now and then bear a dispute, especially as to the Case of those who wander into foreign Countries purely on account of Curiosity; whether or no such Persons may claim free Admission by any natural Right^d. The *Spartans* to justify themselves in driving all Strangers from their Coasts, thought this one Reason sufficient, Lest the Converse of Strangers should introduce a Corruption, or a Contempt of their receiv'd Manners and Customs^d. In answer to which it is well urged by some, that what we practise at home is not always the best, nor what others do abroad the worst; if then a *foreign* Custom be really *better*, it is absurd to despise, and to reject it on the Score of its being *foreign*. That this is the Temper and Property of Curs to fawn on *domestick* Slaves, and to bark at the most noble and excellent of *Strangers*. That those Men usually contract a Roughness and Clownishness of Behaviour, who never breathe out of their native Air, and see no more of the World than what passes under their Nose^e. As to the Que-

MR. BARBEYRAC'S NOTES on §. VIII.

¹ See Mr. *Noodt's* Book called, *Probabilia Juris*, (i. e.) *The Probabilities of the Law*, Lib. 4. c. 1.

² Sometimes, on the contrary, as our Author observes a little below, one People agree with another that they will not come into the Ports, nor on the Coasts one of another, as appears from two Treaties made long ago between the *Romans* and *Carthaginians*. That the *Romans* and their Allies shall not sail beyond the *fair Promontory*, unless they are driven farther by a Tempest, or by the Pursuit of their Enemies; and if thro' these Means they passed their Bounds, they should buy nothing, nor meddle with any thing but what was either necessary for Sacrifice, or to repair their Vessels, and set sail again to return within five Days. *Polyb.* l. 3. This was their first Treaty. The second was, that no *Roman* should trade into *Sardinia* or *Africk*; that they should not build any City there, nor land, unless to get Provisions, or repair their Vessels; and if they were driven ashore by a Tempest, they should depart within five Days. *Ibid.*

³ See §. 4. above, and Lib. 2. c. 6. §. 5. where you'll find Examples of these imperfect Obligations, which have been made perfect by the Determination of the Legislator, who has made them effectual by Law: As also, see Lib. 4. c. 2. below.

MR. BARBEYRAC'S NOTES on §. IX.

¹ For the same Reasons *Lycurgus* forbid the *Lacedemonians* to travel out of their own Country, lest they should learn the bad Customs and coarse Manners of Strangers. *Plut. Inj. Lac.* See *Potter's Archæol. Græc.* l. 4. c. 21.

² Add. *Plin. N. H.* l. 26. c. 1. ^b *Vid.* l. 50. *D. de acq. rer. dom.* ^c *Aristot. Mag. Moral.* l. 2. 11. Of all kinds of Friendships that seems to be the firmest which is express'd in the courteous Entertainment of Strangers; because the Persons here havin' not the same Ends and Interests to propose, cannot so easily fall into Contention, as those who are Members of the same State. *Homer* says, the Poor and Stranger are the Care of *Jove*; and again, the suppliant Stranger craves a Brother's Love. In *Lucian (de Dea Syria)* amongst the Crimes which brought *Deucalion's* Flood upon the World, we find these which follow. They practis'd all kinds of Injustice; for they neither kept their Oaths, nor receiv'd Strangers, nor gave a patient Hearing to the Request of the Miserable. Of the Humanity which the *Indians* shew to Strangers, see *Diod. Sic.* l. 2. c. 42. Add. *Plato de L. L.* l. 12. *Ælian (V. H.)* l. 4. c. 1 recites this Law of the *Lucanians*, If at Sun-set a Stranger arrives, and desires Reception in a House, in case the Master refuse to admit him, let him be punish'd as an Offender against the Laws of Hospitality. Add. *Lex Burgund.* Tit. 30. s. 1. *Helmoldus (in Chron. Slav.)* l. 1. c. 82.) reports of the antient *Slavi*. If a Man be discover'd to have denied Lodging to a Stranger (a Rudeness which seldom happens amongst them) the People join in a Body to pull down his House, and to ruin his Estate; which way of proceeding is permitted by the Laws. *Philos. Jud.* in his Life of *Moses*, says, that Strangers have the same Rights as Suppliants.

^d The *Chinese* have much the same Constitutions in reference to Strangers. *Vid. Nieuhof. Gen. Descript. Chin.* c. 1.

^e (In *Livy* l. 41. c. 24.) The Decree of the *Achaëans*, by which they forbid the *Macedonians* to enter their Territories, is call'd, *exsecrabilis velut desertio Juris Humani*, as it were a detestable Desertion of the Law of human Nature. 'Tis a Saying of *Periander* in *Plutarch (Sympos.)* I commend those States and those Magistrates which first give Audience to Strangers, and then to their own Subjects.

tion before us then, thus much is certain, that if our People are kindly receiv'd by any Nation abroad, we ought to entertain the Men of that Nation with an equal return of Civility. As on the other hand, those who drive us from their Coasts, cannot without the most stupid Impudence petition us for a more courteous Treatment. But supposing that any one Nation, contented with what it finds at home, utterly refrains from all foreign Travel, it does not appear what Obligation such a State can have to admit those who would visit it, without a necessary or weighty Cause. The Case is somewhat like that of a private Man, who in his House or Gardens, possesses some rare Curiosity, or other valuable Sight; such an one does not apprehend himself tied freely to let in all Spectators; but whoever is thus gratified either rewards, or at least acknowledges, it as an extraordinary Favour. And this seems the more reasonable, because the Grounds of prudent Caution and Suspicion are so numerous, that we may easily make use of one or other of them, to justify us in keeping such Persons at a distance, as would too curiously examine and pry into our Affairs.

Therefore the *Spanish Casuist*^a has not made many Converts by the Reasons he lays down to justify his Countrymen in their Proceedings against the *Indians*. The first Right on which he founds their Title, is that of natural Society and Communication, which he draws up into this Assertion, *The Spaniards had a Right of travelling and of living in those Countries, provided they did the Natives no harm, and from this Privilege none could restrain them*. In reply to which it is well urged, that this *natural Communication* does not hinder a just Proprietor from communicating his Goods by such Methods, and upon such Considerations as he finds necessary. And farther, that it seems very gross and absurd, to allow others an indefinite or unlimited Right of travelling and living amongst us, without reflecting either on their Number, or on the Design of their coming; whether supposing them to pass harmlessly, they intend only to take a short view of our Country, or whether they claim a Right of fixing themselves with us for ever. And that he who will stretch the Duty of Hospitality to this extravagant Extent, ought to be rejected as a most unreasonable, and most improper Judge of the Case. The second Principle he lays down is, *That it was lawful for the Spaniards to traffick with those People, and the Sovereigns on either side could not hinder their Subjects from such Intercourse*. But here Men of more sober and moderate Judgments confess themselves unable to find out any such Liberty of trading, as Princes may not abridge their Subjects of, for the good of the Commonwealth; much less such as shall force and obtrude Strangers upon us, whether we will or no. His third Reason is this, *If the Indians had amongst them any Rights and Privileges allow'd in common to Natives and Fo-*

reigners, in these they ought not to hinder the Spaniards from their Share: For Example, If other Strangers were permitted to dig Gold, the Spaniards might fairly claim the same Liberty.

On which Point some have judged it worth considering, first, whether those Privileges were granted to others, by way of *Debt*, or by way of free Gift and Favour. For of those things which Men cannot claim from me as *strictly* their *Due*, I may be more liberal to one than to another. And in the next place, whether these new Comers will behave themselves with the same Justice and Modesty as the former, who made use of our Goods without our Prejudice or Inconvenience; and whether these late Guests propose no other End of their Visit. Suppose I give one or two of my Neighbours leave to come into my Garden, as often as they please, and to gratify themselves with tasting my Fruit; it may be, there breaks in afterwards a rude Hector, who is for tearing up my Trees, and would kick me out, to plant his own Body in my proper Land; my Case is bad if I may not be allow'd to shut the Gate against such an intruding Villain^b. But let others settle this Controversy. As to our main Question, it is look'd on by most as the safest way of resolving it, to say, That it is left in the power of all States, to take such Measures about the Admission of Strangers, as they think convenient; those being ever excepted, who are driven on the Coasts by Necessity, or by any Cause that deserves Pity and Compassion. Not but that it is barbarous to treat in the same cruel manner, those who visit us as Friends, and those who assault us as Enemies^c; The free Admission of Ambassadors is deduced from another Head^d.

But having once admitted Strangers and foreign Guests, to turn them out again, unless by *good Reason*, is usually censured as some Degree at least of Inhumanity^e. From the number of these *good Reasons*, St. *Ambrose* and with him *Grotius*^f excludes the Case of grievous Scarcity and Dearth afflicting a People. To whose Judgment we subscribe with this Supposition, That there are still Means left, though perhaps very hard and pressing, to save both Natives and Strangers, and if the latter have been formerly, or may be hereafter useful and serviceable to us, and of such only St. *Ambrose* speaks. But in case we are not *obliged* to the Foreigners amongst us, and there be no Necessity of their perishing, should we send them off, there seems to be no Reason why the Subject on their Account should be content to struggle with a Famine^g.

X. In the same Class of Duties *Grotius*^h places the allowing of a perpetual Habitation to Strangers, who being driven by Violence out of their own Country, are forced to seek out a new Seat; provided still, that they submit to the establish'd Government, and behave themselves with such Prudence and Decency, as to administer no Occasion to Factions and Seditiousⁱ.

^a See what is said above, L. 2. c. 3. §. 23. and below, Lib. 8. c. 9. §. 12. Note 1.

^b *Franciscus a Victoria Relect.* 5. f. 3. ^c Add the Answer given by some of the *Americans* to the *Spaniards*, in *Montaigne's* Essays, l. 3. c. 6. ^d Vid. *Diod. Sic.* l. 1. c. 67. ^e Add *Ziegler ad Grot.* l. 2. c. 2. f. 23. ^f Vid. *Liv.* l. 2. c. 37, 38.

^g *De Offic.* l. 3. c. 7. *Grot.* l. 2. c. 2. f. 19. ^h Vid. *Sueton. August.* c. 42. & *Bœcler. ad Grot. d. l.* ⁱ Lib. 2. c. 2. f. 16, 17. ^j *Euripides* *Medea.* $\chi\epsilon\iota\theta\ \delta\ \epsilon\iota\upsilon\upsilon\upsilon$, &c. ver. 222.

A Stranger should conform
In Manners to the State that entertains him.

*Socer arma Latinus habeto,
Imperium solenne socer; mihi moenia Teucri
Constituent, urbiq; dabit Lavinia nomen.*

Latinus shall the Regal Scepter bear,
Latinus first in Peace, and chief in War.

K k

Humanity,

So among the Articles of Peace proposed by *Aeneas* in *Virgil*, *Æn.* xii. 192. we find this for one:

Humanity, it is true, engages us to receive a small number of Men expell'd their Home, not for their own Demerit and Crime; especially if they are eminent for Wealth or Industry, and not likely to disturb our Religion, or our Constitution. And thus we see many States have risen to a great and flourishing Height, chiefly by granting Licence to Foreigners to come and settle amongst them; whereas others have been reduced to a low Condition, by refusing this Method of Improvement.

But no one will be fond of asserting, that we ought in the same manner to receive and incorporate a great Multitude, especially if now in Arms, or naturally addicted to War; since it is scarce possible, but that their Admission should highly endanger the Natives. Therefore every State may be more free or more cautious in granting these Indulgences, as it shall judge proper for its Interest and Safety. In order to which Judgment, it will be prudent to consider, whether a great increase in the Number of Inhabitants will turn to Advantage; whether the Country be fertile enough to feed so many Mouths; whether upon Admission of this new Body, we shall be straitned for room; whether the Men are industrious, or idle; whether they

may be so conveniently placed and disposed, as to render them incapable of giving any Jealousy to the Government. If on the whole, it appears that the Persons deserve our Favour and Pity, and that no Restraint lies on us from good Reasons of State, it will be an Act of Humanity to confer such a Benefit on them, as we shall neither feel very Burthensome at present, nor are likely to repent of hereafter. If the Case be otherwise, we ought so to temper our Pity with Prudence, as not to put ourselves in the ready way of becoming Objects of Pity unto others. Farther, since whatever we bestow on such Petitioners, we may justly reckon as a Matter of free Bounty in us, hence it follows, that they are not presently to lay hands on what they please, nor to fix themselves as it were by some Right, in any Spot of Waste-ground they find among us; but that they ought to rest satisfied with the Station and Privileges we assign them^a.

XI. The next Office of Humanity mention'd by *Grotius*, is that we allow every Man the Privilege of procuring for himself, by Money, Work, exchange of Goods, or any other lawful Contract, such things as contribute to the convenience of Life, and that we do not abridge him of this Liberty, ei-

Mr. BARBEYRAC'S NOTES on §. X.

^a See *Parthasiana*, Tome 1. p. 265, &c. and a Discourse *De conscribendo Milite*, §. 18. among the Select Discourses, *Jur. Nat. & Gen.* of Mr. *Buddeus*.

^a What hath been said may be illustrated by these historical Examples. *Latinus*, in *Virgil Æn.* 11. ver. 316. offers the *Trojans* this Condition:

*Est antiquus ager Tusco mihi proximus amni,
Aurunci Rutulique ferunt, & vomere duros
Exercent colles, atque horum asperima pascunt.
Hæc omnis regio & celsi plaga pinea montis
Cedat amicitie Teucrorum, & fœderis æquas
Dicamus leges; sociisque in regna vocemus.*

A Tract of Lands the *Latines* have possess'd,
Along the *Tiber*, stretching to the West,
Which now *Rutulians* and *Auruncans* till,
And their mix'd Cattle graze the fruitful Hill;
Those Mountains fill'd with Firs, that lower Land,
If you consent the *Trojans* shall command,
Call'd into part of what is ours; and there
On Terms agreed the common Country share.

Mr. *Dryden*:

Servius on this Passage observes, from *Cato's Origines*, that the Land here mention'd contain'd 100 Acres. He tells us likewise, for fear we should think that the King was liberal of what did not belong to him, that to those Words *Aurunci Rutulique ferunt*, we must join *mibi* in the preceding Verse; the *Auruncans* and *Rutulians* having that Country allow'd them in a way of free Stipend, or else being placed there by the King as his Husbandmen, to manage the Crown Lands. The Story is told more at large by *Dionys. Halicarnass.* L. 1.

The *Cimbrians* in *Florus* (l. 3. c. 3.) petition the *Roman* Senate, that so brave and warlike a People would give them a little Portion of Land as a kind of Pay, promising in return, that their Hands and their Weapons should be ever employ'd in the Cause of *Rome*. But (as the Historian there reflects) what Land could the *Romans* give them without quarrelling amongst themselves, on the Point of such arbitrary Distributions? And how could the Senate without manifest Injustice dispose of the Property of private Men? Besides, possessing so many things as were likely to raise the Appetite of needy Strangers, they judg'd it unsafe to admit so strong and so fierce a Nation into their Limits.

In *Cæsar* (de B. G. l. 4.) the *Tencteri* and *Usipetes* petition'd in this boasting manner: That they did not voluntarily leave their own Country to seek a foreign Seat; that if the *Romans* would accept of their Service, they were able to shew themselves no unprofitable Friends; only they desire some Lands to be assign'd them, or to have the Privilege of keeping what they had already gotten by their Arms. The Answer which *Cæsar* sent them was to this purpose; That 'twas unreasonable in those Men to invade another Country, who could not defend their own. That there were no vacant Lands in *Gallia*; especially not to hold so vast a Multitude, without Prejudice or Danger. Though indeed he had still another more secret Reason, why he would not have those new Neighbours.

In *Tacitus* (A. xiii. c. 55.) the *Antibarii* being at a Loss for a Dwelling, having therefore seated themselves in some Lands beyond the *Rhine*, belonging to the *Romans*; excus'd themselves, not altogether unreasonably, in these Words: That the main part of the Land was useless; being only employ'd now and then by Chance in feeding Beasts for the Army. That the *Romans* ought to resign a Place which was fill'd only with Beasts, when they might relieve the Distress of Men; and prefer Friends and Subjects to Deserts and Solitudes. That as Heaven was possess'd by the Gods, so the Earth was given to Mankind; and what Parts were void of Inhabitants, lay in common to all the World. (Which Principle Sir *Thomas Moore* establisheth amongst his *Utopians*, l. 2.) This Message deserv'd a more favourable Answer than those most haughty Words of *Avitus*, That they ought to submit to the Pleasure of their Betters. That the Gods, whose Assistance they now implore, had chosen the *Romans* to be Commanders of the World, and to dispose of it as they should think convenient, without suffering any other Judges but themselves.

The Emperor *Probus* settled an hundred Thousand of *Bastarnæ* in the *Roman* Territories; who all proved fruitful and quiet. But he using the same liberty of Transplanting vast Numbers from other Nations, as from the *Ge-*

* These Tyrants were such as revolted from the Emperor then reigning, and caused themselves to be proclaimed Emperors by the Soldiers. *See* *Salmasius upon the Thirty Tyrants of Trebellius Pollio*.

So likewise in *Ammianus Marcellinus*, the *Goths* deserting their Seat for fear of the *Huns*, begg'd leave of *Valens* to fix themselves in *Thrace*, promising to live quietly, and to lend him their Service when he should have occasion. Soon after other barbarous People put up the same Request, to whom *Valens* granted the like Favour, hoping that from these Numbers he might draw Men for his Troops, without any great Charge. Yet this Indulgence proved afterwards his Ruin; as the Historian demonstrates at large. *Add. Socrat. Hist. Eccles.* l. 4. c. 28.

ther by any civil Ordinance, or by any unlawful Combination, or Monopoly. For that as Trade and Commerce highly promote the Interest of all Nations, by supplying the unkindness of the Soil, which is not every where alike fertile, and by making those Fruits seem to be born in all Places of the World, which are to be found in any one^a: So it cannot be less than Inhumanity to deny any *Son of the Earth* the use of those good Things, which our common Mother affords for our Support; provided our peculiar Right and Propriety be not injured by such a Favour. And therefore the *Megarensians* (in *Plutarch*) when the *Athenians* had forbidden them entrance to all their Ports and Mart-Towns, complain'd that this was done *παρά τὴ νόμῳ Διῶνα*, *contrary to the Law of Nations*.

But this Assertion will admit of many Restrictions. For we do not seem in Duty obliged to communicate to others such Goods, as belong not to the Necessities, but to the Pleasure and the Superfluity of Life. And then, if Scarcity lies upon us, we may justly keep what we have to our selves. Could *Joseph* have discover'd that the Corn of *Egypt* was not sufficient to support the Natives, under the seven Years Famine, he might with good Reason have forbid the Exportation of it to Foreigners^b. So the *Athenians* once decreed it to be capital for any Subject of that State, to carry Corn for Sale any where but to *Athens*^c. Besides, we may fairly exclude others from trafficking with us for things not absolutely needful for the Support of Life, when by such a Permission our own Country would lose a considerable Advantage, or sustain (though by indirect Consequence) some notable Evil. For Example, one Kingdom, suppose, produces admirable Horses; what should hinder the Government there from passing an Act to prohibit the carrying into foreign Parts, any that are fit for breed? For should the fine Strain grow common, the Country would lose its greatest Profit, and its greatest Ornament. And this beautiful Race is affected abroad, not for necessary Use, but for Pomp and Pride, for Elegance and Ease^d. In one of the old *Roman* Constitutions it is made capital to carry Wine, Oil, or Arms to the barbarous Nations. They thought the Prohibition about the Wine and Oil no less necessary, than the other about the Weapons, fearing lest the *Barbarians* by tasting such generous Productions of the Empire, should endeavour to make themselves Masters of so rich a Soil. And we find in *Livy*^e, that when *Aruns* of *Clusium* invited the *Gauls* into *Italy*, he made them a Present of *Italian* Wines, as the Encouragement and the Reward of their Expedition^f.

Lastly, there lies no Restraint on a State, why, in reference to the Exportation of Goods, it should

not favour its own Subjects more than Strangers; as by demanding less *Custom* of the former, than of the latter, or by giving them the Right of *first Purchase*.

XII. Though, as has been shewn, we are oblig'd in many Cases to sell, yet as *Grotius*^g observes, no Law ties us to a necessity of buying. In as much as every Man is naturally free to accept, or to refuse what Purchase he pleases; and no one has just Reason to complain, because another is content to want somewhat which he could supply him with. And therefore we find it forbidden in many Places, as well antient as modern, to import some particular Commodities: either lest any Damage should by this Means arise to the State; or to excite the Industry of our own Subjects; or to hinder our Money from passing into foreign Hands.

Therefore the *Spanish* Casuist, lately mention'd, is widely mistaken, when he asserts, that by the *Law of Nations*, every one has a Right of trading into foreign Parts, of importing what the People there want, and of exporting Gold, Silver, and other Goods in which they abound. For supposing I declare myself well satisfied with what I possess of my own, with what Face can another force his Things upon me, whether I will, or no?

When the contrary is enacted, for Example, when in some Places, every Householder is obliged to buy yearly such a Quantity of Salt, this arises from the Power of Princes over their Subjects, and that Necessity of buying is a kind of Tax or Tribute. Thus too a Ruler may enjoin his People, that if they want such a particular Commodity, they shall buy it only of such a Person. Which kind of Laws are very just, when they promote the Interest of the Commonwealth. In the same manner we find it often commanded by Authority, that the Subject do immediately buy up Corn and other Necessaries, even in remote Parts, when there is danger of a Scarcity (especially upon Apprehension of a Siege) or to bring down Provisions to a more reasonable Price amongst us. But that I should go about to compel a Man, over whom I have no Power, to the purchase of my Commodities, this is what no Reason will justify, or excuse^h. For upon what Pretence can I assume such Authority over the Purse of another, who is not my Subject, as to prescribe the Matter, and the Measure of his Expences, and to teach him how he should provide for his Necessities, or for his Pleasures? And though my Gain be in the mean time hinder'd, or lessen'd, yet this Consideration can by no means abridge the other Party of his natural Liberty. Or, if I would have him thus contribute to my Advantage, I ought to encourage him by mutual good Offices, and render myself worthy of the Favour. But if a Man being

^a See the Discourse of Mr. *Thomasius*, entitl'd, *De pretio affectionis in res fungibiles non cadente*, c. 2. §. 1, 2, 5.

^b *Liban. Orat.* 3. God hath not enriched every Place with all his Blessings; but hath divided his Gifts according to the difference of Countries, that he might incline Men to Society, by the want of mutual Assistance; and he discover'd to Men the way of Trading, that what was the Product of any particular Soil, might by this Means be enjoy'd in common by the whole World.

^c *Quintil. Declam.* 12. Whilst we were selling to the neighbouring Nations, and urged on by the hopes of ready Gain, we neglected a due Regard to the publick Safety; and having emptied our Stores abroad, brought a Famine upon our selves at home.

^d *Lycurg. Orat. contra Leocrat.* ^e In *Livy* (l. 43. c. 5.) Upon the Request of the *Gallick* Ambassadors, it was order'd, that they should have the liberty of buying Ten Horses, and of carrying them out of *Italy*. L. 5. c. 33. ^f *Add. Numb.* 13. 24. ^g *Judith* 10. 20. ^h L. 2. c. 2. §. 20. *Plato de L. L.* 8. Let no Man import Frankincense, nor other foreign Things used in Sacrifices, nor Purple, nor any Colours which are produced at home; nor in short, any Commodity, but such as is absolutely necessary; and on the other side, let no Man export what is of necessary use in our own Country. *Casar de B. G.* l. 2. reports of the *Nervii*, that they allow no Entrance to Merchants, suffer no Wine or any other Incitement to Luxury to be imported; imagining that the use of these Delicacies must needs weaken Mens Minds, and unbend the stiffness of their Courage. The same Author tells us of the *Suevi*, that if Beasts be brought from other Parts for their Assistance, they refuse to make use of them; and as for Wines they absolutely forbid the Importation of them, being of Opinion, that those Liquors soften and effeminate the Spirits of Men, and render them unfit for laborious Employments.

stock'd with such particular Commodities, offers to vend his *Abundance*, where-ever he can find Chapmen, it would, in this Case, be most inhuman, and unjust to hinder him from thus furnishing himself with other things, which he *wants* for the necessary Occasions of Life ^a.

XIII. Another Duty of the same Rank, is the giving Licence to Men of other Nations, especially if seated in our Neighbourhood, to solicit, and contract Matrimony with our Subjects, when they are at a Loss for Women amongst themselves ¹. As for Instance, if a People compos'd only of *Men*, either being expell'd their own Country, or upon some other necessary Account, are fix'd near us, and design to form a new State. For to live without the Assistance of the other Sex, is what the Frame and Temper of few Men can bear. Celibacy in a healthy Constitution is the Gift only of excellent Souls; and to seek other Satisfaction in this Case, than Nature advises or allows, would be foul and brutal. Besides, as *Florus* observes, *Res tantum unius ætatis est populus virorum* ², A State made up of one Sex, *viz.* Men, can last but one Age. Upon this Principle many are willing to defend, or at least to excuse, the famous Exploit of *Romulus*, the Rape of the *Sabine* Women. Authors indeed are divided about the Reason and the Manner of this Proceeding. *Dionysius Halicarnassens* reports, that the main design of *Romulus* was to obtain the Friendship, and Alliance of the neighbouring Nations, by joining with them in Marriage; and that, though he began this Project in an injurious Way, yet he imagin'd that in time this ill Beginning would produce a good Conclusion, and that a fair Correspondence and Familiarity would be establish'd, so soon as they should have clear'd themselves to the new Brides, by the Plea of Love, and to the Fathers and Relations by urging that the *Stratagem* was set on Foot, not out of Affront and Abuse, but as a necessary Relief to a desperate Condition. Yet it must be confess'd, this seems a very preposterous way of gaining Friendship. See *Tacit.* An. l. I. c. 55. What he reports of *Segestes*, that when *Arminius* had stolen his Daughter against his Consent, *Gener in-visus*, &c. The Names of Son-in-Law, and Father-in-Law, which when there is a mutual Consent of Parties used to be a Band of Love and Endearment, prove now the Seed of Hatred, and the Incitement to mortal Discord.

Others pretend, that *Romulus* by this Attempt only sought an Occasion of quarreling with his Neighbours, which seems very improbable. The common Defence of the Fact is to alledge the want of Women, and so to have Recourse to Necessity; but then Authors take care to tell us, that Commissioners were first sent about to treat with the People on the Affair, and to beg that they would not think it hard to let Men like themselves mix with them

in Race and Blood; and that when these Agents were dismiss'd after a reproachful manner, it was then at last thought proper to gain Relief, by the joint Application of Cunning and of Force. And what makes the thing still carry a better Force, is, That this way of *catching Wives* was in those Times, not only a common, but a laudable Practice; *Dionysius* calls it, *An Antient and a Grecian Custom, and the most renowned Method of obtaining Maids in Marriage.* L. 2. c. 30. Add *Judges XXI. 22.* It is true, Violence can seldom be necessary in this Case, since it is never difficult to find Women enough, who shall be ready, of their own accords to accept of any Husbands that are not abominably vile and scandalous.

To reject those who seek our Alliance by such Proposals, would be very hard Dealing. And tho' the denying of a Woman for a Wife be not, *in it self*, a just Cause of commencing a War, yet is it, if the Refusal were accompanied with Reproach. As the Inhabitants of *Rhegium*, when *Dionysius* of *Sicily* sent to desire a Wife amongst them, returned in answer, That they would grant him none but the Daughter of their common Executioner. See *Diodor. Sic.* l. xiv. c. 108. & *Strab.* l. vi. a like Instance is to be met with in *Paulus Venetus*, l. I. c. 52. On the other hand, should a Prince, by Virtue of his sovereign Authority, compel the Women of his Country to accept of such Husbands as have nothing in them to deserve Affection, this would look like Inhumanity; especially in Case the Fortunes and Conditions of the Parties were unequal. The Speech of *Canuleius* in *Livy*, where in the Name of the Populacy ³, he intreats the Senate, that they would allow them the Privilege of Marriage, a Favour granted to Foreigners, and to Neighbour Nations; and that they would not exclude them from the Number of Mankind, does not belong to the Question before us, although produced as an Instance by *Grotius*. For the *Plebeians* did not then feel a Scarcity of Women, but the Aim and Design of this Petition was to raise themselves to an equal Pitch with the *Nobility*, by Means of marrying into *Patrician* Families. Otherwise, when Women are plenty, there is no occasion of winning a Bride by main Force of Arms: *Invenies aliam, si te hæc fastidit.* As for those civil Laws which forbid Marriage with Foreigners, or between Subjects of different Ranks, they always presuppose, that every one is able to find out a Match suitable to his Condition; and they are generally founded on such Reasons as these; that the Splendor of great Families may be preserv'd; that our Women may more easily get Husbands at home, whilst our Men are not allow'd to get Wives abroad; or that the ⁴ Riches and the Affections of our People, may not by the Means of Inter-Marriages be estrang'd from us, and settled on a foreign State.

MR. BARBEYRAC'S NOTES on §. XIII.

¹ See Mr. *Buddeus's* Discourse, entitl'd, *Jurispr. Historica Specimen*, §. 9. among his *Selecta Juris Naturæ & Gentium*.

² *Res erat unius ætatis, populus virorum.* Flor. l. c. 1. numb. 10.

³ *Canuleius's* Words are, *Connubium petimus, quod finitimis, externisque dari solet. — ut hominum — numerosimus.* Liv. Dec. 1. Lib. 4. c. 3.

⁴ This Clause in Mr. *Hertius's* Edition, with his Notes, is thus rendered, *Ne opes aut effectus nostrorum in alias Civitates per Connubia transferantur*; whereas other Editions have it, as it ought to be, *affectus*. This renders it credible, that 'tis not a Fault in the Impression, but as *Hertius* remarks, by way of Supplement, a thing contained in the Author's Expression. For fear (says he) a Citizen in respect to the Alliance and Riches of some powerful Stranger, should exalt himself above others, or on the contrary, for fear a powerful Stranger should make use of his Alliance to a Citizen to become a Master of the State. For so *Aristotle* observed, that *Dionysius* the younger, having married a Woman of *Locris*, found a way by means of that Alliance to possess himself of the Government of that Republick, *Polit.* l. 5. c. 7. But all this is not comprehended in the Word *affectus*, of which Mr. *Pufendorf* speaks.

^a Add *Bœcler. in loc. citat. Grot.*

XIV. Lastly, *Grotius* adds, that any Right common to all, and consequently an Obligation to a Duty to be perform'd towards all, arises from this *Supposition*, that we grant such an Indulgence promiscuously to every Stranger; because then, if any one be excluded from the Privilege, he is manifestly *injur'd*. For it is an Affront and Reproach to debar a Man, without particular Reason, from a common Advantage; this being to make him unequal and inferior to others. Hence *Grotius* concludes, that if it be in any Place permitted to Strangers, to hunt, to fish, to hawk, to gather Pearls, to receive Legacies, to sell Goods, to contract Marriages (even without being compell'd to it by scarcity of Women) no Nation can be deny'd the same Liberties, except they have forfeited them by their own Default. But this Assertion will scarce hold. For the Concessions here spoken of must be made either *expressly*, or *tacitly*. When we grant a Thing *expressly* to another, we do it either *precariously*, or in the manner of a *Pact*, or *perfect Promise*. Now that any one should give a *perfect* Right over a Thing of his (not due by the Law of Nature) to all Nations, known and unknown, without Limit or Restraint, is a Case which I believe never did, and never will happen. For every one is desirous to know at least, on whom he bestows his Benefit, and in what Measure. But when a Man either by *Pact*, or *free Favour*, has granted such a particular Privilege to all that come under his Friendship or Acquaintance, for a meer Stranger to pretend a Right to the same Indulgence, would be very impudent and very wicked. As for those Things which we permit *tacitly*, or as it were overlook, they are reckon'd of Course to be of the same Nature with precarious Favours; and such may be fairly revoked, either upon the Change of our Affairs and Circumstances, or because the Persons who enjoy'd them did not make so prudent and modest a Use of them, as they ought. *Bæcler. ad Grot.*

XV. What we have hitherto touch'd on, are but vulgar Degrees of *Humanity*, the Omission of which implies a most base and abject Temper of Mind. A much higher, and more illustrious Strain of the same Duty, is when a Man out of pure Benevolence and Inclination, arising either from a native Generousness of Soul, or from Pity and Compassion to a Person in distress, is at some Pains or Charge in bestowing freely on another, what may relieve his Necessity, or procure his Advantage. Kindnesses of this noble Rank are by way of Eminence stiled *Benefits*; the Manner and Measure of dispensing which are commonly to be adjust'd with regard to the Condition of the *Given*, and of the *Receiver*. And these are the Things which open to Mankind the largest Field of doing good, and of acquiring Glory, if they are temper'd and regulated by true Prudence and Greatness of Mind. For to throw about Favours without Reason and Judgment,

ought, as *Pliny*¹ observes, to be call'd Ambition or Ostentation, or any thing rather than Liberality. Wise Men have made it their chief Business to prescribe Rules for the guiding and perfecting of these Obligations: And the antient Books of Morality are not on any Subject more copious; or more clear.² *Tull. Off. l. c. 14. Beneficentia, qua nihil est naturæ humane accommodatius, multas habet cautiones, &c.* The Duties of Liberality or Bounty, than which there is nothing more agreeable to the Nature of Man, fall under many Limitations³. For in the first place it should be our Care to see that our Bounty prove not a Prejudice, either to the Person we would oblige, or to any other Body; and then that we do not give above our own Ability, nor above the Merit of the Receiver. As to this last Point, we are principally to regard those, to whom we ourselves already stand obliged, and then others, as they have more or less need of our Assistance. We are likewise to consider the several Degrees, by which we stand related in the World. Of these the first and most extensive, is the universal Society of Mankind. Nearer than this is the Alliance between Persons of the same Nation, of the same Province; of the same Language, of the same City. There is yet a nearer Tye of Kindred. And here the first Society is in Wedlock, the next in Children; the Relation of Brothers comes afterwards, and then of Brothers and Sisters, Children and Men, the Matches and Alliances between different Families. But the most excellent and strongest of all Alliances is, when good and virtuous Men join in familiarity upon account of the Agreement of their Manners.

Idem de Finib. l. v. c. 23. In omni honesto, &c. In all the Compass of Honesty there is nothing so illustrious, or of so great a Latitude, as the Conjunction and Society of Men with Men, including a mutual Communication of Conveniences, and general Love for Mankind. This Dearness begins immediately upon one's Birth, when the Child is most affectionately beloved by the Parent; from the Family, it by degrees steals abroad into Affinities, Friendships, Neighbourhoods; then amongst Members of the same State, and amongst States themselves, united in Interests and Confederacies; and at length stretcheth itself to the whole Extent of human Race. In the Exercise of all these Duties, we are farther to observe what every Man hath most need of, and what with our Help he may, what without our Help he cannot attain; so that in some Cases the Tye of Relation must yield to the Point of Time; and some Offices there are which we would rather pay to one Relation than to another. Thus you ought sooner to help a Neighbour in with his Harvest, than either Brother, or a familiar Acquaintance; but on the other side, in a Suit at Law, you ought to defend your Brother, or your Friend, before your Neighbour. See Seneca's Treatise of Benefits, which it would be tedious here to abridge. Plutarch (in Sympof.) tells us 'twas a Rule amongst the Pythagoreans, not to take a Burthen from their

MR. BARBEYRAC'S NOTES on §. XV.

¹ *Ambitio enim, & jactantia, & effusio, & quidvis potius, quam liberalitas existimanda est, cui ratio non constat.* Plin. Paneg: chap. 38. numb. 4.

² See the Commentators upon these and several other Passages, where Tully treats of Beneficence. See *Marc. Antonin. Lib. 5. c. 6.* with *Gataker's* Notes, and *Pliny* the younger, *Lib. 9. c. 30.* But above all, I must commend to your reading a little Book, wherein Mr. *Le Clerc* gives a fine Description of Liberality, and wherein he shews excellently well the false Notions which Men ordinarily have of that Virtue. 'Tis the 12th Chapter of his Book, which he entitles, *Reflections upon our good or ill Luck, as we commonly call it, in the Business of Lotteries.* A Work printed at Amsterdam in 1696.

³ Under the Notion of Beneficence we may comprehend all the Services we do to others in averting the Dangers they are threaten'd withal. 'Twas a Precept of the antient Gymnosophists, as appears from a Saying of *Charicles* in *Heliandus*, which our Author cites above, *Οὐδὲ γὰρ ἄν μοι δευρὸν ἐν κινδύνῳ ἄρχω δὲ τῆς ἐνανθρωπισσαυαν περιεὶν. ἐν γὰρ τῷ τῷ παρῆντι ἐν τῷ γυμνῶν περὶ ἡμῶν σωθῆναι.* We must not leave any Soul that is enter'd into an human Body in danger, as the Gymnosophists instruct us, *Lib. 2. c. 6.*

Fellow, but to help him to bear it; and this they did to exclude all Idleness and Ease. Tho' S. Paul could have taught them a better Reason, 2 Cor. viii. 13. *Not that other Men be eased, and you burthen'd, but by an Equality, &c.*

Add *Ambros. Offic. l. i. c. 30.* and from him *Gratian Dist. lxxvi. c. 14, &c. & Caus. i. Quest. 2. Chap. 6, 7.* *Socrates in Xenophon (Ἀπομν.)* lays down this as a Rule in our Assistances, to our Friends or to Strangers, and in almost all the Concerns of Life, *To do according to our Ability*⁴.

XVI. The Virtue answering to *Benevolence* in the Giver, is *Gratitude* in the Receiver, by which he demonstrates, that the Kindness was acceptable to him, and upon this score entertains a hearty Respect for the Author of it, seeking all Occasions of making a Requit, as far as his Abilities will give him leave. For it is by no means absolutely necessary, that our Return should be precisely as much in Value, as the Courtesy amounts to; but good Will and earnest Endeavour are frequently allow'd to satisfy an Obligation. *Ovid. de Ponto l. iv. El. 8. ver. 37.*

*Sed qui, quam potuit, dat maxima, gratus abunde est;
Et finem pietas contigit illa suum.*

He that repays to his Extent of Power,
Were not more grateful with the noblest Store.

The Reason of this Duty ceases, when ever we have a just Exception against the Donor, and are fully assur'd, that his Bounty was more in Pretence than in good Will⁵. But here wise Men give us an excellent Caution, that we should not be too curious in enquiring upon what Grounds and Motives a Man has been our Benefactor; because this Niceness of Examination will ever afford a Plea, and a Colour to *Ingratitude*.

The more apt in their own Nature Benefits are to unite and to engage the Minds of Men, the more strictly does Reason enjoin us to apply ourselves with Vigor and Industry to a just Requit. When a Man has express'd so much Dependence upon me, as to confer the *prior* Obligation, I am bound at least not to suffer him to be the worse for his Kindness, and I ought never to receive a good Turn, but with a Resolution to hinder the Author, if possible, from repenting of what he has done. If upon some particular Reason we are unwilling to be oblig'd to a certain

Person, in this Case it is lawful for us to refuse the Benefits he offers. But then great Care must be taken to do this without giving the least Suspicion of Contempt; since otherwise, to reject a voluntary Favour³, carries in it a manifest Affront.

Take away the Necessity of *returning* Kindnesses, and no Man will ever begin them; for then it would plainly be acting against Reason, to part with our Bounty, whilst we know it would be thrown away. And thus all *Benevolence*, all mutual Trust and good Will must be banish'd out of the World; there must be no such Thing as free Help, or antecedent Merit, no way of endearing and engaging one Man to another. *Comp. Hobbes de Cive, c. iii. f. 8. Aristot. ad Nicom. l. ix. c. 2*⁴. It will hold good for the most part, that we are rather to return a Benefit, than to serve a Friend in the way of *Gratuity*; as we ought likewise rather to pay a Debt, than give away our Money to our dearest Confident. In general, what we owe of any kind is first to be made good; yet if a free Gift to another Person would at the same time plead more Honesty, and more Necessity, it is then to have the Preference in our Disposal. Add *Socrates*, his Discourse of brotherly Love, in *Xenophon. Ἀπομν. 2.* ⁵ *Tully* is admirable on this Point of *Gratitude*: *It is*, says he, *of all Duties, the most indispensibly necessary. If Hesiod bids us restore what we borrow, if we can, in a larger Measure; what ought we to do when we are as it were challeng'd by a prior Obligation? Are we not in this Case to imitate fruitful Fields, that still return more than they receiv'd? For if we make no Scruple to oblige those whom we hope to be the better for hereafter, how then should we behave ourselves towards such as we are the better for already? Since there are two sorts of Liberality, the one of bestowing a Benefit, the other of returning it; it is at our Choice whether we will give or no; but an honest Man is not at Liberty in the Point of returning, provided it can be done without Injury.*

It is observable, that *Cicero* here makes *Gratitude* a part of *Liberality*, and consequently, hints, that it is not tyed up to Laws altogether so strict as those of *Justice*, which commands us to repay what we owe upon Contract most punctually and precisely⁶. It may be remark'd farther, that when he says the former kind of Liberality, the *bestowing* of Benefits, *is in our Choice*, he ought not to be understood in an absolute Sense; for it is plain we

⁴ To these rare Passages of the Antients, we may add a small Sentence taken out of our Author himself in his Abridgment of the Duties of a Man and Citizen, *l. i. c. 8. §. 5.* The manner of exercising Benevolence and Liberality much enhances the Value of Benefits, as when a Man does a good Office with an Air of Cheerfulness and Briskness, and with all the Signs of a good Will.

MR. BARBEYRAC'S NOTES on §. XVI.

¹ 'Tis a Maxim of the Scholars of Zoroastres, *Præceptum est, ut si aliquis beneficium facit alteri, tum alteri incumbit illud eadem quantitate rependere, quantum poterit.* In *Sadder. Porta. 95.* We are commanded, that if any does a Benefit to another, that other is oblig'd to do the like, if he be able.

² As for example, If a Man keeps me from drowning, I have no manner of Obligation to him, if he threw me into the Water; as our Author speaks in his Abridgment of the Duties of a Man and Citizen, *Lib. i. c. 8. §. 6.* See *Seneca de Benef. l. 6. c. 26.*

³ Our Author in his last Editions interrupts the Thred of his Reasonings with this Remark, That when one refuses a Benefit, we should take care that we give no Suspicion of Contempt to him who civilly offers us his Service, otherwise such a Refusal is a kind of Injury.

⁴ *Aristotle* maintains, that as it is a greater Duty to restore what one has borrowed, than to lend to a Friend; so it is ordinarily to make an Acknowledgment of a Kindness, than to do one to a Friend; at least there is a greater Reason drawn from Honesty and Necessity to engage us to the Duties of Gratitude, than Friendship, according to the Passage our Author quotes out of *Aristotle*, *Καὶ τὰς μὲν εὐεργεσίας ἀντιποδοτέον ἐπὶ τὸ πολὺ μᾶλλον, ἢ χάριστον ἐπιτέλει, ὡς πρὸς δάνειον, ὃ ὀφείλει ἀποδοτέον μᾶλλον, ἢ ἑταίρου δωτέον* — ἐὰν δὲ ὑπερτείνῃ ἢ δόξῃ τὸ καλῶς, ἢ τὸ ἀναγκαίως, πρὸς ταῦτ' ἀπικλιτέον.

⁵ His Words in the *Latin* are, *Nullum enim officium referenda gratia magis necessarium est. Quod si ea, quæ utenda acceperis majore mensura, si modo possis, jubet reddere Hesiodus, quidnam beneficio provocati facere debemus? An imitari agros fertiles, qui nullis plus offerunt, quam acceperunt? Etenim si in eos quos speramus nobis profuturos, non dabitamus officia conferre, quales in eos esse debemus, qui jam profuerunt? Nam cum duo genera Liberalitatis sunt, unum dandi beneficii, alterum reddendi, decus, necne, in postera potestate est; non reddere viro bono non licet, modo id facere possit sine injuria.* *De Offic. l. i. c. 15.*

⁶ *Vid. Ambrosie de Offic. l. i. c. 31. Gell. l. i. c. 4.*

are under some Obligation even to antecedent Beneficence; but the Point is, that this Obligation does not carry so much Strictness in it, as that which binds a Man to Gratitude; or to endeavour the approving himself by all good Will, and good Service to his Benefactors.

It happens, 'tis true, very frequently that in the doing a Kindness there is more true Love on the Part of the Giver, than of the Receiver. The Reason of this is enquired into, by Aristotle in his *Ethicks*, Book ix. c. 7. There being too much Ground in fact, for that politick Remark of Tacitus, *Beneficia eo usque laeta sunt, dum videntur exsolvi posse; ubi multum antevenero, pro gratia odium redditur*, An. iv. 8. Add Hobbes *Leviathan*, c. 11, &c. Where he tells us, that the receiving great Benefits from a Superior inclines to Love, but the receiving of the like from Equals or Inferiors does not, unless there is Hope of being able to requite them. "Good Turns do so far yield an agreeable Satisfaction, as we fancy ourselves able to repay them; when they much exceed this Measure, the Debt grows desperate, and so produces a sullen and a secret Hatred, instead of a real Kindness and Affection.

XVII. But tho' the bare Notion of Ingratitude does not imply a real Injury, inasmuch as it is not the Violation of any full and perfect Right, yet it passes in common Censure for a Vice more foul, more odious, and detestable, than Injustice itself. For it is look'd on as an Argument of a most abject and degenerate Soul, for a Man to declare himself unworthy of the fair Opinion which another entertain'd of his Honesty, to be proof against Benefits, and consequently past all Sense of Humanity.

The Account which Des Cartes (in his *Discourse of the Passions*, Artic. 194.) gives of Ingratitude, is very rational and very elegant. "It is the Vice, says he, of Men, who are either madly proud and vain, and so imagine every Thing to be due to their Merit; or else senselessly stupid, and so unable to reflect on the Benefits they receive; or lastly, pitifully weak and abject, who sue with the meanest Submission for the Af-

sistance of others; which if they chance to obtain, they immediately hate the Persons to whom they have been oblig'd, because either wanting Will to make requital, or despairing of Ability, and at the same time fancying all the World to be mercenary, and that no good Turn is done without hopes of Retribution; they apprehend themselves to have exceedingly baulk'd and disappointed their Benefactors."

Learned Men have disputed, whether or no there ought to lie an Action against this Vice, in Courts of Civil Judicature. Seneca takes the negative Side of the Question, and the Reasons he proceeds upon are chiefly these; "First, That if a Benefit be strictly to be repaid like a Sum of Money, or as if it were let out to him, it then loses the Name of a Kindness, and becomes a Loan or Debt: Secondly, That whereas the requiting of a good Turn is esteem'd an Act highly virtuous, it must cease to be virtuous, were it once made necessary: Thirdly, That there must needs arise more Causes on this Head, than all the Courts in the World would be sufficient to try, Themist. Orat. iii." By the Persian Constitution, there is a settled Penalty decreed against Ingratitude; as being the readiest Incentive to Hatred, and ill Will. And where this Vice is not punishable by Law, it produceth more desperate Enmity, and more fatal Contention. Add Xenophon *Cyrop.* l. i. And *M. Antonin.* l. ix. c. 42. & *Val. Max.* l. ii. c. 6. f. 6, 7. & l. v. c. 3. f. 5. To these Instances and Arguments, other Authors have answer'd at large. See Bacler's *Actio Ingrati*. Our Design leads us no farther, than to observe, that from every Transgression of the Law of Nature it does not presently follow, that there must lie an Action (or the Resemblance of an Action) against a Man in Nature's Court. This is certain, that the Divine Justice hath reserv'd severe Punishments to be inflict'd on ungrateful Persons in another Life; and in this present World they ought to suffer the Hatred and Detestation of all Mankind, and to be adjudg'd unworthy of the least Benefit or Favour. But why a Man cannot be sued in an Action, at the Civil Bar, for simple Ingratitude,

MR. BARBEYRAC'S NOTES on §. XVII.

¹ The Reason that Tully gives of the evil Eye of Ingratitude is this: *Omnes immemorem beneficium oderunt, eamque injuriam in deterrenda Liberalitate sibi etiam fieri, eamque qui faciat, communem hostem tenuiorum putant*, (i. e.) The Ungrateful is hated by all the World, for their Proceedings discourage them who are inclined to Liberality, which is an Injury which every Man shares in; inasmuch that the ungrateful Man is accounted the common Enemy of all those who need Help from powerful Persons. *Cicero. De Offic.* l. 2. c. 18.

² Οὐ γὰρ τὸ χρησθῆναι ἐκ ἐπίουσιον ἡμεῶν
Τί δ' ἂν δέξασθαι ἄλλο ἢ πάντων πότε;

If Benefits will not affect the Mind,
There's nothing in the World will make us kind.

Greg. Nazianz.

Lucian also speaks to the same purpose, as in (a). See also the Reflections which Mr. De Evremont makes upon ungrateful Persons, *Tom.* III. p. 79. and in his *Miscellanies*. Printed at Amsterdam 1706.

³ This was practis'd heretofore not only among the Persians (as appears from Xenophon *Cyropæd.* Lib. 1. p. 3. *Ælian. Hist. Animal.* l. 8. c. 3. & Themistius *Orat.* 22. *De Amicitia*) but also among the Athenians. For Valerius Maximus says, *In qua urbe (Athenis) adversus ingratos actio constituta est*. Lib. 5. c. 3. §. 3. *extern.* See also Lib. 2. c. 6. §. 6. & Petit. *de Legib. Athen.* Lib. 2. Tit. 6, & Lib. 7. Tit. 8. which Passages Mr. Bayle did not remember, when he said, in his *Thoughts about a Comet*, That none but the Medes have made any Laws against ungrateful Persons, for which he quotes Xenophon and Seneca *De Beneficiis*, Lib. 3. c. 6. in which last the Editions read *Macedonum* for *Medorum*; about which, see Muret. *Var. Lect.* Lib. 12. c. 3. See also *Brisson. De Regn. Persarum*, Lib. 2. p. 198, 199.

⁴ Seneca's Words are these, *Primum omnium, pars optima beneficium perit, si actio, sicut certæ pecuniæ, aut ex conducto, aut locato datur. Deinde, cum res honestissima sit referre gratiam, desinit esse honesta, si necessaria est. Adjice nunc, quod huic uni legi omnia fora vix sufficient.* *De Benef.* Lib. 3. c. 7.

⁵ In fine, Besides, that there is hardly any Man but complains, that he has been ungratefully dealt with, it is very hard to weigh exactly the Circumstances which increase or lessen the Value of any Benefit. See what Seneca says of this

⁶ Lucian in *Antholog.* Φαῦλα ὄνθη, &c.

A thankless Wretch is like a broken Sieve,
Lets out, and loses faster than you give.

Add Pheraula's Judgment concerning the Nature of Man in Xenophon *Cyropæd.* 8.

^b Sophocles *Ajace*.

A Favour should be treasured in the Soul,
And made the Mother of a kind Return.

A Wretch that stifles Benefits bestow'd
Scarcely deserves the generous Name of Man

^c *De Benef.* l. 3. c. 6, &c.

that is, forgetting a good Turn, or for neglecting to requite it, when he had Opportunity, there seems to be this plain Reason; that the very Cause of my conferring the Kindness (that is, of my giving somewhat without taking Security for its return) was to afford the Party an Opportunity of shewing himself grateful out of pure Honesty, not out of fear of Compulsion; and on my own part to demonstrate that what I bestow'd was not done out of a fordid Desire of Gain, but out of Humanity and good Nature, since I required no *Caution*, or Insurance of being repaid. *Antoninus*⁶ will teach us better *Philosophy*. *When thou accusest a Man* (says he) *of Falseness or Unthankfulness; turn the Censure upon thyself. For the Fault is without doubt thine; that thou didst not confer the Favour*

freely and undesignedly, without looking for any farther Fruit, than the Action itself. Is it not sufficient Satisfaction to have relieved and assisted one that is a Man as thou art? Dost thou demand a Reward for doing what thy Nature obliges thee to do?

But when a Man is guilty of *mix'd Ingratitude*, or when he not only neglects to requite a Courtesy, but answers it with Injuries and Abuses; the Injury thus offer'd founds an *Action in Nature's Court*, or a *Cause of War*; and its being accompany'd with an ungrateful Mind, as it highly aggravates the Fact, and renders it more vile and odious, so it engages the Sufferer more speedily to seek redress; and to punish the Villain the more severely, in regard, that Benefits themselves could not reclaim him⁷.

⁶ Όταν (says Antoninus in the Greek) ως απίσω ή άχρείσω μέμφοι, εις έαυτὸν επιστρέφει, προσήλως γὰρ σὸν τὸ άμαρτία, είτε πει τὸ ποιούτω τὴν διάδοσιν έχρησθί επισείουσαι, ὅπ τὴν πίσιν φυλάξει, είτε τὴν χάριν διδῶς, μὴ καταληκτικῶς ἔδωκας, μηδὲ ὡσεῖς ἐξ αὐτῆς σῆς προσέξως ἐυδὲς ἀπειληθῆναι πάντα ἢ καρπὸν. Τί γὰρ πλεόν θέλεις, ἐν πόμοις ἀνθρώπων; ἢ ἀρκεί σοι; κατὰ φύσιν τὴν σὸν πῖ ἔπρεξας; τῆτε μὲδου ζῆτείς; ὡς εἰ ὁ ὀφθαλμὸς ἀμοιβὴν ἀπείλει, ὅπ βλάπτειν, ἢ οἱ πόδες, ὅπ βαλῆζεν ὡσπερ γὰρ ταῦτε πρὸς τὸδε π γέρονεν, ἀπερ κατὰ τὴν ἰδίαν κλάσκακων ἐνεργῆσα ἀπέχει τὸ ἰδίον, ἄπως ἢ ὁ ἀνθρώπῳ ἐνεργῆσκῳ πέφυκῶς, ὁ πόταν π ἐνεργῆσκῳ, ἢ άλλως εἰς τὰ μέσα συνεργῆσκον πρεξῆ, π τίνκι πρὸς ἀκαλασκέας α, ἢ ἔχει τὸ ἐκτῆ, Lib.9. §.42.

⁷ How far the Necessity of returning a Benefit is taken off by a subsequent Injury, *Seneca* teacheth us, *De Benef.* l. 6. c. 4, 5. & *Epist.* 81.

CHAPTER IV.

Of the Duty of keeping Faith, and the Diversity of Obligations to it.

The CONTENTS of every Paragraph of the fourth Chapter.

- I. There must be Covenants and Agreements in all human Societies.
- II. Covenants are to be kept.
- III. Obligations are natural, or adventitious.
- IV. Atheism destroys all natural Obligations.
- V. A natural, or civil Obligation.
- VI. What is the Force of each of them.
- VII. A perpetual and temporary Obligation.
- VIII. Obligations not mutual.
- IX. Obligations perfectly, or imperfectly, mutual.

THE Duties hitherto explain'd, are mutually owing upon account of that common Relation, which *Nature* has establish'd amongst Men; altho' we suppose no antecedent Act to have pass'd between them¹. But it would be unreasonable to confine within these narrow Limits, all the Offices that Men are to exercise towards each other. For in the first place, all are not of so good and honest Dispositions, as to perform every Thing, whereby they can benefit their Neighbours, out of pure Humanity and Charity; without being secure of Retribution. And then, many Things which we should be glad to receive from others, are of such Value and Consequence, that we cannot in Modesty desire them *gratis*. Or perhaps it does not become our Fortune or Station to be beholden to another, for such a Benefit. Therefore unless an *Equivalent* be paid, commonly the other Party is unwilling to give, and frequently we are unwilling to receive. Again, others are many times ignorant, how they might serve and oblige us. Lastly, Inasmuch as the Power of Man,

being finite, cannot in the same manner extend itself to all Persons, it is agreeable to Reason, that such Acts as are not already *bespoken* by an antecedent Obligation lying on us, should be made sure to those, who by entering into Covenant with us, first obtain a Right to receive them². Therefore, that the true Fruits of a social Nature, the mutual Offices of Mankind, might be practis'd with more Frequency, and more Regularity, it was necessary for Men to bargain, and agree amongst themselves, that they would perform to each other such and such Services, as they could not be absolutely secure of by the bare Law of Humanity. So that their Business must be to settle before-hand what every Man ow'd to another, and what he should by virtue of his Right accept and challenge in return³.

Hence it is easy to apprehend how the Offices of Humanity, or Charity, differ from those which are requir'd by full and proper Right, and which are the Objects of strict Justice. The former are not owing upon any Covenant, either *express* or *im-*

MR. BARBEYRAC'S NOTES on Chap. IV §. I.

¹ See Chap. 1. §. 1. Note 1. foregoing, and Chap. 9. §. 8. with the Note on it.
² The Period which is placed here, and is joined to the foregoing by the word *Deniq;* finally, seems design'd for a new and the last Reason to prove the Necessity of voluntary Engagements. But, as any one may discern, that Period supposes a Necessity of such Engagements already establish'd: For it endeavours to shew the Right which an Agreement or Promise gives over the Actions of another; and so has bred Confusion in our Author's Work. This has proceeded evidently from the Negligence of our Author in inserting his Additions; for the Sentence, which causes this Disorder, is not found in the first Edition.
³ I have added the following Sentences to compleat our Author's Reasoning, as he has done himself in his Abridgment of a Man and Citizen, *Lib.* 1. c. 8. §. 2. This is what is done by Agreements or Promises: For since our Abilities are so limited, that they can't extend at the same time and in the same manner to the Necessities of all Men, Reason tells us, that he that has acquired by an Agreement or Promise any particular Right to the Actions of another, which were not before, as we may say, engaged to any other, has a Power to dispose of these Actions according to the Agreement.

plicit; but purely by force of that *common Obligation* which *Nature* has laid upon Mankind. But what I owe another upon *Pact*, or *Agreement*, I therefore owe him, because he has obtain'd a *new Right*, holding good against me by virtue of my free Promise or Consent. Farther, whatever I transact with another by way of *Covenant*, is design'd not for his Profit, but for my own. Whereas in Duties of Humanity the Case is quite otherwise. For, although the Performance of these be *in general necessary*, for the rendering the Life of Man comfortable and commodious, and consequently be an Advantage to the Performer, by giving him good Grounds to expect fair Treatment; yet with regard to *particular Acts* of Kindness, a Man does them not for his own sake, but for the sake of the Party who receives them. For a *Benefit*, if conferr'd upon a Principle of *private Interest*, loses its Nature and its Name.

Thus then the Duties of *Humanity*, or *Charity*, and those arising from *Covenant*, do afford a mutual Assistance and Supply to each other; whilst those things which *Charity* either cannot, or does not ordinarily procure, are obtain'd by *Pact*; and in Matters about which no *Pacts* have pass'd, *Charity* comes in, and serves our Turn as well. And although to fix the Subject, and the Conditions of *Covenants*, be left to the Pleasure of particular Persons; yet that there shall be some such Agreements, the Law of Nature does (indefinitely, and in general) command; in as much as without these Transactions there would be no possible Means of preserving Peace and Society in the World. So speaks *Isocrates advers. Callimach.* *So great is the Force of Leagues and Covenants, that scarce any Affairs, either of Grecians or Barbarians, are transacted in any other manner. By means of these we traffick abroad, and bargain at home. By means of these we terminate private Dissentions and publick Wars. These we all make use of, as an universal Good to be enjoy'd in common by Mankind.*

II. When Men have once engaged themselves by *Pacts*, their Nature obliges them, as sociable Crea-

tures, most religiously to observe and perform them. For were this Assurance wanting, Mankind would lose a great part of that common Advantage, which continually arises from the mutual Inter-course of *good Turns.* *Aristot. Rhet. l. I. c. 15. Take away Covenants, and you disable Men from being useful and assistant to each other.* *Tull. Off. l. II. c. 11. So great is the Force of Justice, that even those who live by Outrage and Villany, cannot subsist without some Shadow and Semblance of this Virtue.* Which he shews in the Instances of Thieves and Pirates. Farther, were not Men more strictly and necessarily tied to keeping their Promises, we could not with any Certainty build on the Assistance of others, in the ordinary Affairs of Life. And then *breach of Faith* is the aptest thing in the World to found an endless Succession of Quarrels and Complaints. For in case I have actually perform'd my part of the Contract, and the other Person fails, whatever I have *done*, or *given*, is absolutely *lost*. And if I have not as yet proceeded to any actual Performance, it is however a Trouble, and it may be a Prejudice to me, to have the Course of my Designs and Business overturn'd; since I could have settled things by other Ways and Measures, had not this Man offer'd to transact with me. And 'tis most unreasonable, that I should be expos'd to Scorn and Censure, for entertaining a kind Opinion of a Person's Goodness and Honesty. We are therefore to esteem it a most sacred Command of the Law of Nature, and what guides and governs, not only the whole Method and Order, but the whole Grace and Ornament of human Life, *that every Man keep his Faith*, or which amounts to the same, that he fulfil his Contracts, and discharge his Promises.

III. But in as much as *Pacts* or *Covenants*, those especially which are *express*, do impose an *Obligation* on us, which Nature did not before enjoin, at least not in so precise and determinate a Manner; it may not be here inconvenient to run over the principal Kinds, and Divisions of *Obligations.* *Obli-*

⁴ *Isocrates's* Greek is this, Το πάλαιον δ' ἔχουσι δόξουσι [αἱ συνθήκαι] ὡς τὰ πλεῖστα τῶ ἐόν, καὶ τοῖς Ἕλλησι, καὶ τοῖς βαρβάροις, διὰ συνθηκῶν εἶναι πάντας γὰρ πείθοντες, ὡς ἀλλήλους ἀδικούμεθα, καὶ περιζόμεθα. ὃν ἔχουσι πυγχανομῶν δεδούκει μετὰ τόπων καὶ τὰ συμβόλαια τὰ πρὸς ἡμᾶς αὐτὸς πείόμεθα, καὶ τὰς ἰδίαις ἔχουσαι, καὶ τὸς κοινὸς πολέμου διαλυόμεθα, τότε νόμο κοινῶ πάντες ἀνθρώποι διατελέμεν χρῶμεθα.

MR. BARBEYRAC'S NOTES on §. II.

¹ The Greek of *Aristotle* is this, Ὡς ἀλλήλων γιγνομένων [ἢ συνθηκῶν] ἀναρῆται ἢ πρὸς ἀλλήλους χρεῖα τῶ ἀνθρώπων.
² *Cicero's* Words are, Cujus [Justitiæ] tanta vis est, ut nec illi quidem, qui maleficio & scelere pascuntur, possint sine ulla particula Justitiæ vivere. Consult also *Plato* about this matter, in a Passage which *Grævius* quotes, and *Simplicius* upon *Epicæus*, Chap. 58. near the end.

³ We must add, Of what Condition or Religion soever he be, to whom we engage our selves for any thing. It is a Precept of the Scholars of *Zoroastres*, a sort of Men in this not so loose, and more honest, than many Christians: *Cum quocunque feceris pactum, id ne frangas.* — *Nec putes tecum dicere, Quamvis pactum fragero, id tamen non erit mihi peccatum, & sicut sit cum aliquo in Religione nostra, sive extra eam, res perinde est.* (i. e.) With whomsoever you make an Agreement, you must not break it — Nor must you say with your self, If I break my Agreement, I do not sin, whether it be made with a Person of our own Religion, or not. In *Tho. Hyde De Relig. Vet. Persarum, &c.* In *Sadler, Porta.* 28. See also the fine Thoughts of *Montaigne* upon the indispensable Necessity of keeping a Man's Word, Lib. 3. c. 9. The *Pythagoreans* to accustom themselves to keep their Words in Matters of Importance, shewed the greatest Exactness in Things of a trifling Nature. And of this they tell a pleasant Story. "One *Lyfis*, a Philosopher of that Sect coming one Day out of *Juno's* Temple, met "one of his Fellow-Disciples, named *Euryphamus*, going into it, who desired him to stay till he had payed his Devotions. "Whereupon he sets him down before the Temple; but *Euryphamus* having unhappily fallen into a deep Meditation, forgot "his Promise, and departed at another Door. Nevertheless *Lyfis*, without Discouragement, staid patiently all that Day, the "next Night, and good part of the next Day, when being in their School, and hearing some talking of *Lyfis*, as if they knew "not what was become of him, he called to mind what he had promised, and went to relieve this scrupulous Observer of his "Word. *Jambl. de Vita Pythag.* c. 30. §. 185. Ed. *Kust.* Doubtless this is an over-nice Exactness; but 'tis better to offend on this side, than to suffer ourselves to be guilty of the least Negligence.

⁴ The Author begins here to distinguish between Agreements or Contracts, and Promises, whereas in other Places he uses the Word Contract in such a general Sense, as to comprehend Promises, whereas a Promise is an Engagement made by him, who makes the Promise; and therefore to avoid all Equivocation, and not to make things obscure without Necessity, it is better, when we speak so in general, to use the Word Engagement.

² See *Dionys. Halicarn.* 1. 2. where he tells the Story of the Consecrating Faith amongst the Goddesses by *Nurra.* *Euripides* *Heracl.* ver. 890. Χρὴ ἀ-ἀδής εἶναι τίλη θρηναίς εὐμα. Truth's the best Mark of Honour and of Race.

gations then in the first place, are distinguish'd into *connate* and *adventitious* ^a. *Vid.* Sander. *de Oblig. Jur. Prælect.* I. c. 11. The former are such as all Men fall under by Virtue of their being Creatures endued with Reason, or such as necessarily attend and accompany the rational Nature, consider'd in that *simple* and general Notion. Altho', in regard that all Men are born Infants, and as yet incapable of the exercise of Reason, these Obligations do for some time lie without Act, or Force; and do then at length exert their Power, and render Men capable of contracting Guilt, when the Understanding, improving by Age and Use, makes us sensible of them. And from this Period they date their Influence, and produce their penal Effects, should a Man be never so negligent in weighing and considering their Authority. Therefore *Ignorance of the Law of Nature* is an insufficient Plea, to excuse a Person of mature Years; tho' he should urge that it never came into his Head to reflect whether this Law had settled such a Point, or not. *Adventitious* Obligations are such as fall upon Men by the Intervention of some human Deed, not without the *Consent* of the Parties, either *express*, or at least *presumptive*.

IV. Amongst *connate* Obligations, such as are planted, as it were, in our *Being*, the most eminent is that which lies on all Men with respect to Almighty God, the supream Governor of the World; by Virtue of which we are bound to adore his Majesty, and to obey his Commandments and his Laws. Whoever wholly violates and breaks through this Obligation, stands guilty of the most heinous Charge of *Atheism*; because he must at the same time deny either the Existence of God, or his Care of human Affairs. Which two Sins, with regard to their moral Consequences and Effects, are equivalent to each other; and either of them overthrows all Religion, representing it as a frightful Mockery, introduced to awe the ignorant Vulgar into some Decency and Duty ^a. Therefore we ought in Justice to discard and explode, as most foul and scandalous, that Notion of *Hobbes* ^b, in which he would rank *Atheism* amongst the Faults of Imprudence, or Ignorance; as if it were not properly *Sin*, but a *Mistake*, or *Folly*, more worthy of Pardon than of Punishment. The Argument he makes use of runs thus, *The Atheist never submitted his Will to the Will of God, in as much as he never believ'd there was such a Being. But now it is impossible any one should have a sovereign Power over us, unless he obtain'd it by our Consent. Therefore since the Atheist was never under the Kingdom of God, it follows that he is not obliged by the Laws of that Kingdom.* But here it is most grossly false, that all Sovereignty is constituted by the Consent of the Subject; for this will hold only with regard to human Dominion; where unless by our own Contract and Consent, we cannot lose the Power of resisting another, who is *by Nature our Equal*. But who will pretend to assert that GOD has not a Power of commanding his Creatures, unless they voluntarily agree to invest him with such Authority? Nay, *Hobbes* ^c has sufficiently confuted himself, by deducing the Right, which God has

of ruling and of punishing in *his Kingdom of Nature*, from his *irresistible Power*; but did any one ever imagine that an *Atheist* was able to *resist the Power of God*? And therefore *Atheists* are not, strictly speaking, God's *Enemies* (as *Hobbes* defines *Enemies*, *who are neither under a common Sovereign, nor under each other*) but his rebellious Subjects, and consequently guilty of *Treason* against the divine Majesty, as *Hobbes* himself has elsewhere ^d expressly acknowledged. And agreeably to this he defines *Treason* against human Power to be: "When one either by Word, or Deed, does in general manifest and declare, that he will no longer submit to that Man or Council of Men, in whom is lodg'd the supream Administration of the State, or when a Man wholly throws off the Bond of civil Obedience." It is no such obscure Matter therefore to assign the particular Species of *Sin*, to which *Atheism* belongs. Nor is the following Assertion built on better Grounds, *That Atheists cannot be punish'd any otherwise, than by the Right of War*; as the Poets represent the Gods, routing by force of Arms the old Giants that assaulted Heaven. On the contrary, that Evils inflict'd in *martial* Encounters are not properly *Punishments*, we shall hereafter have Opportunity to shew. A *Sovereign* must not presently be said to make use of the *Right of War*, when he reclaims his refractory Subjects. For the bare *Right of Sovereignty* includes thus much, That the Person invest'd with it shall have the Power of reducing those to Obedience by Force, who refuse a voluntary Submission. Much less are those rebellious Opposers of lawful Authority to be accounted *just Enemies*, or such as have a Right of making Resistance.

It does not excuse *Hobbes* to alledge that Passage of the *Psalmist*, *The Fool hath said in his Heart, There is no God.* As if there was any such Nicety in the Scripture Language, to call those only *Fools* who sin out of *Mistake*, and not those who offend *wilfully*: Or, as if this too were not the highest *Folly*, by a *wilful Sin* to incur the most intolerable Torments, for the sake of a very slender Pleasure, or perhaps no Pleasure at all. Again, it is by no means a matter of such Difficulty, to discover the Being of a GOD by natural Reason, as to *find out the Proportion between a Sphere and a Cylinder*; the Instance which *Hobbes* makes use of. It may not be indeed in the power of every unlearned Person to form, or to apprehend an artificial and philosophical Demonstration of God's Existence; but he cannot thence claim a Privilege of securely doubting or denying it. For in as much as the whole Race of Men in all Ages have constantly held this Persuasion, whoever would attempt to assert the contrary, must of Necessity, not only solidly confute all the Arguments produced on the other side, but also alledge better and more plausible Reasons for his own particular Opinion. And farther, since the Safety and Happiness of Mankind have been hitherto thought to depend chiefly on this Belief, it is requisite, that he likewise prove *Atheism* to contribute more to the Interest and the good of all Men, than the Acknowledgment of a Deity. Which be-

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Mr. BARBEYRAC'S NOTES on §. III.

^a *Arrian* in his Dissertation on *Epietetus*, Lib. 3. c. 2. distinguishes also between *Σχέσεις φυσικάι, & ἐπίθετοι*, Habitudes, or Relations natural and imposed.

^b *Andres.* *Offic.* l. 1. c. 26. Nothing hath more Influence in promoting an honest Life, than our Belief, That we have such a Judge of our Actions, as no Secrecy can escape, no Indecency but will displease, no good Performance but will delight. *Add Lucant.* *De Ira Dei*, c. 8. ^c *De Civ.* c. 14. f. 19. c. 15. f. 2. ^d *C.* 15. f. 5. ^e *C.* 15. f. 19

ing a Task manifestly impossible, the Atheists are to be judg'd Offenders, not only against the Divine Majesty, but against all Mankind. And they deserve the less Favour on this Account, because these very Men who would reverse the Judgment of all People and of all Ages, do arrogantly assume to themselves a deeper Sagacity, and a clearer Light of Understanding than the World was ever acquainted with before. And consequently, tho' their Unbelief be indeed an Error, and a most fatal and destructive one; yet it is such as they did not fall into thro' Imprudence or Simplicity, but by a vain and impudent Pretence of more than ordinary Degrees of Wisdom^a.

It will be a very easy Labour to refute those Arguments, which *Spinoza*^b has alledged in defence of this Notion of *Hobbes*. The *Thesis* he lays down to work upon is this, *Every one who cannot govern himself by Reason, may by the highest Right of Nature live according to the Laws of his Appetite*. And foreseeing it might be here objected, That the Assertion was contrary to the Reveal'd Law of GOD, he answers, That a natural State is both in Nature and Time antecedent to Religion; which with regard to natural Religion is as absolutely false, as what he subjoins, *That no Man knows by Nature any Obligation lying on him to obey GOD; and that no Reason can obtain this Knowledge, but such as is confirm'd by the Signs of Revelation*. Therefore the Consequence he draws is most absurd, *That before Revelation, no Man was bound by any such Divine Law, as it was impossible for him to be ignorant of; and, That a natural State is to be conceiv'd without Religion, or Law; and for that Reason without Sin,*

or Injury. In all this he only ridiculoussly confounds the natural with the positive Divine Law. He proceeds to assert, That Man consider'd in a State of Nature, is free from all Religion, not only upon account of Ignorance, but by virtue of that common Liberty, in which all are born. For, says he, if Men were by Nature bound to the Divine Law, or if the Divine Law were a Law by Nature, it would be superfluous that GOD should afterwards enter into a Contract with Men, and oblige them by Oath and Covenant. Now it is clear that these Pacts or Covenants pass between GOD and Men in reveal'd Religion, not in natural, to which a Man immediately stands obliged upon account of his being created by God a reasonable Creature. So that *Spinoza's* Conclusion is most vain and senseless, That Divine Law began from that time, when Men by express Compact promised to obey GOD in all things; by which Deed they receded, as it were, from their natural Liberty, and transferr'd their Right upon GOD, just as Sovereignty is conferr'd in civil States. For the Support of which Doctrine it is necessary to suppose, that Men in a State of Nature had not their Existence from God Almighty.

From this Obligation, by which Men are bound to pay Obedience unto GOD, springs the Obligation of all Men towards all Men, as such; by virtue of which they are engaged to lead a social Life. How this is to be discover'd, it has been formerly our Business to shew.

V. There is another famous Division of Obligation, into natural and civil; but such as is by different Authors differently stated^c. *Grotius* observes, that the Lawyers sometimes call a Thing of natural Obligation, the doing of which Nature shews

MR. BARBEYRAC'S NOTES on §. IV.

^a Mr. *Bayle* in his Thoughts about a Comet (*Art. 177.*) distinguishes between two sorts of Atheists, the one which begins to doubt, and the other which have pass'd all doubting. Of the first Sort are ordinarily all those who bear the Name of Learned, but falsely; and glory in their Reason and their Contempt of bodily Pleasure; as also those whose Souls are subject to all sorts of Vices, which are capable of the worst Aggravations, and perceiving that the Fears of Hell cause them no small Disquiet, and imagining that 'tis their Interest that there should be no God, endeavour to persuade themselves that 'tis so. Others become Atheists because they have been great Sinners, and are full of as much Malice as can crowd into any Man's Soul. The second Sort are Infidels without design, and moral Men. Mr. *Bernard* in his News about the Republick of Learning, *November 1701*, calls them both Atheists by Reflection; but he after distinguishes them thus, giving the Name of Atheism in Fancy to him who begins to doubt, and of Atheism in Heart to him who is past doubting. According to this Author, 'tis undeniable, That there are Atheists in Heart in the World; for, says he, Perhaps, 'tis hard to maintain, that there are Atheists in Mind in the World, who are confirm'd in Atheism; but there are such perhaps as labour under so many Scruples concerning the Being of a God, that they think it a Thing so very dubious, that they can have no Certainty of it. But the same Author says, There are Atheists without Reflection, who believe no God, because they have never thought of it, but being so wholly taken up with sensible Objects, it never came into their Minds to suspect that there is any Thing in the World but what they see, never enquiring after the Principle of their Being. There is no doubt but there are such Atheists, without returning to the fabulous Relations of the *Chinise* and *Caffres*. In my Opinion, there is nothing more judicious than these Reflections, and this System of the different sorts of Atheists. The Notion of our Author above-mention'd is not much different from the common Hypothesis of Divines, who with regard to common Experience determine a Matter of Fact by metaphysical Reasons. I can't then but wonder, that he gives such a careless Solution of the Question, which he touches by the bye, *viz.* Whether Atheists ought to be punish'd? He maintains elsewhere (*viz.* in his Book, *Of the Duties of a Man and Citizen*) that they ought to suffer the most severe Punishments, *Gravissimis poenis est coercenda eorum impietas*. But on the contrary, Mr. *Titus* says, that such Men ought not to be treated so severely. For, says he, that Method of Punishment and Force is not proper to cure a Man of Atheism; the only Punishment of such as are in Error, if they will not be instructed, is to leave them to God's Judgment, *Observ. 95. on Pufend.* For my part, I profess, that if an Atheist makes an open Declaration of his Opinion, and labours to get himself Followers by misleading such weak Judgments as are not able to answer his Sophisms and Subtilties, or by encouraging those vicious Persons, who are ready thro' the Wickedness of their Hearts to embrace his Tenets, such a Person may with as much Justice be punish'd as he that teacheth others to thieve, murder, or cheat. In this Case our Author's Reasons are very good: For those who disturb a Society by endeavouring to destroy an Opinion so universally received, and which is look'd upon as one of the strongest Props of it, deserve as much to be treated as Criminals, as an Atheist, consider'd as such, for perplexing the common Belief of a God. Let him be content that he has found out the unhappy Secret of shaking off all Tyes of Religion, and applauding his own Impiety, and not hope that others should follow his Example, but be easy, that they resolve to continue in the common Opinion for the Advantage of human Society, knowing how strong Impressions the Fear of God has made upon most Men. (See the *Philosophick Comment. &c. Tom. II. p. 482. 483.*) But if Atheists either in Mind or Heart do not pretend to propagate their Opinions, why should they be punish'd purely as Atheists? The Nature and End of Punishments as they are used in human Judicatures, does not, in my Judgment, require that they should be used upon such. Their Impiety will be sufficient Punishment, if they continue in it to their Death; but 'tis possible they may see their Error, and by Consideration remove the Sophisms by which they are at present blinded. These Arguments will have a stronger Force, as to Atheists, by Reflection, and therefore need not be enlarged on here.

^a *Comp. Jean de Espagne de Erroribus Popularibus, s. 1. c. 6. Bacon Essay 16. and Advancement of Learning, l. 3. c. 2. Add Plato de L. l. 9. near the end, where he distinguisheth the several kinds of Atheists, and directs with what Penalties they ought to be restrained.*

^b *Traſat. Theolog. Politic. c. 16.*

^c *L. 2. c. 14. s. 6.*

to be good and honest, altho' it be not strictly a Debt: As for an Executor to pay the entire Legacies, without reserving to himself what the *Falcidian Law* allows him; to requite a Courtesy receiv'd; to pay Debts which the *Creditor* has in Law forfeited; or to the exacting of which the *Macedonian Decree* may be oppos'd². When any thing of this kind is voluntarily paid³, a Man cannot recover it again, on pretence that it was not due⁴, tho' he might at first have refus'd to pay it.

Sometimes we call that a *natural Obligation* which truly binds us; whether it cause in the other Party a *perfect*, or whether only an *imperfect Right*. In like manner by a *civil Obligation* we sometimes mean such, as is void by the *Law of Nature*, but depends purely on a *civil Law*, of which the *Obligatio literarum* (when a Man confesses a Debt in writing, which he really never contracted) is commonly brought as an Instance; at other times it signifies such as is grounded on both *Laws, natural and civil*; or such as will bear a good *Action* in Courts of civil Judicature.

Others with more Clearness assign three Species of *Obligation, purely natural, purely civil, and mix'd*. The first depends entirely on *natural Equity*⁵; and in such a manner, as not to found an *Action* in civil Courts. The second arises merely from the Force of *civil Law*, in the Strictness and Rigor of which it will bear an *Action*; tho' such an *Action* will always in point of *Equity* be invalidated⁷ by the Judge⁶, as the *Obligatio literarum* before-mention'd. The third is such as is at the same time supported by *natural Equity*, and confirm'd by the Autho-

riety of *civil Constitutions*. This is the Distinction commonly made by the Interpreters of the *Roman Laws*.

VI. This Division of *Obligations* into *natural and civil*, is a Subject which we ought to insist farther on in our present Enquiry; yet not so much to derive thence the *Original* of such Tyes, but the *Efficacy* or *Force*, which they bear in common Life. So that by *natural Obligation* we mean such as binds us only by virtue of the *Law of Nature*; and by *civil Obligation*, such as is supported and assisted by *civil Laws* and *civil Power*. The Efficacy of both is consider'd with regard either to the *Subject*, the Person in whom the Obligation inheres; or the *Object*, the Person in whom it terminates, or to whom it is directed. In the first respect, the Efficacy or Virtue of *natural Obligation* chiefly consists in this, That it binds a Man's Conscience; or that every Person at the same time when he fails of performing it, is sensible that he has displeas'd Almighty God; to whose Mercy as he owes his Being, so he knows he ought to pay all possible Obedience to his Laws. And altho' we cannot indeed, in the *Law of Nature*, discover any precise and determinate *penal Sanctions*, yet we ought on all Accounts to acknowledge, that it is enforced by some such due Fruits and Consequences; and that the Author of Nature will infallibly inflict great Evils on those who violate this *Obligation*, which the just Performers of it shall as infallibly escape. For the Truth of which Belief, amongst many Arguments, one very considerable Presumption is that remorse of Conscience, which attends the Actors of

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¹ Which is the 4th Part of the Inheritance, which the *Roman Laws* assign the Heir; insomuch that if the Legacies exceed this 4th Part, the Heir is not oblig'd to pay the Overplus. See the *Digests*, Lib. 35. Tit. 2. *ad Leg. Falcid.* and *Dumma's Civil Laws* in their Natural Order, Part II. Lib. 4. Tit. 3.

² Our Author adds this Sentence to explain *Grotius's* Words above-mention'd, which *Gronovius* interprets otherwise. For he says, the Debt is discharged by the Punishment of the Creditor, when the Debtor is excus'd from paying what he owes to a Man who is disfranchis'd, or condemn'd to perpetual Banishment; but *Grotius's* Quotations, and the following Discourse shew, That the Discharge granted by virtue of the Punishment of the Creditor was made by the *Macedonian Law*. Now this Decree was so called from a certain Usurer, who was the Cause of it, call'd *Macedo*, and forbad lending to an Heir, and declares all Obligations void that were made by him. Insomuch, that they who had lent Money, could not in justice require any Thing. See the *Digests*, Lib. 14. Tit. 6. §. 4. See also the Interpreters of *Suetonius* in the Life of *Vespasian*, Chap. 11. There was also a Law like it among the *Lucanians*, *Ἐάν τις ἀσπίτω δανείσους χρεῖσθ' ἐλεγχθῆ, εἰρεται ἄπθ*. If any shall lend Money to a Prodigal, he shall lose it. *Nicol. Damascen. de Meribus Gent.*

³ We ought to take particular Notice of this word *Voluntarily*, which our Author adds to expound *Grotius's* Opinion, who doubtless suppos'd it. Nevertheless, Mr. *Hertius*, both here and in his Dissertation of an Action for a Debt due naturally, but not by human Laws, which is in *Tom. III.* of his small Tracts and Comments, criticises upon *Grotius* and our Author, as if they had spoken of a Payment by mistake. He must suppose that they had forgot the Principles of Law, and did not remember what the *Roman Lawyers* had laid down as an essential Condition of requiring again a Thing not due. He that pays a Thing which he knows not to be due, must be supposed to give it. *Et quidem, si quis indebitum ignorans solvit, per hanc actionem condicere potest, sed si sciens se non debere solvit, cessat Repetitio.* *Digest.* Lib. 12. Tit. 6. *De Condit. indeb.* Leg. 1. *Cujus per Errorum Dati repetitio est, ejus consulto Dati donatio est.* Lib. 50. Tit. 17. *De Divers. Reg. Jur.* Leg. 53.

⁴ *Creditio indebiti* is a Right of requiring a Thing in justice, which one has paid, but was not due. See *Digest.* Lib. 12. Tit. 6. But that such a Right has no Place by the *Falcidian Law* appears from these Words of the *Roman Lawyers*, *Solutum vero non repetitur.* *Digest.* Lib. 35. Tit. 2. Leg. 1. §. 17. As to the *Macedonian Law*, their Opinion is very plain, *Quamquam autem solvendo non repetant, quia naturalis obligatio manet.* *Digest.* Lib. 14. Tit. 6. Leg. 9. in the end, and 10.

⁵ As for example, If a Minor has borrow'd any thing without the Consent of his Guardian, the Creditor can demand nothing of him in justice; but the Minor is still oblig'd by natural Right, or in Conscience, to pay what he has borrow'd. See *Chap. 6. §. 4. Note 5.* following.

⁶ This appears by full Restitutions, but in the main this Obligation being purely civil comes to nothing, as the *Roman Lawyers* themselves have acknowledged, saying, It matters not, if a Man has no Right, if it can be made void by an Exception. *Digest.* *De Divers. Reg. Jur.* Leg. 112. See Mr. *Noodt*, *De Forma emendandi doli mali*, Chap. 5.

⁷ Among the *Romans* that only was call'd a Law, which was enacted by the Votes of the People, upon the Proposal of the Head of the Senate. They had also *Plebiscita*, which were the Decrees of the People, made upon the Proposal of the Officer, chosen out of their own Order. The Laws and *Plebiscita*, with the *Senatus Consulta*, or Decrees of the Senate only, the Constitutions of their Princes, the Edicts of their Magistrates, and Determinations of their Lawyers, make up the Body of the Civil Law. For every Prætor, or Judge, when he enter'd upon his Office, put out an Edict, in which he intert'd not only what he thought just and equitable in the Edicts of his Predecessors, but he added new Constitutions, and sometimes made void some old ones. This is what is call'd, *Jus Prætorium*, The Law of the Prætor; or *Jus Honorarium*, The Honorary Law, because the Prætor had the Title of *Honoratus*, i. e. a Person honoured. Hence it is, that the Prætors explain'd and correct'd the Decisions of the Civil Law, and supply'd some Defects. See the *Institut.* Lib. 1. Tit. 2. *De Jur. Nat. Gent. & Civil.* §. 3, &c. I can't here but advertise the Reader by the bye concerning the Rescripts of the Emperors, that Mr. *Skulting*, Professor at *Franker*, publish'd there not long since, viz. in 1708, a good Discourse to shew the Force they were of.

⁸ See the *Institut.* Lib. 4. Tit. 13. §. 9.

Wickedness, even whilst they are in fair hopes of escaping human Discovery, and human Punishment. A Disquiet, which no good and wise Man can imagine to proceed from bare Simplicity, from Custom, or from fear of secular Justice; but from a much higher Principle, a Sense of God's Sovereignty, and a Dread of his Vengeance. *Cicero pro S. Roscio, c. 24. Every Man that is dishonest, lives in a perpetual Fright, every Man's Wickedness haunts him, his Folly and his Madness disturb him; his evil Thoughts and guilty Conscience terrify and distract him. These are the constant and the domestick Furies, which plague and torture the impious.* Add *Selden. de J. N. & G. l. i. c. 4. p. 37, &c.* Nor can I believe that any Man by flying to the impious Refuge of *Atheism*, ever found there so good Security against these Terrors, but that his wicked Mind would frequently recoil, and shake him with more Violence than before. And we have scarce had an Instance of any such bold Desier of Heaven, who has not at length been driven into a Consternation by his own Crimes, and turn'd a Penitent in Horror, according to that of *Horace* ^a.

Although to bind the Consciences of Men, be principally the effect of *natural Obligation*, yet the same Power is communicated to *civil Obligation*, provided the Object of the latter be not repugnant to the former. And therefore *Civil Law*s do also bind the Conscience, so far as they are consistent with the Law of Nature. Both *Obligations* do farther agree in this Respect, that the Duties they enjoin, a Man ought to perform voluntarily, and as it were upon his own internal Motion.

And 'tis this which makes the chief Difference between *Obligation* and *Compulsion*; by the latter, the Mind is by external Violence driven upon a thing contrary to its inward Inclinations; but whatever we perform on the former Account, is suppos'd to be done upon the Approbation of our own Judgment, and the hearty Disposition of our Will.

If we consider these *Obligations* again, as they regard the *Object*, or as they produce some Effect in the Person, to whom by Virtue of them something is due, they have this Force common to both, That what being thus due, is paid or perform'd, may be fairly accepted and possess'd. But when the other Party neglects or refuses to make good his *Obligation*, there is then a Difference in the manner of compelling him, between the *natural* and the *civil Obligation*, or between those who live in a state of Nature, and those who are settled under a Polity, or Government. To those who live in their *natural Liberty*, the Precepts of the *Law of Nature*, being of two kinds, do cause the same Distinction in the *Obligation* to perform them. Those things which *Nature* enjoins one Man to pay to another, without any antecedent *Paet*, as are the Offices of Charity

and Humanity, we cannot challenge any otherwise, than by gentle and easy Methods; as by persuading, admonishing, desiring, or intreating. But we must not apply *Force* to the most obstinate Refuser; unless in Case of extream Necessity². The Reason of which Proceeding seems to be this, That human Society cannot be preserv'd in a very easy or peaceful Condition, without the conferring of those mutual good Offices; and therefore Nature seems to have set them aside, as constant Subjects of exercising Mens particular Benevolence, by Means of which they might win on the good Opinions and the Affections of each other. And now it is clear that those things which may be recovered by Force, are not so apt to procure the Favour, or to unite the Minds of Men, as those which we give only upon our own free Motion, and which we might deny without Fear, or Danger. But what is due to us, upon an intervening *Paet*, if not voluntarily tender'd, we may procure by *forcible* Means. As we may likewise defend by *Force*, our just Possessions and Goods, when an Attempt is made upon them by any injurious Assailant. *Civil Obligations*, or such as have been confirm'd by the Authority of *civil Law*s, create an *Action* in Courts of *Justice*, by virtue of which I am to carry the Defailant before the Magistrate, who has a Power of compelling him to the Performance of his Duty. But even in *States*, *Obligations* purely *natural*, or such as have been enforc'd by the Sanction of *civil Law*s, are left wholly to the common Modesty and Conscience of Men, and to their just dread of a Divine Sovereign and Judge; and the Subject ought not by a Course of Violence to be brought to the Observance of them.

What *Obligations* ought to be confirm'd by *civil Ordinances*, it is the Business of *Legislators* to determine; and they are to measure their Expediency and Use, according as they seem likely to contribute to the inward Happiness, and Tranquillity of the State³. As it would be ridiculously troublesome, to disturb the Judge on every *petit* Account, so it would be an Error on the other hand, to imitate the Custom of the *Seres* (in *Strabo* l. xv.) who⁴, he tells us, had no Hearings in Court, but upon Murther, or Scandal; these being such Mischiefs as the Sufferer could not prevent; whereas it is in every Man's power not to be cheated in a Bargain, only by considering well whom he trusts. Much to the same Purpose, is what he reports of the *Indians*, That they have no *Action* at Law, upon Matters of Faith and Trust, nor do they make use of Witnesses, or Seals, but believe each other on their bare Words. *Comp. Ælian V. H. l. iv. c. i. Add. Senec. de Benef. l. iii. c. 15.*

VII. *Obligation* may again be divided into *perpetual* and *temporary*. The former is that which cannot be taken off so long as the Person exists, in

Mr. BARBEYRAC'S NOTES on §. VI.

¹ Is the same with ^a at the bottom of the Page.

² See Lib. 1. c. 7. §. 8. and Lib. 2. c. 6. §. 5. aforegoing.

³ See Lib. 8. c. 1. §. 1.

⁴ See Lib. 5. Chap. 2. §. 3. where the Author recites the same thing.

^a Hor. l. 1. Od. 34.

*Parcas Deorum Cultor, & infrequens
Infanientis dum Sapientiæ
Consultus erro: Nunc retrorsum
Vela dare, atque iterare cursus
Cogor relictos.*

These Words of *Horace* our Author uses here without quoting him; although, as *Mr. Dacier* very well observes, the Poet speaks there in Joke only.

whom it inheres. Such is our *connate* Obligation towards God; which, even with respect to the Exercise, can at no time be suspended or diminish'd. Such likewise is the *connate* Obligation of all Men towards all, as Partners of the same Nature, which no Person can throw off, so long as he makes a Part of Mankind; yet the Exercise of it may sometimes, with regard to some particular Persons, be suspended. And this happens, when I devolve into a *State of War* with another. For the Obligation being *reciprocal*, in case one Party break it, and return Hostilities for the good Offices of Humanity, the other Party is no longer bound to deal with him in friendly manner; but may maintain his own Safety, and his own Rights, although with the hurt of the unjust Opposer. Yet the same Obligation may still be said to remain *perpetual* in this Respect, That so soon as our own Safety is provided for, and ensured, we ought to be ready to renew the Peace, and to return to the exercise of all Courtesy and Humanity, towards the Party who began the Contention. Amongst *adventitious* Obligations we commonly reckon *perpetual*, the Obligation of Children towards their Parents, and that which passes between Husband and Wife; which shall elsewhere be explained at large ¹.

Temporal Obligations are such as may cease and be cancell'd, whilst the Persons in whom they inhere do yet exist in the World.

VIII. Farther, since it generally happens, that Obligations answer one another, it may be useful to divide them into *mutual*, and *not mutual*. An Obligation *not mutual* is, when one Party stands bound to perform somewhat towards another; yet so that the other Party shall lie under no corresponding Obligation, nor be tied to make equivalent Requital. Such is the Obligation of Men towards God, by which they are engaged to pay him absolute Obedience; but he on his Part is not constrain'd, by Virtue of any such external Obligation ¹, to make any Return for their Obedience. Amongst those Obligations where both Parties are Men (if we except a few Contracts, binding only one side) there are none to be met with of this sort. And the Reason is, because it seems repugnant to the *natural Equality* of Men, that one Person should be bound to another, and the other Person lie under no Engagement towards him. For we cannot ² apprehend them to be sociable Creatures, who are not united by a common Tie, who have not a mutual Communication of Services; but of whom one seems to be made as it were for the sake of the other, and the other is not bound in Return to contribute any thing towards his Interest, or Happiness. Nor, when Men by political Institutions introduced

a State of Inequality, was it in their Power, to invest any Person with such an extraordinary and transcendent *Right*, as should disengage him from all Obligation and Duty towards other Mortals ³.

IX. *Mutual* Obligations are such as answer to one another; so that the Party who on the one hand receives a *Due*, on the other hand is bound to repay it ⁴. These again are subdivided into *imperfectly mutual*, and *perfectly mutual*. The former are such as answer unequally, one of them being oppos'd to another, which is either different in kind, or in Virtue and Efficacy. This seems to happen chiefly on account of one of these two Reasons, either that the Persons are unequal, one having a Right of commanding, the other a Necessity of obeying; or because Persons in other Respects equal, as to some particular Business, refuse to receive an Obligation of the same Strictness on both sides. For it is clear that Obligations do thus differ in Force, or Efficacy, some producing a *perfect Right* in the Person towards whom they are directed; so as to found an *Action* in human Cognisance, to be prosecuted either by War, or before the Judge, according as the Parties live, either in a State of Nature, or under a Form of civil Government; whereas others produce only an *imperfect Right*, so that the Performance of them ought not to be extorted by Violence. From the former of these Causes arise the Obligations *imperfectly mutual*, betwixt Princes and Subjects, betwixt States and particular Members, betwixt Masters and Servants, Parents and Children; all which will be examined in their proper Places. The latter Cause of making Obligations *imperfectly mutual*, chiefly happen in Cases of *gratuitous Promises*, and the Performances of them. For whilst I promise any thing to another out of free Favour, I perfectly oblige *my self* to give it, and the other Party has a Right of requiring it from me. But because I did not engage him to pay me an Equivalent, he is bound to me only by the Law of *Gratitude*, which ties him much more loosely than if he were my Debtor upon *Pact*. For we cannot on such unlimited Obligation build our Hopes or our Affairs, and therefore should the Party prove ungrateful in the highest degree, we do not reckon our selves properly to have receiv'd any Loss or Prejudice: For 'tis a Mistake in some Authors to assert, "That Nature gives us a *perfect Right* to claim a Return of our Benefit, from an ungrateful Person ⁵; though in most Commonwealths, the Courts of Law refuse to admit an Action on that Score." Nor is this a good Consequence, *The Necessity of returning a Kindness is greater than that of giving one; therefore the latter is founded upon an imperfect Right, the other upon a perfect*.

MR. BARBEYRAC'S NOTES on §. VII.

¹ See Lib. 6. c. 1. and 2.

MR. BARBEYRAC'S NOTES on §. VIII.

¹ Our Author expresses himself thus by way of Opposition to that which the Goodness of God requires of him. See Lib. 2. c. 1. §. 3. and c. 3. §. 5. foregoing.

² This Period, not containing at least directly a Reason of what the Author was speaking of before, I suspect that the Word *enim* has crept into the Text instead of *etiam*, either through the Carelessness of the Author or Printers; altho' it is found in the last Edition of 1706, of which Mr. Hertius had the Oversight.

³ We can't maintain this, without encroaching upon the Prerogative of God, who imposes these Duties on Men by the Constitution of their Nature. This we ought nicely to observe, that we may understand the just Extent of the Rights of a King, which are founded upon the Power which every Man can and is willing to grant to him over himself. See my Notes on Lib. 7. c. 8. following.

MR. BARBEYRAC'S NOTES on §. IX.

¹ See Lib. 5. c. 2. §. 5. following.

² See c. 3. §. 17. foregoing.

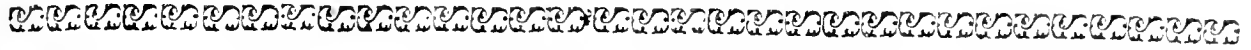
For, however the Case may stand before, yet when I once have promis'd to do a Favour, there lies a greater Necessity on me to perform it, than on the other Party to return it³. For there may be diffe-

rent Degrees in Obligations of the same kind⁴; especially when we are to compare such Duties as concur in point of Time⁵.

³ To perfect the Reasoning of our Author, we must remember, that the Foundation of the Difference between perfect and imperfect Right, ariseth from the necessary or unnecessary Influence that a thing hath in establishing Peace and Society among Men, and not simply a degree of Obligation from the matter of the thing. So that though we are more indispensibly obliged to the Duties of Thankfulness than of Beneficence, the first ought not to authorize us to use Force or Justice to make us perform them, rather than the last; because neither of them are of that Nature, that the Continuance of Peace or Society doth necessarily require the Practice of them. In some Cases the Duties of Gratitude ought to give place to those of Beneficence, as when a Benefactor may want, or at least spare without any great Loss or Trouble, a thing of which another Person has great need.

⁴ See my Notes on Lib. 5. c. 12. §. 23. following.

⁵ Comp. Bœcler. ad Grot. l. 1. c. 1. f. 4. See what shall be said hereafter in Lib. 5. c. 12. f. 23.



CHAP. V.

Of the Nature of Promises, and Pacts, or Covenants, in general.

The CONTENTS of every Paragraph of the fifth Chapter.

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|--|---|--|
| <ul style="list-style-type: none"> I. Whence adventitious Obligations arise. II. What is Mr. Hobbes's transferring of Right. III. No Man has a Right to all things, as Mr. Hobbes asserteth. IV. In what a transferring of Right consists. V. A meer Assertion doth not oblige. | } | <ul style="list-style-type: none"> VI. An imperfect Promise obligeth, but does not give another a Right. VII. A perfect Promise. VIII. Promises in the future Tense give no Right. IX, X, XI. Whether there be a Power of obliging in bare Pacts or Covenants. |
|--|---|--|

IT now follows in course, that we enquire how such Obligations as are not born with Men, should by virtue of some Act of theirs be laid upon them, by which means there arifes, at the same time, in other Persons a Right which before they wanted. For these two moral Qualities have such a mutual Relation and Dependence, that whenever there is produced an Obligation in one Man, there immediately springs up a correspondent Right in another; for 'tis impossible to apprehend that I am bound to any Performance, unless there be some Person in the World, who can either fairly require it, or at least fairly receive it of me. Tho' the Remark will not hold *vice versa*, that where-ever there is a Right in one, there must presently be an Obligation in another. For example, the Magistrate has a Right of requiring Punishment for Crimes; but such a Right as is attended with no Obligation in the Criminal^{1a}. Unless we solve the Doubt by this Distinction, That if we take Right in a strict and close Sense, for a Power or Aptitude to have any thing, then there is always in some other Person an Obligation answering to it; but not if the Word be taken for a Power of doing any thing. This then in the first place, is clear, that all adventitious Obli-

gations proceed either from a simple, or from a mutual Act; of which the former is properly call'd a free Grant or Promise, the latter a Pact or Covenant.

II. But inasmuch as all acknowledge that Promises and Pacts do transfer a Right to others, before we proceed, it may not be improper to examine Hobbes's Opinion^b about the transferring of Right. He then, from his Project of a State of Nature, having infer'd, that every Man hath naturally a Right to everything, and having farther shewn, that from the Exercise of this Right there must needs arise a War of every Man against every Man, a State very unfit for the Preservation of Mankind; he concludes, "That whilst Reason commands Men to pass out of this State of War, into a Condition of Peace, which Peace is consistent with a Right of every Man to every Thing, it at the same time prescribes that Men should lay down some part of this universal Right. A Man, he says, may lay down, or divest himself, of his Right two ways, either by simply renouncing it, or by transferring it to another. The former is done, if he declares by sufficient Signs, that he is content it shall hereafter be unlawful for him to do a certain thing, which before he might have

MR. BARBEYRAC'S NOTES on Chap. V. §. I.

¹ This is not absolutely true. See my Notes on Lib. 8. c. 3. . 4, 5. But Mr. Thomasius, to shew that Right and Obligation do not always answer to each other, alledges the Example of two Persons, who in a Shipwreck getting upon one Plank, which could not save them both, had each of them right to thrust off his Companion, and consequently, there was no Obligation to answer each other. *Fundam. Jur. Nat. & Gent.* Lib. 3. c. 7. §. 10. But this only proves, that there may be a Case where one Man's Right becomes of no worth by the Opposition of an equal Right in another Person. In like manner, certain other Duties so clash sometimes, that one of them must give place in certain Circumstances, without being less obligatory in general. In the Example of the Plank, we must suppose, as I have said elsewhere, that it belong'd no more to the one than to the other, and neither of them was seized of it alone. For then the Right of Property of the first Occupier would lay an Obligation of giving place on him against whom any of these Titles could be alledged. But yet the other, who was not in the same Case, let it be to whom the Plank did appertain, might lawfully hinder him from using that Instrument to save his Life, which Providence had furnish'd him with; so far is it from this, that he ought to help us, if he can, to seize it.

^a 'Tis true, Punishments are not due to Criminals by virtue of any Compact; but since the Right of Life and Death, or the Right of the Sword is conferr'd upon Sovereigns, we are oblig'd not to resist 'em when they make use of that Right, tho' it be upon our own Persons. See Mr. Barbeyrac's French Translation of this Book, Lib. 8. c. 3. f. 4. Note 8. and f. 5.

^b *De Civ.* c. 2. f. 3, &c. & *Leviath.* Engl. Book I. c. 14.

“ lawfully

“lawfully done. The latter, if he declare by sufficient Signs to another Person, who is willing to receive such a Right from him, that he consents it shall be for the future, as unlawful for himself to resist him in the doing of a certain Thing, as he might before have justly resisted him.” Hence he infers, That the *transferring of Right consists purely in Non-resistance*; or that, he who in a *State of Nature* transfers a Right to another, does not give the other Party a new Right which before he wanted; but only abandons his *own* Right of resisting such a Person in the Exercise of *his*. Which Assertion, according to his *Hypothesis*, he thus makes out; “Before any such Act of transferring Right, the Person to whom it is said to be transfer’d, had a Right to all things, and therefore it was impossible to give him a new one; but the Person *transferring*, loses his Liberty of just Resistance, which before hinder’d the other from exercising his Right in its full Extent. Therefore, whosoever in a *State of Nature* acquires a Right, only gains this Privilege, to enjoy his primitive Right securely, and without just Disturbance; for example, If a Man in a *State of Nature*, by Sale or Gift, makes over his Field to another, he only takes away his own Right to that Piece of Ground, not the Right which all other Men have to it; or which comes to the same, he declares that he will not resist, or hinder such a particular Person, who has a mind to make use of the Field; but he does not by this Act prejudice the rest of Mankind, who still keep their primitive Right, as well to this Spot of Earth, as to every Thing else which Nature affords.

III. But as we have formerly made out^a, that this *Hobbesian State* is by no means *natural* to Man, a Creature design’d for a *social Life*; so neither can we admit of what the same Author thus establishes as the Consequence and Result of it, such a Right of each Man to all Things, as shall produce any Effect in reference to other Men. For the clearer Illustration of this Point, it is necessary to observe, That not every natural Licence, or Power of doing a Thing, is properly a *Right*; but such only as includes some moral Effect, with regard to others, who are Partners with me in the same Nature. Thus, for instance, in the old Fable, the Horse and the Stag had both of them a natural Power or Privilege of feeding in the Meadow; but neither of them had a *Right*, which might restrain or take off the natural Power in the other. So Man, when he employs, in his Designs and Services, insensible or irrational Beings, barely exercises his natural Power, if without regard to other Men, we here precisely consider it in reference to the Things, or Animals, which he thus uses. But then at length it turns into a proper Right, when it creates this moral Effect in other Persons, that they shall not hinder him in the free Use of these Conveniences, and shall themselves forbear to use them without his Consent. For ’tis ridiculous Trifling to call that Power a *Right*, which should we attempt to exer-

cise, all other Men have an *equal Right* to obstruct or prevent us. Thus much then we allow, that every Man has naturally a Power or Licence of applying to his use, any thing that is destitute of Sense, or of Reason. But we deny that this Power can be call’d a *Right*, both because there is not inherent in those Creatures, any *Obligation* to yield themselves unto Man’s Service; and likewise, because all Men being naturally *equal*, one cannot fairly exclude the rest from possessing any such Advantage, unless by their Consent, either *express* or *presumptive*; he has obtain’d the peculiar and sole Disposal or Enjoyment of it. And when this is once done, he may then truly say he has a *Right* to such a thing. Or to decide the Business more briefly, we may make use of this Distinction, that a Right to all Things antecedent to any human Deed, is not to be understood *exclusively*, but *indefinitely* only; that is, we must not imagine one may engross all to himself, and *exclude* the rest of Mankind; but only that Nature has not *defined*, or determined, what Portion of Things shall belong to one, what to another, till they shall agree to share her Stores amongst ’em, by such Allotments and Divisions. Much less will the same *Equality* amongst Men admit, that one should naturally claim a *Right* over another. It is rather true, that no Person will have a Right to govern any other Person, unless he acquire it in a peculiar manner, either by his Consent, or by some other antecedent Deed; as shall be made out more at large in its proper Place^b.

IV. The proper Notion then, of transferring and of acquiring Right, will appear with more Exactness, if we premise, that some *Rights* bear a regard to Persons, others to Things; and that the latter kind of Rights is again divided into Original and Derivative. I acquire a *Right* over a Person, if he either expressly or tacitly consents, that I shall prescribe to him what he ought to do, to suffer, or to forbear; by virtue of which Agreement he both obliges himself voluntarily to study Obedience to my Pleasure, and at the same time grants me a Right of compelling him, in case of default, to his Duty, by proposing some considerable Evil, which I shall otherwise bring upon him. A Man then acquires an *Original Right* over Things, when all others either expressly or tacitly renounce their Liberty of using such a Thing, which before they enjoy’d in common with him. This original Right being once establish’d, by virtue of which the primitive Community of Things was taken off, the transferring of Right is nothing else but the passing it away from me to another, who before was not Master of it. Hence appears the Absurdity of saying, That the *transferring of Right consists barely in Non-resistance*. Inasmuch as that negative Term cannot express the Force of the *Obligation* arising from such an Act; which properly implies an inward Inclination to make good the Contract: Tho’ Non-resistance be indeed one Consequence of the *Obligation*, and without which it cannot be fulfilled. The Instance about the *Field*, propos’d by *Hobbes*, does not come

MR. BARBEYRAC’S NOTES on §. III.

^a Our Author reasons here upon a false Supposition, which I shall confute in its proper Place. See my Notes on *Lib. 4. c. 4.* All that can be said is this, that before the Property of Goods was settled, no Man ought to exclude another always from the use of any one thing, and when they had no farther use of it, it return’d to the first Occupier, as if he had enjoy’d it himself by that Title.

^b See *c. 2. §. 7.* of this Book, and *Lib. 1. c. 6. §. 12.* and *Lib. 6. c. 2, 3.* and *Lib. 7. c. 2, 3.*

^c *Lib. 2. c. 2. §. 7. &c.*

up to the Point in hand; for beſides, that it is very abſurd to call that an Act of *Selling*, when I only quit my Pretenſions to a Thing, whilſt all other Men ſtill keep *theirs*; even according to his own Doctrine, *Propriety* of Things had its Riſe from civil Government¹, aiter the *State of Nature* was ſuppoſed to be paſſ'd and gone. Therefore during the *State of Nature*, no Man could call the Field *his own*, and conſequently not *ſell* it. He ought indeed to have expreſs'd himſelf thus: " Since in a State of meer Nature things belong'd no more to one than to another, therefore if a particular Perſon deſired the ſole Uſe of any thing, to make him Maſter of his Wiſh, it was neceſſary, that all other Men ſhould renounce the Uſe of the ſame Thing. If they did this *gratis*, the Act had ſomewhat in it like a *Gift*; if with ſome Burthen, or under ſome Condition, it was then a kind of a *Contract*², for which we have no Name. But ſhould one Man have renounced his Power over ſuch a thing, this could have been no Prejudice to others³, and conſequently, he only would have been debarr'd from the Uſe of it, who had thus freely quitted all Title to it.

V. Let us now carry on our Enquiries, and examine how a Man may contract an Obligation, and confer a Right on another, by means of his own *free Promise*. To underſtand the Nature and Effects of this kind of *Tye*, we muſt in the firſt place obſerve, that there are two ways of ſpeaking about giving, or doing a thing to another, which now is, or which we imagine, will hereafter be in our Power. The firſt way is, when we barely expreſs our preſent Mind about a future Act; yet ſo as to lay no Neceſſity on ourſelves, of perfevering always in the ſame Reſolution. An Inſtance we have in what *Tiberius* in *Tacitus*¹ writes to his Favourite *Sejanus*, *Iſpe quid intra animum voluaverim, quibus adhuc neceſſitudinibus immiſcere te mihi parem, omittam ad præſens referre. I forbear to tell you at preſent, by what Fortunes, and by what Alliances I am conſidering to unite you to myſelf*. Such a bare Aſſertion neither founds an Obligation in me, nor a Right in the other Party². And to render it virtuous and unblameable, there is only this Condition requiſite, that we *ſpeak* as at preſent we really *think*, and do not impoſe upon a Man by Falſe-

hood and Diſſimulation. But we are by no means obliged to continue always in this Deſign; ſince the mind of Man has not only a *natural Power* of changing Opinion, but likewiſe a *Right*; ſo as to do it without Fault, when there is no particular Obligation impoſing a Neceſſity of holding firmly to a Reſolution already taken and declared. Yet theſe Changes of Purpose are liable to juſt Cenſure, if either the former Judgment, from which we receded, was better than this laſt; or by altering our Meaſures ſo unexpectedly, we expoſe a Perſon to Diſappointment and Deriſion, who did not deſerve ſo unkind Treatment at our Hands. See the Paſſage between *Q. Cæcilius* and *T. Marius Urbicus* in *Valer. Max.* l. viii. c. 8. §. 5, 6. See *Grot.* Book II. c. 11. f. 2. Tho' it be often a juſt³ Punishment to baſe Flatterers and Deſigners, to balk them of their greedy Hopes, and to cheat the gaping Crows, when they have prepared their Mouths for the Morſel. Vid. *Plin.* 2. *Epift.* 20. *Comp. Grot.* l. ii. c. 11. f. 2.

VI. We may call it an *imperfect Promise*, when a Man determines his Will to the doing a Favour hereafter, with a ſufficient Sign to make it firm and laſting, or ſo as fully to declare his Willingneſs to lie under an *Obligation*, but not ſo as to give the other Party any proper Right of compelling him to ſtand to his Word. The like to which happens in the Duty of returning Kindneſſes, where the Receiver is obliged to make a grateful Acknowledgment, tho' the Giver has not a full *Right* to require it. Some are of opinion, that it is hardly poſſible to produce an Inſtance of this kind of *Promise*, in the *Law of Nature*, barely conſider'd. It is uſual to alledge for Examples, the Promise of an abſolute Prince made to his Subject, of a Maſter to his Servant, of a Father to his Son, whilſt yet under his Power; by all which the Parties promiſing, ſtand obliged to make good their Engagement; but the others ſeem to want a *Right* of demanding it from them, becauſe they are allow'd in no *Court* to bring an *Action* againſt them upon Default. But now the Lameneſs or Defect of theſe Promiſes does not ariſe from any intrinſick Weakneſs or Invalidity; but from that ſuperior Quality or Station in the Promiſers, which hinders the *Obligation* from taking its full outward Effect. Others inſtance in

Mr. BARBEYRAC'S NOTES on §. IV.

¹ See Mr. *Hobbes's* Treatiſe *De Cive*, c. 6. §. 16. and c. 14. §. 10. and what our Author ſays, *Lib.* 8. c. 1. §. 2. following.

² I ſhall explain this Term, *Lib.* 5. c. 2. §. 7.

³ This is grounded upon a falſe Hypotheſis, as I have ſhewn in *Note* 1. of the foregoing Paragraph. The Truth is, that till a Man abandons a thing, of which he had poſſeſſed himſelf, with a Deſign to make uſe of it, it belongs to him, and no Man may diſpoſſeſs him of it; but if he releaſes it to another, as from hand to hand, this latter acquires the ſame Right, and conſequently excludes the Right of all others, until he again in his turn leaves to the firſt Occupier the thing which he had Power to diſpoſe of all the while he had it, becauſe the Ceſſion of him who was in poſſeſſion before him, gave him Power to prevent any other who would be maſter of it.

Mr. BARBEYRAC'S NOTES on §. V.

¹ *Tac. Annal.* Lib. 4. c. 40. Numb. 9. Ed. Ricq.

² *Nulla promiſſio poteſt conſiſtere, quæ ex voluntate promittentis ſtatim capit.* *Digeſt.* Lib. 45. Tit. 1. *De Verborum Obligationibus*, Leg. 108.

³ The Author plainly ſpeaks here only of thoſe wandering Hopes which ſome ſuffer others to conceive, or rather give them, to diſappoint the Covetouſneſs of thoſe who would cheat us, or deceive us of our Inheritance. So that here is no real Promise, nor any real Declaration of our Will fully, nor irrevocable; but only ſuch hope as was formed at the time when the Words or other equivocating Signs were ſpoken, by which the Deceiver was deluded himſelf, and pleaſed himſelf with Smo'le. See *Lib.* 4. c. 10. §. 3. following. It may be convenient here to ſay ſomething of ſuch Promiſes, which, tho' made in jeſt, were valid among the *Romans*, provided they were made in the Form of a Stipulation. For if one ſaid to another, Doſt thou promiſe me this or that? And he ſaid, I do promiſe; the firſt had a juſt Action againſt the other, and he was adjudged to make good his Promise, tho' he had no deſign to engage himſelf. But at length they found out an Expedient to hinder the Effect of this ſcrupulous Obſervation of Laws, contrary to all Natural Right: It was this, Altho' ſuch a Promise would bear a juſt Action, it was eluded, and made null by the Right of the *Prætor*, who found out a poſitive Exception. See upon this Subject the *Julius Paulus* of Mr. *Noodt*, Chap. 11. and his Treatiſe *De forma emendandi Doli mali*, &c. publiſh'd in 1709. *Chap.* 6.

^a We ſhall explain this Term in *Lib.* 5. c. 2. f. 7.

an imperfect *Stipulation*; when the civil Laws enjoin, that Promises shall be made under such a particular Form of *stipulating* Words; and will not permit a Man to sue another upon his Promise, if it did not run precisely in those Terms. Here they observe, That in case the Parties concern'd fully intended to contract a perfect Obligation, and omitted the set Form of Law, only thro' Error or Imprudence, the Promiser is by natural Equity engag'd to perform his Word, tho' the other Person cannot force him to it by an *Action* in Courts of civil Judicature. But neither have we in this Example a *Promise*, which is imperfect upon account of the Law of Nature, but by virtue of a positive Law, which ties up its Effect to such a punctual Form of Speech, a Restraint, which naturally it did not lie under. A true Instance then of all imperfect *Promise* is, when I express myself in this manner, *I really design to do this, or that for you, and I desire you'd think I am in earnest, and speak Truth*. In which case I am bound to perform my Word, rather by the Law of *Veracity*, than of *Justice*; I lay an Obligation on myself, but I give the other Party no Right of forcing me to perform it. Men have naturally somewhat of Greatness and Generosity in their Temper, upon account of which they had much rather seem to do a good Office, purely on the free Motion of their own *Virtue*, than for the sake of any *Right* which another has to challenge it from them. To this Head we may refer the Promises of Men in Favour and Authority, when not by fair Words and general Complements¹, but in a serious and particular manner, they engage to assist us by their Recommendation, Intercession, Promotion, or Suffrage; which yet they would not have a Man challenge from them by virtue of any *Right*, but desire they should be imputed wholly to their Generosity and Honour. Even the Law of Nature does not seem to allow, that a Man should be *compell'd* to the Performance of these Promises; since in the very Act of engaging himself he made a tacit Reserve against such Proceeding; that his Benefit might carry the more Grace and Beauty in it, by being remov'd as far as possible from Necessity and Constraint.

VII. A *perfect Promise* is, when a Man not only determines his Will to the Performance of such or such a Thing for another hereafter, but likewise shews that he gives the other a full *Right* of challenging or requiring it from him. When we engage to give away a particular Thing, or to perform a particular Service, the former is a kind of *Alienation* of our Goods, or at least somewhat in order to it; the latter is an *Alienation* of some part of our natural Liberty; inasmuch as we are now to stick to the Restraint and Confinement of our Promise about a Matter, which before we might have used,

or done, or omitted, at our Pleasure. It must be well observ'd, that what we here deliver, concerns only such Promises as are made betwixt Men: tho' it be impossible, that the Divine Promises should fail, yet it would be highly arrogant and indecent to say, That these seeming Engagements on God's Part do give a *Right* to Man, which shall hold valid against his Maker. Add *Grot. loc. cit. f. 3, 4.*

VIII. It is a nice Remark of Mr. *Hobbes*², and worthy our Notice, That *in relinquishing or transferring Right, if we make use of no Signs except Words, those Words ought to be of the Time present or past*. For he, for instance, who shall say in the future, *To morrow will I give*, plainly shews that he has not given already; and therefore the Right he has over the Thing promised continues firm and entire all this Day, and all the next Day too, and so on, unless in the mean time he actually give it, or pass away the Right of it by a new Promise. Yet in case, besides his Words, he made use of other Signs sufficiently arguing, that it was his Will to transfer the Right at present; then the Words, tho' Grammatically future, shall not hinder the Engagement from taking full Effect. But where these other Signs are wanting, we ought to be very tender of putting so wide and forced an Interpretation on Verbs of the future Tense, as to make them imply a present Act of Alienation. For since we are not wont to make over our Goods to others, without the Prospect of some Advantage to ourselves, which Advantage does not, in these Acts of Grace or free Gift, visibly appear; therefore, in construing such an Act, to which Men are commonly averse, we ought not to presume on any Thing farther, than what is by express Tokens of the Will declar'd. Especially since it is usual by these Terms to signify only a *simple Mark of Good Will*³, and such as shall, at present at least, have no Effect. So that whilst a Man speaks in the future⁴, he is suppos'd to be yet under Deliberation; and before the Time prefix'd, perhaps his Affection and the Merits of the Person may alter; or some Misfortune may intervene, rendring it incommodious for him to part with what he intended. In the same manner as he that makes his *Will*, does not transfer his Right immediately on the Heir; but he is suppos'd ever to have this Clause or Condition in his Mind, *Such a Person shall be my Heir, unless I alter my Will before my Decease*. Tho' indeed it be look'd upon as an Argument of Levity and Inconstancy, for a Man to cheat and delude another with false Hopes and Expectations.

The Case is very different, if I express myself thus, *I have given, or do give to be deliver'd to morrow*: For this is plainly, giving a Man to day the Right of having a Thing to morrow, or transferring

Mr. BARBEYRAC'S NOTES on §. VI.

¹ See §. 10. following.

Mr. BARBEYRAC'S NOTES on §. VII.

¹ See *Lib. 2. Chap. 1. §. 3.* foregoing,

Mr. BARBEYRAC'S NOTES on §. VIII.

¹ Is the same as (1) at the bottom of the Page.

² We may observe here, as Mr. *Hertius* directs us, what the modern Lawyers call, *Tractatus incundarum Conventionum*, i. e. a Treaty in order to an Agreement; or, *Paſta contractuum præparatoria*, i. e. some previous Covenants in order to Contracts, which we may call, Preambles or Discourses, by which we seem disposed to enter upon a Bargain, and testify some Desire of Agreement, but conclude nothing positively. For in this Case every Man is free, and there must be a new Treaty to render the Agreement full and entire. Hence it is said in the *Digests*, That if any one hath promised to lend us any Money, we may receive it, or not, as we please, *Qui pecuniam creditam accepturus spondit creditori futuro. in potestate habet, ne accipiendo se ei obstringat*, *Lib. 12. Tit. 1. De Rebus Creditis. &c. Leg. 30.* See what Mr. *Hertius* says there, and in his *Paræmia Jur. German. Lib. 1. c. 8. §. 5.*

³ *De Cive, c. 2. f. 6, &c. & Leviath. Engl. Part I. c. 14.* (1) In the last Editions of the Original there is *effectum* for *affectum*, which entirely corrupts the Sense; and yet Mr. *Hertius* has retain'd it in the last Edition of 1706.

to him to day the Right over a thing, which ought to morrow to be actually deliver'd to him. Nor is it any Objection against what we have been asserting, that according to the ordinary Form and Manner of Speech, most Promises are express'd in Terms of Futurity. For in the most solemn Engagements by formal *Stipulation*, or by Oath, we use the same way of speaking, *You shall have such a thing of me, I will give such a thing, &c.* The reason of which Custom is, that the delivering of a thing promis'd, generally follows at some *Distance*. And indeed, we can scarce call it a Promise, when at the same time the Intention of giving is declared, and the thing actually tender'd; inasmuch as there seems here, either to have been no *Obligation*, or such as expired in the very minute that it was contracted. However, it is plain the Generality of Men never think they properly *have* a thing, till they get firm Hold and full Possession of it. If then these Terms of Futurity occur in a *perfect Promise*, as for instance, *To morrow I will give you an hundred Pounds*, the Sense of them amounts to this, *I now give you a Right to have and to require of me the said Sum; and I likewise oblige myself on the Day appointed, to deliver it to you accordingly.* We may settle the whole Point with more Brevity, by only saying, that Verbs of the future Tense, made use of in Promises, and especially the Term of *Giving*, do either imply an *Obligation* hereafter to be contracted, and then they neither transfer the Thing, nor the Right, to another; or else they import the delivering of a Thing hereafter, the Right to which either is now, or has been formerly transferr'd; and then they do not hinder the *Promise* from being most perfect and compleat.

IX. It is requisite, that whilst we are engaged on this Point, we endeavour to settle a famous Question, which has been much canvass'd by Authors, Whether there can be a Force of *obliging* in bare Promises, or in bare Pacts, whilst they are no more than verbal Agreements, and are not strengthen'd by any actual Performance betwixt the Parties¹? *Connanus* the *Civilian* has been the principal Assertor of the negative Side; whom *Grotius*², and others have labour'd to confute. And indeed, it has been the fix'd Opinion of wise and learned Men in all Ages, that *Faith* ought to be kept inviolably, though given only in *Words*; or that a Man by *speaking* only, without the Intervention of any *Deed*,

may lay on himself a Necessity of some future Performance³. *Tull.* Off. I. c. 7. *The Foundation of Justice is Faith*, that is to say, a Firmness and Truth in our Words, Promises, and Contracts. Hence some will have the word *Fides* to be call'd *Quia fit quod dictum est*, because that which was said is done, *Ulpian* in l. i. *D. de Pactis*. What is so agreeable to human Faith, as to observe mutual Agreements? *Vid. D. l. ii. c. 14. de Pactis*. It was a very wicked Jest of the petit Prince of *Bantam*, when being reproved for Breach of Promise, he answer'd, His Tongue had no Bone in it, to make it more stiff than was necessary for his Interest⁴. Whether *Connanus* has with any Colour oppos'd this universal Judgment, will appear, if we bestow a little time on taking his chief Arguments under Consideration. In the first place then, he says, that *he who rashly believes a Promise made without Cause, is no less to blame, than the vain Person who made it.* Now here all the Difficulty lies in explaining what he means by a Promise made without Cause. If he would be understood of such Promises as if not perform'd, it brings no Loss or Prejudice to the Party, to whom they were directed, and if fulfill'd, must needs create Trouble or Damage to the Performer; we are willing to allow, that Engagements of this kind produce no *Obligation*. For how can a Man have any Right of requiring me to put myself to any Charges, or any Toil, in doing a thing which shall profit him nothing⁵? And it is indeed against Reason, to undertake an Action which can produce no Good, and may produce Evil. Thus for instance, suppose you had got me to promise you that I would forbear eating four Days together; upon what account should I stand to such a rash Engagement, if so long a Fast would prejudice my Health, and yet would contribute nothing to your Interest or Advantage? Therefore in this Case it is alike vain and foolish in one Man to make the Promise, and in the other seriously to challenge the Performance. Besides, since Promises are Matters of *Grace*, or free Favour, they ought to be interpreted under this Condition or Limitation, *Provided I can compass the Thing I speak of, without any considerable Damage to myself.* Nor can the Person to whom I make the Promise be so impudent and unreasonable, as to desire that my Kindness should be an Injury to me, and that I should enrich him

MR. BARBEYRAC'S NOTES on §. IX.

¹ Συμμάχουα. See what is said, *Lib. 5. c. 2. §. 2, 3.*

² *Comment. Jur. Civ.* Lib. 5. c. 1. But Mr. *Buddens* in his *Element. Philos. Pract.* Part II. c. 4. §. 9 asserts, That this Lawyer is fully accus'd of any such Opinion. Mr. *Hertius* also rejects the Opinion of a certain nameless Person, who justified *Connanus*, and maintains, That that Person spake only of simple Contracts, considered as they are used in the *Roman* Judicature. For he says, We must here distinguish between these two Propositions; the one is, That Promises produce a natural Obligation, and the other, That the natural Obligation which arises from a Promise, does not produce a Civil Obligation, which is founded upon a Maxim of the Law of Nature, which authorizes a Sovereign Prince to declare what Obligations shall be valid, and what null. Nevertheless, according to Mr. *Hertius*, we need only to read *Connanus's* Reasons to convince us, that he denies Promises to produce any Obligations able naturally and of themselves to give a perfect Right, without the Assistance of the Civil Law.

³ The Latin of *Cicero*s, *Fundamentum Justitiæ est fides, i. e. dictorum conventorumque constantia & veritas, eaque de causa fidem appellatam, quia fit quod dictum est.*

⁴ And *Ulpian's*, *Quid tam congruum fidei humanae, quam ea, quæ inter eos placuerunt servare?*

⁵ Mr. *Barbeyrac's* 5th Note is inserted in the Text.

⁶ We must distinguish here between Pacts or Agreements, which may be called Momentary, which are perform'd immediately, and leave no durable Effect after them, and Succellive, whose Performance is accompanied with a long Train of Effects. As to the first, there is no Necessity that they should have any impulsive Cause, or suitable Motive; but as to the latter, they do not oblige, unless they have a sufficient impulsive Cause, or which comes to the same, unless they tend to profit. That sort of Engagements which want this is not only unprofitable, but hurtful to Society; because by the Duration of their Effects they may cause Trouble and Disorder in the Affairs of the World. As for example, if any one promise not to alienate his Estate without the Consent of his Neighbour. See the *Digests*, Lib. 2. Tit. 14. *De Pactis*, Leg. 61. (and Mr. *Hertius's* Dissertation, entitled, *De Pacto, ne Dominus rem suam alienet*, Tom. 3. Opusc.) In fine, Men having establish'd Pacts and Covenants for their Advantage, and not to hurt or deceive one another, every Agreement, which aims not at the hat of these Views, may be, and ought to be look'd upon as null by the natural Law. *Tit. Observ. in Lauterbach. Obj.* 59. See *Lib. 5. c. 2 §. 3. Note* 3.

¹ L. 2. c. 11. f. 1, & 4.

² *Vid. D. L. 2. T. 14. Leg. 61.*

by my own Losses⁷. It often falls out⁸, that even not to keep one's Promise shall be just. For all must be refer'd to the fundamental Rules of Justice; as first, that no Man be wrong'd; and secondly, that the publick Good be as far as possible promoted. It may likewise happen, that the Performance of a Promise or Contract would prove highly prejudicial⁹, either to one of the Parties, or to the other. For if *Neptune* (as it is in the Story) had not made good his Promise to *Theſeus*, *Theſeus* had not been so unfortunately deprived of his Son *Hippolytus*. Therefore neither are we to keep those Promises which are unprofitable to the Person to whom they are made; nor those which are more hurtful to ourselves than advantageous to him. It is a Breach of Duty to prefer a greater Damage to a less. If you promise to plead another Man's Cause, and in the *Interim* your Son falls dangerously ill, it will be no Violation of your Duty to recede from the *prior* Engagement; and the Fault will be much greater in the other Party, if he complain of such a Disappointment. *Tull. Off. I. Vid. D. L. 50. T. 17.*

Add. *Senec. de Benef. Liv. c. 35, 39. Tull. Off. l. iii. c. 24.* This Case is proposed, *I have a Remedy given me for the Dropsy, upon this Condition, That if it cures me, I am never to use that Medicine again. Within a few Years after I have been thus cured, I relapse into the same Disease, and the Person with whom I contracted will not give me leave to make any farther use of it. What am I to do here? It is Inhumanity in him to refuse me, besides, that my using it would do him no hurt. I may therefore safely consult my own Life and Health.*

But if by a Promise made without Cause, *Comanus* understands only a gratuitous, or free Promise without prospect of Gain; then his Assertion will overthrow the whole Business of Beneficence and Liberality, and make all the Offices of Humanity base and mercenary Performances. For why should not I credit a Man, who knowing his own Abilities has bid me expect some free Gift from him, purely that I may have occasion to love and to esteem him? And since if he had pleas'd, he might safely have forborn the Promise, why did he order me

to depend upon his Word, if he design'd not fully to oblige himself to the making it good? For the denying of a Benefit is then only void of Injury, when a Man is bound to confer it only by the Law of Humanity; not when by express Promise he has given another a *Right* to receive it.

X. *Comanus* urgeth farther, "That since Promises of this kind commonly arise from Ostentation rather than good Will, or at least from Rashness and Inconsiderancy, supposing the Design to be real; the Fortunes of Men would be in great Danger, were they bound to perform every thing they said." It was perhaps on some such Principle, that the Antients imagined the Oaths and Protestations of Lovers were invalid, and that the Gods excused the Breach of them, as proceeding from Minds blinded with Passion. *Plato in Sympos. & Poete passim.* But indeed the Danger here mention'd is chiefly in Imagination. For we do not attribute a Power of obliging to any Promises, but to such as are made upon serious and deliberate Purpose; and he that mistakes Jest for Earnest, ought to pay for his want of Apprehension. On the other hand, to promise really more than one can conveniently perform, as it must be acknowledg'd a Fault, so it would be a much greater, and indeed a piece of Barbarity, strictly to challenge and require it. *Aurelian in Flavius Vopiscus, c. 35.* Setting out on an Expedition, and promising the People to bestow Crowns of two pound weight on them, if he return'd victorious, when the Distribution was to be made, the Crowns proved only of Bread, whereas the People expected them of Gold². And besides, we should take care to distinguish between such Terms of Honour and Esteem, as Persons make use of to express, in an indefinite manner, their good Affection towards us; and such particular Engagements as they bind themselves by, to perform somewhat on our behalf: For Men of good Nature and good Breeding often express their Kindness and Civility in very ample Terms; they declare themselves to be *entirely ours*, and offer all they have to our Service and Disposal³. Old *Aeolus* in *Virgil* had this Piece of Gallantry:

⁷ This is contrary to Nature, according to the Roman Lawyers. *Jure Naturæ æquum est, neminem cum alterius detrimento & injuria fieri locupletiores*, *Digest. Lib. 50. Tit. 16. De Divers. Reg. Jur. Leg. 206.*

⁸ The Latin of *Cicero* is this, *Sed incidunt sæpe tempora, cum ea, quæ maxime videntur digna esse justo homine, eoque, quem eorum bonum dicimus, commutantur, suntque contraria; ut reddere depositum, promissum facere, quæque pertinent ad veritatem, & ad fidem, ea migrare interitum, & non servare sit justum. Reserri enim decet ad ea, quæ proposui in principio, fundamenta justitiæ, primum, ut ne cui noceatur; deinde, ut communi utilitati serviat. Cum tempora commutantur, commutatur officium, & non semper est idem; potest enim accidere promissum aliquod, & conventum, ut id effici sit inutile, vel ei, cui promissum sit, vel ei, qui promiserit. Nam si, ut in fabulis est, Neptuneus, quod Theſeus promiserat, non fecisset, Theſeus filio Hippolyto non esset orbatus. Ex tribus enim optatis, ut scribitur, hoc erat tertium, quod de Hippolyti interitu iratus optavit. (See *Eurip. Hippolyt. c. 1315, &c.*) quo impetravit, in maximos luctus incidit. Nec promissa igitur servanda sunt ea, quæ sint iis, quibus promiseris, inutilia, nec si plus tibi noceant, quam illi prosint, cui promiseris. Contra officium est majus non anteponi minori, ut si constitueris te cuiquam advocatum in rem præsentem esse venturum, atque interim graviter ægrotare filius cæperit, non sit contra officium, non facere, quod dixeris, magisque ille cui promissum sit, ab officio discedat, si se destitutum queratur. *Cicero de Offic. Lib. 1. c. 10. Si quis medicamentum cuiquam dederis ad aquam intercutem, pepigeritque ne illo medicamento unquam postea uteretur, si eo medicamento sanus factus fuerit, & annis aliquot post incidit in eundem morbum, nec ab eo quicum pepigerat impetret, ut item eo liceat uti, Quid faciendum sit? Cum is sit inhumanus, qui non concedat uti, nec ei quicumque fiat injuria, vitæ & salutis consulendum. Ib. Lib. 3. c. 24.* where there are also some other Examples.*

⁹ See *Lib. 1. c. 3. §. 7. Note 1.*

MR. BARBEYRAC'S NOTES on §. X.

¹ See §. 5. Note 3. foregoing.

² Mr. *Thomasius* thinks that the People were befotted when they believed the Crowns should be of that weight; but on the other hand, that the Emperor mocked his Subjects by giving his Promise such a strait Interpretation, which look'd like a Trick. There was really cause to believe that the Crowns promised by the Emperor were not Crowns made of Dough.

³ *Ea autem sola dicta sive Promissa admittenda sunt, quæcumque sic dicuntur, ut præsentur, non ut jaclentur*, *Digest. Leg. 21. Tit. 1. De Adilitio edito, Leg. 19.* See Mr. *Hertius's Paræmia Jur. German. Lib. 1. c. 10.*

⁴ Is the same as (a).

⁵ See what *Abab* said to *Benbadad*, *1 Kings xx. 3, &c.* Tho' *Josephus* in his *Antiquities, l. 8. c. 8.* otherwise interprets the Place. *Grotius* saith, *Abab* understood the Words in this Sense, *I give up myself, and all I have in way of Homage and Fealty*; but *Benbadad* took them in a stricter Meaning, *for the very Propriety and Possession.* Add. *Polyb. excerpt. Leg. 13. & Liv. l. 36. c. 28.* concerning *Phaneas* the *Ætolian* Ambassador.

—Tuus, O Regina, quid optes,
 Explorare labor; mihi iussa capessere fas est.
 Æn. 1. v. 80, 81.

—Great Queen, be pleas'd to say
 The thing you wish: my Duty's to obey.

Here the Goddess had been uncivil, should she have taken Advantage of his general Compliment. Words of this Nature then, how ever seriously deliver'd, oblige a Man to no certain Performance; but only serve to testify his hearty Respect and kind Inclination towards another^a. But those Promises by which we empower another to expect some particular and determinate Service from us, ought most strictly to be fulfill'd, because the other Party building on our Word has adjusted his Affairs accordingly. So, though there now and then happens an Instance of a vain Prodigal, who should have been put under Government for a Fool, or a Madman, that ruins himself by profuse and inconsiderate Engagements, this ought to be no Reason why we should affirm all verbal Obligations to be invalid, and banish them from the use of human Life: As we don't condemn *Suretyship* in general, though many have suffer'd so severely by it. Upon the whole, since an express Promise passes into a Debt, Men ought to be very cautious of engaging for more than they are able to compass. And 'tis not Modesty, but a vicious Weakness in any Person to be so easy and tender, that he dares not deny the most impudent and unreasonable Petitioner^b.

XI. What *Comnanus* alleges more in defence of his Opinion, may be solv'd with little Difficulty: he says, "'Tis fit that some things should be left to every Man's Honesty and free Bounty, and that all Matters should not be reduced to the Rigor and Necessity of strict Obligation. That the study of Integrity and Constancy would improve amongst Mankind, were there but a Field left for those Virtues to exert and exercise themselves in; which is hardly possible, if Men are compell'd to observe all the Promises they make. But that otherwise it was a great and glorious thing to perform, what by Words or other Signs you shew'd your Intention of doing; and so much the more glorious, the less it seem'd constrain'd. But indeed there is still left scope enough for Liberality, though you give a Man a Right of demanding somewhat from you, which at first you might have securely denied him.

And since there must needs pass such a mighty number of Promises amongst Men, whilst they continually want the Assistance of each other, it is more for the Interest of human Affairs, that there should be less Glory in the Act of keeping Faith, than that so many Persons should be deluded by

other Mens Inconstancy and Irresolution. The Law of Nature commands us to lend to another, so far as we can do it without any considerable Prejudice to our selves. But the Obligation is rendered more strict and binding, if by our own free Offer we reduce this general and unlimited Injunction of Nature to a particular Engagement, and assure the Party that he may expect for certain it shall be fulfill'd. So that this Argument is plainly false, *If I had not promis'd, it had been nevertheless the Duty of a just and good Man to relieve the Indigence of others; therefore it is laudable to stand to Promises, not because we have bound our selves by giving our Word, but because the Party is in real want of our Succour.*

He is willing to grant thus much, That if a Man by breaking his Promise, has caus'd the other Party to suffer Damages (who for instance might depend perhaps on his Word, and so neglect to provide for his own Necessities) that in this case he should be bound to make good the Loss sustained. And from this Concession we may as fairly infer, That Promises may be challeng'd, and that we stand oblig'd to perform them, lest we prejudice the Persons to whom they were directed. But it is very dangerous to draw thence such Consequences as these; *That when you would not be in a worse Condition, should I break my Promise, than you was before I made it, I may then have liberty of revoking it; supposing that nothing has yet been done towards the Performance. And it is more against Nature for you to require me to make good this Engagement against my Will for your Gain and Benefit, than it would be for me to recal it without your Detriment.* For the Duty of Humanity is not fulfill'd by your not hurting another; but you ought as far as you are able positively to advance his Good. Therefore when you have peculiarly engaged your self to such a kind Performance on his behalf, to repent of your Design only with this Consideration, That he is not like to be the worse for your Inconstancy, looks as if it were a thing not worth a Man's Regard to improve the Condition of his Neighbour. The Case then is the same with these verbal Promises as with those Pacts which have receiv'd the farther Confirmation of some Deed between the Parties; and no one will pretend that we may run from those, when we see that our change of Mind will not render the other Person's Condition worse, but only negatively, *not better.* Besides, as *Grotius* well observes from this Opinion of *Comnanus*, taken in so gross and general a manner as he expresses it, 'twill follow, That Articles of Agreement made between the Princes and the People of different Nations, so long as nothing has yet been perform'd on either side, are invalid; and especially in such places where no particular forms of Leagues or Covenants have been receiv'd into Use. And were this true, a ge-

^a To which purpose *Terence* speaks in his *Andria*, Act 4. Scene 1. v. 5, &c.

—Imo, id genus est hominum pessimum
 In denegando modo queis pudor est paululum:
 Post, ubi jam tempus est promissa perfici,
 Tum coacti necessari se aperiunt & timent,
 Et tamen res cogit eos denegare. Ibi

Plutarch also in *Brutus* relates it thus, Τὸ ἄπὸ τῆς ἀναγκῆς ἀποκρίνοντες ἡλικίαν ἢ τῆσαν, &c. It is unbecoming a great Man to yield to impudent Petitioners. *Brutus* used to say, They do not seem to have employed their Youth well, who are not able to deny any thing.

MR. BARBEYRAC'S NOTES on §. XI.

^b We shall treat of this, Lib. 8. c. 8, and 9 following.

^c *Add. Fern. Vasq. Controvers. illustr.* l. 1. c. 10. f. 20, &c.

neral Diffidence and Jealousy must reign amongst Mankind, and no one must believe another any farther than he can see him. Which close and immediate way of transacting the Condition and Circumstances of many Men will not admit of; who may nevertheless have occasion to settle Business with each other.

The last Argument of *Connanus* taken from the Practice of the *Roman* Courts of Law, which granted an *Action* only upon such Promises as were confirm'd by *Stipulation*, is easily answer'd by ob-

serving, That the Reason of this Caution in the Civil Law was not because serious Promises do not bind by the meer Law of Nature; but that the Ceremony of these solemn² Forms might put Men on considering thoroughly, whether it was expedient for them to enter into a Promise, which it would be impossible afterwards to revoke. As likewise, that the things promis'd might by this means be express'd more punctually and plainly, lest any Obscurity in that respect might give occasion to future Cavils and Disputes³.

¹ See Lib. 5. c. 2. §. 3. following. But Mr. *Thomasius* maintains, nevertheless, that they that establish'd these Forms among the *Romans*, had such Designs as tended more to advance their private Interest, than the publick Good. The *Patricians* labour'd by this means to keep the People in a Dependence upon them, and by making the Laws obscure, interpreted them as they pleased, and by multiplying Forms of Law without end, opened a large Field for Contentions and Divisions. This *Pomponius* the Lawyer tells us plainly in a Fragment preserved in the *Digests*. *Deinde ex his Legibus [duodecim tabularum] eodem tempore fere actiones composita sunt, quibus inter se homines disceptarent; quas actiones, ne Populus prout vellet institueret, certas solennesque esse voluerunt, &c. Et quidem ex omnibus qui scientiam [Juris civilis] nati sunt, ante Tiberiam Coruncanium (He was the first of the People that arrived at the Dignity of Pontifex Maximus, i. e. the High-Priest) publicè professum neminem traditur, ceteri autem ad hunc vel in latenti jus civile retinere cogitabant, solumque consultoribus [vacare] potius, quam discere volentibus præstabant, Lib. 1. Tit. 2. De Origine Juris, Leg. 2. §. 6. 35. See the *Nævi Jurispr. Rom.* by Mr. *Thomasius*, l. 1. p. 12, &c. and his *Divine Civil Law*, l. 2. c. 11. §. 60. in the Notes.*

² *Add.* l. 19. Tit. 5. *D. præscript. verb.*

C H A P. VI.

Of the Consent required in making Promises and Pacts.

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SINCE the regular Effect of Pacts and Promises is to abridge and restrain our Liberty, and to lay on us the Burthen of necessarily doing such or such a thing, which before we might have perform'd or omitted at our pleasure; there can be no better Argument to hinder a Man from complaining of this Burthen, than to alledge, That he took it upon him by his own free Will and Consent, when he had full Power to refuse it¹.

II. This Consent is usually declared by express Signs, as by *Speaking, Writing, Nodding, &c.* Yet sometimes, without the help of any such Tokens, it is sufficiently gather'd from the Nature and Circumstance of the Business². And it is well known that³ Silence it self, in many Cases, is

interpreted for Consent. Thus *to be silent, is to own your Crime*, Euripid. *Iphigen. in Aulid.* v. 1142. *vid. D. L. l. Tit. 17.* But in all these Exceptions it is strictly required, That the State and Condition of Affairs be such as shall on every side conspire to ground the Presumption; and that not so much as one probable Conjecture appear to the contrary. For otherwise it would be very hard Measure to put a Man under *Obligation*, upon any little Hint or Symptom of Agreement. And thus we see wherein the proper Nature of *tacit Pact* consists; that it happens, when we express not our Consent by the Signs generally made use of in human Commerce and Transactions; but leave it to be suppos'd from the Business it self, and from the

MR. BARBEYRAC'S NOTES on Chap. VI. §. 6.

¹ The wise King *Solomon* has expressed this Matter well in these Words, which *Grotius* has quoted, *My Son, if thou hast promised any thing to another, and thou hast bound thy hands in favour of him for whom thou art engaged, thou art sworn with the Words of thy Mouth, thou art taken with the Words of thy Mouth*, Prov. vi. 1, 2. Hence it is that the *Hebrews* call Promises a Bond, *Numb. xxx. 5.* See also what *Grotius* says, Lib. 2. c. 11. §. 4. numb. 1.

MR. BARBEYRAC'S NOTES on §. II.

¹ Is the same with² at the bottom.

² *Qui tacet, non utique fatetur, sed tamen verum est, cum non negare.* Digest. l. 50. Tit. 17. *De Diversis Regulis Juris.* Leg. 142. See *Numb. xxx. 5.* with Mr. *Le Clerc's* Notes, and Mr. *Hertius's Paræmia Jur. German.* c. 7.

³ *Labeo ait convenire posse vel re, vel per epistolam, vel per nuncium; inter absentes quoque [posse]: sed etiam tacite consensu convenire intelligitur.* Digest. l. 2. Tit. 14. *de Pactis, Leg. 2.* *Conventiones etiam tacitæ valent.* Ibid. Leg. 4. See also l. 13. Tit. 6. *Commod. vel contr. Leg. 13. §. 2.* in fin.

Circumstances that attend it ³. What we most commonly meet with of this kind is, That when some principal and leading Contract has been entred upon by *express* Agreement, some other *tacit* Pact is included in it, or flows from it, as we cannot but apprehend upon considering the Nature of the Affair. In the same manner most Covenants leave some *slight* Exceptions and Conditions to be *understood*. But we must have a care of stretching these Indulgences any farther than is well consistent with the carrying on of Trade and Business in the World, lest they should prove of ill Consequence to the Validity of Contracts, by rendering them too slippery and uncertain.

Of *Tacit Pacts*, it may not be amiss to offer these few Instances: A Stranger comes into a *State* where Foreigners are treated with great Civility, and he comes in a friendly manner here; though he does not expressly swear Fealty to the Government, yet he is suppos'd by the very Act of his coming, tacitly to have engaged, That according to his Rank and Condition, he will conform to every Law of the Place, so soon as he shall understand that such a Law was designed to reach all manner of Persons who should abide in those Territories. And on the other side, the Government tacitly engages to grant him Security and Protection, and the Benefits of publick Justice.

A Man is abroad at a distance from his Family and his Concerns, in the mean time a Neighbour without particular Orders, transacts some Business for him; here again we must suppose a *tacit* Pact, by virtue of which the one having lent his free Assistance and Service, the other is bound to requite the Pains, and to refund the Charge. In as much as it may be fairly presum'd ⁴, That had the absent Party known how Affairs stood, he would readily have consented to the whole Management.

A Guest sits down to a Table at a publick House; and though he has not exchange'd a Word with the Host about the Price of his Dinner, yet by the bare Act of sitting down to eat, he is suppos'd to consent to the Payment of his Scot; since all know that

this is not a Place where Men are treated for nothing.

In like manner, the *Obligation* between a *Guardian* and his *Ward* ⁵ has its Rise from a *tacit* Contract ⁶.

As for those *tacit* Pacts which we observ'd to flow from principal Contracts, and which we may call *Accessory*, these Examples will shew the Nature and the Manner of them. A Man that bargains with another to have free *Ingress* to a Place ⁶, is suppos'd at the same time to obtain Liberty of *Regress* from it, though this be not expressly mentioned; because otherwise the former Agreement would be to no purpose. A Prince or Magistrate, who by Covenant gives leave to Strangers to frequent his Markets, is suppos'd to consent likewise, That they shall carry home the Goods they purchase there. As on the contrary, it would be most ridiculous Madness for me, supposing I have sold a Field to another, to deny him the Liberty of possessing it here, and to desire he would translate it to another place. In the same manner, he who lets out a Chamber to hire, is suppos'd to consent withal, that the Lodger shall make use of such other parts of the House, as he cannot be without; as of the Doors, Entries, and the like; at least so far as to have free Access to his Apartment, and free Passage from it.

Instances of *tacit* Exceptions and Conditions are so frequent, that 'tis not necessary to set down any in particular. But we must observe this of them in general, That they were ever to be interpreted with the greatest Strictness and Severity of Judgment; and that they will hold good no farther than it appears from very sure Grounds and Presumptions, that they were consented to by the Parties whom they concern. *Add. D. xxii. tit. 3. de Probation. & Præsumptionib. Leg. xxiv.* For otherwise it would be easy to thrust a troublesome *Obligation* upon a Man against his Will. And were too great a Licence given to these secret and *implied* Reserves, there is scarce any Covenant, which might not be either annull'd or evaded ⁷.

³ A tacit Consent properly arises from certain things done, or omitted on purpose; but yet of themselves do not imply directly an Approbation of the thing that is doing. Further, we distinguish a presumptive or supposed Consent, as the *Roman* Lawyers speak, which consisteth in this, That tho' a person be absolutely ignorant of what passes, and consequently could neither indirectly nor directly agree to it, yet we suppose he acquiesces in it, because we believe, That if he knew it, he would freely consent, or at least that he ought so to do by the Maxims of Natural Equity: But this sort of Consent is of no use nor necessity in Civil Life; and the Lawyers invented it only to found certain Obligations upon, for which they could not see any true Principles. If we consider this Matter well, we shall find that what they refer to a presumptive or supposed Consent, may easily be deduced, either from a tacit Consent, properly so called, or from the necessary Duties of Society, without any other Consent. And hence it is, that Terms *tacit* and *presumptive* are often used one for another in this Case. Our Author distinguishes neither the Terms nor Notions, as appears from the Examples he alleges of them that do another's Business in his Absence from his Family, and of those who take upon them a Guardianship. *Titius's Observ. on Pufendorf*, 205, 206. and in *Compend. Lauterbach, Obsere.* 56. See l. 4. c. 13. §. 5. Note 11. We may also find some very good Remarks upon this Distinction of a tacit and presumptive Consent in Mr. *Thomasius's Instit. Jurisprud. Divin.* l. 2. c. 7. §. 19, &c. whose Notions, tho' they seem different, may easily be made to agree with our Author's, which I have recited and represented in my manner. See also Mr. *Thomasius's* Discourse, entitled, *Philosophia Juris de Obligationibus & Actionibus*, which is the third among his Disputations at *Leipsick*, c. 2. §. 132, &c.

⁴ See the foregoing Note, and what is said farther, l. 4. c. 13. Note 3. following.

⁵ See l. 4. c. 4. §. 15. and l. 5. c. 4. §. 1. Note 5.

⁶ See *Grotius, De Jure Belli & Pacis*, l. 3. c. 21. §. 16. and Mr. *Hortius's* Discourse, *De Literis Commeatus pro Pace*, §. 13.

⁷ Is the same with ^b.

^a *Add Grot.* l. 3. c. 24. See what we shall say hereafter in Book 4. c. 4. f. 15. ^b The *Roman* Lawyers give this Instance of a *tacit* Pact in l. 2. tit. 14. *D. de Pactis*, leg. 2. If I restore to my Debtor his Bond or Caution, it should seem there is a tacit Agreement between us, that I demand not the Loan. Yet here according to the Simplicity of Natural Law, there appears to be no occasion of introducing a *tacit* Pact, since it is much plainer to say, That by the returning back the Caution the Debt is suppos'd to be forgiven, and consequently no room left for an *Action* upon it. But that the *Civil* Law chose this round-about way of proceeding, was the effect of Caution, lest an Obligation really contracted should seem to be cancell'd by bare Consent. Another Example they produce, and say, Suppose that in a Lease of a Farm there be this Clause, That in case the Farmer does not till the Ground as he ought, the Proprietor may let it to another: Must it not be meant, That the Farmer is obliged not to damage the Land, in consideration that the Lands are Lett at a low price? But on the contrary, if it happens to be Lett at an higher price, 'tis for the advantage of the Proprietor; because there seems to have been a tacit Agreement between them, that no advantage should come thereby to the Farmer. *Digest.* l. 19. tit. 2. *Locati, conducti*, leg. 51. in the beginning, *Et Lege fundum locavi, ut si*

III. To make a Man capable of 'giving a serious and firm *Consent*, 'tis above all things necessary that he be master of his Reason, so far as to understand the Business in hand, to know whether it be convenient for him, and whether he have Strength and Ability to perform it; and when he has well consider'd these Points, to be able to express his Agreement by sufficient Indications. Hence it follows, that the Promises of Infants², of Madmen, and of Ideots³, are utterly invalid. But as to the Case of Madness, it is particularly to be observ'd, that this does not render a Man's Actions null and void in moral Esteem, any longer than during the actual Continuance of it. But so long as he enjoys lucid Intervals of Sense, there's nothing hinders why he should not be able *effectually* to oblige himself for such time as the Distemper allows him the use of his Reason. Yet the Fit returning suspends his Power of contracting or of performing any Business, till he again recover the Government of himself and of his Actions. Therefore the common Maxim in the Civil Law, That *Madness coming upon a Man destroys not any Business which he had before duly perform'd*, is to be understood of such Actions or Concerns as can be completed and dispatch'd at once. Of this kind is a *Will or Testament*⁴, which being once rightly made, stands good; unless it be revoked by a sufficient Declaration to the contrary; such as a distracted Person cannot give. But in case a Man lies under such an Obligation as is to be fulfill'd by distant Acts, all requiring the use of Reason, it is plain that if he fall into Distraction, the Duty is thereby suspended. Thus if a Person bargain with me to work at my Affairs for a certain time; if he happen to be seiz'd with a Phrensy, the Obligation expires, in as much as he is now incapable of making it good. Although indeed, in hopes that a Person in this Condition may recover his Health, we usually suppose him still to have inherent in him all his former Obligations, Powers, and Rights, the charge of exercising which is for a time committed to others. But if the Madness be judg'd incu-

nable, the Person is in all legal and moral Consideration to be accounted *Dead*⁵. Vid. Dig. l. I. tit. 6. *De his qui sui vel al. jur. sunt.* Leg. viii. tit. 18. *De Offic. Præsid.* Leg. xiv. & l. iii. tit. 3. *De Procurat. & Defensor.* Leg. ii. & l. ix. tit. 2. *Ad leg. Aquilian.* leg. v. f. 2.

IV. Farther¹, since the use of Reason is exceedingly hindered, and sometimes entirely oppress'd by Drunkenness, it is an usual Question, Whether a Person under that Disorder can bind himself by any Covenant or Promise? Which we think ought to be decided in the Negative, in case the Intemperance were so great, as entirely to drown and overwhelm the Understanding. For it can by no means be esteem'd a real and deliberate Consent, if a Man should with never so much Eagerness of Inclination run into an Engagement, and express his Agreement by Signs which would at other Times be valid, whilst his Mind lies as it were under a stupifying Charm, and he is bewitch'd out of his Reason. It would indeed be highly impudent for a Person to challenge the Observance of such a Promise, especially if it could not be perform'd without considerable Burthen or Trouble. And if it farther appear, that he purposely took advantage of the other Man's Weakness, and cunningly drew him into an Engagement under that Distemper of his Brain, he stands liable to be punish'd as an arrant *Cheat*. But when a Man, after the drunken Fit is over, shall upon being put in mind of his Promise, acknowledge and confirm it; it shall then be *Obligatory*, yet not by virtue of what pass'd when he was drunk, but of what he since did when he was sober². Yet the Merriment of a cheerful Cup, which rather revives the Spirits, than stupifies the Reason, is no hindrance to the contracting of just Obligations; especially if they be afterwards renew'd at more sober Seasons. To this purpose, the account which *Tacitus, De Mor. Germ. c. 22.* gives us of the old *Germans* is very remarkable. 'Tis at their *Entertainments*, says he, that they commonly make up *Differences, contract Alliances, choose Princes, and*

non ex Lege coleretur, relocare cum mihi liceret, & quo minoris locassem, hoc mihi præstaretur (nec convenit, ut si pluris locassem, hoc tibi præstaretur) videtur autem in hac specie id silentio convenisse, nequid præstaretur, si ampliore pecunia fundus esset locatus, (i. e.) ut hæc ex conventionem pro locatore tantummodo interponeretur. But yet in the Case propos'd, without supposing any such feign'd Agreement, it is more natural to affirm, that the Conditions on which this kind of Contract was founded, cannot be extended so far as to benefit the Hirer, who is indeed worthy of no manner of Favour, in as much as he hath neglected to cultivate his Land according to Bargain. Vid. D. l. 17. tit. 1. *Mandati, vel contra,* leg. 6. f. 2. l. 19. tit. 2. *Locati, conducti,* leg. 13. in fine, & 14. *Cod. l. 2. tit. 3. De Pactis,* leg. 2.

MR. BARBEYRAC'S NOTES on §. III.

¹ Every true Consent supposes, 1. A Physical Power of consenting. 2. A Moral Power, 3. A serious and free use of them. Our Author treats of the first here, and the others afterwards.

² *Infans, & qui infantie proximus est, non multum à furioso distat.* Institut. Lib. 3. Tit. 20. *De Inutil. Stipul.* §. 9.

³ *Furiosus nullum negotium gerere potest, quia non intelligit quod agit.* Institut. l. 3. tit. 20. *De Inutil. Stipul.* §. 8. *Furiosus, --- nulla voluntas est.* Digest. Lib. 50. Tit. 17. *De Divers. Reg. Juris* Leg. 40.

⁴ *Nam neque testamentum recte factum, neque ullum aliud negotium recte gestum, postea furor interveniens perimit.* Institut. Lib. 2. tit. 12. §. 1. See also *Cod. Lib. 6. tit. 22. Qui testamenta facere possunt,* &c. Leg. 9.

⁵ We call properly a Civil Death, the State of them who are condemned to Death, perpetual Banishment, or any other Punishment, which implies an Exclusion from Society and a Civil Life, upon which account they are as if they were not. Among the antient *Romans* such as lost their Freedom, or Right of Incorporation, either both together, or the last only, were accounted in the same State, which was called *Capitis Maxima, & Media Diminutio*, as the *Digests* speak. *Intereant autem homines quidem maxima aut media capitis diminutione.* Dig. Lib. 17. tit. 2. *Pro Socio,* Leg. 63. §. 10. See also, *Instit. Lib. 1. tit. 16. De capiti. Diminutione.*

MR. BARBEYRAC'S NOTES on §. IV.

¹ I have transpos'd this Paragraph, and put the Author's fifth Section instead of it, making this my fifth, because the Author after he had spoken of the Promises of such as have lost their Reason, ought, according to his own Method, to have went on to the Promises of Infants, and not have interrupted the thread of his Discourse by treating of the Promises of Drunkards, which might better make a Chapter by it self, because Drunkenness is a transient Accident, whereas Infancy and Folly are States of long continuance. By this Transposition, not at all inconvenient, I preserve the Natural Order of things, which will be my Excuse.

² 'Tis a general Rule, that such Agreements as are null upon account of some Incapacity of the Persons making them, may become valid, if that Incapacity ceases, and the Person approves or ratifies the said Agreement. So if a Minor, being come to Age, ratifies or executes a Contract which he made in his Minority, it becomes as irrevocable as if it were made after he came of Age. See *Digest. l. 26. tit. 8. De Autoritate & Consensu Tutorum & Curatorum,* leg. 5. §. 2. & *Cod. l. 2. tit. 46. Si major factus ratio habuerit.* See also what our Author speaks §. 14. in this Chapter, and what I have said in my *Treatise of Sports*, l. 2. c. 1. §. 7.

in fine dispatch most Affairs of Peace and War. They think no time so proper as this, because the generous Heat of the Liquor, as it opens their Hearts, and takes off all Disguise from their Thoughts, so it inspires them with brave Resolutions and hardy Attempts. They are Strangers to Craft and Dissimulation, and the Liberty of the Table gets out all they know, and all they design. But the settling and finishing of Business is left to the next Day, when their Minds are closed, and their Judgments grown cool. Thus they make the right Use of each Time; they consult whilst they cannot dissemble, and they resolve when they cannot mistake. The like is reported of the Persians by Herodot. in *Clio*, l. i. c. 133. *Athenæus*, l. iv. c. 10. *Curtius*, l. vii. c. 4. *Add. Plutarch Sympof. Quest.* l. vii. c. 9, & 10. 3.

It is true indeed, that Faults committed in Drunkenness are not on that account excusable 4. Legislators have then thought fit to punish even Ignorance, when the Person is the cause of his own Ignorance. And therefore a double Penalty is usually enacted against drunken Offenders. For here the Excess, and consequently the Ignorance, was of the Man's own procuring, it being in his Power to avoid them. *Aristot. Ethic.* l. i. c. 5. l. 10. It was one of *Solon's* Laws, That a Governor taken in Drunkenness should be put to Death; and *Pittacus* decreed, that a Fault committed under this Disorder should have a twofold Punishment. *Laert.* l. i. in *Pittac.* Because, though a Person whilst the fit is on him knows not, perhaps, what he does, yet in as much as he voluntarily applied himself to the use of such Things as he knew would cast a Cloud on his Understanding, he is supposed to have yielded Consent to all the Effects of that Disorder. Yet it will not follow from this Consideration, that the Promises of drunken Men are Obligatory; because there is great difference between committing a Crime, and contracting an Obligation. For since there lies an absolute Prohibition against all Sin, therefore Men are to avoid all Occasions that may probably draw them into a Violation of their Duty. And how many Enormities Drunkenness betrays a Man to, is obvious to the meanest Apprehension. An Action then in itself sinful, can by no means lose that Character by proceeding from another Sin which led and disposed a Man to it. But on the other hand, since it is left to our free Pleasure, whether we will contract new Obligations, or no, we are not (as in the other Case) bound to avoid all Occasions which may render our Consent imperfect and invalid. As we are not bound to decline Sleeping, out of a Fear that others should interpret our 1 Nodding or Winking for a Token of Agreement to somewhat which they proposed. To this purpose, *Sueton* tells us a jesting piece of Knavery in *Caligula*. He made an Auction of his superfluous Gladiators; and as the Cryer was performing the Sale, *Aponius Saturninus*, a Gentleman of the *Pretorian* Dignity, happening to sleep upon

one of the Benches, the Emperor commanded the Cryer to take notice of the worthy Chapman that nodded * to the Price proposed. And the Business was so managed, that the poor Gentleman had laid out ninety thousand Sesterces before he knew a Word of his Bargain. *Vit. Calig.* Chap. 38. Therefore if Drunkenness had no other ill Effect, but that it made a Man seem to give some Indications, which at another time would imply Consent, it would not on this bare Account be esteem'd unlawful. And since a Man cannot contract an Obligation by Promise or Pact, without agreeing to it, and at the same time understanding the Business, we cannot infer his Consent to such an Engagement from his first consenting to make use of a Thing, which would probably hinder the Exercise of his Reason. Especially, if we consider, that Men seldom drink merely for the sake of stupifying their Brain, but their general Design is to comfort and cheer up their Spirits; and the former Effect steals upon them almost insensibly, whilst they unwarily prosecute the latter. To make the Difference appear more manifestly, we may add, that since the Property of a Crime or Offence is to bring some Evil upon some Man, and of a Promise to bring him some Good, which before was not his due, and since to be positively hurt, or injured, is more odious in the eyes of common Justice, than barely not to acquire some Benefit, there is much more reason why Drunkenness should invalidate a Promise, than why it should cancel a Transgression. As for a Man's being bound to pay for that useless load of Wine which he pours down, after his Stomach is already overcharg'd, and which he would refuse, were he in his Senses; this Obligation arises from the Contract made at the first sitting down, by which he engaged himself to give the Price of whatever he should drink, though he drank it to no purpose. If during this Fit of sottish Extravagance he be guilty of any mischievous Frolicks, as throwing away the Liquor, destroying the Vessels, or the Windows, and the like, he stands bound to make Satisfaction by the general Law of *Reparation of Damages*.

V. How 1 long Children continue under such a Weakness of Reason, as renders them incapable of contracting Obligations, we cannot universally determine; in as much as some arrive at a Maturity of Judgment sooner than others. Therefore in settling this Point, regard is to be had to the daily Actions and Proceedings of the Persons, from whence the best Conjectures are to be made about their Understanding; or commonly we have recourse to the positive Laws of the Country; all *States* almost having fix'd this Period by their particular Constitutions, and sooner or later 2, according as they found their People to be naturally more brisk and apprehensive, or more sluggish and heavy. Amongst the *Jews*, a young Man might ob-

3 See Mr. *Thomasius's* Discourse, *De Hominibus propriis, & Liberis Germanorum*, §. 12. *Max. Tyrius*, l. 12. and Dr. *Potter's* *Greek Antiquities*, l. 4. c. 20. as also *Briffon. de Reg. Pers.* l. 2.

4 Some Nations inflicted a double Punishment upon such as had committed any Crime in their drink; and by one of *Solon's* Laws it was enacted, if a Ruler or Magistrate were found drunk, he should be put to Death. The Words are, Τῷ Ἀρχόντι, ἂν μεθύων λησῆ, θάνατον εἶναι τὴν ζημίαν. *Diog. Laert. in Solone*, l. 1. §. 57. See *Menage* upon this Passage.

5 In all the Editions of the Original it is *nistando*; but besides, that the shutting of the Eyes is no sign at all of Consent, the Passage of *Suetonius*, which our Author quotes, shews, that either he or the Printers set it down for *nutando*.

MR. BARBEYRAC'S NOTES on §. V.

1 This Paragraph is the fourth in the Original. See Note 1. on the former Paragraph.

2 This Age is not the same for all Contracts, for there are some Things that they can do at 14 Years of Age, and others not till 25.

* *Crebro capitis motu nutantem.*

lige himself by Promise after thirteen Years of Age, and a young Woman after twelve. But because Persons of tender Age, though they may sometimes tolerably *understand* Business, yet for the most part act with too much Vehemence and Rashness, are too free and easy in their Promises, eager and over-confident in their Hopes, proud of being thought generous and liberal, ambitious and hasty in contracting Friendships, and not furnish'd with prudent Caution and Diffidence, it has been wisely order'd in most Commonwealths, That in contracting all Obligations³ they shall be sway'd by the Authority of graver Heads; till such time as their Rashness and Heat of Youth shall appear in a good measure to be abated. Hence in some Places, whatsoever they do in their own Names, during their Minority, is declar'd null and void; in others, if they have been cozen'd or over-reach'd, they are allow'd to recover full Satisfaction⁴. *Vid.* l. xi. f. 3, &c. l. xxiv. f. 1. l. xlv. *D. de Minoribus*. The Law of Nature itself plainly directs, that these Provisions should be made by positive Constitutions. Especially since he would justly forfeit the Character of his Honesty, who should make his Advantage upon this *easy* Age, and enrich himself at the Cost of those, who for want of Judgment and Experience, either could not foresee, or do not rightly apprehend the Loss⁵. The same Law of Nature enjoins, that when any Statutes or Customs of this kind have been establish'd in a Commonwealth, they shall be strictly observ'd; not only by the Subjects amongst themselves, but in all their Tran-

actions with Foreigners. Not so much as (as *Grotius* says in B. ii. c. 11. §. 5.) because he who enters into Contract in any Place, is during that Affair, bound by the Laws of the Country as a kind of temporary Subject, as because no State will admit of an *Action* in its Courts of Justice, upon a Business not conformable to its Constitutions, unless it has particularly declared, that in judging the Causes of Strangers the bare Law of Nature shall be followed. The same is to be said of Contracts made by Letter, between the Subjects of different States, when upon Default, either of them sues the other in the Courts of his own Country. For though here the injured Party may not have made himself, so much as for a time, a Subject of the other Commonwealth; yet, if he desires Redress by its Assistance, he must submit his Case to the standing Laws⁷: Or supposing two Subjects of the same Nation shall enter into a Pact or Promise, in some place which acknowledges no Sovereign, as on the wide Ocean, or in some Desert *Island*, they must nevertheless have recourse to the Laws of their Country, if they would obtain a full and perfect Right to what they bargain'd for; or an *Action* to hold good in Court upon Failure on either side. How the Case stands with Reference to the Acts of those Persons who are placed above the Power of civil Laws, it will be our Business elsewhere to enquire⁸.

VI. Another thing which invalidates *Consent*, and by Consequence the Promises or Pacts that are built upon it, is *Error* or Mistake²; through which it comes to pass, that the Understanding is

³ The *Attick* Law in this respect put *Women* in the Case with *Minors*; not allowing them to bargain for any thing beyond a Bushel of Barley, *ὡς τὸ τὸ γράμματα ἀδενέες*, on Account of the Weakness of their Judgment. *Dion. Chrysol. Orat.* 75. *Læus. Orat.* 9.

⁴ The Law grants this Privilege to him who hath been injured by any Act, as a Party to it, to look back to the Age he was of before that Act, if there be a just Cause. See *Digest.* l. 4. tit. 1. and what *Mr. Horrius* says upon that Title in his *Observat. in Compend. Juris Lauterbach*, where he carefully distinguishes the Maxims which may be drawn from natural Right from the Subtilties which the Roman Lawyers have perplexed the Matter with. See also *Daumal's Civil Laws*, Part 1. l. 4. tit. 6.

⁵ We ought to observe (as *Mr. Placcette* speaks in his *Treatise of Conscience*, p. 60.) That if, for Example, we meet with such a dull understanding at the Age assigned by the Law, that there is not Sense enough to oblige them sufficiently, we ought not to play upon their Simplicity, and engage them to do what we please upon that Pretence. Doubtless such an Action would be unjust; and in this case we ought to say, as in many others, We ought to attend more to the Intention of the Law, than the Terms. But here is another important Question to be examined into, and that's this, Whether if a Young Man engages himself before he arrives at the Age fixed by the Law, he is bound in Conscience to do what he has promised? For Example, If he has borrowed any thing before that Age, is he bound to pay it when he comes to it? *Mr. Placcette* seems to have determined this Question very well in these Words, The Casuists of the Church of *Rome*, even the strictest of them, answer by this Distinction, If the young Man has made a good use of what he borrowed, and in general, if the Agreement he has made be profitable and advantageous to him, he is obliged to stand to it; but he is not obliged, if he hath got nothing by the Bargain, *viz.* if he has spent what he borrowed upon his Debaucheries, and other Excesses. But *Mr. La Placcette* adds, This is not my Opinion, and says, I can't allow, that a Man should get by an ill Action, and free himself from his Engagement by a Fault. We may have regard to other things, and in the first Place consider whether he with whom we have contracted loseth any thing otherwise by the breaking the Bargain. For if he loseth nothing, but all the Damage he suffers, is only, that his Hopes are disappointed, I believe we are not obliged to make good the Promise we have made in that manner without any ill Design. Did he foresee the ill use that was likely to be made of what he lent? If he did foresee it, and did lend with an evil Intention, he ought to lose what he lent, and impute the Loss to himself; but if he had no ill Design, and lent freely, 'tis my Opinion he ought to be paid; and I am persuaded, to do the contrary, and take the Advantage of the Law, is a Fault, which not only a tender Conscience, but an honest Man in the Esteem of the World, ought to be ashamed of. See my *Treatise of Sports*, l. 2. c. 4. §. 12. and what this Author says, l. 4. c. 2. §. 11. following.

⁶ *Mr. Hertius* in his *Treatise, De Collisione Legum*, which is in Tom. 1. of his Comments and small Tracts, proves at large, that we often judge according to the Laws of another State, when we have made an Agreement, either where the thing of which we have treated is found to be, or where one of the Parties has his Dwelling.

⁷ *Grotius* is of Opinion, l. 2. c. 11. §. 5. numb. 3. that in this Case we ought to judge only according to the Rules of natural Right; and *Mr. Hertius* agrees to his Opinion. See the fore-mentioned Discourse, §. 56. and another of the same Volume *De Comœatu Literarum*, §. 16, &c.

⁸ See l. 8. c. 10.

MR. BARBEYRAC'S NOTES on §. VI.

¹ The three Conditions which are generally required in a full and free Consent, as I have noted above, §. 3. Note 1. are not to be met with, 1. In Promises made in jest and by way of Compliment. 2. In Promises made by Mistake. 3. In Promises made by the Deception of others. 4. Nor in such as are made thro' Fear.

² This the Law says, *Non videntur, qui errant, consentire*, *Digest.* l. 50. tit. 17. leg. 116. §. 2. See also *Leg.* 76. & l. 2. tit. 1. *De Jurisdictione*, leg. 15. So *Seneca*, *Demens est, qui fidem præstat errori*. *De Benef.* l. 4. c. 36. He must be a Fool, who will perform what he has promised through Error: But here we must mean an Efficacious Error, as this Term is expounded, l. 1. c. 3. §. 10. Note 2. and not a Concomitant Error: For by this Distinction our Author's Rules in some places must be explained and rectified. *Titius Observ.* 212. See the Notes upon the next Paragraph.

³ *Demens est, qui fidem præstat errori*. *Sen. de Benef.* l. 4. c. 36.

cheated in its Object, and the Will in its Choice and Approbation. We ought here carefully to distinguish, whether the Case relate to a *Promise*, or to a *Paët*. As for Promises, we may lay down this for a certain Rule, that if a Promise be grounded upon Belief and Presumption of some Fact³ which really never was, or when in making an Engagement of this kind I supposed such an Action, or such a Quality, without regard to which I should never have given my Consent; in this Case my Promise is naturally null and void; provided it appear evident from the Nature and Circumstances of the Business, that I agreed to the Proposal purely on account of that Fact, or of that Quality, which I took for granted. Because, here I did not promise absolutely, but upon Presumption of a necessary Condition; which Condition failing, whatever was built upon it, must consequently come to nothing⁴. Thus, for Instance, suppose I have been inform'd that you have done me a Kindness in promoting and well-ordering my Affairs, and upon this score I have promis'd you a Gratification; you will not say I am bound to stand to my Word⁵, when I find the Intelligence was absolutely false. By the same Rule we may decide the Case proposed by *Cicero* in *Lib. i. De Oratore, c. 38.* "A false Report was brought home of the Death of a certain Soldier abroad in the Wars. His Father believing the Story, alter'd his Will in favour of another Heir, and afterwards died. The Soldier at last returning safe, sues the Possessor of his Inheritance." It was here urged for the Plaintiff, that the *Civil Law* declares such Wills of a Father to be null⁶, in which the Son is neither made Heir, nor yet particularly, and by Name, disinherited; neither of which was done in the Will now under Consideration. But to this the Defendant might have return'd, that the Law cited on the other side plainly supposed that the Father knew his Son to be living, which here he knew not, but imagin'd the quite contrary. Therefore it might perhaps have been a more clear and easy Way of asserting the Soldier's Title, to proceed only upon the Law of Nature, and to alledge, that the Father's Will was grounded upon Supposition of his

Son's Death, which proving false, the Will became void and ineffectual; since it appears that his belief of that Report was the sole Reason of his altering his Measures. And hence too it is easy to answer that over-nice Question of *Sir Thomas Browne* in his *Religio Medici; Whether it was lawful for the Person whom Lazarus had made his Heir to possess the Goods?* or whether the Owner upon his being restored to Life, had not a Right to challenge them again? Where the latter must without doubt be affirm'd. For the reason why the Goods of the Deceas'd pass away to others is, because they themselves are taken out of the World, and consequently have no farther need of these Possessions. Hence in many places, some part of the Goods are set aside to be given to the Poor, or to the Church for the Benefit of the Soul of the Deceas'd. And in the *Pagan* Superstition, it is usual to bury or burn some of the Goods with the dead Body, for the Service of another Life.

But in case the Promiser was negligent in searching into, and examining the Condition upon which he built his Consent, he shall be bound to repair any Damage that is sustain'd by the other Party, upon account of his idle Engagement.

If the Promise was not grounded upon the Presence or Absence of such a Quality, as a necessary Condition, then tho' the Promiser was mistaken in that Point, yet his *Obligation* shall stand good. If the Promise were but *in part* occasion'd by an Error, it may as to the rest of it remain valid; unless one Part were included by way of Condition in another; or unless the Parts cannot separately be perform'd; for then an Error in part destroys the whole.

VII. As for Mistakes in *Paëts*, it seems necessary to distinguish whether the *Person* was thro' Error drawn into the Bargain, or whether there proves to be an Error as to the Thing or *Subject* for which he bargain'd. In the former Case we should again enquire, whether any Step is made towards Performance, or not. If I am prevail'd with to enter into a Paët or Contract upon Mistake, and I find this Mistake out, before any thing is done in order to the fulfilling of the Agreement, it is but equi-

³ The Lawyers distinguish between an Error of Fact, and an Error of Right, *i. e.* of Right positive, and build divers Determinations upon it. See *Daumat's Civil Law*, Part I. l. 1. tit. 18. §. 1.

⁴ Mr. *Thomasius* in his *Jurisprud. Divin.* l. 2. c. 7. §. 43. says, That a Man is obliged in this Case to keep his Word, especially if he did not expressly insert that Condition in his Promise, or he in whose behalf he is engaged, used no false Pretences to persuade him. But from the Moment that he knows in any wise that he promised upon the Account of some Service done by him to whom he made the Promise, the Condition is of the same Nature as the Thing. And so the Non-performance of the Condition makes the Promise null, as much as if he had declared it before-hand in express Terms; since, as we may suppose, nothing else could incline him to promise. Another Thing is in the Case of Horses bought upon a false Report, as our Author speaks in the following Paragraph, where read Note 2.

⁵ The Words in *Latin* are. *De cujus [Militis] morte, cum domum falsus ab exercitu nuncius venisset, & Pater ejus, re credita, testamentum mutasset. & quem ei visum esset, fecisset Hæredem, essetque ipse mortuus; res delata est ad Centumviro, cum Miles domum revenisset, egissetque tege in hæreditatem paternam testamento exheres filius.* See also, *Val. Maximus*, l. 7. c. 7. §. 1. and Mr. *Skulting's* Oration *De Jurisprud. M. T. Cicer.* p. 260. Mr. *Thomasius* in the Place before quoted, §. 44. observes, that this Example is nothing to the purpose. For, he says, the Sense of a Will ought to be expounded in a clear different manner from an Agreement or Promise, as well because a Will gives no Right to him to whom the Testator has bequeathed his Goods, as because he requires an Acceptation on his part. Besides, in Wills we ought to have some regard to the Laws; and above all, to such Constitutions as are made in behalf of Children. But it is evident, that our Author speaks here only of the manner how the Question ought to be determined by Natural Right only. I shall shew in its proper Place, that a Will gives a Right to him that is appointed an Heir, altho' it be not an irrevocable Right.

⁶ So the Law speaks, *Inter cætera, quæ ad ordinanda testamenta necessario desiderantur, principale jus est de liberis hæredibus instituendis, vel exheredandis; ne præteritis istis, rumpatur testamentum.* Digest. l. 28. tit. 2. *De liberis & posthumis Hæredibus instituendis, &c.* Leg. 30.

⁷ There was a Book printed in 1705, wherein this Question was seriously handled. The Title is, *Henrici Verduyn. &c. Disquisitio Jurisprud. de Testam. & Hæredit. Lazari bis mortui, aliorumque bis mortuorum. In ordinem redègit & ---- auxit Tobias Boel, Junior Iñus.* We may learn the Substance of it in a little time from the Extract of it given in the Works of the Learned printed at *Paris, Anno 1705, &c.*

⁸ 15. *D. de Jurisprud.*

table, that I should have liberty to retract; especially if upon making the Engagement, I plainly declared the Reason of my Proceedings¹. But if the Error be not discover'd till the *Paët* is either wholly or in part perform'd, then the Person who lay under the Mistake, cannot demand a Releasement any farther than the other shall, upon a Principle of Humanity, be content to allow him². For instance, a Man being at a Distance from home, receives false Intelligence, that he has lost all his Horses. Upon this Information he enters into Contract for the Purchase of new ones; but before the Money or the Horses are deliver'd, he finds himself to have been deceiv'd in the former News. Here we judge he is not bound to fulfil the Bargain, inasmuch as the Seller very well knows, that the false Account of his Misfortune at home was the Reason of his Purchase. Yet he is in Equity obliged to make some Consideration to the Seller; at least to repay the Damage which he sustains by losing the Bargain. But in case the Money and Horses were on both sides deliver'd, tho' the Buyer should now

find that he has no occasion for his Purchase, yet he cannot force the Seller to refund the Price, and to take back his Horses, unless this Condition was expressly mention'd in the Agreement.

But when there happens to be a mistake about the *Thing* which is the Subject of the Contract, then the Business is *null*; not so much upon account of the Mistake³, as because the Laws and Terms of the Agreement are not really fulfill'd. Inasmuch as in all Bargains the *Matter*, about which they are concern'd, and all the Qualities of it, good or bad, ought to be clearly understood, and without such a distinct Knowledge the Parties cannot be supposed to yield a full Consent. And therefore upon discovery of any Defect, the Person who was likely to suffer may either draw back from the Engagement, or may compel the other to supply what is wanting⁴; and likewise to make Satisfaction for Damage, if occasion'd by his Deceit or Default. And this, not only if the Defect be immediately found out, but if it appear at some Distance of Time. Which Period or Interval, when it is not fix'd

Mr. BARBEYRAC'S NOTES on §. VII.

¹ Provided (as our Author says in his Abridgment of the Duty of a Man and Citizen) that the other that makes the Contract receives by it no Damage, or that it be repair'd to him. The Example that is alleg'd a little lower, shews, that it is another Condition which the Author puts. But see Note 2.

² The Author is not consistent with himself here. For, if in the first Case there is any good Reason to excuse him who has made a mistake, so that he may lawfully retract, why should not the same Reason be good in the second Case? [The delivering of a thing consider'd in itself is a Physical Act, which can't deprive him of his Right, who has it; nor give it to him that has none. Whence it comes to pass, that when one hath paid what he ought not, he has not less Right to require again what he has done, than if he had forgiven him that which he had not deliver'd. See Mr. *Thomasius's Jurisprud. Divin.* l. 2. c. 7. §. 45, 46.] Further, if in the first Case we have Right to recant, how are we obliged to repair the Damage? The truth is, in both Cases we are indispensibly obliged to keep our Word. For if the Error be invincible, 'tis nevertheless only concomitant (see l. 1. c. 3. §. 10. Note 2.) and consequently does not exclude a necessary Consent in our Agreements. In fine, this Reason obliges us to conclude, that the Price doth not at all influence the Engagement farther than as it is an Indication of our manner of Dealing, and can't be formally inserted into it as a Condition to render it null, so that the Error which is committed thereupon can have no manner of Effect as to the Validity of the Contract. The Roman Lawyers own the Truth of this Principle in a like Case, I mean, in the Subject of a Delegation made thro' mistake. See *Digest.* l. 46. tit. 2. *De Novationibus & Delegationibus*, Leg. 12, 13. The same thing has place in an *Onerous Contract*. For example, in a Bargain of Sale, when there is a Mistake, as to the Person with whom we treat, taking him for another. For this is only an Error concomitant, having nothing in the Contract which necessarily requires that he with whom we treat should be certainly such or such a Man, or at least that he should declare himself, and we should affirm, that we dealt only with *Peter* (for example) and no other. Most of the Interpreters of the Roman Laws do indeed quote some Laws, which seem to establish the contrary; but if we examine those Places, we shall find that they treat of some Act of Liberality or Service, or suppose in the Person dealt with some Care, Industry, or other particular Quality; for then 'tis essential to a Contract, that the Contractor be certainly he whom we believe him; inasmuch that if we are mistaken in that, the Error is efficacious. *Titius Objerv. in Pufend.* 214. and in *Lauterbach.* 513.

³ The Author opposeth things here one against another, which have no Appearance of Opposition, but are the Consequents one of another. For the Error, in which one of the Contractors was, shews, that he consented to a thing that really was, and consequently, that the other Contractor did not satisfy the Intention of the first. *Titius Objerv.* 215. In fine, this hath place also, when the Seller as well as the Buyer really believes, that a *Bafon* of Tin, for example, is Silver, and no other Metal. For the Error of both the Contractors does not hinder, but that it is essential to the Bargain, that the *Bafon* sold should be Silver, and no other Metal. See *Digest.* l. 18. tit. 1. *De contrahenda Emptione*, leg. 14. But it is not so, when the Thing, or the Quality of it, wherein the Error consists on both sides, doth not come into the Bargain. A for example, if a Man says only, How much will you have for this *Bafon* or Metal? without explaining himself any farther, whether he is about buying a Vessel or maffy Piece of Silver. In that Case, says Mr. *Thomasius*, the Contract is in Strictness good and valid, altho' fair dealing does require, that the Seller, to whom he has paid for Tin instead of Silver, should give him part of the Price back again. For we must lay this down as a general Maxim, That in a doubt, if a Man mistakes, 'tis so much the worse for him; because it belong'd to him to explain himself. See *Jurisprud. Divin.* l. 2. c. 7. §. 39, &c. and c. 11. §. 22, 23. and what shall hereafter be said, l. 5. c. 12. §. 5. Note 4.

⁴ This is too much from the purpose. Something more exact ought to have been said to give us an Idea of the Effects of an efficacious Error. This Maxim may be added to those of our Author, If he that is mistaken aims at that chiefly wherein the Error lies, the Agreement is absolutely void, and he hath liberty to recant; but if he had not the thing itself in view, altho' he could heartily wish it had been what he believed it, the Agreement is good, and he can have a Right only to demand some Satisfaction for the Fault he overlook'd. As for example, if a Man in a great Necessity buys an House, which afterwards he finds to be subject to several Services, as he did not principally endeavour to have it free from all Services, that alone don't break the Bargain; but he may demand of the Seller, that he lessen the Price in proportion to the Inconvenience that those Services bring, with which he did not think the House was charged. It is very probable that the Roman Lawyers did follow this Principle in their Practice. Nevertheless the Determinations which we find in their Writings are neither accurate enough, nor consonant one with another, as this Reason will shew. That they may build the Efficaciousness of Error upon the Connection of the thing in which they are mistaken, with the Essence of a Bargain, they only consider the Natural Constitution of the thing in itself. Hence they distinguish the Error which hath for its Subject the Substance or Matter of a thing about which they treat, from that which falls only upon the Qualities of the thing. But here we are not examining what relation the Object of Error hath to the Matter of an Agreement, we only enquire upon what Foot the Bargainers consider'd it; and if it appear that they had only some certain Quality in view, 'tis the Error alone that respects that Quality, that can make the Bargain null, as much as if it fell upon the thing itself. *Titius Objerv. in Pufend.* 216. and in *Lauterbach.* 511. See Note 5. at the bottom of the following Page.

by the civil Laws, is to be determin'd by the Arbitration of some honest Referee; that no Indulgence may be given, either to the Fraud of the one Party in concealing, or to the supine Negligence of the other in examining the Business. And the larger Space of Time is to be allow'd, if the Defect were such as did not appear to external View, or could not be discover'd but by Men of extraordinary Sagacity and Skill.

As to that common Maxim with the *Civilians*, that an Error in the *Essentials* of a *Pact* dissolves the Agreement⁵, but not an Error in the *Accidentals* or Circumstances; we are so to interpret it, as by the *Essentials* to understand, not only what makes up the *Physical Essence* of the thing bargain'd for, but likewise those *Qualities* of it, to which the Contractor had an especial Eye and Regard⁶. For it frequently happens, that in a Bargain some *Quality* of the thing shall be chiefly esteem'd and valu'd, and the *Substance* or natural Constitution be only look'd on as a necessary Adjunct or Vehicle⁶. Thus my Contract will not only be void, if I buy such a particular Slave of a Merchant, and he sends me a different Person⁷; but likewise if I bargain'd with him for one skilful in the

Art of Cookery, and the Man whom I receive proves utterly ignorant of the Business, and incapable of serving me in that Condition^b.

VIII. Much more ought a *Mistake* to render a Promise or *Pact* *invalid*, if it were occasion'd by the *Fraud* of one of the Parties, who by that means drew the other into the Engagement. What Force or Effect the Practice of Deceit in these Matters will bear, may be clearly stated by making these Enquiries; first, as to the Author of the Knavery, whether it be he with whom we bargain'd, or a third Person. And in the next place, whether the Deceit was really the Cause of our Engagement, without which we had not ventur'd upon it, or whether it was only accidental to the Business, which we had nevertheless undertaken, but were now cheated in the *Thing* and its *Qualities*, or the true Price and Value of them. If the Trick was put upon us by a third Man, the Party with whom we transact not having been accessory to it, and the *Thing* for which we bargain'd proves without Fault²; in this case the Agreement shall stand good³; but we may recover of the Knave whatever we lose by his contrivance. If the Party himself with whom I contract, by some Deceit draws

⁵ The Intention of the Contractors must be known by the Circumstances. Here's an Example taken out of the Determinations of the Roman Lawyers, wherein yet they do not express exactly the Difference between the two Cases propounded, *Quod si me virginem emere putarem, cum esset jam mulier, emptio valebit, in sexu enim non est erratum. Ceterum si ego mulierem venderem, tu puerum emere existimasti, quia in sexu error est, nulla emptio, nulla venditio est.* Digest. l. 18. tit. 1. *De contrahenda Emptione*, &c. Leg. 11. §. 1. The Reason why, if a Slave which is bought prove a Woman, whereas he thought it a Man, the Bargain of Sale is not void, is, because there is no other apparent Mark of a Woman from a Man, but the Bigness, he had no Cause to think he bought a Man rather than a Woman, but that he did not sufficiently explain himself; so that the Error is only concomitant, and can't turn to the Prejudice of the Seller. But 'tis not the same as to the Sex, which are so differenced by the Habits, that they can't be mistaken, unless by some Fraud or Disguise. And so the Buyer must be supposed to make his Markets for the Sexes according to their Habits, and then the Error is efficacious, and consequently the Bargain is null. *Titius in Lauterbach. Obs.* 514. If the Buyer believing that he purchases a Man, the Seller, who knows his Intention well, leads him into an Error, and sells him a Woman without declaring it, the Contract is void, as the Law speaks, *Si quis virginem se emere putasset, cum mulier venisset, & sciens errare venditor eum passus sit, redhibitionem quidem ex hac causa non esse, verum tamen ex empto competere actionem ad resolvendam emptionem, & pretio restituito mulier reddatur.* Digest. l. 19. tit. 1. *De Action. Empt. & Vendit.* leg. 11. §. 5. See what Mr. Noodt says upon this Law in his Treatise, *De forma emendandi Doli mali*, &c. c. 9.

⁶ *Plerasque res aliquando propter accessiones emimus, sicut cum Domus propter Marmora, & Statuas, & Tabulas pictas ematur.* Digest. l. 18. tit. 1. leg. 34. *in initio.*

⁷ Vid. l. 18. *Princ. D. de Contrah. emptione.* Cicero (*pro Q. Roscio*, c. 10.) speaking of a Slave who was at the same time claim'd by *Fannius* and *Roscio*; What belong'd to *Fannius*? (says he) his *Body*; what to *Roscio*? his *Activity*. Not his *Face* but his *Skill* was valuable. The share which *Roscio* had in him was worth double to that which *Fannius* could challenge, &c.

MR. BARBEYRAC'S NOTES on §. VIII.

¹ By Fraud (which the *Civilians* call *Dolus malus*, or *Dolus* only) is understood any sort of Surprize, Deceit, Craft, Cheat or Dissimulation. In a word, any corrupt Methods, direct or indirect, positive or negative, by which Men maliciously deceive others. For there are innocent Errors, as that of a Medicine, which instead of curing enrages the Distemper. *Itaque ipse [Labeo] sic definiit, Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est.* Digest. l. 4. tit. 3. *De Dolo malo*, leg. 1. §. 2. *Non fuit autem contentus Prætor DOLUM dicere, sed adiecit, MALUM, quoniam veteres dolum etiam bonum dicebant, & pro solertia hoc nomen accipiebant,* &c. *ibid.* §. 3. See Mr. Noodt's Treatise *De forma emendandi Doli mali*, c. 1, & 2. In fine, tho' where there is a Fraud in the one Part, there is always an Error in the other; yet ordinarily the Invalidity of a Contract is entirely founded upon the evil Intention of the Contractors: For that Reason alone is in the main sufficient to make an Engagement void.

² The Lawyers call a Damage without Deceit, *Dolus in re ipsa*, which is grounded on this Law of the *Digests*, l. 45. tit. 1. *De Verbor. Obligation.* leg. 36. *Si nullus Dolus intercessit stipulantis, sed ipsa res in se Dolus habet,* &c. But we ought rather to call it the Vice or Fault of a thing, than a Fraud. For the word *Fraud* agrees properly only to a personal Cheat (as we say) which supposes an ill Design in one of the Parties, or a third, and an actual Performance of some Deceit. *Fraudis interpretatio* (as the Roman Lawyers themselves speak) *semper in Jure civili, non ex eventu duntaxat, sed ex consilio quoque consideratur.* Digest. l. 50. tit. 17. *De Divers. Regul. Jur.* leg. 79. Otherwise the Law from whence this Distinction of a personal and real Fraud is inferred, is commonly misunderstood, as Mr. *Thomasius* observes in his Discourse *De æquitate Cerebrina* leg. 2. *Cod. de rescindend. Vendit.* c. 2. §. 4. See l. 5. c. 3. §. 9.

³ It being understood that the Motive which by the Deceit of a third Person, inclined us to promise or treat, hath a necessary Relation to the Foundation of the Engagement, *i. e.* that the Error is purely concomitant. For if (for example) any one makes me believe that all my Horses are dead, and I declare to him that sells me others, that I did not buy them, but upon this Supposition, that the News is true: The Moment that I discover the Falshood, the Bargain is void, by virtue of the Condition which was formerly mention'd, and the Seller is to take care of him that hath deceived me. See §. 7. *Note* 2. before-going.

^a Vid. l. 57. *D. de Oblig. & Act.*

^b *Add.* l. 9, 10, 11, 14, 41. f. 1. *D. de Contrah. emptione.*

me into the Business⁴, I am then free from all Obligation to performance⁵. If the Deceit were not antecedent to the Contract, but happen'd *in it*, with reference to the *Thing* bargain'd for, its Qualities, &c. the Agreement shall be so far void, as that it shall be at the pleasure of the suffering Party, either to reverse the whole Business, or to require Satisfaction for his Damage⁵. A Matter not essential to the Agreement, nor expressly consider'd init, shall not prejudice its Validity; tho' perhaps one of the Parties might have a secret and sly Respect to some such thing in the very Act of driving the Bargain⁶. Upon what Right a Man may proceed, in case he be egregiously cheated, as to the Price of any thing contracted for, we shall hereafter examine and declare.

IX. It comes now in course, that we consider the Point of FEAR, what Power it has in rendring human Acts incapable of producing an Obligation. There are two Species of Fear, which especially fall under this Enquiry. The former arises from some Vice or ill Disposition in the Person with whom we transact, or else from his ill Will to us in particular; whence we entertain a probable Suspicion, that he will deceive us. The other denotes a vehement Terror of the Mind, caus'd by the threatening of some grievous Mischiefe, unless we engage in the Promise or Pact desired. As to the first sort of Fear, this is evident beyond dispute, that if I see a Man who makes it his common Practice to cheat all the

World, and reckons every piece of Knavery a piece of Wit⁷; or if as to the present Business I find he has a manifest Design upon me; I shall be a ridiculous Fool, if by trusting to his Faith, I expose myself to his Fraud, and to his Scorn. For he that runs into a Snare with his Eyes open, falls not only without help, but without pity⁸.

(**) *Promisi lingua, eadem nunc nego;
Dicendi, non rem perdendi gratia hæc nata est mihi;
Plaut. Curcul. Act. v. Scen. iii. ver. 27, 28.*

'Twas my Tongue said it; and my Tongue un- says it. Nature never gave me a Voice to be the Instrument of my own undoing. And again in *Rudent*: Act. v. Scen. ii. ver. 68. and Scen. iii. ver. 17, 18.

*Quæ hæc factio est? non debes? non tu juratus es mihi?
Leno. Juratus sum, & nunc jurabo si quid voluptati est mihi.
Jusjurandum rei servandæ, non perdendæ, conditum est.*

What a stir's here? Don't you owe it? Did not you swear Payment?

Pimp. Yes, I swore and I'll swear again, whenever it pleaseth my Fancy. Oaths were invented to preserve Mens Goods and Estates, not to ruin them.

The Character which *Polybius* in *B. VI. p. 498. A. Ed. Wech. Casaub.* gives of the Grecians is not much

⁴ Indeed 'tis absurd to imagine that a Man can by a design'd and wicked Cheat, lay a valid Obligation upon another on our Account. *Nemo ex suo delicto meliorem suam conditionem facere potest* (say the most judicious Roman Lawyers.) *Digest. l. 50. tit. 17. De Divers. Reg. Jur. leg. 134. §. 1.* Nevertheless, these Lawyers, as Mr. *Titius* observes (on *Lauterbach. Observ. 116, 117.*) deliver here many vain Distinctions. For they affirm, that a Fraud, which has been the Cause of a Contract, does render it null in itself, and by Right (*Ipso Jure*) unless when Sincerity may be pretended, *i. e.* when a favourable Construction can be put upon it by the Rules of Equity, if we do not insist rigorously upon the Terms. But in an Act of rigorous Right, where we must strictly observe what is said or written, the Fraud does not hinder the Contract from being valid, altho' it may be reversed by a full Restitution. For the Laws in this Case always allow the Benefit of Restitution, which comes to the same thing as to the Damage of the Person cheated. But according to Natural Right, a Fraud does no less disannul a Contract of rigorous Right, than a faithful Contract. Mr. *Titius* (in *Lauterb. Observ. 1148, &c.*) maintains also with Reason, that this Distinction of Acts of good Faith and rigorous Right is not conformable to Natural Right by the Principles which ought to take place in all sorts of Acts, which admit of an equitable Construction, as Mr. *Noodt* acknowledges, *De Forma emend. Dol. mali. Sec. c. 4.* where he observes that before the Prætor *Caius Aquilius Gallus* there was no regard had to Contracts of rigorous Right, unless there were some formal Agreements, and the Person cheated were a Minor. See *l. 5. c. 2. §. 8. infra.*

⁵ The Interpreters of the Roman Law have hitherto affirm'd, that in this last Case a Contract is neither null by Right, nor subject to be made void by a full Restitution, when it is transacted by a Contract of good Faith, and has no other Source than an Action done in good Faith, besides the Exception of Deceit. But the famous Mr. *Noodt*, who has made admirable Discoveries in the most knotty Parts of the Civil Law, undertakes to prove in his excellent Treatise *De Forma emendandi Dol. mali in contrahendis negotiis admitti apud Veteres*, printed in 1709, That this Distinction of the modern Lawyers has no Foundation in the Writings of the Antients, and that every Fraud, whether it consists in the way of treating, or be found in the thing itself, or the Price, renders the Contract made in good Faith always null in itself, and by the Civil Law, inasmuch that the Person cheated being summoned by the other Contractor to answer it, has no more to do but prove the Cheat on his part, without opposing to him the Exception of a Fraud, and the Prætor or Judge must declare the Contract null by Right. But if he who is damaged becomes the Plaintiff, he may either declare the Contract entirely null by Right, or suffer it to be in force, if he judges it convenient, saving to himself in both Cases to require a Reparation of the Damage which comes to him by the Cheat, when the Defendant shall demand a Cessation of the Contract. This last Circumstance is remarkable, and I took the more notice of it, because it confirm'd the Notion I had deliver'd in my Treatise of *Sports*, where I had said (before Mr. *Noodt's* Treatise appear'd) following my own Reason, *l. 2. c. 1. §. 11.* That there is this particular in all Contracts made by Force or Error, or, in a word, which are not perfectly free on the Part of one of the Contractors, that it is lawful for this last to make what Advantage he can of it, but the other hath no Right to ease himself of the Damage done him contrary to his Intention, &c. Mr. *Noodt* hereupon quotes a Law of the *Code*, which imports, that after a Matter concluded, if he who has some way been guilty of a Cheat, requires a Nullity of the Contract, such a Demand, which is shameful, ought not to be granted to its Author. *Transfatione finita, quum ex partibus tuis magis dolum intercessisse, quam eorum, contra quos preces fundis, confitearis, instaurari grave, necnon criminiosum tibi est.* Lib. 2. tit. 6. leg. 30.

⁶ Altho', adds our Author in his Abridgment of the Duties of a Man and Citizen, *l. 1. c. 9. §. 13.* the other Contractor has directly led us into that Thought till the Bargain was concluded.

MR. BARBEYRAC'S NOTES on §. IX.

¹ *Plautus* has given us a good Character of these sort of Men in the Person of a Seller of Slaves, who demanding if he had not promised to pay the Money for which he had sold a Boy, in case any one would warrant him to be free, answers, as in the Latin Quotation at (***) in the Text.

² Our Author leaves us here to guess at his Meaning about the Validity of an Agreement, which notwithstanding the Knowledge of the ill Design of the other Contractor, we have engaged ourselves in with him for something; but he explains himself in his Abridgment of the Duty of a Man and Citizen, *l. 1. c. 9. §. 14.* where he lays down this Rule, He that trusts to the Promises or Agreements of a Person who makes no Scruple of violating his Faith, and breaking his most sacred Engagements, acts with a great deal of Imprudence, but that is not a Reason sufficient to render the Engagement null and of no Effect. The Reason is plain, he ought to have taken care not to engage, and if he be deceived 'tis his own Fault, he can blame none but himself.

⁷ Vid. *Diadr. Sic. l. 2. c. 28.*

better. The publick Bankers of Greece (says he) if you lend them only a single Talent with ten Bonds, as many Seals, and twice as many Witnesses, yet will never be prevail'd upon to be honest. But whether this Fear or Suspicion of being deceiv'd, can render invalid a *Pact* already made, and can absolve the suspecting Party from a necessity of Performance, will appear when we shall have consider'd the Opinion of Mr. *Hobbes*, on this Point. He then lays it down for a Rule, that a *Covenant wherein neither of the Parties perform presently, but trust one another, in a State of Nature, becomes void, if on either side there arise a just Fear*^a. Which Assertion we cannot admit of, but under this Construction; that one Party after the Covenant is made has just Reason to fear, that when he has perform'd the Engagement on his side, the other Person will fly off. And by a just Reason to fear, we mean such as is grounded on plain Indications and Proofs. For it is highly injurious to question a Man's Fidelity without good Evidence, when we have experienc'd it in former Instances. And indeed Mr. *Hobbes* himself by a subjoyn'd Note, brings his Words to this qualified Sense; *Unless, says he, there arise some new Cause of Fear from some Fact, or other sign of the Will, in one Party, tending to Non-performance, the Fear cannot be esteem'd just. For that which could not binder a Man from promising, ought not to be admitted as an Hindrance of performing.* That is, tho' before the entering into the Covenant, one of the Parties might entertain some Suspicion, that the other would impose upon him; yet by the very Act of covenanting with such a Person, he as it were renounces this Fear, and declares it insufficient to hinder his believing and trusting him. And otherwise, no Engagement could pass between them. But at first this seems to have been *Hobbes's* Judgment, that a *Pact* thus made would be void, tho' there should no such Fear arise after the Conclusion of it, as appears both from his *Work of a Body Politick*^b, written in the *French* Tongue, where we do not meet with this Restriction; and from the reason assigned by him in the *Latin* Treatise, for that Rule of his at present under our Examination. And the reason he gives for it is this, *Because he that performs first, betrays himself to the covetous Designs of the other Party, upon account of the ill Disposition of most Men, inciting them to study and advance their own Interest by Right or Wrong. But it is against Reason, that one should perform now, whilst it is improbable that the other will perform hereafter.* Whence it is plain^c, That he derives the Cause of this Suspicion and Diffidence from the general Pravity of Mankind. And by this Means must the greatest

number of Mortals be branded as Persons unfit to deal with; and in general, all Faith and Trust be banish'd from amongst those who are not subject to a common Ruler or Judge. For since we cannot be infallibly certain of any Man's Honesty, and since the World is for the most part inclin'd to Wickedness; and farther, since in a State of Nature every Man orders his Business according to his own Opinion, and is Judge of the Justice of his own Fears, it will follow, that a Suspicion, though vain and groundless, shall render a Contract invalid; and therefore that *Pacts* are of no manner of use, except under civil Governments. And it is an exceeding hard Censure, to think the greatest part of Men to grossly vile and wicked, as that (setting aside the civil Power) the Fear of God, the Regard to Faith and Trust, and the Force of sound Reason, shall have so little Influence on their Minds. Whereas, on the contrary there seems to be stamp on the Souls of all Men, in indelible Characters, a just Sense of the Duty of keeping their *Faith* sacred and inviolable; an Argument for which Truth we may draw from this easy and natural Reflection, That we can find no Man who will openly profess *Perfidiousness*, but every one who recedes from his Word or Bargain, pretends to have done it on very just and weighty Reasons. A Commonwealth which breaks its Faith with one of its neighbouring States, immediately engages its Faith again, to procure the Alliance and Confederacy of another; and thus endeavours to avert the Danger it lay under from that Baseness and Treachery, by the Help of the same Duty which before it violated. We ought therefore to presume, that every Man will do what is just and honest, till his contrary Practice forces us to change our Opinion. To distrust every Body, says *Lucian*, is a most ridiculous Folly^d. From all which we may venture to conclude, That this distrust of Mens Faith arising from the general Pravity of human Nature, is not sufficient to justify the Non-performance of Contracts^e. And therefore the Excuse of the *Mitylenians* for deserting the Confederacy of the *Athenians*, was vain and groundless, as it is given by their Ambassadors in *Thucydides*, B. iii. c. 12. Edit. Oxon. Pag. 154. *When they had War, they for Fear courted us; and when they had Peace, we for Fear courted them. Thus our Faith on both sides was not preserv'd as is usual by mutual good Will, but by mutual Distrust; and they who could be first encouraged by Security were likely to be the first that should break the Union.*

Nay, should we discover some particular Vices in a Person, this is not always a good Reason for us to recede from an Engagement made with him^f. For there are many Vices which have no ill influ-

³ This is a Mistake of our Author, for 'tis only a Translation into *French*, as Mr. *Barbeyrac* observes.

⁴ The Author here cites a Passage from *Lucian's* Dialogue of the Liar or Incredulous, Γενλία πιστῆς, ἔστι δ' ἴσον, ἀπιστῶν ἀπιστοί. These are the Words of a Man very incredulous in Matters of Magick, who reprov'd another that did not believe his Relations concerning it; but if our Author had minded the Connection of the Discourse, he would have found that he had misapply'd these Words; to which the judicious Maxim of the Philosopher *Seneca* had been more pertinent, *Utrumque enim vitium est, & omnibus credere, & nulli; sed alterum honestius dixerim vitium, alterum tutius, (i. e.)* We must neither trust all the World, nor distrust them, both of these Things are faulty; but the first in my Opinion is most honest, and the other most safe, *Epist.* 3. See *Hesiod* in his Book *De Oper. & Diebus*, ver. 372. And as to the following Maxim of our Author, see l. 8. c. 4. §. 3. following.

⁵ The Greek is, Καὶ οἱ μὲν ἡμᾶς ἐν τῷ πλεόνει δεδόπισ ἐδεσθῆμεν, ἡμεῖς δ' ἐκείνους ἐν τῇ ἡσυχίᾳ τὸ αὐτὸ ἐπιθέμεν. ὅ, τε πῶς ἀλλοις μάλιστα ἔνοια πῶςν βεβαίον, ἢ μὴν περὶ τῶν ἐγγυρῶν παρείχε, δέει τε τὸ πλεόνει ἢ φιλία χατηρόμενοι, σὺμμαχοὶ ἡμεῖς, καὶ ὁποτέρους δάων παρέχει ἀτάλεια δεσθῶ, ἐπι πείρα. ἢ π καὶ ἀσθῆσις ἐμειλλοι.

⁶ Mr. *Hertius* here quotes to this Purpose certain Words of *Terence*, which he makes a Buyer of Slaves to speak, *Leno sum, fateor, pernicios communis adolescentium, perjurus, peffis; tamen tibi a me nulla est orta injuria, (i. e.)* I own, I am a Buyer of Slaves, the Ruin of young Men, a perjured Person, a common Plague; but for all this I have done no Injury. *Adelph.* Act. 2. Scene 1. v. 34, 35.

⁷ *De Civ.* c. 2. f. 11. ^b And much more plain from his express Words in the English *Leviathan*, where the same Doctrine is thus delivered: If a Covenant be made, &c. p. c. 63.

ence on the Duty of keeping Faith. Thus suppose a Man to be inclin'd to Lust, Drunkenness, or Cruelty, those ill Habits, consider'd barely in themselves, do not hinder but that he may be a strict Observer of his Word, and a constant Performer of his Covenants. And farther still, should we find a Person addict'd to such Vices as do commonly prejudice Fidelity and Trust; as if we observe in him a desultory Lightness and Inconstancy of Mind, an insatiable Desire of Riches, or a violent Strain of Ambition; yet even these Qualities do not give us an absolute Liberty of refusing to make good our Word, when we have pass'd it on his Account. For in the first place, it may often happen that a Man out of a particular Inclination may practise Dishonesty towards others, and yet may live fairly and justly with me. And then (as has been lately observ'd) by my very Act of bargaining with a Person whose Disposition I am acquainted with, I declare those Vices which I know him guilty of, to be insufficient to hinder me from trusting him, and so renounce all my Privilege of making Exception against his present Morals, after the Business is concluded between us. For otherwise nothing would have been firmly transacted, supposing one Party at first to have made such a Reserve as should, when he pleas'd, overthrow the whole Proceedings⁷. Though indeed when I have been once deceiv'd by a Man, I shall act very imprudently, if I engage in any Contract with him again, without requiring particular Security. And the very Proverb will tell me, That if such a Knave cheats me once, 'tis his Fault, but if he cheats me a second time, 'tis my own⁸. *Add. Senec. de Benef. l. iv. c. 27. Cic. de Invent. l. i. c. 39.* Or even after the Pact is concluded; suppose I find by evident Tokens, that he is contriving to play me a Trick, I shall be an egregious Fool, if I betray my self voluntarily to his Designs. *Cicero de Invent. l. i. c. 39.* It's the highest Pitch of Madness to rely on their Fidelity, whose Perfidiousness you have often experienc'd. Hence *Menelaus* cries out in *Homer. l. iii. Iliad. v. 105, 106.*

Ἄξιός τε Πειράωιο βίην, ὄρε' ὄρνια τάμην
 Ἄπτος, ἐπεὶ οἱ παῖδες ἑσφιάλοισι καὶ ἀπτοισι.

Bring Priam's self to see the Contract made,
 For Priam's Sons are faithless and unstead.

⁷ There is a Passage in *Cicero* very pertinent to this Purpose, *Nam illud quidem, Neque dedi, neque do fidem infideli cuiquam, idcirco recte a poeta, quia cum tractaretur Atræus, personæ servendum fuit; sed si hoc sibi sumunt, nullam esse fidem, quæ infideli data sit, videant ne quaratur latebra perjurio,* (i. e.) When the Poet makes *Atræus* say, I never have, nor do believe a faithless Person, he had reason to make that wicked King say so, to make up his Character. But if we lay down this as a general Rule, That Credit given to a faithless Man is void, I fear under that pretence an Excuse will be found for Infidelity and Perjury. *De Offic. l. 3. c. 29.*

⁸ *Cicero's* Latin is, *Primum quidem decipi incommodum est, iterum stultum, tertio turpe — summa igitur amentia est, in eorum fide spem habere, quorum perfidia toties deceptus sis.* *De Invent. l. 1. c. 39.* See also *Homer's Iliad, l. 3. v. 105. Cicero, l. 1. in Verrem, c. 15. Sen. De Benef. l. 4. c. 27. Polyb. l. 8. c. 1, 2. and l. 10. c. 34.*

⁹ *Mr. Vander Muellen* in his Commentary upon *Grotius*, Tom. 2. will not agree to the Opinion of our Author. For he says, Experience shews, that those sort of Men have not so altogether put off Humanity, but are usually conformable to the Rules of Honesty and good Sense established among Men; and if they do not act with any fear of a Deity, yet they do it with the Prospect of their own Advantage and Preservation. So that though we know that a Man is infected with that detestable Opinion, we have no Right under that pretence to break our Word with him, and neglect to perform the Agreements made with him. We were at our Liberty to agree with him, or not; but from the Moment that we have concluded an Agreement with him, we are necessarily obliged to perform it. It is a clear different thing when we deal with Traitors, Thieves, Pirates, &c. *Mr. Bayle* has also proved at large in his Thoughts upon a Comet, and the Enlargement of that Work, that Atheists are not always wicked and faithless, and that they may through a Principle of Honour or other human Motives abstain from grosser Vices.

¹⁰ The Author here speaks only of that Circumspection that we ought to use in treating such Men. For he denies not but we are obliged to observe what we have freely promised. See what he speaks a little lower, §. 11. in the place where he examines the Maxim of *Cicero. De Offic. l. 3. c. 29.* See also l. 8. c. 4. §. 5.

¹¹ We may easily discern that this Passage is not very pertinently alledged.

ed and deluded; or that he must depend entirely on the Favour and good Grace of the other, for what he expects in return.

Thus *Socrates of Achaia* replied to the Demands of King *Artaxerxes*; The King deals most unreasonably by us; what he desires to receive from us, he would have to be immediately deliver'd; but what he is to give us in return, he expects we should afterwards humbly sue for. *Diod. Sic. l. xiv. c. 24.* For the same Reason, *facilior fides speratur ex pari*, we may trust more safely to the Faith and Honesty of an Equal, *Quintil. Declam. 312.*

And lastly, That he exposes his Safety to manifest Danger, who by performing a Covenant weakens himself, and strengthens the other Party; upon hopes that in Requital, and according to the Agreement, he shall afterwards receive the like Assistance and Succour. For 'tis a piece of Folly to give a real and substantial Good, in exchange for Words, Writings, or Seals, when we have nothing to oppose to the Charms of Ambition and Covetousness, but the ill-grounded hopes of Honesty and Fidelity ¹².

Maurocen. Hist. Venet. l. v. p. 193. Ed. Ven. I dare not venture to place the Security of our Affairs in a League. For such is the Nature of Confederacies, that they are frequently hindred and interrupted by the various Events of Things; different Ends propos'd draw the Strength and Minds of the Allies different ways; and whilst each State pursues its own private Interest, the common Good is disregarded or betray'd. Reinforcements and Supplies are neither sent in equal Proportion, nor at the time agreed upon; hence arise Suspicions, and Estrangement of Affections, from this open Quarrels, and from Quarrels utter Desertions, and Violations of the main Contract; and thus at length, those of the Confederates who are least able to make Resistance, become a Prey not only to their Enemies, but to their Allies.

X. We are now to proceed to that other Species of Fear, arising from the Approach or the Apprehension of some grievous Mischief. And in stating this Point it is necessary, that we go back to furnish our selves with some clear and fundamental Principles. And such is this undoubted and original Truth, That *our Will naturally inclines to*

what it looks upon as good. Now it appears no less good and desirable to the Will, to avoid an imminent Evil, than to acquire an absent Benefit; and towards the attaining of both these Ends, we employ the most likely Means, although they be such as we should not barely on their Account choose or embrace. For we commonly make use of Methods in themselves ungrateful and troublesome for the escaping of a Danger, as for the acquiring of a Pleasure ¹. Though indeed, the Hopes of compassing a Good does more sweeten the Grievousness of these Means or Methods, than the Care of preventing an Evil. For which Reason *Aristotle* ^a calls those only *mixt* (that is, partly voluntary, partly involuntary) Actions ², which are undertaken for the sake of declining some Mischief which we are like to suffer; as in that trite Instance, of throwing Goods over-board in a Storm. Though as great Hardships as any of this kind are undergone by the Wrestlers, and other Engagers in the publick Games, to prepare their Body for those Exercises ^b. What we would observe then is this, That although Actions perform'd upon Fear of a greater Evil, ought to be accounted spontaneous, and tho' the lesser Evil, which in those Cases we choose, is, as Things then stand, the real Object of our Desire; yet all this is not sufficient to found an *Obligation* in us towards another. For since every *Obligation* is directed towards some other Party, to whom it is to be made good, and who thereby obtains a correspondent Right of compelling us to Performance; to produce such an Engagement, 'tis not enough that one Person has in him the due Grounds or Principles of an *Obligation*, but it is requisite, that there be in some other Persons Principles fit to create a *Right*. For we can have no Notion of an *Obligation*, unless a *Right* answer to it, or be consequent upon it: As I can owe nothing, if there be no Person who can rightly demand any thing from me. Therefore such *Fear* alone invalidates and destroys an *Obligation*, as is caus'd by some *Vice* or Imperfection in the other Party, rendering him incapable of acquiring a *Right* ³. And such a Defect is every *injurious* Action; which cannot be said to produce a *Right* without a manifest Contradiction ⁴. For to pay what

¹² This Quotation is not very necessary, because that Historian there treats in general of the Inconveniences which arise by Alliances of one State with another.

MR. BARBEYRAC'S NOTES on §. X.

¹ As for Example, The antient Wrestlers, as our Author observes a little lower, underwent cheerfully the Regimen of a very austere Life, and great Fatigues, that they might win the Crown of the Olympick Games. See *Epiſtet. Enchirid. c. 35. in fine.* What our Author says here is not contrary to the Maxim which we have defended above after him, l. 1. c. 6. § 14. For tho' in general Man is more sensible of Evil than Good, that hinders not, but that sometimes he may resolve to do some things disagreeable in themselves upon some Occasions, to obtain a Good which he looks upon as much more considerable, or to avoid an Evil more troublesome. And then the Hope of Good makes us think the Means less troublesome, than the Desire of avoiding the Evil does, as well because we embrace these Means with an entire Liberty in the first Case, and not in the latter, as because the Acquirement of Good is something positive, which produces a new Pleasure and Advantage, whereas a Deliverance from Evil leaves us in the same Estate we were.

² See l. 1. c. 4. § 9. before going.

³ *Nihil consensui tam contrarium est, qui ac bonæ fidei judicia sustinet, quam vis atque metus, quem comprobare contra bonos mores est.* Digest. l. 50. tit. 18. De Diversis Reg. Jur. leg. 116. See tit. 2. l. 4. *Quod metus causa gestum erit,* and Mr. *Daumiat's* Civil Laws in their natural Order, Part 1. l. 1. tit. 18. § 2. We may add also what *Cicero* says, *Jam illis promissis standum non esse, quis non videt, quæ coactus quis metu, quæ deceptus dolo promiserit? Quæ quidem pleraque Jure Prætorio liberantur, nonnulla Legibus.* De Offic. l. 1. c. 10. (i. e.) As for Promises extorted by Fear or Fraud, who sees not that we are not obliged to keep them? The Prætor himself frees us from many of them, and the Laws from some others. "Solon (as *Plutarch* relates) by allowing Men who had no Children to give all they had by Will to whom they pleased, yet did not thereby approve of all sorts of Donations indifferently, but of those only that were given freely without any Violence, and without a Mind corrupted with the Potions, or Fawnings of a Woman, being justly persuaded that there is no difference between Seducement and Force; and placing in the same Rank, Surprise and Force, Pleasure and Pain, as the things which equally cloud our Reason. *Εὐ πάνυ καὶ ἀρροσσηρόντος τὸ πειθώσαι ὅτι τὸ βέλτιστον, ἐδὲν ἠγέρθητε τὰ βλαδύαι διαζέρειν, ἀλλ' εἰς τάντο ἢ ἀπάτω τῆ ἀνάσκει, καὶ τὸ πῦρα ἢ ἠδονὴν δέμας, ὡς ἔχ ἠπλον ἐκείνηται λογισμὸν ἀνδρῶτα δωμαρῶσαν.*

⁴ See the Law of the *Digests*, cited §. 8. Note 4.

^a *Ethic. l. 3. c. 1.* See what we have said of these in l. 1. c. 4. § 9.

^b *Vid. Epiſtet. Enchir. c. 35.*

another has a *Right* to demand, is a Precept of the *Law of Nature*; and should an Injury (*that is, a Deed or Fact* directly contrary to that *Law*) be able to cause any such Effect, the *Law of Nature* would lend Strength and Assistance to its Enemy, and manifestly contribute to its own Destruction. We may as well say, that a Law which forbids Thieves, may at the same time reckon their Trade and Practice amongst the honest ways of Gain^s.

XI. But, before we apply these Remarks more closely to the Point, it is necessary that we make farther Enquiry, whether the Author of the *Fear* was the Party with whom we are engaged in Business, or some other Person. And then again, whether he had a just Power and Authority of presenting such a Fear to our Mind, or not. For this is true beyond Dispute, that in case I have taken an *Obligation* upon me through Fear of Mischief, threatened by a *third Person*, neither at the Intigation, nor with the Confederacy of the Party to whom the Engagement was made^r, I stand firmly bound to perform what I promis'd him. For there appears no Fault in him, which might render him incapable of acquiring a *Right* upon me; and on the contrary, he may justly challenge a Requit, in that he lent me his Assistance, in warding off the Danger I apprehended from ano-

ther Quarter². Thus, if I hire a Guard of Soldiers to defend me against Robbers, I am no doubt oblig'd strictly to pay them the Price of their Service. And a Man who being reduc'd to a low Condition, procures by large Promises the Help of others, and having by their Means escap'd the Danger, is afterwards backward in performing, contracts the double Guilt of Perfidiousness, and of Ingratitude.

A Promise is likewise valid, if made to a third Person, through our Awe and Dread of a lawful Superior³; who had a just Right of commanding us, and of denouncing a Penalty upon Default. For here the Party to whom I make the Engagement is in no Fault; and I can only blame my self for being driven to a thing through Fear of Punishment, which I ought voluntarily to have undertaken. Thus should a King lend a Body of his Soldiers for Guards to a foreign Prince, and for the greater Security, command them to swear Obedience to the Stranger; they shall not afterwards fly from their new Obligation, upon pretence that they were brought to it by *Fear*; since the *Fear* proceeded from *him*, who had a sovereign Right of laying this Injunction on them, and of forcing them by any Methods to their Duty. In the same manner,

⁵ To clear this Matter, it is necessary to make some Reflections. 1. The Reason which our Author alleges, taken from the Incapacity made by the Cause of Fear, to acquire any Right from the other Contractor, is very good, but there is another drawn from the Person in whom the Fear is, That his Consent is not so free as is required in all Promises and Agreements, which ought to be perfectly voluntary. 'Tis not here as it is in Actions criminal and evil in themselves, which ought not to be committed for fear of the greatest Menaces, though the Fear yielded to may lessen the Crime. Because as we ought and may obey the Law that forbids them, we are thought to be free so far as is necessary to make us culpable, though we have nothing in view but the Trouble which we are immediately threatened with. But in the Matters of Promises and Agreements, all that is not done without Artifice and Constraint from him with whom we engage, is looked upon with Reason not to have a good ground of Consent, and consequently is void in itself, because we act about things indifferent, which we need not determine farther than we see convenient. The Law that leaves us at liberty to do them or not, lays no Necessity upon us to keep what we are engaged to contrary to our Will and Interest. Reason and Prudence will oblige us rather to depart from our Rights, than expose our selves to the ill Effect of Force; but if there be no Damage to us, nothing can oblige us to make good an Act which is null in itself, unless we fear a worse Consequence than appears in doing it. Mr. *Daumat*, who has used (in his Civil Laws reduc'd to a natural Order, Part 1. Lib. 1. tit. 18. § 2.) this Reason to shew the Nullity of forced Engagements, but explains them obscurely, has not forgot the other Reason taken from him who is constrained to promise or treat. 2. Our Author seems to think that the Evil, which being apprehended, is sufficient to make forced Promises and Agreements void, ought to be very terrible, whose Prospect may affright the most courageous Persons. 'Tis certainly the Opinion of the *Roman* Lawyers, who confine this Fear to the Danger of losing Life, or suffering some violent bodily Pain. *Metum accipiendum Labeo dicit, non quemlibet timorem, sed majoris malitatis----qui merito & in hominem constantissimum cadat.* Digest. l. 4. tit. 2. leg. 5, 6. *Talem metum probari oportet, qui salutis periculum, vel corporis cruciatum contineat.* Cod. l. 2. tit. 4. De Transactionibus, leg. 13. But supposing always, that the Fear is unjust, I do not see why the Apprehension of a small Evil is not sufficient to make Promises and Agreements void, if that be the principal Motive, and without it Consent had not been given. The least Injustice, in my Opinion, gives no more Right to the Author of it than the greatest. But the Fear must not be a vain one, for he that resigns himself up to panick Fears, must blame himself. *Vani timoris justa excusatio non est,* Digest. l. 50. tit. 17. De Diversis Reg. Jur. Leg. 184. Otherwise, as Mr. *Daumat* observes, all the World would not have the same Resolution to resist Force and Menaces. There are some Men so very weak and timorous, that they yield to the least Impressions; so that the least Force prevails as much on them, as the greatest on the most courageous, and 'tis principally for their sake that the Laws punish Matters of Fact and Oppressions. But if the same Laws do not allow the Fear of a small Evil to be ranked among the Causes of nulling a Contract, it proceeds from hence, according to the judicious Reflection of Mr. *Placette* in his Treatise of Restitution, that the Lawgivers would prevent the Multiplication of Suits, which are without Contradiction a great Evil; but they have left, adds he, the Rights of Conscience entire, and their Authority hinders not but that we may observe exactly what that inward Law prescribes upon that and the like Subjects. We must then conclude, that by natural Right all Force, and every kind of Violence, direct or indirect, all Menaces, and in general all unlawful Influences which oblige Men, contrary to their Inclination, to give their Consent, which otherwise they would not, takes away that Liberty which is necessary to make an Engagement valid, and consequently renders all Promises and Agreements in such Cases null and void. I shall farther add only one Passage in *Plato*, wherein that Philosopher asserts, That the Agreements to which a Man is obliged by an unjust Force, ought to be valid no more than those which are contrary to the Laws, or are not in our Power to execute, by reason of some unforeseen Accident, "Ὅσα τις ἀνὸς δολογῶν ξωθέει, μὴ πῶν κτ' πᾶς δολογίας, πλὴν ὅν ἀν νόμοι ἀπειρώσων, ἢ ψήφισμα ἢ πνθὸς ὑπὸ ἀδίκου βιαδέει ἀδικίας δολογίᾳ, κτ' ἐάν ἀπὸ τύχης ἀπεσθδὴται τις ἀκων κωλυθῆ, δίκας εἶδ' ἢ ἀδὼν ἀπὸ δολογίας ἐν ἡ φυλακῆσι δίκας, &c. De Legibus, l. 11. Tom. 2.

MR. BARBEYRAC'S NOTES ON §. XI.

¹ Whether the Evil be at a distance and uncertain, or it be according to all Appearance just ready to happen. In the first Case it is plain, that Fear from a third Person can't invalidate a Promise or Agreement. In the other, though the Fear be present, it has no manner of Influence upon the Nature of a Promise or Agreement. All that is done is, that it gives the Person engaged a Right to accuse the third Person, by whose unjust Force he made the Engagement, and without which he had made no Contract. *Titius's Observ.* 224.

² *Si quo magis te de vi hostium vel latronum, vel populi tuerer, vel liberarem, aliquid à te accepero, vel te obligavero; non debere me hoc edicto teneri, nisi ipse hanc tibi vim summiserit. Cæterum si alienus sum à vi, teneri me non debere; ego enim operæ potius meæ mercedem accepisse videor.* Digest. l. 4. tit. 2. leg. 9. § 1.

³ *Non eam vim quam Magistratus intulit, scilicet jure licito, & jure honoris, quem sustinet.* Ibid. leg. 3. § 1. This Author in his Abridgment of the Duties of a Man and Citizen, l. 1. c. 9. § 15. adds, With Respect or Deference to a Person to whom we have great Obligations. And 'tis for this Reason that he reports an Example of a Child who married against his own Inclination to please his Father, although he could have absolutely freed himself. See l. 6. c. 2. § 14. following.

should we suppose that a Father might betroth his Daughter to a Man, quite against her Inclination; and in this Case, when she, out of fear of her Father's Authority, has given her Faith to the less agreeable Spouse, she cannot afterwards disappoint him. For there is no Fault in him, to prejudice his *Right*, accruing from that *Promise*; and the Daughter ought freely to have obeyed her Father's Pleasure; and so cannot plead *Compulsion*, when she has no *Right* to resist. Thus far then it is a Point of Moment to consider who was the Author of the *Fear*. But in other Cases, the Rule of the *Roman* Lawyers holds good, That it makes no difference from what Person the *Fear* proceeds; that is, when one has a *Right* of putting us into such a *Fear*; and when the *Fear* is actually the *Cause*, not the bare *Occasion* only of the *Promise*, or *Pact*, consequent upon it ⁴.

Those *Promises* then, or *Pacts*, we take to be invalid, which a Man is compell'd to engage in by the unjust Force of the Party to whom they are made. For since he who extorts any thing from another, by using unjust Terrors, is by the Law of Nature bound to restore it; and must consequently make good what the other Person loses by such a forced Bargain. So ⁵ *Seneca* l. iv. *Controv.* 26. The Question is, whether Force and Necessity render a Business invalid, when they did not proceed from the Party contracting? What Influence (will he say) "can your Compulsion have on me, when it was not I that compell'd you? The Punishment cannot be mine, unless the Fault were mine. But the other denies this way of arguing. The Law, says he, as to the present Case, doth not prosecute him that offers the Violence, but assists and relieves him that suffers it; it seeming unreasonable, That a Man should be bound by an Engagement thrust upon him against his Will. Whence the Necessity proceeded, is a Point of no weight in the Dispute. That which renders the Contract unjust, is the hard Fortune of the Sufferer, not the Person of the Doer. *Idem* *Controv.* l. iv. c. 8. If it be said it was not I that applied the Force, but another; the Answer is, That Man who makes his Advantage by Violence, offer'd by some other hand, is no less guilty, than if he had been himself the actual Performer.

The Necessity of *Reparation* in the Party who offer'd the Violence, takes off all Obligation to

Payment in the Party who suffer'd it; because should he offer to *do* ⁶, or to give what in the Agreement he promis'd, he ought in common Justice immediately to receive full Recompence, or full Restitution ⁷. And 'twould be a foolish and idle way of acting, when we are once got clear of the Danger, to pay *voluntarily* what we promis'd *upon Force*, and then to require *Reparation* of the Damage ⁸. *Martial.* L. XI. *Epig.* 59.

*Quid si me tonsor cum stricta novacula supra est,
Tunc libertatem divitiisque roget?
Promittam: Nec enim rogat illo tempore tonsor,
Latro rogat; res est imperiosa timor.
Sed fuerit curva cum tuta novacula theca,
Frangam tonsori crura manusque simul.*

My Barber with his Razor on my Throat,
Asks me for Wealth and Freedom, and what not:
I promise all, whilst Danger ties my Hands,
For not the Barber, but the Rogue demands;
But when fierce Razor to safe Sheath withdrew,
I'd spoil his Dancing and his Fiddling too.

Especially since the other Party, when he demands or accepts our Promise, does by that very Act declare manifestly, that 'tis far from his Thoughts and Designs to make us any Satisfaction. Besides, how ridiculous would it be in you to reckon it a piece of *Merit*, when you forbear a Mischief which the Laws forbid you to commit, to pretend that you do a Man a *Kindness*, by refraining from some notorious Villany? And therefore *Cicero* ⁹ utterly denies himself to have been obliged to *Antony*, for not killing him at *Brudusium*. *What Benefit, what Favour is it* (says he) *that you withheld your Hands from the foulest Wickedness? What Kindness can Thieves boast of, but that they spared a Man's Life, when it was in their Power to have murder'd him?*

Horat. l. I. *Epist.* 16.

*Non furtum feci, nec fugi, si mihi dicat
Servus, babes pretium loris, non ureris aio.
Non hominem occidi; non pasces in cruce Corvos.*

⁹ *Id.* de *Arte P.*

—vitavi denique culpam,
Non laudem merui.

⁴ *In hac actione non quaeritur, utrum is qui convenitur, an alius metum fecit; sufficit enim hoc docere, metum sibi illatum, vel vim; & ex hac re cum qui convenit r, etsi crimine caret, lucrum tamen sensisse. Nam cum metus habeat in se ignorantiam, merito quis non astringitur, ut designet, quis ei metum, vel vim adhibuit, & ideo ad hoc tantum Actor astringitur, ut doceat metum in causa fuisse, ut alieni acceptam pecuniam faceret, vel rem traderet, vel quid aliud faceret. Digest. l. 4. tit. 2. Quod metus causa, leg. 14. §. 3.*

⁵ The Latin of *Seneca* is, *An, si est in re vis & necessitas, ita tamen rescindantur, quæ per vim & necessitatem gesta sunt, si vis & necessitas à paciscente adhibita est? Nihil, inquit, meâ, an tu cogaris, si non à me cogaris, meam culpam oportet esse, ut mea pœna sit. Non inquit, neque enim Lex adhibenti vim irascitur, sed passio succurrit, & iniquum illi videtur, id ratum esse, quod aliquis, non quia voluit pactus est, sed quia coactus est. Nihil autem refert, per quem illi necesse fuit. Iniquum enim, quod rescinditur, facit fortuna ejus, qui passus est, non persona facientis. And again, Non mea, inquit, sed aliena vis fuit; æquè dignus est pœna, qui ipse vim adhibet, & qui ab alio admota ad lucrum suum utitur. See also Mr. Noodt, De Jurisdic. & Imperio.*

⁶ There is no Necessity here to have recourse to this Fiction of Law; and our Author ought the more to have avoided it, because he condemns it himself, when he criticises upon *Grotius's* Opinion, at the end of §. 12. in this Chapter. He had better have insisted upon the Principle he laid down above, viz. The Incapacity that the Author of Force should obtain any Right by such extorted Engagements, and the want of Liberty in the Person which gives such a forced Consent. See §. 10. Note 5. The Argument our Author uses here, can only be *ad hominem* against the *Roman* Lawyers, who having searched into the idle Fallacies of this Head, as they have done in other Matters, maintain, That the Contracts of Rigorous Right extorted by an unjust Fear, are valid in Equity, altho' they ought afterwards to be disannulled by the Prætor. See *Institut.* l. 4. tit. 13. *De Exceptionibus*, §. 1. and Mr. Noodt, De Forma emendandi doli mali, c. 16.

⁷ This is a Term of Law, by which is understood a Discharge which two Persons Debtors to one another, give one another. Of this our Author will treat in Lib. 5. c. 11. §. 5. Vid. *Digest.* l. 44. tit. 4. *De doli mali & metus Exceptione*, leg. 8.

⁸ This Note is put into the Text.

⁹ *Horace* is there treating of another Matter, and so the Quotation is not proper.

² *Philip.* 2.

Speak, Slave, your Merits, I ne'er fled nor flole; }
 You've 'scaped the Scourge, and still your Hide }
 keeps whole: }
 I've done no Murther; and you feed no Fowl. }

I merit Pardon, but I win no Praise.

Add. l. vii. f. 3. *D. de pactis.* Seneca, l. ii. *Controv.* 13. Not to do a Villain will never pass for a Benefit. *Quintil.* Declam. 330. To make an end of an Injury is by no means to begin a Kindness.

No more is a Man bound to perform his Promise, who in a Case of this Nature¹⁰, gives *Security* for the Person in Distress; although his own Fear is not the Cause of his entering into the Engagement. For since *Suretyship* is a kind of inferior Contract, admitted to confirm and strengthen the main Business; it would be absurd (at least with regard to natural Law) to attribute more Efficacy to the former than to the latter; to make the principal Debtor less strictly obliged, than he who comes into the Business purely for his Assistance¹¹. The Case is otherwise, if this third Party, for the relief of the Sufferer, contract an Obligation, in which he himself is the Principal, not the Surety, or the Accessary. For instance, if a Man out of Kindness and Pity should promise some Reward to a Villain, upon Condition he will set a poor Wretch at Liberty, whom he has got under his Power¹². For here the Contractor himself is not properly put under *Fear*, nor can he use those Exceptions, which might be made by the Person he delivers; in as much as he engages upon his own Score, not in the Name of the other, and cannot be said to build his Bargain on a primary Obligation; since indeed, none pass'd, but what he freely set on foot, and of which he took the whole Burthen on himself. And he ought to esteem it a thing well worth his Pains or Cost, to have saved the Life of an innocent Man, and to have acquired the Glory of Beneficence in so extraordinary a Degree.

But if a Person in this captive Condition, upon making Terms for his Liberty shall leave Hostages to continue under the Power of the Villains, till such time as he shall have perform'd what he promised; he is then indeed bound to make good his Word; yet not by virtue of his Contract with the Rogues, but of that whereby he stands engaged to the Friends whom he has left in his room. In *Morocco*, and other Parts of *Africk*, the whole Body of *Christian* Slaves pass their *Faith* for each particular Man of their Number, that he shall not go off; and by means of this *Security* they are allowed to walk the City without their Chains; and

in case one of them make their Escape, the rest are obliged to pay the Price he was valued at. Whether an *Oath* added to Promises of this kind, does more confirm and establish their Force, we shall hereafter examine.

It is a noted Saying of *Tully* in his third Book of *Offices*, c. 29.¹³ *If you have agreed with Thieves to give them such a Sum to save your Life, it is no Deceit to recede from your Promise, though you have given your Oath too for the Performance. For Robbers or Pirates are not in the number of any particular and lawful Enemies, but should be look'd on as the Adversaries of Mankind; and therefore no true Faith or Oath can properly pass between us and them.* Which Assertion we thus far allow holds good, that a Promise made to such Men through the Compulsion of Fear shall not be binding. But the reason on which *Tully* proceeds, is not satisfactory to many Persons; especially, if extended to such *Pacts* or *Promises* as we commence with the same Villains, without being brought to it by Violence. For tho' by the common Custom of Nations¹⁴ a lawful Enemy and a Robber are treated in a different Method, yet the latter cannot be said immediately to lose all *Rights* of Humanity; at least, if he still deal with some Persons in a fair and peaceable manner. For when he transacts with me without influencing my Consent by Fear, he bargains not as a *Robber*, but like any other Man. Now a Robber is call'd a *common Adversary*, because he does not, like other Enemies, offer War peculiarly to any Party; but practises hostile Force upon all, without Distinction, that fall into his Hands. Upon which account, in order to quell and to suppress him, there is no need of the Formalities of denouncing War, and lifting Soldiers against him; but Nature commissions every Man to prosecute him in a military way. But it may still be affirm'd, that as by *Tully's* own Confession, a State of Hostility does not hinder us from being bound to observe Faith with an Enemy; so neither is this *common Hostility* of the Robber an Hindrance to our performing a Covenant made with him; especially if, as we have all along suppos'd, he lays aside the Part of an Enemy in the Act of Covenanting.

Grotius forms another Objection to this purpose; "Such as are notoriously wicked, and are no part of any civil Society, may, if we regard the Law of Nature, be by any Man punish'd. (This¹⁴ *Hypothesis* we shall examine in another place.) Now they who may be punish'd, and even with Death, may likewise be despoil'd of their Goods, may be dispossest'd of their Rights. But, amongst their *Rights*, that which accrues to them

¹⁰ This is the Decision of the *Roman* Lawyers, who say at the same time, That if the Surety has engaged thro' Fear, and he for whom he is Surety engageth himself voluntarily, the Engagement of this latter is good, but of the other null. *Labo ait, Si quis per metum Reus sit constitutus, & fidejussorem nolentem dederit, ipse & fidejussor liberabitur. Si solus fidejussor metu accessit, non etiam Reus, sed fidejussor liberabitur.* *Digell.* l. 4. tit. 2. *Quod metus causa*, leg. 14. § 6. See l. 5. c. 10. § 9. following.

¹¹ *Mr. Hertius* maintains, that in this last Case the Engagement is not valid, unless there be an open Donation of what is delivered or promised on that account. For, says he, though he be engaged in Person, 'tis only to save another, who is unjustly oppressed. The Author himself in the following Chapter, § 9. puts the like Engagement among such as are extorted by Fear, or gotten by Surprise, and in Sport. This Criticism is well grounded, altho' in the Case he is speaking of the Engagement be free, he to whom it is made can acquire no more Right by our Promise, than by those for whom the Engagement is made.

¹² *Cicero's* Latin is this, *Ut si pro donibus pactum pro capite pretium non attuleris, nulla fraus est, ne si juratus quidem id non faceris. Nam pirata non est perduellium numero definitus, sed communis hostis omnium; cum hoc nec fides debet, nec jusjurandum esse commune.* See also what is said, l. 4. c. 2. § 8.

¹³ *Heliodor.* *Aethiop.* l. 1. c. 3. p. 56. When we make War upon Thieves, we do not finish it with the usual Ceremonies of Articles and Leagues. The Greek is, *Οὐ γὰρ ἐπὶ ῥητοῖς ποτὲ λήσειε ἢ ἔληξε πόλεμος, εἰ δ' ἐν σπονδαῖς ἔρε τὴν τελευτήν.* But see *Gratus*, l. 3. c. 19. §. 2. Numb. 2.

¹⁴ See l. 8. c. 3. §. 4. following.

¹⁵ *Vid. In l. 1. §. tit. 21. De Fidejussor.* §. 5.

“ from our Promise is one; and therefore that too
 “ may by way of Punishment be taken from them.
 But *Grotius* answers this Argument with great Ease.
 For he that voluntarily bargains with a Thief, know-
 ing him to be such, does by that very Act renounce
 all Exception against his Person, which might o-
 therwise render the Promise invalid. Else the Bu-
 siness was vain and insignificant, and nothing re-
 ally pass'd between them. Should I be got out of
 my Road, and promise a Thief some Reward for
 setting me right again, there is no doubt to be
 made, but I ought freely to pay it. And thus too
 the *Roman* Lawyers rightly maintain, “ That what-
 “ soever is deposited with us by a Thief, ought to
 “ be restored to him ¹⁵, if the true Owner of it
 “ does not appear. To which they should add this
 farther Condition, That the Man who receives the
 thing in trust, does not know the Fraud of the o-
 ther. For in Case he is satisfied that the Person
 is a Villain, and that the Goods are stolen, I do
 not see how he can take them in Charge, without
 bringing himself in as an Accessary to the Crime.

XII. But many indeed there are, who maintain
 that *Pacts* and *Promises*, though extorted thro'
 Fear, have yet the Force and Power of *Obliging*
¹. Some urge the Authority of the *Roman* Law,
 which by giving full Restitution ² should seem
 to suppose, that those Engagements are in strict
 Justice *binding*, but ought to be reliev'd and cor-
 rected in Courts of *Equity*. But 'tis easy to vindicate
 the Practice, without drawing any such Con-
 clusion from it. For since the Parties are Mem-
 bers of a civil State, the *Court* does not presently
 take it for granted, that one of them offer'd Vi-
 olence to the other; and since that Point may bear
 a Dispute, it seems convenient so long to keep up
 such a Contract, and to suppose it good, till the
 Judge shall receive manifest Evidence, That the
 Allegation of *Fear*, on which the *Action* was
 grounded, was really just and true. But it does
 not follow hence, That Contracts of this kind,
 or other Business which may be disannull'd by a
peremptory Exception at Law, are in themselves firm
 and obligatory; since the Formality of that way
 of Proceeding, though proper *civil* Judicature, yet
 is not agreeable to the Simplicity of the Law of
 Nature; at least, when the Case happens between
 Persons who do not acknowledge a common Judge.

Grotius asserts ³, “ That a Man who makes a
 “ Promise through *Fear*, is therefore naturally o-

blig'd to perform it, because he plainly gave his
 “ Consent, and such Consent as was full and
 “ absolute, according to the present Posture of
 “ Things ³. For, as *Heliodorus* says, l. v. c. 15.
 “ p. 253. Edit. *Lugd.* Life is so precious, that we
 “ seldom think we buy it too dear; though he
 “ had never pass'd his Consent, had he been re-
 “ cure from the Danger. But in answer to this,
 'tis sufficient to repeat what we formerly observ'd,
 That since every *Obligation* arising from a Contract,
 supposes a correspondent *Right* in the other Party,
 it is not enough that I have in me the necessary
 Causes and Principles of an *Obligation*; but 'tis re-
 quisite, that the Person with whom I deal, be
 free from all such Defects as might hinder him
 from obtaining a *Right* upon me. And therefore
 my having the *Power* to give a thing, does not
 presently make another have a *Power* of receiving
 it. Since then an *Obligation* without a *Right* an-
 swering to it, is of no Use or Purpose; it cannot
 be imagined, that my bare Consent should bind me
 to a Performance, which the Law of Nature for-
 bids the other Person to receive at my Hands. And
 this is manifestly the present Case. For the same
 Law which prohibits the Application of Violence
 and Terror, must needs at the same time prohibit
 the Acquirement of any *Right*, or any *Gain*, by
 such wicked Means. What *Grotius* subjoins appears
 not altogether agreeable, “ That if he to whom
 “ the Promise was made, did obtain it of the other
 “ Party, by putting him in a *Fear*, though never
 “ so slight, he is oblig'd to release the Promiser, if
 “ he desire it; not because the Engagement was in-
 “ valid, but by reason of the Damage which he un-
 “ justly occasion'd. Now if I can at my Pleasure
 “ or Desire be freed from my *Obligation*, I am al-
 “ ready actually quit of it. What need is there then
 of this round-about way of Application? *You ought*
to release me from my Obligation, if I request it? Is
 it not more easy, and more natural to say, *Since*
you compell'd me by Force to make the Promise, I owe
you nothing; and 'tis idle in you to demand that of
me, which should I pay, you are oblig'd immediately
to restore ⁴? *Ald. Senec. Controvers. iv. 25.*

XIII. The same Opinion is defended by Mr. *Hobbes*
^b, though by different Arguments. He says, *Cove-*
nants entred into by Fear are not therefore invalid,
because they proceed from Fear; for then it would fol-
low, that those Covenants by which Men unite in
Civil Life, and make Laws, must be invalid; for

¹⁵ *Quod si ego [cui spolia abstulit Latro] ad petenda ea non veniam, nihilominus ei restituenda sunt, qui deposuit, quamvis male quaesita deposset.* *Digell. l. 16. tit. 3. Depositi vel contra, leg. 31. §. 1.* See l. 4. c. 13. §. 5. following.

MR. BARBEYRAC'S NOTES on §. XII.

¹ This is the Opinion of Mr. *M utagne* in his *Essays*, l. 3. c. 1. who thus delivers himself, What my Fear has once made me resolve, I am oblig'd to make good without Fear; and though nothing forces me to it but my Tongue without my Will, yet I am oblig'd to make good my Word. As for my self, whenever I have inconsiderately deliver'd my Thoughts, I have made a Conscience nevertheless of disowning them. Otherwise we shall come by degrees to abolish all the Right which a third Person obtains by our Promises. *Quasi vero facti viro cui passet a liberis (Cicero de Offic. l. 3. c. 30.* upon which see *Grotius's* Notes.) In this alone hath the Law a secret Interest to excite us in the Non-performance of our Promises, if we have promised a thing wicked and unjust in it self, for the Right of Virtue ought to prevail above the Right of an Obligation.

² This hath only place in Contracts of strict Right, for those of good Faith would be null in themselves, and by the Civil Law. It is true, that according to the *Roman* Lawyers, the Words *annul, make void, rescind, make good fully*, may be indifferently applied to both sorts of Contracts, because when we are brought to Justice by the Contractor, who would oblige us to keep them, the Judge may declare them null one way or other, either as having no Force in themselves by the Tenure of the Civil Law, or being void by some Exception made by the Defendant. See §. 8. Note 5. foregoing; and Mr. *Nair's* Treatise, *De Forma emendandi doli mali*, &c. c. 15, 16. where it will appear, that our Author's Reason to excuse the Course of Proceedings in the *Roman* Court is no way solid, since the Judge had always time to know the Force, whether the Contract were in itself good, or not.

³ *Heliodorus's* Greek is, ἡνδραπίστου ψυχὴ τάντων προτιμότερον. A trivial Sentence.

⁴ Here we may apply the Maxim of the *Roman* Lawyers, *Non videtur quisquam id capere, quod ei necesse est alii restituere,* (i. e.) He seems not to receive any thing, that must of Necessity restore it. *Digest. de Divers. Rez. Juris*, leg. 51. on which see the Note of *Dion. Gothofred.*

^a *Lib. 2. c. 11. §. 7.* ^b *De Cice, c. 2. §. 16.*

the Fear of mutual Slaughter is the Cause of one Man's submitting himself to the Government of another. It would follow likewise, that a Man acts irrationally, who believes his Captive bargaining with him for his Ransom. Now in the first of these Reasons, there is a plain Ambiguity in the Term of Fear. For that Fear which engages Men to enter into civil Societies, is of a quite different kind from that which we are now considering¹. The former is a Caution against some Evil which may happen indefinitely; I know not when, nor which way: The latter is a dreadful Apprehension of grievous Evil just now coming upon me, and which I am not able to resist. Therefore the Covenants which we make for the Procurement of mutual Assistance against a common Enemy, are entirely of another Nature, from those by which we promise some Reward, to free our selves from a Danger which a Villain unjustly brings upon us². As to the latter Reason, we readily acknowledge, that a Rogue acts very irrationally, when having first extorted a Promise by Force, he afterwards yields Credit to the Person, as if the whole Business had been honestly and fairly transacted. For that Wickedness and Folly should meet together, is no Contradiction. On the other side, we may venture to say, That he would not act very rationally, who being got safe from a Mischiefe, with which he was unjustly threatened, should freely pay the Ruffian the Price of his Villany³. (***) *Dionys. Halicar.* l. viii. p. 509, in *fin.* Edit. *Lips.* "Whatever is extorted from private Men, or from publick States, by Force and Necessity, holds no longer than the Necessity it self continues.

He adds, 'tis universally true, that *Pacts oblige, whensoever a Good is receiv'd, and when the Act of promising, and the Thing promis'd are both lawful.* But is it lawful for me both to make a Promise for the rescuing of my Life, and also to give what I will of my own, even to a Robber? But indeed, what the Robber in this Case performs for the Traveller, in forbearing to take away his Life unjustly, cannot be call'd a Good. The obtaining from an Injury ought not pass for a Benefit. And we are then only said to have done some Good to a Man, when we have conferr'd some Advantage on him, which he wanted, or secured and preserved some which he before enjoy'd; or have deliver'd him from some Evil or Danger, which fell upon him without our Fault⁴. As to the latter part of the

Argument, it is no good Consequence to say, "It is lawful for me to promise and to pay the Villain; therefore he has a Right of requiring the Performance from me; or therefore I stand bound towards him by some inward Tie upon my Conscience. We may do many things lawfully, which we cannot be engaged to do by any Obligation. I may lawfully throw away my Goods; but does it therefore follow, that another can oblige me to such an Extravagance? So that the Rule which the same Author lays down on this Subject in his *Leviathan*⁵, is likewise false; *Whatever I may lawfully do without Obligation, the same I may lawfully covenant to do through Fear; and what I lawfully covenant, I cannot lawfully break.* For he ought to have added this Condition, Provided the other Party can honestly demand it of me.

XIV. There is on this Point still one Question behind, which requires our Examination; since Promises made through Mistake, or through Fear, are void; suppose the Party after he gets rid of his Mistake, or of his Fear, is inclin'd to stand to his Bargain, What must be the way of ratifying such Promises, and of putting them in full Force? For an Obligation that was at first invalid, may afterwards recover its Strength by the Intervention of some new Cause, fit to create a Right; which in the present Case must be a clear and voluntary Consent. Some then are of Opinion, That for the Confirmation of such a Promise, no more is requisite, than an internal Act of the Mind, or a full and free Agreement to the Business, tho' it be not express'd by any outward Sign. For the outward Sign, they say, has pass'd before; and this being now enforced by the clear and free Determination of the Mind, nothing is wanting to the Production of a firm Engagement. Others dislike this way of deciding the Controversy; because they conceive that the internal Consent, and the external Sign, ought to exist together, and that therefore an antecedent external Act cannot be a Token of a subsequent internal Act, which perhaps was not then thought of. And upon this Account, they, to make such a Promise valid, require a new verbal Promise and Acceptance. *Grotius*^b offers a middle Judgment, that 'tis indeed absolutely necessary, some Signs should be used to declare such a subsequent internal Consent, because the other Party would else have no Assurance of his Right; but there is no Necessity the Signs should be verbal,

MR. BARBEYRAC'S NOTES on §. XIII.

¹ See Lib. 7. c. 1. §. 7.

² For, as our Author adds, nothing hinders but that a Man may be both wicked and imprudent at the same time, according to the Saying of *Menander* recorded by *Stobæus*, Sermon. 2. Ἀτυλλόγιστον ἐστὶν ἡ πονηρία, Wickedness is a thing that always wants Reason and Consideration.

³ The Words of the *Roman* Ambassadors to *Marcus Coriolanus* make to our purpose, as they are cited by *Dionysius Halicarnassensis*, as at (***) in the Text.

⁴ And therefore it was a foolish Excuse alledged by *Polycrates* in *Herodotus*, l. 3. p. 112. *Thal.* Edit. *Græc. H. Steph.* when he pillaged his Friends and Enemies without Distinction; that to restore to his Friends what he took from them, would be a greater Obligation, than if he had altogether forborn the Injury.

MR. BARBEYRAC'S NOTES on §. XIV.

^a There is among the general Rules of the *Roman* Law, a Maxim which appears quite contrary, *Quod initio vitiosum est, non potest tractu temporis convalescere*, *Digest.* l. 50. tit. 17. *De Diversis Reg. Jur.* leg. 29. And this Maxim is afterwards applied to the making of an Heir, *Quæ ab initio inutilis fuit institutio, ex post facto convalescere non potest*, *Ibid.* leg. 210. But we may discern from divers Examples of the *Roman* Law, that this Principle has not always been followed, even in the matter of Wills. See *Digest.* l. 12. tit. 1. *de Rebus Creditis*, &c. leg. 12, &c. and *Dionys. Gothofredus* upon the Rules quoted above, as also *Mr. Daumat's Civil Laws* in their Natural Order, Part 2. l. 1. tit. 1. Sect. 2. §. 31.

^a Cap. 14.

^b Lib. 2. c. 11. §. 20.

since others may serve as well to the purpose; as suppose the Promiser understanding his Error, or being deliver'd from his Fear, shall voluntarily give what he engaged for, or if the thing be already given, shall not endeavour to recover it, when he has convenient Means; or shall treat afterwards with the other Party about the same things, as he would about any thing else, which the said Party lawfully possesses. To which Decision we readily subscribe.

XV. We are farther to observe, That to the rendring of a Promise good and valid, there is required, not only the Consent of the Person who makes it, but likewise of him to whom it is made²; and this latter Consent too (as well as the former) must be express'd by Signs sufficient; and for this a bare Nod will serve, if the thing offer'd, be either a matter of free Bounty, or have been before requested. For if the other Party do not consent, or do absolutely reject the Proposal, the thing promised still remains in the Power of the Promiser, though he had sworn to part with it; for even an Oath cannot transfer a Right before Acceptance, and has only this effect, That it makes it unlawful for me to revoke my Offer, till I am assured of the other Man's Refusal. For he that profer any thing of his own to another, does neither intend to force it upon him against his Will, nor quite to give it over, and throw it away at a Venture; and therefore he loses nothing of his Right and Title to it, in case the other Person refuse to take it. If a Request pass'd beforehand, it shall continue in Force, unless it be expressly revoked; and in this case the Acceptance is supposed to have been made in the very Petition; provided still, that what is offer'd, be equal to what was desired. For if a Man ask me to lend him a greater Sum, and I profer a less, to make such a Engagement good, his express Acceptance is

necessary; in as much as this lesser Sum may perhaps no ways answer his Occasions, or turn to his Profit; and therefore unless this express Acceptance intervenc'd, he shall be responsible only for such a Sum as he first ask'd me to supply him with. It may not here be amiss, to consider *Plutarch's* Observation, *Sympos. l. ix. q. 13. p. 742. B. Edit. Wech.* That the Words of the Person that proposeth the Conditions, have much more Power and Authority, than his to whom they are offer'd, in as much as he has no Liberty of adding to them: That is, because the latter can obtain no Right, but what results from the Consent of the former. If the Promiser shew his Agreement to the Request of the other Party, barely by Nodding, or any other Sign of the like Nature, it shall be supposed that the Request was tacitly repeated⁴. *Add. Grot. l. ii. c. 16. f. 32.*

Add. l. iii. D. de pollicit. Vid. D. l. L. tit. 12. de pollicit. Whence some have concluded, That to render a Promise valid, the bare Act of the Promiser is sufficient. *Grotius* (*l. ii. c. 11. f. 14.*) answers, That a Promise once made cannot indeed be revok'd; so as always to lie ready for Acceptance, tho' before Acceptance, the Obligation is not fully contracted. But those who look more closely on that Passage in the Civil Law may find, That *Ulpian* teaches no more than this⁵; a Covenant is the Consent and Agreement of two Persons, but a Promise is only on the part of the Offerer; where it is not denied, but that Acceptance makes even the latter firm and obligatory. And indeed the State or City, of which *Ulpian* speaks, had before signified its Acceptance, in case the Promise were made on the Account of Honours already granted, or now desired; and only refused it when the Promise was made without Cause⁶, *Vid. l. I. f. 1. d. t. l. xix. D. De donat.* And again, *l. iii. f. 1. d. t.* Things thus deliver'd without

² This is determined in the Code on the account of a Person who complained that a Bill for a Sum of Money was extorted from him, which he upon that account paid. *Quum te non solum cavisse, verum etiam solvisses pecuniam constiteris, qua ratione, ut vim passus restitui, quod illatum est, postules, perspicere non potest; quando verisimile non sit, ad solutionem te properasse, omnia Precepta de Cbriographo, utpote per vim extorto, nisi & in solvendo vim te passum dicas, (i. e.)* Seeing you confess that you did not only give Security for, but paid the Money, we can't see how you can obtain a Restitution, as if it were forced from you, because you should have complained of the Bill, as extorted, unless you can aver that you were also forced to pay it, *l. 2. tit. 20. De his, quæ vi, &c. leg. 2.* It is also said in *leg. 4. of the same Title*, that Consent after the Force offered makes the Contract valid. *Si per vim vel metum mortis, aut cruciatibus corporis, conditio à nobis extorta est, & non eam postea consensu corroborastis, &c.*

MR. BARBEYRAC'S NOTES on §. XV.

¹ *Non potest liberalitas nolenti acquiri, Digest. l. 39. tit. 5. De Donation. leg. 19. §. 2.* Liberality can't be attributed to a Person unwilling. And again, *Invito beneficium non datur, l. 50. tit. 17. De Divers. Reg. Jur. leg. 69.* A Kindness can't be done to a Man against his Will. See *l. 44. tit. 7. De Obligat. & Act. leg. 55.*

² The French changes the Order of the Author here to render his Reasonings more clear.

³ *Plutarch's* Greek is, *Κυρίως εἶναι τὸ πρὸς ἑκάστῳ μέρει λόγον—οἱ δὲ δεξιόμενοι καὶ ὑπακείμενοι ἐκείνῳ κώστοι προσθήντες.*—Farther, Mr. *Hertius* observes here, that there is this Difference between Engagements advantageous to one Party only, and such as are for the Advantage of both, that in this last the Promise must exactly answer to the Demand, whereas in the first no such thing is required. For if any one (as the *Roman* Lawyers express it) says thus, Wilt thou give me ten Crowns? and I answer, twenty; I am engaged for ten only. But on the contrary, if he says, Wilt thou give twenty Crowns? and I answer, ten, I am engaged for no more than ten; for ten is included in twenty, but twenty is not in ten. But in a Contract of Hire, for Example, if the Leasor require ten Crowns, and the Lessee thinks he has hired for five, the first is not obliged to pass it over for that, tho' five be contained in ten. On the contrary, if the Leasor believes he has Lett for five Crowns, and the Lessee understood him ten, this last is obliged to pay no more than the former meant, as the Laws following direct. *Si stipulanti mihi decem, tu viginti respondeas, non esse contractam obligationem, nisi in decem constat; ex contrario quoque si me viginti interrogante, tu decem respondeas, obligatio nisi in decem non est contracta; licet enim oportet congruere summam, attamen manifestissimum est viginti & decem inesse.* *Digest. l. 45. tit. 1. De verb. Obligat. leg. 1. §. 4.* *Si decem tibi locum fundam, tu autem exiilimes quinque te conducere, nihil agitur. Sed etsi minoris me locata sensero, tu plaris te conducere, utique non plaris erit conductio, quam quanti ego putavi, Lib. 19. tit. 2. Locati conducti, leg. 52.*

⁴ For Example, if one says to another, Wilt thou lend me a thousand Crowns, and I will pay thee 5 per Cent. Interest, and repay it in five Months? and he only answers, Yea, or, I will; 'tis as much as if he had said, Yea, I will lend you a thousand Crowns, for which you shall pay me Interest at 5 per Cent. and repay me in five Months; and so he engages himself under those Conditions, and he can require no more of him, and on the other side he can do no less lawfully to oblige us.

⁵ *Ulpian's* Words are these, *Pactum est duorum consensus, atque conventio; pollicitatio vero offerentis solius promissum, & ideo est illud constitutum, ut si ob honorem pollicitatio fuerit facta [municipibus] quasi debitum exigatur.* *Digest. l. 50. tit. 12. De Pollicitationibus, leg. 3. in princip.*

⁶ *Si quidem ob honorem promiseris, decretum sibi, vel decernendum, vel ob aliam justam causam, tenebitur ex pollicitatione; sin vero sine causa promiserit, non erit obligatus, (i. e.)* If one promise for some Honour conferred or to be conferred, or for some other just Cause, he shall be obliged by his Promise; but if he promises for no Cause, he is not obliged, *Ibid. leg. 1. §. 1.* See also, *Lib. 39. tit. 5. De Donat. leg. 19.*

⁷ *Lib. 19. §. 2. Digest. de Donatione.*

Cause⁷, are forbidden to be claim'd; because the Propriety of the Things being already transferr'd on the Community, they could not properly be deliver'd without the publick Acceptance.

Since in all *Obligations* whatsoever, there is required the Consent of the Person to whom they are directed⁸, or who obtains a *Right* by them; declaring (by himself, or Deputy) that he accepts the *Obligation*, and the *Right* which it transfers to him; and this with Signs sufficient to express the inward purpose of his Mind; we may hence understand somewhat as to the⁹ *Firmness of Religious Vows*, or Engagements voluntarily undertaken with regard to Almighty God. And it seems impossible to make these with any *Force*, unless God has by Revelation declared his Acceptance of them; or unless he has constituted some Vicegerent upon Earth, to judge of their Validity. For otherwise a Man cannot be certain, whether it is the Will of God he should, or should not bind himself in this manner; whether his *Vows* are pleasing or displeasing to Heaven. Especially since the Subject of *Vows* must be such Matters, as God has not by way of Command punctually and precisely required at our Hands. For 'tis absurd and contradictory, to reckon that an extraordinary Performance, which is a matter of strict and necessary Duty; and how can we be assured, except by Revelation, that any Act which God has not enjoin'd, will be acceptable to him? And to engage in *Vows* without knowing whether they will be received, or not, is idle and useless. But may we not, in many Cases, reasonably presume on the Divine Consent and Approbation? This we think can only be done in those things which are *Indefinitely* agreeable to the Law of Nature, and therefore to the Will of God; but in which the Application to Persons, Places, and Times, and the Allotment of the particular *Quantity* are left to the Pleasure, and the Judgment of Men. Thus we take those *Vows* to be good and justifiable, by which a Man binds himself to bestow such a Sum of Money in Charity to the Poor, or on other pious Uses; provided that such an Act of Bounty be no Hindrance or Prejudice to any Duty absolutely necessary: Or if he enjoin himself set Days of Fasting; or resolve to abstain from some particular Meats and Drinks, within a fixt Measure and Quantity; or if he deny himself the use of some superfluous Ornaments; as the wearing of Jewels, Pearls, and Gold; or lay any Command or Prohi-

bition on himself of the like Nature; all which Performances fall under some general *Virtue*, tho' the determinate Manner and Proportion of them are not Matters of strict Precept. On the contrary, such Vows as only create trouble to the Undertaker, and no Benefit to other Men; we esteem no better than idle and superstitious, especially if they prove an Hindrance to other Duties.

A Scruple has been moved sometimes, whether the *Obligation* in the *Promiser* begin at the very Moment, when the Offer is *accepted* by the other Party; or whether it is farther necessary, that the *Acceptance* be formerly made known to the Promiser? And here it is certain, a *Promise* may be design'd, and be expounded two ways, either thus, *I engage myself to do the thing, if it shall be accepted*; or thus, *I engage myself to do the thing, if I shall understand that it will be accepted*. Now which of these two *Senses* the Promiser intended, is to be gather'd and presumed from the Nature of the Business. If the *Promise* were a matter of pure Generosity, without Restriction or Limitation, we are to believe it was meant in the former Sense; because here the Promiser hastens as it were to *bind* himself, without staying for any Formality in the other Party. But those Promises are to be understood in the latter Sense, which express some arbitrary or mixt Condition essential to the Engagement¹⁰. Compare *Grot. l. ii. c. 11. l. 15.*

XVI. It remains that we add a Remark or two about the *Signs* of Consent, which are absolutely necessary to the producing of any Obligation, in as much as the bare Acts of the Will can have no Effect amongst Men, unless manifested and declared by some external Tokens. Of *Signs*, the more imperfect are some particular Motions and Gestures, necessary to be used in Commerce, when the Parties transacting are unacquainted with the Language of each other. The more perfect are *Words*, and such Words as are understood on both sides¹. See *1 Cor. xiv. 11.* And to make these declare the Will more clearly and more firmly, it has been a constant Practice, both to make use of Witnesses in Contracts of Weight and Moment², to whose Memory and Conscience Appeal might be made, in Case either of the Parties denied the Engagement, or cavil'd at the Expression; and also (as a higher Degree of Confirmation) to set down the Terms of the Covenant in *Writing*³. Instead of which the *Grecians* sometimes used *Tallies*, v. *D. L. xxii. Tit. 4. de fide*

⁷ *Si quis, quam ex pollicitatione tradiderat rem Municipibus, vindicare velit, repellendus est à petitione, Ibid. leg. 3.* If any Man require a thing which he hath given to his Freemen, he is to be denied his Petition,

⁸ Mr. *Thomafius* in his *Fundament Jur. Nat. & Gent. l. 2. c. 7. §. 5.* draws a Consequence from hence to shew the Vanity (*palliatam ambitionem* he calls it) of such Authors, who say in their Prefaces, that 'tis to make good their Promises to the Publick that they put out this or that Work. And Mr. *Bayle* had before said in his Advertisement of his Continuation of divers Thoughts about a Comet, that the Promises of such Authors is not looked upon as an Engagement by Contract, nor is the Publick concerned if they break their Word.

⁹ See Mr. *Le Clerc's* Notes upon *Gen. xxviii. 21. and Numb. xxx. 3.*

¹⁰ These Terms will be more fully explained, c. 8. of this Book, § 4.

MR. BARBEYRAC'S NOTES on §. XVI.

¹ Hence it comes to pass perhaps (as our Author adds in his later Editions) that the *Turks* do not think themselves oblig'd to keep those Contracts or Treaties which are not written in their own Language and Characters. See *Marselaer Legat. l. 1. c. 30.* But provided that Contractors understand each other, it matters not in what Language the Contract is written, as the *Roman Law* has judiciously determined. *Utrum autem Latina, an Græca, vel qualibet alia lingua stipulatio concipiatur, nihil interest, scilicet, si uterque stipulantium intellectum ejus lingua habeat. Nec necesse est eadem lingua utrumque uti, sed sufficit congruenter ad interrogata respondere. Quin etiam duo Græci Latina lingua obligationem contrahere possunt. Instit. l. 3. tit. 16. De Verborum Obligat. § 1.*

² *Testimoniorum usus frequens & necessarius est—ad fidem rei gestæ faciendam. Digest. l. 22. tit. 5, De Testibus, leg. 1. in princip. & leg. 11.* The use of Testimonies is usual and necessary to prove Matters of Fact. We shall treat of the use of Witnesses, l. 5. c. 13. § 9.

³ *Fiunt enim de his Scripturæ, ut quod actum est, per eas facilius probari potest.* Writings are made in Covenants, that the Matters of Fact may be more easily proved, *Digest. l. 22. tit. 4. De Fide Instrumentorum, &c. leg. 4.* See Mr. *Daumat's* Civil Laws in their Natural Order, Part 1. l. 1. tit. 1. Sect. 1. § 10, &c. and l. 3. tit. 6. Sect. 2. See also *Pollux, l. 9. c. 6. § 70.* and Mr. *Hemsterhuis's* Note on it.

instrum. For the Memory of Witnesses may be treacherous, or their Integrity capable of Corruption⁴; but Writings are a much stronger Security, both against Forgetfulness, and against Unfaithfulness. And as for *bare Words*, it is an usual way to elude them, by pleading that they were utter'd thro' Rashness, before the thing had been consider'd. But *Writings* do exclude all such Prevarication; whilst they are drawing up, they set the Business clearly and leisurely before the Eyes of the Contractor; so that if he once declare his Approbation of them, he must be judg'd to have yielded full Consent to the Engagement, and cannot afterwards pretend that he was drawn in by Passion, or Precipitancy. Nor are *Writings* liable to such violent and crafty Interpretations, as are often put upon Mens Discourse; in which one Particle artificially inserted, and thro' the quickness of the Pronunciation passing undiscover'd, shall unravel and overturn the whole Affair. And therefore it is not without good Reason, That more Credit is given to authentick and unquestion'd *Instruments*, than to the Depositions of *Witnesses*; since what a Man testifies against himself, is much stronger Evidence, than what can be offer'd by others; and since the Charge never lies so heavy upon him, as when his own Authority is produc'd against him: Yet the Force of unquestionable Witnesses must then be admitted as Superior, when they make out by sufficient Proofs, that the Instruments produced are supposititious or corrupted.

Farther, although the Strength and Firmness of *Covenants* does not absolutely depend on such Writings or Deeds, in as much as they may rightly be made without them⁵, and may as to the Law of Nature still hold good, though these Tokens should by any Accident be lost⁶; yet in Courts of civil Judicature, where they proceed on full and manifest Evidence, the greatest Regard imaginable is had to Credentials of this kind. And commonly if such are not produc'd, the Party who sues another upon a Debt, or Promise, loses his Cause; unless he can make it appear, that they were once

actually in his Custody, and that he has been depriv'd of them by some Misfortune. And for this reason it will become a careful Man to secure his Business by good and legal Instruments; and not to rely too much on the bare Words, or Faith of those he deals with. Thus King⁷ *Perseus* (in *Plutarch De vitioso pudore*, p. 533. B. T. 2. Ed. *Weck.*) lending a Friend Money, required Security in the common Form. The Gentleman desiring the reason of his Strictness; I lend according to Law (replied *Perseus*) that I may receive without Law; in a fair and friendly manner. *Juvenal, Sat. 13. ver. 75.*

*Tam facile & primum est Superos contemnere testes,
Si mortalis idem nemo sciat.*

When *Murena* (in *Appian. Mithridat. p. 214. C. Ed. H. Steph.*) made War upon *Mithridates*, and was accused by that King's Commissioners of Acting against the League, he sophistically denied, that he ever saw any League. The meaning of which was, that *Pompey* had not indeed left *Articles* of Peace in Writing, but thought it sufficient to shew his Agreement by *Fact*, and accordingly had drawn off his Army. *Richerius* reports of the *Turks*, that they are so constant to their Promise, so secure of mutual Fidelity, that in their Bargains they use no Bond or Writing; but the whole Business depends on the Word of the Parties, if present; if not, on the bare mentioning of their Names. *Garcilass de la Vega* testifies the like of the old Inhabitants of *Peru*, *Royal Comment. l. viii. c. 16.* It is vulgarly known, that if a Creditor shall restore the Instrument of Obligation⁸, or shall cancel or destroy it with his own free Consent, and with the Privy of the Debtor, it shall be suppos'd that the Debt is forgiven; but not if the Debtor got the Writings out of his Hand by Stealth, or any other unlawful Means. And from all this it appears, that *Seneca*⁹ carries his Philosophy a Strain too high, when he calls Bonds and Papers of Contract by no better a Name, than *Inania habendi simulachra*, vain and idle Images of Title and Possession.

⁴ Writings on Parchment were invented to put Men in Mind, or convince Men of their Word, the Disgrace of Mankind, (as Mr. *de la Bruyere* speaks in his Characters, Chap. *Of Man*) which 'tis likely he took out of *Seneca* (*De Benef. l. 3. c. 15.*) *Adhibentur ab utraque parte testes, ille per tabulas plurimum nomina, interpositis parariis, facit — O turpem humano generi fraudis, ac nequitiae publicae confessionem! Annulis nostris plus quam animis creditur — in quid imprimunt signa! Nempe, ne ille neget accepisse, quod accepit, (i. e.) Witnesses are produced on both sides, the one produces a Seroll of many Names drawn up by the Scrivener — Oh horrid Confession of the publick Fraud, and Wickedness of Mankind! We trust more to our Seals than Souls! Why do we impress our Seals? Lest such as we deal with should deny what they received.*

⁵ *Si res gesta* (say the Digests, l. 22. tit. 4. *De fide instrumentorum*, &c. leg. 5.) *sine literarum quoq; consignatione, veritate factum suum præbeat, non ideo minus valabit, quod instrumentum nullum de ea intercessit.* See l. 5. c. 13. §. 8. following, (i. e.) If a Matter of Fact were duly and truly done without any Writings sealed, 'tis not of less Force because there is no Instrument made concerning it.

⁶ *Nec oberit tibi amissio instrumentorum, si modo manifestis probationibus eos debitores apparuerit, (i. e.)* The loss of a Bond is no Prejudice, if the Debt can be fully proved. *Cod. l. 4. tit. 21. De fide Instrum. leg. 1.* See also, leg. 4, 5, 7, 8, 10. and l. 4. tit. 19. *De Probationibus, leg. 20, 21.*

⁷ This Note is in the Text.

⁸ See §. 2. Note 7. above.

⁹ *Seneca's* Words are, *Video istuc diplomata, & syngraphas, & cautiones, vacua habendi simulachra.*

² *Benef. l. 7. c. 10.*

C H A P. VII.

Of the Matter of Promises and Covenants.

THE CONTENTS of every Paragraph of the seventh Chapter.

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|--|---|
| <p>I. <i>We are obliged to things possible to be done only.</i>
 II. <i>Promises of things impossible are void.</i>
 III. <i>Impossibilities which arise about Covenants.</i>
 IV. <i>Whether our utmost Endeavour is sufficient?</i>
 V. <i>Whether a Man be obliged to bear such Afflictions as are above Man's Courage and Strength?</i>
 VI. <i>There is no Obligation to things unlawful.</i></p> | <p>VII. <i>Disonest Bargains do not oblige, though in our Power.</i>
 VIII. <i>Nor such as can't be performed, but by some foul Action.</i>
 IX. <i>Whether things dishonestly given can be recovered.</i>
 X. <i>Other Mens Goods are promised in vain.</i>
 XI. <i>Yea, and our own, if they are under any Obligation to another.</i></p> |
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WE are in the next place to enquire into the Matter or Subject of Promises, and of Covenants; or to what things only we can bind our selves by our Word or Bargain. In this respect then it is indispensibly requisite, that we have both a *natural* and a *moral Power* of doing what we engage for; or that the Performance be neither above our *Strength*, nor forbidden us by any *Law*. For when a thing is placed within my Reach and Ability, and I have likewise a Liberty to dispose of it, there is no reason why I should not voluntarily *oblige* my self to confer it on another, so often as I can by this means contribute to the Use and Advantage of human Life. On the other Hand, it would be vain and impertinent to contract an Obligation about such Matters, as either exceed our Strength, or are prohibited by a stronger Obligation lying upon us; in as much as, directly and lawfully, it could produce no Effect.

II. It follows evidently from hence, That *no Obligation can lie to Impossibilities*; a Sentence commonly in the Mouths of all sorts of Persons, but such as cannot fully be understood without a clear and accurate Examination. In order to which it may be, in the first place, convenient to distinguish between those Obligations which we voluntarily bring on our selves by our own Act, and those which are laid on us by the Command and Authority of our Superiors. He that of his own free Motion binds himself to perform a thing which he *knows to be impossible*, cannot be reckon'd well in his Wits²: For he resolves and engages to do that, which at the same time he foresees he shall never be able to compass.

But it does not always follow, That he who by Pact or Promise undertakes an *Impossibility*, shall be entirely free from all *Necessity* of Performance, tho' the thing it self cannot strictly be accomplish'd. Indeed, if I have promis'd a Man somewhat, which I had then good Grounds to think would be in my Power, but which is now above my Power, or will be rendred so before the Day of Performance, by an Accident of which at the time of the Bargain I was

invincibly ignorant; I seem in this Case, neither obliged to make good my Word, nor to repair the Loss which the other Party suffers by the Disappointment. Especially, if the Possibility of the thing were either expressly mention'd as a necessary Condition, or tacitly presupposed on both sides². For instance, I promise to lend a Horse, which at present is at some Distance from me; and the Horse dies before he gets to me; as I cannot here be bound to make the Horse forth coming, so neither am I responsible for any Damage the Man sustains, who was to have used him. For he must conceive me to have built my Promise on this tacit Condition, *provided the Horse arrive safe at my Hands*; which Condition failing without my Default, the Force of the Promise sinks and is ineffective. If both the Promiser, and the other Party, know the thing to be impossible, and know each others Conscioufness as to this Point, the Engagement shall pass for no better than a Jest. But if the Promiser only knew the Impossibility, and not the other Party, he shall pay to him what he loses by being thus imposed on. If the Promiser was careless, and neglected to examine and weigh his own Strength, so as to promise an Impossibility, which upon due Consideration he might have found to be such, the main Obligation shall be void; because he supposed the thing to be possible, as a tacit Condition of the Agreement: Yet upon account of his Neglect and Default, he shall be bound to answer the Damage which befalls the other Party, through the Disappointment; but then it must be observ'd, That the Hope and Expectation of Advantage from such an insignificant Promise ought not to come under the Notion of Damage. The same Rule holds good in Covenants, so that he who through Negligence has bargain'd to perform what is impossible, shall be free upon paying what the other Party suffers; but then he must likewise release the other Party from any Obligation made on his side; or if the thing be already given or perform'd, he must either restore it, or offer an Equivalent.

MR. BARBEYRAC'S NOTES on Chap. VII. §. 2.

¹ See l. 1. c. 5. §. 8. foregoing.

² Or he designs to banter him to whom he is engaged. Mr. *Thomasius* in his *Instit. Jurispr. Div.* l. 2. c. 7. §. 81. distinguishes here two sorts of Impossibilities: The one of things absolutely impossible to all Men, as to fly, to touch the Sky with the Hand, &c. the other of those which are impossible to certain Men only, as to have Children, to pay two thousand or an hundred thousand Crowns, &c. The Rules which our Author gives hereafter about the Cases wherein one is bound to fulfil his Promise, tho' of a thing impossible; these Rules, I say, respect the last sort, and not the first. For he that will believe that a Man may fly, or drink up the Sea, is as great a Fool as he that engages to do it.

³ Vid. lib. 2. f. 3. *Ec. Digest. Si quis cautionibus, &c.*

III. But farther, when the thing at the time of making the Promise or Pact appear'd possible, and afterwards becomes impossible, we must enquire whether this happen'd by meer Chance, or by Default and Deceit. In the former Case the *Pact* is disannull'd, if nothing has yet been perform'd on either side. If any thing have been already done towards it by one of the Parties, the other shall give it back, or pay the value of it¹; if neither of these can be done, he is to use his best Endeavours, that the Man be not a loser by him. For in Contracts the first Regard is had to the thing expressly mention'd in the Agreement; when this cannot be obtain'd, it is sufficient to give an Equivalent; but whatever happens, all imaginable Care is to be used, that the other Party suffer no Prejudice. But when a Man shall by Trick and Design render himself incapable of performing his Part, he shall not only be bound to do the best he can, but he ought likewise to have some Punishment inflicted on him, as it were in supply to his Defect.

These Principles, well applied, might determine most of the Doubts in the Case of *Insolvent Debtors*. A Man that falls into such a Condition by Misfortune, and without his own Default, is obliged only to use his utmost Endeavour to give every one their due. And here Equity and Humanity² engage us to make an Allowance of Time, so much as shall be necessary for him to look about him, and to seek out all honest ways and means of Payment³. For to seize immediately on all he possesses, and to send him and his Family a begging, would be a most unmerciful Barbarity. The *Roman Laws*⁴ were so favourable to certain Persons, in Cases there specified, as to order that they should be condemned in no deeper Sum than they were able to make good⁵. Yet unless the Creditor shall have forgiven all that exceeds their present Abilities, they shall be bound to pay the Residue, upon the Improvement of their Fortune and Condition. Those who have turned Bankrupt out of Knavery, or some other way, by their own Fault, may be justly compell'd to undergo some painful Punishment⁶; that their Body may in some measure pay for the Defect of their Purse⁷.

In the Case between the Creditor and the Debtor, there is another Point that ought to be consider'd;

through what Cause or what Necessity the Man contracted so deep Scores. And he deserves more or less Commiseration and Favour, as the Cause was more or less grievous and unavoidable. For this reason Merchants and other great Traders, though undone by meer Accident and Misfortune, are reckon'd to be in a Condition less capable of Mercy, than others who have been driven by some particular Urgency to the like insolvent State. For the former took up so large Sums on Trust, purely for the sake of making farther Gain and Advantage by them. And in as much as they profess *the Art of growing Rich* as their peculiar Calling, they are to be blamed for not foreseeing and preventing even Casualties, such as the losing all they are worth at one sudden Stroke; since they ought not to have ventured their whole Effects in a single Bottom. This is contrary to the Judgment of *Pliny*, who thinks it the safest Course to try the Uncertainty of Fortune by Variety of Possessions. *Epist.* 19. l. iii. numb. 4. Ed. *Cellar.* King *Philip* (in *Justin.* l. ix. c. 1. in *fin.*) besieging *Byzantium* without Success, at the same time made an Inroad into *Scythia*, for the sake of Plunder; seeking (according to the Policy of Merchants and Dealers) to defray the Expences of one War with the Spoils of another.

Livy (l. xl. c. 21. p. 661. in *fin.* Ed. *Gronov.*) reports of *Antigonus*, That being in great Distress at Sea, when he had all his Friends with him in the Ship, he call'd his Children about him, and strictly charg'd them both to remember themselves, and to caution their Posterity, That they never engaged with their whole Family together in Difficulty or Danger.

Yet it is plain the antient *Romans* had little regard to these different Circumstances. For thus *Seneca* argues (*Benef.* l. vii. c. 16.)⁸ Can you imagine our Forefathers were so imprudent, as not to apprehend how unjust it must be to put a Man who had waded a Loan in Dice or Lewdness, in the same Case with him, who by Fire, Thieves, or some sadder Misfortune, had lost other Mens Money with his own? They allow'd no Excuse, that Men might learn in all Cases most strictly to keep their Faith. And it were more safe to reject the just Plea of a few, than to admit all to a Privilege of offering their Apologies. In *Moscow*, insolvent Debtors are first found-

Mr. BARBÈYRAC'S NOTES on §. III.

¹ This is true in such Agreements where the transferring Property is not concerned, as in Contracts of Hiring; but it is not so in them, where a Right of Property is acquired, as for Example, in a Bargain and Sale. For if a thing so'd perish by mischance, the Loss is the Buyer's, who has the Property and the principal Right in him, if we consider the Principles of natural Right. Hence it is that the Seller keeps the Price of his Goods, or causes the Buyer to pay it, tho' he has never received them. *Titius Observat.* 230. See what is said, l. 5. c. 5. §. 3.

² See what I have said in my Treatise of Sport, l. 3. c. 5. §. 33.

³ Such were, for Example, the Husbands who were obliged to pay back their Wives Portions. *Maritum in id quod facere potest, condemnari, exploratum est, (i. c.)* It is a known thing to condemn the Husband to do what he can, *Digest.* l. 24. tit. 3. *Soluto matrimonio dos quemadmodum petatur*, leg. 12. The Men of War, l. 42. tit. 1. *De re judicata*, &c. leg. 6. Divers Relations, as Father and Mother, Patrons, the Wives and Children, as also their Fathers and Mothers, Givers, Fathers in Law, *Ibid.* leg. 16, 17, 19, 21. See also leg 49, 50. and l. 42. tit. 3. *De cessione bonorum*.

⁴ *Cujus Fortuna laborans*
Non potis est auro venales solvere noxas,
Ardeatur vinclis

Whose desprate Fortune, since it can't by Gold
Redeem its Crimes, Bonds therefore it must hold.

Gunther. Ligurin. l. 8. near the End. See Mr. *Hertius's Paræmia Jur. German.* l. 1. c. 89.

⁵ *Seneca's* Latin is this, *Quid tu tam imprudentes judicas majores nostros fuisse, ut non intelligerent iniquissimum esse, eodem loco eum haberi, qui pecuniam, quam à Creditore acceperat, libidine, aut alea insumpsit, & cum, qui incendio, aut latrocinio, aut aliquo casu tristiore, aliena cum suis perdidit? Nullam excusationem receperunt, ut homines scirent fidem utrique præstandam; satius enim erat à paucis etiam justam excusationem non accipi, quam ab omnibus aliquam tentari.* De *Benef.* l. 7. c. 16.

⁶ See *Matth.* xviii. 25, 26. ⁷ Vid. l. 12. *Digest.* De *soluto matrimonio*, l. 6. l. 16, 17, 19, 21. *Digest.* De *Re judicata*, l. 49. 50. d. t. l. 4. l. 6. l. 7. *Digest.* De *Cessione Bonorum*. ⁸ Vid. *Gell.* l. 20. c. 1. *circa fin.* as likewise *Appian's* Discourse in *Dionys. Halicarn.* l. 5. p. 330, &c. Edit. *Lips.* in *fin.* compared with *Livy*, l. 8. c. 28.

ly whip'd, and then compell'd to be Slaves to their Creditors ⁷.

IV. It is proper for us on this Subject to examine the Notion of Mr. *Hobbes* ^a, which he seems to lay down in too general a Manner, That *Covenants do not oblige to the thing itself, but only to the utmost Endeavour*. That is, since we are not obliged to Impossibilities, and since nothing is in our power but our utmost Endeavours, what we cannot by its means obtain, is to us impossible, and consequently is excluded from being the Matter of Obligation. But he ought indeed to have inserted this Condition, *Provided we have not by our own Fault and Fraud incapacitated our selves for such a Performance*. For if this be our Case, the Obligation is not satisfied by our utmost Endeavour; but when our power of Payment ceaseth, our Punishment must come in to make up the rest. Therefore the Assertion ought to be limited to those Covenants, in which upon account of some *Thing* or *Action* at present reach'd out unto us, we promise some future Labour or Assistance. For here, since such Futurities are uncertain to human Foresight, so that either our Strength may by some Accident be impair'd, or some unaccountable turn of Things may render it extremely difficult, if not utterly impossible for us to meet with an Opportunity of Performance; and farther, since our Sagacity may be mistaken either in rating our own Power, or in weighing the Difficulty of the Undertaking; the Contractors must for these Reasons be suppos'd to have been mindful of their own frail Nature, and consequently not to have agreed on any future Action or Work, but with this Condition and *Proviso*, That their Abilities and Opportunities remain'd the same, and that they had not overrated their present Strength. In these Cases then, he who has us'd his utmost Endeavour may be rightly said to have done his Duty; especially when in the very midst of the Performance some cross Adventure, which we could not possibly have prevented, falls in, and either quite intercepts, or wrests aside the Fruit of our Labour.

That the Rule will hold good only in this kind of Covenants, is further evident from what Mr. *Hobbes* discourseth immediately before. *We very frequently, says he, contract about such things as then indeed seem possible, but which afterwards we find to be impossible* ^b; yet this does not free us from all Obligation. And the reason is, because he who promises an Uncertainty hereafter, receives a present Good, on the

Condition of returning the like. But now the Will of him who offers the present Good, has for its absolute Object any return of good equal in Value to the thing expressly promis'd by the other Party; but the thing itself is affected, not strictly and absolutely, but under Condition of its Possibility. Yet on the contrary, I would choose to say, That whosoever exhibits to another any present Good, does absolutely and directly bend his Desire towards that particular future Good, express'd in the Bargain; and this as well in Contracts of giving, as in Contracts of doing. For the Law of Nature doth not seem to afford Ground for that Distinction which some make, that in Bargains of giving a Man is precisely obliged to give; whereas in Bargains of doing, he is not precisely obliged to do the Work, but may be releas'd by a Commutation. But when he cannot obtain what was peculiarly promis'd, he then, to keep himself from suffering Loss, desires something of equal Value. And if this too cannot be paid him, nor the thing restor'd which he first gave on his Part, the other Man fully satisfies his Obligation by offering what his Abilities will admit of.

But in Contracts of Lending, and others of the same Nature, it will not hold that the Debtor is freed from his Obligation, by using his utmost Ability and Endeavour. For when any thing is taken in way of Loan (especially if it be not in a case of extreme ² Necessity) the Creditor supposes that the Debtor is both willing and able to pay, and the Debtor himself pretends as much; and on this Supposition the whole Contract is founded. If then at the time prefix'd for Payment, the Debtor with all his Stock and Effects cannot make up the Sum; tho' here it be at present impossible to squeeze more out of him; yet he shall stand engaged to make good the rest hereafter ^c.

In simple Promises when we engage to do a thing which is not, as to the Event, fully and absolutely in our Power; some such Condition as this ought always to be understood, *If Fortune favour me, if no cross Accident intervene, or what better becomes the Piety of a Christian, if it please God* ^d. But positively to swear or vow that we will accomplish such an uncertain Enterprize, is not only most extravagant Rashness, but most wicked Presumption. Such was the Oath of *Labienus* and his Party, recorded by *Cæsar*, by which they engaged themselves not to return into their Camp without obtaining the Victory ^e.

⁷ Among the *Athenians* also insolvent Debtors were given to their Creditors to be made their Slaves, or to sell them into Foreign Countries, and many were forced to sell their Children; but *Solon* abolish'd that inhumane Custom. See *Plutarch* in his Life. Some also have thought, that among the *Romans* there was a Law of the 12 Tables, which allowed Creditors to cut their Debtors in Pieces, and part them among them, which Opinion is supported by the Authority of *Quintilian*, *Instit. Orat.* l. 3. c. 6. *Aul. Gell. Noct. Attic.* l. 20. c. 1. and *Tertull. Apologet.* c. 4. But Mr. *Bynkerhook* proves fully in his Observation, l. 1. c. 1. that it allowed only the Sale of his Person to his Creditor by way of Auction. We may compare with this Book a Memoir found in the *Acta Eruditorum* at *Leipsick*, Febr. 1710.

MR. BARBEYRAC'S NOTES on §. IV.

¹ It is a Principle of the Roman Law, *Si minus, quia non facit, quod promissit, in pecuniam numeratam condemnatur; sicut evenit in omnibus faciendis obligationibus*, (i. e.) If a Man performs not his Promise, he is fined a certain Sum, as is usual in other Obligations of doing a thing. *Digest.* l. 42. tit. 1. *De Re Judicata*, &c. leg. 13. §. 1. *Secundum quæ Cellus ut posse dici, justa æstimatione facti dandum esse petit. enem*, (i. e.) According to whom *Cellus* says it may be affirmed, that the Desire may be answered by the Value of the Deed, l. 45. tit. 1. *De Verbor. Obligat.* leg. 72. *in init.* But this is observed at this Day in many Cases, and in the Roman Law there are divers Limitations about it, as Mr. *Hertius* observes, with others before him, that the Reason of this Maxim was, That the *Romans* esteem'd it a kind of Slavery to be constrained to do any thing for another. *Et sunt quidem hæ Pænæ, si quis generaliter tractare velit, inieviles, in eo ut hominem jubere facere, quod facere non potest*, (i. e.) They are Punishments generally speaking, unfit for Society, to force a Man to do that against his Will which he cannot do. *Digest.* l. 48. tit. 19. *De Pænis*, l. 9. §. 10. See *Vinnius* upon the *Instit.* l. 3. tit. 16. *De Verbor. Obligat.* §. 7. And Mr. *Thornasius's* Discourle *De Pretio affect.* c. 2. §. 4.

² See my Treatise of *Sport*, l. 3. c. 5. §. 31.

^a *De Cive*, c. 2. f. 14. ^b It must be supposed that we have not had Opportunity of making Tryal. ^c See *Matth.* xviii. 25. *Eccl.* ^d See *James* iv. 15. ^e *Cæsar de Bel. Civ.* l. 3. c. 87. n. 6. Add. *Actis* xxiii. 21. & *Sidon. de J. N. & G. l.* 4. c. 7.

V. There is another knotty Question proposed by Mr. *Hobbes*, which we ought here to discuss, Whether a Man can by Covenant oblige himself to suffer such Evils, as exceed the ordinary Strength and Constancy of human Minds? For instance, whether he can bind himself *not to resist another, who shall go about to kill or to wound him?* Now whoever closely and carefully considers this Point, will be able to discover on what account Mr. *Hobbes* thought good to take the negative Side; namely, to shew that bare Pacts are not a sufficient Guard and Caution to the Security of Mankind; and that 'tis not enough for a Man to engage by Covenant, that he will freely undergo due Punishment, so often as he shall commit an Injury; but for the Preservation of Peace in the World, it is farther necessary that civil Governments should be establish'd, which may bring Offenders to Justice, tho' against their Wills. Which Principle we acknowledge to be most just and true, and shall enlarge upon it in its proper Place. At present it may be worth our while to examine more nearly the Arguments which he produces. He says then, *No Man is by any Covenant which he shall make, obliged not to resist another, when he offers mortal Violence, or Wounds, or any bodily Mischief. For there is implanted in every one the highest Degree of Fearfulness, by which he apprehends the threaten'd Evil, as the greatest imaginable, and therefore, by a natural Necessity, flies and avoids it as much as possible; and is suppos'd incapable of doing otherwise. When he is arriv'd at such a height of Fear, it cannot be expected but that he will consult his own Safety by Flight, or by Combat. Since then no Man can be obliged to an Impossibility, those to whom Death, or Wounds, or other corporal Pains are presented, and who have not Constancy enough to bear them, are not bound to venture the Trial.* Upon this Argument we may remark, that to suffer Death without Reluctancy, is not a thing absolutely beyond human Strength. And therefore if God has commanded us to lay down our Lives, rather than commit some particular Action, no doubt but we are strictly bound to yield a ready Obedience. But thus much we are willing to acknowledge, that since such a Degree of Constancy is beyond the Strength of the Generality of Men, no one shall be presumed to have bound himself by his own free Covenant to such a rigorous Task. For human Laws and human Contracts ought all to be made with an Eye and Regard to human Infirmary.

Yet this Consideration ought not to be drawn so far, as to prejudice the Force of military Discipline; as if a Soldier under imminent Peril of Death might desert his Post, upon pretence, that a Man cannot be obliged to undergo Death, as being a thing impossible. For we deny that it is a thing above the

Fortitude of Mankind, especially of the military Sex, to sustain a probable Danger of Death, still join'd with a Power of resisting to the last. And there scarce ever happens such a Case in War, that some Persons must be thrown away, and offer'd up as Victims to the Enemy, without a Liberty and an Opportunity of defending themselves by Courage, or by Craft. So that it appears from the Necessity of preserving Commonwealths, and from the Use and Practice of all Nations, that whenever it is requisite, a Commander may lawfully enjoin a Soldier to oppose the Enemy in such a Station assign'd him to his last Breath, tho' 'tis probable he may die upon the spot; and may as lawfully inflict capital Punishment on those who shall quit their Post, after such an express Order to the contrary. For he that lifts himself in the Number of armed Men, does by that Act lay aside all Claim to the Excuse of natural Fearfulness, and is bound not only to enter the Field, but likewise not to leave it, without the Order of his Leader. Neither is there any Absurdity in that martial Punishment of *killing a Man, because he declined being killed.* For is it not much worse to suffer ignominiously under the Hand of the Executioner, than to fall with Honour under the Sword of the Enemy? *Add. l. i. c. 28. De Senatusconsulto Silianiano & Claudiano, &c.* By one of the Roman Laws, Servants who prefer'd their own Lives before their Masters were punish'd with Death, *D. B. 29. t. 5.* We must add, that in case a Person be of so weak and cowardly a Temper, as to shrink at those Dangers which the common Hardiness of Men is able to sustain; his peculiar Infirmary of Mind shall by no means absolve him from his Obligation.

Mr. *Hobbes* proceeds to observe, that since *we dare trust him, who is bound to us by Covenant, whilst we lead Criminals to execution in Chains, and under Guards; it should seem that they are not by Covenant sufficiently obliged to Non-resistance.* The Remark in most Cases is true³, yet sometimes Persons really bound by Covenant to us, are not so absolutely trusted, but that we think it expedient to provide against their Perfidiousness by a Security of arm'd Men^b. He adds, *A Covenant of this kind would be useless; a Man indeed may covenant thus, Unless I do this or that in the appointed day, kill me; that is, you shall have a Right of proceeding to capital Punishment against me upon my Default; but to covenant thus, Unless I do so or so, I will not resist you when you come to kill me, is a thing both unpractis'd and insignificant.* He proves his Point after this manner: "Such a Covenant must be made, either between a State and a Subject, or between two Subjects of the same State, or between two Persons living in a Condition of natural Liberty.

MR. BARBEYRAC'S NOTES on §. V.

¹ This proves, that when a Punishment is once fixed, it is better to die fighting courageously, than run the Risk of the Scaffold or Halter; but this doth not prove, that there is nothing absurd or unjust in establishing such a Punishment. To clear this we must affirm, that it is sometimes necessary that a Man expose himself to Dangers, yea, to Death, for the Preservation and Defence of many others, the Safety of the Publick being to be preferred before our private. And when one is engaged, as in this Case of which we are speaking, and many others, we have no reason to complain of him that inflicts the Punishment, to which we have openly or tacitly consented, if we perform not our Engagements. See what is said, *l. 8. c. 2.* following.

² *Servi quotiens Domini suis auxilium ferre possunt, non debent eorum salutem suam anteponeere. — Ultimum itaque supplicium pati debet [Ancilla, cui Percussor Domine mortem minatus erat, si proclamasset] vel hoc, ne ceteri servi credant, in periculo Minorum sibi quemque consulere debere.*

³ See what is said *l. 8. c. 3. §. 4.* Note 8.

^a *De Cice, c. 2. f. 18.*

^b *Senec. Thyest. ver. 644, 645, 646.*

— *Ara urbem premit,
Et contumacem regibus populum suis
Habet sub ipsis.* —

— *A Cattle awes a Town,
And holds a People, stubborn to their Kings, under the Stroke.*

“In the first Case it would be useleſs, becauſe ’tis enough to ſecure to a State the Power of puniſhing Offenders, if each particular Subject engages by Oath or Fealty, that he will not forcibly defend or reſcue any Perſon, who ſhall be thus led to ſuffer Juſtice. In the ſecond Caſe it would be alike impertinent; becauſe in civil Governments private Men have not the Right of killing. In the third and laſt Caſe, it would be of no more Uſe or Force than in the former; becauſe if the Parties covenanted, that one of them ſhould be kill’d upon Non-performance, a preceding Covenant muſt be ſuppos’d to have paſs’d, importing that he ſhall not be kill’d before the day fix’d for Performance.” For according to his *Hypotheſis*, in a *State of Nature*, before any Paſts have been introduced, each Man hath a Right of killing each Man eſſe. “Therefore upon default of Performance, on the ſet day there returns a Right of War, or a hoſtile State, in which it is lawful for any Man to attempt what he pleaſes againſt another; and conſequently the Right of reſiſting will return at the ſame time.” I would rather chooſe to eſtabliſh the Truth of the Aſſertion another way, by ſaying, that the Force of Covenants, if ſtrain’d to the higheſt, does reach ſo far, as not only to lay on the Parties an intrinſical Neceſſity of performing the Conditions, but likewiſe to give each of them a Right of compelling the other to a Compliance †, in caſe he draw back, by propoſing and preſenting ſome Evil. And that therefore every Covenant may be reſolv’d into this Senſe, *I engage to do this or this for you; if I fail, you ſhall have a Power of compelling me by violent Means.* Now to add a ſecond Covenant about Non-reſiſtance, would here be uſeleſs and abſurd. For then this ſecond Covenant muſt be enforc’d again by a third, including ſome Penalty, as *if I reſiſt you, when you attempt to compel me to Performance, you ſhall have a Power of offering Violence or Evil to me.* Thus it is plain, the ſecond Covenants add nothing at all to the firſt; for the firſt gave a Power of reducing the Deſailant by Violence; and ’tis as eaſy to break this as that. What need is there then of backing one Covenant with another, when ten may as well be broken thro’ as one?

The laſt Argument urg’d by Mr. *Hobbes*, runs thus: *Could there be ſuch a thing as a Covenant for Non-reſiſtance, we ſhould by it be oblig’d out of two preſent Evils, to chooſe that which appear’d the greater. For certain Death is a greater Evil than Reſiſtance and Combat. But of two Evils it is impoſſible for us not to chooſe the leſſer; therefore by ſuch a Covenant we ſhould be tied to an Impoſſibility, which contradicts the whole Nature of mutual Engagement.* Now here it is neceſſary, that the Rule about chooſing the leſſer Evil, be accurately ſtated and explain’d. And this properly ſpeaking, can take place only in two unprofitable or hurtful Evils, conſider’d as ſuch. In which Caſe it looks like a kind of Gain, to ſuffer only a Part of an inevitable Loſs or Damage: But the ſame Rule muſt by no means be extended and

applied to the Caſe of two *dishoneſt Evils*, or of two Evils, the one *dishoneſt*, the other *unprofitable*. For of two Evils of Commiſſion, we are to chooſe neither. But it ſometimes happens, that we cannot fulfil two affirmative Precepts, the Omiſſion of which, ſeparately conſider’d, would be ſinful, yet upon their meeting together the Omiſſion of one of them is look’d upon as lawful. And in this Caſe of the two *Evils of Omiſſion*, the leſſer is to be choſen, or rather the interfering with a more noble Precept, ſhews the Omiſſion of the leſs noble Precept to be no *Evil*, or *Sin*. For in all inferior and ſubordinate Laws, this Reſtriction is ever underſtood, *So far as we can comply with them, and not intrench on Engagements of a higher Nature.* Thus not to obey God, and not to obey the civil Magiſtrate, if taken aſunder, are both notoriously Sins; and yet, ſuppoſing both the Obligations cannot at once be answer’d, as when the Magiſtrate commands any thing contrary to the Divine Law, in this Caſe, Diſobediencce to our earthly Governors ceases to be Evil; becauſe that Law which binds us to conform to the Will of human Sovereigns, is always underſtood with this Proviſo and Condition, that they enjoyn nothing repugnant to the Laws of God.

We are in many Caſes likewiſe permitted, rather to chooſe the bare Execution of another Man’s Sin †, or a Concurrence by way of Inſtrument, than ſome Evil, very prejudicial, or very grievous to be born, with which we are threaten’d upon reſuſal. Which Point we have elſewhere more largely diſcuſs’d.

Neither is it allowable, as was juſt now hinted, to make any ſuch Compariſon between an Evil, troubleſome or damageable, and a Sin, ſo as to chooſe the latter rather than the former; as for inſtance: If a Man ſhould rather act contrary to his expreſs Duty, than ſlip the Opportunity of ſome Advantage, or ſuſtain ſome real Loſs; how poſitive ſoever his corrupt Judgment may be in concluding the Sin to be the leſſer Evil. For, were this admitted, the Force and Efficacy of Obligations would depend upon every Man’s Opinion; and conſequently would vaniſh into nothing, if I were not bound to an Action, when the Omiſſion of it upon account of ſome external Regard, appear’d to me more deſirable than its Performance. Thus it would be but a poor Excuse for a Thief to alledge for himſelf, that he thought it a leſs Evil to lay Hands on the Goods of his Neighbours, than to get his Livelihood by his own Pains and Labour. Indeed Obligations are ſo far from loſing their Force in theſe Caſes, that they never exert it more vigorously; for ’tis the very Nature of ſuch Engagements to produce in Men an intrinſical Neceſſity of ſuch Performances, as they would otherwiſe be averſe to, upon outward Conſiderations and Reſpects.

VI. To make a Promise or Paſt truly obligatory, it is farther requiſite, that we have a moral Power of performing the thing agreed upon. And if the thing be unlawful, and we conſequently want this Power, we cannot tie ourſelves by any ſuch Engagement †a. For every Promise receives its

† And by conſequence the other is oblig’d not to reſiſt, till he ſhall obtain his Right, otherwiſe his Right will do him no good. See concerning this Mr. *Thomasius’s Jurisprud. Divin.* l. 3. c. 7. §. 88, &c.

§ See l. 1. c. 3. §. 8. aforegoing, and what I have ſaid in my *Treatiſe of Sport*, l. 4. c. 5.

§ See what is ſaid above, l. 1. c. 5. §. 9. and hereafter l. 8. c. 1. §. 6. with the *Notes*.

MR. BARBEYRAC’S NOTES on §. VI.

† *Paſta quæ contra Leges Conſtitutioneſque, vel contra bonos Mores fiunt, nullam vim habere indubitati Juris eſt.* Cod. de Paſtis, leg. 6. See alſo the *Digeſt.* l. 28. tit. 7. De *Conditionibus Inſtit.* leg. 15. l. 45. tit. 1. De *Verborum Obligat.* leg. 35. §. 1. & leg. 123. & *Inſtit.* l. 3. tit. 20. De *inutil. Stipulat.* §. 24.

†a ’Tis indubitably certain, that Paſts againſt Laws, Conſtitutions, and good Manners, have no Power of binding Men. *C. de Paſtis*, leg. 6. *Vid. D.* 28. tit. 7. de *Condition. Inſtitut.*

Force from the Ability of the Promiser², and never reacheth farther; for a Man cannot bind himself with any Effect to a Business which he wants Ability to compass. But now the Law by forbidding any Action takes from us the *moral Power* or *Ability* of setting about it, and of entering on any Obligation to perform it. For would it not be most

absurd and contradictory, that an Obligation which derives its Virtue from the Law, should put us under a Necessity of doing somewhat which the Law absolutely prohibits? And when we are once plac'd in Subjection to Laws, the bare Act of our own Will is not sufficient to repeal or to evade them. Therefore he who promiseth a thing unlawful, sins,

² The Validity of unlawful Agreements not being sufficiently explain'd by our Author, who has treated of it too generally, and without regard to such true Principles as the Solution of divers Cases contain'd in it depends on, I have thought fit to propound such Meditations as I have had about this Subject, ever since the first Edition of this Book, under these Heads:

I. That every Act which is attended with something contrary to the Rules of Virtue, is not invalid upon that Account barely. provided that the thing in which we are engaged be innocent in itself; it implies, that one or other of the Contractors, or both of them, offend in certain respects, *viz.* the Engagement, without considering the Parties, as not accompanied with all the Qualities of Right. Not to speak of ill Motives, which render the most innocent Actions criminal. As for example, a Merchant who deals in contraband Goods, may act against his own and Family's Interest, without being obliged to perform the Bargains he has made for them. A Vintner, who spends all his time in drinking with Drunkards, certainly does ill, as well as they to whom he gives an Opportunity to be drunk; yet he is not obliged to pay for the Wine these Men have drank, nor are they less obliged to pay him for it. Gamesters by Profession commit divers sorts of Sin by playing, as I have shew'd in my Treatise of Games, but that does not hinder, that such as have gain'd by fair Play, may lawfully take their Winnings, and require what is due to them. Further, we ought to consider that the End of a Law which forbids certain things, is not only to make void all that may be done upon that account; but to hinder their Commission, and, above all, to slip them of their proper and immediate Effects, especially if they are of any Continuance. So, for example, if a Judge, who is corrupted, gives an unjust Sentence, he, in whose Favour it is given, may in Conscience take the Benefit of the Judgment; but if the Effect of an Engagement contracted by means of some unlawful thing, exists entirely, the Law will not authorize it, but leaves the things in the State they were, and denies the Contractor its Protection, as not deserved by him. This being laid down, we must

II. Distinguish between that which is contrary to Natural Right, and that which is unlawful only, because it is forbidden by some Civil Law. As to those sorts of Agreements which proceed from the first sort of things unlawful, I shall reduce them to these following Rules. 1. If after any one has engaged himself in a thing unlawful in itself, he will not perform it, he to whom he is engaged can't force him, and he can't reasonably complain that he has broke his Word, whether he hath got any thing by it, or no. The Reason of it is, not only because (as our Author speaks very well) the Lawgiver by forbidding it takes away all Liberty to do it, and by consequence also all Right of requiring it of any Person whatsoever; but also in every Matter wherein he is engaged contrary to his Duty, it may be presumed that he did not give his full and free Consent, especially if he be to act any enormous Crime, as if a Man promise to blaspheme, or commit Sacrilege, or Perjury, or murder a Man, &c. When then he comes to repent of his Criminal Engagement, 'tis not a bare Presumption, tho' that be sufficient, but 'tis an infallible Sign that he did not think that he promised such things, and he to whom he promised them ought to acquit him for that Reason, since 'tis the very same which we all make use of in not keeping our Word. If he has got nothing by it, he has lost nothing, tho' he deserves it. But if he hath given any thing, as it was under a Condition, and that such an one as is thought morally impossible, he must restore it, because it was not given with any regard to him, and so much the more, because he can't keep it without giving some Reason to believe that he does really repent; and that to his Fault in promising he adds another of having a Design of making an Advantage of his Error, and cheating him of his Substance. Restitution is in this Case indispensibly necessary, since he that gave it thought he did well in promising a thing upon a bad Foundation; as if a blind Person thro' a false Zeal should promise another to change his Religion against the Dictates of his own Conscience. 2. If he whom we have engaged to commit a Crime, doth actually execute it, we are not obliged to pay him what we have promised him. This were to reward a Crime, and encourage thereby not only him that has already broken the Law, but others to break it hereafter for the like Motives. On the other side, he to whom the Promise is made, may and ought to know, that he does not think it a thing to which any Man would engage himself with mature Deliberation; and if he pretends certainly to enjoy the Reward of his Crime, he is a Fool to trust to a bare Promise. The only reasonable Foundation for hopes that a Man's Word will be kept, is the Honesty of him that gives it; and can we repose any Confidence in that Man, who requires things contrary to Honesty? How faithful soever he may be believed, who expects us to keep our Engagements, in that he has solicited us to do an ill thing, have we not reason to think that he will no more scruple to break his Word, than to require what he propos'd, when we gave him ours? He certainly offends against Charity, who will oblige any Man to do an ill thing for a Reward's sake. But since it belongs to us to reject his Proposition, and we are indispensibly obliged so to do, he can't require the Performance of our Promise upon a pretence that we do him an Injury, or frustrate his Design; because, tho' he seems to be injured, he must blame himself for it. As he ought to repent that he hath attempted with too much Success, so he must presume that we promised but loosely, and are left to hearken to our own Passions. 3. But when we have given any thing on the Occasion or Prospect of an evil Action, we can demand nothing again from him who hath received it. For when the Wickedness is done, there is no help; we do not render ourselves more culpable by leaving that which is not in our Power to take away. When there is only a bare Promise, the Will of transferring the thing promised upon that Account, must not be thought full and entire: We promise much easier than perform, and when we have promised on the View of some Criminal Action, there is a Space before the Execution following to presume he may recant his rash Engagement; but the same Moment that he delivers the thing agreed on, he strips himself absolutely of the Right of Property, and he to whom he gave it, acquires it, by a Title dishonest indeed, but not unjust in relation to us; because it shews the same Consent of the Proprietor as if he had done something honest or indifferent. The Validity of an Alienation consider'd in itself doth not depend on the Nature of the Subject for which we part with a thing in respect to another. Let the Motive be good, or not, we are Masters of our own Goods, and may dispose of them as we please; all the Abuse of them is, when we bestow them not with a Prospect of something honest, or at least indifferent. If a transferring of Property becomes null only because there was something dishonest in the Subject, we shall easily find a thousand Pretences to elude the most lawful Contracts. A Man, for example, who has borrow'd Money at the most reasonable Interest, may refuse to pay any Interest, or require what he hath paid, under a pretence that he believes paying of Usury unlawful, and contrary to Natural Right. But (says Mr. *Titius Objerv. in Lauterbach. 354.*) one of the Contractors gains, and the other loses; and why should either of them have any Advantage, since they both sin? I answer with our Author, §. 9. That he that hath given, believes himself to have receiv'd a thing of equal value. As is the Price, such is the Pay. 'Tis not material, whether in the main there be any Advantage, 'tis sufficient that the Pleasure of Satisfaction is reputed for a real Gain. Further, tho' if we consider him who hath received, that he deserves no Reward for his Crime, no more doth he deserve to recover what he hath given. For he that rewards another for committing a Sin, is commonly esteem'd, and that with reason, more to blame than he who suffer'd himself to be corrupted, because he committed the Wickedness with more Deliberation, and bribed a Person to do evil, who perhaps would not have been guilty of such a foul Action. To deprive a Man then of all Right of recovering what is actually given for an Action evil in its own Nature, it may suffice, that the Acquirement was made near to the Rules of Contracts used in Cases honest or innocent, that is to say, there was no Fraud nor Force practis'd on the part of the Receiver, and the Price was not exorbitant. But it may be further said, Can any Man in Conscience retain the infamous Reward of the Crime he has committed? No, without doubt. If we suppose a Person to examine himself, and consult his own Conscience, the Question is needless: For such an one can't but repent, and then he will neither regard nor demand the Reward of Iniquity, nor keep it, if he has received it already. But if it be restored, it will not follow that he has any Right to require it; and if he knows that he may require what he has given on this occasion, he may have recourse to those Means which are proper to recover what another refuses to give. The Case has place chiefly in the Independence of the State of Nature, and it seems to me that then the Restoration is not more just in respect

but he sins doubly, who performs it ^a. Whence this farther Consequence may be drawn, that those Promises are not to be kept ^b, which would prove hurtful to the Person to whom they are made; it being a general Command of the Law of Nature, that we do no harm to another, knowingly and wilfully, though he out of Folly should desire it.

Moreover, since a good and valid Obligation cannot be contracted about unlawful Matters, it follows that Acts undertaken against legal Constitutions, are, by Virtue of the same Law, null and void, or the Magistrate is supposed to have already declar'd them so ^b. Yet in many Cases, it is a constant Practice in Commonwealths, to impose a Fine on the Performer of some unlawful Act, and not to disannul the Act, because there was perhaps, more Indecency in the momentary Performance, than

in the Effects consequent upon it; and because frequently the Inconveniences attending a Disannulment would be greater than the Act it self, if permitted to stand valid, would produce ^c ^d.

VII. To proceed distinctly in a closer Examination of this Point, it is first mov'd as a Question, whether an Obligation for the Performance of an Act in it self vicious, be good and valid, whilst things stand as at first, and no step is made towards the Execution? And here it is certain, That such a vicious ^e Agreement does produce an Obligation on neither side, and that Parties ought in Honesty to recede from their Bargain ^f. *Senec. Hercul. Oct. v. 480, 481.*

*Præstare fateor posse me tacitam fidem,
Si scelere careat; interim scelus est fides.*

respect to him that gave, than the Approbation of the Subject for which he gave, can be a Commendation to him. 'Tis upon this that we must ground the Maxim of the Roman Law, which imports, That if an Agreement be dishonest, both in respect to him that gives and receives, the first can't require any thing again, but in this Case the Possessor has the Advantage. *Porro autem, si dantis & accipientis turpis causa sit, possessorem potiorum esse, & ideo repetitionem cessare, tametsi ex stipulatione solutum est, Digest. l. 12. tit. 5. De conditione ob turp. & injuri. causam, leg. 8.* In which nevertheless the Roman Lawyers do not always follow their own Principles, since when Men play at the Game call'd Hazard, which was forbidden, and look'd upon as dishonest, they allowed the Loser to require his Money again, even beyond the ordinary Term of Prescription. But as I have shew'd in my Treatise of Gaming, l. 3. c. 9. §. 15. in this last Case the unhappy Gamer can have no recourse to Justice to recover his Money, because in taking upon him to game, he renounces the Benefit of the Law. The same thing may have place in my Judgment, and for the same Reason, in all other dishonest Engagements, supposing that the Law permits Men to recover again what they have given on that Account. Thus much of things evil in themselves, and contrary to the unchangeable Rules of natural Right, after which it will not be hard to state the Validity of such Agreements as are not unlawful, otherwise than as they border upon such things as civil Laws forbid. But here we must distinguish between a Stranger and a Fellow-Citizen. 1. If we treat with a Stranger about things forbidden in our Country, he either knows them forbidden, or not. If he knows them, he has either searched out the Agreement, or not; if he has searched out the Agreement, we are obliged neither to do the thing, nor to make good the Damage he may have by it, but only to restore what he has already given. The Reason is, because in this Case he may and ought to suppose that we are but slightly engag'd, and that we are tempted by the advantageous Propositions that he made us. Besides, we often expose our selves to great Mults, and other Punishments more troublesome, of which we can't suppose that any Person would run the risque. But if we our selves had searched the Agreement, we are not really obliged to execute the same thing, but we must indemnify him with whom we are engaged. I say, we are not obliged to execute the same thing; for tho' Strangers are not strictly obliged to inform themselves of what passes among us, and may behave themselves as they see convenient, without enquiring into the particular Laws of our State, yet they ought in Equity to presume, that a Citizen who recants an Engagement which he has entered into contrary to his Duty, did not engage with mature Deliberation, or at least did not foresee the Obstacles that oppos'd the Execution of his Promise. But since he has searched the Agreement, and seems to have pass'd all these Considerations upon it, 'tis just that some way or other he should indemnify him that has trusted to him. But if the Stranger knows not of the Prohibitions, whether he has searched the Agreement, or no, then we have a more indispensable Obligation to render to him all that he hath suffered by trusting to our Word; and we ought to think our selves happy that he doth not impute it to us as an Injury that we are silent, and let him take other Measures than he would have done if we had spoken our Minds freely. But if the Prohibitions come only when the Market is made and concluded, then we are not obliged to make good any Damages. For in this we ought to be supposed not to have consented but under a tacit Condition, that there was no Obstacle from the Sovereign. 2. But if those that treat together about a thing forbidden by the Law, are Members of the same State, they are both subject to the Punishment really, because they could not be ignorant of the Law, and upon that Account they are looked upon to treat together as if there were no Law about it, and so to renounce the Benefits which might accrue thereby to either of them. So, though they did ill to engage themselves, they ought, as far as in them lies, to suffer their Engagement to continue in force, and neither of them to break it without the Consent of the other; yet if we can't execute the thing to which we are engaged without some great Prejudice, he to whom we have promised should content himself with an Equivalent. I say, every one ought, as far as in him lies, to suffer the Engagement to take effect, for so long as there is nothing done on either part, each of them is free to recant, as if they had done a thing evil in its own Nature, because in this Case we may be thought to have consulted well, or acted with mature Deliberation. As for Example, if I have promised any Man to game with him contrary to Law, I am no more obliged to meet him, than to present my self in the Field to that Man who has challenged me to a Duel, which I have accepted; but when I have actually play'd and lost, I cannot have a recourse to Law to recover my Money, nor use any forcible way to regain it; especially if there was no Cheat put upon me by him who has won it of me. See my Treatise of Gaming, l. 3. c. 9. §. 15, 16. So again, if a Merchant has promised another to furnish him with certain contraband Goods; when they have agreed for the Price, the one may refuse to stand to the Bargain that he ought not to have made, and the other, with whom he has not kept his Word, ought to repent that he had promised such a thing, and be easy that it took not effect; but if the Merchandize be actually delivered, or any thing be received as an earnest of Delivery, which is therefore hoped, neither the Buyer can lawfully refuse to pay the Price agreed on in the first Case, nor the Seller himself to deliver the Bargain without some Prejudice to himself, and incurring a great Punishment: For then 'tis sufficient to restore what he has received, or an Equivalent. With these Limitations nothing hinders but that an Engagement contrary to the Laws purely civil may be of Force between one Bargainer and another. There are Agreements which the Laws forbid, but they suffer them nevertheless to subsist contrary to their Prohibition, for they may be valid between the Parties, altho' the Law nulls them, in as much as that and the Magistrate allow no Action for the Relief of either of them after they have consented with full and entire Liberty.

³ See what is said, l. 5. c. 12. §. 22. in the End.

⁴ See *Grotius*, l. 2. c. 5. §. 14, 16. with the Notes of *Gronovius* the Father, and what our Author says above about Imperfect Laws, l. 1. c. 6. §. 16.

MR. BARBEYRAC'S NOTES on §. VII.

¹ This is the Determination of the Roman Law, *Generaliter novimus turpes stipulationes nullius esse momenti, & luti si quis homicidium vel sacrilegium se facturum promittat.* Digest. l. 45. tit. 1. *De Verbor. Obligat.* leg. 26, 27.

² Thus *Apollonius Tyanæus* (in *Philosofrat.* l. 3. c. 7, p. 130. Ed. Morel. Paris.) having promised to bring a Vessel richly laden in the Hands of Pirates, led 'em a quite contrary Courle, and deluded their Expectation of Booty.

³ *Add.* l. 15. *D. de Condition. Infitut.* l. 35. f. 1. l. 123. *D. de Verbor. Obligat.* ^b *Lex Wisigothorum*, l. 2. tit. 5. c. 7. ^c Thus in *Apollonius Rhodius*, *Argon.* l. 4. *Aleinous* being constituted Umpire between the *Colchians* and the *Argonautes*, gave Judgment as follows, "That if *Medea* had been acquainted with *Jason's* Bed, she should still remain in his Possession, if not, she should be restored to her Father. We have the same Story in *Hygin. Fab.* 23. *Apollodor. Biblioth.* l. 1. l. 25. *Orpheus in Argon.*

Thus for Instance, if a Man hire an Assassine to commit a Murder, and the Assassine upon better Thoughts resolves against the Villany, the Hirer cannot compel him to fulfil his Covenant. And on the other Hand, if the Hirer repenting of his wicked Design, orders the Assassine not to proceed, the Assassine shall not force him to continue in his Resolution for fear of losing the promis'd Wages. Neither shall he in this Case demand the Money of the Hirer, as on whose account purely he now desisted, and was hindred from earning it. Nay, if after he has been thus countermanded he go on, and accomplish the Mischief, the Hirer shall not be guilty of the whole Fact, but shall be condemn'd only in so much as shall seem a proportionable Penalty, for conceiving a Murder in his Imagination, of which he repented before it was put in Execution.

Grotius^a observes, That a Promise of this kind is therefore *vicious* and *void*, because it is made to excite a Man to do a wicked Act^b.

VIII. It is a second Point of Enquiry, whether in Case such a Villany having been once committed, according to the Bargain, the other Party be obliged to pay the Price agreed upon? Which *Grotius* affirms; because, says he, the Price or Reward before the Fact was accomplish'd had indeed a Blemish and Imperfection, as being the Incentive to Wickedness, which Blemish ceateth, when the Wickedness is once past, and the Crime perform'd. But we cannot but declare our selves of a contrary Opinion; for a Bargain of this kind is so far from ceasing to be vicious, when the Deed is over, that it seems then to arrive at its highest pitch of Baseness, as having gain'd its end. Unless it be a smaller degree of Sin to have stolen, than to think of stealing; to receive the Wages of Villany, than to hope for and expect them; to pay the Reward, than to promise it. Indeed if the Promise be in its self vicious, because it is the *Incentive to Wickedness*, the fulfilling of the Promise will certainly be vicious, as being the *Recompence of Wickedness*, and an Encouragement and Invitation to new Mischiefs. And on this account some secret Stain or Blemish is commonly thought to stick on such Rewards, even after they have pass'd to a third Possessor by a just Title; because they were at first the *Wages of Iniquity*. Thus the *Jews* were forbidden to bring the Price of Whoredom, as an Offering, into the House of God^c. Thus when *Judas*^d brought back the Wages of his Treason, the chief Priests thought it not lawful to put it into the Treasury. And thus it is a known Proverb, That a *Family seldom thrives on an ill-gotten Estate*^e. Therefore we can by no means assent to what *Grotius* delivers, That till the *Time of performing the Villany, the Force and Efficacy of a vicious Promise remains in suspense*; just as doth the Efficacy of conditional Promises, till the Condition be made good, and of Promises about things at present impossible, till the things do really fall under our Power, as we have probable Hopes they will, at our first making the Bargain: But that *when the Fact is once committed, the Obligation then breaks out, and exerts its Force,*

which was not at first entirely wanting (in as much as the thing was done by mutual Consent) but was only hindred from displaying it self by that Vice or Defect, with which it is attended; namely, its contributing to the Commission of a Sin. But should we admit this Doctrin, the Edict of Natural Law forbidding us to enter into Covenant about unlawful Matters, would be void, if when the wicked Terms of the Covenant on one side were put in Execution, the other Party must by the Law of Nature be bound to stand to his Agreement. What an insignificant Order would it be to prohibit Theft, if the Act of stealing being once over, the Goods were to remain in the Possession of the Thief, without Blame or Danger? And that Remark is very false, "That there was not originally wanting to "the vicious Covenant, an internal Force of obliging; but that it was only kept in Suspense upon "account of the attending Wickedness, till such "time as it ceas'd to be an Incentive to Sin." For to give a Pact an inward obligatory Force, it is not enough that it be made with the Consent of both Parties, but the Subject of it ought to be such a thing as Men have a Right and Power of disposing of at their Pleasure. Otherwise if mutual Consent were sufficient to produce an Obligation, it would be easy to overthrow all Laws, should Men but enter into a *Covenant* to break them; and thus the Law of Nature would manifestly contribute to its own Destruction. It is our Judgment then, that with regard to the Law of Nature, neither the Actor of a Villany can by any proper Right demand the Wages promis'd him, nor is the Person who hired him bound to pay the Reward by any inward Tie affecting the Conscience. And that therefore the Court of natural Justice does not think it self concern'd to enquire, whether or no a Man has committed a Wickedness *gratis*, or to trouble it self in giving him Relief. Indeed, if the Cut-throat here, or any other Man retain'd for the Execution of some unjust Violence, shall upon the other Party's refusing to pay him his Hire, do him some Mischief in Revenge, no Body will pity the Sufferer, nor think that he had been treated injuriously, but only that he has been dealt with in his own Way. This then we must observe, That although Covenants, in themselves *vicious*, are not obligatory by any intrinsical Force or Virtue, nor fit to produce an *Action* in Courts of Justice, yet they have some kind of Effect upon a Man, who having at first freely consented to them, refuses afterwards to make them good. For they hinder him from having any Right to complain of hard Usage, in case the other Person violently bring him to a Compliance, or inflict some Evil on him for his Refusal. It is true the Law of Nature forbids, that a Man should have forfeited his *Claim*, by another's dealing injuriously, or be compell'd to pay what he does not justly owe, or should be punish'd for denying so unreasonable a Demand. But he who agrees to a vicious Covenant, does by that very Act quit all claim to the Favour of this Law, in as much as he endeavours, so far as he is able, to give another an un-

MR. BARBEYRAC'S NOTES on §. VIII.

^a This Proverb, as any Man may perceive, makes not much to our Author's Purpose; because it is designed to shew, that ill-gotten Goods will not prosper, and that they vanish as they came.

^b Lib. 2. c. 11. f. 9. ^c Thus *Apollonius Tyanæus* (in *Philosofrat.* l. 3. c. 7. p. 130. Edit. *Morel.* Paris.) having promised to bring a Vessel richly laden into the Hands of Pirates, led 'em a quite contrary Course, and deluded their Expectations of Booty.

^d *Deuteronom.* xxiii. 18. *Jeseph.* Antiq. 4. 8. ^e See *Matth.* xxvii. 6.

just Power over him. And those Evils are adjudg'd to fall very deservedly on Persons, to which they give Occasion by their own Fault². For Instance, the Law of Nature forbids, that a Virgin should be robb'd of that Title and Character against her Will; yet if she once consents to her own Dishonour, she has suffer'd indeed an irreparable Loss, but she cannot complain of any Injury that has been done her³. And thus too in Commonwealths, where *Duels* are prohibited by Law, a Man who has receiv'd a Challenge, is not bound to come into the Field, tho' he has given his Word to appear. Yet if he freely meets his *Antagonist*, and happens to be wounded in the Encounter, he cannot say, that he has suffer'd Wrong, or demand the Charge of his Cure.

Grotius, in favour of his Opinion, urges the Example of the Patriarch *Judab* in the Scripture⁴, who appear'd very earnest and solicitous to send *Thamar* the Price of her playing the Harlot. To this Mr. *Selden*^b answers: "That in the Judgment of those Times it pass'd for lawful, for a Woman free from Marriage, and other Restraints, to bestow herself upon a Man, without any Condition of living together; and this either *gratis*, or for a Reward. And that therefore this Agreement was able to produce a Good and Valid Obligation, being made about a Matter, which if not naturally, yet was *civilly* lawful, or according to the Opinion of States and People in those Days. We may say farther, That most Men think they ought in point of Generosity to pay something for the purchase of their Pleasures. And besides, *Judab* might not express so much Care and Concern⁴, lest the Harlot should lose her Wages, but lest he himself should lose his Staff and Ring, the Pledges he had left in her Hands. Another Argument on *Grotius's* side, may be alledged in that Passage of the *Roman Laws*^c, *What is given to a Strumpet cannot be recover'd; yet not because both Parties are in a Fault; for indeed the whole Offence, as to this Point, is on the side of the Giver. 'Tis vicious in the Strumpet to practise such a Profession, but 'tis not vicious in her to receive the Fees of her Profession.* The Meaning of which Determination is no more than this: Tho' to make an open Trade of Lewdness, and to own as much before the *Ædiles*, did not fall under the Penalty of the Laws in the *Roman State*; yet all good and virtuous Men thought it most base and scandalous to engage in such a way of Life. However, when Persons had once fix'd themselves in so vile a Calling, they contracted no new Vileness, by making the usual Gain and Advantage of it. Or to speak more concisely, the Business was thus; the *Romans* granting Toleration to *Courtesans*, the Bargains and Contracts made on the Score of that Profession, were in their Law adjudg'd to hold good and valid. *Ovid* indeed hath

accused these Bargains of Injustice upon another Score,

*Sola viro mulier Spoliis exultat ademptis :
Sola locat noctes, sola locanda venit.
Et vendit quod utrumque juvat, quod uterque petebat,
Et pretium, quanti gaudeat ipsa, facit.
Quæ Venus ex æquo ventura est grata duobus;
Altera cur illam vendit, & alter emit?
Amor. Lib. I. El. 10. v. 29, &c.*

'Tis the Nymph's Privilege the Spoils to win,
To let her Nights to hire, and traffick with her Sin.
She sells what both enjoy, what both invite,
And sets the Price upon her own Delight.
What both with Pleasure doth alike supply,
'Tis hard if one must sell and t'other buy.

This still remains true, That a Man cannot fairly pretend to be displeas'd with a piece of Wick- edness, which has been undertaken with his Con- sent, and for his Service.

Medea to *Jason*, in *Ovid's* *Epist. Ep. 12. v. 131, 132.*
*Ut culpent alii, tibi me laudare necesse est,
Pro quo sum toties esse coacta nocens.*

Others may blame, you must of Force commend,
For whose sweet sake I dared so oft offend.

Nisus to *Minos*, *Metamorph. l. viii. v. 130, 131.*
Scelus hoc patriæque, patrique, officium tibi sit.
What's to my Country, and my Friends a Sin,
To you's a Kindness.

Senec. in Medea. v. 500. 503.
— *Cui prodest Scelus, is fecit,
Tibi innocens sit, quisquis pro te est nocens.*

The Gainer by a Villany is deem'd the *Actor*; he that sins for you, should in your Eyes be spotless Innocence.

Though it be a very usual, and a very good Custom of Princes to take the Benefit (in some Cases) of Mens *Treasons* and *Villanies*, and to punish the *Traytors* and the *Villains*, that the Infection may not spread by Encouragement. Of this Proceeding, we have a very remarkable Instance, recorded by *Paulus Orosius* in his History^d. *Sulpitius* having been voted in Senate a *publick Enemy*, was brought into their Hands by the Treachery of his own Slave; the *Consuls*, with a wise Distinction, order'd the Fellow to be presented with his *Freedom*, as a Reward for his Service to the State, and to be cast headlong down the *Tarpeian Rock*, as a Punishment for betraying his Master. Add *Zonar. Tom. III. in Theophil. in initio.*

² It is a Maxim of the *Roman* Lawyers, *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire*, He that brings a Loss on himself by his own Fault, is not supposed to suffer any. *Digest. l. 50. tit. 17. §. 203.*

³ Though in this Case *Ovid's* Rule commonly holds true *Ipso*
Crimine dotata est, demeruitque virum, *Epist. Heroid. 6. ver. 137, 138.*

She brings her Portion in her Crime, and wins the Husband in the Spark.

⁴ He mightily feared, and that with Reason, that if his Pledge were known to the World, his Wickedness would be divulg'd, and himself expos'd to the Scoffs of the Inhabitants. And for this Reason 'twas that he did not go himself to find *Thamar*,

⁵ *Sed quod Meretrici datur, repeti non potest, ut Labeo & Marcellus scribant; sed nova ratione, non ea, quod utriusque turpitudine versatur, sed solius dantis; illam enim turpiter facere, quod sit Meretrix, non turpiter accipere, cum sit Meretrix.* *Digest. l. 12. tit. 5. De Conditione ob turp. vel. injus. causam, leg. 4. §. 3.*

^a *Gen. xxxviii. 20, &c.*

^b *De J. N. & G. l. 5. c. 4.*

^c *Lib. 4. f. 3. D. de Condit. ob. turp. Caus. & l. 12. tit. 5.*

^d *L. 5. c. 18.*

XI. The third Question moved on this Head is, whether a Reward given for villainous Service, may be redemanded or recover'd? And here the Law of Nature affords no Pretence for such a Recovery, provided the *Receiver* has not dealt deceitfully with the other Party. And the other has not sustained a great Damage¹. In as much as the *Giver* by delivering up the thing promis'd, intended no doubt to transfer the Propriety of it; and this too in way of Debt, in Consideration of a Service perform'd for him, which he himself valued at this Rate. Now we know that when any thing is given, even *Gratis*, all Right of Recovery ceaseth. Nor will it alter the Case to urge, That the thing was here obtain'd on an unjust Title, and by Ways and Means expressly forbidden by the Laws. For this Allegation cannot with any colour be made by the Person who gave the Reward; in as much as he voluntarily bargain'd for the wicked Service, and when that was perform'd for him, thought himself to receive somewhat equal in Value to the Price agreed upon; nor can he complain of a Villany, of which he himself was the principal Author. Indeed the *Illegality of the Means* by which the Reward was required, if consider'd in regard to the publick Authority, shall produce this Effect, That it shall be in the Magistrate's Power, to take the thing from the Receiver by way of Punishment, and (if he sees fit) to restore it to its first Owner. For Instance, if a cunning Strumpet should chouse an unwary young Man out of a considerable Sum of Money, she may fairly be obliged to refund; since even in the most vicious Bargains some Shadow of Justice is kept up, and the Laws of Contracts in some sort observ'd.

But farther, since it is accounted most base and vile in a Man, to demand a Reward for doing a thing which it is his Duty to perform *Gratis*, it is made another Question, whether what he have promis'd or given for a thing before justly due to us, may be with-held or recover'd. Some answer absolutely², That if we respect the Law of Nature, Promises of this kind are good and valid, since those likewise are so, which we make without any particular Reason or Prospect. Yet at the same time whatsoever Damage is sustain'd by violent Extortion, ought to be fully repair'd. Perhaps the Business may be more clearly settled, if we distinguish whether the thing which we say was before due to us, was due upon an imperfect, or upon a perfect Obligation. If the former, our Promise of a Reward for it shall hold good, and we cannot sue for Recovery. Thus for Instance, although the Law of Humanity obliges me to set a Traveller in his Way, and though such a piece of Service may

perhaps cost me no Trouble, yet if I bargain to receive some Consideration on that Account, I may fairly demand the Payment, and the other Person cannot recover what he thus parts with; unless I forced him to make a large and unreasonable Promise, by filling his Head with false Frights, or any other Stratagem of Knavery. Those Promises are likewise valid, which we make to incite another to the more ready, and the more exact Performance of his Duty. For these pass for matters of free Bounty and Gratuity. But if the thing was before owing to us in a *perfect* Manner³, and yet the Person who is to perform it, refuses Compliance, unless upon our Promise of a new Reward, we take this Case to be the same, as in Engagements made through Fear or Guile; and therefore to require the same way of Proceeding. If then, in a State of natural Liberty, a man refuse to pay me my due, it is plain he does it upon Presumption of his own Strength, and because he believes it is not in my power to compel him. And consequently, if he deny to fulfil a Covenant fairly made, without a new supplemental Condition, he immediately gives me just Cause of using Hostility to reduce him. And if my present Affairs will not permit me to engage in a Method of War, but incline me to agree, though on hard Terms⁴, I may afterwards require Satisfaction for the Damage I now suffer; unless I end the Matter by an Act of voluntary Forgiveness. Yet it quite alters the Case, if his denial did not proceed from meer Unfaithfulness and Wickedness; but from his being able to shew that he was exceedingly injured in the former Covenant, to which he now demurs. As for the Members of Commonwealths, if they refuse to answer an old Bargain without some additional Reward, they will be compell'd to be honest by a Course of publick Justice.

To this we may add the Distinction of the *Roman* Lawyers⁵ in Cases of *vicious Service*, whether the Fault or Wickedness was on the part of the Receiver only, or of the Giver only, or of both. In the first Instance, they allow an Action of Recovery; not in the other two.

X. We are likewise *morally* unable or incapable to perform any thing¹, or to oblige ourselves to such Performance, about the Goods or Actions of other Men; which are not subject to our Pleasure and Disposal. And being thus independent from us, we cannot by any Act of ours, whether of Promise or of Bargain, give another a Right over them, by Virtue of which he should claim them as his Due. Hence 'tis a Rule with the Civilians², "That in case one Man promise that another shall give or shall do such or such a Thing, neither of them shall

MR. BARBEYRAC'S NOTES on §. IX.

¹ See what I have said about this Matter in my large Note on §. 6. And l. 4. c. 13. §. 16.

² Mr. Hertius affirms the contrary, and his Reason is, that by submitting to a new Treaty, tho' upon hard Conditions, he deprives himself of his Right. And if one such Agreement, adds he, made after War be valid, why should it not be so when Men think by that Means to avoid it? But see l. 8. c. x. §. 1.

MR. BARBEYRAC'S NOTES on §. X.

¹ Add also the things which are not in our Disposal, altho' otherwise they really belong to us. See what I have said in my Treatise of Games, l. 2. c. 4. §. 4. &c.

² The Words are, *Si quis alium daturum futurumve quid promiserit, non obligabitur; veluti si spondeat, Titium quodpiam daturum.* Institut. l. 3. tit. 20. *De inutil. Stipulat.* §. 3. See *Cujas, Observ.* 12. 36.

³ See *Grotius*, l. 2. c. 11. f. 10. ⁴ *Add.* l. 12. tit. 5. *D. de Condit. ob turp. caus.* ⁵ *Liban. Orat.* 5. I receive only those Advantages which the Law allows me; and where is the Favour in this Case? He that hath been obliged with Kindness, ought to make Requital to his Benefactor. But we can owe no such return to a Judge, who doth not act out of Favour to us, but as the Necessity of the Law directs him.

“stand obliged.” Which is very just and true, if we stick to the bare Words of such a Promise: But because it seems inconvenient, that an Act seriously undertaken should produce no Effect, we are apt commonly to interpret Promises of that kind in this Sense, that the Person promising will take the Care to bring the other Party to performance³, in whose Name he now seems to make the Engagement: But if I make a Promise to a Man in so express and direct Terms as these, that I will endeavour to prevail on a third Person, to do for him so or so; I am then obliged to labour by all means *morally possible*, to move that Person to a Compliance. We say by all *means morally possible*, that is, so far as the other Man can honestly desire me, and so far as is consistent with the Nature and Method of civil Life. And if in this Case, I omit nothing on my part⁴, and yet the third Person refuse to grant the Request, I am not bound to make good the Default; unless this was an express Part of my Promise, or was imply'd in the Nature of the Business⁶. But if I promise in this manner, *Unless a third Person do so or so, I will forfeit thus much*, it is manifest that if the third Person fail, my Engagement will stand good against me. Somewhat like this we meet with in the *Roman Constitutions*⁷, which decree that in case a Person disposes in way of Legacy, a thing which belong'd to another Man, and which he knew so to belong, the *Heir* shall be obliged to redeem, and to restore it, or if it cannot be redeemed, to give the Value of it to the Owner. Yet certain it is, that a Promise of what kind soever, cannot lay an Obligation on the third Person, nor give the other Man a Right of requiring any thing immediately from him.

But if the third Person be one placed under my Governance and Command, his Things or Actions are not accounted another's, but my own; so far as my Authority over him extends. And thus far I can by Promise or other Engagements effectually dispose of them, so as not only to bind myself to see the Agreement made good, but to cause that the Person in whose behalf I transact, shall as soon as he is acquainted with my Pleasure, be obliged by virtue of my Power over him, to perform the Condition. Tho' the common and regular Way of proceeding in these Cases, is to apply to the principal Promiser, and to require him to force the Person under his Care and Direction to a Compliance; and upon the Obstinacy and Default of the govern'd Party, the Action at Law shall lie against his Governor, unless he has resign'd his Charge, and left him wholly to his own Disposal.

XI. *Lastly*, I am morally incapacitated to make a Promise with any Effect, to a third Person, about such Things or Actions of mine, to which another has already acquired a Right; unless perhaps this other Party be content to wave his Claim¹. For he who by a former Engagement has made over his Right, can have no Power left to dispose of it anew. And all Pacts and Promises might be cancell'd and eluded with very little Trouble, were we allow'd to enter into new ones, either directly contrary to the former, or any way inconsistent with them, as to the Performance. In this Case therefore, the latter Contract is disannul'd and render'd ineffectual by the former, or as we should rather speak, the former shews that the latter can be of no Force or Use. Hence, for instance, are all those Covenants void, which Subjects make either among themselves, or with others, in prejudice of the

³ So also the *Dige's* direct, *Quæcumque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostra persona obligationis initium sumant, inanem actum efficiunt, & ideo, neque stipulari, neque emere, vendere, contrahere, ut alter suo nomine recte agat, possamus.* *Digest.* De Obligat. & Action. l. 44. tit. 7. leg. 11. *Certissimum enim est ex alterius contractu neminem obligari.* Cod. l. 4. tit. 12. *Ne Uxor pro Marito, &c.* leg. 3.

⁴ In this latter Case the *Roman Lawyers* themselves affirm, that the Promise obliges. *Quod si effectuum se, ut Titius daret, spoponderit, obligatur.* i. e. If he promised to procure that *Titius* should give, he is obliged, *Institut. ubi supra.* See Mr. *Hertius's* Dissertation, *De Oblig. alium datur. facturumve* in *Tom. III.* of his Commentaries and small Tracts, printed in 1700.

⁵ So *Livy.* l. 2. c. 31. He seem'd to have satisfied his Obligation, inasmuch as he contrived nothing on his side to hinder the Business from being perform'd. See *Grotius*, *Book II.* c. 11. s. 22. and *Book III.* c. 21. s. 30.

⁶ This hath place only in such Engagements where both Parties are concern'd, and not in such as are the pure Effect of the Liberality of one of the Parties. See the Examples cited by Mr. *Hertius* in the Discourse last mention'd, *Sec. 1.* § 8.

⁷ These are the Words, *Non solum autem Testatoris vel Hæredis res, sed etiam aliena legari potest; ita ut Hæres cogatur redimere eam, & præstare; vel si non potest eam redimere, æstimationem ejus dare* — *Quod ita intelligendum est, si defunctus sciebat alienam rem esse, non si ignorabat.* *Instit.* l. 2. tit. 20. *De Legatis*, §. 4. *Idemque Juris est, si potuisses emere, & non emeris.* *Dig.* l. 32. leg. 30. §. 6. The Reason of this Law, which appears at first Sight very harsh and rigid, is, That the Testator is presumed unwilling to do a thing so ridiculous as to give away what he had nothing to do with. So that he is accounted to have bought the thing bequeathed, if it can be, if not, the Legatee must have an equivalent. See Mr. *Daumal's* Laws in their Natural Order, *Part I. Lib. 4. tit. 2. Sec. 3.* §. 3, &c.

MR. BARBEYRAC'S NOTES on §. XI.

¹ This Author in his Abridgment of the Duties of a Man and Citizen expresses himself after a more general way, *l. 1. c. 9. §. 19.* Unless the other waves his Claim of Right (*Nisi forte in eum casum quo alterius jus exspiraverit*) which may fitly be added here. Mr. *Thomasius* in his *Instit. Jurisprud. Divin.* l. 2. c. 7. §. 95, 96, 97. adds another Restriction to the Words recited: Unless he that hath promised may fairly hope that the Case may happen. So a Servant may safely engage himself to serve another Master, when the time which he is hired to serve his present Master is expired. And the Owner of an House may promise to let an Apartment of his House to another, when the time which the present Occupier is to enjoy it is expired. But it is an unlawful Promise, and consequently null, to engage himself to become a Subject of another Prince or State, upon Condition that the State of which he is a Member be ruin'd by a Civil War, or destroy'd after some other manner. By the *Roman* Laws no Man can promise faithfully to give a Man a Freeman, when he is made a Slave, nor a publick Thing, upon supposition that it may become our private Possession. *Nec in pendenti erit stipulatio ob id, quod publica res in prædicatum deduci, & ex libero servus fieri potest* — *Sed protinus inutilis est.* *Instit.* l. 3. tit. 20. *De Inutil. Stipulat.* §. 2. And 'tis not without Reason, adds Mr. *Thomasius*, that Christian Princes declare a Promise of Marriage made by a Person married, in case his Wife or her Husband die, to be null, and punish both Parties that have made such a Promise. Nevertheless, the same Author in his *Fundam. Jur. Nat. & Gent.* and his *Notes upon Huber. de Jur. Civ.* says, that the Punishment inflicted in this Case seems to be very rigorous, and favours of Popish Principles about Marriage as a Sacrament. But *Grotius* thinks such a Promise invalid in its own Nature, *l. 2. c. 11. §. 8. n. 3.*

Duty and Allegiance they owe to their lawful Sovereigns².

It is a common Rule, That *he who has the Precedency in Time, has the Advantage in Right*: Not that Time consider'd barely in itself can make any such Difference; but because the whole Power over a thing being formerly secur'd to one Person, bars all others from obtaining a Title to it afterwards. And hence too it comes to pass, that a Servant cannot dispose of his Labour³, otherwise than his Master pleases, to whom by virtue of a former Contract it entirely belongs. By the Roman Laws, a Slave could not enter into any Obligation, even with his own Master, besides the general Obligation imply'd in that State and Condition of Servitude; and the Reason of this was, because his Master had before a full Right over all that he possess'd, and all that he could do to any advantageous Purpose.

If a Man, contrary to these Duties, shall have deceived and prejudiced another by promising a thing, which either was not his own, or was before otherwise bestow'd and secur'd; he shall be oblig'd to make good the Damage; and in many Cases shall be liable farther to suffer the Penalty of *Cozenage*⁴.

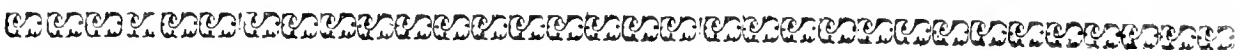
Our Author observes here, that according to the Roman Laws a Servant can't oblige himself to his Master, *Sed Servus quidem non solum Domino suo obligari non potest, sed ne quidem ulli alteri*. Instit. l. 3. tit. 20. *De inutil. Stipulat.* §. 6. And the Reason is, adds he, that the Master has a Right to all the Goods, and profitable Actions, or Labour and Service of his Slave, as he is so. So that a Slave can't oblige himself to his Master, but by the general Engagement he is under as his Slave.

² See Mr. *Hertius's* *Paræmiæ Jur. German.* l. 1. c. 49, 50. The same Author in his *Notes* upon this Place of our Text, observes, that the Maxim takes place chiefly in conditional Bargains, which by the Roman Law are contracted by a single Agreement; but as to other Engagements, 'tis not always true. Whereupon he alleges an Example of a thing sold to two Buyers, but deliver'd to the last: But see what our Author further says, l. 5. c. 5. §. 5. against *Grotius*, whose Principles Mr. *Hertius* follows, tho' here he says nothing in defence of them.

³ Our Author observes here, that according to the Roman Laws a Servant can't oblige himself to his Master, *Sed Servus quidem non solum Domino suo obligari non potest, sed ne quidem ulli alteri*. Instit. l. 3. tit. 20. *De inutil. Stipulat.* §. 6. And the Reason is, adds he, that the Master has a Right to all the Goods, and profitable Actions, or Labour and Service of his Slave, as he is so. So that a Slave can't oblige himself to his Master, but by the general Engagement he is under as his Slave.

⁴ Thus Cheats and Tricking is call'd in the Roman Law, which have not a Proper Name; but chiefly that sort which our Author is speaking of, as when one engages for a thing that belongs to another, or one thing for another; especially if the first be of more value than the last. As for example, If one gives Copper gilt for Silver gilt. See *Digest.* l. 47. tit. 20. *Stellionatus*. And Mr. *Dauemar's* Civil Laws, &c. Part I. l. 1. tit. 18. Sect. 3.

² *Gramond.* Hist. Gall. l. 5. He that is born under a Prince, doth originally engage his Faith and Allegiance to him; and whoever attempts to draw them away, is a most unjust Invader of another's Rights; nor will any such Covenant hold good, being made contrary to the Laws and Constitution of the Kingdom. He that gives his Promise against his Prince, is by the very Act releas'd from the Obligation.



CHAP. VIII. *Of the Conditions of Promises.*

The CONTENTS of every Paragraph of the eighth Chapter.

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| <p>i. How many ways is a Promise made?
 ii. What is a Condition?
 iii. A Condition refers to the time present, or the time to come.
 iv. A Condition is either casual, arbitrary, or mixt.</p> | | <p>v. An impossible and unlawful Condition.
 vi. The Addition of Place.
 vii. The Addition of Time.
 viii. The Difference between Bargains and conditional Promises.</p> |
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Concerning Engagements by Promise, this is further to be observ'd, that some are made purely or simply, and some under Condition¹, or that sometimes we oblige ourselves absolutely to such or such a Performance, and

sometimes we suspend our Obligation, till certain Clauses or Proviso's are made good.

II. A Condition is an *Appendage*¹ added to such Acts, as are productive of Rights and Obligations.

MR. BARBEYRAC'S NOTES on Chap. VIII. §. I.

¹ The Roman Lawyers add to this Division, the Determination of the Time and Place of their Performance. *Id.* Instit. Book III. tit. 16. §. 2, & 5. Our Author himself also speaks of these two Circumstances a little farther. The Words in the Institutes are, *Omnia stipulatio aut pure, aut in diem, aut sub conditione fit* — *Loca etiam inseri stipulationi solent* — *Pure, veluti QUINQUE AUREOS DARE SPONDES? Idque confestim peti potest.*

MR. BARBEYRAC'S NOTES on §. II.

¹ *Sub conditione stipulatio fit, cum in aliquem casum differtur obligatio; ut si aliquid factum fuerit, vel non fuerit, committatur stipulatio, veluti, SI TITIVS CONSUL FUERIT FACTUS, QUINQUE AUREOS DARE SPONDES?* Instit. ubi supra, §. 4. We ought also to observe that there are tacit Conditions included in an Agreement, which are not expressed. As if a Person selling his Estate makes a Reserve of the Year's Profits, this Reserve supposes a Condition that there shall be some Fruits on its *Interdum pura stipulatio ex re ipsa dilationem capit, veluti si id quod in utero sit, aut fructus futurus, aut domum ædificari stipulans fit.* *Digest.* l. 45. tit. 1. *De Verbor. Obligat.* leg. 73. *In Princip.* See what is said above c. 6. §. 2. Further, Mr. *Hertius* observes here, that we must distinguish Conditions properly so call'd, *viz.* what the Lawyers call a *Modus*, and what we call a *Condition*. For example, I have Land engaged, and I sell it upon Condition of freeing of it at such a time. In this Case the Roman Law allows the Buyer to have an Action against the Seller to force him to free his Land at the time appointed, or let him into Possession. *Nam si id actum est, ut omni modo intra Kalendas Julias venditor fundum liberaret, ex empto erit actio, ut liberet; nec sub conditione emptio facta intelligitur, veluti si hoc modo emptor interrogaverit, Erit mihi fundus emptus, ita ut intra Kalendas Julias liberet? vel ita, ut intra Kalendas à Titio redimas? Si vero sub conditione emptio facta est, non poterit agi, ut conditio impleretur.* *Digest.* l. 18. tit. 1. *De contrahend. empt.* &c. leg. 41. *init.* So that such a Clause does not suspend the Obligation, nor disannul it, that it has no Effect, but only prevents the Execution of the Engagement till it takes place. This sort of Agreement may be referred to the Laws which the Lawyers call *Sub Modis*, on condition that the Legatee shall do this or that thing, or with a Prospect of it. See the Interpreters upon the *Digests*, l. 35. tit. 1. *De Conditionibus & Demonstrat.* &c. Hence it is, that Mr. *Hertius* calls the like Clause consider'd in mutual Promises and Engagements, *Causa finalis, propter quam aliquid fit vel præstatur*, which implies, that it is not altogether just, since in the Example that I have alledged after him, we may clearly see that there is no final Cause or Mo-

gations, by virtue of which their whole Force and Efficacy is made to depend on some particular *Event*, proceeding either from Fortune, or from human Pleasure². So that to the true Nature of a *Condition*, these two things are requisite, first that it have the Power of deferring and suspending the Force of the Obligation, and secondly that the *Event* express'd in it do not as yet appear; at least that it be at present uncertain, as to our Understanding.

III. Hence we may conclude, that those additional Clauses are not properly *Conditions* (tho' they seem to be such in a Grammatical Sense) which refer to the Time present, or past. For *Futurities* only are dark and obscure to mortal Apprehensions, but as for things which are now before us, or have already gone over our Heads, we have usually a clear Knowledge of them; and therefore they can include no Power capable of suspending our Assent. And therefore it is given as a Rule in the *Institutions*¹, that Conditions which regard the time present, or the time past, as suppose I should say, I will give such or such a Thing, *if Titius has been Consul*, or *if Mævius be still alive*; do either immediately cancel and annul the Obligation, or else do not put it off at all, nor hinder it from being pure and absolute. For if the things annex'd for Conditions, are not as they are suppos'd to be, the Engagement is to no purpose; but if they are so, the Promise is valid as soon as it is made, and begins *absolutely to oblige*. Yet here it must be observ'd, that a Condition regarding the time present or past, may be added to an Obligation, in case both or either of the Parties transacting be uncertain of the Thing. And Promises of this kind seem to imply a convenient Space of Delay. Inasmuch as nothing can be demanded by virtue of them, until it shall be made clearly apparent to the Promiser, that the Matter insert'd as a Condition has really happen'd; and the Proof of this must necessarily take up some time. For instance, a Man unskill'd in History may be drawn in to promise another Person ten Pounds, *if Cæsar ever pass'd the Rhine*. Now here before the Sum can be claim'd, it must

be made evident from the Authority of creditable Historians³; that such an Adventure was actually perform'd. Again, if I promise in this manner, "I will give so much Money, in case *Mævius*, who is travelling abroad, be still alive;" the other Person can then only require the Money, when I have receiv'd certain Assurance of *Mævius's* Life. But if we take a closer View of these Matters, we shall find that the above-mention'd Promises, and the rest of the same Nature, ought to be interpreted in this Sense, I will give you so much *if you prove to me that Cæsar pass'd the Rhine*, or that *Mævius* the Traveller is now living; and thus they become truly *conditional*; but then the *Condition* is not the Truth and Certainty of the *present*, or *past* Act, consider'd in themselves, but the *future* Proof of it to the promising Party. It is certain therefore, that if the Truth of the Matter insert'd was known on both sides, and the Persons were in earnest, the Promise is not *conditional*, but *absolute*. Again, if both knew the Matter to be false, the Promise shall pass for a Jest, and consequently produce no Obligation. If a *future* Thing be added which they knew must infallibly come to pass, as suppose, *if the Sun rise to-morrow*, 'tis generally agreed that such a Clause ought not to be reckon'd a *Condition*; inasmuch as the *future* Event being already known to be most certain and necessary, does not delay the Obligation, nor hinder it from taking place this very Instant. Yet because we ought not easily to presume that the Clause is added for no reason, it is worth while to consider, whether in such a Promise, the Particle *if* be not put for the other Particle *when*³; so that the Engagement shall not be conditional, but only made for a Day hence; as suppose thus, *I will give such or such a thing to-morrow, when the Sun riseth*.

And thus we find that every *Condition*, properly so call'd, includes somewhat which is at present uncertain, at least to one of the Parties, between whom the Business is transacted; and the Obligation remains in Suspence⁴, till the thing shall hereafter come to pass, or shall be demonstrat'd, by good

Evidence, but only a Stipulation, by which the Seller puts off the Delivery of the thing sold, till he can redeem it, which he engages to do at a certain time. These sorts of Promises may be referred to those which are made for a certain Day, because the time is always prefix'd, or which will come sooner or later, tho' it be not appointed. Mr. *Hertius* maintains with Reason, as some others do, that where there is a doubt, a Promise ought to be thought purely conditional rather than made on a sure Foot.

² Our Author here includes fully the Effect of Conditions, for they not only suspend the Effect of an Engagement, but disannul or change them where they are already. Mr. *Daumat* in his *Civil Laws*, &c. Part I. l. 1. tit. 1. Sect. 4. §. 6. says well, that Conditions are of three sorts, according to the different Effects which they produce. The first is, such as accomplish the Engagements that depend on them, as when 'tis said the Sale shall take place if the Goods be deliver'd on such a day. The second is, such as dissolve a Bargain, as when 'tis said, in case such a Person comes at such a time, the Hire of the House shall be void. The third is, such as neither accomplish nor dissolve an Agreement, only making some Change in it, as if one agree that in case an House that is Lett be resign'd to the Tenant without certain Moveables which are promised him, the Hirer shall have it so much the cheaper. Read the fore-quoted Section of Mr. *Daumat*.

MR. BARBEYRAC'S NOTES on §. III.

¹ *Conditiones quæ ad præsens vel præteritum tempus referuntur, aut statim infirmant obligationem, aut omnino non differunt; veluti, SI TITIVS CONSUL FUIT, vel SI MÆVIUS VIVIT, DARÉ SPONDES? Nam si ea ita non sunt, nihil valet stipulatio; sin autem ita se habent, statim valet, Instit. l. 3. tit. 16. De Verbor. Obligat. §. 6. See Mr. Bynkershoek's Observat. Jur. Rom. l. 4. c. 15.*

² I know not on what our Author grounds himself here, since in the Moment which Men treat, the Fact, either present or future, on which the Effect of a Promise depends, is positively true or false, the Obligation from that Instant seems either absolutely null or valid, and consequently no Condition properly so call'd can suspend the Engagement. All that results from such a Clause is, that the Promise can't be claim'd till the Truth of the Fact be proved; for as the *Roman* Lawyers speak very well, *Quæ per rerum naturam sunt certa, non morantur obligationem, licet apud nos incerta sint. Instit. l. 3. tit. 16. De Verbor. Obligat. §. 6.* These sorts of Promises pass for conditional only, when we treat about a Matter of Fact, of which there is no Certainty whether it will be true or no. For then the Uncertainty produces the same Effect as if the Clause depended upon a future Accident.

³ The Conjunction, *Si*, which can't be express'd in our Language, is elegant in the *Latin*.

⁴ *Quia quæcumque sub conditione traduntur, ita demum fieri possunt propria & peculiaris, si conditio consummata est.* Quintilian Declam. 336. Mr. *Hertius*, who quotes this Passage, observes at the same time that the Distinction made by the *Roman* Law about this Matter agrees not with the Natural Law. The Lawyers say, that there is a Difference between Engagements upon condition, and such as depend on a Promise at a certain time. In the first nothing is due before the thing suppos'd exists, where as in the other there is a due from the Moment the Promise is made, tho' the Person can't demand any thing till the time is come. *Cedere diem signi-*

Evidence,

Evidence, to have already happen'd. When the Condition appears true, the Obligation begins to have a pure and absolute Force; if the Condition fail, the Obligation expires with it.

IV. Conditions are commonly divided into *possible* and *impossible*. The former are such as make an Obligation depend on some Event, which may naturally or morally happen. And are again subdivided into *casual*, *arbitrary*, and *mixt*¹. A *Casual Condition* is such as depends, either on the pleasure of a third Person, not obnoxious to our Power and Authority, or else on mere Chance and Fortune in respect of us, as suppose in such a Promise as this, *I will give you Ten Pounds, if Caius marries Titia; or if it don't rain within these three Days, &c.* an *arbitrary Condition* is such as depends, as to its being or not being, on the Will and Power of him, to whom a Promise is made under that Limitation². But should a Condition be annexed, depending on the Pleasure of the Promiser³, the Engagement would be insignificant; as if one should say, *I will give you Ten Pounds, if I think fit*. For the Sense of such a Speech amounts to no more than this: I make you an absolute Promise that at present, and hereafter too, it shall be my Choice to promise absolutely, or not. And therefore the other Party can hence acquire no Right, unless the Offer be afterwards improved to a full and perfect Engagement; since the Condition here mention'd may be perpetually stopt, or eluded by the Promiser. So that we may reasonably say, That *what is perfectly in our Power, ought not to be confounded with, or thrown amongst, Matters of Chance or Accident*. If the Condition be indeed in the power of the Promiser, and yet such as he is not able, or is not willing always to elude, it must be enforced by supposing a particular Time, beyond which it cannot be deferr'd; as if I say, *I will give you such a Sum of Money, if I marry*, that is, *when I marry*.

From what has been hitherto offer'd, we may be able to explain more accurately the Assertions of Grotius^a upon the same Head. He says, That *if the thing promised be not at present in the Power of the Promiser, but may be hereafter, then the Strength*

and Efficacy of the Promise lies in suspense; for it must then be supposed to have been made conditionally, that is, in case the Promiser should have it in his Power. Now this Rule we allow to hold good, provided that the other Party knew the thing not to be at present in the power of the Promiser. For otherwise it looks like Knavery, when a Man expects an absolute Promise, which shall begin to bind immediately, to put him off with a conditional one, which cannot take place till hereafter. He adds, *If the Condition whereby the thing is promised, may be brought into our Power, be it self in our Power^b, we are obliged to do whatever is morally fit and just, for the Performance of it*: That is, if I promise you any thing, which at present is impossible to me, but may by my Pains and Care be hereafter rendred possible, I am bound to use all my Endeavours, that I may become able to discharge my Engagement⁴. For Instance, a young Student in the Law promises a Man to plead all his Causes in the Court, if he arrive at any good Skill in his Profession. Here according to Grotius's Rule, the Student is under an Obligation to ply his Business with his utmost Strength and Diligence, that he may make himself fit for the Bar. But this will not hold, unless the Person promising has expressly declared, or given fair Presumption, that he will set himself in earnest to the acquiring strength for the Performance. Otherwise the Condition may be delay'd *in infinitum*. We may observe too, that Grotius here useth the Term, *Conditio Potestativa*, quite contrary to that Sense in which we have above defined it; he makes it to be in the power of the Promiser, we in the power of him to whom the Promise is directed.

Lastly, A *mixt Condition* is that the fulfilling of which depends partly on the power of him who receives the Promise, and partly on Chance; as thus for Instance, *I will give you a Sum of Money, if you marry such a Gentlewoman*. Now this is not purely at your Pleasure; for the Gentlewoman may refuse your Suit, or may die before the Match is finish'd.

We have only this to add, That a Condition is then look'd upon as perform'd, when the other Par-

fecit, incipere deberi pecuniam. Venire diem significat, eum diem venisse, quo pecunia peti possit. Ubi pure quis stipulatus fuerit, & cessit, & venit dies; ubi in diem, cessit dies, sed nondum venit, ubi sub conditione, neque cessit, neque venit dies, pendente adhuc conditione, Digest. l. 50. tit. 16. De verbor. signif. leg. 213. Hence they infer, that what Men pay through Mistake, before the Condition is fulfilled, may be recovered, as if it were not due; but 'tis not so in Payments made before the time. *In diem Debitor, adeo Debitor est, ut ante diem solutum repetere non possit*—*sub conditione debitum, per errorem solutum, pendente quidem conditione repetitur, conditione autem existente, repeti non potest, l. 12. tit. 6. De Conditione indeb. leg. 10. 16.* See Laws 17, 18. But Mr. Hertius thinks, that if we judge by the Light of Reason only, we may require our Due as well in the Mistake, before the Existence of the supposed Fact, or the Term agreed on. In both the Obligation descends upon the Heirs, in both there can be no Action at Law. All the difference then that can be is this, That the Condition may fail sometimes, whereas the Term, either fixed or uncertain, will come certainly. Hence Mr. Hertius concludes, contrary to the Opinion of many Doctors, that when we promise a thing which is not in Nature, and which can't take place, but on the account of a future Engagement regulated by the Laws, the Promise is really conditional, tho' there be a time fixed; as if a Man promises any one the Fruits of a Year, and to give such a Portion with his Daughter. For it supposes that there will be Fruit, and that the Marriage will be completed. *Vid. Digest. l. 23. tit. 3. De Jure Dotium, leg. 21. & l. 45. tit. 1. De Verb. Obligat. leg. 73.*

MR. BARBEYRAC'S NOTES on §. IV.

¹ We find this Division in the Code, l. 6. tit. 51. *De Caducis tollend. §. 7. Sin autem aliquid sub conditione relinquatur, vel casuali, vel potestativa, vel mixta, quarum eventus ex fortuna, vel ex honoratæ personæ voluntate, vel ex utroque pendeat, &c.*

² These sorts of Conditions, as our Author observes here, are also called promiscuous in the Digests, l. 35. tit. 1. *De Conditionibus & Demonstrat. &c. leg. 11. §. 1,*

³ *Stipulatio non valet, in rei promittendi arbitrium collata conditione, Digest. l. 45. tit. 1. De Verb. Obligat. leg. 17. Illam autem stipulationem, SIVOLUERIS DARI? inutilem esse constat, Ibid. leg. 46. §. 3.* See also, the 108 Law, §. 1. & l. 18. tit. 1. *De contrahenda Emptione, &c. leg. 7. princip. &c. & l. 44. tit. 7. De Obligat. & Action. leg. 8.*

⁴ Probably (says Mr. Thomasius in his *Instit. Jurispr. Divin. l. 2. c. 7. §. 112.*) Grotius had some Example in his Mind, as this, *I'll marry you, if I commence Doctor*. From whence Mr. Thomasius infers, that as he had not a stock of Learning great enough to commence Doctor in an Univerfity, a young Man who promises Marriage on that Condition may easily disengage himself.

^a Lib. 2. c. 11. f. 8. n. 2. ^b *Si conditio potestativa.*

ty concern'd, does himself hinder it from being perform'd?

V. *Impossible Conditions* ¹ are either *naturally* or *morally* so; that is, some matters by the Nature of things *cannot* be done, others by the Laws *ought not* to be done. Such Conditions annex'd ², especially if both Parties knew them to be such, do, according to the plain and simple Construction of the Words, render the Promise negative, and therefore null. In Business transacted between those who live in a State of natural Liberty, a *Condition naturally impossible* does plainly shew that the whole thing is void: Only with this difference, that to deny some Requests in such a round about way, by making the Answer run affirmatively, but clogg'd with an impossible Condition, is usually reckon'd an Affront; when a plain Denial might not have been taken ill ³. And as to this Point, if the Condition be morally impossible, the Case is

⁵ The Author says here, The other Contractor. (*Si per alterum stet, quo minus conditio impleatur.*) But the Law to which he refers us shews that 'tis badly expressed thro' Inadvertence. This is the Fact: A Man buys a Library upon Condition that the Magistrates shall allow him a place to set it in; but he is the Cause himself why they deny him a place. Hereupon the Lawyers determine that the Seller may force him to take away the Books, and pay the Price agreed on, because the Buyer prevented the Performance of the Condition. *Labeo scribit, Si mihi Bibliothecam ita vendideris, si Decuriones Campani locum mihi vendidissent, in quo eam ponerem, & per me stet, quo minus id à Campanis impetrem, non esse dubitandum, quin præscriptis verbis agi possit. Ego etiam ex vendito agi posse puto, quasi impleta conditio, quam per emptorem stat. quo minus impleatur, Digest. l. 18. tit. 1. De contrahend. Emptione, &c. leg. 50.* Further, it is certain, and it is a Maxim of the Roman Law, That if either of the two Contractors hinder the Accomplishment of a Condition which 'tis their Interest not to be fulfilled, whether the thing depend upon his own Fact, or not, the Condition is accounted as fulfilled in respect to him, and the other has a full Right to require the Performance of his Promise. The Lawyers extend this to the Promise of Emfranchisement, and to a Legacy by which a Person is made an Heir upon certain Conditions; inasmuch that when the Slave, Legatee, or Heir so made, have performed what is expected on their part, they have gained their Liberty, Legacy, and Inheritance. *In Jure civili receptum est, quoties per eum, cujus interest conditionem non impleri, fiat, quo minus impleatur, perinde haberi, ac si conditio impleta fuisset, quod ad Libertatem, & Legata, & ad Heredum institutiones perducitur; quibus exemplis stipulationes quoque committuntur, cum per promissorem factum esset, quo minus stipulator conditioni pareret, Digest. l. 50. tit. 17. De Divers. Regul. Jur. leg. 161. See also leg. 39. 174. of the same Title, and l. 35. tit. 1. De Condit. & Dem. leg. 24. where we must read with *Horatius, Olibri. 4. 28. Cujus interest conditionem NON impleri.**

MR. BARBEYRAC'S NOTES on §. V.

¹ Impossible Conditions are not, properly speaking, true Conditions. For they either suspend an Engagement, nor disannul and change an Agreement which is already valid. For they either cause the Promise to be absolved from the beginning, or cancel the Engagement forthwith, or hinder it from coming to an issue. Before we defined a Condition, we have distinguished the different Significations. *Titius Observat. 237.* Further, the Clause which contains an Impossible Condition, is either Affirmative or Negative. Our Author speaks only of the first sort. As for the other, 'tis evident that it absolves from an Engagement, as if we promise a thing to any one on Condition that he will catch the Moon in his Teeth, or commit Parricide. See the same Mr. *Titius Observat. 239.* We may also find several Things about Conditions in general in Mr. *Thomasi's* Discourse, *De Filiis sub conditione se se filium probaverit, hæredes, instituto*, and principally Chap. 2. It is the 10th in those printed at *Leipsick.*

² *Sub Impossible Conditione factam stipulationem constat inutilem esse, Digest. l. 44. tit. 7. De Obligat. & Actio. leg. 1. §. 11. Non solum stipulationes — sed etiam cæteri quoque contractus, veluti emptiones, locationes — quia in ea re, quæ ex duorum placuitque consensu agitur, omnium voluntas spectatur, quorum proculdubio in hujusmodi actu, talis cogitatio est, ut nihil agi existimentur a se, nisi ea conditione, quam sciunt esse impossibilem, Ibid. leg. 31. See also the Institutes, l. 3. tit. 20. De inutil. Stipul. §. 11.*

³ *Generaliter nocimus turpes stipulationes nullius esse momenti, veluti si quis homicidium vel sacrilegium se facturum promittit, Digest. l. 45. tit. 1. De Verbor. Obligat. leg. 26, 27. Item quod Leges fieri prohibent — veluti si sororem suam nupturam sibi aliquis stipuletur, Ibid. leg. 35. §. 1. The same Lawyers say, with Reason, that it hath place, when likewise the thing is afterward allowed by the Laws, because we must judge of a Promise according to the time it was made in. *Nullius momenti fore stipulationem, perinde ac si ea conditio, quæ natura impossibilis est, incerta esset, nec ad rem pertinet, quod jus mutari potest, & id quod nunc impossibile est, postea possibile fieri; non enim secundum futuri temporis jus, sed secundum præsentis debet æstinari stipulatio, Ibid. leg. 137. §. 6.**

⁴ 'Tis plain, not. For every Promise made on such a Condition, is null in it self, inasmuch that none hath Right to require the Accomplishment. 'Tis another Question, whether we may require a thing actually given by virtue of a Promise made on such a Condition already executed? See what is said Note 2. upon §. 6. of the foregoing Chapter.

⁵ See the Text quoted in Note 3. and *Digest. l. 7. tit. 8. De usu & habitat. leg. 8. §. 1.*

⁶ That is to say, the Legacies which the Testator makes to depend upon such a Condition, were not allowed to be effectual. *Sub Impossible Conditione vel alio modo factam institutionem placet non vitari, Digest. l. 28. tit. 7. De Conditionibus, Intit. leg. 1. Conditiones contra Edicta Imperatorum, aut contra Leges, aut quæ Legis vicem obtinent scriptæ, vel contra bonos mores, vel derisorie, aut hujusmodi, quas Prætores improbaerunt, pro non scriptis habentur, & perinde ac si conditio Hereditati, sive Legato adjecta non esset, capitur Hereditas Legatumque, Ibid. leg. 14. See Mr. *Dauzat's* Civil Laws in their Natural Order, Part 2. l. 3. tit. 1. Sect. 8. §. 18, &c. 'Tis easy to discern the difference as to Validity, which the Laws make here between Promises and Agreements made between Men when they are alive, under an impossible Condition, or dishonest, and the Disposals of a Testator attended with the like Condition. In the first the Condition is imposed by the Consent of both Parties, who knowing it, 'tis so much the worse for him, because he knows how things were managed, and could have no reason to look upon it as a serious Action. See leg. 31. of the *Digests, De Obligat. & Actio.* quoted Note 2. foregoing. But 'tis not so in Wills. The Legatee has no Knowledge of the Testator's Devises, and so is far from looking upon his Declaration as a Trifle, that he believes he acted seriously in his last Moments, although the Condition seem'd to insinuate the contrary.*

⁷ When *Militiades* in *Corn. Nep. c. 1. 2.* summon'd the *Lemnians* to yield up their Island to the *Athenian* Power, they answer'd in a scoffing manner, that they'd then surrender, when the North-wind, which was directly contrary to *Athens*, brought him from home to *Lemnos*. The General took no more notice, but sailing by them, possess'd himself of *Cerberusisus*, and there fix'd his Seat and Command; and soon after return'd to *Lemnos*, whither now the North-wind directly carried him, and claim'd their Promise; his Home, as he said, not being now *Athens*, but *Cerberusisus*. The Inhabitants not daring to make Resistance, fairly quitted the Island; but it was, *non dicto, sed secunda fortuna adærvatorum capta*, not won by the force of their Words and Engagement, but by the good Fortune of their Enemy. Such was the Promise of *Lejæguier* made to *Mapheo Barberini* about proaching the *Pomish* Religion, which we find in *Grariond. Hist. Gal. l. 16. p. 708.*

so very serious and grave, should be put upon with trifling and impertinent Clauses^a.

VI. If in Promises mention be made of a certain Place, without mention of a certain time, it is taken for granted, that so much time shall be allow'd for performing the Promise, as will serve to bring a Man conveniently into the Place of Action¹.

VII. But in case a limited Time be expressly added, this will cause that the Obligation shall not exert its Effect till such a Space be expir'd, or that no Demand shall be made before the appointed Day¹.

VIII. It may be convenient in the last Place to examine in what Points these *conditional Promises* differ from *Pacts*, and in what Points they may be resembled to them. In this then both those kinds of Engagements seem to agree, that as the former do not bind, unless the Condition be made good, so the latter, when one Party forbears to perform the Articles, do by no means oblige the other¹. And hence it is a common Remark, that the particular Heads of a Contract are in the manner of so many *Conditions*. Some indeed make one Exception to our Rule about *Facts*; that in case any Article should be added, not for use, but perhaps out of Gallantry or Compliment, the Non-performance of such a Matter shall not release the other Party

from his Obligation. But as little Indulgence as possible should be granted to this Exception; as well lest Men should abuse it by applying it to the principal Articles, as because it is not to be presum'd, that Persons would clog a serious Covenant with Clauses impertinent and unnecessary. *Groomd. Hist. Gall.* l. xvi. observes of the secret Articles of Marriage between *Charles* the First, when Prince of *Wales*, and *Henrietta* of *Bourbon*, that they were added by the most Christian King in compliment to the Court of *Rome*; neither Party imagining that they were intended to be kept.

Promises under a *potestative* or *arbitrary Condition*, do in this agree with *Pacts*, that in both a Man must perform somewhat on his side, before he claim the Promise or Bargain of the other Party: But in this they differ, that in the former the Person promising does not think it much his Interest whether the thing be perform'd, or no; at least he does not intend to oblige the other Party to a Compliance, but leaves him to use his own Pleasure. But in *Pacts*, as the Reason why I have undertaken any Performance, is the Prospect of somewhat to be done for me by the other Person; so if he fail in his part, I am not only releas'd at present from mine, but I may oblige him by force to stand to the Agreement.

MR. BARBEYRAC'S NOTES on §. VI.

^a *Loca etiam inferi stipulationi solent, veluti CARTHAGINI DARE SPONDES? Quæ stipulatio licet pure fieri videtur, tamen re ipsa habet tempus adjectum, quo promissor utatur ad pecuniam Carthagini dandam.* Instit. l. 3. tit. 16. *De Verbor. Obligat.* §. 5. See *Digest.* l. 45. tit. 1. leg. 73. in *Princip.* & leg. 137. §. 2. As also Mr. *Daumat's* Civil Laws, &c. Part I. l. 1. tit. 1. Sect. 3. §. 6. And *Digest.* Tit. *De eo quod certo loco dari oportet*, l. 13. tit. 4.

MR. BARBEYRAC'S NOTES on §. VII.

^a *Id autem quod in diem stipulamur, statim quidem debetur, sed peti prius quam dies venerit, non potest.* Instit. l. 3. tit. 16. §. 2. See Mr. *Daumat* in the Place above-cited, §. 7. Farther, it is certain that whenever there is no time fix'd for the performing of the thing engaged, the Promise is forthwith to be executed, and will admit of no other De'ay than the Nature of the Thing requires. *Quotiens autem in obligationibus dies non ponitur, presenti die pecunia debetur, nisi locus adjectus spatium temporis inducat, quo illo possit pervenire.* *Digest.* l. 45. tit. 1. *De Obligat. & Actio.* leg. 41. §. 1. See also *Lib.* 50. tit. 17. *De Divers. Reg. Jur.* leg. 14. And *Seneca's Excerpt. Controv.* 3, 5. *sub fin.*

MR. BARBEYRAC'S NOTES on §. VIII.

^a See what is said *Lib.* 5. c. 11. §. 9.

^a Thus *Eumolpus's* Will runs in *Petronius*, "Let all those to whom I have given Legacies, besides my Children, receive them upon these Terms and Conditions, that they cut my Body in pieces, and eat it amongst them before the People." Of the same kind is *Tiresias's* merry Story in *Horace*, l. 2. f. 5, 84, &c.

Me Sene, quod dicam, factum est. Anus improba Thebis,

Ex Testamento sic est elata: Cadaver

Unctum oleo largo nudis humeris tulit Hæres:

Scilicet elabi si posset mortua: Credo

Quod nimium infisterat viventi. _____

Which Place the Scholiast thus interprets, "The old Gentlewoman order'd by Will, that her officious Heir should carry her Body naked, well oil'd, upon his Shoulders to the Grave, with this pleasant Thought, that she might at least slip from him now she was dead, tho' he had stuck so close to her during her Life, that she could never before escape his Importunity." See more on this Point in the *Civilians*, in *Lib.* 7. tit. 8. *D. de usu & habit.*

CHAP. IX.

Of the Ministers or Agents concern'd in contracting Obligations for other Men.

The CONTENTS of every Paragraph of the ninth Chapter.

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| <p>I. <i>We may promise and bargain for another.</i></p> <p>II. <i>How many sorts of Commissions there are?</i></p> <p>III. <i>How if a Deputy die before he has finish'd?</i></p> <p>IV. <i>The Difference between a Deputy and Mediator.</i></p> | <p>v. <i>How far another may accept a Promise for us.</i></p> <p>vi. <i>Heirs can't accept a Promise for a Person dead.</i></p> <p>vii. <i>Of a Burden annex'd to a Promise.</i></p> <p>viii. <i>The general Division of Pacts or Bargains.</i></p> |
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IT is very usual for us to confirm and ratify Pacts and Promises, not immediately by ourselves, but by some Agent or Proxy. What Rules are to be observ'd in such Proceedings, it is now our Bu-

siness to explain. This then is certain, that a Man is oblig'd, not only when he makes known his Consent to the Person towards whom the *Obligation* is directed, immediately from his own Mouth, but

also when he signifies the same to another Man, whom he has empower'd to transact on his behalf. The Agent in such an Affair is to be look'd on as a kind of *instrumental Cause*; inasmuch as he not only does all by another's Authority¹, but likewise acquires no proper Right, brings no Obligation to himself, referring to the Person with whom he is appointed to treat; but obtains a Right only for the Person who has employ'd him, and to him indeed he stands under an Obligation to manage his Concerns with Honesty and Faithfulness. For those Actions of another do produce an *Obligation* or a *Right* in us, and are consequently to be esteem'd *ours*, for the performing of which we have invested the other Person with full Power, and have openly profess'd that we will acknowledge them for our own. But before a third Man can treat to any Effect or Purpose with such a Person, 'tis necessary he be well assur'd that we have chosen and constituted him the Interpreter of our Will, and that we will account whatever he acts as perform'd by ourselves. On this Foundation depend most of the Rules of the *Roman Law* concerning Deputations against the² Matters of Ships for the Facts of their Deputies against³ Merchants, for the Transactions of their Factors, and against the⁴ Master of a Family for the Deed of his Slave, or his Son.

II. Now we are wont to depute another to covenant in our Name, either by a general Commission¹, empowering him to do whatever he thinks most convenient for our Affairs; or by an express and limited Form, prescribing him both the Subject and the Manner of his proceeding. In the former Case I stand oblig'd by whatsoever he has concluded about the Business in hand, honestly, or *bona fide*. It is necessary to add this Restriction; for he cannot bind me by what he does treacherously, and with a knavish Design of circumventing and abusing me; inasmuch as when I conferr'd such Authority upon him, I must be thought to have suppos'd his Integrity as an essential Condition. Nay, the acting *bona fide*, or uprightly and faithfully, implies this farther, that what the *Substitute* performs, shall not derogate from the Honour and Advantage of his *Principal*; at least so far as the present Posture of Things will bear. For to be ignorant of these Points is almost as gross a Fault, as open Dishonesty². The same must be said of those blank Papers with our Names subscrib'd at the bottom, which we often deliver to our Agents to be fill'd up and turn'd into Instruments of Obligation. These shall not bind us at all, if any such

Matters be inserted in them, as are disagreeable to the Nature of the Affair given in Charge, and such as we cannot be presumed to have consented to³.

We have a famous Instance of such a Cheat in Blanks recorded by *Zonaras*, Tom. iii. and by *Glycas*, Tom. iii. in *Roman. Lacapen. circa princip.* The Patriarch *Trypho* being accus'd of extreme Ignorance, and as one that was not so much as capable of writing, to confute the Censure, wrote down his Name in a fair Paper, before the Judges appointed: This Paper *Theophanes* of *Cæsarea* fill'd up with a formal Resignation, and so brought it to the Emperor; who, as the Plot had been laid, took hence an occasion to eject the Patriarch. A *Latin Poet*, as our Author observes, sharply reproves the Pope, who by signing blank Papers hath been the Cause of a thousand Forgeries.

*An pulchrum satis est, & summo Præsule dignum,
Impressas signo vacuas emittere chartas,
Quas possit lator variis inscribere nugis,
Cum volet, & miseris falsas affingere culpas?*
Gunther. Ligurin. v. 656.

If I depute a Man with limited Orders, he cannot lay an *Obligation* on me beyond the Bounds of his Instructions.

If any Assent be sent with a double Commission, one *open*, to shew the Person with whom he is to transact, the other *secret*, prescribing what Steps he shall take, and how far he shall proceed; it may be made a Question, Whether the *Agent* shall oblige his *Principal*, if he exceed his private and secret Orders, yet so as to keep within his *open Commission*, where the affirmative Side ought to be maintain'd⁴. For by my own *Instructions* I bind myself to the third Person, with whom the Contract is made, that I will ratify and make good what my Agent shall conclude on. And by my *secret Orders* I bind my Agent not to recede from such positive Terms; in which Point if he transgress, he stands accountable to me for so much as I lose by his Mismanagement: But I am still tied to perform to the third Person, what was thus granted in my Name. For otherwise there could be no manner of Safety in treating by Commissioners, it being ever to be fear'd lest their *secret Directions* should differ from their *open Powers*; neither could there be a more specious Pretence made use of to overthrow all Affairs transacted by Mediation, and to deceive and abuse Men with vain Treaties⁵: But it must be observ'd, we suppose, here, as in the

MR. BARBEYRAC'S NOTES on Chap. IX. §. I.

¹ *Ufus autem procuratoris perquam necessarius est, ut qui rebus suis ipsi superesse, vel nolunt, vel non possunt, per alios possint, et agere, vel concenire*, Digest. Lib. 3. tit. 3. *De Procuratoribus*, leg. 1. §. 2. *Potest quis per alium, quod potest facere per seipsum*, Decretal. Lib. 6. *De Regul. Jur.* c. 68. *Qui facit per alium, est perinde ac si faciat per seipsum*, Ibid. c. 72.

² It is called *Actio Exercitatoria*, which is treated of *Digest.* Lib. 14. tit. 1.

³ *Actio Institutoria*, see *Digest.* Lib. 14. tit. 3. *Code*, Lib. 4. tit. 25. And Mr. *Daumat's Civil Laws, &c.* Part I. Lib. 1. tit. 16. Sect. 2, 3.

⁴ See *Instit.* Lib. 4. tit. 7. *Quod cum eo qui in aliena potestate est, negotium gestum esse dicitur*, and *Digest.* Lib. 15. tit. 4. *Quod jussu*.

MR. BARBEYRAC'S NOTES on §. II.

¹ *Procurator autem vel omnium rerum, vel unius rei esse potest*, Lib. 3. tit. 3. *De Procuratoribus*, §. 1.

² *A Procuratore dolum, & omnem culpam, non etiam improvisum casum præstandum esse, Juris auctoritate manifeste declaratur*, *Code*, Lib. 4. tit. 35. leg. 13. See also leg. 21. and upon this whole Matter, Mr. *Daumat's Civil Laws, &c.* Lib. 1. tit. 16. Sect. 1, &c.

³ In fine, 'tis certain that a Man is bound by his own Hand, altho' he to whom the Blank is committed fills it up otherwise than he intended, provided there be no false Dealing between the third Person and him. This appears by the Example which Mr. *Hertius* brings of a Man of Business, who being employ'd by his Master to borrow a thousand Crowns, took up two thousand upon his Blank Bond; for here was no fault in the Lender, but in him only who imprudently intrusted his Deputy.

⁴ See *Grot.* 1. 2. c. 11. f. 12.

⁵ Vid. *Wicquefort's Memoires touchant les Ambassadeurs*, p. 582, 583, 588.

former Case, that the Agent when he thus transgresses the Bounds of his private Instructions, did it not out of a dishonest and treacherous Design ⁴.

III. If we make use of a Deputy in transmitting a Promise to another Man, and the Person employ'd happen to die before he have declar'd our Proposal to the other, or obtain'd his Assent, it is plain his Promise may be revok'd ¹. For my express Will in this Case was to contract an Obligation by the Words of this Person only, whom I intrusted with the Affair: And therefore although he may have declar'd his Message to a third Man, whence it may come to the Ears of the Party to whom it was directed, yet this way of communicating the Matter can lay no Tie upon my Conscience. For it was neither my Design in the least to render my self oblig'd by the means of this third Person, nor is he so fully acquainted with my Will, as to give another any good Assurance of it. But the Case is otherwise as to a Bearer, whom I intrust only with Letters of mine, expressing my Pleasure to a Person at a Distance. Though the Bearer die before he reach the Person, and the Letters are deliver'd by another, yet this is no Hindrance to the contracting of a firm Obligation. For here the Letters, and not the Bearer, are the instrumental Cause of the Engagement; and it signifies nothing to either of the Parties concern'd, by what Hands the *Deeds* were convey'd and presented.

IV. On many other Accounts there is a great Difference, whether a Man act by my Deputation purely as a Messenger, and a Bearer of my Opinion and Pleasure, or as an Agent and Mediator, with a Liberty of interposing his own Judgment in some Points of the Business. Which *Grotius* in l. ii. c. 11. f. 17. thus expresseth in other Words: *Whether the Person be pitch'd on to signify the Promise I make, or whether he be authoriz'd to make the Promise himself.* In the former Case, if I revoke my Promise before it hath been accepted by the other

Party, my Revocation shall stand good, although the Messenger being unacquainted with it, should go on in signifying my first Resolution. But if a Man acts for another in the latter way of Deputation, unless the Change of Mind be notified to him, it shall be void, and his *Principal* shall stand oblig'd, if he proceed to settle the Business ¹, as he was at first commission'd. For the *Principal*, when he chose to offer his Promise by such an Agent, lodg'd the *obliging Power* in his *Person*, and not in his *Pocket*; that is, he intended him not barely for the Messenger of his Purpose, but for one that should employ his own Judgment, as well as his bodily Service in the Affair ². The same Distinction the *Civilians* apply to the Question, Whether a Grant should hold good, in case the Donor die before it be accepted? Which they affirm, if the Person deputed to carry the Grant were of the former kind, because then nothing would be wanting on the Donor's Part. But they deny it, if the Agent was of the latter sort; because the Donor did not fully make the Grant, but only order'd it to be made; or had not yet actually offer'd the Thing, but only given Commands for its being offer'd. Yet see *Ziegler* on *Grotius*, lib. ii. c. 11. f. 17. where he delivers it as his Judgment, that the Donation may be accepted, in case the Person deputed made offer of it during the Donor's Life. But one would wonder how the other Party should make any Stop or Delay at Acceptance, if the Donation be suppos'd to have been thus communicated. *Grotius* says, that the same Rule is to be followed in deciding the Controversy, Whether a Person thus acting by a Commission, can bring an Action against the Heir of the *Principal*, or *Donor*, for Recovery of the Charges he hath been at since the Donor's Death, in executing his Orders ³? In which Case, the Author of the Books to *Herennius*, l. ii. c. 13. informs us, that two *Roman* Judges gave a quite contrary Sentence.

⁴ That is to say, There was no Tricking between him and the third Party, otherwise he is to make good the Damages of him whose Business he manages; but the Engagement itself is not less valid in respect to the other Contractor by virtue of his Orders, which are the Foundation of the Treaty, as I spake in the first Edition of this Work. Nevertheless I have observed that Mr. *Hertius* maintains the same thing, and sends us to his Discourse, *De Obligatione mandantis & mandatarii, contemplatu tertii*, §. 2. which is in Tom. 3. of his small Tracts and Comments printed in 1700.

MR. BARBEYRAC'S NOTES on §. III.

¹ *Si adhuc integro mandato mors alterutrius intervenit, i. e. vel ejus qui mandaverit, vel illius qui mandatum susceperit, solvitur mandatum*, Instit. Lib. 3. tit. 27. §. 10.

MR. BARBEYRAC'S NOTES on §. IV.

¹ The Lawyers apply this Law here, *Si mandassem tibi ut fundum emereres, postea scripsissem ne emereres, tu antequam feires me vetuisse, emissis, mandati tibi obligatus ero, ne damno afficiatur is qui suscepit mandatum*, Digest. Lib. 17. tit. 1. *Mandati vel contra*, leg. 15. See also Lib. 1. tit. 18. *De Officio Praesidis*, leg. 17. *Clementin.* Lib. 1. tit. 4. Chap. *De Renunciatione*, and *Cassianus* on *Digest.* Lib. 3. tit. 3. *De Procurat. & Defensoribus*, leg. 65.

² Mr. *Thomafius* in his *Jurisprud. Divin.* Lib. ii. c. 7. §. 118. says, That we must distinguish several Cases here, and examine chiefly whether the Revocation of an Engagement be addressed to the Messenger, or to him to whom we are engaged by his Means? And further, whether the Revocation be sent before the Promise was accepted? If the Revocation be addressed to the Messenger, and he to whom he is to deliver his Commission has accepted the Promise before he knew of the Revocation, the Promiser is obliged to make good his Engagements, tho' he who was obliged to let him know it received the Countermand either before or after the Acceptation. And so all that can be done is this, if the Messenger has given it contrary to Order, he may be charged with an ill Management of his Commission. But if the Revocation be addressed to him to whom our Engagements are made, and he has accepted the Promise before he received the Revocation, we must then observe whether we had a Design to engage ourselves in case the Promise were once accepted, or we were only supposed to have notice of an Acceptation? For it is clear, that we may revoke our Word by means of such a Supposition. But if he to whom we are engaged has received our Revocation before he accepted our Promise, the Engagement is null, whether it be addressed to a third Person, or himself. For in this last Case there is a Fraud in respect of the latter.

³ 'Tis a Rule of the Civil Law, That a Commission is of no Force, when he that gave it is dead before the Execution; and that altho' he has expressly ordered his Proctor to do such or such a thing after his Death, unless it be to build him a Tomb, or buy a piece of Ground for that End. This Mr. *Noodt* has shewed very well, against the Opinion of some famous Lawyers, in his *Observat.* Lib. 2. c. 1, 2, 3, 4. But if we consider the Law of Nature, we may decide it by other Principles, viz. by examining whether the Nature of the thing or the Circumstances do probably make it appear, that he that gave the Commission intended it should be executed after his Death. For in this Case the Proctor ought to execute it, and all Persons concerned ought to yield to it. We must also suppose that the Proctor knew of the Death of him that gave the Commission; for if he were ignorant of it, whatever he did in that time is valid by the Civil Law, which here follows the Principles of Equity. *Nam Mandatum solvitur morte [Mandatoris] si tamen per ignorantiam impletum est, competere actionem utilitatis causa dicitur*, Digest. Lib. 17. *Mandati vel contra*, leg. 6. §. 10. *princ.* See also the *Institutes*, Lib. 3. tit. 27. §. 10.

V. As we may declare our Consent to an Engagement by an Agent or Minister, so it is a farther Question, Whether a third Person may accept, in our behalf, a Promise made to us by another? And here the Dispute is not about those Persons whom we have commissioned to make Acceptance in our Name; for what we do by them, we are supposed to have done our selves, and when we have intrusted a Matter to another Man's Pleasure, our Will and Consent is included in his. But the Doubt regards only those whom we have not in this manner authorized. And here *Grotius* observes^a, "That we ought to distinguish, whether he who makes us a Promise on behalf of a third Person, does address and bind himself immediately to us, or whether he promises directly to the absent Party, and useth us only for Witnesses of the Act; that is, whether the Words run thus, *I promise you that I will give Scius such a thing, and you are Witnesses of this my Resolution.* In the former Case, according to the natural Sense and Import of the Promise, so soon as I have accepted it, I acquire a Right of taking care that the thing mentioned be transferr'd to the third Person, if he too will accept it; so that the Promiser in the mean time cannot revoke his Engagement. Yet he to whom the Promise was immediately directed, may remit it before the third Man has declared his Acceptance. The Promise then seems, on the whole, to amount to this, *I will give Scius such a thing, if you please.* And consequently it is in your Power and Choice, whether you will transfer the Promise on *Scius*, or whether, by refusing the Offer, you will hinder it from coming to him by your Means. And this is all you can do; for if I am absolutely resolv'd to confer the Kindness, I may perform it without your Mediation or Assistance. But if you declare your Approbation of the Proposal, I am not then at liberty to repent, before the Matter hath been made known to *Scius*; and if he join his Acceptance to yours, the Promise shall by the Law of Nature be good and valid. Indeed the *Roman* Laws declar'd all those *Stipulations* to be null¹, which were made for the Benefit of a third Man, without having a Penalty annex'd to them. And the reason they gave for their Judgment is this, That the original Design of inventing *Stipulations*, was to enable a Man to obtain somewhat for his own Advantage; whereas if the thing promised be

to pass to a third Man, he who obtains the Promise does not serve his own Interest, nor is himself concern'd in the Gain. But if I make a *penal Stipulation*, that is, if I procure such an Engagement as this, *Unless you give Scius an hundred Pounds, you shall by way of Punishment pay me Four score;* I then acquire thus much Right at least, that if you do not make good the first Sum on my Friend's account, I can demand the latter on my own. This Rule of the *Roman Courts* seems to have been introduced for the lessening the Number of *Suits*. For the Judge might well rebuke the Importunity of such a Complainant, who should give him and others a publick Trouble, without being himself concern'd or interested in the Affairs. And tho' it cannot indeed be said to be no Advantage to us, when by our Means we derive a Benefit on a third Person, in as much as we thereby oblige him to a grateful Sense of our Service; yet it was thought very improper to grant a Man an *Action* for the recovery of a thing in another's Name, which that other Party could not demand in his own; and consequently to give a Man the Privilege of purchasing the Friendship of a third Person at the Charges of a second.

But in the other Case, when the Promise runs after this manner, *I engage, or I declare before you, that I will give Scius such a thing, if you are not commission'd by Scius to accept the Offer*², your Agreement to it will have no Force or Virtue; you neither acquire a Right for your self, nor for *Scius*, who does not acknowledge your Act for his own. And therefore it signifies nothing, whether the Witnesses here yield his Consent to the Promise, or not; since it is not directed to his own proper Person. And the Promiser, in as much as *Scius* obtains no Right by the Witnesses acceptance of the Proposal, may revoke it without Injury; tho' not always without a breach of Constancy and Truth.

VI. It is farther certain, that if any Offer be made to a Person yet living, by Letter, Messenger, or the like, and he happen to die before he has accepted of it, his Heirs cannot accept of it for him; and consequently that such a Promise may fairly be revoked. For the Promiser seems plainly to have referr'd the Acceptance to the Choice of the deceas'd Party, not to his Heirs. Nor is he presumed to have thought of this Accident, or to have been willing that his Promise should stand good upon such a Supposition. We

MR. BARBEYRAC'S NOTES on §. V.

¹ The Words are, *Alteri stipulari—nemo potest. Inventæ enim sunt hujusmodi stipulationes sive obligationes ad hoc, ut unusquisque adquirat sibi, quod sua interest. Cæterum si alii detur, nihil interest stipulatoris. Pland si quis velit hoc facere, pœnam stipulari conveniat, ut nisi sit ita factum, ut est comprehensum, committatur pœnæ stipulatio etiam ei, cui nihil interest. Pœnam enim cum stipulatur quis, non illud inspicitur, quid intersit ejus, sed quæ sit quantitas in conditione stipulationis. Ergo si quis ita stipuletur, Titio dari, nihil agit, sed si adjecerit pœnam, NISI DEDERIS TOT AUREOS DARE SPONDES? Tunc committitur stipulatio, Instit. l. 3. tit. 20. De Inutil. Stipulat. § 19.*

² Mr. *Thomasius* in his *Instit. Jurisprud. Divin.* lib. 2. c. 7. § 119. observes, That we must carefully distinguish whether he whom we take to witness have any Interest, or no, that we give to a third what he accepts in his own Name, altho' without his Consent; a Distinction which the *Roman* Lawyers have not forgotten, and of which they alledge an Example of a Guardian, who making over the Management of the Estate of his Pupil to another, engaged that he should manage his Affairs well; or of a Person who obliged himself to give such or such a thing to his Commissioner; or of a Debtor, who engaged something for his Creditor, that he may not be obliged himself to pay, what he is engaged to give him, if he do not discharge him at the end of a certain Term, or to hinder him from selling a thing engaged till a certain time. For in this and like Cases, the Engagement is as valid as if the Promise had been directly made to him to whom we have promised. *Sed & si quis stipuletur alii, cum ejus interesset, placuit stipulationem valere. Nam si is, qui pupilli tutelam administrare cœperat, cesserit administrationem contuleri suo, & stipuletur rem pupilli saluam fore, quoniam interest stipulatoris fieri, quod stipulatus est, cum obligatus futurus sit pupillo, si male res gesserit, tenet obligatio. Ergo & si quis Procuratori suo dari stipulatus sit, quod sua interest, ne forte vel pœna committatur, vel pœdia distrahantur, quæ pignori data erant, valet stipulatio, Instit. Lib. 3. tit. 20. De Inutil. Stip. § 19.* In fine, this Remark of Mr. *Thomasius* is delivered in such a manner in the Edition of this Work, which I have; which is the last printed in 1702. that he seems to have fallen upon another sort of Promise, which is accepted by a third Person without his Consent; for having made mention of this after the other, he adds, *Sed in posteriori casu, &c.* but this, doubtless, is a Mistake in the Impression for *Priori*; for the Correctors have over passed a great number of others.

Lib. 2. c. 11. f. 18.

are often inclined to make a Grant to a Person, to be afterwards by him transferr'd to his Heirs, which we are by no means dispos'd to give to his Heirs immediately; it being a very material Point to consider on whom we bestow our Favours¹.

VII. It may in the last place be enquired, whether a Man can add a *Charge* or *Burthen* to his *Promise*, after the Words have been once deliver'd? For that he may *before* annex what Conditions he pleaseth, is true beyond Dispute. This then may be done, so long as the Promise is not yet perfected by Acceptance, nor made irrevocable, by the plighting of Faith for his Performance. For the other Party, before he accepts of the Profer, can acquire no Right to it; and therefore in the mean time, as the Promiser may, if he thinks fit, utterly withdraw it, so he may load and clog it with new Conditions. But when a Grant is completed by the Act of both Parties, no farther Terms can be annex'd to it¹. *Vid. Cod. lib. iv. De Donat. quæ sub modo.*

'Twill be ask'd, What if the Burthen be added for the Sake and Benefit of a third Person; as suppose I say, *I'll give you such a Sum of Money, provided you'll engage to maintain Scius a Year at the University?* We answer, that he who binds himself under this Burthen, may recall it so long as *Scius* has not yet confirm'd the Promise by his Ac-

ceptance; before which it does not of *Right* belong to him.

VIII. The most general Division that can be applied to *Pacts*, seems to be this, all of them create a *Right*, but in some that *Right* extends it self to the common use of Mankind, in others it is limited to the particular Benefit of certain Persons. For the Life of Men would have proved too plain and simple, had they not, to the Ordinances of Nature, added their own Institutions; by means of which their Proceedings were regulated, not only with more Convenience, but with more Comeliness and Grace. Of this latter kind, the principal are; *Speech*, or *Discourse*, the *Propriety*, and the *Value* of Things, together with *Sovereignty*, or *Command*; all which presuppose some universal *Pacts*, *tacit* or *express*, by Virtue of which they have been tied up to certain *Forms* and *Rules*. And the introducing and settling of these Engagements, was what Nature her self, supposing the Increase of Mankind to a great Number, directed and advised; as conducing in the highest degree to the Peace, and to the Ornament of human Life. Having therefore finish'd our Enquiries about Covenants in general, we will proceed to examine these Institutions, to discover on what *Pacts* they are founded, and what Precepts of the Law of Nature, such as we have already term'd *Hypothetical* or *Conditional*, do arise from them.

Mr. BARBEYRAC's NOTES on §. VI.

¹ The Law is this, *Neratius consultus, an quod beneficium dare se, quasi viventi, Cæsar rescripserat, jam defuncto dedisse existimaretur? Respondit, non videri sibi, principem, quod ei quem vivere existimabat, concessisset, defuncto concessisse, quem tamen modum esse beneficii sui vellet, ipsius estimationem esse, Digest. l. 50. tit. 17. De Divers. Reg. Jur. leg. 191.*

Mr. BARBEYRAC's NOTES on §. VII.

¹ The Words are, *Perfecta donatio conditiones postea non capit.*

Mr. BARBEYRAC's NOTES on §. VIII.

¹ Mr. *Titius* in his *Observat.* 241, reproves many things here, of which I shall mention such only as to me appear well grounded, *viz.* 1. All the Duties of Society, of which our Author treats hereafter, and which flow from those three Generals, which I have spoken of above, Chap. 1. § 1. Note 3. and are only the Consequences applied to divers Objects which are presented to us in a Civil Life; Consequences from whence result such Maxims, which have a Place either without supposing any other thing than the Quality of a Man, or supposing some Deed or human Establishment. So that the Establishments of which our Author speaks make the Matter of the Duties of natural Right as well absolute as conditional. 2. All the Establishments of which our Author treats are not founded upon an Agreement. The Introduction and Usage of the Word in general depends not upon any Agreement, either express or tacit, if by Agreement we mean an obligatory Consent. See what is said, Chap. 1. of the following Book, § 5, Note 1. The Property of Goods is not originally founded upon any Agreement, as shall be shewn, c. 4. of the same Book, § 4, Note 2.

² *Vid. Grot. l. 2. c. 11. f. 19.*

LAW of NATURE

AND

NATIONS.

BOOK IV.

CHAPTER I.

Of SPEECH; and the OBLIGATION which attends it.

The CONTENTS of every Paragraph of the first Chapter.

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| <p>I. <i>Of the Use of Speech.</i>
 II. <i>Of the Diversity of Signs.</i>
 III. <i>Of the Origin of Speech.</i>
 IV. <i>Words signify according to Imposition.</i>
 V. <i>Imposition is attended with a Compact.</i>
 VI. <i>This Compact is either general, or particular.</i>
 VII. <i>Whence the Obligation of discovering our Mind to another.</i>
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WHAT Man was design'd by Nature for a Life of Society, this alone might be a sufficient Argument, that he only of all living Creatures is endued with the power of expressing his Mind to others by articulate Sounds: A Faculty, which, abstracting from this social Condition, we cannot conceive to be of any Use or Advantage to Mankind. 'Tis well observ'd by *Aristotle*¹, *Nature doth nothing in vain; and Man is the only Animal whom she hath invested with the Privilege of Speech*: Not such as consists in the bare Repetition of borrow'd Sounds, like the Talk of Parrots, but such as is join'd with a

Sense and Understanding of what the Words import. By means of which one may be able to teach another; one may in the most convenient manner command another, and the other apprehend his Commands; without which Assistance, there would scarce be any Shadow of Society, Peace, or Discipline among Men; or at best, such only as would be in the highest degree rude and unpolish'd. *For (as the Philosopher goes on) Voice (or a certain Kind of inarticulate Sound) is no more than an Indication of Pleasure or Pain, and is therefore to be found in other Animals. Nature having in them proceeded so far, as to give them a Sense of what is agreeable or distasteful, and an Ability of signifying in some*

Mr. BARBEYRAC'S NOTES on Chap. I. §. I.

¹ Οὐδὲν γὰρ, ὡς φάμεν, μάτρω ἢ φύσις ποιεῖ, λόγον ἢ μόνον ἀνθρώπων ἔχει τῶν ζώων· ἢ μὲν ἐν ζωῇ τῆς ἡδέας, καὶ λυπηρῆ δὲ συμπίον, διὰ καὶ τοῖς ἄλλοις ὑπάρχει ζωῆς· μέγιστος γὰρ τέτις ἢ φύσις αὐτῶν ἐλλύθει, ὥστε αἰδανέως τὸ λυπηρῆ, καὶ τὸ ἡδέως, καὶ ταῦτα σημαίνειν ἀλλήλοις· ὁ δὲ λόγος ἐστὶ τὸ δηλῆν ἐπὶ τὸ συμπίον, καὶ τὸ βλάθερον, ὥστε καὶ τὸ δίκαιον, καὶ τὸ ἀδίκον· ὅσοι γὰρ πρὸς τὰ ἄλλα ζῶα τοῖς ἀνθρώποις ἴδιον, τὸ μόνον ἀγαθὸν καὶ κακῶν, καὶ δίκαιον, καὶ ἀδίκον, καὶ τῶν ἄλλων αἰδανῶν ἔχουσιν· ἢ τὴν τέτων κωνία ποιεῖ εἰκίαν καὶ πόλιν, *Aristot. Politic. l. 1. c. 2.*

sort these Affections amongst themselves. (Whence it appears, that the Sounds utter'd by Brutes, of whatsoever kind, are determin'd by Nature, not by Custom and Institution, like human Discourse). But Speech was given to signify farther what was useful, or prejudicial; just, or unjust: It being the Prerogative and Property of Men, above their Fellow-Creatures, to have a Sense of Good and Evil, of Justice and Injustice, and the like; since from their Society and Communication proceed the united Bodies of Families and Commonwealths^a. And since that Want and Weakness, which particular Men lye under, may by the Assistance of others be conveniently remov'd, and yet another cannot apply himself to my Aid, unless he first understand what I desire; which he may do most readily by means of some Signs and Tokens, and especially by articulate Words; therefore, that the most useful Instrument of human Life may duly obtain its End, in uniting Men in Society; and lest by the Abuse of Speech Man should be render'd less sociable, than if he were dumb or silent, it must be suppos'd a Precept of the Law of Nature, That no Man deceive another by those Signs, which have been instituted to express our Meaning and our Thoughts.

II. Now to trace this Point from its first Head, we must understand, that the Nature and Ability of those Objects which affect our Senses, is such as not only gives us notice of their own Presence or Approach, but likewise affords our Reason an Opportunity of attaining the Knowledge of other Things. And this either because there is a natural Alliance and Connexion between those Objects and the Things with which they thus bring us acquainted; or because Beings endued with Sense and Understanding have, without this natural Relation, fix'd such Notions upon them, as to make them capable of representing continually the Images of certain Things to the Mind. Hence ariseth the Distinction of Signs into those which are natural, and those which owe their Force and Validity to Custom and Compact. Of the former kind, we are on every side supplied with Instances from the Frame of Nature; as the Day-break is the Sign of the Sun's rising quickly after; Smoak is the Sign of Fire; and the like. By Compact, Men have impos'd the Use and Power of Signifying, on certain Things, Actions, and Motions, and above all, on Words, or articulate Sounds form'd by the Tongue, and afterwards reduced into Letters: And all these are found to be in use either with some certain Persons, or with the greatest Part of Mankind, or in general, with all the World. Under the first of these Classes may be rank'd the Light-houses and nightly Fires on the Coasts, for the Direction of Vessels: By the Abuse of which *Nauplius* of old is

reported to have driven the *Greeians*, in a Tempest, upon the Rock of *Caphareus*, to revenge the Death of his Son *Palamedes*^b. As likewise those other Marks set up to guide Ships by Day, and to point out the Rocks and Quick sands, together with the *Mercuries*, pointing Hands, and other Conveniences for Information of Land-travellers. And thus heretofore the *Persians* by lighting Fires all along on the tops of their Hills, used in a very little time to spread some Reports or Alarms thro' every part of the Kingdom^c. An infinite Variety of these Signs are met with in Commonwealths, employ'd for the acquainting the Subjects with some particular Matters. To which Head belong Clocks, Bells, Spears set up at Auctions, Bushes, Signs before Houses, and the like. In War, the Sound of Trumpet, Beat of Drum, Discharge of Cannons, Waving of Colours, &c. And so too, certain Gestures and Motions have been taken up amongst most People to denote such or such Intentions of the Mind: To go out of the way, to rise up, to bow, to kiss the Hand, are Signs of Honour and Respect with the greatest part of the World. To uncover the Head in the Ceremony of saluting, or to pluck off the Shooes in some Places is interpreted as a Mark of Honour, in others of Contempt. It is in some Countries look'd on as reproachful to point with the Finger, to bend the Nose, to bid a *Fig for one* (*fare le fica*, as the *Italians* call it) with many the like Motions. To take by the Beard is in some Nations the highest Affront, with others it passes for a Token of Veneration; as with the *Tartars*, with some of the *Indians*, and, as some think, with the antient *Gauls*^d. 'Tis likewise a common Practice to express by some Gesture our desire of performing such an Action as would require that particular Motion of the Body, by which in strange Countries we, after a sort, supply our Ignorance of the Language. To affirm a thing by gently bending our Head; to deny by throwing it on our Shoulders; to refuse by turning our Back, are Customs almost universally receiv'd. As for our pointing out a certain Thing or Place by stretching our Hand or Finger towards it, this perhaps ought to be reckon'd amongst the natural, rather than amongst the arbitrary Signs. What Discoveries may be made by Nods, Winks, Motions of the Fingers, or of the Feet, when particular Men have once agreed on those ways of Intelligence, is vulgarly known, and need not be farther insisted upon in our present Design^e. *Lucian*^f tells us of a famous Artist in *Nero's* Court, who express'd the Amour of *Mars* and *Venus* as well by dancing, as he could have done by Narration; whom for this reason a certain barbarous Prince begg'd of the Emperor for an Interpreter. And the *Sieur De Sancy*, the *French* Ambassador at the *Otto-*

^a Add. *Isocrat. ad Nicoel. paulo post princip. Plin. N. H. l. xi. c. 51.* That Power of explaining our Mind, which hath distinguish'd us from the Beasts, hath caused another Distinction between Man and Man, no less considerable than that between Man and Beast. *Quintilian* is large on this Subject, *Institut. Orat. l. 2. c. 16.*

Sophocel. Oedip. Colon. p. 310. Edit. H. Steph. The wise Inventions which our Mind conceive Our Speech declares _____

Pliny (N. H. l. 7. c. 1.) expresseth the Necessity of Speech in a very smart Sentence, when he observes that, *Externus alieno non est hominis vice*; one Foreigner is not a Man to another. Add. *Garcilas de la Vega*, *Comm. Reg. l. 7. c. 1.*

^b Add. l. 10. *D. de incend. ruin. naufrag. & Lib. 47. tit. 9.*

^c Which Custom is described by *Barclay* in his *Argenis*, l. 1. Add *Polyb. l. 10. c. 39, &c.* Περὶ πυροβολίας καὶ οὐρανοποιίας, *Casaubon. Epist. 812. Edit. Græv. Jul. African. νεσών, l. 2. c. penult.* See likewise *Ferdinand Pinto*, c. 61. where he speaks of the Horn, which amongst the *Japoneze* every Man keeps in his House for a Signal upon occasion.

^d From that Place in *Livy*, l. 5. c. 41.

^e *Æschyl. Agamem.* _____ Barbarian, let your Hand Supply your want of Speech _____

^f *De Saltatione*, Tom. I. p. 807. Edit. *Amsterd.*

man Court, gives an account of two *Mutes* whom he saw there, one by Nation a *Turk*, the other a *Persian*, who by reason of their using different Signs and Motions, could not understand each other; till at length a third *Mute* was found out, who was able to perform an Interpreter's Part between the two former.

III. But that which we are chiefly concern'd about in our present Enquiries, is Speech or Discourse, the most common and the most useful Sign amongst Men, and introduc'd for the sake of communicating Notions and Thoughts. Of the Rise of which *Diodorus Siculus*, Lib. i. p. 8. Edit. *Rhodom.* thro' his Ignorance of the true Origin of Mankind, gives this fabulous Account: *The first Men who were born into the World, led a savage Life, without Culture or Refinement; going out in Herds to the Pastures, and feeding on the most juicy Plants, and those Fruits which plain Nature produced. Being infested with the Wild Beasts, Use taught them to assist each other, and Fear compell'd them into Society; by means of which they grew acquainted, by degrees, with the Resemblance of their Shapes and Features. And having from confus'd Voice, and without Signification, arriv'd by slow Attempts to pronounce articulate Words, shewing every thing by Signs, that they had occasion to observe, and to communicate; they at length gain'd ability to inform one another of all Matters by Discourse. But, inasmuch as there were many of these Communities establish'd in different Parts of the World, and every Man join'd his Words together meerly as it happen'd, all did not speak in the same manner. And hence arose the Number and the Variety of all sorts of Languages. Lucretius's Description is exactly of a piece with this, l. v. v. 1027, &c.*

*At varios linguæ sonitus natura subegit
Mittere, & utilitas expressit nomina rerum;
Non alia longè ratione, atque ipsa videtur
Protrahere ad gestum pueros infantia linguæ,
Cum facit ut digito, que sint præsentia, monstrant.
Proinde putare aliquem tum nomina distribuissè
Rebus, & inde homines didicissè vocabula prima,
Desipere est: nam cur hic possèt cuncta notare
Vocibus, & varios sonitus emittere linguæ,
Tempore eodem alii facere id non posse putentur?
Præterea, si non alii quoque vocibus usi
Inter se fuerant, unde insita notities est
Utilitatis? & unde data est huic prima potestas,
Quid vellet, facere ut scirent, animoque viderent?
Cogere item plures unus, victosque domare
Non poterat, rerum ut perdiscere nomina vellet;
Nec ratione docere ulla suadereque surdis,
Quid sit opus factò: faciles neque enim paterentur;
Nec ratione ulla sibi ferrent amplius aures
Vocis inaudito sonitus obtundere frustra.*

Kind Nature Power of framing Sounds affords
To Man, and then Convenience taught us Words;
As Infants now, for want of Words devise
Expressive Signs, they speak with Hands and Eyes,
Their speaking hand the want of Words supplies.
That One the various Names of Things contriv'd,
And that from him their Knowledge all deriv'd,
'Tis fond to think: For how could that Man tell?
The Names of Things, or lisp a Syllable,
And not another Man perform't as well?

Besides, if others us'd not Words as soon,
How was their Use, and how their Profit known?
Or how could he instruct the other's Mind,
How make them understand what was design'd?
For his, being single, neither Force nor Wit,
Could conquer many Men, nor would they submit
To learn his Words, and practise what was fit.
How he persuade those so unfit to hear?
Or how could savage they with patience bear
Strange Sounds and Words still rattling in their Ear?

Mr. Creech.

He concludes, that since brute Creatures could by different Sounds express different Motions of their Mind,

— *Quid in hac mirabile tantoperè est re,
Si genus humanum, cui vox & lingua vigeret,
Pro vario sensu varias res voce notarent?*

— Since Organs fit, since Voice and Tongue,
By Nature's Gift bestow'd to them belong;
What wonder is it then, that Men should frame,
And give each different Thing a different Name?

Mr. Creech.

The chief Design of *Lucretius*, in these Arguments, seems to have been to oppose *Cratylus* in *Plato*, who celebrates the first Inventor of Words, and the first Author of the Names of Things, as a Person of the highest Wisdom: An Opinion which we shall examine by and by. And indeed those who believ'd the first Mortals to have crawl'd out of the Earth,

Mutum & turpe pecus,

A Dumb and Dirty Herd,

could not easily hit on any other Account. For 'tis manifest, that no Languages are born with a Man, but all are learnt by Use and Experience. Whence it comes to pass, that Persons born deaf, are likewise dumb. And 'tis look'd on almost as a Prodigy, when such an one is taught to speak; as hath been in the present Age perform'd on the Brother of *Velasco*, Constable of *Castile*; who having been deaf from his Cradle, was made to speak, to write, to read, and to understand Authors. And an Instance of the like wonderful Operation was not long since given by *Dr. Wallis* at *Oxford*. Nor doth it look probable, that some one Man in the Beginning should have fram'd a whole Language, with an exact Contexture of Words, and a just Agreement and Conformity to the Things which they were to represent. But 'tis the general Opinion of *Christians*, founded on the Authority of the Holy Scriptures, that the first Language was by Almighty God immediately infus'd into the Original Pair, which their Children easily learnt, by the Use and Custom of hearing. And that, as for the Diversity of Tongues, this was miraculously produced by the Confusion at *Babel*. Yet some have doubted, whether even the Language which *Adam* spoke, was at first compleatly full and perfect, and rich enough to express all manner of Conceptions; inasmuch as the Scripture directly mentions only

^a Add. *Diog. Laert.* l. 10. p. 754. Edit. *Steph. Vitruv.* Architect. l. 2. c. 1. and his Remarks upon the Critical History of *Father Simon*, p. 422. See likewise the Preliminary Dissertation upon the Bible, by *Mr. Dupin*, p. 122. Edit. *Holl.*

^b See *Mr. Le Clerc* upon *Gen. ii. 23.*

the Names which he set on living Creatures. As it is certainly true of most Tongues, that they were at first very poor, and very plain, but were enrich'd in time with Copiousness and Elegance: As likewise that they have, in a long Course of Years, undergone very signal Alterations; and that from their Corruption and Confusion many new ones have, within the Compass of a few Ages, sprung up in the World ^a.

IV. But this is most clear and evident, That the Power of signifying determinately, thus or thus, that is, of raising such certain Ideas in our Mind, doth not belong to Words by Nature, but ariseth purely from the Pleasure and the Imposition of Men ^b; for otherwise no Reason could be given, why different Words should, in different Languages, be applied to express the same thing. Which is likewise true concerning the different Forms and Characters of Letters. St. *Austin* (*de Doctrin. Christian.* l. ii. c. 24.) hath made this Observation on the Point; "That one Letter fashion'd like a Cross (X) imports one Thing amongst the Greeks, and another amongst the Latins; not by the Appointment of Nature, but by the Pleasure and Consent of Men, in fixing such different Significations; and a Person who understands both Languages, when he would express his Mind in Writing to a Grecian, useth this Character differently from what he doth when he writes to a Roman. Thus too the Word *Beta*, under one and the same Sound, in Greek is the Name of a Letter, in Latin the Name of a Pot-herb: And when I say, *Lege*, these two Syllables are by those different People understood in different Senses. See the *Art of Speaking*, by Father *Lami*, B. I. c. 14. Edit. *Amst.* 1699. Nor is it any Presumption to the contrary, that we believe *Adam* ^c to have given Names to the Creatures, not as it fell out by Chance, but with the highest Reason and Design; such as were taken from the peculiar Nature of the Things, and fully and accurately express'd their distinguishing Properties, so as that upon the first Sound of the Words, the Nature of each Thing might be understood; as *Philo* the Jew reports ^d. For although we should grant that the Names set on Animals, and some other Things (for no Man can easily prove this of *all*) were such as denoted their Ge-

nus and Disposition, or their principal Affection; yet those very *Primitives* whence these Names were deriv'd, signify merely at Pleasure. For Instance, though *Adam* gave this Reason for the Name of *Eve*, *Because she was the Mother of all Living*; yet that the Word *hava* should import *to live*, is absolutely owing to Imposition: And though in all Languages, Things allied by Nature are usually allied in Name, there being observed in most Words of this kind, some Conformity of Structure, and which the Grammarians term *Analogy*; yet this is by no means constant and regular, many Words having very particular Ways and Methods of Variation; and even this *Analogy* it self, inasmuch as it consists in a certain Inflection and Combination of Words, is it self establish'd by human Appointment. This is the Judgment of *Quintilian* himself ^e; *We must remember*, says he, *that the Rule and Method of Analogy cannot universally be drawn, since in many Places it is apparently inconsistent with it self: For Analogy was not, at the first Production of Mankind, sent down immediately from Heaven, to teach them the due Form of Speech; but was invented after they had accusom'd themselves to Discourse, and had observ'd the particular Cadences of every Word. It is not therefore built upon Reason, but Example; nor is it the Law, but the Experiment and Remark of Speaking; Analogy being indeed the Effect of nothing but Custom.*

In *Plato's Cratylus* ^f, the Opinion of the Person whose Name the Dialogue bears, is to this purpose; that every individual Being includes in its Nature the true Reason of its Name; which is vain and absurd: *And that that is not properly the Name of a Thing, by which Men agree to call it, by uttering such or such a Portion of their Voice*; which in onesense may be admitted for true; that is, when some particular Men, contrary to common use, impose odd Names on Things for the Deception of others: As in the Case of Jugglers, Strawlers, and Gypsies; with regard to which, *feign'd Names* are oppos'd to true; being fix'd on Persons, or Things, contrary to the publick Imposition; *but there is one and the same true Reason of Names, innate alike to the Greeks and Barbarians*; which Assertion is likewise false. *Hermogenes* in the same Dialogue thus delivers his Opinion on the other side; *I can never be persuaded that there is any other Rule or Standard for the*

MR. BARBEYRAC'S NOTES on §. IV.

^a See the Art of Speaking by P. de Lami, Lib. 1. c. 14.

^b This is the Opinion of *Philo* the Jew in the Creation of the World. For Mr. *Hertius* quotes another Passage here very unfitly, where he treats of the Suitableness of the Seventy's rendring the Original Hebrew into Greek, as *Philo* affirms, who says, that they have found proper Words to express the Sense of the Law of *Moses*, *καὶ ἔτοι σωτηρέζοντα πῶς πρὸς ἡμασιν ὀνόματα ἐξέβουλον*. From which last Word Mr. *Hertius* might have observed, that he speaks of more than one Person, and that it ought not to be translated *advenit*, he found out, but *they*, seeing the Sequel of the Discourse can't otherwise be clear. The Passage is in the Life of *Moses*, Lib. 2. Several of the *Rabbins*, and most of the Christian Interpreters follow *Philo's* Judgment; but nothing is worse grounded. See Mr. *Le Clerc* on *Gen.* ii. 19. and *F. Malbranche* in his Enquiries after Truth, p. 387.

^c The Latin of *Quintilian* is this, *Sed meminimus, non per omnia duci analogiæ posse rationem, cum ἔσ' sibi ipsa plurimis in locis repugnet*—*Non enim cum primum fingerentur homines, Analogia demissa celo formam loquendi dedit, sed inventa est, postquam loquebantur, ἔσ' notatum in jermoni, quid quoque modo caderet, itaque non ratione utitur, sed exemplo; nec lex est loquendi, sed observatio; ut ipsam Analogiam nulla alia res fecerit, quam consuetudo.* But here *demissa* is falsely printed for *dimissa*, which is doubtless a Fault in the Printing, though it is not set down among the *Errata*.

^d Our Author gives himself liberty in these four first Paragraphs of this Chapter to enlarge upon Things very evident in themselves, and well known; and therefore ought rather to be supposed than proved in a Work of this Nature; and here is particularly in this Place a long Confutation of some Reasonings which are met with in one of *Plato's* Dialogues. I would willingly have left it quite out, but not daring to assume that Power, have thought it sufficient to let the Reader know that it is an useless Digression.

Plato's Words are, *ὀνόματα (ὁ ὀνόματα ἔ) ἐκείων τ' ὄντων φύσει πεφυκίαι, καὶ ἢ τὸ πῶς ἔ) ὄνομα, ὃ, πᾶν πνεύσι (ὡς δὲ μέγιστοι καλεῖν, καλῶσι, τ' αὐτῶν σωτῆς μέγιστον ὀνομαστικῶς) ἀλλὰ ὀνόματα πᾶσι ὀνομαστικῶν πεφυκίαι, καὶ ἔλληνσι καὶ βαρβάρους τ' αὐτῶν ἀπασιν, Herm.* Ὅτι ὀνόματα πιδθῆναι, ὡς ἄλλη τις ἐστὶν ὀρθότης ὀνόματι, ἢ συνθήκη, καὶ ὁμοιογία, ἢ γὰρ φύσει ἐκείων πεφυκίαι ὄνομα. ἔθεν ἔθεν, ἀλλὰ νόμα καὶ ἔχει τὸν ἐθιστικόν, καὶ καλόντων.

^e Comp. *Hobbes's Leviathan*, c. 4. ^f This Opinion is ill founded, as Mr. *Le Clerc* makes appear in his Notes upon *Gen.* ii. 19. See *Malbranche's* Search after Truth, p. 387.

Names of Things, than Compact or Consent: 'Tis my Judgment, that the Name which a Man fixeth on any thing, whatever it be, is true and proper; and that if he afterwards alter that Name for another, the last is no less true and right than the former; as 'tis usual with us to change the Names of our Servants (which will hold good, provided no Prejudice be hence done to the common Agreement) for nothing naturally hath such or such an Appellation, but derives it purely from the Law and Custom of Speaking. What Socrates disputes on the side of Cratylus, doth by no means turn the Cause; thus for Instance, when he scouts it as an Absurdity, *If I should give the Name of a Horse to what we commonly call a Man, it would follow, that the same thing might be truly stiled, A Horse and a Man.* It may be answer'd, in short, that Words of publick Use derive all their Force from publick Imposition, which private Persons ought not, to its Prejudice, to contradict; as we shall shew more at large hereafter. Again, that Argument of his is no better than a Fallacy; *If a whole Proposition may be false, therefore a part of it, as suppose, the Noun, or Name of a thing, may be likewise false.* For a single Word is not capable of that Falsty, which we sometimes discover in entire Propositions. The long Discourse he afterwards makes about the Propriety of Terms, will only hold in some Derivatives, but not in Primitives. And since the same things are in different Countries express'd by different Words, it likewise frequently happens, that Words which signify the same thing, have an *Etymology* utterly distinct. Thus Θεός, the Greek Name for God, is deriv'd from θεῖν to run; because the Stars which are perpetually running their Course, were look'd on as Gods by the Antients: But what Affinity is there in the Latin Tongue between *Deus* and *Curro*? So Man is in Greek term'd ἄνθρωπος, quasi ἀναθεῶν ἀποπνεύων, from considering or contemplating the Objects which he beholds. But must we therefore say, that *homo* in Latin comes from *contemplatio*? The Soul in Greek is named ψυχή from ἀναψύχων, to cool or refresh: But is *refrigeratio* in Latin for this Reason, the Theme of *Anima*? And the same may be shewn in any other Instances. In short, however diligent any Person may be in tracing Etymologies, and assigning the Reasons of Words, yet when he hath gone as high as he can, to the primitive and simple Terms, he will be forc'd to acknowledge, that they are purely owing to Imposition^a. What can be more ridiculous, than that of Socrates, when, in the Disputation of which we have been speaking, he is required to give a Reason for the Words πῦρ and ὕδωρ, he can say nothing else, but that they owe their Original to the Barbarians? Indeed he himself confesseth, that there can be no farther Que-

stions or Answers, about Reasons and Derivations, when we are once arriv'd at the first Element of both. Though he afterwards is very ingenious to no purpose, in tracing out the Reasons even of primitive Words: And yet after all, when he hath argued so long, in all Appearance, for Cratylus's Opinion, he at last fairly doubts on the whole Matter.

Sospater Charisius^{*b} the Grammarian, thus discourseth out of Varro, *The Latin Tongue is made up of Nature, Analogy, Custom, and Authority. The Nature of Verbs and Nouns is immutable, and delivers to us neither less nor more than what is receiv'd. Thus if a Man should say scrimbo instead of scribo, he would be convinc'd, not by the Power and Virtue of Analogy, but by the very Constitution of Nature.* But we must confess ourselves at a loss to find out this Necessity of Nature, unless it be said, that the Latin Tongue having in it an extraordinary Sweetness, wonderfully agreeable to the Ear, it must hence come to pass, that we reject, at the first hearing, any harsh and untunable Conjunction of Letters in that Language^d. Arnobius^{†c} speaks excellently to this Point; *No way of Speaking, says he, is by Nature either true and right, or false and improper: For what natural Reason can be given, or what Law, in the general Constitution of the World, that we should say, hic paries, and hæc sella? Since neither do those things admit of different Sexes, so as to be distinguished by the Masculine and Feminine Genders; nor can the most learned Critick inform me of the Original Reason and Meaning of these Terms, hic and hæc; or why the first should be applied to the Male, and the second to the Female Sex. All this proceeds from the arbitrary Appointment of Mankind.*

Grotius[‡] rightly rejects the Opinion of those who make this to be the difference between Things and Words, that the latter are naturally the Signs of our Thoughts, the former not. Indeed if the Meaning of the Assertion be no more than this, that Words were instituted for no other end, but to be the Signs of our Conceptions, and that therefore their whole Nature and Essence consists in their Power of signifying; whereas when Things are used for Signs, this is merely extrinsecal and accidental to them; we ought then by all means to admit it as true. But if it be intended in this Sense, that the Power of signifying such or such a particular Matter inheres naturally in Words, but not in Things, the Position is false and groundless. And on the contrary it is true, that Words naturally, and without respect to human Imposition, signify nothing at all, unless it be some such confused and inarticulate Sound as we make use of in Sorrow, or in Laughter, which ought rather to be call'd *Noise*, than *Speech*. If the said Notion be

* His Words are, *Latinus sermo constat natura, analogia, consuetudine, autoritate; natura verborum nominumque immutabilis est, nec quicquam aut plus aut minus tradidit nobis, quam quod accepit. Nam si quis dicat scrimbo, pro eo quod est scribo, non analogiæ virtute, sed naturæ ipsius constitutione convincitur.*

† Arnobius's Words are, *Nullus sermo natura est integer, vitiosus similiter nullus. Quænam enim est ratio naturalis, aut in mundi constitutionibus Lex scripta, ut hic Paries dicatur, & hæc Sella? Cum neque sexus habeant fæmininis generibus, masculinisque discretos, neque quisquam docere doctissimus me possit ipsum hic & hæc quid sint, aut cur ex his unum sexum virilem designet, fæmininis generibus id quod sequitur applicetur. Humana ista sunt placita.*

^a To this we may add the Remark of *Quintilian*, *Instit. Orat.* l. 1. c. 6. p. 64. Edit. *Lugd. Bat.* Shall it be affirm'd likewise, that Man took his Name of *Homo*, because he was, *Homo natus*, born of the Earth? As if all Animals had not the same Original! Or, as if those Primitive Mortals first set a Name upon the Earth, and then upon themselves!

^b *Instit. Grammat.* l. 1. ex *Varrone.* ^c We meet with the same in *Diomedes*, l. 2. ^d Vid. *Huart. Tryal of Wits*, c. 11. The Reason alledg'd by *P. Nigidius*, to prove that Words signify according to Nature, in *Aul. Gell.* l. 10. c. 4. is altogether vain and frivolous. ^e *Lib. 1. adverst. gent.* p. 45. Edit. *Parisi.* 1605. ^f *Lib. 3. c. 1. f. 8.*

thus explain'd, that such is the Nature of Man above all other Animals, that he can signify to others the Conceptions of his Mind, and that Words were invented to be the Instruments of Communication, then the Assertion is true, but not complet: For it should be added, that these Discoveries are conveyed, not by Words alone, but by Nods and other Motions. As we find several dumb Persons who are able to express their inward Conceptions after a very surprizing and artificial manner. Hence, in the *Roman Law*^a, those who have not the Gift of Speech, are yet supposed to say thus or thus, *By that Striving and Straining which they use, and that Sound and inarticulate Voice which is utter'd by them.* And 'tis a Rule in the same Law^b, That dumb Persons may contract Matrimony, by *mutual Consent, without Words*; that is, it shall be sufficient if they express their Agreement by dumb Signs. Nay *Pliny*^c tells us of some Nations of *Ethiopia*, who had no other Speech amongst them, besides these Gestures and Motions of the Body^d.

To the same Head belong those Marks and Characters which do not denote Voices or Words, but immediately the very Things themselves. And this, either upon account of some Agreeableness which they bear to the things represented; as in most of the *Egyptian Hieroglyphicks*; or because the Imposition of Men hath invested them with such a Power, as in the *Chinese* Characters, by which they express entire Notions and Sentences.

It may not be inconvenient to remark somewhat concerning that kind of Imposition, by which such a peculiar or proper Name is affix'd to Persons, Places, and some other Things; the Design of which is, that one Man, one Place, one City or Country, may be distinguished from another; and that by these Marks there may be a mutual Understanding between Men, in determining their Words or Actions. Now as the proper Terms of other things follow the manner of appellative, or common Nouns, so with regard to the proper Names of Men, it is to be observ'd, that the Power of imposing them usually belongs to those who have others under their Authority and Government: Thus Parents are wont to give Names to their Children, Masters to their Slaves and Vassals, and Princes to those of their Subjects, on whom they confer any signal Honour. In case

this Office be omitted by those Superiors who have such a right to perform it; or in case many have been invested with the same Title; it shall be lawful for every Person to take upon himself some Term and Note of Distinction: But as no Man ought to assume another Name; when by such an Act of his, the general End of imposing Names may be intercepted and hindered; or when upon this Alteration, any Damage or Prejudice, or any probable Danger and Suspicion of it, is likely to accrue to another Person; so neither ought any Man to hide or dissemble his true Name; unless in such a Case, when by this Concealment we do not prejudice the Rights of others, and yet procure some Advantage to our selves, or effect our Deliverance from Loss or Danger; according to those Rules which we shall hereafter deliver about the Obligation to speak Truth. *Add. Valer. Max.* l. ix. c. ult. and l. vii. c. 3. n. 8, 9. See the Oration of *M. Anton. Majoragius* on the same Subject, and *Casaubon ad Baron. Exercitat.* XIII. n. 13.

V. As all Signs, except those which we call *natural*, denote some determinate thing by virtue of human Imposition, so this Imposition is attended with a certain Agreement, Consent, or Compact, tacit or express; from the Force of which there ariseth a Necessity of applying such a Sign to such a particular thing, and to none else. The like Covenant must be supposed in relation to all those Things which we use for Signs, whatever Account we follow of the Origin of human Speech. For although we conceive the primitive Languages to have been immediately infused into Men, yet since each Person separately enjoy'd his Power of Discourse, and could use it freely as he pleas'd, by applying any Words to any Things; this Faculty would not have obtain'd its proper End and Use, unless an Agreement had pass'd between Men, that each Party should exercise their Talent in the same uniform manner, and constantly express the same Things by the same Words¹. For since he who is placed in a State of natural Liberty, doth not hold his Powers at the Beck and Controul of others, but hath the Privilege of using them as his own Judgment shall direct, another Person would have no manner of Right to require of me, that I should apply my Powers in such a particular way², and

¹ Nor Sirname, which may have the same Effect: For both of them are forbidden by the *Roman Law*, under pain of suffering the same Punishment, as they who are found guilty of Fraud. *Falsi nominis vel cognominis adseveratio poena falsi coeretur*, Dig. l. 48. tit. 10. *De Lege Cornelia de falsis*, &c. Leg. 13. *prin.* See the Notes of *Dion. Gotthofred.* on it.

MR. BARBEYRAC'S NOTES on §. V.

¹ It is more probable, that the Signification of Words is settled by a bare Consent, where there is no Obligation to consider it in itself. For, 1. Men never met together to agree upon the precise Signification of Words, or Rules of Speech. It came to pass insensibly, and without any Reflection; neither was there any tacit Agreement properly so called. We may every Day discern new Words, Expressions, and Turns of Speech to come into use, which put a new Sense upon the Terms already received. And how comes it to pass that they are practis'd by others? No Man pretends to lay any Obligation upon them, farther, than as they serve to convey the Truth from one to another in Conversation. 2. If the Signification of Words were settled by any obligatory Agreement, either express or tacit, the least Change, contrary to common Usage, would make it criminal, though no Man received any Damage by it, which none will dare to maintain, and which is daily confuted by our usual Practice, which all must own, and which on the contrary serves marvelously to set off and enrich all Languages. This is what *Mr. Titius* says very near, *Obsere.* 245.

² This proves well enough the Necessity of a bare Constitution, but not of an obligatory Consent. The Obligation, which respects the use of a Word, depends upon other Principles, as will appear from what is said, §. 7, &c. both in the Text and Notes. Whenever we are obliged to speak and manifest our Thoughts clearly, we ought to follow the common Usage, and choose the most suitable Terms; but in any other Case we may put a different Sense upon Words, which is not used, and speak in Terms clear contrary to what we think, which could not be done, if there were any Agreement, either open or tacit, which accompanied the Institution of Language.

³ It is in the Latin, *the same Faculties or Powers.* But good Reasoning, and what the Author adds, That their Thoughts may be understood by that Means, shew, that he would, or ought at least to have placed that Word at the end of the Sentence, which he speaks at the beginning, of the Faculties of Men in general, although, in my Opinion, he expresses himself unfitly in all the Editions.

^a Lib. 33. tit. 13. *D. de Supell. leg.* 7. ^b Cap. 25. *X. de Sponsal.* ^c N. H. l. 6. c. 30. ^d *Add. Qui Trillan.* l. 11. c. 3. *Instit. Orat.* Of the Marks or Signs used by the *Peruvians* under their *Incas*, see *Garcilass de la Vega*, l. 6. c. c.

ten the Style which those People bestow on themselves. It is here likewise worthy to be consider'd, that most Terms of Speech, besides their principal, have a kind of accessory ⁴ or additional Signification, by which we at the same time express our Judgment, Passion, or Esteem. And this is the reason, that of many Words which as to their main Importance exactly fall in with each other, some are opprobrious and injurious, others not; because this additional Signification is found in some, and not in the rest. Thus if I give a Man *the Lye*, I not only signify that his Speech is disagreeable to his Thought, but further denote, that he did this with an ill Intention, and on account of procuring my Prejudice or Hurt. And 'tis on the score of this latter Indication that the Words are look'd upon as contumelious and injurious. So if I call any Person an *Impostor*, or an *Ignoramus*, I affront him; because those Names, besides their proper meaning, include, by the bye, somewhat of Contempt and Reproach: Whereas there are many other Words, by which I may, without any such Affront or Abuse, signify myself to have been hurt by another, or shew that another is ignorant of some things; and which consequently shall only declare the direct Sense, without any such Indication of Disgrace. Sometimes this *additional Mark* ariseth, not from the general Imposition of Men, but from the Tone of the Voice (which is different according as we either teach and admonish, or flatter and court, or chide and reprove) from the Lines of the Face, from particular Gestures, and other natural Signs, which are wont very considerably to alter, diminish, or increase, the principal Signification of Words. And thus too a figurative Speech very often denotes some Passion in the Speaker, whereas a plain Expression barely imports the thing asserted: *Usque adeone mori miserum est*^a? denotes no more than if we should say barely, *non est usque adeo miserum mori*; because it includes a Contempt of Death. From the same *accessory Meaning* it comes to pass, that some Words are accounted obscene, others not; tho' as to the main they signify the same thing; nay, tho' the thing be not really in itself foul or indecent. The reason of which Difference seems in part to be this; that since some Words express a Thing or an Act more loosely and generally, others in a more distinct manner, and with particular Circumstances; therefore he who makes use of the latter sort, at the same time betrays his Lust, with regard to such a Thing or Act, and discovers a Satisfaction and Approbation which a Man of Virtue and Breeding would be asham'd of. Sometimes too the Obscenity of Words proceeds from hence, that they either denote a Contempt of the Thing signified, or else are used only among the baser People, or towards such to whom we owe no Reverence or Respect^b. *Casaubon*, in his Comment on *Persius*^c, hath disputed at large, whether it be allowable to apply obscene Words even to the Reproof and Correction of Vice, which is the ordinary Practice of satyrical Writers.

Those Words are grounded on *special Compact*, which either have been invested with a peculiar Signification, different from what they bear in common Use, or which are utterly unknown to the ordinary Methods of Speech. Of which kind are all those *Terms of Art*, used by Mechanicks, and others; which on account of either the Multiplicity and Confusion of Things, or the meer Pleasure of the Authors, have either been invented a-new, or apply'd to another Meaning than what they obtain'd in vulgar Discourse. Now that no Man may be deceiv'd by these Terms, amongst Persons who understand the particular Art, the very Nature of the Business in hand will be a sufficient Caution and Security. And amongst the unskilful they ought to be explain'd and limited by common Words. Which Explication and Settlement is likewise necessary, when either Artificers differ about the use of their Terms; or when any Person for some particular Reasons thinks fit either to coin new Words, or to fix a new Sense on old ones^d. Some few Persons in Confederacy may, and often do frame to themselves peculiar Words and Marks of Things, or put a different Signification on vulgar Terms, so as to be understood by each other, and by none besides. (And how far this Practice is lawful, will appear from the Sequel of our Enquiry.) In which Point it is enough, if those Words or Marks rightly discover my Mind to those, with whom I have thus enter'd into a particular Covenant about their use: And this holds too in other Signs, determin'd by the peculiar Imposition of certain Men. Amongst these the principal are the military Tokens and Signals of War; of which *Silence* itself hath been sometimes used for one. Thus in *Polyænus*^e the *Arcadian* General undertaking by Night to surprize the *Spartans* at the *Togæa*, gave his Soldiers no other Sign but this, That they should kill all who ask'd for any Sign. The *Arcadians* therefore were silent; but the *Spartans* not knowing their Fellows in the dark, and so demanding the *Word*, were slaughter'd by the Enemy. And so *Pammenes*, in the same Author^f, put a Cheat upon his Enemies by altering the Signal of the Trumpet, and quite inverting the ordinary Method and Use; commanding his Men to fall on when a Trumpet founded a Retreat, and to retire when it seem'd to call them to a close Engagement.

VII. But we must carefully observe, that altho' by this general and special Compact we are bound to use our Words and other Signs in the manner that hath been agreed upon; yet we are not hereby in the least oblig'd to open and discover our Minds to all Persons. To which may be apply'd the Saying of *Apollonius Tyanæus* (in *Philostrat.* l. iv. c. 11. p. 191. Edit. *Par. Morel An.* 1608.) *Palamedes invented Letters, not only for the sake of writing, but likewise that Men might come to the Knowledge of those things which were not to be written.* But to effect this, it is necessary that another Obligation be added, arising either from some

⁴ Our Author hath taken all this from *The Art of Thinking*, Part I. c. 14. where we may find the Reflection better managed. I do not know why he did not quote the Book, since he is not sparing of Citations.

^a *Virgil. Æn.* 12. v. 646.
Advancement of Learning, l. 3. c. 4. in the beginning.
c. 16.

^b *Vid. Ciceron. Epist. ad Famil.* IX. 22.

^c *Sat.* 4. p. 342

^e *Stratagem.* l. 1. c. 11. & l. 5. c. 16.

^d Add *Bacon's Lib.* 5.

particular Covenant, or from the general Command of the Law of Nature: Or lastly, from the Quality and Condition of the Business which is at

present to be transacted by Speech^r. Thus, for instance, if I undertake to be an Instructor to any Person, I am engag'd (by the Contract of *Letting*

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^r To explain this Matter distinctly, we are to observe, that Speech, as all other Actions of an indifferent Nature, is to be govern'd by three great Principles of Duty, of which we have spoken before, but must now repeat them, *viz.* Religion, Self-love, and Society. I. When we speak to God, we must always speak the Truth freely. This is evident of itself, tho' our Author proves it briefly in the beginning of §. 10. Nor may we ever abuse our Speech, when we speak to Men, to the Dishonour of God. See what I have said after our Author in *Note 2.* upon *Lib. 2. Chap. 4. §. 3.* II. When we make use of Speech in behalf of ourselves, either to secure or defend ourselves, or to procure ourselves some innocent Advantage, which neither trenches upon the Glory of God, or the Rights of our Neighbour. In this Case 'tis not only permitted, but expressly ordain'd by the Law of Nature, either to speak the Truth, or be silent; or to feign and dissemble, as a lawful Defence of ourselves, or our innocent Advantage requires. III. The Duties of Society oblige us also, either to speak the Truth plainly, or be silent, or feign and dissemble, if by that Means we can either do good to others, or avert the Danger which threatens them, without doing any thing contrary to the Glory of God, or to the Damage of any Man. Thus, as our Author speaks, *Lib. 2. c. 3. §. 4.* we must give Counsel faithfully to them that desire it, and shew them the right way, who are out of it. But on the contrary, we must be silent in things which may be prejudicial to any Person when spoken, either as to their Person, Goods, or Reputation. Thus if a mad Man running after another with a Sword in his Hand to slay him, asks us which way he went, we may not only, but we ought to shew him another way than that which the Person pursued took to save himself. And I can't think that any Man will dare to maintain the contrary. By the same Reason the wise Midwives of *Egypt* did very well to find out so good an Excuse to *Pharaoh*, as we may see by the Reward God gave them. In short, the greatest Abuse of Speech is, without Contradiction, this, To make it an Instrument of Damage to another. See §. 15. following. Hence it follows, that Men ought above all things to act sincerely in Bargains, and keep their Word inviolably when they have made a serious Engagement. Moreover, we ought to remember what I have elsewhere observ'd, that when the Duties of Society and Self-love are equally concern'd, these last ought to be follow'd, and so we may lawfully use our Speech for our own Advantage rather than any others. This is grounded upon Mr. *Titius's Observ.* 248, &c. tho' his Opinion is not a while the less singular. It is certain, that, as *Grotius* has observ'd, *Lib. 3. c. 1. §. 9.* most of the Heathen Philosophers and Antient Christians believed with St. *Augustin*, That whatever may be call'd a Lye, is always unlawful, altho' that Matter be not well explain'd, as our Author has done after *Grotius*. And since these two famous Works have appear'd in the World, very few, who have been conversant in the Study of Natural Right, but have embraced their Notions. See, for example, Mr. *Thomasius, Jurisprud. Divin.* Lib. 2. c. 8. Mr. *Buddeus, Elem. Phil. Pract.* Part. II. Sect. 6. §. 3, &c. Mr. *Fabricius* in a Note upon the false *Abdias*, which makes a part of the Apocrypha of the New Testament; Mr. *Noodt De Forma emend. deli mali*, &c. c. 3. and several other famous Writers. I might also alledge a great Philosopher of our Time, who had not occasion to explain this Point in his Writings, but he does not treat of it with Authority, wherefore I shall come to examine their Reasons. Those that maintain, that all Speech which is utter'd contrary to our Thoughts, is essentially faulty, ought to alledge good Proofs for it, taken either from the Nature of the Thing, or from some convincing Passage of Scripture. 1. As to the Nature of the Thing, I have not yet seen any thing satisfactory produced. Our Author proves it well; and I will examine in a few Words the new Hypothesis of a modern Author in *Note 2.* on §. 10. All that has hitherto been said with any shew of Reason, may be reduced to these two or three Difficulties, which are not hard to be resolv'd. The first is this, If the Opinion, say they, that allows Men to feign and dissemble upon certain Occasions, either in Deed or Word, be once received, all Confidence in one another must be banish'd from the Earth, and by consequence all Society destroy'd. For a Man can't open his Mouth, or do the least Thing; but it will be first demanded of him, Whether he does not believe, that he may in that case do otherwise than he thinks? But this Argument seems to be built on a Supposition entirely false, *viz.* That the Confidence by which our Dealings in this Life are maintain'd, is grounded only on this Persuasion, that they who speak, ought to say or do nothing but what answers exactly to their Thoughts, their own Conscience being Judge. For Experience and the Knowledge of the World prove the contrary evidently. I own, that Professed Liars, Natural Dissemblers, False Dealers, or Slaves to vile Interest, in a word, all those whose Honesty is dubious, are not proper Objects of our Confidence, and we ought not to trust them, but with very great Caution, if they shew that they believe that one may lawfully sometimes speak contrary to Truth, or profess, that they believe it always allowable. But when we have to do with honest Men, we put not the less Confidence in them because we know they may use an innocent Feint or Dissimulation, and because we have seen them used ourselves in certain Cases with good Reason for their own particular Advantage, or that of their Parents and Friends. As every one is willing to have that Liberty, so he readily grants it to others; and he can't refuse it them, or impute it to them as a Crime, without being accounted, and that justly too, unreasonable and foolishly nice. But, say they, the Benefit which may be obtain'd by a Lye will vanish into nothing, if we once teach that a Lye is allowable. For a Lye can be of no Advantage but upon this Supposition, that they to whom we Lye, believe that we do not Lye, and that we make a Conscience of speaking the Truth. If there be an Occasion offer'd wherein 'tis lawful to Lye, 'tis to administer a Medicine to a sick Person that may save his Life. But supposing that we are taught that Physicians are exempted from speaking Truth upon that Occasion, it will happen that they will not be believed, tho' they speak Truth; and so we shall fall into Inconveniences infinitely greater than those which we endeavour to avoid, by allowing them sometimes to Lye. Either the sick Person believes that the Physician will not Lye, or at least that he may as well speak the Truth; but how can he believe the first, if he knows that upon such Occasions he may Lye? And will not the Doubt keep him from taking the Medicine presented to him? To this I answer, that all this is made evidently false by Experience. Whatever rigid Divines and Casuists may say, 'tis certain, that there are a thousand little Lyes, which almost all the World believe allow'd, and which nevertheless fail not to produce their Effect. When one is in general persuaded that others are innocent, he is not always upon his guard to examine upon every Occasion particularly, whether the Person we have heard may not have reason to persuade us that a Thing is false, which is not. We are not so ready to distrust one another when we have no Cause of Suspicion; and there is scarce any Man, who, tho' he has been innocently deceived by his Physician or Friend, will not nevertheless believe them again upon the like Occasion, if they know how to take him aright, and behave themselves well. He may perhaps doubt a while after, but the first Impressions, and the innocent Artifice, when it has had effect, is soon forgotten; but if sometimes it is not successful, it only proves that there were not good Measures taken, or that some Circumstances render'd the Thing unprofitable, but that proves not that it was unlawful and criminal in itself. Some object farther, that if to speak contrary to a Man's Thought is an Action of like Nature with local Motion, and other outward Actions, which having nothing unlawful in themselves, may become good or evil, according to the different Intentions by which they are done, there will be no evil to make use of that Means for our most vile and trifling Interests, as if I desire a Pin when it is necessary, or stoop to take it up when I see it lie upon the Boards of my Chamber, nothing hinders but that I may tell a Lye to get it, provided I do no Man any wrong by it. But this Consequence does not seem to be well drawn. For the use of Speech is not only guided by Justice, Humanity, and Charity, but also by Maxims of Prudence. For no wise Man will have recourse to the least Disguise, but in Cases of Necessity. Let us hear a pleasant antient Writer upon this Subject, whom neither *Grotius* nor our Author have quoted. Οὐδὲ περὶ τῶν ἡρότων, ὅσοι τὴν χρείαν ἐνεκα ψεύδονται, συζῶντες τιναξὺν ἐπιγεμαλλον καὶ ἐπάμειπτες αὐτῶν ἀξιοί, ὅσοι καὶ πολεμίας ὀνητήρησαν, ἢ ἐπισωτηρία τῶν τοιῶν φαρμακῶν ἐχρήσαντο ἐν τοῖς δεινοῖς, οἷα πολλά, καὶ Ὀδύσσεος ἐπίειε, τὴν τε αὐτῆς ψυχὴν ἀρνύμενον, καὶ τὴν ῥόσον τῶν ἐταίρων, ἀλλὰ περὶ ἐκείνων, ὧς αἰεὶ, φημί, οἱ αὐτὸ ἀνέν τῆς χρείας τὸ ψεύδωσθαι, ἢ ἀληθείας τίθειν, ἢ ὁδύσσει τῶν πραγμάτων, καὶ ἐνὶ ταῖς βίαις ἐπ' ἄλλοια προσοσσι ἀναγκαῖα, *Lucian in Mendac. vel Incredul. in Princip.* "I speak not, says the Discourser in the Dialogue, of them who Lye for their Profit, they are to be excused, and some commended; as for example, such as Lye to deceive their Enemy, or them who make use of it as a Remedy to escape some great Danger, as *Ulysses* often did to save his Life, or to procure the return of his Compa-

and Hiring) to explain and communicate to him a Person with a Commission to search into the all that belongs to that Art or Profession. If I send State of such or such an Affair, he is bound by

nions, but that which surprizes me most, is to see some Men, without any Advantage to themselves, to delight more in Lying than speaking the Truth, and continue in it all their Days without Necessity. Indeed, when Men lye in Bravery, and make a Trade of it, they lose all Credit with the Wife. Otherwise, though an honest Man believes he may innocently, for some good Reason, by his Discourse and Actions, make another understand him of a thing he thinks not, yet he does not therefore neglect a Correspondence between his Words, and Actions, and Thoughts, as the most natural Use of the Tongue, and other outward Motions, so that this Agreement is disturbed against his Will, being forced to it by the Constitution of humane Affairs, and by the Indiscretion, Imprudence, and Malice of the greatest part of Mankind; at least, if he be not engaged in a thing that brings Trouble, his Candour and Freedom, which are the Characters of a truly good Man, will hinder him from speaking or doing any thing which may make his Sincerity and Fidelity be suspected in the least. But there is another thing which ought to keep us from using any Equivocation, but with much Reserve and Circumpection, which is, that we ought not only to avoid all Evil, but every thing that tends to it. For it is certain, that by Lying, Feigning, and Dissembling upon slight Occasions, Men get a Habit of Dissimulation and Counterfeiting, which degenerates into a Vice, because it will incline us to be insincere with those to whom we ought faithfully to discover our Thoughts. For this Reason it is, that we ought to take very great Care to keep Children from Lying (See *Montagne's* Essays upon this Subject, l. 1. c. 9. and the Treatise of Educating Children, by Mr. *Locke*, §. 134, &c.) because this Artifice can serve only to hide their Faults, and they are not of Age sufficient to discover the Occasions, when Dissimulation and Counterfeiting is innocent, and so they'll come in time not to speak one Word of Truth, but always have a Lye ready for the least thing. But as to such as are become Men of Understanding, 'tis not to be feared but that they'll be able to set due Bounds to this Permission of Feigning and Dissimulation, provided they seriously labour to regulate their Conduct by the Light of right Reason, without which they may abuse the least disputable and commonly received Moral Principles, and by which they'll be full of Reverence toward God, Lovers of Justice, careful to give every Man his Due, averse to all fraudulent Dealing, and in a word, a truly good Man; and I dare answer for him, will never be guilty of any unlawful Dissimulation, and as far as is possible, he will so order himself, that his Words and Actions shall exactly agree with his Thoughts. I say, as far as is possible, for as the famous *English* Chancellor, the Lord *Bacon*, judiciously observes, "*Serm. fidel.* c. 6. Dissimulation is a necessary Consequence of Silence and Secrecy (*Taciturnitatis*) inso- much, that whosoever will conceal a thing, must dissemble, do what he can. In truth, Men are too cunning to suffer us to remain in a perfect Indifference, without shewing any Inclination to one or other of the things which they desire to know. They'll attack you, examine and pump you with a thousand Questions, so cunning, that unless you maintain an obstinate and ridiculous Silence, you must discover something of your Sentiments; and if you do nothing to discover them, they'll make such Conjectures upon your Silence, that it will be all one as if you had spoken. You may guard your self a long time by Equivocation, and dark Expressions, but, in a word, there can be no perfect Concealment, if some Degree of Dissimulation be not allow'd; and so Dissimulation is nothing else but a necessary Dependent upon Silence. To keep a just Temper, every Man must get himself a Reputation for Sincerity and Veracity, an Habit of Silence and Secrecy, and an Ability to feign and dissemble, when it is necessary. It is easy to answer all the other Difficulties raised against the Opinion of our Author, and to oppose greater to the contrary. It shall content me to observe, that if this last be true, thousands of Actions which the World accounts innocent, must be condemned, and are practis'd every Day with Deliberation. I do not say, by most of them who are zealous Defenders of this Opinion, but by all Men generally, we may say, that the Question comes to this, Whether (for Example) a Man may say, that such a one is not at Home, or find out some Trick to free our selves from an indiscreet and importunate Person? I do not believe that any Man of Sense will deny himself to have committed such Faults, tho' he is sorry for them. Nevertheless, there is no Medium; either we must condemn our selves for it, or resign our selves to the Indiscretion, Imprudence, and often to the Malice of another, by a general Sincerity, and without Reserve, or we must allow a Permission to speak and act contrary to our Thoughts. Further, to shew the Weakness of the Opinion I am now opposing, I desire it may be consider'd, what Absurdities they engage themselves in, who maintain the contrary Opinion: For these are three Maxims of St. *Augustin*, which Mr. *La Placette* approves in *Part 1. Moral Essays*, 1. That if all Mankind were at the Point of Destruction, and 'twere possible to save them all by a Lye, the Lye must be avoided, and all Mankind perish. 2. That if by telling a Lye we could prevent one or more of our Neighbours from sinning, we ought rather to suffer our Neighbour to sin, than tell a Lye. 3. If by Lying we could keep our Neighbour from eternal Damnation, we should rather leave him to perish, than save him by the loss of Truth. In fine, it is in no wise necessary to determine, when and how many times we are permitted to lye; that depends upon Circumstances, which are infinite, and every Man's Judgment. Here, as in many other moral Subjects, we can give general Rules only. As often as they to whom we speak have no Right to require of us to speak freely what we think, we do them no Injury if we conceal the Truth from them. And so the disguising of the Truth has not the principal Property of a true Lye, which is to give them with whom we treat reason to complain, that we have not dealt sincerely with them. But it does not follow, that we may always speak or act in a manner different from our Thoughts, when a Person hath a Right to require the contrary of us. I have alledged the Reasons that concern our selves above, or the Consequences of taking too large a Liberty. I own that this Permission may be easily abused, and therefore the surest way is to use it as little as possible; but a good use may be made of it; and in what a bad Case shall we be, if we must condemn and disuse all those things, by which Men take an Occasion to excuse or justify their Irregularities? But, II. If it be true, as we have shewed, that the Principles of natural Right afford nothing to prove, that all Discourse, and in general, every exterior Sign differing from our Intentions and Knowledge, is criminal of it self. There is no Evidence to prove that the Holy Scriptures condemns it absolutely, at least, if we may say (what indeed I don't believe) that the Law which forbids Lying and Dissimulation, is a positive Law only. Thus we can't alledge any Text, either in the Old or New Testament, where Lying or Dissimulation is mention'd, but it is accompanied with some Fraud or Cheat, and by which at least some Duty of Charity is broken. Nothing is more common in the Writings of the *Hebrews* and *Hellenists*, than to understand by Truth, Fidelity in keeping our Engagements; and by Lying, Perfidiousness, Deceit, and Injury done our Neighbour, after some manner or other. The Reason that St. *Paul* gives for his Exhortation, *To avoid Lying, and speak the Truth every Man to his Neighbour*, insinuates plainly enough, that he did not extend his Prohibition to Lyes profitable, and altogether innocent. See *Velthuisen De Princ. Justi & Decori*, where we may find Reflections which I have omitted. Farther, we may observe in the Scripture several Examples of good Men, who are not blamed for having used Dissimulation, and an innocent Lye. See Mr. *Le Clerc* on *Gen. xii. 13*. Moreover, there is one that proves plainly, that it is sometimes commendable to speak contrary to what we think, and that is, of the *Egyptian* Midwives mentioned before by the *Bye*. See *Exod. i. 20, 21*. As to my self, I think an unanswerable Argument for my Opinion may be drawn from it. 'Tis evident, these Women did not speak the Truth to *Pharaoh*; and if any one doubt of it, he will be convinced, if he reads what Mr. *Le Clerc* says about it in his Remarks upon the 17th Question of his *Uncle*; and most of our Interpreters and Divines agree with him. Nevertheless, God hath greatly rewarded that Lye, and consequently not only excuses it, but approves it. For it is an empty metaphysical Subtlety to say, That God rewarded not the Lye, but the Act of Mercy, which those wise Women shewed; as if one and the same Action could be good and evil in divers Respects, or as if a good Intention could render an Action, in its own Nature evil, good. But if this Example do not satisfy, behold another, which will make it plain, that God permits, yea, requires sometimes, that Men use an innocent Delusion. 'Tis of the Prophet who is spoken of, *1 Kings xx. 35, &c.* This Holy Man, by God's Order, having caused himself to be beaten, set himself in the way where King *Abab* was to pass, and cover'd himself with a Veil, that it might not be known that he waited for him; when he perceived him coming, he cried out, and implored his Help; and he tells him how he came in that Condition by an Accident, which he had feigned. He says, That being in the middle of the Battel, a certain Man brought a Prisoner to him, and charged him to keep him safe upon pain of Life, or paying a Talent; but while he was busy up and down, his Prisoner got away. Hereupon the King sends to the Prophet that he had condemned himself; and then the Prophet unveiled himself, declared to him why God had ordered him to use such an Artifice, *viz.* That *Abab* might condemn himself by judging in the like Case. See Mr. *Le Clerc's* Notes upon the Place.

Covenant to acquaint me with all the Discoveries and Informations he hath gain'd about that Matter. If I am to exercise towards another any Duty of Humanity, which must be perform'd by Speech, it is manifest my Words must be agreeable to my Thoughts and Intentions. If a Man undertake to write an History², he is to deliver nothing which he knows to be false, by virtue of that general Obligation by which we are bound to promote the Use and Benefit of others. As we are likewise by a common Engagement tied to express our Minds by the clearest and plainest Signs, in all such Cases, when if we do otherwise, we may bring some Hurt or Prejudice on innocent Persons. So, lastly, in all Commerce and Business between Men, in which, by the Consent of the Parties, some Right or Obligation is to be produc'd, we are to declare our Meaning openly and clearly to the Persons with whom we deal. For otherwise there could be no possible way of rightly adjusting those Concerns. But since it doth not always so happen, that I am bound by any of these Rules to open my Thoughts to another about any Affair, especially such as is private and particular, it is evident from hence, that I am not under an Engagement to unfold all my Opinions and Intentions to Men alike, but those only which they have a Right (either perfect or imperfect) to understand; which Right supposeth a correspondent Obligation on my part: And that therefore I may fairly conceal and dissemble those Things, which another hath no Right to know, and which I myself have no Obligation to disclose³: Nay, in such Cases, where no body else is injur'd in his Right, and where the Advantage or the Safety of myself, or of some other Person, cannot otherwise be procur'd, it shall be allowable for me apply the common Signs in such a manner, as to express what is really contrary to my Judgment. For since the Compact about applying Signs in such a certain way, bears a regard to other Obligations, which are by the means of these Signs to be fulfilled; therefore when those Obligations cease, there appears no reason why I may not make a different Use of the Signs, if I injure no Man, and at the same time have no greater Convenience of benefitting myself or others.

VIII. From these Principles and fundamental Rules, it is easy to understand both the Nature of *Truth*, which Men are obliged to speak and profess; and the Nature of a *Lye*, which is so abhorr'd by all the good and honest, and the imputation of which every Man looks on as the foulest Disgrace⁴. The former then consists in this, That the Signs which we make use of, and especially our Words, do in a proper and convenient manner represent our Thoughts to another, who hath a Right to understand them; and to whom we are bound, either by a perfect, or an imperfect Obligation to discover them: And this to the end, that he, by apprehending our Meaning, may obtain some Benefit, or may escape some undeserv'd Evil, which would have follow'd upon our deceiving him. So that besides that *Logical Truth*,

which consists in a Conformity between Words and Things, this *Ethical* or *Moral Truth*, of which we are now treating, superadds the Intention and Obligation of the Speaker: On which Score, he who declares the Truth out of Error, or Imprudence, hath barely recited the *Logical Truth*, but hath not exercis'd the *Moral*. And he who blabs out any Matter without any Obligation in himself, or any Right in the other Party, ought to be esteem'd rather an idle Prattler, than a Speaker of Truth. And hence 'tis easy to gather, what must be the Nature of a *Lye*; namely that it is, when our Signs or Words bear a different Sense from our real Conceptions; whereas the Person to whom the Signs were directed, had a Right to understand, and to judge of those Conceptions; and we on our part lay under an Obligation to make him apprehend our Meaning. I take this to be a more clear and distinct way of shewing the Necessity we stand under to declare our real and undisguis'd Intentions, than if I should derive the Sin and the Baseness of *Lying*, barely from that general Rule of *natural Law*, that *No Man is to be hurt*; as if the whole Nature of a *Lye* consisted in its Power of *hurting*. For strictly speaking, we do not *hurt* another by with-holding from him what he hath only an *imperfect Right* to receive; and yet the Violation of such an *imperfect Right* is sufficient to constitute a *Lye*. For the same Reason *Philostratus's* Notion of a *Lye* is confus'd and unaccurate, when he reports⁵, That amongst some of the *Indians*, any Student in Philosophy who was found guilty of this Vice, was render'd incapable of bearing any Magistracy or Honour, *Because he had by Lying cheated the common Society of Mankind*. But, as in all Acts by which we recede from Law, Error, Imprudence, and Rashness are distinguish'd from *Malice*, or wicked Design, so neither is any Man properly said to *lye*, but he who with evil Intention, and pre-conceiv'd Malice, tells another what is really different from his Sentiments or Resolutions, either to prejudice or to delude him. And hence, he who having been deceiv'd by another Man, delivers things which he himself takes to be true, reports a *Lye*, but is not himself the *Lyar*. Yet a Person, who catching up Things with too hasty a Credulity, afterwards disperseth them amongst others, exposes himself to the Censure of Rashness and Folly. Nay, the spreading of another Man's *Lye*, or of a Matter not certainly known, may in some Cases bring an Obligation on the Publisher to repair the Damage occasion'd by the Report; especially when such a Publication approacheth near to that *Trespass* which the *Civilians* term *culpa lata*⁶.

IX. Having thus discover'd the true Source, and the genuine Foundation of Truth and of Lyes, we may assure our selves, that those Authors are mistaken, who assert, That a *Lye* and an *Untruth* are really the same thing, and that he deserves to be branded with the Name of a *Lyar*, who says any thing differing from his Judgment; and that consequently to speak otherwise than we think, is in

² See what our Author has said in his Discourse, *De Obligatione erga Patriam*, §. 23.

Mr. BARBEYRAC'S NOTES on §. VIII.

³ See §. 10. following.

⁴ See Lib. 3. c. 1. § 4. Note 2. before-going.

⁵ *Aeschyl. Cæphor. σιγῆν θ' ὄρα*, &c. v. 580. The Art of Silence and of well-term'd Speech.

⁶ *Sophocl. Trachin.* p. 347. Edit. H. Steph. ὡς ἐλευθέρῳ ψαυθεῖ καλεῖσαι, &c.

What Fate so grievous to a Free-born Man

As to be call'd a Lyar ————— ?

Add *Montaign's Essays*, l. 1. c. 9. l. 2. c. 18.
l. 16. c. 1, &c.

⁷ *Apollon. Tyan.* l. 2.

⁸ See the Story of *Cæsell. Bassus* in *Tacit. Ann.*

its own Nature base and sinful. An *Untruth* is when you apply Words in such a manner, as that another shall conceive from them a Sense not agreeable to your inward Imaginations. But now, if the other Party have no Right, by Virtue of which he ought clearly to understand my Meaning; and if I do not hereby prejudice any Man without Cause, there seems to be no Reason, why, if I find it convenient for me, I may not use those Words rather according to my own Pleasure, than the Pleasure of another. Hence every *Lye* is an *Untruth*, but every *Untruth* cannot come under the Name of a *Lye*: And if we take *Aristotle*¹ in this Sense, when he affirms, *That a Lye is in itself foul and disgraceful*, there will be no need of *Grotius's* Limitation, who explains *καθ' αὐτὸ, in itself*, by *Generally, or without regard to the Circumstances*. For such an *Untruth* as escapes Censure, by virtue of some particular Circumstances, ought, on no Account, to suffer the odious Character of a *Lye*. And, on the other side, that every *Lye*, properly so called, is in its own Nature base and scandalous, seems to be beyond dispute.

It is worth remarking on this Head, that the very speaking what is true may sometimes create and constitute a *Lye*: Which not only happens when a Person affirms the Truth with the Air and Address of a *Lye*, and by his² Manner, his Gestures, and his Actions, which used to be as it were the Life and Soul of Discourse, makes his Hearers believe the contrary to what he delivers; as *Quintilian* shews us how 'tis possible to be guilty of a *Lye*, as well as of a *Solecism*, by a base Action, when we speak one thing, and hint another, by a Posture or a Nod; but it chiefly takes place in those, who by a Practice of frequent Lying have depriv'd themselves of all Credit and Belief. Now such Persons as they are not easily regarded, how willing soever they may be to deliver serious Truths; so they have an opportunity of abusing the Diffidence of a Hearer³, to his Deception and Delusion; who thinking them to be always like themselves, may easily be cheated by believing quite the contrary of what they avow. The Instance in the Fable is well known, where the Boy so often tricked the Countrymen with a false Alarm of the Wolf, that at length, when the Wolf really appear'd, he could not gain Credit enough for their Assistance. *Agessilaus*⁴ turn'd this Fetch into a Stratagem of War. For in as much

as 'tis reckon'd most impolitick in a General openly to proclaim his Resolutions, for which reason the Enemy is not wont to believe what is given out in this free and *secure* manner, *Agessilaus* by this piece of Subtlety prevail'd on the *Persian* Nobleman who oppos'd him, to march his Army quite another way than what he had thus publish'd that he would take himself⁵.

But as no Man will presume to condemn the wise Gravity of *Epaminondas*⁶, who could not bear to utter a *Lye*, tho' in jest: So, on the other hand, it is very weak to believe, that a Person always incurs a heinous Guilt, when, without injuring any one else, and for the Advantage of himself and others, he delivers Words differing from his real Thoughts. It were therefore to be wish'd with *Cicero*⁷, *That all Simulation and Dissimulation were utterly banish'd from human Life*, and that Men were arriv'd at such a happy Temper, as that no one should envy the Goods of another, or plot to rob him of them: that no one should abuse the Simplicity and Credulity of others to their Prejudice or Deception: and lastly, that no one should in any instance resist the Command of right Reason: Such a strict and accomplish'd Person *Achilles* pretends to be in *Homer*⁸; it is his brave Declaration,

Ἐχθρὸς γὰρ μοι κείνος, ὁμῶς αἰῶδα πύλησιν,
Ὅς γ' ἕτερον μὲν κεύθει ἐνὶ φρεσίν, ἄλλο δὲ βάζει.

Like Hell I hate the Man, whose Tongue reveals
A different Tale from what his Heart conceals.

But since he, who is ever freely publishing and declaring his own Concerns, lays himself open to the Fraud of wicked Men; and since most Persons are inclined rather to be won upon by Artifice and Shew, than to be convinc'd by solid Plain-dealing; therefore it may not be advisable for us to exclude from human Society, the Art of innocent Dissimulation, till all the Wickedness, and all the Folly of Mankind is turn'd into Probity and Wisdom. *Pindar's* Remark is excellent to this Purpose, *Nem. Od. v. v. 30, &c.*

⁶ Not Truth with open Face and open Heart
Is serviceable always, always wise:
But often 'tis in Life the noblest Art,
To know the prudent Use of Silence or Disguise.

¹ Lib. iii. c. 1. f. 9. ² *Xenophon* *Rer. Græcar.* l. iii. c. 4. p. 292. Edit. *H. Steph.* *Cornel. Nep.* in *Agessil.* c. iii. To this Head likewise belongs the sleight of the Old Fox in *Terence*, *Heautontimor.* Act. iv. Scen. 3. ³ See *Cornel. Nep.* c. iii. n. 1. ⁴ *Iliad.* ix. v. 312, 313.

MR. BARB. NOTES on §. IX.

¹ His Words are, *καθ' αὐτὸ δὲ τὸ μὲν ψεῦδος φαῦλον, καὶ ψεκτὸν, Eth. Nicom.* l. iv. c. 13.
² According to the Judgment of *Quintilian*, *Instit. Orat.* l. i. c. 5. *In gestu etiam nonnulli putant idem vitium inesse, cum aliud voce, aliud nutu, vel manu demonstratur*, which is the sense of our Author.
³ 'Twas upon this Principle that the judicious Conduct of *Jobu de Vega* was grounded, when he advis'd *Diego de Mendoza*, who succeeded him in his Embassy, That he would not find the least Truth in the Ministers of that Court. *Mendoza* replied, Then they have met with their Match, for if they tell me one *Lye*, I'll tell them an hundred. But, says *Vega*, I took another course sometimes, for I answer'd their Lyes with as many Truths; and I found that it turned to as good an account: For they never believed me. Thus we see how Lyars may be deceived. This is related by *John Antonio de Vera* in *Disc.* ii. concerning an Ambassador, quoted by *Anchet de la Houffaye* upon the 13th Letter of *Osut*.
⁴ Here we may add some Verses of *Horace*, *Epit.* l. i. Ep. 17. v. 55.
*Nota refert Meretricis acumina, sæpe catellam,
Sæpe perisclidem raptam sibi sentis, uti mox
Nulla fides damnis, perisque doloribus adsit, &c.*
⁵ *Offic.* l. iii. c. 15. *Quasi si Aquilliana definitio vera est, ex omni vita simulatio, dissimulatioque tollenda est.* *Cicero* speaks here only of Feigning and Dissimulation, accompanied with Injustice and False-dealing; although in the manner our Author expresses it in the Original, he seems to take the Orator's Words in a general sense, as *Grotius* has indeed done in §. 13. of the Chapter often quoted. See *Mr. Noëdt*, *De Forma emendandi doli mali in contractibus admissi apud Veteres*, c. ii.
⁶ *Pindar's* Greek is this, *Ὅου τοι ἅπανα κερδαίων* *Καὶ τὸ σιγᾶν πολλάκις ἐστὶ σοφώ-*
Φαίνοισα πρόσωπον ἀλάθει ἀτρειχῆς *τατου, ἀνθρώπων νοῦσαι.*

Theſeus's Wiſh in *Euripides, Hippol. Coron. v. 925, &c.* is but vain and fruitleſs. Tho' 'tis certain at the ſame time, that he who makes uſe of theſe practiſes of Concealment and Cunning farther than is neceſſary for his own Defence, renders himſelf unfit to be truſted, and uncapable of being dealt with in any honeſt Affair or Buſineſs; in as much as 'tis impoſſible, but that ſuch a Perſon muſt be ſuſpected in all that he ſays or does.

The Arguments by which ſome attempt to prove that every *Untruth* is in itſelf odious and ſinful, are of no weight. They tell us, "That the *Faſe-speaker* deſileth and diſgraceth his Tongue, "that moſt noble Member, by ſuch an Abuſe; "that he deprives himſelf of Credit, to the great "ſtop and hindrance of many good Offices amongſt Men; ſince he never fails to gain this "amongſt other Diſadvantages, *not to be believed tho' he ſpeak the Truth.* But this Charge holds good only againſt a ſtrict and proper Lye, not againſt ſuch Falſities as Prudence often adviſeth and recommends. They add, "That to falſify, argues "a Man to be of a low and abject Spirit; ſince "he who could rely upon ſolid Plainneſs and "Truth, would have no need to ſeek Refuge in "Tricks and Shifts. But thoſe Untruths, which are both innocent and unneceſſary, do not always proceed from meaneſs of Soul: And ſometimes, amongſt wicked Men, Honesty and Truth itſelf cannot be ſupported, but by indirect and artificial Methods. Others are more fond of this Argument; "Speech is given to be an Interpreter "of the Mind; ſince then every Untruth is contrary to this End, it ought likewiſe to be eſteem'd repugnant to the Order of Nature: and "farther, that to have the Tongue diſſent from "the Mind, quite diſturbs that Harmony which "ſhould appear in the Powers and Faculties of "Man. In Reply, we willingly allow, that Speech is the Interpreter of the Mind; but 'tis in ſuch a manner, as that it ought not to blab out more than the Mind gives it commiſſion to diſcloſe, the Mind being to judge what is convenient to be declared, and what to be concealed.

N. We have aſſerted every Lye to be a Violation of ſome Right; but what kind of Right this is, and how acquired by Men¹, all are not agreed

in explaining. Some conceive, that ſince both God and Men have a natural Ability to underſtand the Truth, which is obſtruded by the contrary Speeches, therefore they have, on this very account, a Right of requiring others to expreſs themſelves in an intelligible manner. Now with regard to Almighty God, the thing is beyond diſpute: For to uſe any kind of Falſity in our Addreſſes to him, is not only extremely irreverent, as if bare and open Truth were not as prevalent with the Divine Majeſty, as Colours and Fictions; but alſo in the higheſt degree fooliſh, ſince God doth not ſtand in need of the Information of Men. And therefore *Cain*^a was not only impious, but ſtupid, in endeavouring to conceal his Brother's Murder from God, eſpecially by ſo impudent and ſo rude a Reply. And thus far that of *Sophocles*^b will hold good, *I hate a Man, who being taken in Wickedneſs, attempts to make his Excuse.* But otherwiſe, this is no good Conſequence; A Perſon is naturally capable of underſtanding a matter, therefore he hath a Right to underſtand it; nor doth a *physical* Ability always infer a *moral*. As for that which ſome add to what we are now ſaying, That he who hears an *Untruth*, doth yet underſtand the Words; and therefore that Falſe-speaking doth not take away the Right of *Underſtanding*; this is nothing at all to the purpoſe. For ſuch an one underſtands indeed; but he underſtands only a Shadow and Fiction, inſtead of the Truth which he deſires.

Others there are which derive that Right which is violated by *Lying*, not from *Nature*, but from the Art of Men; that is, from ſome tacit Compact: For, ſay they, ſince Diſcourſe, and other the like Marks and Tokens were introduc'd by human Inſtitution, Men at the ſame time laid a mutual Obligation on each other to uſe theſe Signs in ſuch a manner, as to be able hence to make a Judgment of the Perſon's Sentiments, with whom they ſhould confer: Becauſe, without ſuch an Obligation, and if every Perſon were allow'd to apply Words how he pleas'd, and to hinder others from apprehending his Meaning, this Invention of Signs had been altogether vain and fruitleſs. This is the Opinion of *Grotius*^c, on which we may make this Remark, That there is not ſufficient

^a *Geneſ. iv. 9.*

^b *Antigone. p. 234. init. Edit. H. Steph.*

^c *Lib. iii. c. 1. f. 11.*

MR. BARR. NOTES on §. X.

¹ Our Author (in §. viii. before-going) recites the Words of *Philoftratus, De Vit. Apoll. Tyan. Lib. ii. c. 12.* That among the *Judæans*, if a Student in Philoſophy was taken in a Lye, he was condemn'd not to be capable of any Office or Dignity, becauſe by Lying he would deſtroy the univerſal Society of all Mankind, *ὡς καταπορεύσαντα βίον ἀνθρώπων.* The Reaſon which our Author makes uſe of upon this Occaſion is very improper to diſcover diſtinctly the Foulneſs of Lying; but he had done better, if he had ſaid, that *Philoftratus* ſpeaks nothing of it: For this is one of the Places where our Author miſtakes the Senſe of the Writer he quotes. For theſe are his Words, "When any *Indian* is dead, there is a Magiſtrate appointed to go to the dead Perſon's Houſe, and enquire how he hath liv'd. If that Magiſtrate lye, or ſuffer himſelf to be deceived for want of making an exact Enquiry, the Laws put him out of his Office, and render him incapable of all Offices. Becauſe he has repreſented the Man's Life otherwiſe than it was. This is all *Philoftratus* ſays, l. ii. c. 30.

² Mr. *Placette* in his Treatiſe of Lying, c. 6. affirms, "That that which makes a Lye evil, is the Sin committed, and not the Original Compact, which is much eaſier to imagine than prove; but a New and Particular Compact, which is made with them to whom we ſpeak, every time we ſpeak to them. For indeed, *adds he*, when I ſpeak to any Man, I do two things; I oblige my ſelf to ſpeak what I think, and require that he ſhould believe me. If he to whom I ſpeak believes what I ſay, the Bargain is not only made but executed on the part of him to whom I ſpeak. If I lye on my part, I break the Treaty I am making with him, and conſequently I ſin againſt the Law of Nature, which requires, that all Agreements be faithfully executed. When he to whom I ſpeak reſuſes to believe what I ſay, and ſo accepts not the Agreement I propound, he ſtill appears to diſcredit my Proceedings, as if I deſign'd to make an Agreement which I would not keep. So that whether a Man believes what I ſay, or not, I am always oblig'd to ſpeak Truth. But I fear that this New and Particular Compact of Mr. *Placette* will be more hard to prove than the Original Compact, which he rejects. For in both theſe ſorts of Agreements the Conſent is implied only. There ought to be ſomething to ſecure it by a clear Conſequence. And ſo it lies upon Mr. *Placette* to prove that this New and Particular Compact reſults from the very Nature of the Action, which we always do when we ſpeak to any other, (i. e.) from the Nature of Speech, conſider'd barely as ſuch. I own, that the Natural Intention of Speech is to communicate our Thoughts one to another; but it is ſufficient that we do it on all occaſions when any one hath right to require it. The eſtabliſh'd Cuſtom and Good of Society require no more. Farther, as I have already ſaid in Note 1. Men never pretend to engage to ſpeak always, and to all the World, whatever they have in their Minds, ſo that they never reſerve to themſelves a Liberty of ſhewing a contrary Intention by their Actions or Words, and a Man may not reaſonably require the like of others.

Care taken in it to distinguish between those two Obligations, one of which regards the applying Signs in general in such a due manner, that another may understand our Thoughts; and the other engageth us to discover by those Signs our real Meaning to such or such a particular Person; which two are very different, and proceed from distinct Principles: For in as much as Words borrow their Signification from the Force of Imposition, we must suppose some Agreement to have passed between Men who speak the same Language, that in common use they would apply such Signs to express such things. But the Obligation which ties me actually to address those Signs to another, or to open my Mind to him about such a certain Affair, ariseth either from some general Command of the Law of Nature, or from a particular Covenant, as has been above explain'd. Hence it appears what Judgment we should make of their Notion, who deny the Nature of a Lye to consist in the Violation of a Pact, on this Principle, "That whatever is constituted, not by Nature, but by the Compact of Men (especially tacit) is to be derived and to be valued from the point of Profit, and from that alone, Whereas that Men should understand all that others say, doth not seem to be a thing so very profitable and beneficial. On the contrary, it is much for our Interest, that we should have a full Liberty of covering either with Silence or proper Colours, such Matters as may be kept secret without the Prejudice of other Men, and with our own Advantage. Here those Points are confounded, which ought to have been with Accuracy distinguish'd. For in this, that a Man should understand the Thoughts of all others; or that all others should understand his, there is indeed no Profit; nor did Men, by introducing of Speech, lay any such mutual Obligation on themselves. But we have already shewn how far any Person is bound to declare himself to another, and how far the other hath a Right to understand him. Supposing then an Obligation in us to communicate our Thoughts to such or such a Man, upon this the other Obligation which attended the Introduction of Speech falls in, and exerts its Force, engaging us so to apply our Words, that the Party may apprehend our Meaning. And of this the Profit or Advantage is so very great, that without it there would be no manner of use in Speech.

XI. Thus much being premised, it will not be difficult to judge how rightly those several Cases, in which the Truth is not precisely spoken, are yet, in common Estimation, exempted from the Character of Lyes. And here first of all some distinguish between speaking what is *Falſe*, and not speaking or dissembling some part of what is *True*; affirming the former to be unlawful, but the latter to be often innocent. On which point we are to know, that although to hold our Tongue cannot properly be term'd a Lye, especially if we used no other Sign equivalent to Speech; yet our *Silence* may on

another account become criminal: As suppose we hinder by it some Good which we were obliged to procure; or cause some Evil, which we were bound to avert. This is what the Poet calls

—*animumque nefas ſcelerare ſilendo,*
Sil. Ital. l. xvi. ver. 610.

The Soul with ſilent Miſchief to deſile.

Thus a Watchman, who is ſet to give notice of the Enemy's Approach, ſhall incur the ſevereſt Punishment upon Neglect of Information. *Polybius* ^a ſays, that an *Hiſtorian*, who profeſſeth to give an account of Affairs, is no leſs a Liar, if he ſuppreſs and conceal what really happen'd, than if he relate what is falſe. But in a matter which I am not obliged to declare to another, if I cannot with Safety conceal the whole, I may fairly diſcover no more than a part. An Inſtance of this is uſually given in the Caſe of *Jeremiah*, who in the xxxviiith Chapter of his Prophecy, v. 25, &c. ^b being conſulted by the King concerning the iſſue of the Siege, prudently hides that Particular from the Princes, as the King expreſſly order'd him; aſſigning another Reaſon of the Conference, which notwithstanding was alſo really true. Here the Prophet told only a part of the Truth, being in no wiſe obliged to diſcloſe the whole. To the ſame purpoſe the Story of *Athanaſius* is produced, who meeting himſelf with thoſe who were ſent to apprehend him, and being ask'd, Whether he had ſeen *Athanaſius*? answer'd, *That he ſaw him lately paſs by this way, and that he was now gone on board.* For here he was under no Obligation to betray himſelf. As to the Example of *Abraham* in *Geneſis* xx. 12. ſome queſtion whether that moſt holy Man acted prudently in calling *Sarah* his Siſter, and concealing their Marriage: For he knew her Beauty to be ſuch, as might kindle a Paſſion in the Beholders, and at the ſame time that unmarried Perſons are reckon'd more capable of Addreſſes than others ². Nor, ſay they, was *Abimelech's* Expoſtulation with him unjuſt; and on the contrary, it was moſt inhuman in *Abraham* to ſuppoſe that there was no Piety or Honesty in a State, before he arriv'd to be their Inſtructor: Others excuſe the Patriarch on this Argument, That the hope of Life commonly bends the greateſt and moſt ſtubborn Souls; and that ſcarce any thing is lock'd on as baſe and infamous, which is undertaken on the ſcore of declining Death. But this Point we leave undecided.

XII. *Grotius* diſtinguiſhes likewiſe between thoſe Signs which have been invented and determin'd μετὰ ſυνθήκης, or with a mutual Obligation, and other things about which no ſuch Agreement hath paſſ'd (for no doubt when a Compact hath been made concerning the uſe of any thing, we are exactly to conform to that ſpecified Uſe) and as to the latter ſort, he is of Opinion, that 'tis allowable to

^a Lib. 12. c. 7. p. 660. B. Edit. *Caſaub. Wech.*

^b See *Grot.* l. 3. c. 1. f. 7.

MR. BARB. NOTES on §. XI.

³ This is true; but, as is aboveſaid, that Conſent has no Obligation in it ſelf; and if there were no other Reaſon to lay a Neceſſity upon us to make known our Sentiments, nothing would hinder but that every one might ſignify what he pleaſed by all Terms, ſo that of the two Obligations, of which our Author ſpeaks, one is only a Condition neceſſary to acquit us of the other.

¹ *Αγνοῶν, ὅτι τὸ ψεῦδος ἔχ' ἥπτόν ἐστι περὶ τῶς ἢ τὰ γεγονότα γράφοντας ἐν ταῖς ἱſτορίαις,* l. 12. c. 7.

² But, as Mr. *Le Clerc* has obſerved, *Abraham* might have feigned many other Excuſes to let them know that *Sarah* could not be his Wife, or to put off his Answer about his Marriage, till he could get out of *Egypt*. Whereas, had he owned her for his Wife, he had laid Snares for his own Life to take him off, and get rid of him; becauſe he was the only Obſtacle that hindered the Enjoyment of *Sarah*.

misapply them, even when we foresee that the other Party will thence be led into a false Judgment, provided either that no farther Hurt follow this Deception, or that the Hurt which follows it, is (setting aside the Consideration of the Deceit) lawful; and when we might fairly have hurt him in an open manner: And to this we willingly subscribe. For since no Agreement, either general, or particular, is suppos'd to have pass'd, which might have laid a necessity on me to apply the thing in such a manner, and no otherwise, to the end that the said Party might gather my Meaning from it; therefore I am presumed to be left at full liberty as to its Use, so long as I hurt no Man injuriously, or without Cause. The Party may thank himself for the wrong Notion he hath form'd; and attribute it to his over-curious Impertinence in passing Judgment on other Mens Business. Whilst I am exercising my proper Right, I am not always obliged to hinder another from taking up a false Opinion in other respects harmless. For instance, if a Man, to keep himself from being frighted in the Night, or to have a Light always at hand for some occasion, should sleep with a Candle in his Chamber; he is not bound to put it out, how deeply soever his Neighbour may fancy that he sits up at his Business. The Example of our Saviour, *Luke xxiv. 28.* is a Case of no Difficulty. For every Man may at his pleasure use the Gesture there represented: And nothing is in common Life more frequent, than to feign our selves in a readiness to be gone, that we may discover whether or no we are welcome Guests: we being seriously resolved to depart, unless we are solicited and importun'd to stay. The Case of *St. Paul* in *Acts xvi. 3.* seems a Matter of higher Consideration¹. But as to the other Instance alledged by *Grotius*, of deceiving an Enemy, by counterfeiting Flight, Clothes, Colours, Sails, Arms, and the like; this Practice is allowable beyond Dispute; since we might lawfully have done him what Mischiefe we could, by the most plain and open Means.

XIII. It is the Judgment of the same Author², “ That we do not always contract the Guilt of “ *Lying*, when we use an ambiguous Word or Ex- “ pression, which admits of divers Significations, “ either in common Speech, or by the Custom of “ *Art*, or by some Figure unusual or not intelli- “ gible, provided our inward Meaning is agreeable “ to any one of these Significations; although we “ believe that the Person to whom we speak will “ understand it in a different Sense. But he very “ rightly adds, That such equivocal Speeches are “ not rashly to be approv'd of and allow'd; be-

ing only justifiable when they serve for the In- “ struction of one committed to our Care; or for “ the avoiding some pernicious and insinuating “ Question^b; or for the procuring some Benefit “ to our selves, without the Damage of others^c: For else, if you are under an Obligation to discover your Mind clearly to me, 'tis the same thing whether you deceive me by a plain Lye, or by a doubtful Expression; especially since the latter must, to serve your Purpose, be so fram'd and contriv'd, that I may lay hold on the more obvious and vulgar Sense, whilst the more abstruse and uncommon answers to your inward Conceptions: Otherwise, if both Significations are alike probable, scarce any Person will be so supinely negligent, as not to ask you which way you would be understood? But to speak ambiguously or obscurely to one whom we intend to instruct, or whose Proficiency we would thus try and examine, is on no account faulty; if the good End we propose may by this means be better obtain'd, than by more plain and direct Application. To this Purpose is the Instance in *St. John vi. v. 5, &c.*^d. So if I am not obliged to declare my Mind at all to such or such a Person, nothing hinders but that I may as well let him be mistaken, as let him be ignorant, if, besides that Mistake, he incur no other undeserv'd Prejudice. And therefore no one will censure *Athanasius*^e for the Deception he put on his Pursuers, which we have already recited^e.

It is hence evident, that we ought to interpret *Grotius*, with some Caution, when he says^f, “ It “ is requisite to the general Notion of a *Lye*, that “ what is either spoken or written, or by any “ Marks and Tokens express'd, cannot other- “ wise be understood, than in such a Sense as is “ different from the intention of the Person thus “ declaring. For in Cases where a Man is bound clearly to discover his Meaning, he ought so to frame his Expressions, as that the same Sense which either the Nature of the Business in hand, or the common Use and Custom of Speech suggests, shall be likewise agreeable to his real Thoughts; nor can he, with the least Reason, bid the Hearer thank himself for the Mistake or Damage he suffers, only on the account of not diving into all the remote Quirks and Terms of Expression, utterly foreign to the present Affair; that is, for not being a Conjuror. And the Remark of *Isocrates*^g must be own'd for a certain Truth², *That to use ambiguous Sayings in judicial Contentions about Bargains, and Matters of Interest and Moment, is scandalously base, and shews a very high degree of Wickedness.*

^a *De Aequivocis*, l. 3. c. 1. §. 10. n. 1, 2.

^b *Vid. Senec. Troad.* v. 597, &c.

^c *1 Sam.* xxvii. 10.

^d *Vid. Grot.*

ubi supra. ^e *Vid. Theod. Hist. Eccl.* l. 3. c. 9.

^f *Lib.* 3. c. 1. f. 11. n. 1.

^g *Panathenaeic.* p. 486. Edit. *Par.* 1621.

MR. BARB. NOTES on §. XII, XIII.

¹ We may be well satisfied with what *Grotius* hath said about this Matter, which I shall set down. *St. Paul* was not ignorant that the *Jews* went this way, that the Command to be circumcised, which was then abolished, did yet oblige the Posterity of the *Israelites*, and as even *St. Paul* and *Timothy* himself were once persuaded. But this was not in *St. Paul's* Intention, but his Design was thereby to gain a familiar Converse himself with the *Jews*, and procure it at the same time for *Timothy*. In truth, the very same Moment that the Divine Law which commanded Circumcision was abrogated, Circumcision could no longer be a Sign of the Institution which every one was indispensably to bear. But the Evil, which the Error in which the *Jews* were for some time, and which they ought to be deliver'd from, was not so considerable as the Good which *St. Paul* labour'd to draw from it, I mean the Establishment of the Doctrine of the Gospel. The Greek Fathers often give the Name of *Oeconomia* or *Wise Management* to this Dissimulation, &c. See *Gataker* upon *Marcus Antoninus*, l. 11. §. 18.

² See the News of the Republick of Learning, *March* 1699.

² The Greek is, *Οἷς χρῆσθαι [λόγοις ἀμφιβολοῖς] περὶ μὲν συμβολαίων, καὶ πλεονεξίας ἀγωνιζόμενον αἴσχρον, καὶ πονηρίας ἢ μικρὸν σημείον.*

XIV. Much more ought we to abhor and detest those *mental Reservations*¹, which the wicked Artifice of some Men hath invented, by wresting Words to a quite contrary Sense to what they outwardly and plainly import; and this even in Cases where there was an Obligation to speak the Truth, and in Assertions confirm'd by Oath. The Effect of which is, that a Person seems outwardly to affirm what he inwardly intends to deny, and so *vice versa*. A Practice by which the whole Use and Design of Speech is utterly perverted, no Man being sure in what Sense he ought to take the Words of another. Nor is the Invention less absurd than it is pernicious. For since Discourse was originally introduced as a means of declaring what we conceive in our Minds; and since our Thoughts, so long as they do not come abroad, are of no manner of Use or Effect in human Life; by what Authority can these secret Reserves, so repugnant to the common Custom of Mankind, take away that Effect which the uttering of Words would otherwise naturally produce? Thus much indeed is usual with us, to annex to a general Expression some tacit Condition or Restriction, taken from the subject Matter, or some other Circumstances; by means of which we dextrously adapt our Speech to the Business under Debate, and free it from Confusion or Inconvenience. But where would be the Reason, or where the Subtilty of my Proceeding? If, for instance, being ask'd, whether I have done such a thing, I swear *I have not done it*, meaning another thing, or the same at another time? Or, if when a Man desires Money of me, I tell him, *I have none*; that is, none to give him? Or, if I promise that *I will give it him*; that is, meetly for Form and Fashion's sake, so as to take it immediately again? 'Tis a foolish Argument which is urged to excuse such Persons from the Sins of *Lying* and of *Perjury*, *That they do not indeed speak that particular determinate Truth which the Hearers apprehend, and which the Words imply, yet they speak another Truth of a different kind*. As if it were at all satisfactory to my Question, to be told a Truth of any other different kind, and utterly foreign to the Business which I am now upon: Or, as if a Man did at all promote my Purpose, or the Reason of my Enquiry, if when I ask of *Chalk*, he answers me of *Cheese*^a! No less ridiculous is that other Plea, that if in these Cases we put the open Speech and the *mental Re-*

servation together, they will make an entire Proposition; which taken in that united Sense, shall not be false. As for instance, if I say, *I am not a Priest*, keeping this Clause in my Mind, *so as to be under any Obligation of telling you that I am*; this whole Proposition taken together will be true, *I am not a Priest, so as to be under any Obligation of telling you that I am*. But in as much as Discourse was invented with regard to others, not that every Man should talk to himself; to the Truth or Falshood of it is measur'd according to that which we openly declare to those with whom we converse.

XV. That we are not guilty of *Lying*, tho' we speak a thing which bears a wrong Signification^b, to Children or Persons out of their Senses, is generally asserted; and therefore 'tis thought very allowable. The Reason assign'd by *Grotius*^{*} is, *Because since such Persons have not the liberty of Judging, they cannot suffer Injury with respect to that liberty which they want*. This Principle we do not take to be sufficient: For to speak chiefly of the Case of Infants, it is plain indeed, that they so far want the Faculty of Judgment, as simply and rashly to catch at any thing, spoken or represented to them in a wrong manner; not being able by reasoning to distinguish Truth from Falshood: Yet since they make a part of Mankind, and on that account have a Right not to be hurt by others, as they have likewise to receive the common Office of Humanity, and to be furnished with good Notions, particularly by their Parents, and those who have the Care of their Education^b, and are at least capable of apprehending what is easy and familiar; we are by all means to hold, that they have thus far the same Right with Persons of advanced Age, that what ought to be shewn or declar'd to them, shall be propos'd in such manner as that they may understand it. But for as much as through the weakness of their Reason, and the strength of their Passions, they have scarce any Relish for plain Truths, therefore 'tis convenient to instruct them by Fables, and to keep them in Awe by false Terrors, till such time as they grow weary of Trifles, and are able to apprehend and to value the real Solidity of things. And thus we address to them by Fiction and Disguise, not to sport with their Ignorance, or to procure their Harm; but only because they cannot well be applied to in any more serious Method of Information². *Strabo* is

^a Add Mr. *Pascal's* Letters Provincial, *Lett.* 9.

^b Add *Matt.* xviii. 10.

Mr. BARB. NOTES on §. XIV, XV.

¹ See Mr. *Placette* in his Treatise of *Lying*, *§c.* c. 8.

² For the same Reason we may invent something false to deceive an Infant innocently, and to accommodate ourselves to its Capacity: As also, we may so behave our selves towards such as use feeble Reasonings, either because they think them well grounded, since they are suitable to their Understandings, or they are pre-possess'd, and there is no other way to make them receive the most profitable Truth. Hence it is, that we find in the New Testament several Texts of the Old deliver'd in a Sense in which the *Jews* commonly understood them, tho' they did not agree to the Original; and several Arguments *ad hominem* founded upon them, or upon other Opinions of the *Jews*, which were false and uncertain. See the *Latin* Notes of Mr. *Le Clerc* upon the New Testament, and particularly upon the Epistle of the *Galatians*, and his *Parrhasiana*, Tom. I. of the first Edition, pag. 82, &c.

* *Grotius's* Words are, *Quia cum illis non sit Judicii Libertas, non potest eis circa illam Libertatem injuria fieri.*

² *Lucretius* expresseth this by a fine Similitude, l. 1. v. 935, &c.

*Sed velati pueris absinthia tetra medentes
Cum dare conantur, prius oras pocula circum
Contingunt mellis dulci flavoque liquore,
Ut puerorum atas improvida ludificetur.
Laborum tenus; interea perpetet amarum
Absinthii laticem, deceptaque non capiat,
Sed potius tali facto recreata valefacit.*

So the Mother in *Theocritus*, *Idyll.* 15. v. 40.

— ἄρ ἀπὸ τοῦ τέκνου μωρῶν, δάκνει ἴππους.

Physicians use
In giving Children Draughts of bitter Juice
To make them take it, tinge the Cup with Sweet,
To cheat the Lip: this first they eager meet,
And then drink on, and take the bitter Draught,
And so are harmlessly deceiv'd, not caught:
For by this Cheat they get their Health, their Ease,
Their Vigour, Strength, and baffle the Disease.

Mr. *Creech*.

— You must not go, my dear Delight,
For there are Bug-bears, and the Horses bite.

admirable

admirable on this Point^a: “ Not the Poets alone, *says he*, but long before them publick Societies and States made choice of the Art of Fables; and the Lawgivers themselves, in regard to the common Advantage, when they had first reflected on the Genius and Temper of Rational Creatures. For Man is led on with a most greedy Desire of Knowledge; and our earthly Acquaintance with these feigned Relations is the first step this Passion makes towards its own Satisfaction. Here Children begin their Information, and willingly improve their Stock, for the sake of communicating it to others. The Reason of all this is, because Fables do ever carry somewhat of Novelty in them, whilst they report not common and consistent Things, but what is very strange and unusual. But now whatsoever is thus new and surprizing, and what Men never heard of before, cannot fail to be sweet and agreeable: And ’tis this which breeds in them a covetous Solicitude, and an Eagerness after farther Delight. In case the Story be wonderful and prodigious, this Delight is highly increas’d; which is the Bait that tempts the young Learners to Industry and Study. It is fit therefore that they should at first be thus caught and insnar’d with Pleasures, but when they have attain’d to a more mature Age, they are to be disciplin’d and instructed in the solid Knowledge of Things; their Mind and Judgment being now strengthned and confirm’d, and they no longer standing in need of being flatter’d and humour’d in their Good^b. In the same manner it is very lawful to apply Fictions to Persons out of their Senses, in all such Cases where they are not capable of apprehending true Reason.

XVI. And indeed, all in general, upon whom we cannot by plain Speech obtain the good end we design, we may, without the Censure of Lying, by feign’d Addresses lead into a Mistake, for their own Interest and Safety. Nor is it needful to draw the Reason of this Practice from hence; “ That we may presume, in such a Case, the other Party will not think hard of our Trespas on his Liberty of Judgment; nay, that he will give us Thanks for the Advantage he receives from it: “ And therefore what is done with his Consent and Approbation, can be no Injury to him. For he had indeed a Right, that our Speech should procure him some Benefit, or deliver him from some Mischiefe; but not that it should produce the quite contrary Effect; which it would have done, had he understood the plain Business without Art or Colour. And therefore in these Cases we ought as much to accommodate our Discourse to the Temper and Condition of the Hearer, as Physicians do

their Medicines to the Patient’s Strength and Constitution. Since then no Person can be said to have had a Right of hearing Words under such a Form as would have prov’d fatal to him, it cannot be properly affirm’d, that there is any waving or remitting of Right in the present Case. And then for the Speaker, since he was in his part obliged to perform this Office thro’ the mediation of Speech, either by the Law of Humanity, or by some stricter Engagement, ’tis manifest, that he cannot be bound to apply his Speech in such a manner as shall make it lose its End and Effect. Therefore all such feign’d Speeches, as either save and protect Innocence, appease Rage, allwage Grief, or procure any Benefit or Convenience to others, which could not have been obtain’d by direct and open Expressions, are not only to be exempted from the number of Lyes, but to be applauded as so many Instances of Wisdom. Vid. *Exod.* i. 17, 19. *1 Sam.* xix. 12, *Eccl.* xx. 5, 28, 29. *2 Sam.* xiv. 4, *Eccl.* 2 *Cor.* ix. 2, 3, 4. *Plin.* l. iii. *Epist.* 16. Of *Arria*, *Hor.* *Od.* l. iii. *11.* v. 35, 36. Of *Hypermetra*,

*Splendide mendax, & in omne virgo
Nobilis avum;*

Gallantly false, and prais’d in Endless Fame.

Euripid. *Phoeniss.* v. 998, &c. Sadi Rosar. *Persic.* c. 1. *A beneficial Falshy is better than a destructive Truth.* Heliodor. *Æthiop.* l. i. c. 3. p. 52. Edit. Ludg. Bat. *Feigned Speeches are then good and commendable, when they turn to the advantage of the Hearer, and do not prejudice the Speaker*¹. We have a famous Example of this proceeding in the Story of ² *Rahab* the Harlot, *Josb.* ii. 4. And though *Grotius* observes on this place, that *before the Gospel, a Lye which contributed to the preservation of good Men, was not esteem’d faulty; and that therefore this Act is commended by the Apostles*, *Hebr.* xi. 31. and *James* ii. 25. as agreeable to the Times in which it was perform’d; yet ’tis our Judgment, that the same thing may even now be lawfully done, provided no civil Obligation be prejudiced by it^c. To the same Head belongs the Case of those Commanders, who in the heat of an Engagement raise the drooping Spirits of their Men by some false Insinuation or Report, on the strength of which Encouragement they may force their way to Victory and Safety: Or those, who before a Battle lessen and undervalue the Number of the Enemy. Vid. *Cornel. Nep.* *Eumen.* c. 3. The like Instances are frequent in all Histories. *Xenoph.* *Apomn.* l. iv. p. 462, 463. Edit. *Græc.* H. Steph. *If a General observing his Men to be in a Consternation, falsely tells them that there are fresh Succours ready at hand for their Re-*

^a Lib. i. p. 19. *Geogr.* Ed. Par. As also the Fables of *De la Fontaine*, and the Discourse of Mr. *Buddens*, Entitled, *Philosophus Fabularum Amator*, among his *Analæta Historiæ Philosophicæ*.

^b See the Fables of *Æsop* peculiarly recommended by *Philostratus*, *Apollon.* l. v. c. 5. ^c Add *Socrat.* *Eccles.* Hist. l. iii. c. 14.

MR. BARB. NOTES on §. XV, XVI.

³ The Greek is, Καὶ πρῶτον, ὅτι τῆς μύθους ἀνελέξαντο ἢ οἱ ποιηταὶ μόνου, ἀλλὰ καὶ αἱ πόλεις πολλὰ πρότερον, καὶ οἱ νομοθέται, τῆς χρησίμης χάριν, βλέψαντες; εἰς τὸ φυσικὸν τάθος τῆς λογικῆς ζωῆς. Φιλειδύμων γὰρ ὁ ἄνθρωπος, προσιμῖον δὲ τότε τὸ φιλεσιμῶν ἐντεῦθεν ἔν ἀρχῆται τὰ παιδία ἀκροῦσθαι καὶ κοινωνεῖν λόγων ἐπὶ πλείον. Ἄιτιον δὲ ὅτι καινολογία τίς ἐστιν ὁ μῦθος, ἢ τὰ καθεστῆ τα φράσεων, ἀλλ’ ἕτερα παρ’ αὐτὰ, ἡδὺ δὲ τὸ καινὸν, καὶ ὁ μὴ πρότερον ἔγνω τίς, πῆτο δ’ αὐτὸ ἐστίν, καὶ τὸ ποιεῖν φιλειδύμονα. Ὅταν δὲ προσῆ καὶ τὸ θαύμασον, καὶ τερατώδες, ἐπιτείνει τὴν ἡδονὴν ἢ περ ἐστὶ τῆς μαθητικῆς φιλητρον. Καταρχῆς μείζον ἀνάγκη τοῦτέως δελεασίον χρῆσθαι προσιμῶν δὲ ἡλικίας ἐπὶ τὴν τῶν ὄντων μάθησιν ἄγειν ἢ δὲ τῆς διανοίας ἐβρωμένης, καὶ μηκέτι δεομένης κολάκων.

¹ The Greek is, Καλὸν γὰρ ποτε καὶ τὸ ψεῦδος, ὅταν ὤφελου τὸς λέγοντας, μηδὲν καταβλάπη τοῦς ἀκούοντας.

² She knew that God by an extraordinary Judgment would deliver the *Canaanites* to the *Israelites*, otherwise she did not act the part of a good Citizen in hiding the Spyes of a People who came to invade their Country. See Mr. *Le Clerc*’s Note upon that place.

lief, and by this Stratagem composeth their Fears, and keeps them in heart; under what Species of Actions shall we reckon it? In all appearance under those that are just and good. In *Sophocles* (*Philoctet.* v. 108, 109.) when *Neoptolemus* asks *Ulysses*, * Don't you think it base to affirm a Falstuy? His Answer is, No, in case the Falstuy be a means of Safety. Add *Frontin.* *Stratag.* l. i. c. 11. l. ii. c. 7. *Polyæn.* l. i. c. 33. *Stratag. Of Leotychydes, Maxim. Tyrius, Dissert.* iii. p. 29. Edit. Lugd. The bare telling the Truth is no such brave and comely thing, unless it be done to the Benefit of those we are to instruct. Thus a Physician often deceives his Patient, a General his Soldiers, a Master of a Ship his Crew, and we censure neither of them upon this account. For in some Cases, a feigned Story doth Men good, when the plain Truth would do them harm³. Though I know not whether *Agesilaus's* Stratagem of this kind deserves Commendation; who, when he saw his Soldiers in some Fright and Concern at their being like to be over-power'd by the opposite Forces, wrote in his Hand the Word VICTORY; and taking the Beast's Liver out from the Sacrificer, printed those Letters upon it, and then shew'd it to the Troops, as a Divine Promise of Success⁴. For the same Reason Physicians are not to be accounted Lyars, when they persuade a nice or a froward Patient of the Sweetness or Mildness of what they apply for his Cure. *Liban. Declam.* 29. p. 664. D. Edit. *Parif. Morell.* We see the Physicians beguiling their Patients Appetite with harmless Deceits. The same we ought to practise towards those that are in Health, so often as 'twould be better for them to be deceiv'd, than to be truly inform'd. + Yet I question whether the Artifice of

Erasistratus, Physician to King *Seleucus*, in making him believe that his Son *Antiochus* was in Love with his Wife, may be admitted into this Number. Vid. *Lucian, De Dea Syra.* The Conduct of *Joseph* is justifiable on the like account, who, to work his Brothers to a serious Repentance for their Crime in selling him, and to judge how they stood affected towards his Father and towards *Benjamin*, held them a long time in Consternation and Suspence by feigned Accusations^b. Lastly, that the Fables of the Poets, by which they insinuated Truth under a taking Disguise, are not to be condemn'd for criminal Falsties, every one will easily admit^c. And thus far the Saying of *Sophocles* will hold good,

Δουλώ μὲν ἔδδεν ῥῆμα σὺν κέρδει κινδύν^d.

I judge no Speech amiss that is of Use^e.

XVII. The Governours of States may sometimes too very lawfully use a manner of Speaking not strictly true^f; in as much as their Councils and Resolutions, if divulg'd, frequently come to nothing, or perhaps turn to the prejudice of the Commonwealth. And therefore when bare Silence is not a sufficient Covering, they may veil their Designs with feigned Speeches, to divert the Curiosity of inquisitive Men. Lying, says *Plato*¹, is useful to Mankind only in the way of Physick; and therefore should be allowed to publick Physicians, but ought not to be touch'd by private Patients. Princes and Governours (if any Persons else) may be permitted to use the same Stratagem², either for the Ruin of the Enemy, the Preservation of the Subjects, or any

^a *Plutarch. Apophth. Lacon.* p. 214. E. T. 2. Edit. *Wech.* ^b *Gen.* xlii, &c. *Joseph. Antiq. Jud.* l. ii. c. 3. ^c Vid. *Plutarch. De audiend. Poet.* ^d *Electra*, v. 61. ^e Vid. *Grot.* l. iii. c. 1. §. 15. ^f *De Republ.* l. iii. p. 611. Edit. *Wech.*

Mr. BARB. NOTES on §. XVI, XVII.

* The Greek is, *Neopt.* Οὐκ ἀισχρὸν ἡγήσθητα τὰ ψεύδη λέγειν: *Ulysses*, Οὐκ εἰ τὸ σωθῆναι γὰρ τὸ ψεύδος φέρει.

³ The Greek is, Οὐδὲν γὰρ σεμνὸν τὸ τ' ἀληθῆ λέγειν, εἰ μὴ γίγναιτο ἐπ' ἀγαθῷ τῷ μαθόντος, ἔγω καὶ ἰατροὺς νοσοῦντα ἑξαπάτω, καὶ στρατιῶν στρατόπεδον, καὶ κυβερνητῆς ναυτῶν: καὶ δεινὸν ἔδδεν, ἀλλὰ ἤδη ψεύδος ὤνησεν ἀνθρώπων, καὶ τ' ἀληθῆς ἔβλαψεν.

⁴ The Greek is, καὶ μὲν καὶ τῶν ἰατρῶν ὀρώμεν τὰς τῶν κινδυνῶν ἐπιθυμίας ἀπάταις ἀναβάλλοντας. ἤδε που καὶ πρὸς ὑμεινόντας τοῦτο ποιοῦμεν, ὅταν ἢ κρείττον, τοῦ τ' ἀληθῆς ἀκούσαι, τὸ παρακρωθῆναι. But our Author, who quotes this Passage, also observes, that it may be doubted, whether we may use that as an innocent Cheat, which *Erasistratus* made use of to cure the Prince *Antiochus*, who was in Love with his Mother-in-law *Stratonice*. We may find the Story in *Lucian's* Work, *De Dea Syriaca*, and Mr. *Fontinelle's* Dialogues of the Dead, both Antient and Modern, *Dial.* 5. Our Author a little higher also disallows a piece of Craft which *Agesilaus* made use of to encourage his Soldiers: Without doubt, because it contain'd an Affront to the Deity.

⁵ But these Words do not signify what our Author supposes, following the Latin Translation (not excepting the *Oxford* Edition in 1705. of the two Tragedies of this Poet.) There is nothing that one may not speak innocently, if it tends to our Advantage. Mr. *Dacier* translates them differently, but perhaps to no better Purpose. He gives us the whole train of the Discourse, to shew us that these Words ought to have a different Sense. At length, faith *Oristes*, "What evil is it to me if I pass for Dead, if I shew by my Actions that I am full of Life, and I have gain'd an immortal Name? As for me, I am persuaded there can be no sad Prefage, where there is so much Profit." But there may be, as I believe, a better Translation given, more agreeable to *Oristes's* Thoughts, and to the Greek, thus: "I am persuaded that no Report can tend to our Dishonour, and hurt our Reputation, when so much Profit may arise from it." This appears from what follows. "How many of the Sages, who were for a long time taken for Dead, have returned to Life again, and were the more honoured by all the World? I hope I shall have the same good Luck, and after the Report of my Death is dispersed every where, I shall of a sudden appear again to my Enemies, &c. In these last Words the Original thus imports, τῆς δὲ τῆς Φήμης ἀπό, &c. From whence it appears, that ῥῆμα is the same as Φήμη. In fine, We may compare this Expression, ῥῆμα κινδύν, with a like one in the New Testament, *Happy are ye, when Men shall speak all manner of evil* (πᾶν πονηρὸν ῥῆμα) against you falsely, *Matth.* v. 11.

¹ The Greek is, Ἀνθρώποις δὲ ψεύδος χρῆσιμον, ὡς ἐν Φαρμάκῳ εἶδει, δῆλον, ὅτι τὸ γὰρ τοῦτου ἰατροῦς δοτέον, ἰδιώταις δὲ ἢ ἀπτίον τοῦτο ποιοῦμεν, ὅταν ἢ κρείττον, τοῦ τ' ἀληθῆς ἀκούσαι, τὸ παρακρωθῆναι. We ought to observe, that *Plato* treats here of such Lyes only as concern a State, as appears by what follows, and does by no means condemn such innocent Lyes as private Men use one with another. This Philosopher at the End of the foregoing Dialogue owns, that there is a profitable Lye, which is not to be hated. As for Example, when one speaks a false thing to one's Enemy, as well as to those Friends who agree not, to hinder some Mischief. This is a Medicine which we ought to use. Here *Plato* keeps to the Notion of a Medicine, and represents the Sovereign and his inferior Magistrates as so many Publick Physicians, who alone consequently may make use of a Lye for the Benefit of the State. But he always supposes, that in Matters that do not concern the Government, whoever can procure an Advantage to another by a Lye, or some other innocent Fal-lacy, he is really a Physician to whom it belongs to administer that Medicine. Τὴ δὲ δὴ, τὸ ἐν τοῖς λόγοις ψεύδος, τότε καὶ τὴ χρῆσιμον, ὡς μὴ ἀξιὸν εἶναι μίσους: ἀλλ' εἰ πρὸς τε τῶν πολεμίων, καὶ τῶν καλεσμένων φίλων, ὅταν διὰ μανίαν, ἢ τινα ἄνοιαν, κινῶν τι ἐπιχειρήσῃ πράττειν, τότε ἀποτροπῆς ἔνεκα, ὡς Φάρμακον, χρῆσιμον γίνεται. See also *Lib.* ii. *§ de Legibus*, *Lib.* ii. & *Lib.* xi. So that *Grotius* had not thoroughly examined the Sense of *Plato*, when he says, That that Philosopher seems sometimes to allow, and sometimes to deny Physicians, properly so called, a Liberty to speak contrary to their Thoughts; and *Gronovius*, who criticizes on *Grotius*, does not much mend the Matter, affirming, that *Plato* allows it only to Magistrates and Physicians.

² See what our Author says in his Discourse, *De Concordia Vera Politica cum Relig. Christiana*, §. 10.

way for the advantage of the Community: But all others ought strictly to abstain from this Practice. A famous Instance we have in Solomon's Judgment, 1 Kings iii. 25. And so Claudius in Sueton^a, brought a Woman to own her Son, whom she first, on probable Arguments, deny'd, by commanding her to marry him. Thus a Father and a Son being arraign'd together for Murder of a Priest, when it could not be made out which of the two had committed the Fact, each refusing to accuse the other; Charlemagne, as we are told, gave Sentence of Death upon them both; upon which the Father confess'd himself the Murderer. So, it being a Law in Spain, that in case a Female-slave be with Child by her Master, she shall be immediately restor'd to Liberty: Once it happen'd, that a Nobleman's Maid was discover'd to be in this Condition; the Nobleman denied the thing, and the Proofs alledg'd not being evident, King Alphonso order'd the Child to be publickly sold into Servitude; the News of which Sentence mov'd the Father to discover himself. So when Nleus, being about to lead abroad a Colony, was commanded by the Soothsayers to purge his Army of all polluted Persons; he pretended that he himself had murder'd a Child, and so stood in need of Expiation; and by this means persuading others to confess themselves guilty, he left all those behind him, whom he had thus convicted of Impurity^b. 'Tis a Proverb with the Spaniards, Tell a Lye, and you'll get out the Truth. To the same Head belongs the Disimulation and Concealment about the Sickness or Death of Princes, for the prevention of Tumults. Though we are not willing to extend this Liberty so far as to justify the politick Devices of Numma^c. Nor will the same Privilege hold at all in the case of Promises and Engagements^d.

XVIII. But farther, Grotius^e having thus asserted, "That every Lye ariseth from the impairing of some Right which one Man may have to understand the Mind of another; concludes from hence, That we cannot be charg'd with this Fault^f, when we direct a feigned Discourse to one who is not deceiv'd by it, tho' a third Person should thence happen to entertain a wrong Opinion. For 'tis to be suppos'd, that I and he, to whom I address'd my self, are transacting some private Business, which doth not at all belong to the Person who overhears us. Therefore the Man with whom I am dealing is certainly not deceiv'd with my manner of Speech, because he well apprehends my Meaning by it, just as if I should relate a Fable, or use an Irony or Hyperbole to one who knew how to put the right Construction upon the Words. And as for the third Man, I do

not contract the Guilt of Lying in respect of him, because I have no business with him, and consequently he hath no Right to understand my Sentiments. So that if he take up a false Notion, from Expressions applied to another Person, not to himself, he is to lay all the blame on his own Curiosity and Impertinence. But lest this Position should be abused to ill purpose, we are to add, as a necessary Caution, that 'tis by no means allowable for two Persons to make use of such Occasions as these by way of Stratagem to delude or expose a third. For altho' it be never so true, that this third Man hath not a perfect Right to know my Judgment, yet the Law of Humanity and Charity requires that my Speech do not occasion his undeserved Prejudice. Therefore we ought on all accounts to make this Distinction, whether the third Party overhears our Discourse without his own Fault, or whether out of a busy, or a malicious Humour, he purposely intrudes into our Secrets. And therefore this Assertion chiefly holds good against those inquisitive gossiping Knaves, who make it their employment treacherously to catch up what other Persons drop in private Company. Now when we apprehend our selves to be watch'd by such sly Designers, and yet are not inclin'd to be altogether silent, we are wont to disappoint their busy Curiosity, by throwing in a sett of Talk quite impertinent to the Affair which we were before debating of; or by agreeing to tell some Story, which our politick Eyes-dropper hugging as a mighty Discovery, may, upon his communicating it to others, be sufficiently laugh'd at for his Pains; provided neither he nor any Person else suffer any farther damage by this Contrivance. We know very well 'tis a general Duty, not to lessen the Honour and Reputation of others, nor to ridicule and expose them. Yet, as we do not think ourselves guilty of any Sin, when we discover the Mistake of another, supposing it to be done without either Bitterness or Insolence (things so unworthy of Men of Sense and Breeding) although we should hereby rather diminish, in some respect, than improve his Credit: So what should hinder us from correcting a Fault in a Man's Morals, when it proves troublesome to us, even by Sport and Ridicule, that we may incline him to leave off the Habit? For to amend and reform others cannot therefore be judg'd unlawful, because it tends to the Disparagement of their Worth and Excellency. Thus, since 'tis the common Interest of Mankind, that each Man should not understand the Secrets of all, it is establish'd as 'twere by the general Consent of Nations, that seal'd Letters should be open'd by him only to whom they are directed

^a Cap. 15.
l. xvi. c. 11.

^b *Ælian. Var. Hist.* l. viii. c. 5.
^d Add *Bacon's* Ess. vi.

^c Add *Polyæn. Stratagem.* l. ii. in *Epanimond.* n. 6, & 12. *Polyb.*
^e Lib. iii. c. 1. §. 13. n. 1.

MR. BARB. NOTES on §. XVIII.

¹ Some of the Fathers of the Church, as Grotius observes, recite here the Censure which St. Paul pass'd on St. Peter, who being at Antioch, withdrew himself from the Company of the new converted Gentiles, because he would not offend the Jews, Gal. ii. 11, &c. For say St. Chrysostome and St. Jerome, St. Peter knew very well that St. Paul did not censure him in earnest, but did it seemingly only to comply with the Weakness of the Brethren present. But 'tis plain, that St. Paul spoke very seriously, and blames St. Peter's Carriage, as attended with inexcusable Hypocrisy, because by withdrawing from the Gentiles, he gave an occasion to believe that the Observation of the Ceremonies of Moses's Law was absolutely necessary to render them acceptable to God; and this is contrary to the End and Design of the Gospel. See the Interpreters on the place.

² See Mr. Hertius's Discourse, *De Commenta Literarum*, §. 3. in Tom. i. of his Comments, and small Tracts, where he also observes, that it has always been taken for a great Incivility and an inhuman Baseness, to publish the Letters we receive from others, because it may produce some Prejudice to the Writer. Upon which occasion it may be seasonable to rehearse the brisk Reproof which Cicero gave Marc Antony long ago. "He also read a Letter, which he said he had received from me. O Man without Humanity; and who knows not what it is to live! For is there any Man, who has convers'd so little with honest Men,

directed : Therefore if I find any Person intercepting and searching my Letters, it can be no Crime if I contrive to let some Writing fall into his Hands, which shall give him no great Satisfaction in the reading. As a greedy Boy, who hath got a trick of plundering the Cupboard, suffers no injury, if amongst the other Provision he meets with a Bait not very sweet or savoury. It was a pleasant piece of Deception, that which *Herodtus*^a reports of *Nitocris* or *Semiramis*, who order'd the following Words to be engraven on her Sepulchre, *If any Babylonian Prince happens to be in great Distress for Money, let him open this Tomb, and take out as much as he pleaseth.* King *Darius*^b afterward removing the Stone, found no Treasure, but only this Rebuke, *If thou hadst not been insatiably covetous, thou wouldst never have plundr'd Coffers to enrich thee :* Or, as *Maximus Tyrius*^c gives the Story, *All Curses follow thee, thou most greedy of Mankind ; who for the sake of Gold hast presum'd to disturb and violate the Dead**. To give Credit to such Intcriptions is no more an Argument of Avarice than Folly. In the Story of *Papyrius* in *Gellius*^d, the Senators rightly commend the Cause of the young Gentleman's Fiction ; that is, the Wit and Secrecy of so unexperienced Years ; but adjudge the manner of it to be a little undutiful and disrespectful to his Mother ; especially since the Jest occasion'd a Petition not much to the Honour and Credit of the Ladies, That one Wife should rather have two Husbands, than one Husband two Wives. Nor could I ever prevail with my self to be heartily angry with that Senator in *Plutarch*^e, who, to divert his Wife's Importunity in asking about the Secrets of the House, told her a strange Tale of a *Quail*^f, said to be seen fly through the *Forum* with a golden Helmet. Though he ought indeed at the same time to have taken care that this babbling Dame should not put others into a groundless Fright by her Report. For then the present Mistake, which lasted but an instant, would have been sufficiently recompensed by the Diversion and Satisfaction which follow'd it. Now if we are bound to use Caution, that the Person whom we have justly and deservedly impos'd upon, should not deceive others ; much less will it be allowable to persuade one Man of what is false, with design that he may delude a third Person ; although perhaps the for-

mer do not hereby suffer any particular Hurt. For indeed to be thus made the Instrument of deceiving another, is in itself mean and unworthy : And as for our part, 'tis the same thing, whether we abuse a Man immediately by our own Act, or by the Intervention of some Person else, whom we have suborn'd for that Service. Though 'tis an Art which many practise ; first, to cheat those whom they intend to make use of for the cheating of others. Vid. *Senec. Thyest.* v. 320. As *Davus* observes^g, there's a great deal of difference, *ex animo omnia, ut fert natura, facias, an de industria ?* Whether a Man acts according to real Intention and the plain Guidance of Nature, or according to the Affectation of Art and Design, *Terent. Andr.* Act iv. Scen. 4. Add *Gell.* l. xii. c. 12.

XIX. This is manifest, that since the Obligation to disclose our Mind ceaseth with regard to Enemies, it cannot fall under the Sin of Lying, to give them a feign'd Relation^h, to terrify them with false Rumours, or any ways to procure their Prejudice, provided no undeserved Loss or Damage ensue to a third Party who is our Friend. For why may not we by Stratagem and Subtilty, and without endangering our own Persons, hurt him whom we have Licence to attack with open Violence ? The Reason why some have disdain'd this Method of Hostilityⁱ, was not because they thought any Right to be violated by it, but because among the most fierce and martial Souls no Action against an Enemy is look'd on as glorious, but such as carries in it some sort of Vigour and Force of Body and Mind. But what we speak about deceiving and circumventing an Enemy, is by no means to be extended to any Paſſes^j or Treaties set on foot about concluding or intermitting the War. For since the Law of Nature commands us to maintain Peace as far as may be done with Convenience, and to repair any Breach that may happen in it, we must suppose ourselves commanded at the same time to use those Means without which this End can ne'er be obtain'd. But now Enemies cannot possibly come to an Accommodation, unless there be on both sides an Obligation to the clear Discovery of their Mind, in reference to what is transacted between them ; and consequently unless their mutual Diffidence be remov'd by a Necessity and Engagement to speak the Truth in all Articles and

^a Lib. i. p. 48. Edit. H. Steph.

^b *Dissertat.* 10. in fin. Vid. *Olearii Itin. Persic.* l. iv. c. 7.

^c Lib. i. c. 23.

^d *De Garrulitate*, p. 507. Tom. ii. Edit. Wech.

^e See *Grot.* l. iii. c. 1. f. 17, 18.

^f Vid. *Grot. ubi supra*, § f. 20.

MR. BARB. NOTES on §. XVIII, XIX.

“ as upon a little trangle with a Friend to make no scruple to publish and read the Letters he has received from him before all the World? Is it not to banish all Friendship out of the World, to take away the liberty of Friends writing one to another when they are absent? How many Trifles do we put into our Letters, which being divulged, will appear ridiculous? And how many serious things, which ought not to be made publick? *At etiam literas, quas me sibi misisse diceret, recitavit, homo, & humanitatis expert, & vitæ communis ignarus! Quis enim unquam, qui paululum modo honorum consuetudinem nasset, literas ad se ab amico missas offensivas aliqua interposita, in medium protulit, palamque recitavit? Quid est aliud tollere de vitæ vitæ societatem, quam tollere amicorum colloquia absentium? quam multa joca solent esse in epistolis, quæ prolata si sint, ineptæ videantur? quam multa seria, neque enim ulla moris deusculanda.* Philip. ii. 4. See an Example of this indiscreet Rudeness in the News of the Republick of Letters, December 1685, where Mr. Bayle censures the Author of the Dialogue between *Phoebus* and *Irenæus*, &c. which was the famous Mr. Gaultier a Minister.

³ This Example seems not much to our Author's Purpose, relating only the manner how *Darius* was cheated by the Inscription which *Nitocris* Queen of *Babylon* had caused to be engraven on her Tomb. For, says he, he must be a simple and covetous Man to believe such an Inscription.

* The Greek is, Ὁ πάντων ἀνθρώπων ἀπληρότατε, ὃς ἔτιλης νεκροῦ θίγειν δι ἔρωτα χρύσεο.

⁴ Mr. *Bubours* relates this Story also in *French* in his Discourses between *Aristæus* and *Eugenius*, Diſc. 3. concerning a Secret. But some Men suspect it to be a meer Fable. See Mr. *Thomasius's* *Nævi Jurispr. Rom.* p. 126.

⁵ Our Author calls it a *Quail*, but the Original is *Kérudos*, a Lark.

⁶ I can't see what the Passage here alledged by the Author makes to his purpose. For the true Translation of them (as *Madam Dacier* gives us it) is, *Do you think that there is but small difference in things done by natural Instinct, and on a sudden, and such as are done by Premeditation and Consultation?*

⁷ See what is said, l. v. c. 9. §. 3. And l. viii. c. 7, 8.

Conditions of Peace. And when 'tis asserted as lawful to delude or mischief an Enemy by any feign'd Report; this ought on no account to be carried so far as to justify the spreading of false Crimes and Imputations, in order to the impairing his Honour and Credit. The state of Hostility doth indeed license me to conceal my Meaning from my Foe, or by scattering false News to open my way to his Hurt. But he that goes about to charge an Enemy with any grievous Crime, and would have his Accusation believ'd by those who are at peace with him, must lay aside all the Stratagems and Deceits of War, and set up for an Assertor of plain Truths; and therefore, with regard to those Persons who are suppos'd to be his Hearers, he is to play the part of an Historian, or ordinary Relator. Whence, if he voluntarily recede from the Truth and Reality of things, he cannot avoid the double Guilt of Lying and Slandering. Again, to charge an Enemy falsely to his Face, is a Mark of a low and impotent Reviler. To return Lyes for Lyes, is to imitate the Folly and Vanity of the Adversary^a. As for the Notion of *Lippius*, in his Treatise of Politicks^b, who reckoning up the Persons towards whom we may be allowed to practise Simulation or Dissimulation, joins Foreigners to Enemies; this ought no farther to be admitted, than as it is for our Advantage to hide our Designs or our Affairs from their Notice. For that we should by feign'd Speeches procure their Harm or Loss, is what Nature itself will not bear; on account of that nearness of Blood by which all Mankind stand related and allied to each other.

XX. 'Tis a Question of more Difficulty, Whether a Criminal or an Offender arraign'd on any account may deny the Fact^c with which he is charg'd, or endeavour to elude the Accusation by feign'd Arguments, and yet not incur the Guilt of Lying? And here we do not speak of the Divine Tribunal, in respect of which the safest Course is to fly immediately to humble Confession, and an earnest imploring of Pardon: Since it would not be less Impiety than Folly, to use Excuses or Denials before an Omnipotent Judge. And 'twas on this Principle that *Joshua* made the Exhortation to *Achan*, which we have in *Josh.* vii. 19, 20. For there the Criminal was before detected by the Hand of Heaven. The present Enquiry therefore is confin'd to human *Judgments*; which are principally design'd for these two Ends and Uses: First, that every Man may obtain what is his Right and

Due: And, Secondly, that fit Punishments may be inflicted for the Correction and Restraint, both of those, who have dared with wicked purpose actually to violate the Rights of others; and of those too, who by reason of their cold Affection towards Justice would have proceeded to the same Commissions, did they not dread the suffering those Evils, which they have seen fall so heavily on other Offenders. Now, to decline the Severity of this Process, some think it by no means allowable to make use of false Speeches: First, because the Judge hath an especial Right to understand the Truth. Wherefore, neither the Sanctity of the Magistrate, who presides in the Name of God, nor the Necessity which the Subject lies under to Obedience, will give the least place or countenance to Contumacy or Circumvention. Besides, they say, this Permission appears rather dangerous than needful or beneficial; in as much as conceal'd Crimes do the more Mischief. Especially if what is deliver'd in excuse, be not only false in *Fact*, but in *Theory*; every such Untruth being of ill Consequence, not only consider'd by itself, but likewise in regard that one Error gives Occasion and Rise to an infinite Train of others. Yet the contrary Opinion is by many prefer'd; who say, we ought to distinguish in every Crime between the Damage done, and the base Guilt or Commission; to the former of which Restitution properly answers, and to the latter Punishment. By the Law of Nature every Man ought to make Restitution for Damage occasion'd by his Fault; and at the same time the suffering Party ought, upon his Sorrow and Reparation, to admit him to Pardon. Therefore every guilty Person is, by an Obligation strictly so call'd, bound to be always ready to repair any Damage he hath caus'd.

But no Man is tied to offer up himself freely to Punishment, and to be an Informer against himself. So that if the Fact be not known, and an open² Restitution would be a Confession of the Guilt, in this Case the Restitution is to be made in some indirect and secret manner. All Punishment must be inflicted upon Men against their Wills; otherwise it could never obtain its due End, which is to deter the present Offender, and all other Persons from Sin. But whatever we lie under an *Obligation* to perform, is to be undertaken by our own free and voluntary Motion. Since then no Person is properly *obliged* to invite and call down Punishment on his own Head³, but

^a Add Mr. *Pascal's* Epist. 15. *cum Annotat.*
qui ante sentent. &c. Leg. 1.

^b Lib. iv. c. 14. n. 32.

^c Vid. *Digest.* 48. tit. 21. *De bonis eorum*

MR. BARR. NOTES on §. XX.

¹ *Plato* without doubt took the Negative Part here. For he will not allow a Private Person to lye before a Magistrate, and says, 'tis a greater Fault, than for a sick Man to lye to his Physician, a Scholar to his Master, &c. His Words are, ἄλλὰ πρὸς γε δὴ τοὺς τοιούτους ἀρχοντας ἰδιώτη φεύσασθαι ταυτὴν καὶ μείζον ἀμάρτημα φέρομεν ἢ κἀμῶντι πρὸς ἰατρὸν, ἢ ἀσχοῦντι πρὸς παιδοτρέβην, περὶ τῶν τοῦ αὐτοῦ σώματος παθημάτων μὴ τ' ἀληθῆ λέγειν. &c. *De Republ.* l. iii. p. 389. *Ed. Steph.* Nay, he goes farther, and maintains, that every one of his own accord is to accuse himself and Relations, that they may suffer the Punishments which the Law inflicts, though they be Capital, as his Words import. Εἰ μὴ εἰ τις ὑπελάβοι ἐπὶ τὴναντίον κατηγορεῖν δεῖν μάλιστα μὲν ἑαυτοῦ ἔπειτα δὲ καὶ τῶν οἰκίω, καὶ τῶν ἄλλων δὲ ἀνὰ εἰ τῶν φίλων τυγχάνη ἀδικῶν, καὶ μὴ ἀποκρύπτεσθαι, ἀλλ' εἰς τὸ φανερὸν ἄγειν τὸ ἀδικημα, ἵνα δῶ δίκην καὶ ἑαυτῷ γένηται. Ἀναγκάσειν δὲ καὶ αὐτὸν, καὶ τῆς ἄλλης μὴ ἀποδειλιάειν, ἀλλὰ παρέχειν μύσαντα καὶ ἀνδρείως, ὡς περ τίμνειν, καὶ κἀν ἰατρῷ, το ἀγρῶν, καὶ καλὸν διώκοντα, μὴ ὑπολογίζεμενον τὸ ἀγρῶν, εἴν μὲν γε πληθῶν ἄξια ἢ δικηκῶς ἢ, τύπτειν παρέχοντα' εἴν δὲ δεσμῷ, δεῖν' εἴν δὲ ζημίας ἀποκρίνοντα εἴν δὲ φυγῆς, Φεύγοντα εἴν δὲ θανάτου ἀποθυήσοντα. In *Gorgia*, p. 480. *Ed. H. Steph.*

² Mr. *Thomasius*, who in his Treatise, *De Jurispr. Divin.* l. ii. c. 8. §. 85, &c. is of a contrary Judgment to our Author, objects, that the Condition of making good the Damage causes that the Crime can't be concealed, as is supposed; because by making good the Damage, the Crime is owned. But he afterwards answers it himself in his Book, Entitled, *Fundam. Jur. Nat. & Gent.* where he changes his Opinion, and says, that the guilty Person may, either by way of Accommodation, or by Friends, satisfy the Person injured in such a manner, that he shall not know who it was that wrong'd him, or if he has some knowledge of him, the thing shall not be so notorious as to bring him to Punishment.

³ The Words are, *Ignoscendum confitentibus Principes eis, qui sanguinem suum qualiter qualiter redemptum voluit.*

must, indeed, as he is a Man, naturally abhor it in the highest degree; especially if it tend to Death, or some other grievous Evil; there appears no reason why he may not decline it any way possible, provided he do not hereby injure a third Party^a. Nor can it much conduce to the Interest of a Commonwealth, that after Reparation hath been made for the Damage, any such Fact, as we now speak of, should be punish'd; that is, a Fact not open and notorious, and which consequently might be disguis'd or excus'd by some Colour or Plea. Therefore, as none but a Fool will deny manifest Faults, so from what hath been here alledg'd, it seems allowable for a Man to wipe off an Imputation by a false Defence. Tho' for a Prisoner to urge false Opinions, can seldom turn to his Advantage, the Court being suppos'd well skill'd in Right and Equity. A Judge indeed hath Power and Liberty to get out the Truth by any possible Means⁴, in case the Fact be of such Consequence, that the Safety of the Publick absolutely requires it should be punish'd. And therefore he cannot be tax'd with Lying, if to bring the Party to a Confession, he make use of some Stratagem or Fiction: As suppose, by pretending that he hath receiv'd full Information some other way, or by threatening that he will proceed to such or such Severities, if the Person accus'd persist in his Obstinacy, and the like. But it cannot hence presently be concluded, that the Criminal himself is bound to own the Charge: Because neither doth every Power, which denotes the bare Exercise of some Act, infer an *Obligation* in the Object towards which it is directed: And besides, there are other ways for the Judge to penetrate into the Business, as by Arguments and Witnesses, which Witnesses, when examin'd about the Crimes of others, are oblig'd, though unsworn, to declare the Truth, in Obedience to the Command of Authority. Farther, Self-preservation is a thing which challengeth so much Favour and Allowance, that 'tis reckon'd odious to punish the most notorious Offenders, without giving them a Hearing⁶. On which account, no Person is blamed for casting any Veil or Colour over his Fault. The Divine Tribunal and the Human are not in all respects alike; nor doth a mortal Judge preside with such Majesty and Authority as Almighty God. And if a Prisoner be not bound to make a voluntary Confession, his Denial cannot in the least impair that Obedience which he owes to the Civil Power. 'Tis true, a Crime, which hath been resolutely and stubbornly disown'd, commonly meets with the severer Punishment; because free Confession is generally a sign of Penitence, which much lessens the Malignity of the Offender: Yet whether it be more advantageous cunningly to deny a Fact,

or to embrace the Ingenuity of an open Acknowledgment, is a Point which belongs to another kind of Enquiry, not to that which we are now engag'd in, and which confines itself to Matters of strict Duty, what a Man is bound to do, and what not⁷. Which of these two Opinions ought to be chosen rather than the other, any Man will apprehend, who hath Judgment enough to weigh the Arguments offer'd on both sides. 'Tis very remarkable, that which *Hayton* reports in his History of the *Tartars*, c. 48. That although in other respects they are most notorious Lyars, yet in two things they strictly observe the Truth: First, that no Man among them arrogates to himself the Glory of an Exploit which he really hath not perform'd: And, Secondly, that whoever hath committed a Crime, though such as he knows will cost him his Life, when examin'd by his Lord, never conceals the Matter. And amongst the *Japoneses*, to be discover'd in a Lye before the Judge is a capital Offence.

XXI. But 'twill be ask'd, What liberty may the Council or the Advocate fairly take in this Case? Our Opinion is, that we ought here to distinguish between *civil Cases* and *criminal*. In the former it doth not appear that the Advocate can with a safe Conscience hinder the injur'd Party from obtaining his Right as soon as possibly he may. And therefore in such Controversies we condemn, as unlawful, not only false Allegations and feign'd Reasons, but likewise all dilatory Exceptions and Demurs; in as much as all these are a Let and Hindrance to the one Party from paying what he owes; and to the other from receiving what is due to him^c: But in criminal Cases, where the Dispute regards only the Punishment, we judge it ought farther to be consider'd, whether the Council be assign'd by the publick Authority, or by the particular Appointment of the Prisoner. If by the former, it doth not seem allowable for them to make use of feign'd Arguments and false Colours; since the Design of the Court, in deputing them, was only that they might wipe off any Calumny thrown upon the Prisoner, and take care that he suffer no Injustice. Which End is sufficiently answer'd by a bare Refutation of the Proofs offer'd by the Accuser. But he whom the Prisoner particularly chooseth and retains to plead in his behalf, since he only acts as his Client's Interpreter, may, in our Judgment, lawfully use the same Method of Defence which the Prisoner might have used, had he answer'd for himself. *He is under a very great Mistake*, says *Tully*¹, that supposes he hath got our real Opinion and Authority for all that he meets with in our Judiciary Orations. Whatever we deliver'd on those Subjects is to be ascrib'd to the Causes, and to the Times, not to the Man, or to the Pleader. And

^a Yet compare l. xiii. *D. De custodia & exhibitione reorum.* ^b Vid. l. xlviii. tit. 17. *Princ. D. De requir. vel absent. demand. & Grati Annotat. in Flr. Sparfionib.* ^c Comp. l. ix. §. ult. *D. Ad L. Cornel. de falsis.*

MR. BARR. NOTES on §. xx, xxi.

⁴ Yet *Grotius* on *Dem.* xiii. §. observes, that the *Jews* were allow'd to use Artifice in the Discovery of Criminals; only when the Party was accus'd of enticing others to Idolatry.

⁵ There is always some Obligation, though it is not always so far extended as Right. See l. iii. c. 5. §. 1. n. 1. And l. viii. c. 3. §. 4. n. 8.

⁶ The Words are, *Neque enim inaudita causa quenquam damnari æquitatis ratio patitur.*

⁷ We may easily discern that our Author embraces the last Opinion.

¹ *Tully's* Words are, *Sci. erat vehementer. si quis in orationibus nostris, quas in Judicis habiturus, auctoritates nostras confingit se habere arbitratur. Omnes enim illæ orationes causarum & temporum fact, non hominum ipsorum & Patroorum. Nam si causæ ipse pro se loqui possent, nemo adhiberet Oratorem, Orat. pro A. Cluentio, cap. 50.* In truth, *Cicero* explains this Maxim but briefly, and extends it to things which our Author approves not of. See *Mr. Le Clerc's* Questions taken out of *Jerem. Quæst. 2. §. 14.*

in his Second Book of *Offices*: he maintains, sometimes to defend a guilty Person, is not contrary to any Duty of Religion. Nor is Justice in any great danger of suffering by this Permission: For, since the Judge is supposed fully to understand the Law, the Advocate, by producing false Laws or false Authorities, is not likely to prevail to any purpose: And he is never credited upon his bare Assertion, but obliged to produce sufficient Proof. And therefore, if a guilty Person do by this means sometimes escape unpunished, the Fault is not to be charged on the Advocate, or on the Prisoner, but on the Judge, who had not the Wisdom to distinguish between Right and Wrong: Yet *Plato*^a would not grant even this degree of Indulgence in his Commonwealth. And the antient *Egyptians* held it for a certain Maxim, That the *Hurangues* of the Lawyers very much darken'd and perplex'd the Law^b. Especially, since, as *Euripides*^c observes, *Truth always speaks plain*; and therefore doth not stand in need of the Windings and Turnings of Interpreters: Whereas, * *unjust Speeches being always sick and weak in themselves, require strong and subtil Medicines for their Support*. 'Tis a Saying of *Pindar* †, *Three Words are enough to set off a good Cause*. And *Isocrates*, amongst his other Rules to *Demonicus*, adviseth him, *Never to undertake in Court the Defence of a Wicked Man: For, says he, People will think you are inclined to those Practices your self, which you defend in others* §.

It is hence evident how far we may admit of *Quintilian's* Assertion^d; *A Wise Man, says he, is on some Occasions allow'd the privilege of Lying: and an Orator, if he cannot otherwise bring the Judge to Reason and Equity, must necessarily apply himself to the moving his Affections*. And again, *That which at the first Proposal appears so harsh and strange, may however be maintain'd upon reasonable Grounds; namely, that a good Man in defending a Cause may sometimes go about to perplex the Truth, and deceive the Judge*^e. But the instances which he offers require a more strict Examination. First, he affirms, *That a Person arraign'd for plotting against a Tyrant may be defended by false Allegations*^f. And this is built upon the *Grecian* Hypothesis, which makes the killing of Tyrants lawful. Otherwise, to defend by feign'd Arguments, a Person guilty of Treason against the Prince to whom we have our selves sworn Allegiance, is therefore unlawful, because every Subject is bound to guard

and preserve his Sovereign to his utmost Ability. Whereas the desire or endeavour of sheltering a Conspirator from just Punishment would be utterly inconsistent with that Obligation. He proceeds to urge, *What if a Judge should be about to condemn a Man for some good Actions, unless we can prove the Actions not to have been perform'd, shall not the Orator who appears in his behalf be allow'd the use of such Means to preserve this innocent, and what is more, this worthy and commendable Member of the State?* But indeed such a Case as this can hardly be suppos'd. For nothing ought to be honour'd with the Name of a good Action, but what is agreeable to the Laws of the Commonwealth. And it doth not appear how any Man should be brought into Judgment for such a Performance. Let us imagine therefore, that a Person by some good and noble piece of Service hath incur'd the Envy of Wicked Men, and that these Wicked Men have afterwards got possession of the Seat of Justice. Here if the Fact were openly known, and an Accusation brought against him for it, 'twould signify nothing to disown it. As 'twould have been idle for *Cicero*, had he been arraign'd for putting to death the Associates of *Catiline*, to deny the Charge. But if the Fact may still be dissembled with some colour and probability, there's no reason why an innocent Prisoner may not be defended by feign'd Arguments before a wicked Judge. As for the other instance of *Quintilian*, *When a Man is to dissuade from some Undertaking, just indeed naturally and in itself, but in the present Juncture of Affairs disadvantageous to the State*^g; there's no need he should endeavour by false Reasons to prove those just Things to be unjust; but 'tis sufficient for him to shew, that what may justly be done, is not always necessary to be done; and that the Times now require us to choose what is useful and profitable, rather than what in strictness may seem more commendable and right; and all this may be urged without receding from the Truth. Another Case propos'd by *Quintilian* is, *When an Orator hath good Hopes of the Criminal's future Reformation*^h. And this indeed may prevail with him to be the more willing to lend the Prisoner all his Parts and Cunning in order to his Deliverance, because he is assur'd that 'twill not be to the prejudice of the Publick, that such a Person should go unpunish'd. But to rescue a good Commander from suffering for a manifest Crime, when his Life is necessary for the Honour

^a *De LL. l. xi. sub fin.* ^b *Diadr. Sicul. l. i. c. 6.* ^c *Phaniff. ver. 475.* ^d *Instit. l. xi. c. 17.* ^e *Instit. l. xii. c. 1.*

MR. BARB. NOTES on §. xxi.

² His Word are, *Nec tamen habendum est Religioni, nocentem aliquando, modo ne nefarium impiumque, defendere. Vult hoc multitudine, patitur consuetudo, fert etiam humanitas.* Our Author reflects upon the beginning of this Sentence, and falls thereby into a present Mistake. For having read these Words of *Cicero*, *Habendum est Religioni*, he supposes him to mean, that 'tis not contrary to Religion; and so says of him, *Religioni non contrarium tradit*; whereas Boys know, that *habere Religioni* signifies only, *To make a scruple of a thing*.
³ His Words are, 'Ο δ' ἀδικος λόγος Νεσῶν ἐν αὐτῷ, Φαρμάκων δεῖται σοφῶν.
[†] The Greek is, Ἐδύναμεν ἐς δίκην τρια ἔτη διαρκίσει. Nem. vii. 70.
[¶] *Isocrates's* Words are, Μηδενὶ πονηρῷ πράγματι μήτε παρίσασσι, μήτε συνιγῶρει, δόξεις γὰρ καὶ αὐτὸς τοιαῦτα πράττειν, οἷον ἂν τοῖς ἀλλοῖς πράττειν βελήσῃ.
³ His Words are, *Et mendacium alioce etiam sapienti aliquando concessum est: Et affertur, si aliter ad equitatem perducere Judex non poterit, necessarium erit Oratori. ii. 18.*
⁴ The Latin is, *Verum & illud quod prima propositione durum videtur, potest afferre ratio, ut vir bonus in defensione cause velit asserre aliquando Judicii veritatem. xii. 1.*
⁵ The Latin of this long Sentence of *Quintilian*, which our Author examines in the following part of the Chapter, is this, *Sic aliquis insidiatus Tyranno, atque ob id reus: utrumne scilicet cum nolet is qui à nobis sumitur Orator? an si tuentium susceperit, non tam falsis defendet, quam qui apud Judices veritatem causam tuetur? Quod si quaedam bene facta damnaturus est Judex, nisi ea non esse scien conciverimus: non vel hoc modo servabit Orator non innocentem modo, sed etiam laudabilem civem? Quod si quaedam justa natura, sed conflictata temporum inutilia civitati sciemus, nonne uterque arte dicenti, bona quidem, sed malis artibus simili? Ad hoc nemo dubitabit, quin si nocentes mutari in bonam mentem aliquo modo possint, sicut posse interdum concedatur, saltem esse eos magis à Republica sit, quam puniri. Si liqueat igitur Oratori, futurum bonum civem, cui etiam obijciuntur, non id agat, ut saluus sit? Da nunc ut crimine manifesto promittat Dux bonum, & sine qui vincere, h. n. esse Civem: non possit, nonne et communita utilitas, Oratorem ad docerit? Ib. and*

and Success of the State, the best Expedient is, which *Tully*^a tells us, was us'd by *Antoni* the Orator, in his Defence of *M. Aquilius* 6.

^a In *Verrem*, l. v. c. i. circa finem.

MR. BARB. NOTES on §. XXI.

⁶ This *Aquilius* being accused of cruel Extortion and Oppression, *M. Antony* the Orator open'd his Breast to shew the Judges the horrible Wounds he had received in the Defence of the Commonwealth.

CHAP. II.

Of an OATH.

- I. The Sanctity of an Oath.
- II. What an Oath is.
- III. It must be taken only by the Name of God.
- IV. And according to the Religion of him that swears.
- V. Of the Intention of him that swears.
- VI. An Oath is an additional Bond of an Obligation.
- VII. Of Oaths obtained by Deceit.
- VIII. Of Oaths obtained by Fear.
- IX. Oaths to perform things unlawful bind not.
- X. Nor those, which hinder a greater good.
- XI. An Oath doth not alter the Nature of those Actions to which they are joined.

- XII. An Oath excludes all Curvils.
- XIII. But is not always to be interpreted strictly.
- XIV. Or without some tacit Conditions and Limitations.
- XV. An Oath is to be explained by the intention of the Imposer.
- XVI. Of an Oath made in another's stead to oblige him.
- XVII. How an Heir is obliged by the Oath of the Dead.
- XVIII. A Division of Oaths; as, 1. For Confirmation. 2. In bearing Witness. 3. Decisive of a Controversy. 4. Suppletory or Clearing.
- XIX. Whether every breach of an Oath is Perjury.
- XX. Of the ways of dispensing with Oaths.

WE proceed to examine and state the Nature of an Oath, which is judg'd to add great strength and confirmation to our Discourse, and to all our Acts which have any dependence upon Speech: which though we might have treated of very properly and conveniently hereafter, when we come to explain the enforcements of Paçts and Covenants; yet we chose to assign it this particular Place rather than any other, because the Custom of Swearing is us'd for the Establishment and Security not only of Covenants, but of bare Assertions. (To which purpose it may not impertinently be observed, that amongst the *Jews* no Oaths or Vows were esteem'd obligatory, but such as were openly deliver'd in ^a Words.)

An Oath the very *Heathens* look'd on as a thing of so great Force, and of so sacred Authority, that they believ'd the Sin of Perjury to be pursued with the severest Vengeance; such as extended itself to the Posterity of the Offender, and such as might be incur'd by the bare Thought and Inclination, without the Act. Vid. *Grot.* l. ii. c. 13. s. 1. *Philo Jud.* de Sacrificiis *Abel. & Cain.* p. 113. E. Edit. *Genev.* Our Assertion derives its Force from the Oath, the Oath from God¹. Thus *Diodorus Siculus*^{2 b} re-

ports of the *Egyptians*, That by their Laws Persons who had forsworn themselves, were adjudg'd to capital Punishment, as guilty of the two greatest Crimes; in violating that Piety which they ow'd to God; and in destroying Faith from amongst Men, the strongest Pillar of human Society.

II. An Oath then is a religious Asseveration, by which we either renounce the Mercy, or imprecate the Vengeance of Heaven, if we speak not the Truth. That this is the Sense and Purport of Oaths, appears from those Forms of Words in which they are commonly express'd; as, *So help me God, God be my Witness, God be my Avenger*, and other equivalent Terms, which amount to much the same. For when a Superior, who hath a right of Punishing, is appeal'd to as a Witness, his Vengeance is likewise invoked in case of Breach of Faith; and God who knows all things, being ever a Witness, is ever an Avenger. *Plutarch*, *Quæst. Roman.* 44. observes¹, that every Oath terminates in the Cause of Perjury; or, that is the Ground and Bottom upon which all Swearing depends. In the same place enquiring into the Reasons why the *Flamen Dialis* amongst the *Romans* was not allow'd to swear, he delivers himself to this purpose: *Was it*

^a Vid. *Grot.* in *Levit.* v. 4. *Numer.* xxx. 3. *Deut.* xxiii. 23.

^b Lib. i. c. 77. p. 69. A. Edit. *Rbdam.*

MR. BARB. NOTES on Chap. II. §. I, II.

¹ The Passage of *Philo* the *Jew*, which our Author quotes, respects the difference between Oaths made by God, and such as are made by Men, which consists in this, That an Oath adds a Force to our Words, whereas God's Oath takes all its Force from his Word. So are his Words, *Καὶ συμβέβηκε τὴν μὲν ἡμετέραν γάρμην ἰσχύω. τὸν δὲ ἔρκον αὐτὸν Θεὸς πεπιστέωμαι.* I am mistaken, if our Author did not think that *Philo* meant by these last Words, That the Force of Oaths made by Men proceeds from the Fear they have of God. The Impropriety of the Latin Translation, consider'd with the following part of the Discourse, was apparently the Cause he so understood it, otherwise he could not have quoted this Passage, which had been nothing to his purpose.

² *Diodorus's* Words are, *Πρῶτον μὲν ἦν κατὰ τῶν ἑπισημῶν θάνατος; ἢ παρ' αὐτοῖς [Αἰγυπτίους] τὸ πρῶτον, ἕς ὅσο τὰ μέγιστα ποσῶν τῶν ἀνομίμων Θεοῦ τε δεσβεύοντων, καὶ τὴν μέγιστην τῶν παρ' ἀνθρώποις κρίσιν ἀνατρέποντων.* See several other Authorities in *Grotius*, l. i. c. 13. §. 1.

¹ The Greek is, *Πῶς ἔρκος εἶ; κατὰραν τελευτῆ τῆς ἐπισημίας.* See also *Grotius*, lib. ii. c. 13. §. 10.

because an Oath is a kind of Torture, or the only Force that may be applied to the Souls of free Subjects ; whereas the Priest ought to be exempt from all Violence, as well in Mind as in Body : Or because every Oath terminates in the Curse of Perjury ; whereas all Cursing is ominous and unlucky ; which is the Reason that the Priests are forbidden by the Laws to use Imprecations towards others ? And indeed the Conduct of the Athenian Priest was commended, who being order'd by the People to devote Alcibiades with the usual Ceremonies, refus'd ; alledging, That his Business was to preside in good Wishes, not in bad. Or, was it, because the Guilt of Perjury might turn to the Danger of the Publick, if an impious forsworn Wretch were to offer Vows and Prayers in behalf of the State, and to perform the Offices of religious Worship ? Nor can a more grievous Punishment light upon Mankind, than their losing all Title to the Protection and Assistance of Providence. Yet when we say, that God is invoc'd as a Witness in Swearing, it ought on no account to be hence infer'd, that an Oath should be look'd on as the Testimony of God ; or as if God himself gave Attestation to the Veracity of the Swearer^a ; which seems to be the Opinion of Bishop Sanderfon^a. But when an Omniscient and Omnipotent Being is call'd to be both a Witness or Guarantee, and likewise an Avenger, we therefore presume upon the Truth of what is deliver'd, because we cannot conceive any Person to be arriv'd at such a pitch of Impiety, as lightly to stir up the Divine Vengeance against himself. And hence Perjury appears to be a most monstrous Sin, in as much as by it the forsworn Wretch shews, that he at the same time contemns the Divine, and yet is afraid of human Punishment ; that he is a daring Villain towards God, and a sneaking Coward towards Men^b. The scope and meaning of Oaths is likewise suggested by the End for which they have been introduc'd : and that is, that Persons might be the more firmly engag'd to declare the Truth, or to perform their Promises, by the just Awe and Dread of the Divinity, infinite in Knowledge, and infinite in Power ; whose Wrath they thus invite down upon their own Heads, if they knowingly deceive : Whereas perhaps there would not have been Force and Security enough in the Fear of Men, whose Strength they might fancy themselves able to baffle or to decline ; or whose Discovery they might hope to escape^c. For in Cases where the Party with whom we transact, if he deceive us after his bare Word or Promise, cannot possibly lie conceal'd, nor avoid human Punishment, it seems superfluous to put him to his Oath. 'Tis the Advice of Demosthenes^d,

Those who escape your Justice, leave to the Vengeance of the Gods ; but those on whom you can lay hands, never consign over to Providence, without punishing them your selves. And for this reason we should judge it to be an Absurdity in the Civil Law^e, when, on the contrary, it allows a Woman to swear that she is not with Child. This Caution will appear to have the more Weight, if we consider that the too frequent use of Oaths doth in many Persons much impair the Reverence due to them. It was an excellent Lesson which Pythagoras^f gave his Scholars ; Very rarely and very hardly to be brought to an Oath, but if they had once sworn, most inviolably to observe it. Nor is Isocrates's Precept on the same Subject to be despis'd ; Never swear, says he, on the account of Money, though you would do it with the greatest Safety and Assurance ; lest you draw upon your self a double Imputation, of Perjury with some, and of Avarice with others^g.

But as 'tis just and right to pay the most religious Reverence to Oaths, so is it vain Presumption to expect or desire that their Truth or Falshood should be evinc'd by an immediate Miracle ; as if God were obliged to exercise his judicium Office, at the pleasure and humour of Men. And yet this was a Superstition which very much obtain'd of old, not only amongst the Heathens, but in the ignorant and barbarous Ages amongst Christians themselves. Sophocles^h plainly speaks of the Fiercy Ordeal ;

Ἦμεν δ' ἑτοιμοὶ καὶ μύδρες αἶρειν χερσῶν,
καὶ πῦρ διέρπειν, καὶ Θεοῦς ὀρκιωμετεύ.

Prepar'd we stood to lift the burning Steel,
To tread the Flames, and by all Heaven to swear.

'Tis remarkable what P. Baldens in his Treatise of the Idolatry of the Indians reports of the Malabars, That amongst them, the Person who is to take a Purgative Oath, bath his three first Fingers dipt in melting Butter, and then wrapt up in Leaves, which three Days after are uncover'd, to see the Effect. Others are order'd to swim over a River between Colchis and Cranganor, full of Crocassiles : Others to reach an Apple out of a Pot stuf'd with Serpents, and by the success of these Attempts a Judgment is made of their Innocence^k.

And indeed if we would confess the Truth, Oaths either infer or presuppose the Diffidence, Unfaithfulness, Ignorance, and Impotency of Mankind. For what need would there be of such Engagements, if we could securely rely on the Faith and Constancy of others ; or if there were no Examples extant

^a De Obligat. Jurament. Prælect. 1. §. 6. ^b Vid. Charron. de la Sagesse, l. iii. c. 8. n. 7. ^c Lucian. Phalar. 1. p. 731. Edit. Amst. It may perhaps be an easy matter to deceive Men, but 'tis impossible to lie conceal'd from God, Plin. l. iv. Epist. 25. n. 4. Edit. Cellar. Men of wicked Inclinations take Confidence and Encouragement from that Reflection, quis sciet ? Who will ever know what we do ? ^d De falsa legat. p. 209. Edit. Genev. ^e Vid. l. iii. §. 3. D. de jurajur. ^f Ad Demonic. Hobbes De Civ. c. 2. §. 23. Add. Valer. Max. l. ii. c. 10. §. 2. ext. They are the truest Men, qui colunt fidem jurant, who have no other Oath than to keep their Word without Swearing. Vid. Curt. l. vii. c. 8. n. 29. Edit. Cellar.

In Sophocles, Oedip. Colm. Oedipus thus bespeaks Theſeus, ver. 642.

I'll not require an Oath as from the Wicked.

Theſeus replies, Oaths could not force more than my Word shall pay.

^g Antigon. v. 269. ^h See Dr. Potter's Græcian Antiq. l. ii. c. 6. ⁱ See the Forms of Exorcisms in Marsalpb. Cap. ult. ^k See likewise Bern. Varon. Descript. Japon. c. 18. & J. duc. Schouten. in Descript. Regn. Siam. where he gives an account of their judicial Proceedings. Euseb. in St. b. Sermon. xxvii. It's the Advice of many Men, that we should strictly make good what we swear : But I think it no less a Duty of Religion to consider well before we swear. Add. Grot. in Matth. v. 34.

MR. BARRÉ'S NOTES on §. II.

² See Mr. Placcette's Treatise about an Oath, lib. i. c. 1.

³ His Words are, Ἐπανίως μὲν ἑμνύσαι, χερσαίμους δὲ τοῖς ὀρκίοις πάντως ἐμμένειν.

of Perfidiousness; or if we had strength enough to compel Persons to make good what they owe? Lastly, what Occasion would the Judge have to enquire the Truth of sworn Witnesses, unless he were ignorant of it himself? And from this Principle I should draw the Reason of that Speech of the Emperor Frederick in the Poet ^a.

*Juramenta petis? Regem jurare minori
Turpe reor. Nudo jus & reverentia verbo
Regis inesse solet, quovis juramine major.*

Dost thou desire an Oath? it is below
A Prince to Subjects such Respect to show.
The Sacred Awe that guards a Prince's Word,
Hath stronger Tyes than strictest Oaths afford.

Not only to have Faith and Honesty kept up inviolably in the World, is in the highest Manner the Interest of Princes; but likewise because 'tis unbecoming their Majesty, to seem liable to the least suspicion of Perfidiousness, Falshood, or Deceit. Thus we are told, that amongst the old *Peuvians* Oaths were not at all in use; but the Persons who were to give their Testimony, barely promised they would confess the Truth to the Ynca ^b.

III. Since GOD alone is of infinite Knowledge, and of infinite Power, the Absurdity is manifest of Swearing by any thing which we do not look upon as Divine; in such a sense as to invoke it for a Witness of our Speech, and for an Avenger of our Perjury. Hence as it was usual for the Heathens to swear by the Stars, because they judg'd them to be so many Deities; so for a Christian to imitate them in that Practice, would be a Mixture of Impiety and Folly. As for those Forms attributed to some of the Antients, as that of *Socrates* ², by a Dog, by a Goose (whatever *Porphyry* ^c pretends to the contrary) and by the *Plane-Tree*, that of *Zeno*, by a *Caper*; and that of others, by *Crambe* ^d, we are to esteem them meerly jocular. They swore by these, as *Apollonius* ^e saith, not as by Gods, but to avoid Swearing by the Gods; when by the practice of the generality of Men it was grown into

an ill Custom, to apply Oaths as the supplemental Ornament of Speech.

But that which was most in use by the Antients, was to swear by those things which each Person held most dear, or set uppermost in his Veneration and Esteem. So *Ascanius* in *Virgil*,

Per caput hoc juro, per quod pater ante solebat;
Æn. IX. v. 300.
By this my Head; my Father's Oath before.

So we every where read of Persons swearing by their own Life and Soul, and by the Life and Soul of those Friends who stood first in their Affections. And the Lovers thought themselves very Religious in swearing by the *Bright Eyes*, the *Sweet Lips*, the *Golden Tresses* of their Mistress ^f. All which Speeches are by no means to be interpreted in this sense; either that those things were invoked as Witnesses and Avengers of Falshood, as *Apuleius* ^g amongst others believed; nor that they were cited to give Testimony under the Notion of belonging to God, and expressing somewhat of the Divinity, namely, his Truth, Goodness, and Power, and which the Person thus swearing hereby acknowledgeth, that he enjoys by God's Mercy; and that he is unwilling to lose by God's Justice; as if he should say, *I swear by my Life*, that is, *by God to whom I owe my Life*; which is the Opinion of many, and particularly of *Bishop Sanderfon* ^h. But they only thus invoc'd GOD himself, desiring that if they swore falsely, he would be pleas'd to punish their Crime in those things especially, for which they were most nearly and tenderly concern'd ⁱ. Thus it was the ordinary Custom of the *Athenians*, in their solemn Oaths to devote themselves and their Family to Destruction, if they deceiv'd; and on the contrary to beg all Happiness from the Gods on themselves and Friends, if they swore truly; as is evident from frequent instances in *Demosthenes* ^j. And they firmly believ'd, that the Violation of such Engagements would draw down the Anger of Heaven upon the Heads of others, as well as upon their own. *Pliny* ^k tells a Story of one *Regulus*,

^a Gunther. *Ligurin*. l. iii. v. 510, &c. ^b *De la Vega*, Comment. Reg. l. ii. c. 3. ^c Lib. iii. *πρὸ ἀποχῆς*. ^d Vid. *Attes-*
næum *Deipnosoph.* l. ix. c. 2. ^e In *Philostrat.* l. vi. c. 9. ^f *Ovid Amor.* l. iii. El. 3. 13, 14.
Perque suos illam nuper jurasse recordor,
Perque meos oculos; & doluere mei.
^g *De Deo Socrat.* ^h *De Jurament. Obligat. Prælect.* 1. Sect. 4.
ⁱ *Ovid. Trist.* l. v. El. 4. 45, 46.
Per caput ipse suum solitus jurare, tuumque
Quod scio, non illi vilius esse suo.
^k Add. *Antiphon. Orat.* 15. ^l Lib. ii. *Epist.* 20. n. 5, 6.

Mr. BARB. NOTES on §. III.

¹ What Confusions, Absurdities, and Contradictions the Notions of the Heathens were! These two Attributes of the Deities, which are the Foundation of an Oath, were so well known to them, as to give a great Force to that Act of Religion. They believ'd that God was present in all places, and saw all things, the most secret Thoughts of the Heart not being excepted. This appears, for Example, by this Fragment of the Comedian *Philemon*, who takes the Air for *Jupiter*.

Ἐγὼ δ' ὅ θεῶν ἔστιν ἔργον, εἰμὶ πανταχοῦ.
Ὅ δὲ παρὼν ἀπανταχοῦ,
πάντ' ἐξ ἀνάγκης οἶδε, πανταχοῦ παρών.
Stob. De Rerum Nat. Tit. 3. Collect. Cler.

And so in the Prologue of *Plautus's Amphitryo*, ver. 57, &c. *Mercury* thus speaks,
Utrum sit, annon, voltis? Sed ego stultior,
Quasi nesciam vos velle qui Divus siem,
Teneo quid animi vestri super hac re fiet.

See *Lucian* in *Chronosol* Tom. ii. p. 614. *Ed. Amst.* As to God's Omnipotence, these Verses of *Ovid* are sufficient to alledge, God's Power's immense, and has no Bounds:

Non habet: & quicquid Superi voluere, peractum est.
Whatever the Gods will have done, must be perform'd.

² See *Menage* upon *Diogenes Laertius*, lib. ii. §. 40. where he hath amassed together many things relating to this Matter. It shall suffice at present to relate the Words of *Philostratus*, of which our Author quotes only a part. *πρὸς ταῦτα ὁ Θεσπεσίαν, ἐγένετό τις ἔφη, Σωκράτης ἰθιναῖος ἀνίστος, ὡσπερ ἡμεῖς, γέρον, δεῖ τὸν κύνα, καὶ τὴν χίνα, καὶ τὴν πλάτανον, εὖς τε ἤγειτο, καὶ ἄμυν ἔκ ἀσθή-
τος, εἶπεν ἄλλοι θεῶς, καὶ ἀπεκνήσ, σοφός ἄμυν γὰρ ταῦτα, ἐκ ὡς θεός, ἀλλ' ἵνα μὴ θεός ἄμυν.*

who made a gainful Trade of Perjury, in relation to Wills and Testaments; that giving a Visit to a sick Lady (*Verania* Wife to the famous *Piso*) and persuading her that by his Astrological Observations he foresaw she should recover: The Lady being easily credulous under so great an apprehension of Danger, call'd for her Will, and set down *Regulus* for her Heir; but soon after falling into Extremities, she died with this Exclamation against her Deceiver; *O wicked and perfidious! O worse than perjurd Villain, who forswore himself by the Life and Safety of his own Son!* The Reflection which *Pliny* makes on the thing is this, *Regulus useth this Stratagem not more frequently than wickedly; whilst he imprecates the Wrath of the Gods, whom he every day deceives, upon the Head of the unfortunate Youth*^a.

And hence too we may gather the Meaning and Design of those Oaths, which were heretofore made by the *Life*, the *Genius*, the *Safety* of Princes; which we are told are still customary amongst the *Persians*, and are esteemed more strict and sacred, than those in which the Name of God is immediately invoked. For they did this, not as thinking there was any Divinity in their Princes, whilst alive, nor as imprecating their Displeasure if they spoke false; but because many of them either in good earnest, or at least in Flattery, intended hereby to shew, that they prefer'd their Prince's Safety to their own; and therefore look'd upon it as a more horrid Perjury to devolve the Wrath of God upon *Him*, than upon *Themselves*³. So that the sense of those *Protestations* was properly this; *So may my Prince be happy and safe, as I perform what I now Promise*; that is, unless I fulfil my Engagement, I desire the Divine Judgment may light upon my Prince's Head. *St. Augustin*^b speaks very pertinently to this purpose. *What else, saith he, is that which we call (Jurare) to swear, but (Jus reddere) to pay the Due or Right; to God, if we swear by God; to our Children, if we swear by them? And what Right do we owe to our own Safety, to our Children, or to our God, but the Right of Love and of Truth, not of Treachery and Falshood? When any Man says, By my Safety, he pawns and engageth his Safety to Providence, for the truth of what he affirms; when he says, By my Children, he consigns over his Children as so many Pledges to God; desiring that whatever comes*

out of his own Mouth may fall upon their Head; Truth, if he declares Truth; Falshood, if he speaks falsely. Whatsoever therefore a Person names in his Oath, whether his Children, his own Life, or Safety, or any thing else, he devotes and binds it over to Almighty God. And hence, although *Philo* the Jew is justly to be prais'd for condemning rash and profane Swearing, yet we can by no means approve of his Doctrine, when he delivers himself so loosely, as in the following Terms^c: *If, says he, the Exigency of Affairs necessarily requires an Oath, it is more becoming to swear by the Health or the prosperous Age of our Father or Mother, if alive; or by their Happy Memory, if they are dead. For their Act of producing their Children into Life from nothing, makes them the Images and Representatives of the Divine Nature*⁴. *They too deserve Commendation, who, as often as they are urged to swear, by delaying and hesitating strike an awe, not only into the Spectators, but into those very Persons who require the Oath at their Hands. For 'tis a Custom with some, when they have pronounced the first Words of the Form, So help me, to leave off abruptly, adding what they please besides in their Mind and Thoughts. For the Sentence may be fill'd up by subjoining not only the Highest, or the Creator of all things, but the Earth, the Sun, the Heavens, or the World. Nor do I see any Excuse that can be brought to justify that Oath of the Christian Soldiers recited by *Vegetius*^d, which carries in it too gross an excess of Reverence towards the Emperors. They swear, says he^e, by God, and by Christ, and by the Holy Spirit, and by the Emperor's Majesty, which next to God is to be loved, and to be worshipp'd by Mankind. For when our Prince hath been once invested with the Title of Augustus, we are to pay to him, as to a present mortal God, faithful Devotion and most watchful Service. For though we should grant the following Clause, A civil or a military Person then serves God, when he faithfully loves him who reigns by God's Appointment and Authority; yet this is by no means a Reason why they swear by the Majesty of the Emperors in the same manner as by the Name of God. Nor is it to be supposed, that common Soldiers should be capable of so much Subtily as to distinguish the Words (by) in the same Form into two different Senses, one as apply'd to God, another as spoken of the Emperor. This is certain*

^a *Lysias* Orat. adverb. *Diagiton*. "I am ready with a well assured Mind, whenever you please to require it, to swear by the Lives of these my Children, and of those which I have since had by a second Bed. And I am not yet arriv'd at so desperate a degree of Misery, nor am so unreasonably covetous of Money, as that I should be willing to devote my Family to a Curse, only that I may leave them a Maintenance; or by an unnatural Wickedness to rob my Father of his Estate.

And here likewise it may be remarked by the *Bye*, that the *Banjans* in *India*, who set the highest Value and Respect on their Cows, esteem it a most sacred Oath to hold a Knife near the Cow, and say, *If what I affirm be false, or if I do not perform my Bargain, may the Cow be struck through with this Knife*, *Pietr. della Valle* Itin. Part ii. Epist. 1. ^b Citat. à *Grotio* in Flor. Spart. ad l. xxxiii. *D. de Jurjur.* ^c *De special. legib.* ^d *De re militar.* l. ii. c. 5.

MR. BARB. NOTES on §. III.

³ Hence it appears, saith our Author, that such Persons were with Reason punished very rigorously, who were perjurd, after they had sworn by the Head, Throne, or Health of the Prince, because they believed, that by such an Oath they exposed that sacred Person, upon whose Safety the whole Kingdom depended, to Divine Vengeance. See what *Herodotus* says of the *Scythians*, Lib. iv. and *Zosimus*, Lib. v. In the *Capitularies* of *Charles the Great*, Men are forbid to swear by the Life of the King or his Children, Lib. iii. c. 42. See the *Diogenes*, lib. xii. tit. 2. *De Jurjur.* &c. leg. xiii. §. 6.

⁴ *Philo's* Words are, Ἄξιον ἑπαινεῖν καὶ τῆς, ὅποτε βίαισθετεν ὁμνῶναι τῷ μέλλειν καὶ βράδυνειν καὶ ἀποκεῖν ἐμποιοῦντας δῖος ἕ μόνου τοῖς ἔρῳειν, ἀλλὰ καὶ τοῖς προκαλομένοις εἰς τὸν ἕρκον, ἐὼθσαι γὰρ ἀνασθεγῆζόμενοι τοσοῦτον, ἢ τὸν, ἢ μὴ τὸν, μηδὲν προσλαμβάνοντες, ποσῶσαι τῆς ἀποκοπῆς, τρανῶν ἕρκον ἕ γενόμενον ἀλλὰ καὶ προσλαβέτω τις, εἰ βούλοιο μὴ μὲν τὸ ἀνωτάτω καὶ πρὸς ὑτάτου εὐθὺς αἰτιον, ἀλλὰ ἕην, ἕμιον ἀξέρας, ἕρανόν, τὸν σύμπαντα κόσμον. See the Interpreters upon *St. Matthew*, v. 34. and *Aristophanes's Ranae*, ver. 1422. where *Mr. Spanhemius* quotes this Passage of *Philo*, *De Spectaculo*, for *De Legibus Special.*

⁵ The *Historian's* Words are, *Jurant autem per Deum, & per Christum, & per Spiritum Sanctum, & per Majestatem Imperatoris, quæ secundum Deum generi humano diligenda est & colenda. Nam Imperatori, cum Augusti nomen accipit, tanquam presenti & corporali Deo, fidelis est præstanda devotio, & impendendus pervigil famulatus. Deo enim vel privatus, vel militans servit, cum fideliter sum diligit, qui Deo regnat auctore.*

from *Eusebius's* Ecclesiastical History ⁶, that to swear by the Fortune of the Emperor was accounted one of the Marks of abjuring Christianity; which therefore *St. Polycarp* resolutely refus'd to the last. And so too it may be justly question'd, whether we ought to approve of that Oath prescrib'd by *Charles Gonzaga* to his new Order of Knights, in the Form following; *I swear by the Immortal God, and by the Antient Nobility which I profess* ^b. Hence likewise it appears, That the Antients had good reason for punishing with the utmost severity Persons who had forsworn themselves by their Prince's Life or Safety; inasmuch as they were thought hereby to make him obnoxious to the Divine Punishment, whose Success and Preservation is yet so closely connected to the publick Security ^c. Thus we find the *Scythians* in *Herodotus* ^d, as often as their King happen'd to be sick, making strict enquiry whether any of the Subjects had sworn falsely by the Royal Throne; and if such a Person was discover'd, he suffer'd Death for his Perjury. In *Zozimus* ^e the *Roman* Magistrates declar'd they could not accept of the Proposals of *Alaric*, though fair and just, because they had sworn by the Life of their Prince, that they would never consent to a Peace with the Invader. *If their Oath had been directed to God, they say, they might possibly have waiv'd it in this necessity, relying on the Divine Mercy for the pardon of so impious a Crime; but since they had bound themselves by the Life of the Emperor, they thought it absolutely unlawful for them to break through so solemn an Engagement.* In the Capitulatory of *Charles the Great* ^f, we find a Prohibition against swearing by the Life of the King, or of his Sons. As to the Civil Law, *Ulpian* doth not deny it to be an Oath, when a Man swears by his own Safety ⁷; but says, it is not valid, unless it were expressly propos'd to him in those particular Terms ⁸. Because Oaths being taken for the Benefit and Security of him that requires them; therefore Custom makes it necessary they should be form'd in the Words which he proposeth, so that they may fully bear his Meaning, and answer his Design ^h. Whereas, if the Party who is to swear might choose his own Words, he would have an opportunity, by insidious or equivocal Expressions, to evade the force of his Obligation. Another Reason for *Ulpian's* Assertion may be, because such Speeches and Protestations continually losing somewhat of their Reverence by daily Use, no Man can be bound to let the trite Form of another Party (with which he often lards his Discourse when he doth not think on't) pass for a serious and solemn Oath. And *Mr. Hobbes* ⁱ is in the Right, when he censures these customary

Expressions, as not properly Oaths, but profane Abuses of the Name of God, arising from an ill Habit of being too positive and vehement in Talk.

From what hath been offer'd it is clear, that Execrations, although strictly taken, as when a Man barely lays Curses, or imprecates Mischief on himself or others, they are not Oaths; yet are on all Accounts to be reckon'd part of an Oath, as they respect any Assertion or Promise, which they are added to bind ^k. And this is to be extended likewise to those Prayers or Wishes, by which a Man makes the performance of his Oath the Condition of his obtaining such or such a Blessing. As that of the Boy in *Jelias* ^l, *So may I crack Timeias's Skull.* Thus we find *Julian*, to encourage his Army, constantly swearing (as the Historian speaks ^m) not by the *Graces*, but by the Greatness of his commenc'd Exploits; *So may I bring the Persians under the Yoke; so may I reverse the weak Condition of the Roman World:* As *Trajan* is reported sometimes to have confirm'd his Speeches, by adding, *So may I see Dacia reduc'd into the form of a Province; so may I lay Bridges over the Danube and Euphrates* ⁿ. 'Tis remarkable in the *Parthians*, a People of *Indostan*, that they are so extravagantly proud, as to use for an Affirmation, *May I never come to be a King in Dehli, if I don't make good my Promise.* And hence too it appears what Interpretation we ought to put on those Oaths which we meet with in Scripture, when even good and pious Men swear by some created Thing ^o. That amongst the Jews of the latter Ages, nothing was more common than Oaths ^p, *By the Head, by the Heaven, by the Earth, by the Temple, by the Gold of the Temple, by the Altar, by the Gift upon the Altar,* is evident from *St. Matthew* *xxiii. v. 16, &c.* Where our Saviour reproves them severely for their profane Abuses, and impertinent Cavils in this Matter. The *νὴν μὰ τὸ δὲ σκεπτρου* in *Homer* ^q, *Didymanus* thus expounds, *We are to know, says he, that in swearing by the Sceptre they swear by God himself, the great Governour and Controller of Kingdoms* ^r. Yet *Ovid* hath given us another sort of an Explication:

*Nam sibi quod nunquam taetam Briseida jurat
Per sceptrum; sceptrum non putat esse Deos* ^s.

Who by his Sceptre swore *Briseis* free,
Ne'er took the Wood to be a Deity.

We learn from *Procopius* ^t, that the *Persians*, in the latter Times of that Nation, used to swear by *Salt*. And in one of the *Byzantine* Historians, we

^a Lib. iv. c. 15. ^b *Gramond. Hist. Gall. l. v.* ^c *Vid. Grot. in Specul. Flor. ad leg. 23. D. de Jurjur.* ^d *Melpomen. p. 154. init. Edit. H. Steph.* ^e *l. v. in fine.* ^f *Lib. iii. c. 42.* ^g *Add. l. iii. f. 4. l. iv. l. v. princ. d. t.* ^h *Comp. Lic. l. xxii. c. 33. c. 3.* ⁱ *Levitab. c. 14.* ^k *Comp. Ziegler ad Grot. l. ii. c. 13. f. 10.* ^l *V. H. l. xii. c. 9.* ^m *Ammon. Marcellin. l. xxiv. c. 3.* ⁿ *Add Grot. ad Gen. xxiv. 2.* ^o *Vid. Gen. xlii. 15.* ^p *1 Sam. xxv. 26. 2 Sam. xiv. 19. 1 Kings ii. 23. 2 Kings ii. 4. 10. 11. l. v. 234.* ^q This place of *Homer* is thus imitated by *Valerius Flaccus*,
*Hanc ego, magnanimi spoliis Didymantis, hastam,
Quæ neque jam frondēs, arides nec preseret umbras,
Ut semel est excussa jugis & matre perempta,
Fida ministeria. & duras obit horrida pugnæ;
Testor, & hoc omni ductor tibi numine firmo.* *l. iii. 707.*
Comp. Virgil. Æn. xii. v. 206.
^r *Ovid. De Remed. Amor. 733, 784.* ^s *Add Grot. l. ii. c. 13. f. 11.* ^t *De Bell. Persic. l. i. c. 3.*

MR. BARB. NOTES ON §. III.

⁶ I have recited the Passages of *Origen* and *Tertullian* about this Matter in my Notes upon *Dr. Tillotson's* 22^d Sermon, which, though a short one, contains a strong Confutation of such Christians who absolutely condemn the use of all Oaths.

⁷ The Words of the Civil Law are, *Qui per salutem suam jurat, licet per Deum jurare videtur respectu casu Dei ini Nominis in jurat) attamen si non ita specialiter jusjurandum ei delatum est, jurasse non videtur: & ideo ex hoc non videtur juramentum est. D. gell. l. xii. tit. 2. De Jurjurando, &c. Leg. 33.*

⁸ As the Heathens did. See *Mr. Baron Spanhemius* upon *Aristophanes's* *Plutus*, v. 129.

find *Mahomet* the *Turkish* Emperor adjuring, by *Bread and Salt*, his *Vizier Bajazet* ^a.

IV. To proceed: That part of the Form in *Oaths*, under which God is invoc'd as a Witness, or as an Avenger, is to be accommodated to the religious Persuasion ¹ which the Swearer entertains of God: It being vain and insignificant to compel a Man to swear by a God whom he doth not believe, and therefore doth not reverence. And no one thinks himself bound to the Divine Majesty in any other Words, or under any other Titles, than what are agreeable to the Doctrines of his own Religion; which in his Judgment is the only true way of Worship. And hence likewise it is, that he who swears by false Gods, yet such as were by him accounted true, stands oblig'd; and if he deceives, is really guilty of Perjury. Because whatever his peculiar Notions were, he certainly had some sense of the Deity before his Eyes; and therefore by wilfully forswearing himself he violated, as far as he was able, that Awe and Reverence which he ow'd to Almighty God ^b. Yet when a Person requiring an Oath from another, accepts it under a ² Form agreeable to that Worship which the Swearer holds for true, and he himself for false, he cannot in the least be said hereby to approve of that Worship. Thus a *Christian*, when he admits of the Oath of a *Jew*, doth on no account subscribe to his Opinion, who denies the one only true God, the Maker of Heaven and Earth, to be the Father of our *Lord Jesus Christ*. Yet I doubt whether the Example ³ of *Laban* in this Case, alleg'd by *Grotius* ^c, from *Gen. xxxi. 53.* comes up to the Purpose; for the *God of Abraham*, and the *God of Nahor*, and the *God of the Fathers*, was the living and true God ^d.

V. But farther, it is requisite to the Force and Obligation of an Oath, that it be taken with deliberate Thought, and real Design. And therefore

he shall by no Means stand bound, who not thinking himself to swear, hath happen'd to utter Words which imply an Oath; or who hath barely recited the Form; or who, being by Virtue of some Office appointed to give other Persons their Oath, tells them how they shall speak after him ^e. In this Case *Lucian's* Saying will hold good, *We are not to consider his Mouth, but his Heart* ^f. It was vain therefore in *Cydippe* to fancy herself religiously oblig'd, by reading the Oath which *Acontius* had wrote upon the Apple. And so indeed *Ovid* ^g hath taught her to argue,

*Quæ jurat, mens est; nil conjuravimus illâ.
Illa fidem diâis addere sola preest.
Consilium prudensque animi sententia jurat,
Et nisi judicii vincula nulla valent.
Si tibi nil dedimus præter sine pectore vocem,
Verba suis frustra viribus orb. tenes.
Non ego juravi; legi jurantia verba, &c.*

The Mind must swear; with that we never swore;
Yet that alone can add a binding Power.
Oaths are the Act of Wisdom and of Thought;
Words give the Thread, but Judgment ties the [Knot.

Since all we said an empty Sound we prove,
Sound without Sense hath lost its Force to move.
We did not *take*, we did but *read* the Form, &c. ^h.

But 'twould be most senseless and absurd, if a Man designing to swear, or at least pretending such a Design, should yet refuse to be ty'd by what he says; and should urge in Excuse, that when the *Oath* was administer'd to him, his Intention was barely to recite the formal Words, but not to lay any Obligation on his Conscience ^h. Not so much (if we consider the immediate Reason) because Obligation is the necessary Effect of an *Oath*, and inseparable from it; as because otherwise the whole use of Oaths, nay and the whole Method of engage-

^a *Ducal. Hist. Byzant. c. 22.*

^b *Juvenal. Sat. xv. 37, 38.*

Numina vicinorum

Odit uterque locus: cum solus credat habendos

Effe Deo, quis ipse colit.

^c *Add. l. xii. t. 2. l. v. l. 1. De Jurejur. which is not contradicted by §. 3. d. l. &c. or the Decision of Canon-Law, Quest. 5. Cauf. 22.*

^d *Lib. ii. c. 13. f. 12.*

^e *Ald. Jul. Can. xvi. Quæst. 5. Cauf. 22.*

^f *Add. l. xiv. t. 7. l. iii. f. 2. D. de Obligat. & Action.*

^g *Pro Lapp. inter salutatand.*

^h *Epist. Heroid. xxi. v. 135, &c.*

^h See *Grot. l. ii. c. 13. f. 2, 3.*

Each calls the other's God a senseless *Stock*,
His own *Divine*, though from the self-same Block.

Mr. Tate.

MR. BARB. NOTES on §. IV, V.

¹ *Dicus Pius, jurejurando, quod propria superstitione juratum est, standum rescripsit, Digest. lib. xii. tit. 2. De Jurejurando, &c. leg. 6. §. 1.* Our Author adds, that §. 3. of the same Law is not contrary to this he has cited, no more than the decision of the Canon Law, *Cauf. 22. Quæst. 5.* Further, as *Gronovius* observes in his Notes upon *Grotius*, History furnishes us with Examples of such Heathens as have been punished for their Impieties committed against their false Gods, such as *Cambyzes* in *Justin. l. i. 9.* 'The *Gauls*, who robb'd the Temple of *Delphos*, *ibid. l. xxiv. 8.* *Pyrrhus* and a Roman Garrison, *Liv. xxix. 18.* See Mr. *Bayle's* Thoughts on a Comet, *Art. 118.*

² Mr. *Placcette* in his Treatise of an Oath, l. i. c. 13. distinguishes here between, requiring an Infidel to swear by his false Gods, and proposing an Oath barely to him. In the first he is induced to commit an Act of Idolatry, which can never be allowed; but in the other he tempts him not to Idolatry, though he has reason to believe that he will commit the Sin in doing what is required. The Reason is, because what he requires is innocent; for 'tis not unlawful to swear. But if he adds any thing Criminal to what is required, he does it of his own accord, without being determined or induced by him who proposed the Oath. If it were otherwise, no Man that hath an urgent occasion for a Sum of Money, which no body will lend him at reasonable Interest, could be permitted to borrow it of an Usurer, who he knows very well will not lend but at exorbitant Use, &c. This is what is said, but to me this distinction of Mr. *Placcette* seems not necessary. To require an Oath of a Heathen is in my Opinion the same thing as to desire him to swear by his false Gods. He can't swear but by the Object of his Religious Worship; and if he swears by any thing else, no Man will take it for an Oath. The truth is, though an Oath consider'd in itself is a Religious Act, yet in common dealing it ought to be look'd upon as no more than a Civil Act. 'Tis a Security that is required, and the Force of it depends upon the Impression that the fear of God makes upon Mens Minds; which imports no more, than that he that swears, calls the true or some false God to witness, provided we swear not lightly and without necessity. I compare it to *Numan's* Action, who, to discharge his Office, went into the Temple of *Rimmon*, and bowed himself there, to support his Mother the King of *Affyria*, which the Prophet *Elisha* did not disallow. See *2 Kings v. 18.* and *Josk. xxiii. 7.* where the *Israelites* are forbidden to swear by other Gods, which refers to the rest of the *Canaanites*, with whom they were to have no Commerce, lest they should be won to serve and worship their Gods, to which they were too much disposed.

³ This Example is very well apply'd. It is very clear from *Josk. xxiv. 2.* that *Terah* the Father of *Abraham*, and *Nabor* the Father of *Terah* served strange Gods. See Mr. *Le Clerc* upon that place in *Genesis*, and on c. xiv. 33. of the same Book.

⁴ We may find the like Adventure in *Anton. Liberalis Metamorph.* chap. i.

ing each other by mutual Signs, would be banish'd out of human Life; if any Person might be able by his secret Intention to hinder an Action from obtaining such an Effect as it was first instituted to produce. Therefore, whatever your inward Purpose might be, you shall certainly be bound by your Oath, when both the Party to whom you swore, apprehended this to be your Meaning and Design, and you your self, when you utter'd the Words, evidenc'd by all outward Tokens, that you were in earnest, and not in jest. And 'tis indeed a downright Contradiction to desire to take an Oath, and yet not to be oblig'd by the Oath; to desire to promise, and not to be bound by your Promise; to desire to utter Words in a serious Manner, and yet not to let them bear that Use and that End which hath been assign'd them by the common Agreement of Men. Thus 'twas grossly ridiculous for the *Milanese* to tell *Frederick I.* *We swore indeed, but we did not promise to keep our Oath*^a. And 'tis much to the same Effect, what *Father Paul* reports in his History of the Council of *Trent*^b; That during the Vacancy of the Holy See, the Cardinals are wont to draw up a Form consisting of so many Heads, for the Reformation of the Papal Government, which each of them swears he will exactly observe, in case the Election falls on him. Tho' the Experience of all Ages testifies, that not one of them so stands to the Engagement; inasmuch as immediately after their being chose Popes, they declare, that either they could not be tied by any such Bonds; or that their very Investiture with that Dignity quite releases them from the Obligation. If therefore any Person shall pretend that he took an Oath with such a preposterous Design, the Excuse shall avail nothing towards reversing what he promis'd, but shall pass for meer Trifling. We may illustrate the Case by a like Instance: A Person who hath his

Doctor's Degree conferr'd on him in the Schools, is nevertheless a Doctor, though we should suppose, that he, who pronounc'd the Form of his Promotion, thought all the while of dignifying an Ass. But if a Player upon the Stage invest another with the Habit and Formalities of that Degree, he shall be just as much a Doctor as he was before. *Ipsa statim scena rem fictam esse testatur*, as *Quintilian*^c observes on a like Occasion; the Place shews the Action to have been insignificant. Whence we see that 'tis an idle Question, Whether a Person be oblig'd, who deliberately utters the Words of an Oath, yet with an Intention not to swear? for if he barely rehears'd the Words without any farther Purpose, 'tis plain he hath neither sworn, nor is oblig'd. But when the Matter hath been perform'd in earnest; that is, when he who spoke the Words, gave all Proofs of his real Design to swear, and the other Party understood him in that Sense, no doubt but the Oath is properly taken, and the Obligation contracted, whatever secret Drift the Swearer might entertain in his own Mind.

VI. We ought likewise carefully to observe, That Oaths do not of themselves produce a new and peculiar Obligation¹, but are only applied as an additional Bond to an Obligation in its Nature valid before. For whenever we swear, we always suppose some Matter, upon Non-performance of which we thus imprecate the Vengeance of Heaven. But now this would be to no purpose², unless the Omission of the thing suppos'd had been before unlawful, and consequently unless we had been before oblig'd. Tho' indeed it frequently happens, that we comprehend in one Speech both the principal Obligation, and the additional Bond of the Oath; as for Instance, if I say, *So God be my Helper, as I shall pay you an Hundred Pounds.* And yet it doth

^a *Radevic.* l. ii. c. 25. Add. *Grot.* ad *Matt.* v. 33.

^b *Lib.* i. Add. l. v. p. 358. Edit. *Gorinch.* 1658.

^c *Declam.* 342.

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¹ Except Oaths extorted by some unjust Fear.

² *Grotius*, *Lib.* ii. c. 13. §. 14. supposes on the contrary, that every Oath by which we engage our selves to do or not do any thing to another, contains a double Promise; the one respecting the Person that took the Oath, and the other the God by whom we swear; and that one of these Promises may oblige, though the other does not. Mr. *La Placette*, who had been once of this Opinion, hath retracted it publicly. He maintains, in his Treatise of an Oath, *lib.* ii. c. 2. "That, properly speaking, we promise nothing to God in an Obligatory Oath, otherwise there would be no difference between a Vow and an Oath. See what our Author says, §. 8. Moreover, we often swear to do things wherein God is not at all concerned, and sometimes with which he is displeas'd. For it is ridiculous to say that we have promis'd a thing to any Man, who has no Interest by it, or which will be no Advantage to him, because it displeases him. Lastly, Promises become void in themselves, when they are not accepted. If then an Oath confirms a Promise made to God directly, it can't be of force, till we know that God accepts it; and how can we be assur'd of this, that God accepts a thousand Promises confirmed by an Oath, if they have no respect at all to his Service? what then is there in an Obligatory Oath, more than a bare Promise made to the Person who is sworn to? Mr. *La Placette* finds nothing that can give us a better Notion of this, than Treaties of Warranty so common among Princes. "Two Men, says he, make a Bargain, but one suspects the other will break it; to assure himself of the contrary, he propounds taking of an Oath, i. e. to take God for the Warranty of the Agreement, and consents, that in case he breaks it, God shall declare against him, and punish his "Perfidiousness." I thought, when I read these Words, that he had been of our Author's Opinion, which seems to be a Consequence of it; and I thought, when I put out the first Edition of this Work, I had given three good Reasons for my Opinion, as may appear from the Extract made of them by Mr. *Bernard* in the News of the Republick of Letters, *June* 1701. but I now see, that Mr. *La Placette* still maintains, That Oaths may be of Force and Obligatory, although the Promises added to them be null. This he pretends to prove in the End, but the Reasons he brings are weak, and not to the purpose, as I shall shew hereafter. And we may easily foresee, that he can produce nothing satisfactory in this matter, and agreeable to his own Principles. He rejects the Opinion of a double Promise included in an Oath, because we can have no certainty that God accepts an infinite number of things indifferent in their own Nature, to which we engage our selves by Oath. But then he ought to be sure that God will be the Warranty of the Oath taken, after the same manner as the Prince, who is Warranty in a Treaty, ought to agree to it. For here is no Revelation, and I defy Mr. *La Placette* and all the rigid Casuists to prove that God will be Warranty in an Engagement otherwise invalid, at least, that it is his Will, that the Holiness of an Oath may secure to the wicked Man the benefit of his Extortion. According to Mr. *La Placette*, Fraud dispenses with keeping an Oath, and why may not Violence have the same effect?

² This Reason does not appear to be good, or at least is not well express'd. For as the Author says a little after, and §. 19. it happens ordinarily, that we engage our selves and swear at the same time, otherwise we can't conceive of an Obligation antecedent to an Oath, and valid without any dependence upon that religious Act. The Notion of an additional Bond, which the Author mentions above, is sufficient to prove what he maintains. Men engage not themselves by swearing, but swear to confirm their Engagements. An Oath, in respect of the Obligation we take on us, is as Modes and Accidents are to the Substance, without which they can't subsist. So that from the Moment that the Engagement, to which we have call'd God to witness, includes something that makes it null in itself, an Oath loseth all its Force, and we swear only with the Mouth, as all those apparently do, from whom a Promise by Oath is extorted either through fear of Death, or some other great Danger.

not follow, that an Oath is unnecessary or superfluous, because it is thus added to an Obligation before firm and good in itself. For although all Men, except downright Atheists, believe that God will punish the violation of Promises, not confirm'd by Oath; yet they believe at the same time, and with good Reason, that those Wretches will feel a more severe Vengeance, who have in express Terms call'd down the Wrath of God upon themselves, and, so far as in them lies, have shut themselves out from all Hopes of Mercy; whilst they engag'd in Wickedness with so full a Purpose and Design, as to shew, that they valued not the displeasure of Him who is able to bestow the greatest Good, and to inflict the greatest Evil. Whence we may conclude, that those Acts which were before attended with some inward Flaw hindring any Obligation to arise from them, cannot be rendred obligatory even by the Addition of an Oath. As neither can a prior Obligation, truly valid, be disannul'd by a subsequent Oath, or the *Right* which it gave another Person, be revers'd. Thus for a Man to swear that he will not pay a just Debt, can be no Prejudice to the Claim of the Creditor.

VII. And hence too it follows, that since in Promises and Pacts, Consent, grounded upon Mistake, is not effectual towards producing an Obligation, therefore an Oath is not binding, in case it be evidently made out, that the Person who swore suppos'd some Matter to be otherwise than it really proves to be; and which if he had not thus suppos'd, he would not have taken the Oath: especially, if his Mistake was caus'd by the Deceit of the Party to whom he swore. For here the Point suppos'd was in the nature of a Condition, which failing, all that was built upon it falls of course. Thus if a Person brings me some very welcome News from a remote Place, in consideration of which I solemnly swear to reward him; in case I afterwards find his Relation to have been false, my Oath shall fix no Tie upon me. *Grotius*^a adds, *If it be doubtful whether a Man would not have sworn, altho' he had not been thus mistaken, then he shall stand to his Oath. Because Simplicity and plain Meaning are the most agreeable attendants of Oaths, and all Tricks and Evasions are strictly to be banish'd from them: And likewise, because the Promise was not built on that Mistake only, though such a false Prospect might be the occasion of its being express'd in larger Terms.* But this doth not clearly settle the Case; for who shall be the Judge whether in this Case, abstracting from the Mistake, the Promise would have been

nevertheless made? Certainly, not the Party towards whom the Oath was address'd: For how is it possible he should be able rightly to discern what Mind the other Person would have been of, upon supposal of such or such a Condition? But neither can the Person who swore give a full Determination of this Difficulty; since we are not wont to be equally pleas'd with the same things propos'd at different Times, or at the same time in different Manners. It seems probable therefore that even such an Oath is not valid; at least, so far as it is founded upon Mistake. Yet if the Party who made it, thinks he shall pay some kind of Regard to the Honour of God, in not receding from it altogether, he ought to judge by the Condition of his Affairs, how far he may conveniently go in the Performance. And whilst we are speaking of this Case, it will not be improper to make a Reflection or two on the Oath which *Joshua* perform'd to the *Gibeonites*^b. Where we may first observe, That the Subtlety used by that People was not culpable, nor did fall under the Notion of a *Lye* strictly so term'd. For who will blame a Man for endeavouring by some Fiction of Speech to preserve his Life from an Enemy bent upon his Destruction? Nor, properly speaking, was this Stratagem the Cause of any Damage to the *Israelites*: For what doth a Man lose by being hinder'd from shedding the Blood of another Person, whom he may nevertheless spoil of all his Possessions, and drag into perpetual Servitude, so weaken'd and disarm'd, as to be incapable of future Opposition or Resistance? The whole Point therefore turns upon this Question, Whether or no it was the express Command of God, that they should kill all and each of the Inhabitants of *Canaan*, without Distinction; even such as should voluntarily submit to their Yoke, and from whom they could apprehend no Danger hereafter? If this be absolutely affirm'd, *Joshua's* Oath was void. For then the only use of it would have been to evade a Divine Injunction; that is, *Joshua* would have invoc'd God to punish him, if he did not break his Command. Nor can it be urg'd, that *Joshua* was therefore willing to keep his Oath, lest it should somewhat abate the Awe and Reverence towards the Divine Majesty, in those Nations, to see him break a Covenant which he had call'd God to attest. For the Inconvenience in this respect would have been the same, had he neglected to put the Divine Command in Execution. *Grotius*^c therefore is of Opinion that the Order in *Deut.* vii. 2. and xx. 16. is to be understood with this Limitation^d, *unless any People should submit upon the first Summons*; which he urgeth

^a Lib. ii. c. 13. s. 4. n. 1.

^b *Jos.* ix.

^c *Ibid.*

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* In this Hypothesis there is more Difficulty. For when *Joshua* knew how things were, he still certainly determined to receive the *Gibeonites*; not to treat with them as Equals, and make them his Allies, but as Tributaries, or at least as Slaves to the Children of *Israel*. So that he could not dispense with his Word, though an Oath had not intervened in the League concluded with them. But Mr. *Le Clerc* has fully proved, that *Grotius* is mistaken in his Notion, and confutes him thus: The Law expressly excepts the Seven Nations of the *Canaanites* from the number of such as they ought to offer and give their Lives, if they would yield at Discretion. See *Deut.* xx. 15, 16. Farther, there is a great difference between a Law which orders the Destruction of a People, for fear that if they are spared they will ensnare their Conquerors into Idolatry, and a Law that orders the Destruction of all, at least every one of them that does not voluntarily become tributary, and embrace the Religion of their new Masters. If the last had been *Moses's* Meaning, he would have deliver'd himself clearly in some of the Places where he mentions the *Canaanites*. This Matter ought to have been taught the *Hebrews* carefully, yet we do not find any Footsteps of an Exception to that severe Order given by God in several Places to slay the Seven Nations of *Canaan* with the edge of the Sword, and make no Treaty with them. Again, the Vow, which the *Hebrews* call'd *Cherem*, was of that Nature, that he that had vow'd it could not redeem it, but it must be destroy'd. See *Lev.* xxvii. 29. Now it appears from several Places, that the Seven *Canaanitish* Nations ought to be look'd upon as such, as may be seen in the Law mention'd, *Deut.* vii. 2. The Examples alledg'd by *Grotius* do not prove the contrary. For, 1. The History of *Rahab* is a particular Instance, from whence no Consequence can be drawn. 'Tis no wonder if the *Hebrews*, to whom she had done so considerable a piece of Service, spared her; and so much the more, because she did it before

urgeth many Reasons to confirm. Mr. *Selden* likewise has shewn at large^a, that the utter Slaughter and Extirpation of those People was rather a Permission to the *Israelites*, than a Command. And others think this the more probable, because the Reason assign'd for that Commission against the *Canaanites* was, partly lest the *Israelites* should imitate their Idolary, being then strangely prone to foreign Superstition; and partly lest the antient Inhabitants, if left in any considerable Numbers, should gain Strength to turn out their new Guests; especially in case they were allow'd to live with them upon equal Terms^b. This Danger therefore being once surmounted, they judge it would have been no Fault to admit some to Mercy and Favour; especially such as should abjure their Idolatrous Worship. However this were, 'tis plain that *Joshua*, upon discovery of their Fraud, interpreted his Oath in a more strict and severe Sense. They had profess'd themselves the Servants of the *Israelites*, a Phrase common with the *Eastern Nations*, and had desir'd a League. *Joshua* had promis'd them their Life, and had enter'd into League with them, according to their Petition: And by this Agreement (had they prov'd such as they pretended, that is, none of the Number of those Nations which God

had design'd to Destruction) they had been left in Possession of their Goods and Liberties^c. But on account of the Deception they had us'd, he insists strictly upon his Words; and, as it appears, left them nothing but their Life and necessary Maintenance^d.

VIII. But what are we to think of Oaths extorted by unjust Fear? Surely the Person who by means of this Fear procur'd a Promise upon Oath, is no less obliged to release the Promise thus violently obtain'd, than if no Oath had been added to confirm it. Therefore there appears no reason, why a Compensation should not be admitted in this Case, in opposition to the claim of the Injurious Party; according to the Rules laid down by us, when we treated of the general Subject of Fear. Indeed 'tis the Opinion of *Grotius*^e, that if either the Words of the Oath do not respect the Man, by conferring any Right upon him; or if they do respect him, yet so as that somewhat may be opposed to his Claim, then the effect of the Oath shall be this: That the Man shall obtain no Right, but that the Swearer shall nevertheless stand to his Oath, by virtue of his Obligation to Almighty God. And he urgeth, as an Instance, the case of one, who by some unlawful Fright, or Terror, hath forced a Promise from another. But if we

^a Lib. vi. c. 16.

^b See *Judg.* i. 34. ii. 2. iii. 5, 6.

^c *1 Kings* xx. 4.

^d *Add. Arthres.* Off. l. iii. c. 10.

^e Lib. ii. c. 13. f. 14.

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before they had declared War against her Country. 2. 'Tis certain that *Solomon* contented himself to make the Remnant of the *Canaanites* tributary to him, *1 Kings* ix. 20, 21. But the Law, which order'd the Destruction of that People, did not extend to their Posterity; it is enough to suppose that it reached to them only, over whom God made them victorious in *Joshua's* time, or after, till they were well settled, and in possession of as great an extent of Ground as was necessary. So that if any of the *Canaanites* escaped into the neighbouring Countries, as the Text above quoted seems plainly to prove, and they after fell into the Hands of the *Israelites* or their Posterity, they ought not to slay them without Mercy. 3. As to what is said in the Book of *Joshua*, chap. xi. v. 19, 20. That there was no Town of the Seven Nations of the *Canaanites* that would make Peace with the *Israelites*, because God had hardened their Hearts, so that they fought against *Israel*, that he might destroy them utterly without shewing them any Mercy: 'Tis not meant, as *Grotius* tells us, that the *Israelites* were obliged to spare them which yielded to them at discretion, but that through the influence of Divine Providence all the Seven *Canaanitish* Nations, except the *Gibeonites*, agreed together to fight, and would not submit to the *Hebrews*, who would not have had the Courage to have put them all to the Sword without Mercy, as Divine Justice had resolv'd to punish them, had they laid down their Arms and open'd their City-Gates to the Conquerors. These are Mr. *Le Clerc's* Reasons, to which I freely assent. But if this be so, what shall we say to *Joshua's* Oath? As for me, I can see no Reason but we may say, that his Oath was rash and null in itself. The Sacred Historian seems to grant the first, when he says, v. 14. that they did not ask Counsel at the Mouth of the Lord, *i. e.* of *Urim* and *Thummim*. In truth, since he suspected something, as appears from Verse 7. he ought to have been cautious how he engaged himself by Oath in a Matter of such Consequence, and in a manner run the hazard of opposing God's Command, which being so formal and absolute, the Artifice of the *Gibeonites* had been soon discover'd, and then *Joshua's* and the Elders of *Israel's* Oath had been of no Force. For all the World agrees that an Oath engaging us upon a thing unlawful is of no Force, see §. ix. following. Nevertheless we see that *Joshua* thought himself obliged to keep his Oath. 'Tis possible that God by some posterior Act might ratify this Oath, though the Holy Scripture, which omits many Circumstances, speaks nothing of this Ratification. The severe Punishment which God laid on the *Israelites* and Posterity of *Saul* for slaying the *Gibeonites*, *2 Sam.* xxi. 1, &c. may give ground to such a Conjecture, although the Action of *Saul* was otherwise inhuman and cruel; because, as I say with Mr. *Le Clerc*, the Law which order'd the Destruction of the *Israelites* was not in being. But be that as it will, it is certain, that a Superior may render an Act good contrary to his own Prohibition, especially in the Case of a positive Law so rigorous as this we are treating of. Moreover, we know that the Civil and Canon Law permit certain Acts confirmed by an Oath to be valid, though forbidden by those Laws, and so the Oath does not render them effectual of themselves. See *Grotius*, lib. ii. c. 5. §. 14. n. 4. and §. 16. and c. xiii. §. 20. n. 4. and what our Author says §. 19. following. Nor is it hard to discover why God would ratify *Joshua's* Oath. The Breach of so solemn a Promise made with an Oath, which is accounted by all people in the World a most sacred and inviolable Act, would have doubtless begat an ill Opinion both of the *Israelites* and of God himself with all the neighbouring Nations, with which they were to live in Peace, so that they would have had no Commerce with them, nor value their Word. Our Author pretends that the same inconvenience will follow upon our Neglect to execute an absolute Order of God; but in vain, because it is not in the least to be feared, that the Neighbours would make any such Reflection. They might think it strange, that the *Israelites* should treat the People they conquer'd with so much Rigour, but they could never be offended in the least to see that Rigour mitigated by the Sanctity of an Oath. See what I have said in the first Edition of this Work. But Mr. *Le Clerc* has changed his Opinion, as appears from his Comments upon the other Books of the Old Testament printed in 1708. where he says, That the *Israelites* did ill in not informing themselves fully of the place from whence the *Gibeonites* came, although these last might use any innocent Arts to save their Lives; but he believes that they did not insert that Clause in the Treaty, but it was made upon the supposition, that the *Gibeonites* were a People who dwelt at a great distance, upon which account it was null. But the *Israelites* not insisting upon that, and having directly sworn that they would do them no harm, they were obliged to keep their Word, which they had confirmed with an Oath, and so much the more, because it engaged them to do nothing contrary to their Law, as he proves by the same Reasons that *Grotius* had used. To this Action of the *Israelites* we may apply a Sentence of *Publius Syrus*, which shews that we do well to keep our Word, though we have committed a Fault in giving it. *Etiā in peccato rectē præstatur fides*, v. 192. We must look into Mr. *Le Clerc's* new Edition of the Pentateuch, to see how he confutes his own Reasons; for I hear, that while I am writing this Comment (in 1709.) he has reprinted that first Part of his useful Work on the Old Testament.

¹ See what is said on lib. iii. c. 6. § 11. n. 6. As to the Question itself, we shall find in Mr. *Muelen's* Comment on *Grotius*, Tom. ii. p. 487. the Reasons brought on each side, tho' what is said by our Author may be sufficient for any Man of Judgment.

would truly settle this Point, we ought to distinguish between the different Kinds and Natures of Oaths. First, for those Words which are directed not to Men, but to God; as if I say either alone, or before Witnesses, *I swear to God that I will give Seius thus or thus*^a. Here the Oath hath the Nature of a Vow, by which I promise to God that I will perform somewhat in respect to his Honour; and consequently by which I intended to transfer a Right on God, and not on Man. The case is quite otherwise in Oaths which are directed to Men, or in which I promise a Man somewhat, calling God to witness. For here the Obligation seems altogether to expire, if it appear that the Person, to whom the Promise was made, lay under some Fault which render'd him incapable of receiving it. Thus in a Promise to a Thief, I neither directed the Engagement towards God, nor express'd my self thus, That I would, in regard to the Honour and Glory of the Divine Name, pay the Man what was mention'd. And tho' we should grant never so freely and absolutely, that even such an Oath hath likewise the Force of a Vow: Yet since a Vow binds not, unless it be accepted by God, how shall I be sure that 'tis consistent with the Divine Pleasure and Approbation, that I, an innocent Person, should rob my self of my Goods, to bestow them on an ungodly Villain, only to put him into a way of making some gain of his Wickedness? And then there is no Fear that my neglect of my Oath should lessen the Awe and Reverence of God in such a Wretch, who by his very Profession, and way of Living, shews how little he values God and Religion. Yet if there be any Man who in this case, to avoid giving Scandal to the Weak, and that he may not seem, now

he hath escaped the Danger, to treat the Divine Name in a slighting or irreverent Manner, which before was the cause of his Deliverance; if any Man, we say, on these Considerations, is resolv'd to part with the Sum thus promis'd, it seems not only to be more safe and expedient, but likewise more acceptable to God, that he should rather convert it to pious Uses, than to the maintaining of the Wretch in his villainous Courses. And this method of proceeding is the more justifiable and secure in Governments, where all Oaths of this kind are by the municipal Laws declared void². The Examples alledg'd by *Grotius* to the contrary will, to those who rightly consider things, appear not at all to reach the Purpose. 'Tis strange that *Matthæus* the *Civilian*^b should, in his Discourse on this Point, commend the Act of *Julius Cæsar*, who being taken by Pirates, and made swear to pay his Ransom, sent the Money, but afterwards putting to Sea, took them and brought them to Execution. For *Plutarch*^c, *Velleius*^d, *Sueton*^e, and *Polyæus*^f, who all tell the Story, do none of them mention a Word about any such Oath: And *Matthæus* seems in this to follow the Notion of those who fancy that a Person, thus compell'd to swear, may satisfy his Oath by paying, just for the present, what he promis'd; yet so as that it shall be lawful for him immediately after to recover what he gave, either by his own Strength, or by calling in the assistance of the Magistrate. Which is indeed but a vain piece of Superstition; it being the same thing not to pay, and immediately to take back what we paid. *Tully* asserts^g, That it is no Fraud to withhold from a Robber a Ransom promis'd him for saving our Life³, for this Reason, *Because a Robber is a common*

^a Add *Paul Serris*. de Inquisit. p. 55, 56, 57. when he distinguisheth between an Oath directed to God, and an Oath given to Men. ^b *De Criminibus*, tit. de perjur. n. 5. ^c *In ejus vita init.* ^d Chap. 41, 42. ^e Chap. 4. & 74. ^f Lib. viii. c. 25. ^g *Offic. l. iii. c. 29.*

MR. BARB. NOTES on §. VIII.

² This is thus decided by a Constitution of the Emperor *Frederick II.* inserted in the *Code*, lib. ii. tit. 28. *Si adversus venditionem, Leg. 1. per vim autem, vel per justum metum, i. e.* not by a just Fear, but by such a Fear as is sufficient to move a Person not very timorous. *Extorta etiam à majoribus [sacramenta] (maximè ne querimonium malefactorum commissorum faciant) nullius monumenti esse jubemus.* The Poet *Gautier* also makes mention of a like Constitution of the Emperor *Barberissa* in his *Ligurinus*, l. viii. v. 793, &c. *Juramenta metu, mortisque dolore coacta, Præcipiunt ne quis multis nocitura loquendo Publicet, aut in se crudeliter acta queratur, Nullius meriti, et ponderis esse jubemus.*

Oaths took on Force, or Fear of threat'ed Fate; And chiefly those forbidding to relate Designs of publick Harm, or to complain Of cruel Wrongs, we here revoke as vain.

Our Author quotes these Verses at the End of the next Chapter. See *Fend.* lib. ii. tit. 53. §. 3.

³ Mr. *La Placette*, in his Treatise of an Oath, l. ii. c. 21. takes our Author's Words in a wrong Sense. These are his Words. "He makes *Cicero* say, That there is a Fraud in keeping these sort of Promises." Whereas these are Mr. *Pufendorf's* Words, *Cicero quoque, prædoni pactum pro capite pretium, sine fraude non afferri afferit.* Where the whole Connexion of the Discourse shews, that there is no appearance of any such Imputation to *Cicero* by our Author, but that he fairly relates the Opinion of that famous Orator. For he lays not, *non sine fraude afferri, sed sine fraude non afferri*; which is very different, and comes up exactly to the Sense of *Cicero's* Words, which are, *Si prædonibus pactum pro capite pretium non attuleris, nulla fraus est, ne si juratus quidem id non feceris, &c.* Mr. *La Placette*, after he has made this Mistake, infers from it what our Author never did, and of which none ought to suppose him guilty without very great Reason, supposing that through Carelessness it had been ill express'd, as it happens to him sometimes; he infers, I say, from thence, that Mr. *Pufendorf* seems to assert, that a Traveller can't in Conscience, to save his Life, either promise Thieves the Sum that they demand of him, or pay it them; and that 'tis an Offence against the Publick to do either of them. So that this Oath is sinful, and we ought not to make it; since no Man may lawfully oblige himself to that which he can't do without a Sin. And so upon such Occasions a good Man ought rather to suffer himself to be kill'd, than promise a Shilling to such Thieves as offer to spare his Life, provided he'll oblige himself to do a thing which is in his Power. I am of Opinion, that Thieves trouble not themselves, whether it be in their Power or no to perform the Promise which they have extorted, with or without an Oath. In fine, there is not the least thing in our Author, which can give ground to suspect any such Notion as he attributes to him, nor can it be inferred from his Principles, but by supposing the thing in question. He affirms, that a Man is not bound to keep a forced Oath, but he elsewhere leaves him at liberty to observe it or not, as he sees fit, and so makes it a matter of Prudence; and though he believes he can't keep it without offending against the Publick, yet it follows not, that he may never do it, because he supposes (to speak properly) that it is no true Oath; and as he makes no Engagement with the Thief, who had no Right to require or accept it, so he called not God to witness; and so 'tis past all Contradiction, that he only swore with his Mouth. Mr. *La Placette*, after these weak Reasonings, concludes nevertheless with this sharp Censure: "See how the Liberties which the Enemies of severe Morality propound, do usually end! They carry the Severity and Rigour much farther than those whom they accuse of casting good Souls into Despair." But I'll refer it to any judicious Man to examine whose Books have done more Harm and less Good, whether those who are of our Author's Judgment, or those Moral Divines who are full of Myseries, scholastick Notions, and metaphysical Impulses to the highest Degree, and impracticable Maxims. Mr. *La Placette* affirms also, "That to maintain that a forced Oath doth not oblige, is to do great Mischief to Society, by making Pyrates and Banditti desperate, and hindring them from coming to any Treaty." But he may assure himself, that they will neither read this Author's nor his own Works. They depend more upon the Fear which such Men have of falling into their Hand, again, than upon the Obligation which lies upon them indispensibly to keep their Word or Oath. See what is said upon the *Corraire of Barbary*, l. viii. c. 4. §. 5. following. As for the Treaties in which we engage our selves to an Enemy or Conqueror through Fear, we shall speak of that, l. viii. c. 8.

Enemy to all Mankind, to whom no Faith can be engag'd, with whom no Covenant can be transacted. For which he is censured by *Grotius*^a, who observes, That although a Robber hath no Title to those common Rights which the Law of Nations hath establish'd between Enemies, in a fair and open War, yet he ought to be admitted to Fellowship and Communion so far as the Law of Nature extends; one Precept of which is, That Covenants be faithfully observ'd. And yet there are not wanting Arguments which might be urg'd in *Tully's* Defence^b; as, That since a Robber is a common Foe to all Men, or such an one as without any precedent Injury or Provocation spoils and murders all that fall into his Hands, and consequently makes it his very Profession to break and disturb that Society which God hath ordain'd amongst Men; therefore he ought to receive no Benefit from any such common Bond (as Oaths are) invented by Men to knit themselves more firmly together, after the Divine Appointment hath made them sociable Creatures. And that a way of Life, which declares for Atheism, ought not be admitted to any Gain or Advantage from Religion. As, on the other side, the Oaths and Proteftations of such Villains are little regarded or relied on by Wise Men^b. And we find the *Pander* in *Terence*^c reckoning it amongst the necessary Accomplishments of his Art, to have the knack of Perjury. *Nic. Machiavel. Hist. Florent. l. iii. When Religion and the Fear of God are once extinct, the Consequence is, that Men regard and observe their Oaths only so far as suits with their Advantage; using them not with an intention of performance, but as Means and Instruments of deceiving with greater Ease; and thinking themselves to have won the more Praise and Glory, the less Trouble and the greater Security they have met with in bringing about their knavish Designs.*

IX. It is farther requisite, in order to the Validity of an Oath, that the Obligation be lawful, which it is added to confirm^d. Therefore a Promise, tho' sworn to, shall be of no Force or Effect, if the Subject of it were a matter either repugnant to the Natural or Divine Law, or to any Human Law (if the Party lives under Civil Government) inconsistent with the Natural and Divine^d. The Example of *David* is most illustrious in this Case^e; who having in his Passion sworn to destroy the House and Family of *Nabal*, for denying him a reasonable Kindness in abusive and slanderous Language, yet

being pacified by the Intercession of *Abigail*, he thanks God, that he hath been thus hindered from a more sinful Performance of a sinful Engagement^f. And so *Alboinus* was no doubt in the right, for retracting a Vow which he had made to cut off all the Inhabitants of *Parvii*, upon their refusing to surrender at his Summons. For 'tis absurd to invoke the Divine Vengeance upon any Action; but such as God himself hath, under a severe Penalty, forbidden. To do otherwise would be to abuse the Awe and Reverence which we owe to the Divine Majesty, in making it, as it were, a means of affronting him. And the design of introducing Oaths amongst Men was, that they might add Strength to good Actions, not that they might afford Excuse and Protection to bad. *Dionys. Halicarn. l. vi. p. 694. Edit. Lips. The Gods would have us make use of Covenants for just and honest Designs, not for those that are vicious and unreasonable*^g. The very *Alcoran* forbids Men to swear unlawfully^h; as suppose, That they will never come near their Wives: And enjoins any Person who hath happen'd to make such an Oath, to set a Slave at liberty by way of Expiation, before he presumes to break it. And here 'tis made a Question, Whether a Man falling amongst Thieves, and being by them compell'd to swear that he will for ever keep Silence, and as far as in him lies, provide for their Security, be bound to stand to his Oath? To which we are inclined to answer in the Negative; in case his Silence be likely to prove the occasion of exposing many other Persons to Danger. For as to his own part he might lawfully enough suffer the Villains to escape with Impunity; but not if their Safety was to be follow'd by the Murther and Ruin of many innocent Men. And we might apply to a Person under these Circumstances the Saying of *Ateius Capito* to *Tiberius* in *Tacitus, Sane lentus in suo dolore esset; reipublice injurias ne largiretur; So far as he was concern'd himself, or, in regard to his own particular Grievance, he might be as merciful as he pleas'd; but he ought not to forgive the Injury done to the Commonwealth.* *Ann. III. c. 70.* In *Gautier. Ligurin. l. viii. ubi supra, Frederick* makes the following Ordinance:

*Juramenta metu mortiferae dolore coacta,
Præcipue, ne quis multis nocitura loquendo
Publicet, aut in se crudeliter acta queratur,
Nullius meriti vel ponderis esse jubemus.*

^a Lib. ii. c. 13. f. 15. & lib. iii. c. 19. f. 2. ^b See what has been said in l. iii. c. 6. towards the End. ^c *Act. ii. Scen. 1. v. 35.* ^d See the Passages collected out of the Fathers by *Gratian, Caus. 22. Quæst. 4.* See *Gratian, lib. ii. c. 13. f. 6.* ^e *1 Sam. xxv.* ^f See *Grotius, lib. ii. c. 13. f. 7.* ^g *Paul Warrington, de Gest. Longobard. l. ii. c. 27. Add. l. v. c. 40. in fin. Æt. Sylv. Hist. Bohem. c. 18.* ^h *Cap. de Disputat.*

MR. BARB. NOTES on §. VIII, IX.

⁴ With the Limitation which our Author makes above, lib. iii. c. 6. §. 9, and 11. about the End.
¹ 'Tis in this Sense that we may allow the common Maxim to be true, That an Oath that ought not to be made, ought not to be kept; for if the thing to which we oblige ourselves be good or indifferent in itself, the Oath is valid and obligatory, whether we sin or not in making it. Here are two Examples which will clear this Matter: A Man obliges himself by Oath never to swear all his Life; nevertheless some time after he swears, and by this second Oath obliges himself to restore something he has borrowed. Doubtless he sins by making the second Oath, which he ought not to have done, but yet is bound to keep it. Another borrows, and swears he will restore what he has borrowed, having yet no Design to do it. He commits an horrible Sin by it, but will any Man say he is not obliged to perform his Oath? The Maxim by which he acts is not true, but in respect to such Oaths by which he engages himself to do some wicked Action, or forbear some good one, which he ought to do. This is what *Mr. La Placette* says, l. ii. c. 5. of his Treatise of an Oath.
² See the Comment of *Mr. Le Clerc* upon this Story. *Mr. Hertius* observes here, that *David* was not yet a King, and the refusal of such a Service did not authorize him to use those Methods with the Refuser. He was not in extreme Necessity, and if he had, that was not Cause sufficient to revenge himself in that terrible Manner.
³ The Greek is, *Θεοὶ γὰρ ἐπὶ καλαῖς, καὶ δικαίαις παραλαμβάνεσθαι φιλῶσι ἐπιχειρεῖν, ἐκ τῆς ἀρχῆς καὶ ἀλικίας*. See what *Mr. Buddeus* says about the Oath that *Hannibal* made his Son *Hannibal* to swear when he was a Child, That he never should have Peace or Amity with the *Romans, Spec. Jurisprud. Hist. §. 68, &c.* among his *Selesta Jar. Nat. & Gen.*

Oaths took on Force, or fear of threat'ned Fate;
And chiefly those forbidding to relate
Designs of publick Harm, or to complain
Of cruel Wrongs, we here revoke, as vain.

X. But to go farther, altho' the thing promis'd be not in itself unlawful, yet the Oath shall be invalid, in case it hinders any greater moral Good¹, or if we are by it withheld from discharging any Duty of Humanity or Piety². And under this Head we may rank those Oaths, by which Men tie themselves up from discovering and communicating to others any honest Art, tending to the Use and Benefit of Mankind³: "Unless I or others, who are already privy to the Secret², can sufficiently supply the Needs of Men in this Particular; and upon supposal that my Discovery cannot prejudice and endanger the Party who required the Oath from me. Such an Oath we find in *Lucian* [*Tragopodag.*] Tom. ii. p. 118. in fin. Edit. *Amst.* *The Sacred Oath of Silence which I have taken, suffers me not to declare what you desire. To which is added the Command of my dying Father, enjoining me never to disclose the force of this Composition.* *Plin. Nat. Hist.* l. xxv. c. 1. *It adds some kind of Strength and Authority to our Knowledge, when we refuse to communicate it to others.* The Reason of all which is, because we owe all our Proficiency in good and useful things to Almighty God, and are each of us bound to carry our Endeavours to the highest degree that we are capable of attaining. so that 'tis not in our power to abridge ourselves of this Liberty, or by our own Acts to absolve our Consciences from a Duty enjoin'd by the Law of God. Oaths of this kind were not uncommon amongst the *Jews*, which are insisted on at large by other Authors⁴. Thus too we judge that Oath to have been invalid, which *Narfes* in *Paulus Diaconus*⁵ requir'd of an Old Man who had dug up a quantity of Gold, engaging him never to acquaint any Person with his good Fortune. And the Old Man was in the right, when upon the Death of *Narfes* he discover'd the Treasure to *Tiberius* the Emperor. And in this respect the case of a Vow is the same with that of an Oath: For neither is a Vow to be look'd on as good and valid, not only if it be unlawful, but if it be silly and impertinent. The *Spartan* who had sworn to throw himself headlong down the Promontory *Leucate*, when he beheld the dreadful Height, turn'd back at the Prospect; and being reproach'd for his want of Resolution, wisely

answer'd⁶, *I did not consider that my first Vow stood in need of a much greater Vow to bind and confirm it*⁷.

X. Lastly, That Oaths do not alter the nature and substance of these Promises and Pacts to which they are join'd¹, is sufficiently evident. Thus an Oath about a thing absolutely impossible, is not obligatory; though the Party is guilty of a very heinous Sin, in thus rashly abusing the Divine Name. So an Oath added to a Promise which was before conditional, doth by no means render it absolute. For the Oath, which supposeth such a Condition, doth no less stand and fall with that Condition, than the bare Promise would have done without this Confirmation. Thus too an Oath, as well as any other Promise, ceaseth and expires upon failure of the Quality which the Person held when he swore, and with regard to which alone the Oath was made. For instance, a Magistrate, when he leaves his Office, is no longer bound by the Oath which he took at his admission. And on the other side, the Subjects owe no farther Obedience to a Magistrate, who hath either quitted his Dignity, or been fairly depriv'd of it; though no such Release be expressly and in formal manner granted them. For thus much is implied in the very Nature of the Affair². So likewise it is no less requisite to Promises confirm'd by Oath, than to others which are not so confirm'd, that they be accepted by the other Party. And he who obtains a Right by any Covenant, may equally release the performance of it, whether it was sworn to, or not. In the same manner we are to judge from the Nature of Covenants, whether an Act undertaken contrary to Oath be only unlawful, or whether it be likewise void and ineffectual³. For unless the Swearer did by his Promise divest himself of his Right, and confer it on another, though he afterwards give the thing to a third Person, yet the Act shall be valid. If a Man, for Instance, hath sworn that he will leave such a thing in Legacy to any Party, and afterwards sells it to another Party, the Sale shall not be void, though the Seller is perjur'd⁴. Thus if a Person, who, in the Life-time of his Parents, hath promis'd them upon Oath that he will never marry such a particular Woman, shall nevertheless after their Decease take her for his Wife; the Man indeed will be guilty of Perjury, but the Marriage shall stand good and firm, unless the municipal Laws ordain the contrary. Farther, an Oath added to a Promise or Pact shall derive its Force and Efficacy either from natural or

¹ See *Grot.* l. ii. c. 13. f. 7.

² Vid. *Matt.* xxv. 27.

³ Vid. *Grot.* l. ii. c. 13. f. 7. & notas suas ad *Matt.* xv. 4. &c.

Selden. de J. N. & G. secund. *Hebr.* l. vii. c. 2. *Constantin.* l'Empereur in *Babakama*, c. 9. l. 20. *Gratian.* c. 21. *Caus.* 22. *Quæst.* 5.

⁴ *Lib.* xviii. *Add. Gratian.* c. 2. *Distinct.* 13.

⁵ Vid. *Plutarch.* *Apophtheg.* *Lacon.* in fin.

⁶ See the Passage of

Guthberus above-mentioned.

⁷ *Add. Grot.* d. l. f. 18.

⁸ Vid. *Grot.* ubi supra, f. 19.

MR. BARB. NOTES on §. X, XI.

¹ Most of the Examples alledged by *Grotius* and *Pufendorf* consist of things absolutely unlawful, as Mr. *Thomasius* very well observes, *Jurisp. Dicin.* lib. ii. c. 9. §. 20. In truth every one is necessarily obliged to honour and help his Father and Mother; and although no Man hath right to require our Service rigorously, the Law of Humanity lays an indispensable Obligation on us to do all the Good we can to another. And so no Man may directly swear with a good Conscience that he will forsake his Father or Mother in their Need, to do no Kindness to such or such a Man, &c. We may then suppose here, I think, this Case, that a Man may do a thing innocent and permitted in itself, yet he can't well discharge himself of it, without putting himself out of the way of doing some other Duty; or a thing good and laudable in itself, but joined with something better, which lays a greater Obligation upon him, as our Author speaks in several Places. As for Example, every Man is free to give his Estate to whom he pleases; but suppose any one imprudently swears to give out of it, to any one who has no need of it, or to the Poor, a Sum from which he can't disengage himself with Reputation, without entrenching upon his Duty to such Persons as are more nearly related to him, and whom he is obliged to maintain. In this Case an Oath is altogether void.

² See Mr. *Placet*'s Treatise of an Oath, l. ii. c. 10. §. 183, &c.

³ See *Cajacius*'s Observ. 22.

⁴ That is to say, adds Mr. *Hertius*, supposing we have no good Reasons to revoke our Promise,

from civil Law, according to the Nature of that Promise or Pact. For the Oath hath not in itself a Power of causing that which otherwise produced only a natural Obligation, to produce likewise a civil; unless the municipal Laws interpose particularly in the Matter. As neither can it change the Species of an Act: A bare Donation, for instance, cannot by the addition of an Oath be turned into a *chargeable Contract*, nor *vice versa*. And here we fall in with the common Question, Whether a Contract confirm'd by Oath, in which the swearing Party is remarkably prejudiced, may be revers'd, and the Party restor'd in full to what he lost? *Grotius*^a takes the negative Part, adding for a Reason, *That although, in this Case, we may perhaps owe the Man nothing, or however less than is required, yet we are bound to perform our Oath to God*: Which Argument we just now consider'd and reject'd. The Expounders of the *Roman Law* handle the same Question at large in their Observations upon *Lib. ii. tit. 28. C. Si adversus vendit.* and the *Authentick* subjoin'd: which many *Civilians*, and especially those of the *French Nation*, censure as unjust. To the Rescript of *Alexander* they answer³, *That it doth by no means contain a general Decision, but was directed wholly to a particular Case.* For the matter stood thus: The Emperor was petition'd here by a Soldier, who must consequently be a Man of ripe Judgment, being in his eighteenth Year; and yet he alledg'd no extraordinary Loss or Damage, but only his Defect of Age. Now the Contract, which this Person had made and confirm'd by an Oath, that religious Prince would on no account evacuate: and his pious Caution had no less a Precedent than *Hercules* himself; who, as the *Historian*^b reports, never swore but once in his Life. And then as for the *Authentick*, they say it was extorted by Force from the Emperor *Frederick* by Pope *Honorius III.* who refus'd to grant him his Imperial Crown on any other Terms: and that *Frederick* had resolv'd to alter it, but was prevented by Death. The Reason why⁴ the Pope should insist on obtaining that Decree, is easy to be discover'd by all those who are acquainted with the Policy of the *Roman Court*^c. We, for our Parts, must think it necessary to the clear Determination of the Point, first of all to observe, that those Pacts, in which there appears a very considerable Inequality, those which depend on any Deceit, Fraud, or unjust Fright, and those which are struck without Thought and Deliberation, have all of them a natural and intrinsic Defect, and are therefore such as the Law of Nature enjoins should be either revers'd, or corrected. But that the Party's being under the Age of Five and Twenty, is not sufficient of itself to render the Covenant defective. Tho' thus much indeed may

fairly be presum'd, that the Minor had suffer'd some Damage in the Transaction, on account of his weak and unexperienc'd Judgment, which lays him open to the Circumvention and Treachery of others. But if there appears no such Damage, no Reason can be given why the Act should be disannul'd. This being premiss'd, we affirm, that if a Covenant or Promise made under Oath be in no other respect faulty, it cannot be revers'd on this bare Score, that it was made by a Minor, provided he was capable of understanding the Business in Hand. But if the other Party was guilty of any Deceit; or if, without any such Deceit, the Minor happens to suffer any signal Prejudice, only through Infirmity of Age, the Oath shall not hinder him from petitioning either to have the Bargain revers'd, or at least amended to his Advantage. For in this Case, the Youth, who swears to the Contract, supposes it to be free from all Defect, and the other Party pretends as much. This then is, as it were, the Condition on which his Oath is founded, and upon failure of which it comes to nothing. The Case is different, if a Youth, without any Deceit in the Person with whom he deals, hath knowingly and deliberately given more than the Purchase was worth. For then the Business was a mix'd Act, made up partly of a Contract, and partly of a Donation. It is unnecessary to add, as a general Remark, that a Person subject to the Power and Authority of another, cannot oblige himself farther than he is by that Authority allow'd^d. If he exceed these Bounds, the Governour may, if he thinks fit, declare the Business to be void, whether sworn to, or not.

XII. Yet in as much as Oaths are made by the Invocation of the Divine Majesty, whom no Man can fraudulently deceive, and whom no Man can securely mock and deride, they ought to be allow'd this Effect; that, on their account, all Tricks and Cavils shall be excluded from every Business which they are added to confirm^e. Hence the *Roman Censors* justly condemn'd the Subtilty of that Captive; who having obtain'd leave to depart from the Enemy's Camp, giving his Oath to return, when he was got a little way, slept back, on the Pretence of having left something behind him, and then fix'd himself at *Rome*, as if he had fulfill'd what he swore². The Fallacy of *Dercyllides* deserves a Censure no less severe; who besieging the Tyrant of *Scepsis*, solemnly swore to him, *That if he would come out to a Parly, he should immediately return into the City.* The Tyrant coming out on his Promise, *Dercyllides* commanded him, on Pain of Death, to set open the Gates, and then told him, *Now I give you leave to return into the City, and I intend too with my Army to bear you Company*^e. For *Fraud*, as

^a d. l.^b *Plutarch. Quest. Rom. xxviii.*^c That this Law is not observ'd in *France*, we have the Testimony of *Mornay*, add. d. l. See likewise *August. Barboza* ad d. l. & *Groenewegen. de LL. abrogat.*^d See the last Section of this Chapter.^e *Polyæn. Strateg. l. ii. c. 6.* The wicked shuffling of the *Locrians* is likewise to be condemn'd, as we find it reported by *Polyb.* l. xii. c. 4.

Mr. BARB. NOTES on §. XI, XII.

³ The Rescript of *Alexander* is this, *Imp. Alex. A. Florentino Militi. Si minor annis viginti quinque emptori prædii cavisti nullam de cætero te esse controversiam faciurum, idque etiam jurejurando corporaliter præstito servare confirmasti, neque perfidiae, neque perjuria me auctorem tibi futurum sperare debuisti.* The New Constitution of *Frederick* is, *Sacramenta puberum sponte facta super contractibus rerum suarum non retractandis inviolabiliter custodiantur, Code l. ii. tit. 28. Si adversus venditionem.*⁴ This has afforded the Clergy a Means to gain to themselves, under a pretence of Religion, the Estates of Children under Age, viz. Boys at fourteen Years, and Girls at twelve.¹ The Oath makes the Cheat the more Criminal; but indeed every Action done without an Oath excludes also all vain Subtilties. See what is said upon the Paragraph following.² For the Fraud heightens, and doth not take away the Perjury. *Fraus enim astringit, non dissolvit perjurium, Cicero de Offic. l. iii. c. 32.*

Tully observes^a, doth not loosen Perjury, but bind it stronger than before. Thus Harry Stephens, in his preliminary Treatise to his Apology for Herodotus^b, is very pleasant on the common Sophism of the Tradesmen, when they swear they cannot afford a Thing under such or such a Price, unless they design to lose by it; observing that in this Conduct they have always an Eye to the Proverb, *A Tradesman loses when he doth not get*. I know not whether we are to rank under this Head the Act of the Count de la Fontain, who in the Battle at Rocroy was carried in a Chair; having bound himself by Oath, *Never to fight against the French on Foot, or on Horseback*^c. Or that of Pope Alexander VII. who having, at his Admission to the Papal Dignity, sworn that *he would never receive his Kinsmen in Rome (di non ricevere i suoi parenti in Roma)* by the Advice of the Jesuits made use of this Evasion; he receiv'd his Relations first at the Castle of Gandolf, and then brought them with him into the City^d. Or what Tavernier reports^e of the Dutch Agents of their East-Indian Company; who, before they leave Holland, engage themselves by Oath never to drive any Trade on their own private Account, but to rest satisfy'd with the Salary allow'd them by the Publick. Yet when they once arrive at the Indies, many of them marry, and suffer their Wives to carry on that forbidden and clandestine Traffick. 'Tis a barbarous Story, which Ælian^f tells of Cleomenes the Spartan, that making Archonides privy to his Design on the Kingdom, he swore to him, *If his Enterprize succeeded, πάντα σὺν τῇ αὐτοῦ κεφαλῇ πράττειν*, that he would do nothing without his Head. But having secured the Government, he cut off his Friend's Head, and kept it in a Vessel of Honey, and before he undertook any Business turn'd towards the Vessel, and declar'd his Resolutions. Aryandes, in Polyænus^g, treating with the Buceans, brought their Commissioners to a Trench, which he had contriv'd for that Purpose, lightly cover'd with Earth and Wood, and there swore to them, That he would observe the Articles of Agreement, *as long as the Earth continued*. And presently after throwing down the Trap, rush'd upon the City, when under no Suspicion of Violence^h. To the same Case belongs the common Instance of two Rogues; one of which steals a thing, and the other hides it; the former swearing that he hath it not, the

latter, that he did not take it; who are both to be judg'd guilty of Perjury. It was a most gross Evasion of the Turkish Emperor Solymán, when having sworn toⁱ Ibrahim Bassa, that *he would never hurt him while he liv'd*, he order'd him to be kill'd in his Sleep, as if he were not then to be reckon'd amongst the Living. On the other hand, the Antients extol the Constancy of Q. Metellus Numidicus^j, for refusing to swear to the Law proposed by Saturninus; though Marius the Consul, and others, endeavour'd to persuade him to a Compliance, by telling him, *That the present Necessities of the Commonwealth would justify him in taking the Oath, and that he might decline the Force of it by this secret Reserve, That he swore to the Law, provided it were a Law*; that is, if it were duly propos'd and enacted. Whereas it would be easy for him afterwards to shew, that it was indeed no Law, being made in the time of Thunder, when, by the Rites of their Religion, they were forbidden to transact any Business in the Assemblies of the People. Yet that good Man chose rather to go into Banishment, than to make use of this shift; knowing that when Persons swore to a Law, they must, at least in Pretence and Appearance, acknowledge the manner of its Enactment to be right and true. But we think Lycurgus to have been over solicitous, when he order'd his Ashes to be thrown into the Sea, for fear, if they shuld be brought to Sparta, the People should fancy their Oath to expite, by which they had bound themselves not to repeal his Laws, 'till he should return home. For the bringing back of a dead Body can with no Propriety be look'd on as the Return of the Person to whom it belongs^k.

XIII. Yet on the other side, the interpretation of Oaths is not always to be extended, but sometimes to be made in the closest and narrowest Sense, if the Subject Matter seem to require it^l; as suppose we swore to the Prejudice of another, and confirm'd in this solemn manner not Promises, but Threats, which are not in themselves capable of conferring any Right on another^m; the common Instance of which Case is the Example of the Israelites in Judges xxi. who having sworn not to give their Daughters to the Benjamites, afterwards persuaded them to steal themselves Wives, and interceded for them with the Virgins Fathers. For 'tis one thing to give, and another thing *not to resume* what hath

^a Off. iii. ubi supra. Add. Stobæ. Serm. xxviii. of Lydia. Tacitus, Ann. xii. Rhodanthe, as if he would pretend to be mindful of his Oath, doth not use his Sword or his Poison against his Uncle or Sister; but, as they lay upon the Ground, stifles them with a load of heavy Garments. ^b Chap. xvi. ^c Benj. Prioli Hill. Gall. l. 2. ^d Il Nepotism. Rom. Part I. l. iii. ^e Voyages, Part II. c. 14. ^f V. H. l. xii. c. 8. ^g Lib. vii. c. 34. Strateg. ^h Yet Herodotus, Melpon. cir. fin. attributes this Action to the Persians. ⁱ Vid. Appian. l. i. de Bell. Civil. p. 368. Edit. H. Steph. Plutarch. in Maro. ^j Vid. Plutarch. Lycurg. Justin. l. iii. c. 3. ^k See Grot. l. ii. c. 13. s. 5.

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³ Our Author unfitly imputes this to Ibrahim. See the Continuers of Chalcondylus upon Solymán II.

^l It is certain, that we ought to restrain the Sense of the Words of an Oath, as the Nature of the thing requires, but that is not peculiar to an Oath, single Promises and Agreements necessarily require it. As for the Examples which our Author alledges, they have most of them a shew of Subtily, either wicked, or unprofitable and superstitious. It is not sufficient to give the Words of an Oath a Sense that may rigorously be put upon them; we must also see, if in the Circumstances in which they were pronounced that Sense is suitable, and agrees with the Intention of him that swears, and him to whom the Oath is made. If it be not so, and the Sense in which the Terms are taken contains nothing that can render it null, I don't know how any can secure themselves from Perjury by putting another Sense upon them, which was not thought on in taking the Oath; but if in following the Sense which was in view when the Oath was taken, the Oath is null in itself, we ought not to put another Sense upon the Words, tho' they are capable of it, and we may without scruple dispense with keeping a like Oath in any manner. See Mr. Titius's Observ. 273. who sends us to Mr. Thomasius's Instit. Jurispr. Divin. l. ii. c. 8. §. 50, &c. where he maintains the same thing against our Author, as I have seen my self since the first Edition of that Work, but 'tis the eleventh and not the eighth Chapter. I shall speak something of each of these Examples in particular in the following Notes.

been forcibly taken². And there was the more Reason for insisting thus closely on the Words of the Oath, because it had been Cruelty to extinguish a whole Tribe³, though for the most heinous Offence: and perhaps they had in their Oaths excepted this very Case⁴. In *Ammianus Marcellinus*^b, *Athanasius* the Gothick Judge and Commissioner for the Treaty of Peace, alledging, that he was bound by a dreadful Curse, and by the Commands of his Father, “ Never to tread upon the Roman Ground, and no Arguments proving sufficient to move him to the contrary; it being likewise dishonourable for the Emperor to pass over to him; the wise Heads found out this Expedient, to have the Emperor and the Judge meet in their Boats about the midst of the River (the Danube) and thence to settle the Articles of Agreement between their People on both sides⁵. So when the Romans, in *Livy*^c, requir’d the Achæans to repeal some Decrees which they had made, the latter urg’d in their own Excuse, That they were engaged by Oath not to do it. But *Appius*, the Roman Commissioner in the Affair, telling them, he would by all means advise them to undertake that willingly, which otherwise they would be brought to by Compulsion: They were so terrified, as only to request, That the Romans would give themselves the trouble of making what Alterations they thought fit, and not bring the Achæans under the Curse of Perjury. Here, we see, they look’d on the Case of not opposing a formidable Superior in cancelling

the Laws, to be different from that⁵ of repealing them by their own free Act. Thus *Agamemnon*, in *Euripides*, refuseth to punish *Polymnestor* of *Thrace*^d, in regard that he was the Friend and Allie of the *Grecians*^e, yet he promiseth *Hecuba* not to hinder her from taking any Revenge on him by her own Force, and on her own Account^e. Thus the knavish Servant in *Terence*^f, begging the Maid to take the Child which he had in his Arms, and to lay it at his Master’s Door, being demanded, why he could not do’t without Assistance? answers, *Because if my Master makes me swear that I did not lay it here by my self, I may do it with a safe Conscience.* But *Darius* was in our Opinion but a very poor *Casuisit*; it being in this respect the same, to perform a thing by one’s self, or by another. The Emperor *Aurelian*, when he found the Gates of *Thyan* shut, swore in a Rage, That he would not leave in it one Dog alive^g. *Alexander* the Great having resolv’d to destroy the City *Lampsacus*, when *Anaximenes* came to petition him on the Behalf of the City, immediately swore, He would do nothing which *Anaximenes* should desire. *Anaximenes* took the advantage of the Oath, and desir’d him to destroy *Lampsacus*^h. *Antigonus*, on account of a strange Dream which he hadⁱ, fully designing to kill *Mitridates*; and discovering the Matter to his Son *Demetrius*, after he had forced him to swear that he would never speak of it; *Demetrius* being concern’d for the Life of the young Prince, took him once aside from

² Add. *Joseph. Archæol.* l. v. c. 2. & *Ambros. Off.* l. iii. c. 14. v. 869. *Ex.* ³ Add. *Polyb. Excerpt. leg.* viii. circa fin. ⁴ Add. *Flav. Vopisc. Aurelian.* c. 22. Add. *Valer. Max.* l. viii. c. 3. Sect. 4. *inter extern.* ⁵ When *Etearbus* in *Herodotus* in (*Melpom.*) p. 171, 172. Edit. *H. Steph.* had obliged *Themison* by Oath to assist him in any Service he should command, and afterwards order’d him to throw his Daughter into the Sea; *Themison*, tying the young Lady to Ropes, let her down amongst the Waves, but presently pull’d her up again without Harm.

^b Lib. xxvii. c. 4. ^c Lib. 39. c. 37. ^d *Hecub.* ^e *Andr. Act.* iv. Scen. 3. ^f *Aurelian* was but just in interpreting his Threats according to the strictest Sense, when he commanded his Men to run up and down, and kill all the Dogs that met with, *Flav. Vopisc. Aurelian.* c. 22. ^g *Alexand.* was but just in interpreting his Threats according to the strictest Sense, when he commanded his Men to run up and down, and kill all the Dogs that met with, *Flav. Vopisc. Aurelian.* c. 22. ^h *Themison* by Oath to assist him in any Service he should command, and afterwards order’d him to throw his Daughter into the Sea; *Themison*, tying the young Lady to Ropes, let her down amongst the Waves, but presently pull’d her up again without Harm. ⁱ *Vid. Appian. de Bello Mitridat.* p. 176. Edit. *H. Steph.*

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² But as *Mr. Vander Muelen* has also observed in his Comment upon *Gratius*, Tom. ii. p. 472. if at the time that the *Israelites* swore, they had been demanded what they meant by not giving their Daughters in Marriage, could they sincerely say, that they intended thereby to hinder them from taking them; and the rather, because without any prejudice to their Oath they were free to advise the *Benjamites* to have recourse to such an Expedient, and afterwards to intercede for them to the Fathers of the Virgins they had taken away? We may add, that these sort of Oaths, which give no Right to any Person, are properly speaking, Vows. Now what assurance can we have that God accepts them? And on the contrary ought we not to suppose that he rejects them, since they only proceed from a principle of Hatred and Animosity? In a word, all minatory Oaths have two essential Marks which render them null; the first is, That so long as there is any Knowledge of them in the Person against whom any thing is threatened to be done, or not, he always hopes that they’ll not be performed; the other is, That these sort of Oaths are always made rashly and without Consideration; for they either proceed from Hatred next to Madness, or arise from such a Motion of Choler, as causes a menacing with an Oath of such as we are not angry with, because we love them, and would make them sensible that they have committed things that have provoked our Indignation. In all these Cases we ought to beg God’s Mercy for those unwarrantable Passions with which we have suffered our selves to be transported, and for the Rashness we have been guilty of in using his Holy Name, as if he ought to authorize our Passions and Weaknesses; but we are not obliged to keep such Oaths, and we often sin much more in executing our Threatnings with Rigour.

³ *Mr. La Placette*, in his Treatise of an Oath, l. ii. c. 9. maintains, That it is impossible to prove with the least Solidity, that these Oaths are evil. “ There was indeed, says he, a great deal of Severity in this Treatment; but we must also own, that it was deserved. This Decision certainly is not moderate, if we consider the Nature of the Thing determined, for it authorizes an Action very harsh, or rather extremely cruel; but as to the Decision it self, it seems to me, that to qualify it singly with Moderation is a Term very sweet and pleasing. It is not necessary that I should prove this, but send the Reader to the History it self, and to *Mr. Le Clerc’s* Commentary upon it.

⁴ If the Peace could not have been concluded, unless *Athanasius* had went into the *Romans* Country, he had been discharged of his Oath by this only, that Cases of Necessity are always excepted.

⁵ We must say the same thing in this Example as in the preceding. Otherwise all publick Deliberations may be revoked, when it is necessary for the Good of the State, there being nothing in which this Condition is not tacitly included.

⁶ In this Example there is no Oath, and the Explication of *Agamemnon’s* Words helps not the Matter.

⁷ This way of keeping Oaths is to burlesque them. The *Hebreos* have a proverbial Expression something like this of *Aurelian*, which is to make them pass under the Edge of the Sword, understanding it of Men, and not of Beasts, although the Words properly taken belong only to Dogs. See 1 *Sam.* xxv. 22. and what *Mr. Le Clerc* says of it against *Beibartus*. The Truth is, the Emperor’s Oath was null. See what I have said in Note 2. And so was *Alexander’s* for the same Reason, when *Anaximenes* begged the contrary to what he wished for.

⁸ As the Proposition of *Etearbus* was wicked, it is clear that *Themison’s* Oath was null, and that he ought not to keep it in the Sense that the Tyrant took the Words, as also that he did wrong in putting the Virgin into the Sea, although he resolv’d to pull her out again; for he could not be sure that the Cords would not break, or that he should not do her some Mischief in throwing her into the Sea.

the Company, and saying nothing to him⁹, only wrote with his Javelin in the Dust, so as to be observ'd by him, *Fly, Mithridates*^a. To the same Head belongs that Instance which *Sueton*^b gives of *Cesar's* great Clemency of Nature; That having sworn to crucify the Pirates by whom he had been taken, he orders them first to be strangled, and then fastned to the Cross. Of the like kind was *David's* Oath of Safety to *Shimei*, 2 *Sam.* xix. 23. notwithstanding which, on his Death-bed he commands *Solomon* to take due Care that such a wicked Rebel should not die a peaceable Death, 1 *Kings* ii. 9. For *David's* Promise of Pardon was made only in his own Name. Nor did he here properly enjoin *Solomon*, that he should drag the Man to Punishment for his old Crime, but only that he should diligently watch so notorious a Villain, and by no means spare him, if taken in a second Fault. And *Solomon* acted with great Wisdom^c, in obliging so turbulent and so implacable an Offender to live in the Royal City under his Eye, for fear he should engage in new Treasons, threatening him with Death upon his Disobedience in this Particular; which Condition *Shimei* himself gladly approved of, and accepted. Nor did it fall out without the special Direction of Providence, that being caught transgressing this Command, he suffer'd the just Reward of his former, as well as of his present Guilt. Add *Montaign's* Ess. l. i. c. 7. Perhaps we ought to allow a Place under this favourable Head to the Action of *Mary Queen of Hungary*, Wife to the Emperor *Sigismund*, who having promised Indemnity to *Hervatus*, Governor of *Croatia*, by whom she had been taken, and very hardly used; upon the Recovery of her Liberty is said to have put her Husband upon revenging the Injury; alledging, *That she had no Power to engage for him, though she might for her self.* *Bonfin.* *Rer. Hungar.* l. iii. c. 2. I know not whether we may put in the same rank the Act of *Timoleon* recorded by *Polyanus*; he was engaged in Pursuit of *Milarchus*^d the Tyrant, an impious Wretch, who had cheated many Persons out of their Lives, by swearing to preserve them, and afterwards despising his Oath. The Tyrant made an Overture of coming in Person to *Syracuse* to take his Tryal, provided *Timoleon* would not be his Accuser: *Timoleon* swore he would not; and on these Terms *Milarchus* came to *Syracuse*: *Timoleon* bringing him into the open Assembly, address'd him in the following manner, *I will not accuse you, for so I covenanted beforehand; but I'll command you instantly to be executed: for he who hath deceiv'd so many to their Ruin, may justly be thus deceiv'd himself.*

XIV. In like manner an Oath doth not exclude any tacit Conditions or Limitations properly arising from the Nature of the Subject. As suppose I have given a Person his Option to desire of me whatever he pleas'd; if his Request shall be either unjust, or absurd, I am not tied by my Engagement. For he that makes an indefinite Grant to another, before he knows what he will ask, presupposeth that the other Party will petition for what is honest, what is morally possible, what is not ridiculous, and what is not mischievous either to himself, or to any besides^e. 'Twas a good Caution of *Phœbus* to his rash Son,

*Ne dubita, dabitur (Stygias juravimus undas)
Quodcumque optâris; sed tu sapientius opta*^e.

I've sworn by *Styx*, doubt not, I'll not refuse
Whate'er you ask; but with more Wisdom chuse.

Such a Case as this gave occasion to that noted Saying of *Hippolytus* in *Euripides*^f, which *Tully* so much commends, ἡ γλῶσσο' ὀμῶμοζ', ἡ δὲ φρήν ἀνώμοτος, *My Tongue hath sworn, my Mind unsworn remains.* For it seems he had sworn to the Nurse, that he would keep secret whatever she discover'd to him. But when she made a Proposal of Adultery and Incest with his Mother in Law *Phœdra*, he denies that his Oath oblig'd him to conceal so foul a Villany. Though the *Poet* makes him so scrupulous as to recede from this Judgment, and to keep close the Matter in regard to his Oath. *Nicomachus* in *Quintus Curtius*^g makes the same Exception, *resolutely denying that he had given his Oath in confirmation of the Parricide, or that any tie of Religion should be able to hinder him from declaring so barbarous a Treason*². For it is indeed one Part of the Duty and Obligation of a Subject, not to hide any Designs that he shall observe to be carrying on against the Person or the Government of his Prince. So *Tully* (*Offic.* 1.) *It may so happen, that the performance of a Promise or an Engagement should be prejudicial to the Party to whom it was made. For if Neptune, as we have it in the Story, had not made good what he promised to Theseus upon Oath, Theseus had not lost his Son Hippolytus. The Death of his Son being one of the three Wishes, which, in his Passion, he put up to Neptune. (Comp. Euripid. Hippolyt. Coron. ver. 315.) These Promises therefore are not to be kept, which would be hurtful to the Persons, whom in promising you design'd to serve.* Add *Diod. Sic.* l. iv. c. 65. And thus too *Herod* ought not to have sold the Head of *John the Baptist* to his Daughter in Law for a Dance; be-

^a *Plutarch. Demet.* l. ii. v. 101, 102.

^b *Jul.* c. 74.

^c *Verf.* 36, &c.

^d *Stratag.* l. v. c. 12. n. 3.

^e *Ovid. Metamorph.*

^f *Hippolyt.* v. 612.

^g *Lib.* vi. c. 7. n. 7.

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⁹ This Expedient was superfluous, and could not have preserved *Demetrius* from Perjury, if the Oath had been valid. But every one is indispensibly oblig'd, as much as in him lies, to avert the Evil from others with which they are threat'ned unjustly. So that *Demetrius* might without any Evasion have delivered *Mithridates* from the Danger he was in. All that *Mr. de Saey* has spoken in his *Treatise of Friendship*, p. 110, &c. upon the Question, *Whether a Man may break his Oath to discover to his Friend a Secret of that Nature, that he hazards his Life if he hides it from him?* All, I say, that this ingenious Author has said upon this Subject, taking the Negative part, is void and of no Force. The Reasons which he himself alledges for the Affirmative are sufficient to show that his Determination is extremely wrong.

¹ Our Author cites this Passage out of *Ovid's Metamorphoses*, lib. ii. v. 101, 102. but it is so far from establishing, that it contradicts our Author's Principles. *Phœbus* supposes here, and the Sequel of the Story proves it plain enough, That an Oath made by the Waters of *Styx* was inviolable, although the performance of it was fatal to him, for whose sake it was made. This is contrary to both Reason, and the System of the Author.

² *Curtius's* Words are, *Quibus juvenis [Nicomachus] auditis, se vero fidem in parricidio dedisse constanter abnuat, nec ulla religione, helus negat, posse constringi.*

cause, since there can lie no Obligation to what is unlawful; in such a general Promise this Condition ought to have been understood, If the desir'd any thing which he might lawfully perform^a. We find King Solomon not adhering to his indefinite Grant, when his Mother ask'd a Favour which was likely to turn to the prejudice of his Government^b, 1 Kings ii. 20, &c. There is a very remarkable Story in *Diodorus Siculus*^c, which bears some relation to the Point now under Debate: "Xerxes being warmly engag'd in prosecuting a new Expedition against Greece, desired *Themistocles*, who was then in his Court, to be his Guide and Director in the War. *Themistocles* consented, upon condition the King would swear, never to attack the Grecians without him. A Bull being sacrific'd, and the Oath taken with the usual Solemnity, *Themistocles* took a Cup of the Blood, and drinking it off, immediately expired." And by this means diverted *Xerxes* from his Resolution. But here, if *Xerxes* had no other Reason to alter his Purpose, he need not have been deter'd by his Oath, in which *Themistocles*'s Life was a Condition suppos'd; it being no more than if he had promis'd that Grecian Captain never to undertake any thing against his Countrymen, whilst he liv'd, without his Counsel and Assistance. So that upon his Death the force and virtue of the Oath died with him^d.

XV. Although the Invocation of the Divine Name in Oaths is to be adjusted according to the Persuasion of the Person who swears, yet the whole Proposition shall bear that Sense which he who requires the Oath protesteth to understand it in^e. For 'tis on his account chiefly that the Oath is taken, and not on the Swearer's: And therefore it belongs to him too, to settle the Form of Words; and he ought to do this so plainly and clearly, as both to signify how he understands them himself, and to bring the Swearer to acknowledge that he apprehends his Meaning. And to conclude the Business, the Swearer is to pronounce the same Words openly and distinctly, so as to leave no possible room for Cavil or Evasion. Therefore, those Wretches whom *Tacitus* speaks of^d, in vain declined to attempt the Guilt

of Perjury, when being conscious to themselves of the Wickedness with which they were charg'd, they trembled and faulter'd in their Oath, changing the Words with much Artifice and Slight. So *Ulysses* and *Dio-medes* in *Diſtis Cretensis*^e, like true Masters of Sophistry and Guile, swore to the Trojans, That they would stand by the Agreement they had settled with Antenor: By which Agreement they meant the Articles for betraying the City, which Antenor and they had adjusted. As for that Form us'd in administering Oaths amongst the Romans, *ex animi sui sententia*, according to their Judgment and Opinion, it is not so to be expounded, as if Oaths receiv'd all their Force and Validity from the Notion which Men form'd of them in their Mind; but to shew, that those who swore ought to perform so solemn an Act in the most serious Manner, and with the most real Intentions^f, not in the way of Dissimulation, of Fiction, or of Sport. This too was an usual Form of the Questions put by the Censors; as for Instance, *Ex animi tui sententia habes uxorem? Have you a Wife according to your real Mind? Which a Roman Knight once answering with this cavilling Jest, I have a Wife, according to my Mind, not according to your Mind, incur'd the Penalty of a Fine for his indiscreet Wit. Cicero, in his Academical^g Questions, endeavouring to prove that human Knowledge can reach no higher than Probabilities, in a very elegant manner alledgeth this and other the like Customs as Proofs of what he asserts. This is evident, says he, in the diligent Caution of our Ancestors, who first required Men to swear only according to the best of their Judgment; and then told to the Party who took the Oath, that he should be rendred guilty by it, only, if he knowingly deceiv'd. As likewise, when they order'd a Witness to say no more than that he thought such or such a Matter, though perhaps he had seen it with his Eyes; and pronounc'd a Fact which the sworn Judges had examin'd and determin'd, not to be, but only to seem, or to appear thus or thus. 'Tis Remark of the same Author^h, That what is sworn agreeable to the Mind and Intention of him who requires the Oath, ought strictly to be perform'd; but what is not, may without Perjury be omitted; that*

^a Matth. xiv. 6, &c.

^e Lib. v. c. 10.

^b Lib. xi. c. 58. p. 44. A. Edit. *Rhadom.*

^f Lib. iv. c. 47. *sub fin.* & l. iii. c. 29. *de Offic.*

^c See *Grot.* l. ii. c. 13. f. 3. n. 2.

^d *Hist.* 4. c. 41.

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⁴ The Promise was not granted with an Oath. *Solomon* did not swear, till having refused his Mother's Petition; he on the contrary declared, that what *Bathsheba* came to do, should cost *Adonijah* his Life. The Rigour of this Prince is very hard to be excused, being against his Brother, whose evil Designs he might have prevented another way. See Mr. *Le Clerc* upon 1 Kings ii. 24.

¹ The Roman Lawyers say, That if a Man has promised with an Oath to appear before a Judgment Seat, and is prevented by some lawful Reason, he is not perjurd. *Qui jurato promissit judicio sisti, non videtur pejerasse, si ex concessa causa hoc deseruerit*, Digest. l. ii. tit. 8. *Qui satis dare cogantur, &c.* Our Author here criticizeth upon the Reflection which *Homer* makes upon the Oath of *Heſtor*, by which that Trojan Hero had promised to *Dolon* to give him the Horses and Chariot of *Achilles*. Καὶ ἐπιόρκον ἀπάμμοε, &c. He swore and was perjurd, says the Poet. But our Author lays, *Heſtor* swore only under this tacit Condition, "If we take the Horses and Chariot, and if you return from the Battle safe and sound. So that he understands by the Word ἐπιόρκος, perjurd, an Oath that did not take effect.

¹ Our Author quotes this from his Memory, and does not tell us where he had it. He has it from *Aulus Gellius*, where he of whom he speaks was not a Roman Knight, but a captious Fellow. Moreover, the last Edition of Mr. *Gronovius* reviewed by the MSS. relates the Jest after a different manner, so that it had nothing offensive for the Censor to punish; for he that made this unseasonable Jest, said only, that he had a good Wife, but not to his Humour; for his Answer was, *Habeo equidem, inquit, uxorem, sed non herede ex animi mei sententia*. Vid. *Cicero* de Orat. l. ii. c. 64. & *Just. Lipsius* Var. Lect. l. i. c. 1. In fine, a famous Lawyer very unfitly concludes from this Passage of *A. Gellius*, That Women were subject to the Reproof of the Censors. See Mr. *Thomasius*'s Discourse, *De Judicio seu Censura morum*, c. 2. §. 12, &c.

² *Cicero*'s Latin is, *Quod enim ita juratum est, ut mens conciperet fieri oportere, id servandum est; quod aliter, id si non feceris, nullum est perjurium.* — *Non enim falsum jurare, perjurare est: sed quod ex animi tui sententia juraris, sicut verbis concipitur more nostro, id non facere perjurium est.* *Grotius*, and our Author have followed the ordinary Editions in the first Words, which import, *ut mens deferentis conciperet fieri oportere*. But seeing the Manuscripts acknowledge the Word *deferentis*, which is not there, as *Aldus Manutius* testifies, the sequel of the Discourse shews plain enough, as I think, that it is a Gloss which has been thrust into the Text by some body that did not attend to *Cicero*'s Reasoning. The Example which is found in the following Words, will not permit us to doubt but that he treats of him that swears, and not of him that imposeth the Oath. A Corsaire without doubt intends to pay what he has promised with an Oath, or why doth he swear? 'Tis then *mens jurantis*, and not *mens deferentis*, in this place.

is, if a Man happens to misunderstand the Party who puts him to his Oath, so as to swear in a different Sense from what the other conceives, he is not perjurd by Non-performance. For since the other Person had a contrary Meaning, he must be suppos'd not to have accepted of this Proposal made upon Oath by the Juror; and without Acceptance there ariseth no Obligation from a Promise. For it is not, as Tully goes on, *always Perjury to swear what is false*; that is, to assert by Oath thro' some Mistake what is really otherwise; but you are then perjurd, when you fail in making good what you swore, *ex animi tui sententia* (as the Form is in our common Practice) according to your real Sentiments and Persuasion.

XVI. It hath been a Dispute amongst some of our modern Casuists, whether an Oath could be taken by Proxy¹; that is, whether one Man could in the Place and in the Name of another take an Oath which should bind the absent Party? On which Point our Judgment is this: As a Person may in his Absence contract an Obligation, since Consent may as well be signify'd in Writing, as *viva voce*; so there seems no Reason why an Oath likewise may not be express'd in the same manner. Which, after it hath been once solemnly recited, shall as fully oblige, as if the Party were there present, and had taken it by word of Mouth. Yet before it hath been rehears'd in this solemn Manner, it seems allowable to revoke it; so that a Person who retracts an Attestation which he made upon Oath at a Distance, before it be convey'd to the Place for which it was design'd, ought not to be look'd on as perjurd. But in the common Proceedings of Courts in this Affair, there seems to be somewhat not very proper or convenient, as that the Proctors who read the Instrument, use such a Posture and Ceremony, as if they were to swear in their own Name, and that, for fear they should seem to be themselves obliged, they change the concluding Clause of the Oath after this manner, *So help him God*. Whereas it might be sufficient barely to recite the Oath of the absent Party, as it lies in the Writing. However, since it hath been with good Reason, the receiv'd Custom of most Nations to render Oaths more sacred and august by the Ceremonies of Religion, and by some Sign of Devotion, to set the Awe and Reverence of the Divine Majesty more sensibly before the Eyes of the Juror, as by Sacrifice, by approaching to the Altar, and the like Acts of Worship; therefore we are of Opinion, that if the Matter be of very important Concern, the absent Party ought to be put to his Oath with the usual Solemnity, in the place where he lives; especially since the Case requires a *corporal Oath*²; which Name we cannot give to an Oath express'd and convey'd

in the manner we before describ'd. For it is much more to invoke God as a Witness, in the midst of those sacred Rites; which, not without some kind of pious Horror, signify the Divine Presence; than to write so many Words on Paper, which never *blusheth*. And 'tis a material Consideration, that Evidences thus given in Writing at a distance, are by the Lawyers themselves term'd *Testimonia caca*³, *Blind Testimonies*.

XVII. Lastly, It is a Question usually discuss'd on this Head, Whether or no, and how far an Heir is bound by the Oaths of the Person to whom he succeeds? In which Case this is certain, that if by such an Oath some other Party obtain'd a perfect Right, which ought to be satisfy'd either in whole or in part out of the Goods of the deceas'd; then the Heir is oblig'd to see it fulfill'd: Since this Burthen or Debt inhering in the Possession, passeth to him with it. But when the Oath hath given no one a perfect Right, and the Obligation itself was founded barely in the Piety, Fidelity, or Constancy of the Juror, then it's plain that the Heir doth not stand bound, inasmuch as he doth not represent another, as to those Obligations which terminate ultimately and solely in the Person deceas'd. Thus, for Instance, if a Man hath sworn or vow'd with an Oath, That he will fast once every Week; that he will continue in Celibacy five Years; or, that he will undertake a Pilgrimage to the Holy Land; if he die before he hath fulfill'd his Engagement, his Heir shall by no means be tied to perform it. But the Case is different, if a Person hath been Heir expressly under such a Condition. So likewise, if a Man hath sworn to give an Hundred Pounds yearly to the Poor for Ten Years to come; and dies before the time is expir'd, his Heir shall be free from the Obligation; unless the former Grant confer'd on certain Persons a Right of demanding the said Sum. For he who makes a Promise, and doth not withal give the Party a Right of challenging it as his Due, intends to engage his own Word only, and not his Estate; and therefore upon his Decease the Obligation shall not in the least affect his Possessions, or his Heir, unless an especial Injunction to that Purpose were added in the Will. *Gravius*^b observes farther, That if such a Promise confirm'd by Oath was in some respect faulty, so as to produce a Right, not in regard of Man, but of God only, then the Heir shall not be charg'd with the Performance. Which we allow, if it be suppos'd that the Party who swore, resolv'd either out of a Point of Honour, or a Scruple of Conscience, to fulfil such a defective Oath, which he might, if he pleas'd, have utterly evacuated, by alledging some Deceit, or some Fear unlawfully caus'd. For otherwise the Question is insignificant; we having above shewn that the Ju-

¹ Vid. leg. *Wisigoth.* l. ii. tit. 4. c. 5.

^b Lib. ii. c. 13. f. 17.

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¹ Our Modern Law calls it, *Jurare in animam alterius*. Mr. Hertius recites here a Passage out of a Letter of William the Good King of Sicily to Henry II. King of England, written A. D. 1176, where that Prince says, That all his Time it has been a Custom in his Realm and among his Ancestors, not to swear himself, but it is all one to lift up our Hand, or cause another to lift up his Hand for us in our presence. *Quum unum & idem putemus Sacramentum, quod vel manu propria fit, vel in anima jubentis & presentis juratur*. That the Antient Romans sometimes swore after this manner, appears by an Example which Mr. Hertius alledges of an Oath which Anthony made to Pompey by the Ambassadors he sent to him. *Dion. Hist. Lib. xlix. Tit. Livius* also tells us, That C. Valerius Flaccus not being able to swear himself, his Brother L. Valerius Flaccus swore for him by the allowance of the Senate and People, who esteem'd such an Oath good, and for the advantage of him for whom it was made. *Plebeiq; scivit, ut perinde esset, ac si ipse Aedilis jurasset*, Lib. xxxi. c. 50. & ult. See what the Expositors of the Civil and Canon Laws say about Oaths taken by a Proxy.

² *Juramentum Corporale*, or, as it is called in the Code, *Juramentum corporaliter praestitutum*. See the Law cited about this Matter, § 11. n. 3. and l. ii. tit. 43. *Si minor se majorem, &c.* leg. 3. in fin. 'Tis an Oath that a Man takes himself with the ordinary Formalities.

ror himself is not in this Case effectually oblig'd. But what if the Heir neglects to perform a Promise or Covenant under Oath made by the deceased, doth he hereby contract the Guilt of Perjury? It seems reasonable to answer in the Negative. For that which in strict Speech we call an Oath, or the Invocation of the Divine Vengeance super-added to a common Engagement, passeth no farther than the Person of him who swears¹. Since we cannot say that the Heir put a Slight on the Reverence due to the Divine Majesty, because it was not he who call'd God to Witness: And therefore he shall be chargeable only with breach of Trust. It alters the Matter, if the Oath were taken by a whole People: It being the Judgment of many, that a People, whilst they remain such, are by their publick Oaths put under perpetual Obligation. Which Opinion nevertheless seems to us not altogether clear and decisive: For an Oath and the breach of it affects only the natural Will, or the Will of particular Men, and reacheth the compound Body, or *moral Person*, only by Communication from each Individual. The People therefore, as a *moral Person*, cannot invoke the Wrath of God upon themselves; but this is done by those single natural Persons, of whom the Community was made up. And consequently upon the violation of a Promise or Pact made by Oath in the Name of the State, those Persons only shall be guilty of Perjury, who corporally swore to the Business, if they are now consenting to the Omision of it; but the rest shall be only branded with the Mark of ordinary Perfidiousness². And for this Reason we should be unwilling to accuse the *Spartans* of Perjury, in receding, after so many Ages, from *Lycurgus's* Institutions: Or, the *Romans*, in case they had invested the *Cesars* with the

Title of Kings, notwithstanding the Oath which *Brutus* of old impos'd on the People to the contrary. Which will appear yet more evidently, if we consider, that this Oath contrer'd a Right on no Person; but the Design of the *Romans* in it was only to lay a Restraint on the Liberty of their Will, that they might not think of restoring that Form of Government, which had prov'd so unfortunate to them. By which means they might indeed bind *themselves*, never to let up a *Monarchy* in *Rome*; at least, so long as the publick Safety could be preserv'd without it. For in this case the very Persons, who took the Oath, must be supposed to be releas'd from it; because then the Necessities of the State, which is conceiv'd incapable of subsisting without a single Governour, render the Matter or Subject of the Oath unlawful. But their Posterity, unless they repeated the Oath, could not be tied by it; as well because their Ancestors had no Authority thus to impose arbitrarily upon them, as because the Consent of Posterity was wanting, as at present we suppose. Nor is it any Argument to the contrary to urge, that a Nation is reckon'd the same, tho' the particular Members who compos'd it are all chang'd: And that therefore the Acts of past Generations seem justly enough to be attributed to the present. For the Acts of former Ages can then only be imputed to the latter, when some other Parry obtain'd any Right as the necessary Consequence of those Acts. But in such things as result to the whole Body from the Actions of particular Members, the Descendents in a People do not always represent the Progenitors. As, tho' a People have been heretofore eminent for martial Glory, yet their lazy and degenerate Race can claim no Share in their Triumph, or in their Fame. Yet still the

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¹ *Bulfinch, De Republ.* l. v. c. ult. concludes hence very unfitly, That Princes are not obliged to stand to the Treaties made by their Predecessors, though confirmed by Oaths, as *Grotius* has observed, *De Jur. Bel. & Pac.* l. ii. c. 16. §. 16. n. 4. "For," says he very well, Nothing hinders but that the Promise may oblige the Heir, though the Obligation of an Oath be purely Personal." Upon which *Gronovius* affirms, "That a Prince and his Successor being one Person, because they both represent the People, an Oath binds the Successor." But what I shall say with our Author in the following Note, will make it appear that the Representation falls only upon the Engagement, and not upon the Oath that attends it.

² Mr. *Hortius* declares here against the Notion of our Author, and much depends upon the Authority of *Grotius*, which yet seems to make nothing for him. For this great Man, treating upon the Agreements made with rebellious Subjects, says, Lib. iii. c. 19. §. 8. n. 1. "That they may be confirmed by Oath, not only by the King and Senate, but also by the Body of the State, as *Lycurgus* and *Solon* made, the one the *Lacedemonians*, the other the *Athenians*, to swear to observe their Laws; and, THAT THEIR OATH MIGHT NOT LOSE ITS FORCE BY ANY CHANGE OF PERSONS, they order'd it to be renew'd every Year. In this Case, says *Grotius*, we can't break our Word, when the Publick Good requires it; for the Estate may recede from its Right, and the Terms of the Treaty may be so clear as to admit of no Exception." Either I am much mistaken, or these Words suppose the clear contrary to what Mr. *Hortius* infers from them, as appears from those Words which I have written in Capital Letters, especially if we compare them with the following Places of the same Author, *viz.* *Gr.* l. ii. c. 13. §. 17. & l. iii. c. 19. §. 5. In short, *Grotius* does not speak at all of the Posterity of them with whom the Treaty was concluded, at least, he will have us know, that the Obligation of an Oath has as much force upon Posterity, as the Promise to it annexed. The Reason of Mr. *Hortius* is no whit stronger. He says, "A People may be sworn, as a People." Be it so, yet the People which is to day, is not the same it was an hundred Years ago; it is only thought so, by reason of the perpetual Succession of New Citizens, who fill up the Place of those who are dead, or have left their Country, and the Continuation of the Government. So that he comes under the real Engagements of his Ancestors, by which he hath acquired a true Right, and which are by Nature perpetual, and not into that which must be looked upon as purely Personal. Now such is the Oath here. In a word, the People that are to day have no other relation to the People that liv'd an hundred Years ago, than an Heir has to a dead Person, whose Promises, confirmed by an Oath (as Mr. *Hortius* holds) are to be performed, not upon account of the Oath, but upon the account of the Promise. For an Oath is only a thing accidental, a simple Confirmation of an Engagement, which were not less valid without a kind of a religious Formality, which hath no other effect, than to assure him more of our Fidelity, with whom we resolve to keep our Word. The Example which Mr. *Hortius* brings of the *Israelites*, who about 150 Years after the Death of *Josiah* made good what that Patriarch had made their Ancestors to swear, *viz.* to carry his Bones out of *Egypt* into the Land of Promise: This Example, I say, proves only, that the *Israelites* did think themselves obliged to perform the Promise of their Ancestors; But there is nothing that insinuates, that if they had not done it, they had been guilty of Perjury. We may say the same of the Murder of the *Gibonites*, supposing that *Saul* did it under a pretence that the Oath of *Jehoiada* was null. But Mr. *Le Clerc* has well observ'd, that that Prince had another Pretence. See *Jos.* xxi, 1. 2. As to Oaths which give no Right to a Person, as when a People having made a Law, swear ever after to observe it, it is clear that these are Vows which have no Force any farther than as we may presume that God accepts them, so that as no Person can oblige himself, but as he judges it for his Advantage, nothing hinders, but that not only Posterity, but the People themselves, who have engaged themselves by Oath to observe a Law, may afterward abrogate it, if they find it prejudicial to the End for which it was established; for that exception is included in all Engagements which concern them only that enter into them, and we may believe that God no farther requires the constant performance of Vows. See Lib. i. c. 6. §. 6. and Lib. iii. c. 6. §. 15. foregoing.

Case would be quite otherwise, if such an Oath as we are speaking of, hath been solemnly renewed by Posterity, each particular Man engaging for himself. But in regard to these publick Obligations, *Sophocles's* Advice³ might pass for a general Rule;

*Let nothing thus be sworn beyond recall ;
For Men are frail, and human Thoughts will change.*
Antigon. ver. 394.

And 'tis no trivial Remark which *Joan. Labardée* makes in his History of France^a, That the Leagues of Monarchs are more firm and sacred, than those made by Republicks, or popular Governments: Because when one Person only engageth his Faith, he is struck with a more religious Concern for the Observation of it, than can affect each Man in a Multitude, where every one considers, that but a little of the publick Faith, if any at all, comes to his share; by which Means all are easily induc'd to recede from the common Engagement.

XVIII. The two principal Ends to which Oaths may be, and commonly are applied, are, either to strengthen and confirm a Promise by such a solemn Act of Religion; or to open a way to the clearing some Fact, which is at present doubtful, and cannot be conveniently made out any other way. And 'tis in this Sense we ought to interpret *Aristotle's* Definition of an Oath, when he styles it¹, an undemonstrable Assertion made with an Appeal to the Divinity; that is, an Asseveration, not demonstrated by any Arguments, but credited purely on account of the Piety and Religion of the Swearer. For when the matter may be prov'd by evident and convincing Reasons, 'tis not fair or regular to have recourse to Oaths. On the other hand, when Oaths are to decide a Cause, no search is made after other Proofs². Why Oaths are admitted only in determining matters of Fact, not matters of Law or Right, is very obvious. For we cannot swear whether a Thing be done well, or ill, but barely whether it were done, or not done. Which being once known, the Court may proceed upon the Points of Right and Law, by infallible Evidences and Rules. As for the Oath which the Judges themselves take, it is not assertory, but promissory; for they engage by it, That they will give Sentence in the Case before them, as Justice and Equity shall direct. And this Division of Oaths into promissory and assertory, may comprehend them all, with regard to the two Ends or Uses but now mention'd.

^a Lib. vi. p. 329. Comp. Anton. Matth. de Crimin. tit. De Perjurio, n. 15.

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³ The Greek is, Ἐνάξ, βροτοῖσιν ἕδεν ἐς ἀτόματον.
Ψεύδει γὰρ ἢ πίνονα τὴν γνώμην.

¹ The Greek is, Ὁρκός ἐστι μετὰ θείας παραλήψεως φάσις ἀναπόδεικτος. Rhet. c. 18.

² See §. 21, 22. following.

¹ These sorts of Oaths are either unjust or rash for the most part. To make them innocent, we ought most certainly to know, that the Deed or Omission to which we are obliged, is allowable or innocent; whether it be a thing that depends on us, and is in our Power; and we ought to examine whether it will not bring us into some Danger, though inconsiderable, of offending God, and breaking his Law, and if there be a necessity of Swearing. See the Treatise of Mr. Placette, l. ii. c. 4. & 25.

² The Words of the Law are, *Secundum itaque prædictam regulam, qua ubicunque non servari factum lege prohibente censuimus, certum est nec stipulationem hujusmodi tenere, nec mandatum ullius esse momenti, NEC SACRAMENTUM ADMITTI, Cod. l. i. tit. 14. De Legibus, &c. leg. 5. §. 1.* See also the Digests, l. ii. c. 14. De Pañis, leg. 7. §. 16. & l. 30. tit. 1. De Legat. leg. 112. §. 4.

³ 'Tis a Maxim of the Canon Law, That every Oath ought to be performed, which can be kept without any Prejudice to our Eternal Salvation. On this account the Engagements of a Woman, the Promises of a Minor, and other Acts which are null by the Civil Law, are valid by the Pope's Sentence, upon the account of the Oath which is join'd with them. See the Decretals, l. ii. tit. 24. De Jurejurando, c. 9. 28. & §. 11. n. 3, 4. above. But Mr. *Thomasius* observes with reason in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 9. §. 9, &c. That it is contrary to the Nature of an Oath, which, as our Author sufficiently proves, is only an Accessory to our Engagements, and that the Roman Clergy would by it usurp a Power to correct the Civil Law, and the Sentences of the Judges; as also hinder, that the Promises and Donations made to the Church, should not be weaken'd by such just Exceptions.

⁴ See l. v. c. 13. §. 9. following.

XIX. It hath been generally the Custom to make use of promissory Oaths in publick, as well as in private Causes, and perhaps more frequently than was necessary¹. Concerning which Authors have observ'd, That some of them are taken to introduce an Obligation, and are call'd *Promissory in Specie*: Others are added to confirm some Act already in Being. Which Distinction is not to be understood, as if every Oath were not accessory to another Obligation; but because some Promises include an Oath in the Compass of the same Proposition; as when one says, *I swear to do so or so on your Account*: Whereas many times the principal Business is express'd in a different Sentence from the Oath which confirms it. Now 'tis rightly observ'd by the Expositors of the Roman Law, and 'tis no more than we have already prov'd, That all Oaths are void which Men apply to strengthen any Business in itself unlawful or vicious², and which tends either to the impairing of the publick Good, or to the Prejudice of a third Person, tho' at the same time there are some sort of Transactions which are of themselves, in civil Cognifance, invalid, and yet are rendred good and effectual by the Addition of an Oath³. The reason of which is, because they are not defective in their own Nature, but only capable of being easily turn'd to the harm of the Party, who thus by swearing to them shews his full Consent and Approbation. For since any Man may wave a Privilege or Favour not design'd for his Benefit, he who thus refuseth to lay hold on the Invalidity of the Affair, and peremptorily proceeds to the confirming it by an Oath, is presum'd to have consider'd very seriously whether it makes for his Interest, or not.

XX. Assertory Oaths, or such as are applied to the Decision of Controversies not to be terminated by other Proofs, are taken either by the Party concern'd in the Business, or by a third Man: Those, who swear to the Facts of others, are term'd Witnesses¹; whose Honesty and Fidelity, unless by some probable Token rendered suspicious, are with Justice allowed a very great Weight and Sway; it being well suppos'd, that no Man of any Religion or Goodness will expose himself to the Divine Vengeance, for the Affair of another Person: Yet is it a wise Constitution in most civil Governments, not lightly to admit Persons to give Evidence in the Cause of others, engag'd to them by nearness of Birth; which

is so strong a Motive to Affection and Love : It being consider'd that such Persons might easily suffer their Passion to gain the Ascendant of their Religion². Nor was it altogether without Reason, that the *Romans* of old requir'd Witnesses of Wealth and Substance, especially in difficult and important Causes³.

XXI. But a Man may likewise in his own Business, when 'tis his Interest to do so, solve the Dispute by Oath, and this either by Agreement of the Parties¹, or by order of the Judge. For when a Controversy ariseth concerning some Due demanded by one Man, and denied by another, the Claimant may challenge the other Party to his Oath, promising to let fall the Suit, if he swears the thing not to be owing which is requir'd: And if the Person thus challeng'd be doubtful whether he can swear clearly and peremptorily to the Matter, as suppose the Debt was transferred to him from another, then he may return the Oath to the Claimant, engaging to pay, if he shall swear it is his Due². And this giving and returning of the Oath between the Parties may be made either in Court, or out of Court; yet with this difference, that out of Court I am not necessarily oblig'd to take the Oath when offer'd me, because it implies a Contract³; by means of which I shall, upon my refusing, become a Debtor. But now no Person, who is not invested with an Authority over me, can compel me to a

Contract or Agreement which shall be burthenfome to me⁴. Whereas, in Court, when the Oath is offer'd by one Party, the other shall not decline it, unless upon very weighty Reasons; but shall either take it himself, or return it to his Adversary; that is, when the Judge conceives the Claim not to be groundless, and yet there is no full Evidence of the Matter ready at hand; then if one of the Parties thinks fit to refer the Business to the Conscience of the other, the Judge may fairly lock on him as Convict, who neither dares in this religious manner to deny the Debt, nor yet, in Return, challenge the other to affirm it with the like Solemnity. For this starting and boggling can be attributed to nothing but to his inward Conscience of the Debt; because, if he pretend to fear that Men should think he swears only on the account of Gain, 'tis easy for him to avoid this Suspicion, by returning the Oath to the Claimant⁵. If he is afraid that the other will be perjurd⁶, why doth not he swear himself? Yet *Plato* in his Laws^a admits of an Oath, only in such Cases, where, according to the Judgment of Men, no Advantage can be got by forswearing; but where any profit may be reap'd from the Perjury, there he orders that the Process shall be manag'd without Oaths.

XXII. And lastly, In some Cases, when other Proofs are not sufficient¹, the Judge may put the Party to his Oath, though he do not desire it; and

^a Lib. xii. p. 987. C. Edit. *Francof.*

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² The Latin of the Digests is, *Testium fides diligenter examinanda est — an amicus ei sit, pro quo testimonium dat.* Dig. l. xxii. tit. 5. *De testibus*, leg. 3. See the following Law.

³ *An locuples, vel egens sit, ut lucri causa quid facile admittat*, *ibid.*

¹ So the Roman Law directs, *Maximum remedium expediendarum litium in usum venit jurisjurandi religio: qua vel ex passione ipsorum litigatorum, vel ex auctoritate Judicis deciduntur controversæ*, Digest, Lib. xii. tit. 2. *De Jurejurando*, &c. See *Daumat's Civil Laws* in their natural Order, Part I. l. iii. tit. 6. Sect. 6.

² The Roman Law speaks thus, *Alterum itaque eligat reus, aut solvat, aut juret — Datur autem & alia facultas reo, ut, si malit, referat jusjurandum; & si is, qui petet, conditione jurisjurandi non utetur, judicium ei Prætor non dabit: æquissime enim hoc facit, cum non deberet displicere conditio jurisjurandi ei, qui detulit*, Digest. *ibid.* leg. 34. § 6, 7. *Manifestæ turpitudinis & confessionis est, nolle nec jurare, nec jusjurandum referre*, *ibid.* leg. 38.

³ 'Tis a kind of Transaction say the Roman Lawyers, very well. *Jusjurandum speciem transactionis continet*, Digest. *ubi supra*, leg. 2.

⁴ But when we have once accepted an Oath, we can't refer it. *Jusjurandum, quod ex conventionione extra judicium desertur, referri non potest*, *Ibid.* leg. 17. And in the very Moment that the Oath is taken, the Controversy is at an end, so that either of the Parties cannot retort; whereas, when an Oath is taken by the order of the Judge, we may require a Review of the former Proceedings, averring, that he hath new Matter to produce, and that he will only insist upon that. *Admonendi sumus, interdum etiam post jusjurandum exactum permitti constitutionibus principum, ex integro causam agere, si quis nova instrumenta se invenisse dicat, quibus nunc solis usus sit — Quod si alias inter ipsos jurejurando transactum sit negotium, non conceditur eandem causam retractare*, *Ibid.* leg. 31. See Mr. *Titius's* Observation on *Lauterb.* 338.

⁵ Nevertheless, *Plato*, as our Author observes here, allows not an Oath in all affairs of Interest, and where Perjury may be an advantage in the Judgment of Men. See l. xii. of the Laws of this Philosopher, p. 948. *Edit Steph.*

⁶ This is a nice question, Whether an Oath may be required of a Person, when we have reason to believe that he will swear falsely? We speak not here of a Judge; for as Mr. *La Placette* speaks very well in his Treatise of an Oath, l. i. c. 13. "The Laws in certain Cases order an Oath to be administer'd, and he must conform himself to them without troubling himself about the manner how they who take the Oath, can do it. They also suppose, without doubt, that some considerable Interest is concerned" This being allow'd, I am of Mr. *Thomasius's* Opinion, who says, "That this Question is more curious than profitable, *Instit. Jurispr. Divin.* l. ii. c. 9. For we cannot be certain that any one resolves to forswear himself; for though he have often sworn falsely, he may have repented, and may resolve never again to commit such a foul Crime deliberately; but if he threatens to do it, we may believe, that he does it that we may not put him upon swearing". I may add, That there are Men who are inclinable enough to do great Wickednesses, and yet dare not swear, either through some scruple of Conscience, or through I know not what monstrous pretence of Piety, which they make after their way, tho' they are free, as they think, to accommodate themselves to another's Interest as far as they can without falling into such enormous Crimes as incense the Deity. Further, supposing we may presume, That he, for example, who denies a Debt, or thing trusted, can't be convicted judicially; and he is willing to clear himself by Oath, is it not almost the same thing, as if he had sworn falsely; since he is willing to do it? Mr. *La Placette* owns, that what such a Person adds to his horrible disposition by actually swearing falsely, is so small a thing as is not to be regarded, yet he determines, that an Oath ought not to be administer'd in such a Case, for fear of provoking God's Anger, and offending our weak Brethren. But the fear of Scandal does not indispensibly require that a Man should lose his Goods without trying all ways possible to recover them, if it be a thing of Consequence, as we suppose here it is. Besides, the Scandal is less, if we declare the Reason why we will have the Party sworn. As to God's Anger, that is not so much excited by the outward Act, as by the inward Disposition, which in this Case is supposed full and entire, and is looked upon as the Act.

¹ *In bonæ fidei contractibus, necnon [etiam] in cæteris causis, inopia probationum, per Judicem jurejurando causa cognita res decidi oportet.* C. Lib. iv. l. 1. *De rebus creditis & jurejurando*, Leg. 3. This Law is ordinarily quoted, as if it meant that a Judge may administer an Oath when there is an half proof on the side of one of the Parties, as for Example, but one Witness, who may not be credited, though he be a Senator. But Mr. *Noodt* has well shewed in his *Probabilia Juris*, l. iii. c. 6. that *inopia probationum*, (i. e.) want of Proofs, is when there are such Proofs on both sides, that the Judges know not how to determine. For when a little matter would weigh down the Balance, we ought not rashly to administer an Oath. See *Digest.* l. xii. tit. 2. leg. 31. where is, *in dubiis causis*.

this either that he may possess himself of some Right, or clear himself from the Suspicion of some Fact. But here it must be observ'd, that 'tis never the Custom to offer these *Oaths*, when either capital Punishment, or any grievous Inconvenience, must be the consequence of confessing the Truth. For, besides, that it looks very hard to bring a Man into so dangerous a Necessity on the account of an uncertain Fact, as that he must either deeply wound his Conscience, or incur some very considerable Damage; little Trust is to be given to an *Oath* thus exacted, the Minds of Men being always ready to entertain this Hope, That God Almighty may again be pleas'd, whose Mercy even the Perjur'd Sinner is not forbidden to implore. 'Tis a good Remark of *Libanius* ², *He who despairs of all other Means, and hath but one Remedy left, which is not to be obtain'd otherwise than by Lying, will certainly dare to change one Danger for another, knowing the present Mischief which is before his Eyes to be unavoidable; but, as for the future Evil, often flattering himself that he shall be able, by Worship, Sacrifices, Gifts and Oblations, to bribe Heaven into a Pardon.* But for an account of these several kinds of *Oaths*, the Writers on the Civil Laws are to be consulted at large ³.

XXIII. In relation to the Breach of *Oaths*, this Question still remains to be resolv'd, since it is usual in civil Governments to bind Men by *Oaths* to the faithful discharge of their respective Trusts and Employments, whether he is always to be deem'd guilty of Perjury, who hath neglected any one part of this Duty? Where the Controversy is not about those *Oaths* which regard some peculiar Act; as, when a Man gives his Evidence, denies a Trust, forsakes a particular Promise, and the like (for he who violates these ought, no doubt, to be branded as forsworn) but about such in which the Party binds himself to many Things together: As when Persons are admitted to any Office, to be discharg'd by different Performances. And here there seems to be no reason why we should scruple to take the Affirmative side, in case the Breach was made against Knowledge, and with deliberate Wickedness. Only, that there are different degrees of Perjury, as well as of other Crimes. For as he is reckon'd less guilty, who hath transgress'd a Law or two, than he who hath at once renounc'd all civil Government, or hath committed Treason against his Prince; so he who hath violated the whole sum of his Duty, contracts a more heinous and aggravating Perjury, than he who hath broken only a

part ^a. Nor ought we to give any heed to those Authors, who are of opinion, that Persons in these Circumstances may be absolv'd from the Sin of Perjury, by submitting to the Penalty of the Law. For unless, when the Obligation was first entred upon, it was expressly left to the choice of the Person, either to perform what he promis'd, or at a certain Price to purchase the liberty of doing the contrary ^b, the Punishment shall by no means render him clear from the Crime ^c; as we shall make out more at large hereafter. Thus he who hath suffer'd a Whipping for Thievery, is no less a Rogue ², than if he had never felt the Lash.

XXIV. What is usually canvass'd amongst Authors about the Dispensations, and relaxations of *Oaths* and of *Vows*, may be wholly determin'd by the fixing two Principles, or Rules. The first, That a Person, who in regard both to his Actions and his Possessions is under the Government of another, can dispose of nothing to his Governour's Prejudice; and if any such disposal be made, it shall be lawful for the Governour to revoke it. The other is, That he who is invested with such Authority over any Person, may, as he shall think convenient, retrench and confine any Rights, which the Party under his Direction hath already obtain'd; and much more those which he shall obtain hereafter. Whence it appears, that the Acts of Superiors are not of sufficient force to hinder the Performance of an *Oath*, so far as it was truly obligatory; that is, an *Oath* not defective in it self, and made about a thing which the Juror may dispose of at his Pleasure, cannot be disannull'd by a Superior. Thus the *Roman* ^c Senate could not revoke the *Oath* which *Regulus* made to the *Carthaginians*, engaging him to return: Though indeed in this particular Case there was another Reason; inasmuch as *Regulus* was now in a Condition of Slavery under his Conquerors, and therefore the *Romans* had lost all their Power and Authority over him. But when the Subject of the *Oath* is any Thing or Action falling under the Direction of the Superior, it shall then borrow all its force from the Superior's Consent, either tacit or express; and he may, if it displease him, declare it null and void. Nor is there the least danger of Perjury to be fear'd, when an *Oath* is thus revers'd. Since the Person under Government ought to have presuppos'd his Governour's Approbation as a necessary Condition. Nor doth the Superior sin in thus cancelling what the other hath sworn: because he only exerciseth his Right in hindring the Inferior from acting in Prejudice of his

^a Yet add *Sanderfon* de Oblig. *Jurament.* prælect. iii. f. 18. *Wales* and *Henrietta*, in *Gramond.* Hist. *France*, B. xvi. Artic. 23.

^b See the Articles of Marriage between *Charles* Prince of *See Grot.* l. ii. c. 13. f. 20. n. 1, 2.

MR. BARB. NOTES on §. XXII, XXIII.

² *Libanius*'s Greek is, *Ὅτω δὲ τὰ μὲν ἄλλα ἀπίγνωσι εἰς δὲ ὑπολείπεται πόρος, ὃν ἐκ ἑστὶ μὴ ψευδόμενον ἔχειν. ὃ δὲ τοῖστος τομὰ κίνδυνον ἀναλλαττ μένος κινδύου. τὸν μὲν ἐν ὀφθαλμοῖς ἀφικτον εἰδὼς ὑπὲρ δὲ ἐκείναις πολλῆς αὐτὸν ἀπατῶν ὡς καὶ θυσιῶν, καὶ θεραπείαις καὶ ἐυχῆσι καὶ ἱερείαις καὶ κάλλει ἀναθημάτων, συγγνωμῆνας ἀν κατασκευάσαι τὴν θείαν ἔπειτα τὴ μὲν τὴν δίκην μέλλεν ἡγεῖται, τὴ δὲ τὸ δεινὸν εὐδὸς ἐφεισῖναι ἰλάττω δὲ τῆς ἐπικεμῆνης, τὴν ἔτιω παρῆσαι κρίνει, κατ' αὐτὸν τὸν χρόνον.

³ Such is the *Oath* called *Juramentum calumniæ*, or *de Calumnia*; which consists in this, according to the *Roman* Law, that both Parties swear when they enter their Action, that they act honestly, *i. e.* the one, that he believes his Demand well grounded, and the other, that his Defence is just, and that neither of them design to find out Tricks and Evasions to hinder or delay an equitable Determination. See *Cod.* l. ii. tit. 59. *De Jurjurando propter calumniam dando*, and the *Novel* xlix. c. 3. §. 1. But since this *Oath* is often an occasion of Perjury either to the Plaintiff or Defendant, and sometimes to both, it is with much reason banish'd most Courts. Another sort of *Oath* famous in the *Roman* Law is *Juramentum in litem*, when the value of a Debt is referred to the *Oath* of the Creditor, and the Debtor is not allowed the same privilege, because he is a person not to be credited, or is guilty of some gross fault. See *Digest.* l. xii. tit. 3. *De in litem jurando*, & *Cod.* l. v. tit. 53. Mr. *Thomasius* in his Dissertation, *De pretio affectionis in res fungibiles non cadente*, reprinted at *Hall* in 1707, speaks many curious things on this Subject, and which may rectify the Notions of our Modern Lawyers.

¹ See *Lib.* viii. c. 3. §. 4. at the end.

² See *Lib.* i. c. 9. §. 6. above.

just Prerogative. And 'tis the same thing as to the Nullity of the *Oath*, whether the Superior prohibits all *Oaths* on such certain Subjects beforehand, or whether, when they have been already made, he forbids their Performance. Though, in the former Case, the Inferior incurs a very heinous Guilt, in thus rashly presuming to swear against the Prohibition. The Father, by the *Jewish Law*, *Numb. xxx. 4*, &c. was allow'd to revoke the sworn Vows of his Daughter, whilst under his Direction; the Husband of his Wife, the Master of his Servant, if they thought convenient: For otherwise, the Parties here, who were to live in Obedience, might by swearing and vowing have render'd the Power of their Governours wholly useless. Nay, *Leo Mutinensis* reports, *That if any Person had entred on an Oath or Vow of what kind soever, and afterwards upon good Reasons repented of it; and if it did not lead to the Prejudice of a third Party, the Reason of his retracting having been produc'd and approv'd, he might by one Rabbin, or three other Men, be absolv'd.* Another way there is, by which the effect of an Inferior's *Oath* may be made to depend on the Pleasure of his Superior; namely, if the Superior so constitute and ordain, that what the Inferior shall swear in such a particular Case, shall not be valid 'till it hath receiv'd his Approbation. And thus in the *Civil Law*, under the Head of *Oaths*, it^b is inserted as a necessary Caution, *That the Right of Superiors is always excepted in the Case of Swearing*: Or, that all *Oaths* are to be construed with a Salvo to that right. Now it is evident in all these Instances, that the relaxation of an *Oath* can only be made by him who is invest'd with Authority over the Swearer, and with such Authority, as implies in it this degree of Power. And therefore it was of old very properly claim'd and executed by the *Roman Emperors*: As appears from *l. ult. D. ad municipalem*², where *Antoninus* and *Verus* dispense with a certain Person's *Oath*, who having sworn never to come into the Assemblies of his Order, was afterwards created *Duumvir*: Because a Subject cannot by any *Oath* of his withhold his Service, when requir'd by the Commonwealth. And so *Tiberius*, in *Sueton*³, granted a *Roman Knight* the Power of being divorced from his Lady, whom he had taken in Adultery with his Son in law, though he had

before sworn never to put her away: The Emperor declaring, *That the Oath could not be so far extended, as to reach the present Case, where the Wife by so infamous a Crime had render'd her self unworthy of cohabiting any longer with her Husband.* Afterwards the Christian Emperors very frequently delegated the Bishops to preside and to determine in the Affair of Dispensations; that if any Scruple should happen to arise, the Opinion of their Sanctity and Goodness might satisfy the Minds of less intelligent Judges. Yet it is too notorious how extravagantly some Ecclesiasticks, and especially he who pretends to be the chief of that Order, the Bishop of *Rome*³, have stretch'd this Privilege, and what a Flood of Mischiefs hath over-spread the Christian World from its Abuse. And indeed, since we are to proceed by the Principles of Law in determining what kinds of *Oaths* may be releas'd, and for what Reasons, I know not why the Clergy should assume more Authority in this Point, than the Men of the other Profession.

And farther, sometimes when an *Oath* cannot be made void on the side of the Swearer, the force and efficacy of it may yet be stopp'd by the Superiority of the Party towards whom the *Oath* is directed, and who obtains a Right upon it; either by taking this Right from him, or by forbidding him to make use of it, in receiving what the other hath sworn to pay. And this may be done either in the way of Punishment, or on account of the publick Advantage, by virtue of the Superior's Prerogative. In which case the Swearer is free from all danger of Perjury, because he is not the occasion of the Non-performance; and he is releas'd from all necessity of fulfilling his *Oath* by the Party, who either in a direct, or in a more eminent and extraordinary Manner, acquir'd a Right by virtue of it^d. To conclude, a Prince, who upon just Reasons dispenseth with an *Oath*, doth not commit the least Sin, in thus hindring an Act which was solemnly undertaken with the Invocation of the Divine Majesty, from producing its regular Effect: Though the Subject may sometimes incur a Guilt, by rashly using the Name of God to confirm an Act, which he ought to have known was prejudicial to the Right of his Superior.

^a *De ritibus Hebræorum*, Par. II. c. 4. f. 4.

^b *Vid. Jus. Can. c. 19. Add. tit. 55. l. ii. Fudorum.*

^c *Tiber. 35.*

^d *Comp. Grot. loc. cit. Sect. 20. n. 3. & ad Matt. v. 37.*

Mr. BARB. NOTES on §. XXIV.

² The Latin is, *Imperatores Antoninus & Verus rescripserunt, gratiam se facere jurisjurandi ei qui juraverat, se ordini non interfuturum, & postea Duumvir creatus esset, Digest. l. 50. tit. 1. Ad municipalem, & de incolis, leg. 38.*

³ See Mr. *La Placette's* Treatise of an Oath, l. ii. c. 24. It is evident, that an Oath is one of those things by which the Clergy have most effectually advanced their temporal Interests, and encroached upon the Rights of the Magistrate. Before the Emperors were Christian, an Oath was never required of Witnesses. 'Twas *Constantine* that made the Formality necessary. See Mr. *Thomasius's* Discourse, *De Fide Juridica*, c. 2. §. 61, &c. and in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 9. §. 3. After the Use of Oaths was introduced into the greatest part of the Affairs of Life; and as the Clergy took upon them the right of judging of the Validity of Oaths, they by that means took upon them the Cognizance of almost all Civil Causes. We know that the Pope has assumed the Authority of disannulling Treaties most solemnly sworn to, as *Eugenius IV.* did in favour of *Ladislaus* King of Hungary, to Sultan *Amurat* II. and to absolve all Subjects from the Oath of Allegiance made to their lawful Sovereigns. In a word, the Clergy have omitted nothing in this respect, no more than in other things, to strengthen and increase their Power under the Name of Spiritual, which they have extended to the utmost, and accordingly have lessen'd the Temporal, which they have left with regret to Magistrates and Princes.

C H A P. III.

Of the Power of Mankind over the Things of the World.

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| <p>I. The greatest part of the Law is employed about worldly Things.</p> <p>II. Man uses other Creatures by God's Ordination.</p> <p>III. Man does no Injury by destroying Vegetables.</p> | | <p>IV. Some doubts about killing and eating living Creatures.</p> <p>V. Which yet is proved to be lawful.</p> <p>VI. The abuse of our Right over living Creatures is to be reprov'd.</p> |
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SUCH is the Constitution of Man, that it cannot be preserved by its own internal Substance, but needs continually to take in the assistance of certain Things from without, as well for its Nourishment and Support, as for its defence against those many Enemies which seek to ruin and dissolve its Frame. Again, a great part of what the World affords, turns another way to the Service of Mankind, in rendering Life more commodious and more easy. *Hesiod. Op. & Dier. ver. 684. For Riches are the Soul of feeble Men*¹. Now with regard to these Matters, a multitude of Business and Transactions pass betwixt Men, and large Occasion is administered to Controversies and Strifes: And lest the common Peace of Mankind should be disturb'd by such Disputes, as the Law of Nature hath with due Caution provided, so the civil Ordinances of most Nations are in this respect found most careful and solicitous. For the full illustration of which Subject, we ought first of all to enquire, by what Right it is that human Race claims the disposal of other Creatures, whether animate, or inanimate; for their Use, their Conveniency, or their Pleasure; as likewise on what Principle this Power is founded, in respect both of the Creator, and of the Creatures themselves, which Man not only useth, but very often perverts, embezzles, and destroys.

II. It is therefore beyond Dispute, that Almighty God, inasmuch as he is the Maker and the Preserver of all Things, doth likewise hold, as it were, an originary and super-eminent Property over all, and they belong so strictly to him, as that no one can pretend to the least Right in them, without his Permission or Consent. Concerning which Dominion or Property of Almighty God, *Philo the Jew* (lib. de *Cherubim*) p. 97. Ed. *Genev.* treats at large, and with regard to that superior Right, called the Right which Men hold over things¹ *Usufructuary* only. Yet because he himself stands in need of no foreign Succour, and because it is not

possible for any thing besides to make an Addition to his Happiness; therefore his Goodness inclin'd him to be bountiful and gracious to his Creatures, and to give them the Privilege of using each other for their mutual Benefit. But Man especially hath in so extraordinary a manner tasted of the Divine Favour, that all other Creatures are by a common strain of Speech said to have been at first made for his Use and Service. Though this Right of God over all things is very different from the Right of Men to the same Possessions. So that the Reasoning of *Diogenes the Cynick*² was false and vain, when he thus argued, *All Things belong to the Gods; wise Men are the Friends of the Gods; all Things are common amongst Friends; therefore all Things belong to wise Men.* Yet it is too bold and arrogant a Pretension in some Authors, whilst they tell us, That should any thing fail of turning to the Advantage of Mankind, it must follow, that such a thing was created in vain; and that 'tis hence apparent, that the whole World is the common Possession of human Race, and what they may (if thus taken as a general Body) not unjustly term *their own*. This was *Aristotle's* Mistake; *If then*, says he, *Nature*^b *makes nothing imperfectly, and nothing in vain, she must of necessity have made all these things for the sake of Men.* *Lucian*^c delivers himself to the same Purpose; *Had not Men been created, the Consequence of the Omission had been no less than this, That all the Grace and Beauty of the rest of the World had shone without a Witness, or Beholder; and that the Gods themselves had despis'd their own Wealth, as not worth the enjoying*². But certainly the great Frame of the Universe might, in all appearance, have been more compendiously erected and adorn'd, had it been the Intention of its Author to make nothing but what should in some respect or other serve the Occasions of Men^d³. And it was not ill said of *Seneca*, *Nimis nos*^e *suspiciamus, si digni nobis videmur, propter quos tanta moveantur: We are too much taken*

^a Apud *Diogen. Laert.* l. vi. f. 37. ubi vid. *Meny.* ^b *Pelitic.* l. i. c. 8. p. 304. C. Edit. *Parif.* ^c *Prometh.* p. 181. tom. 1. Edit. *Amst.* ^d See the Honourable Mr. *Boyle's* Dissertation concerning the final Causes of Natural Things. See Archbishop *King's* Treatise *De Origine Mali*, c. iv. f. 2. §. 5. ^e *De Ira*, l. ii. c. 27. Add *Charron de la Sageffe*, l. i. c. 40. n. 3, 4, 5.

Mr. BARB. NOTES on Chap. III. §. 1, II.

¹ See *Gronovius's* first Note on *Gratius* l. ii. c. 1. §. 11.

The Greek of *Hesiodi*, *Χρήματα γὰρ ψυχῆ πέλειται δειλοῖσι βροτοῖσι.*

² *Seneca* uses the same Expression, as Mr. *Hortius* has observed, *Ususfructus noster est, cujus tempus ille arbiter muneris sui temperat*, *Consol. ad Marc.* c. 10. As for that Passage of *Euripides* which Mr. *Hortius* joins to it, besides that the Notion is much the same, our Author quotes it in the next Chapter, §. 1.

³ See an *English* Treatise written by Mr. *Boyle*, call'd *A Discourse concerning the final Causes of natural Things*, the Extract of which may be found in the universal Library, Tom. ix. p. 63. And also a Treatise, *De Origine Mali*, written by Dr. *King*, Bishop of *Londonerry*, and since Archbishop of *Dublin*.

⁴ *Mtaigne* in his Essays speaks something like this, l. ii. c. 12. He makes me to understand by his Discourse upon what Foundations these great Advantages are built, which he prides himself to have over the Creatures. He persuades himself that this admirable Architecture of the World, consisting of the Celestial Arch, bedeck'd with the inextinguishable Lights of the Sun and Stars moving so swiftly above our Head., the prodigious Fluxes and Reflexes of the vast Ocean, were at first created, and have continued to many Ages for our Convenience and Service. Mr. *Boyle* also in his Thoughts about a Comet, p. 226. cites another Passage of *Seneca*, where the Philosopher says, that the Cares of Providence do indeed extend to us, and we have a Part in it, but their end is more considerable than our Preservation. *Et quanquam majus illis [Soli, Lunæ, & cæteris Cælestibus] propositum sit majorque actus sui fructus, quàm servare mortalia; tamen in nostras quoque utilitates à principio rerum præmissa mens est, & is ordo mundo datus, ut appareat curam nostri non inter ultima esse habitam.* *De Benefic.* l. vi. c. 23.

with the admiration of our own Nature, if we fancy our selves worthy to have all these glorious Works move only on our Account. Yet let this be as it will, thus much is evident; that Man makes his advantage of other Creatures, by the Grant and Licence of Heaven: As we may apprehend from this easy Argument, That without the use of those things human Life could not be preserv'd, for which Service some of them do, as it were, freely deliver themselves up into our Hands. Since then God Almighty hath conferr'd on Man the Privilege of Life, he is at the same time suppos'd to have allow'd him the Use of every thing necessary for the keeping and maintaining of that his Gift^a. The same Truth is confirmed by the Authority of the Holy Scriptures, which expressly mention God's investing Man with Power and Dominion, not only over Vegetables, but over every living Thing, produced either in the Air, in the Earth, or in the Sea^b. Yet this Concession hath not the Force of a Command, but only the Allowance and Indulgence of a Privilege; which any Person may use so far as he thinks fit, but is not bound to exercise it at all times, and upon all Occasions. For otherwise Man would offend against the Divine Law, should he let any Animal go free, or should he neglect any Opportunity of bringing the same Creature again under his Subjection; which no Man in his Wits will affirm^c. But still this Power of Man over Brute Creatures is of a different Nature from that Dominion or Sovereignty which is exercis'd over Men: Because Brutes are not capable of any correspondent Obedience arising from the Obligation; and because this is a much more absolute Sway, than that with which Men govern each other. The Divine Prohibition to the Jews from feeding on some certain Animals, doth by no means retrench or impair the Right of Men over Beasts; the Reason of that Injunction seeming to have been taken from Physick^d. Mr. Selden^e reports it, as the Opinion of the antient Rabbins, That Adam was forbidden to eat any manner of Flesh (God having commanded him to feed on the Herbs of the Field^f) but that Noah afterwards was dispens'd with in this Particular, by the Grant in *Gen.* ix. 3. Yet so as to be still under an Obligation to abstain from Blood, and from any Joint or Limb of any Creature taken from it whilst alive^g. The same Author adds, That the Blood of Fishes was excepted from the Prohibition: Nay, That they might eat these Creatures alive, as Oysters, &c. or such of them as died by Chance; neither of which it was lawful for them to do, with regard to terrestrial Animals.

III. If, in the next place, we consider this Power of Mankind, with respect to the things themselves, whether animate or inanimate, which Men use, and waste, and destroy; that no Injury is hereby offer'd to those Creatures, may clearly be evinc'd, as well from the Nature of Man, as from the Grant and Allowance of God. For it can on no account seem probable, that a Maker of infinite Goodness, and of infinite Wisdom, would impose such a Necessity on Man, the principal of earthly Creatures, as that he should not be able to preserve himself without injuring others, and consequently without the perpetual Commission of Sin^h. To which, if we add the express Licence of God, that must remove all Doubt and Scruple, which might otherwise have risen, especially about the Slaughter of Animals. And if there appear any Cruelty or Barbarity in such a Practice, it is sufficiently taken off by this one Consideration, That their Divine Author hath appointed these his Creatures to such a Condition, and to such a Service in the World, and hath granted to Men such an Authority over them, which if they exercise (whether by the Deputation, or only by the Permission of God) they certainly do no Injury. Now, as for Vegetables, and other things destitute of Sense, there seems, with regard to them, to be no more of Difficulty in this Point; it being impossible to discover that they suffer any hard Treatment, or unjust Hurt, when they are consum'd by Men; especially, since they must necessarily perish, and be destroy'd, either by Beastsⁱ, or by the speedy turn of the Year, and the Change of the Seasons; and farther, since many of them had never been produc'd without human Pains and Endeavours. The Superstition of the Egyptians in abstaining from certain Pot-herbs, is not of weight enough to give us any stop in the present Determination^k.

IV. But then, as to living Creatures, which are endued with a Sense of their own Being, and cannot leave it without Pain and Trouble, the point appears in some measure dubious to many, who have consider'd the Liberty of Men against Brutes, only on the Principles of Reason. For, from God's allowing the first Man to have Dominion over other Animals, it doth not presently flow as an evident Consequence, that he was at the same time invested with so wide a Commission, so infinite a Licence, that he might slay them even for unnecessary Uses^l: For Man hath Dominion too over Man, and yet cannot in the least pretend to any such Licence as this against his Fellows. Nor could Men have complain'd, that the Divine Goodness was sparing towards them, or had made an ill Pro-

^a Add. *Arrian. Epictet.* l. i. c. 16. initio.

^b *Gen.* i. 28, 29.

^c See *Psal.* cxv. 16.

^d *De Jur. Nat. & Gen.*

sec. Heb. l. vii. c. 1.

^e See *Gen.* i. 29.

^f Add *Deuteron.* xii. 20.

^g Vid. *Diodor. Sic.* l. i. c. 89.

^h Add

Grot. ad Gen. ix. 3. *Selden de Jur. Nat. & Gen.* sec. Heb. l. vii. c. 1.

MR. BARE. NOTES in §. II, III.

⁴ This Remark of our Author's ought to be placed at the end of this Paragraph, where it will much better agree with the Sense.

⁵ This is not to be doubted, although our Authors, and particularly Mr. *Fleury*, in his Treatise of the Manners of the *Israelites*, speaks of it. The *Israelites* had not a better Constitution, nor a more vigorous Health than the other Nations, who eat of such sorts of Food as they obtained from. It seems that the Prohibitions of the Law were grounded upon mere politick Reasons, so far as concerned their particular Notions, Opinions, and the Constitution of their Commonwealth. See Mr. *Le Clerc's* Note upon *Levit.* xi. 2. and *Grotius, De Verit. Relig. Christi.* l. v. §. 9. But be that how it will, whatever Motive we attribute to the Legislator, as this Law was only positive, it in no wise destroys the Natural Right which Man has over the Beasts and all other earthly Creatures.

¹ Here is a great Disorder in this Part of our Author's Discourse, and therefore I have transpos'd some Sentences, and put them in a more natural Order, treating first of Vegetables, and then of Beasts.

² Our Author speaks very pleasantly here in all his Editions, *By other Beasts*, as if the Beast Man did not spend and destroy the Vegetables, the other Beasts would. And Mr. *Hertius* has overlook'd this great Mistake in his Edition of 1706.

vision for their Necessities, tho' they should have been denied a Power over the Life of Animals; at least of such as did not threaten any Hurt or Danger to the Life of Men: Inasmuch as the Work of those Creatures in cultivating the Earth, together with what comes from them otherwise, as Milk, Eggs (such as are not necessary for the Propagation of the Species) Wooll, and the like, might have been sufficient to sustain Men in a tolerable way of Living. Nor did God by commanding Men to sacrifice them, as a Token of Divine Worship, confer any Power or Privilege of turning them at pleasure into Food. For such things as are lawful to Mankind, only by some peculiar Command of God, may still remain unlawful, except in that particular Case. Hence it was, that many of the ancient Philosophers utterly disapprov'd of this Practice. For why should Man, on the bare account of superfluous Pleasure, rob an harmless Animal of that Life which it enjoys by the Gift of the same common Creator? Especially, since even the Examples of the fiercest Wild-beasts, of Lions, Wolves, and other Devourers of Flesh, will do them no Service, if urg'd in their Excuse. For these are so fram'd by Nature, as not to be able to support Life, without feasting on Blood, and to loath and reject that common Provision afforded by the Earth. Whereas Men are not under the like case of Necessity; receiving very commodious Nourishment from other Food, and being obliged to prepare Flesh by dressing or seasoning it, before they can make it agreeable to their Digestion. We hear indeed of some barbarous Nations, which make use of no Flesh or Fish but what is raw, and support themselves with that; as *Rochefort*^a reports of the Coasts on *Davis's* Streights. But the same Author tells us^b of the Inhabitants of the Province of *Pasto* in *Peru*, That they eat no manner of Flesh; and that if desired but only to taste any, their Answer is, *They are not Dogs*.

Others have observ'd, in relation to the present Enquiry, that whereas those Animals, which naturally feed on Flesh, have their Fore-teeth oblong, sharp, and divided from each other, that so by closing them with a deeper stroke they may grind and separate the Prey; Man's Teeth are short, join'd one to the other, and spreading round, after the manner of those Animals, which live on Herbs and Fruits: And that on this account we are necessitated to make use of Knives for dividing the Flesh we eat; whilst the Creatures, which eat this as their natural Food, stand in no need of such Assurances or Inventions: That thus we see Children by the bare impulse of Nature loving Fruit beyond all other Provisions, and preferring Apples, Cherries, and Nuts, to the most exquisite Dainties of Flesh; because in them Nature is not yet corrupted, nor their Appetites debauch'd by ill Customs of Eating^c. It is farther evident, that the fierceness and cruelty of Men, having been first excited, encourag'd, and harden'd by the Slaughters of Beasts, afterwards broke out against their own

Kind; and those, who had taken a delight in destroying the harmless Race of dumb Creatures, made it their next step to murder weak and defenceless Men. *Diogenes Laertius*, in his Life of *Pythagoras*^d, reports that Philosopher to have forbid the killing of Animals¹, *κοινὸν δίκαιον ἡμῶν ἔχόντων ψυχῆς*, *As enjoying the same common Right of Life and Soul with our selves*. This indeed (as the Historian goes on) was his Pretence: But the true reason of his commanding his Followers to abstain from all living Creatures was, *That he might exercise and train Men up in a more easy method of Food, by means of which they might always have ready at hand a large Provision of Meat, requiring no Fire to dress it; and as much Drink as they had plain Water*. For this way of Sustenance he thought most proper to produce Health of Body, and Quickness of Mind². Though *Lucian* (in *sonnio seu Gallo*, Vol. II. p. 174.) bringing him in under the Shape of a Cock, makes him give this Reason of his Opinion: "I consider, says he, that if the Precepts I set on foot were common, and such as many had deliver'd before, I should not be able to prevail with the World to look upon me as any extraordinary Person; but the more strange and unusual the Doctrine should be which I offer'd, the more new and surprizing I should appear, and gain the more Admiration. *Add. Jo. Scheffer. de Philosoph. Ital. c. 14.*

Plutarch. in *Grill*. "Man, with a craving Appetite, drawing all things to himself, trying all things, tasting all things, as being still ignorant of his own Nature, or what is agreeable to it, is the only Creature in the World that lives in general upon every thing which comes to his hands. First, He useth Flesh, without the excuse of Want or Necessity, when he might at any time gather other Food from the Seeds and Plants, with an inexhaustible and never failing Store. But thro' Luxury, and Disdain of his proper and necessary Provision, he follows strange and polluted Diet in the slaughter of Beasts, exceeding the most savage Creatures in Fierceness and Cruelty: For Blood, and Slaughter, and Flesh are the proper sustenance of the Kite, the Wolf, and the Dragon, as Fish and Spoon-meat are of Men. The same Author, in his second Oration about the eating of Flesh, among many other things, offers what follows: "At first they fed perhaps on some wild or hurtful Animal; then on Birds and Fish; 'till their Appetite, thus taught and accustom'd, proceeded to the Ox that labours in our Service; to the Sheep that cloaths and adorns us; to the watchful Cock that guards our House. Hence, by degrees, adding Strength and Force to their insatiable Desires, they broke out into the Murder of their Brethren, and the Misderies of Blood and War.

Aratus Phenom.

"The faithful Ox, accustom'd to the Plough,
"Defil'd the Table.——"

^c Vid. *Anton. le Grand. Instit. Philos. Cartes. Part VI. Art. 3.*

^a Descript. *Antillar. Par. I. c. 18.*

^b Part II. c. 11.

^d Lib. viii. Sect. 13.

MR. BARRÉ'S NOTES on §. IV.

¹ The original Greek is this, *τῶτον γὰρ καὶ τὸ φονεῦν ἀπαγορεύειν, μὴ ὅτι γε ἀπίστευται τῶν ζώων κοινὸν δίκαιον ἡμῶν ἔχόντων ψυχῆς, καὶ τότε μὲν ἦν τὸ πρόσχημα τὸ δ' ἀληθὲς, τῶν ἐμψύχων ἀπεγορεύειν ἀπίστευται, συνασκήν καὶ συνεθίζων εἰς εὐκαλίαν βίην τῶν ἀνθρώπων, ὡς εὐτορίσας αὐτοῖς εἶναι τὰς τροφὰς, ἀπυρα προσφερομένοις, καὶ λιτὸν ὕδωρ πίνουσιν, ἐντεθθεν γὰρ καὶ σώματος ὑγίαιαν, καὶ ψυχῆς εὐσχητα περιγίνεσθαι.* See also *Pythagoras's* Speech in *Ovid's* *Metam.* xv. Fab. 2. v. 75, *Est. Grot. ad Gen. xlvi. 34. Plato Timæo circ. fin.*

² Here is an heap of very needless Quotations, which teach us only what divers Persons and People have thought of the use of Meats. As the Author quotes them all at length, they make a large Page in the Original, and form a confus'd Chaos, which I would not fill my Translation with.

“ Add. *Plin.* l. vii. c. 45. & *Val. Max.* l. viii. c. 1. *inter damnatos*, n. 8.
 “ *Sueton. Domitian.* cap. 9. *Ælian.* V. H. lib. v. cap. 14. *Dio Chryst.* Orat. 64. p. 592. Edit. *Morrell.* *Cicero de nat. Deor.* lib. ii. c. 60.
 “ *Nicol. Damascenus* reports of the *Phrygians*, That it was a capital Crime amongst them to kill a labouring Ox, or to steal any Instrument of Agriculture. So *Aloys Cadamust* in his Voyages, c. 57, 60. tells us, That the People of the Kingdom of *Calecut* shew the like sacred Veneration to Oxen. And the *Nomades*, as *Diodor. Sic.* relates, l. iii. c. 32. p. 165. Ed. *Rhodom.* gave the Bull and the Cow, as likewise the Ram and the Ewe, the Name of *Parents*, as affording the daily Support of Life. *Strabo*, l. xv. p. 490. observes of the *Brachmans*, that they eat the Flesh of those Creatures only, which do not assist Mankind in their Works. *Varenius*, *Descript. Japon.* c. 23. reports much the same of the *Japoneze*; who are said likewise to profess an Aversion to Blood, and no less to Milk, which they take to be nothing else but white Blood.
 “ We may here likewise, by the way, remark what is in *Plutarch’s Sympotic.* lib. iv. c. 4. to prove that Fish are the most proper Diet. For, says he, as to the Creatures which live with us upon the Earth, supposing them to have no other common Rights with Mankind, yet at least they receive the same Nourishment, they breathe, and wash, and drink as we do; and when we kill them, their piteous Cries make us blush for our Cruelty: Besides, that the greatest part of them are made familiar to us, by dwelling and feeding so near. Whereas on the contrary, the Race of Sea Animals is utterly strange to us, is born and bred, and lives as ’twere in another World; nor are we restrain’d from killing those Creatures by their Cry, by their Aspect, or by any Service that they can do us. For they can indeed be no way useful in our Business, not being able so much as to live in our Element. Our Earth is a kind of Hell to them; they die almost as soon as they touch it. On the other side, the *Pythagoreans* were more averse to eating Fish than any other Animals; the grounds of which Opinion are examin’d at large by the same Author, *Symp.* l. viii. c. 8. So likewise *Xiphilin.* reports, That the *Caledonians* never tasted Fish; nay, though they had them in great Plenty, *Epit. Di. n.* in *Sever.* One of the Reasons there given is this, That other Animals deserve their Death at our Hands, by some way or other doing us Mischief; whereas the Fish neither hurt us, nor are able to hurt us. That amongst other Animals some ought necessarily to be kill’d, lest by multiplying too fast they should rob Men of their Sustenance, as Cunnies and Hens. Whereas (again) the Fish, being born as it were in another World, give us no Occasion to hurt them: But we are set against

“ them only because our extravagant Greediness and Luxury is supplied by their Destruction.”
Porphyry is very prolix in attempting to shew, that abstinence from Flesh is in the highest manner the Duty of Philosophers, who place all their Happiness in God, and in the Imitation of the Divine Nature. Amongst a great number of Arguments, the Substance of which hath been for the most part already deliver’d, he endeavours to demonstrate, That all Souls, endued with Sense and Memory, are likewise Partakers of Reason; and that since we may discover thus much in other Animals, we ought to extend our Justice to them, which consists principally in offering no hurt without due Cause: And that we have a convincing Evidence of the Reason of Brutes, in their being capable of Madness and Distraction. To this time the *Benjans* in *Cambay*, believing the Souls of Men to remove at Death into the Bodies of Beasts, never harm any living Creature, nor dare to turn them into Food: Nay, they have Hospitals erected on purpose, for the reception of diseas’d and maimed Birds^b. *Phil. Baldaus* in his description of the Island *Ceylon*^c reports, That the *Bramines*, even when converted to Christianity, keep their old Method of Living; and that if they be encounter’d with that Text of Scripture, To the Clean all things are clean; they reply in another, that; The Kingdom of God is not in Meat and Drink: That they have been ever accusom’d to their light and easy Diet, and find themselves very well upon it. Thus the whole Nation of the *Apichitas*, of old, never tasted Flesh or Fish, ’till they learnt this Custom from the *Europeans*^d.

V. But, though in these Arguments and Authorities so much ought justly to be commended, as makes for the Encouragement of Temperance and Frugality, and for the hindering the finer Spirits from being obstructed, and as it were mix’d up with too gross Feeding; yet, that the killing and the eating of animate Creatures is really not sinful, may be sufficiently made out on the bare strength of Reason: And the main Evidence seems to be this, That no mutual Right or Obligation passeth¹ between Men and Brutes, nor ought to pass by the direction of Nature^e. For we neither find that the Law of Nature, by virtue of its absolute Authority, commands us to maintain Friendship and Society with Brutes; nor are they capable of sustaining any Obligation towards Men arising from Covenants. From which Defect of all common Right there follows, as it were, a State of War betwixt those who both are able to hurt each other, and are upon very probable grounds suppos’d to be willing. And in this State each Party hath liberty to do to the other, with whom he is thus engag’d in Hostility, whatsoever he thinks conducive to his own Interest and Convenience. Yet such a state of War, in which Men stand towards Brutes, is very different from that which sometimes ariseth from Men’s Clashing amongst themselves:

^a Lib. iv. περι ἀποχρῆς.
Antillar. P. II. c. 8.

^b Add *Abrab. Roger. de Bramin.* Par. I. c. 1. & 18.
^c *Cicero de Finib. bonorum & malorum.* l. iii. c. 20.

^d C. 47.

^e *Rocheport* descript.

Mr. BARB. NOTES on §. v.

¹ See l. ii. c. 3. §. 2. before-going, and *Grotius*, l. i. c. 1. §. 11. *Cicero* has a Passage also from whence this Consequence seems to be drawn, *Homini nihil juris esse cum bestiis. Præclare enim Chrysippus, cætera nata esse hominum causa & Decorum, eos autem communitatis & societatis juæ, ut bestiis homines uti ad utilitatem suam possint sine injuriâ.* The same Author also has another Passage, shewing the Right that Man has over Beasts and other Creatures: *Itaque ad hominum commoditates & usus tanta rerum ubertatem natura largita est, ut ea, quæ gignuntur, donata consulto nobis, non fortuito nata videantur; nec solum ea quæ frugibus atque baccis terræ factu profunduntur, sed etiam pecudes; quod perspicuum sit, partim esse ad usum hominum, partim ad fructum, partim ad vescendum procreatas.* *De Legibus*, l. i. c. 8.

strip'd a Ram of his Skin whilst alive ². And the Followers of Pythagoras, as Porphyry observes, made Gentleness and Mercy towards Beasts the Introduction to Love and Pity towards Men, l. iii. c. 20. p. 125. Ed. *Cantab. de Abſtinentia*. Nor was the Advice of the Chinese Philosopher, *Mentius*, altogether amifs, *That the King ſhould give no Perſons leave to uſe Nets with ſmall Maſhes; that by this means the greater Fiſh only ſhould be taken, and the leſſer have power to eſcape; which ſufficiently growing up in the following Years, would afford a ſupply at all times, and for all Perſons.* As likewiſe, *that none ſhould be allow'd to kill Hens, Porkers, or other Animals, before they were come to their full growth; that they might the more eaſily give a full and conſtant Proviſion of Fleſh.* Whence it became a Cuſtom amongſt the Chineſe, never to kill any living Creatures, till they had attain'd that pitch and maturity, which Nature had af-

ſign'd them. Comp. *Deut. xxii. 6, 7.* agreeable to which is that of *Pbocylides*,

The Neſt's whole Family you muſt not ſeize,
But leave the Dam a future Brood to raiſe.

The Action of *Alexander Severus* ³ (recorded by *Lampridius*, c. 22.) is likewiſe worthy to be mention'd on this occaſion. When the People of *Rome*, complain'd to him of a great Dearth and Scarcity, he ask'd them, by a publick Officer, what kind of Meat was dear; and finding by the common Cry that *Beef* and *Pork* were the Subject of the Complaint, he did not lower the Price, but order'd that none ſhould kill a *Cow* or *Heifer*, a *Sow* or *Sucking Pig*: And by this means within a Year, or leſs than two Years, there was ſuch Plenty of both Sorts, that from Eight-pence the Pound, they came to Three-pence.

MR. BARB. NOTES on §. VII.

² The Greek is, Οἱ δὲ Πυθαγόρειοι τὴν πρὸς τὰ θηρὰ πρακτικὰ μελέτην ἐποιούσαντο τῷ Φιλανθρώπῳ καὶ Φιλοκτίρμονος, *Porphyry. de abſtinent. l. iii. c. 20.* See Mr. *Le Clerc's* Comment. on *Gen. ix. 4.* and what I have ſaid in my *Treatiſe of Gaming*, l. iii. c. 5. §. 7.
³ This Example is not much to the purpoſe, becauſe it reſpects an Expedient which *Alexander Severus* made uſe of upon a particular occaſion, wherein it does not appear that there was any abuſe.

CHAP. IV.

Of the Origin of Dominion or Property.

- I. Property and Community are moral Qualities.
- II. What is Property and Community.
- III. That it has no place, but where there are more Men than one.
- IV. It proceeds immediately from an Agreement among Men.
- V. Of the Ancient Community of Goods.
- VI. By what degrees Men departed from it.
- VII. That it was profitable to Mankind.

- VIII. The Opinion of the Antients about the Original of Dominion or Property.
- IX. Grotius's Judgment conſider'd.
- X. XI, XII, XIII. The Arguments of thoſe who deny the Community of Goods uſed among the Antients.
- XIV. In what Senſe Dominion is ſaid to be by natural Right.
- XV. How far Infants are capable of Property.

THAT this Power of Mankind over Things ever began to take effect in relation to other Men (for no human Property ought to be oppoſ'd to the tranſcendent Right of GOD) ^a or, that this indefinite Right was converted into *Dominion* ², by virtue of which ſuch or ſuch a Thing belongs to one Perſon, and to none elſe, is

all owing to another Principle: Of, which, before we proceed to treat, it ſeems neceſſary to premiſe, that *Property* and *Community* are moral Qualities, which do not affect the Things themſelves, as to their inſtrick Nature, but only produce a moral Effect with regard to other Perſons: And that theſe Qualities, as all others of the ſame Kind, derive their

^a Vid. *Euripid. Phœniſſ. v. 558, &c.*

MR. BARB. NOTES on Chap. IV. §. I.

¹ *Euripides's* Words are,
Οὔτοι τὰ χρήματ' ἴδια κέκτηνται βροτοί,
Τὰ τῶν Θεῶν δ' ἔχοντες ἐπιμελίμεθα
Ὅταν δὲ χρεῖζωσ', αὐτὰ ἀφαιρῶνται πάλιν.

Men poſſeſs nothing of their own, but are
The Stewards of the Goods, which to their Care
The Gods commit, and take away when they ſee fit.

See *Lev. xxv. 23. Pſal. xxiv. 1.*

² Men by the Conceſſion of the Creator and Supreme Sovereign of the Univerſe have naturally a full power to make uſe of the Creatures, as they ſee fit, according to the ſtrength of their Reaſon. If there had never been but one Man in the World, as *Adam* was alone for a little time, the effect of his Power had been reduc'd to this, That nothing had been done contrary to the Will of the Creator, by diſpoſing of what had been preſented to him according to his Humour. But Mankind began to frame and perpetuate themſelves from Generation to Generation, from the moment that they became more than one Man, ſince by Nature one had not more power than another over the Beaſts and inanimate Creatures. Every one acquir'd a Right, by virtue of which another ought to permit him to enjoy, as well as himſelf, all thoſe things which their Creator had granted them the uſe of in common. When any one finds a thing to pleaſe him, from the time he had got the Poſſeſſion of it, no other Man ought to take it from him, but ſuppoſing it to be of that Nature, as not to be conſumed by the uſage, he may appropriate it to himſelf ſo long as he has occaſion for it; and others do him an Injury, if they would make uſe of it in their turn. So long as there were but few Men, and they contented themſelves with ſuch Fruits of the Earth as grew up without Tillage, they needed to poſſeſs themſelves of nothing but what was for preſent uſe, and here we may believe that all their Cares and Claims were bounded, and ſo all things were common. But when Mankind was conſiderably multiply'd, and they contriv'd to till the Ground, and ſeek out ways to render their Lives more commodious and agreeable, there was no way left to live in that Community; but Men muſt fix upon ſomething, and 'twas juſt, that what was gotten by Labour and Induſtry ſhould be made ſuch a Property, that

their Birth from Indisposition. And therefore 'tis an idle Question, Whether the Property of things arise from Nature, or from Institution? Since we have plain evidence, that it proceeds from the Imposition of Men; and that the natural Substance of things suffers no Alteration, whether Property be added to them, or taken from them.

II. In the next place, we ought with due accuracy to weigh and examine what *Communio* is, and what *Property*, or *Dominion*. The Term *Communio* is taken either negatively, or positively. In the former manner things are said to be common, as consider'd before any human Act or Agreement had declared them to belong to one rather than to another. In the same sense, things thus consider'd are said to be *No Body's*, rather negatively, than privatively, *i. e.* that they are not yet assign'd to any particular Person, nor that they are incapable of being so assign'd. They are likewise term'd *res in medio quibusvis exposita*, Things that lie free for any Taker. But in the positive Signification of the Word, common Things differ from appropriate only in this Respect, That the latter belong to one person only, the former to many Persons together, though in the very same manner. To proceed, *Property* or *Dominion*, is a *Right*, by which the very Substance¹, as it were, of a Thing, so belongs to one Person, that it doth not in whole belong, after the same manner, to any other. For we take *Dominion* and *Property* to be the very same. Though some affirm the *Right*, as separated from the *Use* and *Profit*, to be *Property*, and as join'd with the *Use* and *Profit*, to be *Dominion*; which nevertheless is a difference that doth not perpetually hold. Some again are over-nice, whilst by *Property* they understand the Thing it self under that Quality, by which it belongs to me, and to none besides; and by *Dominion* a Right to dispose of the said Thing, as I please, which flows from *Property* in the manner of an Effect; so that the *Dominion* shall be lodg'd in the Person, but the *Property* shall seem rather to inhere in the Thing². In which Distinction it is falsely suppos'd, that *Dominion* is as it were the Effect of *Property*; whereas if a Man thinks it at all necessary thus to divide them, the reverse of this is rather true. For the *Right*, strictly speaking, inheres in the Person, from which the

things themselves derive some kind of extrinsecal Denomination. And this appears sufficiently evident from hence, That the *Right* dying with the Person, the things cease to be appropriated, without any change in their Substance, or in other natural Qualities and Affections.

Now the force of *Property* is such, that we may at our pleasure dispose² of the things which we hold by this *Right*, and may keep any other Person from the use of them; unless he hath obtain'd from us, by Covenant, a particular *Right* to this purpose: And that therefore whilst they continue ours, they cannot after the same manner, and in whole³, be another's. I say, *after the same manner*; for neither as there is no reason to the contrary, so Custom informs us, that the same thing may belong to several Persons at once, according to their different ways of holding or owning it. Thus the Commonwealth, the Landlord, and the Tenant, by Copy or Lease, may be said each of them to have the *Property* of the same piece of Ground; the first an *eminent Property*⁴; the second a *direct*⁵, and the last an *useful*⁶. It was added likewise, *in whole*^b; for many Persons may, even in the same way, hold the same thing, yet not in whole, but each according to his determinate Share. As is the case in those Goods which are, without Division⁷, possess'd by many together, who all happen to have the same kind of *Property* with regard to the same thing.

Sometimes we conceive *Property* to be divided into several Parts; or (if any one likes this Expression better) to admit of several Degrees. For 'tis frequently distinguish'd into *plenary*, and *diminutive*. The former is either join'd with what they call *eminent Property*, in which manner civil States, or the Heads and Governours of them, possess their Goods; or else disjoin'd from it, and term'd *vulgar*; by which a private Man enjoys a full power of disposing of his Goods, except so far that the Use of them be not under the Direction of the municipal Laws. *Diminution* of *Property* may be made several ways, as that the bare Exercise or Administration of it shall be restrain'd; or that the Profit and Advantage of it shall be lessen'd; or lastly, that somewhat shall be cut off from the very *Property* it self. The first happens⁸, when by Covenant,

^a Vid. Ziegler ad Grot. l. ii. c. 2. f. 1.

^b *Plures eandem rem in solidum possidere non possunt*, D. l. iv. tit. 2. *De acquirenda et amittenda possessione*, leg. 3. f. 5.

MR. BARB. NOTES on §. I, II.

no other might have to do with it without his Permission. Wherefore every one possessed himself of certain things with a design to keep them always, and not to part with them unless it be by disposing of them to whom they think fit, either alive or dying, at least declaring openly not to abandon them, and leave them to the first Occupant. Thus the property of Goods was first established, of which the Mark of Distinction is, That others are always excluded, whereas when all things were common, others were not excluded from the things of which every one was possessed but for a little time, *i. e.* as long as they were actually in use. Then were civil Societies formed, the Rights of Property were settled, and order'd divers ways according to the Laws agreed on. Thus have I given, as I think, in a few Words, a clear and exact notion of this Matter, about which our Author enlarges much, and yet reasons obscurely; and which has long been perplex'd with vain Subtilties. If we joyn this with Note 4. of Paragraph 4. we shall have Principles sufficient to judge well of it, and to rectify the Notions of other Authors, who have written about it. See also chap. vi. §. 1. Note 1.

¹ See Note 2. of the precedent Section, where you'll find a more natural and exact Definition. Our Author gives us a Notion of a particular property, rather than a general one, consider'd in opposition to an universal Community of Goods.

² So says the Civil Law, *Nam suæ quidem quisque rei moderator, atque arbiter*, &c. *Cod. l. iv. tit. 35. Mandati*, &c. leg. 21.

³ So the Civil Law speaks, *Et ait Celsus filius, duorum quidem in solidum dominium, vel possessionem esse non posse*, *Digest. l. xiii. tit. 6. Commodati vel contra*, leg. 5. §. 15.

⁴ See Lib. viii. c. 5. f. 7.

⁵ Our Author explains in the next Line, what is meant by direct and useful Property, as the Modern Lawyers distinguish. In short, Useful Property imports a greater Right than direct Property, and is rather a Right Personal than Real, as Mr. Titius observes in his *Jus Privatim Romano German.* &c. which was publish'd in 1709. Lib. iii. c. 11. §. 3.

⁶ See Chap. viii. §. 3. following.

⁷ So the Civil Law speaks, *Nec quenquam partis corporis dominum esse, sed totius corporis pro indiviso pro parte dominium habere*, *Digest. l. xiii. tit. 6. Commod. vel contra*, leg. 5. §. 15.

⁸ See the *Institutes*, l. ii. tit. 8. *Quibus alienare licet, vel non licet*.

or by Testament, or by the Command and Authority of Law, on account either of the Condition of the Persons, or of the Quality of the Things, or for some other just Causes, the Alienation of Possessions is either prohibited, or confin'd within certain Limits⁹, yet so as that no Right to the said Possessions is hereby derived upon others. Add *Theophrastus's* Will in *Diog. Laert.* l. v. f. 53. The Advantage of Property is lessen'd, if either the full Use and Enjoyment of my Goods is in the Hands of another, without Loan or Hire; or otherwise, if I am bound to allow another some particular Use of them, by way of *Service*. Lastly, the Property it self is then retrench'd, when we grant to another, besides the full Right of using and enjoying what is ours, a Right likewise of alienating it after a certain manner; and such a Right too, as is in some sort perpetual. In which case, he who retains the Property, though thus abridg'd, and holds a superior Power over the Possession, is said to have a *direct Property*; and he who, together with the Right of using and enjoying, partakes likewise of the Property in the manner before describ'd, is said to have an useful *Property* in the Possession thus granted to him⁸. Where we may observe, by the way, what Limitation ought to be added to that common Rule with the Lawyers, *What is already a Man's own, can't become more his own*¹⁰. Whence they conclude, that no Pawn¹¹, no Charge, no Bargain of Buying, or of letting to Hire, can possibly stand, when made to him who is already the Proprietor of the thing thus dispos'd of. As likewise if a Testator happens to bequeath to the *Legatee* what was his own before, the Act is void and fruitless¹². And so too, that no one can¹³, to any purpose, stipulate or bargain for a thing that will be his own without any such Conditions; with other the like Cases. All which are true, unless it so happen, that a *diminutive Property* should, by any of these means, be advanc'd to a greater degree of *Plenitude*^b.

Farther, since the same thing may be possess'd either in whole by one, or else by many¹⁴, without falling under a Division; so that each Person, according to his determinate Share, shall have an equal Right in it; hence it comes to pass that things are, in this respect, distinguish'd into *proper*, and

common, as the word *common* is taken in its latter Signification; implying that the same thing is by the same kind of *Dominion* held by several Men, without being divided, or parcell'd out amongst them. And this *Communio* differs from *Property*, strictly so called, only with regard to the Subject in which it is terminated and lodg'd; a *proper* or appropriated thing belonging to one Person alone, a *common* thing to several, but not with regard to the manner or the virtue of the *Dominion*; for many Persons have the same Right over a *common* thing, as a single Person hath over a *proper* thing: And as the Propriety of a thing appertaining to one only excludes all others from an equal Right in the same thing; so a *common* thing excludes all others but those to whom it is said to be *common*. Now since neither of these Commoners hath a Right extending it self to the whole thing, but only to a part of it, though suppos'd to remain undivided; it is manifest that no one Person can, by his own Right, dispose of the thing entirely, but only according to his fix'd Proportion¹⁵: And that if any Resolution is to be taken, any Bargain to be made about the whole, the Consent and Act of each Commoner is necessarily required. *Ziegler*^c, *Felden*^d, and *Boecler*^e, in their Observations on *Grotius*, have all confounded *negative* Communio with *positive*: On account of which Mistake many Arguments have been thrown away to no purpose, in discussing this Point; as will appear hereafter. What *Seneca* hath deliver'd about the several kinds of Communio, may not be impertinent to our present Subject: *I hold all things*, says he, *in common with a Friend*¹⁶, *not as I do with a Slave, so that one part should be mine, and another part his; but as Children are common to their Father and Mother, who, supposing the Children to be two, are not said to have each one, but each both. The Knights Seats belong to all of that Order, yet in them, by taking Possession of a place, I appropriate it to my self. And if I assign this place to another Person, though he had an equal Right to it, yet it seems to be my Gift. Some things belong to some Men under a certain Condition. Thus, again, I have a place in the Knights Seats, not to sell, not to let out, not to make my Home, but barely to sit in whilst I am a Spe-*

⁹ Comp. *Struvi. Syntagm. Exerc.* 11. Th. 55, &c. *Seneca de Beneficiis*, l. vii. c. 12. It's no Argument that a thing is not your own, because you cannot sell or spend it, because you cannot change it for better or for worse. For that likewise may be truly call'd your own, which is your own under certain Terms and Conditions. ^b As *Lucilius* in the *Anthologia*, l. ii. jests smartly on the old Miser *Hermocrates*, in feigning that he had set down himself in his Will as Heir to his own Goods.

^c Add *Grot.* l. ii. c. 2. f. 1. *in it.* ^d d. l. f. 2. ^e d. l. p. 47. ^f *De Benef.* l. vii. c. 12.

MR. BARE. NOTES on §. II.

⁹ *Seneca's* Words are, *Non est argumentum, ideo aliquid tuum non esse, quia vendere non potes, quia consumere, quia mutare in alterius aut melius. Tuum enim est etiam, quod sub lege certa tuum est.*

¹⁰ *Quod proprium est ipsius [Legatarii] amplius ejus fieri non potest*, *Instit.* l. ii. tit. 20. *de Legatis*, f. 10. See also l. iv. tit. 6. *de Adionibus*, §. 14. & *Digest.* l. xlv. tit. 2. *de exceptione rei judicate*, leg. 14. §. 2.

¹¹ *Neque pignus, neque depositum, neque precarium, neque emptio, neque locatio rei sue consistere potest*, *Digest.* l. l. tit. 17. *De Divers. Reg. Juris*, l. xlv.

¹² *Sed si quis rem Legatarii ei legaverit, inutile est legatum*, *Instit.* l. ii. tit. 20. f. 10. See also *Cod.* l. vi. tit. 37. *de Legatis*, leg. 15. And *Mr. Daumart's* Civil Laws in their Natural Order, Part. II. l. iv. tit. 2. Sect. 3. §. 8, &c.

¹³ *Nemo rem suam futuram, in eum casum, quo sua fit, utiliter stipulatur*, *Instit.* l. iii. tit. 20. *De inutilib. Stipulat.* f. 21.

¹⁴ So the Civil Law speaks, *Servus communis sic omnium est, non quasi singulorum totus, sed pro partibus utique indivisi, ut intellectus magis partes habeant, quam corpore*, *Digest.* 45. tit. 5. *De Stipulat. Servorum*, leg. 5. See also *Lib. xxxi de Legatis & Fideicom.* 2. leg. 66. §. 2.

¹⁵ Thus the Civil Law commands, *Nemo ex sociis plus parte sua potest alienare, etsi totorum bonorum socii sint*, *Digest.* l. xvii. tit. 2. *Pro Socio*, leg. 68. *prin.* See *Cod.* *Lib. iii. tit. 37. Communii dividendo.*

¹⁶ *Seneca's* Latin is, *Non enim mihi sic cum amico communia omnia sunt, quomodo cum socio, ut pars mea sit, pars illius; sed quomodo Patri Matrique communes Liberi sunt; quibus cum duo sunt, non singuli singulos habent, sed singuli binos — Deinde pluribus modis communia sunt: Equestria omnium Equitum Romanorum sunt: in illis tamen locus meus fit proprius, quem occupavi. Hoc si cui cessi, quatenus illi communi recesserim, tamen aliquid dedisse videor. Quaedam quorundam sub certa conditione sunt. Habes in Equestribus locum, non ut vendam, non ut locem, non ut habitem; in hoc tantum, ut spectem. Propterea non ventiar, si dicam me habere in Equestribus locum, sed cum in theatrum veni, si plena sunt Equestria & jure habeo locum illi, quia sedere mihi licet; & non habeo, quia ab his, cum quibus jus mihi loci commune est, occupatus est.*

Etat v. It will be no Falsity then, if I should say, I have a place in the Knights Seats; yet if they happen to be full when I come into the Theatre, I both have a place there by Right, because I am allow'd to use them; and I have not a place, because it is already possess'd by those who had a common Right to it with my self.

III. From what hath been offer'd, 'tis evident that as well positive Communion, as Propriety, doth imply the Exclusion of others from the thing thus said to be either *common*, or *proper*, and consequently doth presuppose more Persons in the World than one. As then, if there were but a single Man upon Earth, it could by no means be said, that things were appropriated to him; so those things, from the use of which no Person is excluded, or which belong no more to any one, than to another, are to be stiled *common* in the former, not in the latter sense of the Word. And thus it appears in what respect we may attribute the Dominion of things to *Adam*, whilst he yet stood alone in the World. Namely, although by reason of the vast Extent of the Earth, and his small Occasions, he needed to apply to his Service but a very inconsiderable Portion of things; yet supposing him to have had Inclination, and likewise Ability and Convenience to turn all that God had given him to his own use, there was no Right of others to oppose or hinder him. Therefore the Right of *Adam* over things was of a different kind from that Dominion, which is now settled amongst Men: We may call it an indefinite Dominion¹, not formally possess'd, but absolutely allow'd; not actual, but potential. It had indeed the same Effect which Dominion now obtains; that is, the using things at Pleasure; yet was it not Dominion, strictly speaking, by reason that there was no other Person against whom this Effect might prevail; but 'twas capable of passing into Dominion, when the number of Mankind should afterwards increase. And thus on the whole, whilst *Adam* was the only Man, things in respect of him were neither *proper*, nor *common*. For Community supposeth a Partner in the Possession; and Propriety denotes an Exclusion of the Right of others to the thing enjoy'd: So that neither of them can be understood, 'till the World was furnish'd with more than one Inhabitant.

IV. But farther, it ought no less carefully to be observ'd, that the Grant of Almighty God, by which he gave Mankind the use of earthly Provisions, was not the immediate Cause of Dominion, as this is directed towards other Men, and with relation to them takes Effect (which is evident likewise from hence, that even Brutes², by the Divine Permission, use and consume the Fruits of the Earth, and yet they are certainly incapable of Dominion) but that Dominion necessarily presupposeth some human Act³, and some Covenant either tacit or express. GOD indeed authoriz'd Mankind to apply to their Service and Convenience the Earth, with the Product of it, and the living Creatures upon it; or, he gave Man an indefinite Right to all these Possessions; but still it was left to their own Choice and Disposal, what Manner, what Degree, what Extent they would fix to this Power; that is, whether they would circumscribe it with certain Bounds, or leave it unconfined; as likewise whether they would allow each Person a Right to all things, or only to one and the same determinate part of things; or whether they would assign to every particular Man his own Portion, with which he should rest contented, and pretend no Right or Claim to any thing besides. *Ambros. Off. L. i. c. 28.* Nature pour'd out all things in common to all Men: For so God commanded the whole Stock of things to be produc'd, that Men should have a general Supply of Sustenance, and should hold the Earth as a general Seat. Common Right therefore was the Work of Nature; private and peculiar Right the Work of long Use and Possession. *Add. Selden. de J. N. & G. sec. H. br. l. vi. c. 1.* 'Tis in vain therefore to dispute whether God conferr'd the Dominion over things on our first Parents, as the Representatives of all human Race; or whether he gave it them as their own Peculiar³, and so as to terminate in their single Persons; that they, by their own proper Right, should hold the Lordship of the whole World, and that all other Mortals should owe their private Dominion to their Bounty and Favour. For that Divine Grant only confirm'd Men in a fuller Assurance of the Goodness of their Maker towards them, and satisfy'd them that 'twas his pleasure they should dispose of other Creatures for their own Use and Service. But it was left to the Reason of Men

Mr. BARB. NOTES on §. III, IV.

¹ The Author expresses himself very scholastically here, saying, *Quod quis vocare possit dominium indefinitum, non formaliter, sed concessive; non actu, sed potentia*; which I think may be thus better express'd: A shadow of Property, or a power of possessing with Property, rather than a true and actual Property.

² I wonder our Author should in this place make use of so weak a Reason. For he himself observes in more than one place, that Beasts are not capable of any Right or Obligation, neither among themselves nor with others, nor is there any Law for them, properly so call'd; so that tho' in one sense God permits the Beasts to use what is for their Convenience, yet 'tis not such a real Grant, as has the Nature of Right; and in that respect we can no more say, that God wills (for example) that the Birds should eat the Fruits and Corn where-ever they find it, than that God would have a Bear or a Lion to pull that Man in pieces, who has the Misfortune to fall into their Paws.

³ An human Right: I grant, that is to say, taking possession, by virtue of which every one acquires a particular Right over that which before he had only a common one. But Contracts are necessary, when a thing is to be parted, of which several have possession at the same time.

³ An English Knight, named *Robert Filmer*, maintains it with a great deal of Heat, and makes use of it to prove the absolute Power which he attributes to Sovereigns, and which, as he pretends, has come down by Succession from the Authority of *Adam*, whom he makes the first Sovereign. He chiefly insists on this Text, *Gen. i. 28.* where God says to our first Parents, *Increase and multiply, and replenish the Earth, and subdue it: and have Dominion over the Fish of the Sea, over the Fowls of the Air, and over every Beast that moveth upon the Earth.* But *Mr. Lock*, who has confuted that Book in an English Work, of which we may find an Extract in the Universal Library, Tom. 19. answers judiciously, 1. That in these Words God gives *Adam* no Power but over the Beasts. 2. That he gave him no property over these living Creatures to possess them as his own, but as in a common Right with all Mankind. This the Author proves at large from diverse parallel Passages of the Holy Scripture, and particularly by the very Grant that God repeated to *Noah* and his Sons. The Text in *Psalms cxv. 16.* is not answer'd. *God, saith the Psalmist, hath given the Earth to the Children of Men;* which, according to the Hebrew Stile, is to Men in general, or to Mankind. *Treatise of Government, l. i. c. 4.*

to determine what measures should be taken to prevent any Discord that might arise amongst them from the Exercise of this Right. But we can by no means say, That there was any universal Rule and Manner of Possessing prescrib'd by God himself, which all Men should be obliged to observe. Therefore things were rendred neither *proper*, nor *common* (that is, in a *positive* Communion) by the express Command of God: But this matter was afterwards adjusted by the Disposal of Men, according as the Peace of human Society seem'd to require. Whence, those Authors must needs be under a Mistake, who deliver themselves in so gross Terms as these: *The Division of Things belongs to the Law of Nature; that is, it doth not only receive its Rise and Foundation from Nature, so as afterwards to be turn'd into Law by the Consent of Mankind; but Nature herself frames and compleats this Law by her own Act and Authority.* And again, *The Division of Things is one Command of the Decalogue; that is, one Head of the Law of Nature.* For he that said, Thou shalt not steal, in effect said, Let there be a Property and Distinction of Things; let every one hold what is his own, and not covet what is another's^a. For there is no Precept of natural Law to be discover'd, by which

Men are enjoin'd to make such an Appropriation of things, as that each Man should be allotted his particular Portion, divided from the shares of others. Though the Law of Nature doth indeed sufficiently advise the introducing of separate Assignments, as Men should appoint, according to the Use and Exigencies of human Society; yet so as to refer it to their Judgment, whether they would appropriate only some particular things, or whether they would possess some things without bringing them to a Division, and leave the rest as they found them, only forbidding any particular Man to challenge them to himself alone. Hence too, the Law of Nature is suppos'd to approve and confirm all Agreements made by Men about the Possession of things, provided they neither imply a Contradiction, nor tend to the Disturbance of Society. Therefore the *Property* of things flow'd immediately from the compact of Men, whether *tacit*, or *express*. For although after the Donation of God nothing was wanting but for Men to take possession; yet that one Man's seizing on a thing should be understood to exclude the Right of all others to the same thing⁺, could not proceed but from mutual Agreement. And though right Reason mov'd and persuaded Men to intro-

^a Vid. *Bæcler. ad Grot. in præfat. p. 9.*

MR. BARB. NOTES on §. IV.

⁺ No, in no wise. It is certain on the contrary, that the immediate Foundation of all particular Right, which any Man has to a thing which was before common, is the first Possession. This was the most antient way of Acquirement. And indeed, when several things are given in general to a number of Men which exist not at the same time, and who neither can nor will possess all things in common, and such are Men of all Times and Places, the Intention of the Donor doubtless is, That those who come first shall gain a personal Right to those things that they have gotten, exclusive of the Pretensions of all others, without any Consent from the Occupant appropriate to himself lawfully any thing before held in common, provided he takes no more than he needs, and leaves enough for others. This is what Mr. *Titius* says judiciously, *Obsere.* 278. n. 2. in which he was prevented by Mr. *Lock*, who, in his excellent Treatise of Civil Government, has among other things searched to the Bottom with much Curiosity and Solidity into the manner how the Property of Goods is acquired. Take, in short, his Judgment, how Men may possess in divers parts what God gave them in common, and enjoy it without any Agreement made between them, who have the same Natural Right. God, who gave Man the Earth, and all things in it for his Subsistence and Convenience, intended, without doubt, that they should put them to such an Use, as would be most advantageous to their Life, and most conformable to the Reason of him that holds them of him. Now no Man can receive any Benefit from the Fruits which are produced of themselves, and the Beasts which are brought up by the Care of Nature only, unless he appropriate to himself, some way or other, some of these fruits and Animals. If it were a Crime to take the least thing which is given in common, before we had the Consent of all others who had any Right, we might perish a thousand times with Hunger in the midst of Plenty. When a Master of a Family provides a Dish of Meat for his Children or Servants, he does not divide to each of them a Part; but what each of them fairly takes, belongs to him, although before none of them had more Right than others, and although none of them had an allowance given them to take this or that Portion. Farther, seeing every one is the only Master of his Person and Actions, the Labour of his Body and Work of his Hands entirely and solely belong to him, as his own proper Goods. So that all that he has derived from the state of Nature by his Labour and Industry, what he has gotten by his Pains, belongs to him only, and others can't pretend to them, unless there does not remain enough of the same things, or as good, among those that are common. A Man who feeds on the Acorns he has gather'd under an Oak, or wild Apples which he has gather'd in a Wood, certainly makes them his own. But when is it that these Acorns and Apples come to be his Property? when he eats them, or when he dresses them, or when he carries them home, or when he lays them up? 'Tis plain, that nothing but his Labour in gathering them can make them his own. *Quod omnibus nascitur, industriæ præmium est,* Quintil. Declam. 13. 'Tis our Labour that distinguishes these Fruits of the Earth from other common Goods, and which adds something more than the common Mother of all Men, I mean Nature, hath bestow'd. See *Plautus* in his *Rudens*, or *Fortunate Shipwreck*, Act iv. Scen. 3. v. 33. &c. By the same Reason, the Grass that a Man's Horse hath eaten, the Turf which his Servant hath cut, the Ditch he hath digged, and the Water which he hath drawn, become his own Goods and Inheritance, without the Consent of any other. 'Tis the same at this day with the Stag which we have kill'd, the Fish we have taken, the Ambergrease or Pearls which we have fish'd up, and the Hare which we have hunted down, in the Places where Hunting and Fishing are allow'd to every body, or in them that belong to no body, as the vast Ocean. So that so many Acres of Ground as a Man can till and sow, and whose Fruits he can spend for his Maintenance, belong properly to him, and he hath a Right to inclose that Space with Hedges, Ditches, Walls, or after any other manner, without any Man's Permission. And this is the rather true, because the Creator himself, in giving the Earth to Men in common, hath commanded them to labour, and has put them into such a natural State, that they are necessitated not to be idle. But it doth not hence follow, that we may gather as many Fruits, take as many Beasts, or possess our selves of as many Acres of Land; or, in a word, appropriate to our selves as many Goods as we please. For the same Law of Nature which hath given every one a particular Right to the things she hath bestow'd, by his Labour and Industry, separate from the State of Community wherein they were; the same Law, I say, has set certain Bounds to our Right. *God hath given all things abundantly,* 1 Tim. vi. 17. Why? to enjoy them. This is the Voice of Reason confirm'd by Revelation. Wherefore the Property of Goods acquir'd by Labour must be regulated by the good Usage which may be made of them for the Necessity and Convenience of Life. See what our Author says, c. vi. §. 3. following. If we pass the Bounds of Moderation, and take what others have occasion for, without doubt we seize on that which belongs to others; especially, if having got any thing superfluous, we leave not sufficient to relieve their Necessities, and supply them with things convenient and useful. We must not suffer any thing which God hath created for the Service of Man, to perish or become useless. If we consider with attention the abundance of natural Provisions which have been a long time in the World, the small Number of those who can use them, and for whom they are appointed, and how little a Man can appropriate to himself with the exclusion of others, especially if he keep himself in the just Bounds prescribed by Reason, we must be obliged to acknowledge, that the Propriety of Goods so establish'd would not produce the least Disputes and Quarrels. We may see this discoursed at large in the Work of Mr. *Lock*, Lib. ii. c. 4. Moreover, Mr. *Vander Muelen* hath also confuted our Author in his Comment upon *Grotius*, l. ii. §. 1. p. 56

duce distinct Properties, yet this doth not hinder but that they might derive their Rise and Original from human Covenant.

V. Thus much being premis'd, it is manifest, that, antecedently to any Act or Agreement of Men, there was a Communion of all things in the World; not such as we have before term'd a positive, but a negative Communion; that is, all things lay free to any that would use them, and did not belong to one more than to another. But since things could afford no Service to Men, were we not allow'd to lay hands at least on Fruits and Products of them, and since this would be to no purpose, if others might lawfully take from us what we had before actually mark'd out for our own Use: Hence we apprehend the first Agreement, that Men made about this Point, to have been, that what any Person had seiz'd out of the common store of things, or out of the Fruits of them, with design to apply to his private Occasions¹, none else should rob him of. This² may be illustrated by the Case of Beasts, amongst which none can claim a peculiar Right to any thing above others³; but each satisfies his Appetite with what he first meets with in his way: And if any of them hath been so provident as to lay up a Stock for future Use, the rest are under no Obligation to forbear invading and plundering it: Inasmuch as no Agreement can have pass'd amongst them, which might lodge the chief Right to any thing in the first Taker.

The Author of the Treatise *De Principiis justitiae & decori*⁴ hath advanc'd somewhat on this Subject, which may serve to set it in a fuller Light. He supposeth beforehand, that Man may lawfully possess and use Creatures void of Reason; and thence infers, that since Men are by Nature equal, all must have an equal Right to the Creatures⁵; there being in respect of the Creatures themselves no Rule assigning one Part to me, and another to my Neighbour: What remains then, but that the Distinction and Division of Goods must be deduc'd from Compact? But so far as all human Institutions and Ordinances are made with the exception of extreme Necessity, therefore when so desperate a Case happens, the primitive Right to all things revives: Because, in the common Agreement for the Division of Things, every one is suppos'd to have renounc'd his Right to those Things which were allotted

to others with this Reserve and Restriction, Unless I am unable otherwise to compass my own Preservation. My Calamity doth not give me a Right to those things, to which I had none before; but the extremity of my Danger makes that Condition cease, under which I gave up my first Right. For the same Reason it is lawful in War to seize the Goods of the Enemy: Because all Compacts being dissolv'd⁶, the original Right returns. He adds, p. 110. That, before the settling of Covenants, first Occupancy did not by its own force confer any Right. Because first, in whatever necessitous Condition I was plac'd, I could then have no Right to recall these Goods to my own Use; this Privilege taking place only in Goods which I voluntarily resign'd to my Neighbour: But there are not many Persons to be met with, who would allow such a Prerogative to Things thus acquired.

Which Reason might be thus propos'd in clearer Terms.

If first Occupancy of itself confer'd a Right exclusive of all others, it would follow, that, even in a case of Necessity, Goods thus attain'd could not be made use of by any other Person than the Possessor: Because the Right of Necessity follows from an Exception added to the first Compact about the Division of Goods; but we before suppos'd, that no such Compact had pass'd about Things which came into Mens Possession by these Means. It being then absurd and unreasonable, that a Person reduc'd to Extremity should not be allowed to use what another hath by Occupancy made his own; it follows, that the Right, by virtue of which Occupancy fixeth a Property, is likewise owing to Covenant. Though this Argument is at the best but very feeble⁷.

He proceeds Secondly to affirm, That there is in Nature no more Reason why Men should desire a Right from the first Occupancy of things⁸, than from the first discovery of them with the Eve. Therefore the Difference must arise from the Institution of Men, ordaining, that the Right to a Piece of Land, for Instance, should be in him who first took possession of it, not in him who saw it before others. Thirdly, he says, Let us suppose two Men, one swift, and one slow of Foot, 'tis evident what an ill match'd Couple we have here, as to the Business of acquiring Property; and by consequence, that the Right by which he who first seizeth the thing, in this Case, should be the true Owner of it, is not borrow'd from Nature, but from implicit

¹ To this belongs l. xli. t. 2. D. De acquir. vel admittenda poss. l. i.

² *Veltbuisen*, p. 100, 3^o. Ed. in 12^o.

MR. BARB. NOTES on §. v.

¹ This Agreement is in no wise necessary, as may appear from what has been said in the preceding Note. The Roman Lawyers do not suppose any, even in that Law to which our Author refers them; and whereas to shew, that Property of Goods did begin by taking Possession, they say, there remains to this day some footsteps of it in things which yet remain common, which belong to the first Occupant. *Dominiumque rerum ex naturali possessione cepisse Nervus filius ait, ejusque rei vestigium remanere, de his, quae terrae, mari, caelo capiuntur; nam haec protinus eorum fiunt, qui primi possessionem eorum apprehenderint*, Digest. l. xli. tit. 2. De acquirentia aut amittenda possessione, leg. 1. There is also a Place in the *Institutes*, which I shall quote, c. ix. §. 9. n. 9. from whence it will appear, that, according to the Notion of the Roman Lawyers, Possession is all that transfers Property by virtue of the Intention of him who gives any thing to many in common.

² See §. iv. Note 1. foregoing.

³ This is true, but they have it only for their Use. All that follows from this Equality of Right is, that no Man ought to possess himself of such a great quantity of Goods, that there remain not sufficient for others. See Note 4. upon §. iv. foregoing.

⁴ This is not so; but the true Reason is the state of War, where two are Enemies the one to the other. And indeed supposing that they, who have had each their Goods in Property, should come of a sudden to suffer them to be common by an unanimous Consent, and without ceasing to be Friends, every one may after this take what is convenient, and none have right to deprive others of what they are possessed of for their Use. Thus *Veltbuisen* argues upon the false Principles of *Hobbes*.

⁵ The Rights and Privileges of Necessity are not so bounded as to dispense with such Duties, as suppose an Agreement in certain Cases. They also make Exceptions to several natural Laws, which in no wise depend upon human Agreements.

⁶ The Reason of it is very clear, and 'tis this, That he declares thereby an intention to set apart such a thing for his Use, or to appropriate it to himself, as he may by virtue of his common Right to use it, which without that would become useless to any Man. The meer sight of a thing can't have the same Effect, because we see many things without any design of taking them to our selves only. But if at the same time we perceive a thing first, and we discover any ways an Intention of reserving it to ourselves, others may no more pretend to it, than if we were actually seiz'd of it. See what is said on c. vi. So that 'tis not necessary to stay to prove, that the third and last Reasons of *Veltbuisen* are of no force.

Covenant or Agreement: He might have said more briefly, upon Supposition that all Men had originally an equal power over things, we cannot apprehend how a bare corporal Act⁷, such as Seizure is, should be able to prejudice the Right and Power of others, unless their Consent be added to confirm it; that is, unless a Covenant intervene. What the same Author disputes farther; *That^a in the primitive State one Man might have brought the whole World under his Subjection*, is vain and idle, and is confuted by Mr. *Hobbes* himself^b.

VI. To proceed, Men left this original negative Communion, and by Covenant settled distinct Properties, not at the same time, and by one single Act, but by successive Degrees; according as either the Condition of Things, or the Number and the Genius of Men seem'd to require. Thus the *Scythians* of old appropriated only their Cattle, and the Furniture of their Houses; leaving their Land in its primitive Communion^c. Indeed the Peace and Tranquillity of Mankind, for which the Law of Nature appears especially concern'd, gave no obscure Intimation, what would be most convenient for Men to appoint in this Affair. For that each Man should retain an equal Power over all Things, or that the universal Provision should be laid in Common, ready for the promiscuous use of every Person, was not consistent with the safety and quiet of human Race; especially after they were multiplied into considerable Numbers, and had cultivated and improv'd the Method of living. Because^d there could not but arise almost infinite Clashings, from^e the desire of many Persons to the same Thing, which was not able to satisfy them all at once; it being the Nature of the greatest part of what the World affords, to be incapable of serving more than one Man at the same time. As for the precise Order, and the particular Causes of Things passing into Properties, I conceive we may thus come to an apprehension of them: Most things of immediate use to Men, and which are applied to the ends of Nourishment and Cloathing, are not by bare unassisted Nature produc'd every where in so great abundance, as to yield a plentiful supply to all. As often therefore as two or more should want the same thing, which could not content them all together, and should endeavour to seize and secure it for themselves; so often there must arise a most probable occasion of Quarrels and Hostilities. Again, many things stand in need of human Labour and Culture, either for their Production, or to fit and prepare them for Use. But here it was very inconvenient that a Person, who had taken no pains

about a thing, should have an equal Right to it with another, by whose Industry it was either first rais'd, or exactly wrought and fram'd, to render it of farther Service. It was highly conducive then to the common Peace, that immediately upon the Multiplication of Mankind, Properties should be appointed in moveable Things, especially such as require the Labour and Improvement of Men; and in those Immoveables which are of immediate and necessary Use, as Houses, for Instance; so that the Substance of them should belong either separately to particular Persons, or to such a number of Men as had by peculiar Covenant agreed to hold them in the way of *positive Communion*. Farther, although there appears some reason in these Things, why they should rather belong to some than to others; yet the Dominion or Property of them, such as implies the exclusion of all Persons besides, was to be confirm'd at least by tacit Compact¹: And this tacit Compact involv'd a tacit Cession of the rest of Mankind; intimating, that whatever had been assign'd for any one's private Share, they would never challenge any Right or Title to, upon pretence of its receiving its Matter, or its Nourishment, from the Earth, the common Habitation of Men. As for those Immoveables which Nature produc'd, without the concurrence of human Industry, that is, Lands, since they were so widely extended, as abundantly to satisfy the small number of the first Men; so much of them was from the beginning taken into Possession, as Men thought convenient for their present Occasions; the rest being left in its natural and negative Communion, to be possess'd by any Person that should afterwards think fit to use it. Here therefore² we must conceive a Covenant to have pass'd to this Effect: That those Lands which had been assign'd to particular Men by the express Agreement of the rest, or such as the rest were suppos'd to have resign'd all their Title to, by permitting a single Person quietly to enjoy, and by taking to themselves other Lands in the same manner, should belong to the Manurers and Improvers of them: And that what remain'd should pass into the Property of those who would afterwards fix upon it.

VII. That the settling distinct Properties turn'd to the real Benefit and Advantage of Men, when grown more Numerous, may be illustrated from the same Arguments which *Aristotle*¹ brings to overthrow the *Platonick* Communion of Goods. Though indeed his Design was to refute a *positive* Communion; whereas our Enquiry proceeds about the Reasons inclining Men to quit that Communion which

^a Ibid. & 103. 266.

^b *De Cive*, c. 1. f. 11.

^c *Justin.* l. ii. c. 2,

^d *Vid. Digest.* l. viii. tit. 2. *De servitut. prædior*

urbanor. leg. 26.

^e *Vid. Hobbes de Cive*, c. 1. f. 6.

¹ *Polit.* l. ii. c. 5. p. 316. *Ed. Paris*

Mr. BARB. NOTES on §. v, vi.

⁷ It is available by virtue of the Intention of the Creator, who has given Men this common Right, that they may make use of it. And every one ought to think, that it belongs to him to do no prejudice to the Rights of any other, who in their turn may one way or another plead the privilege of the first Occupant.

¹ By what I have said in the foregoing Notes, we may see that there is no need of any Renunciation, either express or tacit. This may suffice to rectify the attentive Reader in understanding all that our Author in the following part of this Work builds upon that false Principle, without which I should be obliged to enlarge my Notes to no purpose every moment to correct it.

² Our Author doth here by the by criticize upon an Expression of the *Jewish* Historian *Josephus*, l. i. c. 3. where he says, That *Cain* was the first that set bounds to Lands, *Ἔπος τὸ πρῶτον ἔθετο*, p. 7. in which he deserves, says our Author, not to be believed more, than in what he says in the same place, That *Cain* barbarously used and insolently treated all those that dwelt with him; that he gather'd great Wealth by Rapine and Violence, and that he cherish'd Companies of Thieves. For how can such things be attributed to the eldest Son of the first Man and first Woman, from whence all Mankind are descended? See *Baader's* Dissertation, entitled, An Exercitation upon *Fl. Josephus's Antiq. Jud.* Lib. i. c. 2. printed in 1701. and what is said, §. 10. &c. about the Primitive Community of Goods.

we have already shewn to be negative ^a 1. If, says he, *Men labour'd in common, and laid up all they got in one Heap, out of which they were freely to take for their Support; 'tis impossible but that Heats and Quarrels should arise from the Inequality which must be observ'd between some Mens Getting and Spending* ². In general (as he well remarks) *the living together, and upon the same Stock and Maintenance, is grievous and uneasy. Which is the Reason that we are never so highly displeas'd with other Persons, as with our Servants and Family-Dependents, who are continually under our Eye. But now upon the introducing of Property, all these Complaints are silenc'd* ³, every one grows more *Industrious in improving his peculiar Portion; and Matter and Occasion is supplied for the Exercise of Liberality and Beneficence towards others. It were better therefore that Goods should be made proper as to the Possession* ⁴, and should be common only in the Use. Again, *To consider a thing as our own, raiseth the Pleasure we take in enjoying it* ^b. To gratify and assist a Friend, a Guest, or a Companion, fills us with sensible Satisfaction and Delight; and this we cannot do, unless we have a separate Share of Good things to our selves. Besides, since there are few things which can be made use of by all Men at once, when many Persons should happen to set their Mind on the same Object, which could not suffice them together; they must of Necessity fall out, were not the desired Object already assign'd to a particular Owner. It must be confess'd these Reasons did not weigh so much with Sir Thomas More and Campanella, as to hinder them from setting up a Common of Goods, the former in his *Utopia*; the latter in his *Realm of the Sun*: It being much more easy to fancy perfect Men, than to find them ^c. But farther, we may hence too

discover the Falsity of that vulgar Saying ⁶, *Meum and Tuum are the cause of all the Wars and Quarrels in the World*. For on the contrary the Distinction of *Meum and Tuum* was rather introduc'd to prevent all Contention. Hence *Plato*, LL. l. viii. p. 214. Ed. *Wech.* calls the *Meer-stone* ⁷, the *Boundary of Friendship and Enmity, confirm'd by Oath, and approv'd of by the Gods*. Of the Sacredness of the Landmark, see likewise *Deut.* xix. 14. *Job* xxiv. 2. L. xxvii. c. 21. *D. de Terminorum. Collat. leg. Mosaicarum cum Rom.* tit. 13. *Paul. Sentent.* i. 16. v. 22. *Frontinus de re agrar.* Let every one keep his own Bounds and not disturb those of other Men: for therefore was the *Mark-stone* set up, *litem ut discerneret agris*,—to end the *Quarrels of the Field*. But that infinite Field of Hostilities and Strifes arises only from hence ⁸, That the Avarice of Men is ever aiming to break through those Bounds of *Meum and Tuum*, which have been by Law or Covenant establish'd ^c.

VIII. Though what hath been here deliver'd seems plain and evident, yet we think it not impertinent to examine more largely the Opinions of some ancient and some modern Writers on this Subject. Amongst the former, *Diodorus Siculus* ^d reports, *That the first Earth born Men led a wild and irregular Life, went out in Herds to seek their Food, which consisted of the most juicy Herbs, together with such Fruits as the Trees spontaneously produc'd: But not knowing how to bring their Provision together, and to lay up a Store for future use, many perish'd during the Winter, partly through the Inclemency of the Air, and partly through want of Sustenance; 'till by degrees gaining Instruction from Experience, they began to retire into Caves in the cold Season, and to reserve*

^a To which add *Aristophan.* *Concionatr.* ver. 586.
Est aliquid quocunque loco, quocunque recessu,
Unius sese Dominum fecisse locuta.

^b *Juvenal* Sat. 3. ver. 230.

'Tis somewhat to be Lord of some small Ground,
In which a Lizard may at least turn round.

Mr. Dryden.

^c *Lyfias* Orat. 17. *De Nicta bonis publicatis*, chap. iv. *The main Causes of Dissentions among Subjects are, that some covet other Mens Possessions, whilst some again, are robb'd of their own.*

^d Lib. i.

M. BAER. NOTES on §. VII.

¹ The Greek is, *Kai gar en tais apolautais, kai en tois ergois mh gnomemenois ison, all' anison, anagkaton egnhmatata ginesqhai pros tas apolautas mh e lambanontas pollis eligma de poudntas tois elattw mh lambanousi pleiwh de poudsin*

² The Greek is, *'Olas de to ouzen kai koinouein tan anhrwpiwn pantwn xalupton, kai malista tan toiatwn dhlas d' ai tan sunapodhmwn koinwniai' scheidon gar oi pleistos diaferimenois en tan en pros, kai ek mikrow proskhontes; allhlois. Eti de therapoutwv tetois malista proskhromenoi' ois pleistes proskhrometha pros tas diakonias tas egnhmatas.*

³ So *Aristotle* expresses it, *AI mh gar epimeleiai dihrhmenai, ta egnhmatata pros allhlois e' epoihsai' mallon de epidwsasin, ws pros idiou zhsen diaferi tē nomizein idion ti*—*allā mh kai tō charisadai, kai bohosōthai Philois, kai zēnois; ē itērois hōdion o ginetai tēs ktēsews idias zhsen.* *Epicurus* (to use Mr. *Bayle's* Words in *Hist. Diōion.*) would not imitate *Pythagoras*, who taught, that among Friends Goods ought to be common. (*Diog. Laert.* l. x. §. 11.) He found it out, that such an Establishment betray'd Dissidence; he lik'd better that things should remain on the same foot, that every one might voluntarily contribute to the Wants of others when there was a necessity. He assures himself, that this Notion comes nearer Perfection, than to maintain a Community of Goods, and we can't sufficiently admire the Union of *Epicurus's* Followers, and the Goodness by which they assisted one another, while every one remain'd Master of his own Estate. See *Cicero de finib. bonorum et malorum*, l. i. c. 20.

⁴ An universal Community of Goods, which might have place among Men perfectly just and free from all irregular Passions, can't but be unjust, chimerical, and full of Inconveniences among Men so dispos'd as we are. For the Agreement which is observable sometimes among the Members of certain particular Communities, can't be drawn into a Consequence for an universal Society of all Nations and People; nay, not so much as of a Village, or some other place, which contains several Families of different Conditions, and makes up a number of unequal Persons. See Mr. *Dumont's* Civil Laws in their Natural Order, Part II. in the Preface, §. ii. and the Discourse of *Ulric Obrecht, De Communione*, which is the first of the Collection publish'd in 1704. at *Strasbourg*. To this we may add that Mr. *Brugere* (in *Charact. penult. du dern* chap.) says, That if Men abound with Goods, and no body in this Case live by his Labour— we shall want Necessaries and Conveniences. If there be no Wants, there will be no Arts, Sciences, Invention, nor Mechanick Trades. Farther, an equality of Possessions and Riches would fettle all in like Condition, banish all Subordination, reduce Men to a state of serving themselves and not helping one another, render Laws frivolous and useless, introduce an universal Anarchy, and bring in Violence, Injuries, Massacres and Impunity. The rest of the Character is pleasant to read, but too long to be inserted whole in this place. See also *Quintil. Declam.* 261.

⁵ *Quinta vita iis qui tollunt, Meum, Tuum.* Publ. Syr. *Sentent.* v. 620.

⁶ *Plato's* Words are, *Σμικρὸν λίθον ὀρίζοντα Φιλίαν, καὶ ἐχθράν.*

⁷ *Lyfias's* Words are, *Διαφίρεσθαι δὲ πρὸς ἀλλήλους ἐκ τῶν τοιούτων μάλιστα' ἂν οἱ μὲν τῶν ἀλλοτρίων ἐπιθυμῶσιν, οἱ δὲ ἐκ τῶν οὐτου ἀκρίπτουσι.*

a sufficient Stock of such Fruits as were fit for keeping : Some new Advantage or Improvement being every day added to Life ^a. This Hypothesis concerning the Origin of Mankind, though false, being taken for granted, it follows, that Men in the beginning liv'd upon the Supplies of Nature in common ; afterwards settling by Covenant the Property of Houses, and of Fruits treasur'd up for future Service, 'till by slow Advances the Appropriation of Land was introduc'd. To the same purpose is frequently alledg'd what Justin ^b relates of Saturn ¹, King of the *Aborigines*, who, he tells us, was so remarkable for exact Justice, *As that no Person under his Reign liv'd in a Condition of Slavery, or held any private Possessions ; but all things, like one universal Patrimony, lay undivided, and in common to all.* The Authorities of the Poets are likewise produc'd in great Numbers, where they describe the happy State of their golden Age, *Virgil*, *Georg.* I. 125, &c.

*Ante Jovem nulli subigebant arva coloni ;
Nec signare quidem, aut partiri limite campum
Fas erat : in medium quærebant ; ipsaque tellus
Omnia liberius, nullo poscente, ferebat* ^c.

Before *Jove's* Reign none vext the peaceful Ground,
Which only Turfs and Greens for Altars found.
No Fences parted Fields ; nor Marks, nor Bounds
Distinguish'd Acres of litigious Grounds :
But all was common, and the fruitful Earth
Was free to give her unexpected Birth.

Mr. Dryden.

Tibull. Eleg. 3. B. I. ver. 41, &c.

*Illo non validus subiit juga tempore taurus,
Non domito franos ore momordit equus :
Non domus ulla fores habuit ; non fixus in agris,
Qui regeret certis finibus arva, lapis.*

No sturdy Ox did to the Yoke submit,
No broken Courser champ'd the galling Bit :
No Door the fearless Cottager conceal'd,
And the wide Earth was but a common Field.

Senec. *Oſtav.* ver. 402, &c. Act. iii:

— *Cingere assuerant suas
Muris nec urbes ; pervium cunctis iter.
Communis usus omnium rerum fuit :
Et ipsa tellus lata fecundos sinus
Pandeat ultro.*

^a *Plin.* Nat. Hist. l. xxiii. Proœm. de Arborib. *Pomona* urgeth this in her own Honour and Defence, " That the first Food of Men was owing to Trees ; and that this taught them to look upright towards Heaven : Nay, that they might still find a Sustainance from the same Stores, without Corn and other Products of the Earth " ^b *Lib.* xliii. c. 1. ^c See this Place illustrated by *Seneca*, *Epist.* 90. ^d *Macrob.* *Saturn.* i. c. 3. " The Romans appointed the Temple of *Saturn* to be their Treasury, for this Reason, because during the time of his Reign in *Italy* no Robbery was committed : Or, because under him there were no distinct Possessions or private Estates,

*Nec signare quidem aut partiri limite campum
Fas erat : in medium quærebant.*

" therefore it was thought convenient to lodge the common Treasure under his Protection, in whose Reign all things had been common to all Men. ^e *Institut.* l. v. c. 5.

Mr. BARB. NOTES on §. VIII.

¹ *Justin's* Words are, *Itallæ cultores primi Aborigines fuisse, quorum rex Saturnus tantæ justitiæ fuisse traditur, ut neque servierit sub illo quisquam, neque quicquam privatæ rei habuerit ; sed omnia communia & indivisa omnibus fuerint, veluti unum cunctis patrimonium esset.*

² *Lactantius's* Words are, *Quippe cum Deus communem omnibus terram dedisset, ut communem degerent vitam, non ut rabida, & furens avaritia sibi omnia vindicaret, nec ulli deesset, quod omnibus nasceretur. Quod Poetæ dictum [viz. Virgilii in his versibus, nec signare, &c. supra memoratis] sic accipi oportet, non ut existimemus nihil omnino tum fuisse privati, sed more Poetico figuratum, ut intelligamus tam liberales fuisse homines, ut notas sibi fruges non includerent, nec soli absconditis incubarent, sed pauperes ad communionem proprii laboris admitterent.*

— Nor had they yet begun [Scene
To fence their Towns with Walls, but Nature's
Lay a free Road : The universal Store
Supply'd Mankind ; at large they liv'd and fed.
The willing Earth her fruitful Bosom shook,
Rich with diffusive Plenty —

Again in his *Hippolytus*, Act. ii. ver. 525, &c.

— *Prima quos mixtos deis
Profudit ætas, nullus his auri fuit
Cæcus cupido ; nullus in campo sacer
Divisit agros arbiter populis lapis.*

— — The first good Race of Men ;
Companions of the Gods and mixt with Heaven,
Not blindly led by Avarice and Gold,
Forbore to fix the consecrated Stone
To bound the Fields, and judge between the Swains.

Thus 'tis one of the Alterations which *Ovid*, *Met.* i. ver. 135, &c. describes in the Iron Age,

*Communemque prius, ceu lumina solis, & auras,
Cautus humum longo signavit limite messor* ^d.

Then first the wary Swain inclos'd his own ;
All common was before, as Air, or Sun.

These ², and the like poetical Relations, *Lactantius* ^e interprets in the following manner :

" *Nec signare quidem aut partiri limite campum
Fas erat : in medium quærebant.*

That is, God Almighty gave the World in common to Men, that they should live freely together, not that furious Avarice should claim the whole Store to itself, or that any one should want what was produc'd for the sake of all. This Saying of the Poet we ought not to take so strictly, as to imagine that in those Times there was no private Possession ; but in a figurative Sense, so usual in those Compositions ; giving us to understand, that Men were so generous and liberal, as not to shut up to themselves the Fruits of the Earth, or to lie hovering over a conceal'd and separate Store ; but that they admitted their poorer Neighbours to the common Enjoyment of what they had gotten by their own Pains. But indeed as no sensible Person will let the Poet persuade him, that these primitive Mortals had omnia in medium quæsitâ, or a positive Communion of Goods ; so the Reason which *Lactantius* assigns to those Expressions, doth not in our Judgment appear satisfactory : For as on the one

side Men were not then perhaps greatly inclin'd to Covetousness, being yet ignorant of Wealth, and finding an easy Supply of Food from Nature's Store, whilst they remain'd Strangers to Delicacies and Excess; so, on the other side, we do not see what matter they could have for Bounty, when there was no occasion to scrape up Treasure. 'Tis a good Consideration that some recommend to us, in order to a right understanding of the whole Fable of the golden Age; that the dispositions of rustic and barbarous People make them almost natural Friends to Ease and Laziness, and Enemies to Labour; that the more rude and simple way of Life any Persons are engag'd in, the less inclinable they would be to Plenty and Luxury, to Magnificence and Splendor, which commonly require much Industry and Pains^a. And that, lastly, 'tis the general Vice of old Persons to commend the Times of their young and flourishing Days, to despise for the most part present things, and what they see before them; extolling whatever comes mark'd with the Advantages of Age; and that therefore it seems very probable, those rude and ignorant Men, when the Legislators compell'd them to a Life of Manners and of Industry^b, might be very uneasy under the Change, and frequently send out a Wish for their Acorns and their Idleness. From which Complaints of their old Sires Posterity might frame their Dreams about the golden Age. This Conjecture is strengthen'd by the Character which *Salust*^b gives of the *Aborigines*, the People of those primitive Times; *They were*, says he, *a chawish Race of Men, without Laws or Government, tied up to no Order or Rule.* And *Ovid*^c himself placeth the Happiness of the golden Days chiefly in this; that Men obeyed Faith and Honesty *without Law*, and fear'd no Punishment, because no civil Societies were yet establish'd.

^a Add *Montaign's* Essays, lib. i. c. 30. *Halicarn.* l. i. p. 8, &c. Edit. *Oxon.*

^b *Catilinær. Bell. init.* Add the Character given of the same People by *Dion.* *Met.* i. ver. 103, &c. As for what follows about the perpetual Spring, the spontaneous Production of the choicest Fruits, and the Rivers overflowing with Milk and Nectar, 'tis no truer than that extravagant Rant of *Pherocætes*;

Ποταμοὶ μὲν ἀθήρης, καὶ μέλαρος ζωμῶ κλέει,
Διὰ τὴν ζενοπῶν τουθολυγῆντες ἔρθεον
Ἄνταῖοι μυζήλοιο καὶ νασῶν τρύφῃ
Φύσκαο δὲ καὶ ζέοντες, ἀλλάντων τέρμοι παρὰ
Τοῖς ποταμοῖς εἰζόντες ἐκχυνοῦτ' ἀντ' ἐσθράκων.
Ὅσταί κηχλαὶ γὰρ ἀνάβρασ ἤρτυμίνοι περὶ τὸ σῆμα
Ἐπέτουντ' ἀντιβολέσαι καταπιεῖν.

*Contentique cibus nullo cogente creatis,
Arbuteos fetus, montanaque fraga legebant,
Cornaque, & in duris hærentia mora rubetis,
Et quæ deciderant patulâ Jovis arbore glandes* c.

Content with Food which Nature freely bred,
On *Wildings* and on *Strawberries* they fed;
Cornels and *Bramble-berries* gave the rest,
And falling *Acorns* furnish'd out a Feast.

Mr. *Dryden*.

There's a famous Place produc'd on this Head from *Tully's* first Book of *Offices*, c. 7.⁶ 'Tis the part of *Justice* to distinguish between Things common and peculiar, and to use them accordingly. Now nothing is private by Nature, but as it becomes so, either by antient Possession, as appropriated by the first Occupant, or by Conquest, upon the Right of Arms; or else by Law, Agreement, Condition, or Lot. Hence come the Names of the *Arpinate* and the *Tusculan Lands*. And in like manner are private Possessions settled and describ'd. Since therefore the Things which Nature made common, have by this means been turn'd into Property, let every Man quietly enjoy his Lot: *Whoever covets more than this, shall be deem'd to have violated the Law of human Society.*

Horace is sometimes brought in, giving his Judgment amongst the rest.

*Nam propria telluris herum natura, neque illum,
Nec me, nec quenquam statuit: nos expulsi ille;
Illum aut nequities, aut vassus inscitia juris;
Postremum expellet certè vivaciter heres.
Nunc ager Unbreni sub nomine, nuper Ofelli
Dicitus erat; nulli proprius; sed cedit in usum
Nunc mihi, nunc alii.*

Lib. ii. Sat. 2. ver. 129, &c.

MR. BARB. NOTES on §. VIII.

³ Mr. *Le Clerc* has thoroughly proved, that the Men, that lived in the Times when the golden and silver Ages were said to have been, were not a whit better than those of the following Ages. See his Notes upon *Hesiod's Theogonia*, ver. 211, and what he has extract'd out of it himself in an Article added to his *Memoirs, De Treveux in March and April 1701*, Tom. i.

⁴ *Silva's* Words are, *Carique his [Trijanis] Aborigines, genus hominum agreste, sine legibus, sine imperio, liberum atque solutum.*

⁵ This Poet makes the Felicity of the golden Age partly to consist in this, That they had neither Laws nor Punishments, but every one was free, in these Lines;

*Aurea prima fata est ætas, quæ, vindicæ nullo,
Sponte sua sine lege fidem rectumque colebat.
Pæna metusque aberant.* —————

because they had no Cities.

⁶ *Tully's* Words are, *Deinde justitiæ manus est, ut communibus utatur quis pro communibus, privatis ut suis. Sunt autem privata nulla natura, sed aut veteri occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello positi sunt, aut lege, passione, conditione, sorte. Ex quo fit, ut ager Arpinas Arpinatum dicatur, Tusculanus Tusculanorum, similisque est privatarum possessionum descriptio. Ex quo, quia suum cuiusque fit, eorum quæ fuerant natura communia, quod cuique obtigit, id quisque tenet, ex quo si quis sibi appetet, violabit jus humanæ societatis.* But Mr. *de Bynkershoek*, in his *Treatise De Dominio Maris*, printed in 1703, Chap. i. believes, that about the middle of this Passage there is a Corruption, which he thus amends, *aut lege, PACTIONE, CONDITIONE, ex quo fit, ut ager FORTE Arpinas Arpinatum dicatur.* Upon this Supposition the Translation must be, *Or Law and Compact*, whence it is that the Country of *Arpinas*, for Example, belongs to that City, &c. The Reason why this Author changes *sorte* into *forte*, and puts it in another Place, is, because the parting of Goods made by Lot always supposes an Agreement publick or private. He might likewise have said, that *Cicero*, who often uses Words synonymous, and is not very exact in his Divisions, would, after he had spoken of Covenants in general, add some particular kind, as he knew is very common in the best *Latin* Authors. But then still there will a Doubt remain, whether in *Cicero's* Days the Word *FORTE* was used in the Sense, for Example, as the *Roman* Lawyers use it now. Nor is the Law which Mr. *Bynkershoek* quotes here very suitable in my Opinion to establish that Sense, for there 'tis *nisi forte*, an Expression very common, in which the last Word is not likely to signify, *verbi gratia*, *Digest.* l. vii. tit. 1. *De usufructu.* &c. leg. 9. § 7.

Nature

Nature, nor him, nor me, nor any made
The proper Master of the Stage we tread.
He turns out me; and him some vile Deceit,
Or a dull Head at Law shall send to share my Fate.
At least he one day must, with all his care,
Yield to the stronger Vitals of his Heir.
Ofellus lately gave the Farm its Name,
And now Umbrenus: None of Right may claim
The Property; the Use is passing still;
And all are Fortune's Tenants at her Will.

— *Tinquam*

*Sit proprium cuiquam, puncto quod mobilis hora
Nunc prece, nunc pretio, nunc vi, nunc sorte supremâ
Permutet dominos, & cedat in altera jura.
Sic quia perpetuus nulli datur usus, & hæres
Hæredem alterius, velut unda supervenit undam,
Quid vici profunt, aut horrea? L. ii. Ep. 2. v. 171,*
(*Ec.*)

As if the Treach'rous World had ever shown
A thing we might presume to call *our own!*
Since in one fleeting point of Time, convey'd
By Grant or Sale, to Force or Fate betray'd,
New Lords it may enrich, new Titles wear:
And thus, since none are fix'd, but Heir to Heir
Succeeds, as Wave to Wave; in vain we learn
To lengthen out a Street, or croud a uselefs Barn.

We have an Epigram of *Lucian*, Tom. ii. p. 838.
which is also recited in the *Anthologia*, much to the
same purpose: 'Tis a Farm that speaks ⁹.

Once *Achæmenides* I serv'd, and now
Menippus, and to thousands more shall go:
Each vain Possessor cheats himself a while,
But Fortune is the *Mistress* of the Soil.

The same Author hath told us as much in Prose.
Nature ¹⁰, saith he, *hath made us Lords and Proprietors of nothing; but obtaining by Law and Succession the use of things, for an uncertain Period, we pass for the ελιγοχρονοί δεσπόται, the temporary Masters or Possessors of them; and when the appointed Term is over, then another receives them from our Hands, and enjoys the same Name and Title.* But indeed these kind of Speeches refer rather to the Instability of Fortune and of human Possessions, than to the Original of Property ^a.

IX. We proceed to examine *Grotius's* Opinion;

^b in which we shall pass over what he delivers contrary to the receiv'd Doctrine of the Church, as sufficiently refuted by other Hands. He tells us then, *That God conferr'd on Mankind a Right in General to things of this inferior Nature, both immediately upon the Creation of the World, and again upon the repairing of it after the Flood.* This we allow in the following Sense, that God empower'd Mankind to use these earthly Things, *in a General Manner*; that is, without determining whether they ought to possess, either under Division, or in Common, all, or only some things; but leaving this whole Matter to the Judgment and the Choice of Men, to settle it according as they should think most convenient for the publick Peace and Welfare. But we ought by no means to suppose, that any positive Communion was at the beginning instituted by divine Appointment; from which Men afterwards departed by their own Decree; for, on the contrary, with regard to Almighty God, things were rather laid, as a Free-Stock, to be us'd in any Service that Men should apply them to. Amongst whom, so long as the very Substances of things were not assign'd to particular Persons, we must conceive this tacit Compact to have prevail'd, That every Man should take for his Occasions whatever he pleas'd, especially of the Fruits, and should consume what was in its Nature consumeable. And such a universal use of things supplied, in some sort, the room of Property; and what any Person had thus taken for himself, none could deprive him of, without Injustice. Now as the Simile borrow'd from the Theatre, which *Grotius* produceth, fitly enough illustrates this Matter ^c, so his other Instance of the *Aborigines* is not applicable, as *Justin* describes them ^d. For the Historian's Words represent some positive Communion, quite different from the primitive; as if the whole Country was indeed the Possession of the People, but not yet divided into private Estates; whilst Men rested satisfied with the Fruits produced without their Assistance, such as the vast extent of the Lands and Woods afforded them in great abundance, their Number being as yet inconsiderable: But that they gathered these Fruits into a common Store doth not seem probable. Thus far *Grotius* ^e is in the right, that were the first negative Communion to continue, without disturbing the general Peace, Men must live with great plainness and simplicity, contented to feed on what they found, to dwell in Caves, and either to go naked,

^a As *Tully*, for the same reason, affirms, *prædiorum nullam esse gentem*, That Estates are not ensured to Families and Kindred, *pro Balb.* c. 25. in fin. ^b *Lib.* ii. c. 2. f. 2. ^c *Vid. Arrian. Epictet.* l. ii. c. 4. ^d *Lib.* xliiii. c. 1. ^e *Lib.* ii. c. 2. f. 1. n. 4.

MR. BARB. NOTES on §. VIII, IX.

⁹ The Greek is thus,

Ἄγρὸς Ἀχαιμενίδε γενόμεν ποτὶ νῦν δὲ Μενίππε,
καὶ πάλιν ἐξ ἑτέρου βήσομαι εἰς ἕτερον.
καὶ γὰρ ἐκεῖνος ἔχειν με ποτ' ὤστο καὶ πάλιν ἔστος
οἶσται εἰμὶ δ' ὅλωσ ἔδενος ἀλλὰ τύχης.

¹⁰ *In Nigrino. Natura quidem nullius rei Domini sumus, lege autem, & per successionem usum earum in tempus incertum acquirentes. ελιγοχρονοί δεσπόται, temporarii possessores habemus; ac postea quam terminus ille constitutus præterierit, tunc rursus alius eadem accipiens nomine illo fruatur.*

¹ The Comparison is taken out of *Cicero de senib. bonorum & malorum*, l. iii. c. 20. *Sed quemadmodum theatrum, quæ commune sit, recte tamen dici potest, ejus esse eum locum, quem quisque occupavit; sic in urbe mundovæ communi non adæquatur jus, quo minus sumus quodque cujusque sit.* And in the Note he quotes a part of a Passage in *Seneca*, which we may see at length, §. ii. n. 16. Our Author also refers us to a Passage in *Arrian's* Discourse on *Epictetus*, where we find the same Thought, upon the occasion of that Philosopher's Saying, That all Women by Nature were common, till the Laws assigned to every Man his own. Ἄγε, τὸ δὲ θεῶνρον ἐκ ἐστὶ κοινὸν τῶν πολιτῶν, ὅτε ἂν καθίσωσιν, ἔλθων, ἂν σοι φανῆ, ἐκβαλέ τινα αὐτῶν ἔστω καὶ αἱ γυναῖκες φύσει κοιναί, ἔταν δὲ ὀνομοθετῆς, ὡς ἐπιτάτωρ, διέλη αὐτάς, ἢ θέλεισ καὶ αὐτὸς ἰδίου μέρος ζητεῖν, ἀλλὰ τὸ ἀλλοτριον ὕφαρπάξεις καὶ ληχνεύεις; l. ii. c. 4. in the end. This Example might prove to our Author, that there is no need of any Agreement to acquire a particular Right in that which is otherwise common, since every one seats himself in a Theatre, where he can, without the consent of others, who have a Right as well as he to take the first vacant place. But of this I have spoken enough in the Notes before-going.

or to cover their Bodies with the Barks of Trees, and the Skins of Beasts: Whereas, if they grew more inclined to a Life of Elegance and Refinement, the Conveniences of which must be acquir'd by Diligence; there was a necessity of introducing distinct Properties. But when he adds, *That this Communion might have lasted, had Men liv'd under the Influence of an eminent Charity and Friendship towards each other*; he confounds negative Communion with positive; such as was observed by the *Essenes* of old,^a by the primitive Christians inhabiting *Jerusalem*, and by those who now follow an Ascetick Life^b: For this can never be constituted nor kept up, except amongst a few Persons, and those endued with singular Modesty and Goodness. When Men are scattered into different places, and fixed at a distance from each other, 'twould be a foolish Labour to gather all the Provision into one Heap, and to distribute it out of the common Mass. And where ever there is a great Multitude of People, many must of necessity be found, who through Injustice and Avarice, will refuse to maintain a due Equality, either in the Labour required for the getting of the Fruit, or afterwards in the Consumption of them. *Plato* insinuates as much as this^c, when he makes only Deities, and the Sons of Deities, Members of the Republick where he would have this Communion absolutely obtain. But 'tis idle to believe, that when Men were divided into numerous Families, they neither actually establish'd, or had any design to establish such a Communion^d. Lastly, it's a true Remark of *Grotius*,^e *That things were at first turn'd into Property, not by the bare Act of the Mind, or by Thought and inward inclination*. For neither could others know what any Person intended to keep for his own, to direct them in abstaining from it; and besides, 'twas very possible that many should be Competitors for the same thing. There was need therefore of some external Act^f, or of formal *Seisin*, which, that it might be capable of producing a Moral Effect, or an Obligation in others to forbear what each Man had thus taken for his peculiar, must necessarily have depended on the force of some precedent Covenant: When things which lay together in Common were to be parted amongst many, then the Business was transacted by express Covenant. But a tacit Covenant was sufficient, when Men fix'd a Property in things which the first Dividers had left for waste^g. For we must suppose them to have agreed, that whatever in the primary Partition had not been assign'd to any particular Owner, should belong to him who first took possession of it.

X. Amongst the other Moderns, many, as to the Origin of *Property*, establish a quite contrary Notion. Let us take the pains to see what strength their Arguments afford. They acknowledge then a double Sense of the Term *Communion*, so as to

import either that which being undivided, and having its Property fix'd in many together, affords a common Service to each Person; or that which being in no manner appropriated, lies free for the promiscuous Use of all. But then they exclude from the primitive State of things, not only the former Communion (which is no more than we have done) but likewise the latter; and so deny that things were in the beginning exposed as a general Store, void of Property in every kind; and therefore (which is the consequence of this) that Properties sprung originally from Division, and from first Possession. The Reason they lay down is to this purpose; *Whatever Right that was, which either in Kind or Degree the first Man enjoy'd over other Creatures, he receiv'd it all in that very manner from his Creator. If therefore he receiv'd a bare Power of using, without any settled Property, his Descendants could not afterwards usurp a Property, without incurring the Guilt of unlawful and covetous Desire, and of arrogating that to themselves, which their Maker had forbidden them to assume*. The Answer to this is easy, from what hath been formerly advanced: Man receiv'd indeed, by the Divine Donation, a Right to things: but such a Right as was indefinite, general, and indifferent, neither restrain'd to Property, nor to Communion; and such as Men might reduce, as it were, into any particular Form, according as Reason or Necessity should advise. Whence it is also clear, that the primitive Communion did not denote a bare *Usus fructus*, but Men were at their liberty to quit it by Agreement, and to establish either Property or positive Communion in its stead. Nor is this any Consequence; the first Man did not receive or assume a Right to things in the formal Nature of Property, therefore his Posterity could not exercise it under that Formality. Neither doth that Divine Grant express'd in holy Scripture, describe any determinate manner of Property, but only and indefinite Right of applying things to such Uses as should be agreeable to the Wisdom, and to the Occasions of Men; which Right may be exercis'd full as well in a negative Communion, as in a positive. Besides, 'tis not fair thus to conclude; *Men receiv'd a Right to things from the Donation of God, therefore Property did not first arise from Occupancy and Division*. For this Donation of God only gave Men full Security and Satisfaction, that 'twas consistent with the Divine Will they should consume on their Necessities, the Works of their common Maker. But Property, strictly so called, ought to have produc'd this Effect, in relation to other Men, that none else should invade what had been adjudg'd to one particular Possessor. And here certainly there was need of some human Act and Agreement, that others might know what belong'd to every distinct Person, so as to quit all Pretensions to it, when thus

^a Of whom amongst other Authors, see *Phil. Jud.* in his Book inscrib'd, *that every good Man is free.*

Hist. Sin. l. v. c. 34.

^c LL. l. v. p. 847. Edit. *Wech.*

^d *Ubi supra*, n. 5.

^e Add *Martin.*

^f Add *Jo. Strauch.* dissert. de *Imper. Maris*, c. 1. l. 8.

Mr. BARB. NOTES on §. IV.

² An External, I grant, but not always an Actual and Corporal Possession, properly so call'd, as shall appear by what is said

^e 6. much less an Antecedent Agreement, as I have shew'd above.

³ This first Parting or Division of Goods, which our Author supposes, is a meer Chimera. Mankind never met together to regulate and order, what every one for the future should possess as his own, out of those Goods, which were before common. They possessed themselves of them by insensible degrees, one got one thing, another another; some to day, others to morrow; one after this manner, another after that. All that can be said is, that those who invaded a Country all at the same time, or were inclined to possess themselves of it, for example, did agree sometimes to part it among them for Peace-sake, and to secure themselves a peaceable possession of what fell to them. Sometimes also several persons agreed together, that one should go and search one Coast and another another, where to provide for and settle themselves.

appropriated before. A Theatre is erected by the State for the common Use of the Subjects: But that in the time of the Show, this or that Person should obtain a particular Seat, of which others ought not to deprive him, is owing to some corporal Act, that is, to his first seizing upon it. Nay, each Person may, with the consent of the Publick, acquire a Seat which he shall hold by a perpetual Right. Thus, before any human Act had pass'd capable of introducing Property, every thing must be conceiv'd to have lain free and common (in a negative Sense) to all; that is, not to have appertained to one rather than to another. But when Divisions were establish'd by express, or Possessions confirm'd by tacit Covenant, then things pass'd out of this negative Communion, into settled Properties.

If any will come so low as to assert, *That by the Dominion which God conferr'd on Men antecedently to any Acts of theirs, is meant only a potential Dominion, or a Power of taking and possessing; and consequently no more than a Dominion in actu primo; from which they pass'd on to Possession, and from Possession to Dominion in actu secundo:* These Men differ from our Opinion in Words only, not in Sense. Yet in this respect they are not sufficiently accurate, that call the Power of entering upon things, *Dominion in actu primo;* and the Right which follows Possession, *Dominion in actu secundo.* For the Power of acquiring any Right, and the Right it self now habitually inhering, yet without Operation or Exercise, are different things. As 'tis quite another case to be a Musician *potentially,* and not to use the Art, when the Habit of it hath been fully attain'd. Nor is their potential Dominion very aptly illustrated by the Example, they bring of Inheritances; *the Dominion of which, upon the Testator's Death, passeth out of the Habit, or Power, directly and immediately upon the Heir, without the Formality of taking possession.* For, besides that to pass out of a Habit, or, out of Power, is by no means the same thing; there is always a Fiction of Civil Law conceiv'd to interpose in the Case which they alledge. 'Tis the Rule of Nature, that in the transferring of Dominion from one to another, it shall be requisite for the former Person to tender what is thus convey'd, and for the latter to accept and receive it. But inasmuch as the Laws have consented, that the Will of the Testator shall remain uncertain and changeable 'till his last Breath, and shall be accounted secret 'till after his Decease; they therefore hold, as 'twere, in suspense, the Will of the deceas'd Person importing the conveyance of Goods on his Heir, 'till such time as the Heir shall have signified his Acceptance; or (as some may choose to express it) they bring back the Heir's Acceptance to the Moment in which the Testator expired, his Will being then properly fix'd and settled; so that from that time the Goods are conceiv'd to pass immediately to the Heir, as deliver'd to him. This Fiction produceth so far the Effect of Dominion in the Heir, as that he may challenge the Inheritance, even be-

fore he is actually possessed of it. And without such a Fiction^a, the Dominion would no more belong to a Man in an Inheritance before actual Entrance, than it doth in a Donation before Acceptance. And hence too, amongst Persons who live only under the direction of the Law of Nature, which is for the most part unacquainted with these Fictions introduced by civil Constitutions, there will be no admittance given to any *potestative Possession* as opposed to *actual;* nor will the bare Right and Power of acquiring Possession obtain the Name of Possession it self^a.

XI. Many have thought fit to appeal to the Authority of Scripture in this Point; whence they have suppos'd that it may be made evident, that there never was any such Communion as we have asserted, in the World: They tell us, *That the universal Miss of things pass'd immediately to Adam, by virtue of the Divine Donation; so that he held it as his own proper and entire Possession. The force of which Propriety was such, that it not only excluded all others from the universal Possession which he enjoy'd, but likewise from the Right of taking to themselves any one particular thing: Insomuch that even his Children could claim no Property, so long as they continued in the Family of their Father, unless he convey'd somewhat to them in the manner of a peculium, or separate Stock: That they became Proprietors, first, by possessing that share which he assigned them, when dismiss'd from under his Tuition; and afterwards, upon his Death, by dividing his Store amongst themselves^b.* They explain their Notion in this manner: *The Form of God's Grant conferr'd a Right only on the primitive Pair, before they had Children. Therefore either the Property of things was given to Adam and Eve originally, so that their Descendants were to derive from them all their Title to any Possession; or else the whole World was, in the Person of Adam, bestow'd in common on all Mankind. The latter of these as it implies several Difficulties, so it is particularly repugnant to the Right of Occupancy, which obtains only in things void of a Possessor. For if the entire Miss was given to all Mankind, it doth not appear, how a particular person could by seizing any thing to himself, convert it into his distinct Property, exclusive of human Race in general, or, so as to hinder Men from making any Pretensions to it by virtue of their common Right. For such is the Nature of things which lie in common, and which admit only of undivided Shares, that every single Atom of their Substance is no less common, and no less undivided, than the whole; so that if any private Man apply it to himself alone, he is an injurious Robber of the Community. But now, they who defend a primitive Communion, confess that the first Occupants of things did by that Act acquire such a distinct Right over those things, as excluded the Right of all others to the same. What Reply may be made to all this, is evident from the Assertions already confirm'd^c. The divine Donation confer'd on Man a Right of applying other Creatures to his use; which Right was indifferent to positive*

^a Vid. *Strauch. de imp. mar. c. 1.*

^b *Comp. Ziegler. ad Grot. l. ii. c. 2. f. 2.*

MR. BARB. NOTES on §. X, XI.

^a So the Civil Law speaks, *Omnis hæreditas, quamvis postea adeatur, tamen cum tempore mortis continuatur,* Digest. L. 1. tit. 18. *De divers. Regul. Juris,* leg. 138. See c. 9. §. 2. following.

^b Mr. *Hertius* observes here, that this permission which was given to *Adam,* and renewed to *Noah,* does make no mention of any thing but living Creatures, as I have already observed above, §. 4. Note 3. out of Mr. *Lock,* of whom it appears from other places, that Mr. *Hertius* had seen the Treatise of Civil Government in the French Translation which was printed in 1691.

Communion, or to Property; being of necessity to be turn'd into one of these, before it could take any Effect with relation to other Men. And therefore when others add further, *That the common or publick Dominion of Mankind over things was given by God, under Condition, that they should parcel it out, and constitute it private; for which reason, it neither can, nor ought to be conceived without a respect and tendency towards private Dominion, so to be established as was agreeable to a rational and a social Nature:* This we may without any inconvenience interpret on our side. That is, God by his first Grant plac'd things in a negative Communion: But since that was unable to procure the safety and peace of Society, when human Race was multiplied, and Life began, by the Arts of Industry, to be polish'd and improv'd, Men easily apprehended that 'twas the divine Pleasure they should introduce distinct Properties. In order to the actual Settlement of which, it was requisite that some Transactions and Agreements of Men should precede. For that a thing should be appointed by the Will of God, and yet should not be introduced but by some antecedent Compact of Men, ought not to be look'd on as an inconsistency: As it is certainly none, that God would have Mankind propagated by Marriage, not by uncertain Lust; and yet Marriage is not actually contracted between particular Persons without some Covenant passing before. Farther, since positive Communion and Property both imply a relation to other Men, it can with no manner of accuracy be said, That all created things were proper to Adam; but only thus, That he held the Dominion of all things, not *formally*, but *permissively*; inasmuch as there was then no Right of any Person else to interfere with his, and to hinder him from converting every thing to his own Use, had there been occasion. When God was pleas'd to give him a dear Partner and Companion, they agreed to hold this indefinite Right over things without dividing it: as being united to each other in the strictest Band of Society: For which Reason many Nations at this Day observe a Communion of Goods between the Husband and the Wife. Nor was there any need of separate Properties, so long as Adam's Children, being yet in their Minority, were to be maintain'd by their Father, and made but one House. For though in the use of things, they were at that time obliged to conform to their Father's Pleasure, yet this proceeded not from his *Dominion* (strictly speaking) over the *Things*, but from his paternal *Power* and *Authority* over the *Persons*. Therefore the *Property* of things came then to be distinct, when by Consent of the Father the Sons fell into separate Families; which Separation was undoubtedly owing to the Emulation between Brothers; and to another good Reason, that every one's own Industry might be his own Advantage; as the Idleness of others might be a Punishment only to themselves. Nor must we believe that the whole World was presently shar'd out amongst that small Number of Persons; or that all things were turn'd into *Property* by one Act, and at one time. But it was suf-

ficient at first to fix a *Property* in those things, which either afford an immediate use, not capable of being divided amongst many; as Cloaths, Cottages, and Stores of Provision already gather'd by particular Men; or which require Industry and Improvement to make them fit for Service; as Household Goods, and Instruments, Cattle and Fields². By degrees, what remain'd was brought under the same Condition; according as either the Inclination, or the Number of Men directed and advis'd. Thus the Pasturage continued a great while in its first and common State; till upon the abundant Increase of Cattle, Quarrels arising, the Division of this likewise was made necessary to Peace and Concord. As for that part of the Argument, *That the Right of Occupancy cannot be admitted, where Possession belongs to a general Body;* this will hold good against those who pretend any positive Communion to have been the primitive State of Things; in which indeed no private Person can take any thing to himself, exclusive of the whole Society. But the primitive Condition in which we have plac'd things, is equally distant from positive Communion, and from Propriety in the strict sense of the Word: And we assert, that before Occupancy can produce Dominion, it is necessary that some Compact (a tacit one at least) should have been first settled to that Effect.

XII. Others form their Scripture Account of the Origin of Dominion in this manner: *That God gave our first Parents that common Dominion which he design'd for all Men in general, to be held undivided; inasmuch as the primitive Pair represented the Person of all human Race: In which sense it may still rightly enough be said, That the Dominion of the World, or of the things in the World, as they are capable of passing into Property, belongs to Mankind. But this common Dominion doth not exclude private; since we neither can, nor ought to conceive it without a respect and tendency to private Dominion, so to be constituted as should be agreeable to a rational and a social Nature. But in Adam the latter of these Dominions met in Conjunction with the former, excluding his Children without any previous Cession or Surrendry².* Now, as to this Account, we will make no Quarrel about words; that is, we allow the Name of *common Dominion* to what we ourselves have rather chose to call a Right of using the Creatures, inherent in Men by virtue of the Divine Concession; provided this *common Dominion*, consider'd by itself, be suppos'd to obtain no Effect between Man and Man. On which Point we have before affirm'd, that Men might have rested satisfy'd with that Right of using things as they lay in common; and that 'twas not necessary separate Dominions should immediately be introduc'd, so long as Men were yet few in number, and follow'd a simple unimprov'd way of living; but when their Race was considerably multiplied, and when Industry had advanc'd the Conveniences of Life, then the necessary Regard to the Preservation of Society recommended the Distinction of Properties; yet so as that things did not pass all at once into this Condition, but successively, accord-

^a Vid. *Bæcler. ad Grot. d. l.*

MR. BARRÉ'S NOTES on §. XI.

² It appears from the Sacred History, that in *Abraham's* Time Men went from one Place to another with their Families, Servants, and Flocks, which were their Riches. We also see that Patriarch followed that Custom in the Land, wherein he was a Stranger. So that at that time great part of that Country was common, and when there was not room enough in one place to feed the Flocks of divers persons, they parted by common Agreement, as *Abraham* and *Lot* did. 'Tis also observ'd, that the most antient Inhabitants of *Greece* lead such a wandering Life, about which consult the Historical Explication of the Fable of *Ceres* by Mr. *Le Clerc* in the *Bibliothec. Universel.* Tom. 6. p. 104, 105.

ing as the occasional Methods of Peace and Agreement seem'd to demand. But that *Adam* held a *private* Dominion over all things, before his Sons had left him, to set up Families of their own, is a very negligent Assertion.

For first, private Dominion always takes its Rise from some human Act; therefore *Adam* could not have such a Dominion over those things, which he was so far from having taken Possession of, that they did not so much as fall under his Knowledge.

That Place of the *Civil Law*¹, L. iii. §. 1. *D. De adquir. possess.*² is very unfitly applied to the present Business; as if *Adam*, by setting his Feet on one part of the Earth, should be suppos'd to have taken Possession of the whole World. If any one persists in giving the Name of Property to that Right of using things which Men receiv'd by the Grant of their Creator, then we might admit what these Authors lay down, That Property was the Cause of Occupancy and Division; or that it was therefore lawful for Men to challenge things to themselves by laying hands upon them, and by parting them into separate Shares, because God had given them a general Commission to apply other Creatures to their own Use. But if we take the Word *Property* in its strict and general Sense, as it denotes the Exclusion of all others from a particular thing already assign'd to one; then 'tis altogether true, that *Division* and *Occupancy* are the Causes of *Property*. Farther, *Adam's* Children, whilst they yet continued part of their Father's Family, were bound indeed to obey his Pleasure in regard to their use of things; yet this, as was before observ'd, proceeded not from the Force of any private Dominion in *Adam*, but from the Force of his paternal Power. For whilst they were young and helpless, he was oblig'd to maintain them. And when they were capable of doing some Service, still the same paternal Authority required both that in using the common Store they should be guided by their Father's Directions, lest they should incur any Mischief by Intemperance; and likewise that such things as they had either gather'd from a spontaneous Growth, or had produc'd by their own Industry, they should deliver into the Hands of their Father, to be given out as he should think fit: And he, so long as he enjoy'd this Right, was bound to provide Necessaries for his Children, even after they were arriv'd at Maturity, as Time and Occasion should require. And hence, if any one of his Sons should, for instance, contrary to his Prohibition have privately feasted with too much Greediness on some particular Fruit, the Youth had been by no means guilty of Theft, but of Disobedience to his Father's Command. Or, if *Adam* had order'd one that was grown up to gather Provision for the Sustenance of a young Brother, and the Party thus employ'd had either devour'd it himself, or laid it up secretly for his future Use, he deserv'd Correction, not for Theft, but for violating the Charge which his Father laid upon him. During this Period therefore, neither *Adam* nor his Children had any *private* Dominion:

The Right of *primitive* Communion was sufficient for his Turn; and as for *them*, they in the Exercise of the same Right depended on his Care and Guidance. So that *Adam's* private Dominion then began, when he dismissed his Sons from under his Tuition, and gave them leave to erect separate Families for themselves.

XIII. Let us consider too the Arguments of those who maintain that this *primitive* Communion was impossible^b. They say, That such a Communion neither could have been, nor ought to have been, in the State of Innocence; because as every Order and Method is conformable to right Reason; so the most comely Order of possessing those things, the Dominion of which God had granted to Mankind, agreed in an especial manner to that State, in which the Virtue of abstaining from what was another's deserv'd to bear an honourable Name. Whence the Decalogue, as it establisheth the Duty of forbearing the Goods of others, so it secures every one in the Enjoyment of a certain and separate Possession. To this we answer,

First, That we can have no such clear Evidence what kind of Life (with respect to these external things) Men would have led, had they continued in their first sinless Condition; and consequently whether the Community, or the Propriety, of things would have been most suitable to that State.

But farther; we may venture to make it a Question, whether it be not a higher Degree, a greater Perfection of Virtue to enjoy quietly a common Provision, and to desire no particular Advantage above the rest who have the same Title to it, than to abstain from the distinct Portion of others?

Lastly, Whatever we are to say as to the Eternity of the Law of Nature, thus much is certain; That there's no Necessity every Object of that Law should have always existed^c, many of them proceeding, in the course of Time, from the Agreements and Institution of Men: Thus the Law against Murder had no Object, whilst *Adam* was the only Person in the World; nor the Law against Adultery, whilst none of his Sons were arriv'd to Man's Estate; nor the Law against Theft, before the Division of Things; nor the Law against bearing False-witness, before the judicial Processes were introduc'd; nor the Law against covering the House, the Man-servant, or Maid-servant, of others, whilst they lodg'd in Caves, and e're Servitude was establish'd; nor lastly, the Law of honouring Parents, before *Eve* was a Mother^c. They proceed to tell us, That neither was such a Community possible in the State of Men after the Fall: First, Because we can't so much as form any Nation of it in our Mind: For Grotius so describes its Laws and Rules, as that every Person might immediately seize for his Use what he pleas'd, and might consume any thing that was consumable. But such an Exercise of the general Right serv'd then instead of Property: for what any one had thus seized, none else could take from him without Injury. Therefore this Notion establisheth a Property in Community, and consequently implies a Contradiction; the only End and Effect of Property being this, That one Person should not rob and plunder

^a Vid. l. xli. tit. 2. *D. De acquirend. vel admittend. possess.*

^b *Nid. Boecler. ubi supra.*

^c See above, l. ii. c. 3. §. 22.

Mr. BARB. NOTES on §. XII, XIII.

¹ This Law will be quoted, c. ix. §. 7. n. 7. following.

² See l. ii. c. 3. foregoing §. 22, 24. and the Author's Preface of his Abridgment of the Duties of a Man and Citizen, §. 8, 9. in the *French* Translation printed at *Amsterdam* in 1707.

another. But here they vainly pretend a Difficulty where there is none: For antecedently to any human Act, and to the use of any thing in the World, when the bare Case is thus, That each thing belongs no more to one Man than to another, and consequently belongs alike to neither; the primitive Communion bears a different Aspect from what it hath, after Men begin to lay hands upon the general Store, and to imploy it in their Service; Since in the latter Case, by virtue of a previous Covenant, whatever any Man hath seized for his private Use, becomes his Property. Otherwise Men must altogether abstain from the Use of things. Hence in this *qualified Communion*, as we may call it, the Substances of things belong to none, but their Fruits become matter of *Property*, when gather'd. This Notion of *Community*, temper'd with such a degree of *Property*, may, we think, be easily apprehended by Persons of no very nice or philosophical Heads. To give a plain Instance: The Acorns were his that took the pains of getting them, but the Oak had no particular Owner. Thus much being laid down, the way is the better clear'd towards answering what they farther object. They pretend, that *such a Communion could not possibly last one Moment of Time, that it was contrary to the human or rational Nature, savage, and unsciable; and consequently is capable of affording no other Use, than that from it, as a feign'd Hypothesis, may be shewn the Necessity of a distinct or private Dominion in a civil State.*

It's true, this *Communion* consider'd precisely in itself, and before any Application and Exercise of it, could not subsist, unless Men could have always walk'd naked, and liv'd without eating. Yet why it should not subsist, when thus qualified with a mixture of *Property*, there was nothing to hinder whilst the number of Men was yet few, and their Life plain and unrefined. It is certain however, that the more Mankind was multiplied, and the more Life was improv'd, the greater Necessity there was of appropriating more things than before. Hence those People lead but a rude and barbarous Life, who make the nearest Approach to the primitive Communion; those, suppose, who live on Herbs, Roots, Fruits of chance growth, and what they take in hunting and in fishing, and who claim no other Estate and Wealth than a Cave with its wretched Furniture. Farther, when we assert that all things were by Nature negatively common, we don't mean that the Law of Nature commands Men perpetually to preserve such a State; but that things, if consider'd antecedently to any act of Men, were so dispos'd, as that no one Person should claim them rather than another. On the other side, in affirming that Men left this Communion upon the advice and direction of Reason, we pretend not that it was necessary all things should be appropriated in the same Moment; but according as the Temper or Condition of Men, the Nature of the things themselves, and the difference of Place required; and as was judg'd most convenient for the cutting off all manner of Quarrel or Dissension. And therefore,

neither are we, who are utterly banish'd the primitive Communion, nor those barbarous Nations which still retain many Foot-steps of it, guilty in this respect of a Breach of the Law of Nature. Thus too, what they add hath little Difficulty: *After the Fall, say they, Men could not live without Law, and yet maintain a social Life; therefore, neither without the distinction of Properties; since the Communion of things is inconsistent with Law, which is wont to assign and distribute particular Possessions.* But since all Laws do not presuppose separate Dominion, why might not those others be observ'd so as to keep up a Life of Society under that *qualified Communion*? Tho' it must be confess'd, that before the Division of Properties a very few Heads of Law might have been sufficient for the Government of Mankind. Therefore when *Servius*, in his Observations on *Virgil*^a, reports it as the Reason why *Ceres* was by the Antients called *Legifera*², and her Rites *Thestophoria*, because she is said to have been the Fountress of Laws; inasmuch as before the Invention of Corn Men wander'd about without Law or Government; which wild Condition was taken off, after Corn came into use; and after Laws had been instituted upon the Division of Land. This Account ought not to be admitted without some Limitation. Indeed a more pompous Train of Laws became needful after Proprieties were fixed, Men being ruled before by a small number of Ordinances; yet Communion consider'd by itself, doth not render Life altogether lawless and unsciable, but only more simple and unpolish'd; and, as it were, not well settled and compacted. As for *Platonical Community*, it hath nothing to do with the Case before us; it being professedly positive, and extended not only to Goods, but to Wives and Children.

XIV. We may hence discover in what Sense we are to take that Assertion laid down by some Authors, *That Property and Dominion belong to the Law of Nature, strictly so called, and which is written in the Minds of Men.* Where 'tis to be observ'd, that this Expression, *such or such a thing belongs to, or is of the Law of Nature*, hath a different Meaning, according as 'tis spoke either of any express or immediate Command, or else of some Custom or Institution establish'd in human Life. In the first Sense it imports, that the Law of Nature enjoins the doing, or the not doing of such a Matter: In the second, that sound Reason adviseth the Reception and Settlement of such a thing amongst Men, from the general Consideration of a social Life. For as for those Customs or Regulations which are introduc'd for the particular Advantage of separate Commonwealths, such are said to proceed from *civil* or *positive* Law. When therefore 'tis demanded whether or no *Property* owes its Original to the Law of Nature, the latter Sense of the Word is to be regarded, and not the former: That is, inasmuch as a social Life is the very Foundation of a natural Law, and since it is at the same time sufficiently evident from the Temper and Genius of Mankind, that in a great Multitude, where all join their Endeavours

^a *Æn.* iv. ver. 58.

MR. BARB. NOTES on §. XIII.

² *Legifera Ceresi.*] *Leges enim ipsa dicitur invenisse. Nam & sacra ipsius Thestophoria, i. e. legum latio, vocantur. Sed hoc ideo fingitur, quia ante inventum frumentum à Cerere passim homines sine lege vagabantur, quæ ferias interrupta est, invento usu frumentorum, postquam ex agrorum discretione nata sunt jura. Servius ad Æneid. iv. ver. 58. See also Callimachus's Hymn. in Ceres. ver. 19. and Baron Spanhemius's Comment on it, as also the historical Explication of the Fable of Ceres by Mr. Le Clerc in Tom. vi. of his Bibliothec. Universal. p. 106.*

towards improving Life with various Inventions, the Peace and Beauty of Society could not be kept up without distinct Dominions of things; such Dominions were therefore settled; and this very rightly and agreeable to the Aim of nature's Laws, human Affairs plainly requiring it to be done. And after this Establishment, the same Law commands the observance of every thing that may conduce to the End for which these private Dominions were erected: Yet was there no express and determinate Command of the Law of Nature, by virtue of which all things ought to be brought under *Property*, immediately upon the Origin of Mankind, or in all Places alike; but *Property* was gradually introduced, according as it appear'd requisite to the common Peace. But the Precept of Nature about abstaining from what is another's then first began to exert its Force, when at length Men, by mutual Agreement, had mark'd out and appointed what should belong to others, and what each Person should claim as his own. Before this time it lay conceal'd (as it were virtually or potentially) in that general Precept which enjoins us to stand to our Covenants, and not to injure the Right of our Neighbour. Not is it any Absurdity to affirm, that the Obligation we lie under, not to invade the Goods of others, is coeval with human Race. And yet that Distinction of *meum* and *tuum* was afterwards ordained. Thus we are often bound to yield Obedience, before we know what will be enjoin'd: As when we have an Obligation in general to follow the Directions of some certain Person in all things that he shall hereafter require us to perform; or when we may suppose several particular Commands to be implied in some general Rule ¹.

XV. 'Tis needful in this place to add a word or two concerning the Subject of Property; on which Head the principal Question is, Whether those are capable of being Proprietors, who have not the use of Reason, as Infants and delirious Persons? Now here it is certain, that neither of these can originally acquire the Property of any thing, or make it their own by taking immediate Possession of it. The Reason is, because in this Method of acquiring Property the Intention of the Acquisitor is necessary, signifying that he will for the future hold such a thing as his own; and he should at the same time be able to understand, that such an Act is effectual towards the creating a Right in him. But this cannot be supposed in the Persons of whom we speak. Yet, as to the obtaining the Property of such things as are deriv'd upon them from others, the Case is

different. For tho' here likewise, to make a thing pass to me from another, 'tis in the common and regular course requir'd, that I have an Understanding able to judge of what is done ¹, and to shew by Signs proceeding from real Intention, that I am willing to receive such a thing, and to keep it to my self; yet 'tis the receiv'd Practice of all civiliz'd Nations to permit Children in their most tender Age, and even before their Birth ², to receive and to retain a Property descending to them: And this is no more than what natural Reason and Equity advis'd; inasmuch as the things which Men usually appropriate, belong to the Use and Service of Life, and are no less necessary for Infants than for grown Persons; nay indeed somewhat more necessary for the former; who, by reason of their Weakness in Body and Mind, cannot so well provide for their own Occasions. In Infants therefore a presumed Consent is judg'd equivalent to a formal Acceptance; it being taken for granted, that no one will refuse what conduceth to his Benefit: Yet on Account of their Immaturity of Judgment, the Possession only, and not the Exercise, of this Right could be confer'd upon them. The general Customs of Nations in their Favour might allow them to hold, but not to use any thing by their own Disposal ³. However, lest their Right should by this means come to nothing, Humanity farther requir'd, that Persons of Years and Discretion should act as their Representatives, in the Management of their Goods, till they are capable of understanding it themselves. This Management is either committed to a certain Person by him who transfers the Goods upon them; or, in civil States, the Matter is settled by Direction of the Laws, and of the Magistrates; or, where both these Provisions are wanting, nearness of Blood, or of Habitation, or the bare Law of general Kindness, recommends the good Office to fit Hands ⁴. But all Persons who have engag'd themselves in this Case, by what means soever they came to be entrusted with it, are oblig'd to discharge it with the utmost Fidelity; in regard to that tender Age, insufficient for its own Guidance and Defence. Therefore *Hesiod* ranks in the same Class of Sinners him that hath hurt a Stranger, or one that sued to him for Protection; him that hath defil'd his Brother's Bed; him that hath used rigorous Treatment toward an antient Parent;

Ὅς τε του ἀρραδίης ἀλιταίνεται ὄρφανὰ τέκνα.

Op. & Dier. l. i. ver. 330. Edit. Cleric.

And him whose Fraud the Orphan's Hope beguiles;

¹ Vid. l. vii. c. 26. *D. De Statu hominum*, l. iii. *D. Si pars hæred. petatur.*

² *Gal. iv. 1.*

MR. BARB. NOTES on §. XIV, XV.

¹ See l. i. c. 6. §. 2. foregoing.

² See l. i. c. 1. §. 7. foregoing, and l. iv. c. 12. following §. 10.

³ On this occasion we may mention the Law of *Charondas* (recorded by *Diodor. Sic. l. xii. c. 15. p. 81. Edit. Rhetor.*) which assigns the Goods of Minors to the Care of the Kindred by the Father's Side, but their Persons and the Business of their Education to the Kindred by the Mother. Judging it probable, that the latter, to whom the Inheritance could not descend, would make no Attempt on the Life and Safety of their Wards; and that the former would have no opportunity for any Design against their Persons; and yet at the same time would be very diligent in managing their Fortunes, because after their Death, whether natural or casual, the Estate would fall to themselves.

So also *Publius Syrus*,

Male secum agit æger, medicum qui hæredem facit.

He that makes an Heir of his Physician,

Is a good Patient, but a bad Politician.

Diogenes Laert. (in *Solon*) gives us a Law of *Solon's* much to the same purpose; ordaining, That no Guardian should cohabit with the Mother of his Ward, and that he should be incapable of the Guardianship, to whom the Estate fell upon the Minor's Decease. See also *Menage* upon this Passage of *Diog. Laert.*

Plato³ in his Books of Laws (lib. xi. p. 972. *Edit. Weckel.*) calls Orphans, *The greatest and most sacred Charge*: Where he likewise offers many Considerations about the Duty of Guardians. Yet that a Man should sustain this Office and Trust without Reward, or with Expence, Humanity and Equity do not always require. *Grotius* and his Commentators, *viz. Bacler, Ziegler, and Felden* may be consulted farther on this Subject, in their Observations

upon *Grotius*, B. II. l. iii. c. 6. where they endeavour to prove, contrary to his Judgment, that Infants have a Propriety in their own Goods, not only in respect of the first Act, or Right of possessing, but also in respect of the second Act, or administration of their Goods by themselves; for say they, "The Guardians have only the bare Management of the Right and Goods of another." In all appearance this contest is about words only.

MR. BARB. NOTES on §. XV.

³ His Words are Παρκαταθήκη μεύσει, καὶ ἰσοτάτη, where are also divers other things of the Duties of Guardians. See also Mr. *Daumar's* Civil Laws in their Natural Order, Part I. l. ii. tit. 1. and the Interpreters of the *Digests*, l. xxvi. tit. 1, &c. By the Civil Law a Guardian, who was convicted of unjust Dealing, was expos'd to Disgrace, if he was guilty of wilful Knavery; but if it appear'd that his Fault proceeded from Negligence only, though gross, he was not; as Mr. *Noodt* very well proves in his *Probabilia Juris*, l. i. c. 13. against the common Opinion of the Doctors, who affirm'd, that the Punishment was to be inflicted in both Cases alike.

CHAP. V.

Of the Object of Dominion or Property.

- I. What is requir'd to make things our own.
- II. Things consumed in their use are in vain made our own.
- III. A thing become our own should be capable of keeping.
- IV. The use of some things made our own is common to all.
- V. The divine Grant is not contrary to our Dominion over the Sea.

- VI. Reasons against all Property of the Sea.
- VII. What the use of the Sea is.
- VIII. What Parts of the Sea are made a Possession.
- IX. The main Ocean can't be in any Man's Dominions.
- X. How far Navigation and Commerce on the Sea is free.

WE are in the next place to enquire into the Object of *Property*, or to examine what things are capable of coming under that Condition. Now to give a thing this Capacity, we judge these two Qualifications to be necessary¹: *First*, That it be able to afford some use to Men, mediately or immediately; by itself, or by its connexion with somewhat else: And *Secondly*, That it be some way or other so far under the Power of Men, as that they may fasten on it, and keep it for their Occasions. And farther, since *Property* implies a Right of excluding others from your Possession, without which Right would be altogether insignificant, if it could

not be effectually exercised; 'twould be in vain for you to claim that as your own, which you can by no means hinder others from sharing with you.

II. Yet some things there are, which, tho' very beneficial to Mankind, yet by reason of their vast Extent, are inexhaustible, so that all may enjoy them together, and yet no Man suffer in his particular use. To appropriate things of this Nature, would be malicious and inhuman: And on this account 'tis usual to attribute an exemption from Property¹ to the Light and Heat of the Sun², to the Air, to the running Water, and the like³: Although since Nature, by denying Men Wings,

¹ *Petron.* "Is there any one of the most excellent Works of Nature, which she hath not made common to all the World? The Sun shines with an universal Influence. The Moon, attended with her numberless train of Stars, lights the very Beasts to their Food. What is there in Nature more bright and beautiful than the Waters? Yet they flow for publick Use. *Lutona* thus pleads in *Ovid*, *Metam.* l. vi. ver. 349.

*Quid prohibetis aquas? usus communis aquarum est;
Nec solum proprium natura, nec aera fecit,
Nec tenues undas; ad publica munera veni.*

What Rudeness Water for my Use denies,
Whose endless Store the common World supplies?
Nor Light nor Air did Heaven create for One,
Nor gentle Streams: I crave a publick Boon.

MR. BARB. NOTES on Chap. V. §. 1, II.

¹ It is very hard to bring an Example of any thing altogether usefess, as Mr. *Thomasius* observes in his *Jurisprud. Divin.* l. ii. c. 10. §. 125. It is sufficient, in my Opinion, that we find some pleasure in possessing, and so all that we enjoy is in some measure useful. I think then, that this Condition ought to be omitted as superfluous.

² *Cajacius* in his Observations, l. x. c. 7. brings two Examples; the one of the shadow of the Plane-tree, the other of the Air; upon which a Tax was laid. The one is found in *Pliny*, l. xii. c. 1. The other is in *Cedrenus*, who relates it of *Michael Palaeologus*. See Mr. *Selden's Mare Clausum*, c. 21.

³ Nothing hinders nevertheless but we may appropriate these things to ourselves in some manner, as to such an extent as is contained within our own Lands. Our Author himself falls voluntarily upon the Subject of running Waters, l. iii. c. 3. §. 4. But we must say, that by the Laws of Humanity we are obliged not to deny any Man the lawful use of these Things, *Titius Observ.* 287. See also Mr. *Thomasius's Instit. Jurisprud. Divin.* l. ii. c. 10. §. 127. I observe also, that our Author follows that Notion in his *Elementis Jurispr. Universit.* p. 84. See also §. 4. following.

⁴ *Petronius's* Words are, *Quid autem non commune est, quod natura optimum fecit? Sol omnibus lucet. Luna innumerabilibus comitata sideribus etiam seras ducit ad pabulum. Quid aquis dici formosius potest? in publico tamen manant, c. 100.* See *Ovid Metamorph.* vi. 349. The Roman Lawyers say positively, that these sorts of things are common by natural Right. *Naturali jure communia sunt omnibus haec; aer, aqua profluens, & mare, & per hoc littora maris*, *Instit.* l. ii. tit. 1. *De rerum divis.* &c. §. 1. They also call them publick, in the same sense, tho' they ordinarily make a distinct kind of them. See Mr. *Noodt's Probabilia Juris*, l. i. c. 7, 8.

hath made the use of the Earth necessary to their using the Light; hence it comes to pass, that some Persons may be utterly debarr'd from the latter; as Criminals, for instance, in their Dungeon. In like manner, since the Air is in some places more clear and pure than in others, in this respect the value of a place may be enhanced. As we see Men who allow pleasure any share in their choice, very highly regard the prospect of Buildings, or of Lands, and especially of the former: For which reason those *Services* ⁴ have been introduc'd ^a, of not raising a Building higher; of Lights, and of not hindring Lights; of Prospects, and of not hindring Prospects. So though on other accounts no one will pretend to fix a Property in the Wind ⁵, yet we may appoint a *Service* or Duty of not intercepting the Wind to the prejudice of our Mills ⁶.

III. We are likewise to observe, That as the Substances of those things which Men have Dominion over, are compos'd of different kinds of Matter; so each thing is taken and possess'd in that way which the condition of its Nature admits: For the more closely any thing can be confin'd, and as it were shut up, the more easily will it produce the effects of *Property* against the Claims of others. And consequently, the more capable a thing is of being guarded from unjust Invaders, the greater Security we promise our selves in the Property of it. Yet, as we are not immediately to conclude a thing exempt from Property, because it cannot without some trouble be kept from other Hands; so in case a thing be in so wide a manner spread and diffus'd, as that either 'tis morally impossible it should fall under any method of keeping, or that it cannot be kept without much greater charges than the Fruits and Advantages of it would countervail, it is not to be supposed, that any Person desires to fix a Property which can bring him nothing but Burthen and Expence in defending it ¹. Though, to render a thing capable of being appropriated, it is not strictly necessary that we should inclose it, or be able to inclose it within artificial Bounds ², or such as are different from its own Substance; 'tis sufficient if the compass and extent of it can be any way determin'd. And therefore *Grotius* hath given himself a needless Trouble, when to prove Rivers capable of *Property*, he useth this Argument, ^b *That although they are bounded by the Land at neither end, but united to other Rivers, or the Sea, yet 'tis enough that the greater part of them, that is, their Sides, are inclosed.*

^a See hereafter. c. 8. f. 6.

^b Lib. ii. c. 3. f. 7.

^c Comp. *Zeigler ad Grot.* l. ii. c. 2. f. 3.

MR. BARB. NOTES on §. II, III, IV, V.

⁴ The Author will treat of this, c. 8. §. 6. following.

⁵ See l. v. c. 1. §. 5. following.

⁶ See Mr. *Thomasius's* Discourse, entitled, *Non ens Actionis forensis contra æmificantem ex æmulatione*, §. 28. Mr. *Tulius* treat in general of the Right of Mills, in his *Jus Privatam Romano-German.* l. viii. c. 16.

¹ We cannot when we will. The Will alone doth not suffice here; we must besides this be inclinable to get the possession of the thing, and moreover, the thing it self must be of such a Nature, as to be possess'd in some manner or other. We may then upon a thing, that we may possess it; and nothing is more ridiculous, than to pretend to possess what we can't either make nor preserve in any sort.

² The Bounds of a thing made our Property, are the same with those of Possession. Whatever a Man is seiz'd of, it belongs to him so far as he hath possession of it; and how far he is actually possess'd of it, is easy to determine. See Mr. *Episcopius's*, *De Dominio Maris*, c. 9. p. 69, 70.

¹ This Reason is of force only when a thing is joined with an impossibility of possessing it. For on this account alone, that a thing is in so great an abundance, that whatever quantity we take of it, others have enough still remaining, it follows on the other side, that we may appropriate as much as we will, or can possess, since every one may do the same in their turn, and no Man loseth any thing. I am surpris'd that our Author made not this Remark.

¹ The most considerable are *Grotius* in his Book, entitled, *Mare Clavium*, and *Selden* in his Book, entitled, *Mare Liberum*. A few Years since Mr. *Baynes's* publish'd a Discourse, which I have quoted several times before; in which, tho' 'tis short, this Matter is treated of, in my judgment, more exactly, and with more Elegancy than it was ever yet. It was printed in 1723, and is to a Commentary upon the Law of *Ribon*, *De Jacta*.

IV. Lastly, we farther discover, that the use of some things is confin'd, as it were, within narrow Limits, and cannot admit of Shares; the appropriation of which was highly expedient to the peace of Mankind.

Again, There are things, which as they afford us different Uses, may in regard to some Uses be spent and exhausted, and yet in regard to other Uses yield a never-failing abundance. Now, as on the one side, there is no reason why such things as those should not be brought under *Property*; so, on the other side, the Law of Kindness and Humanity forbids us to deny the inexhaustible Use of them to any Person that in a friendly and peaceable manner desires it. But if any thing could be found inexhaustible in all its Uses, 'twould be absurd not to leave that in its primitive Community. Indeed in a positive Community, if the Object be sufficient to serve all, when divided, nothing hinders but that we may divide it; if it would not be thus sufficient, 'tis best to possess it still without Division: But that a thing lying in common to Mankind, and sufficient for the promiscuous Use of all ¹, should be shared out into distinct Parts, is certainly repugnant to Reason. The Earth is of such a magnitude, as to serve the Occasions of all People in all Uses to which they can apply it; yet it would not thus serve them, were it possess'd, without Division, by so vast Bodies of Inhabitants as it now contains: Because it could never afford them Sustainance, unless manur'd and improv'd. Therefore there is plainly this particular Reason, why the extent of the Earth should not hinder its being divided; and yet the same Reason would make the division of the Ocean appear a ridiculous Absurdity ².

V. Indeed all other things have little difficulty in this Point; but as to the Sea, whether or no that be capable of *Property*, hath been disputed by the greatest Genius's of the present Age. On which controversy 'tis easy to remark, that many of the *Writers* engaged in it were more guided by their Affection to their Country, than by their regard to Truth. Yet by these, and by others who have shewn themselves more dis-interested and impartial, the whole Subject hath been so fully discuss'd, that 'tis hard to say any thing that others have not already offer'd. We may therefore be allow'd to use more Brevity on the Question before us; the *Authors* ³, who have thoroughly canvass'd it, being so universally read. This then is manifest, that the same Divine Grant which first gave Man a Right

of affirming the Sovereignty of the Earth, includ- ed likewise the Sea. The Commission as well runs, *have Dominion over the Fishes of the Sea, as over the Beasts of the Land.* And we cannot conceive any Supremacy and Rule over Animals, without a Right of using the Element which they inhabit, according as the Nature of it will allow. Indeed mention is likewise made of the Fowls of the Air, yet since we cannot move and support our selves in that Element alone, therefore we are unable to exercise Dominion over the Air any farther than we can reach while we stand upon the Earth. But on the Sea we stretch our Empire much farther, by the means of Ships, now brought to their highest Perfection; which are not only serviceable in transporting Burthens, but likewise carry *Mus* through the Kingdoms of *Neptune* in a far more dreadful Array, than he is attended with when he rageth by Land. No one is now so superstitious as to join in the *Poet's* Scruple;

*Nequicquam Deus absidit
Prudens Oceano dissociabili
Terras, si tamen impie
Non tangenda rates transiliunt vada.*

In vain did Nature's wise Command
Divide the Waters from the Land,
If daring Ships, and Men profane
Invade th' inviolable Main. *L. i. Od. 3. 21, &c.*
Mr. Dryden.

Nor doth the Sea appear to have any Privilege above the Earth, by virtue of which Men ought less to apply it to their Occasions and Use. However, since the Donation of God doth not immediately constitute such Dominion as shall take effect against the Claims of others; therefore it was left to the choice of Men, whether they would appropriate the Sea likewise, as they had done the greatest part of the Land; or whether they would let it remain in its primitive State, belonging no more to one Person than to any besides.

VI. The Question is, therefore, Whether any thing particular may be discover'd in the Sea, which should hinder it from being an Object of *Property*? This some have undertaken to affirm, partly upon natural, and partly upon moral Reasons. Amongst the former they have alledg'd the Fluidity of the Sea; that ¹, according to the common Nature of all liquid Bodies, the parts of it are held together by no proper Bands; whereas Possession can take place only in things that are fix'd and terminated. To which others make answer, That Fluidity considered in it self is no Bar against *Property*: And besides, that the Sea is not without its Limits ², being surrounded by the Shore; and that it is a Work of no such great difficulty to confine the several parts and tracts of it within stricter Bounds. It may be added, that as Rivers are not the less capable of *Property*, because they pass away in a perpetual Stream; so neither is the Sea, on account of its being driven about by the force of the

Winds and Tide. The River is one thing, and the Stream or Current another: And in the same manner the Sea is consider'd distinctly from the Waters which it contains. The vast extent of the Sea doth by no means render it impossible to be kept, and therefore doth not altogether hinder it from coming under *Property*. For we may abridge others of the use of the Sea, either by Forts upon the Shore, where it toucheth our Territories in narrow Creeks, and Streights; or by Snips of War, which are able to perform the same Service on the Water, as Castles and Forts on the Land. Though it cannot be denied, but that for one People to keep the whole Ocean, is morally impossible: Nor would it be worth their while to maintain Fleets in all Parts, for the defence of it against all others who should desire to share with them in the Use. Now 'tis great folly to covet what one can't keep; especially when by such a pursuit we do not aim at the Necessities of Life, but at the Gratification of vain Ambition, and of needless Avarice. For though otherwise the Defect of natural Ability doth not presently extinguish a moral Capacity, yet inasmuch as the latter, by reason of the Corruption of Mankind, is almost insignificant, Prudence adviseth us to grasp at no more than we can well secure our selves in the enjoyment of. *Grotius's* Limitation on this point seems superfluous, when he remarks ³, *That Rivers or part of the Sea may be appropriated, upon supposition that either the former or the latter are but inconsiderable in respect of the Land, or however, are not so large; but that when compared with the Land, they may only seem to have the proportion of a part to the whole.* For let us consider a People seating themselves on the side of a vast River, on a long and narrow Slip of Land; here the River will by no means be inconsiderable in comparison with the Land; and yet we don't imagine that this would hinder it from a capacity of Appropriation. Thus there are Kingdoms, which in extent are far exceeded by their Provinces and Appendages.

The moral Reason which these Authors urge to prove the Sea incapable of becoming *Property*, is taken from this Consideration, that the use of it is inexhaustible ³, and therefore sufficient for the promiscuous Service of all. So that 'twould be vain and impertinent to attempt the Division of it into separate Portions and Shares. Which Argument we would indeed acknowledge to be the strongest that can be produced in the present Case, were it once made appear that the Sea is, with respect to all its Uses, sufficient for all Men in all Parts. Because the appropriation of things was introduced on no other account but to preserve the Peace of human Society. And since one effect of it is this, That he who against my Will invades and usurps my Peculiar, really doth an Injury to me, which I might justly revenge in an hostile manner; therefore those, who should have desired to turn a thing into *Property*, which, whilst expos'd to common Use, was not likely to breed any Quarrel amongst Men, ought to have been look'd upon not as promoters of the Peace

¹ Lib. ii. c. 3. f. 7, 8.

Mr. BARB. NOTES on §. VI.

¹ See Mr. *Selien's* *Mare Clausum*, c. 21. 22.

² As for Example, the Rocks which appear above Water, the Banks of Sand, the Capes which are one over against the other, the Isles scattered up and down in diverse Places.

³ See §. 4. n. 2. foregoing, and Mr. *Bynkershoek's* *Treatise*, c. 9. p. 68.

of Mankind, but as Persons who brought in new occasions of breaking and disturbing it. But whether the Sea be thus inexhaustible in all its Parts, with respect to every Use, will be made more evident, if we examine more distinctly the particular Services which it affords.

VII. The use of Bathing and of drawing Water is indeed inexhaustible; but then this is of no great Consequence, and extends no farther than to the Inhabitants of the Shore. The Sea-water is likewise serviceable for the making of Salt: But this Advantage as well as the former is confin'd to those who dwell on the Coasts. Farther, as to the convenience of Navigation, the Sea is inexhaustible, and suffers no damage from being thus employ'd^{a b}. But then, besides these, there are other Uses, part of which are not altogether inexhaustible; and part may prove an occasion of damage to maritime Countries, whose Interest will not admit that the Sea should every where lie promiscuously free to all. Of the former kind is Fishing, as likewise the gathering of any thing which grows in the Water. As for Fishing, though it be much more abundant in the Sea, than in Lakes or Rivers; yet 'tis manifest that it may in part be exhausted; and that if all Nations should desire such a Right and Liberty near the Coasts of any particular Country, that Country must be very much prejudic'd in this respect; especially since 'tis very usual, that some particular kind of Fish, or perhaps some more precious Commodity, as Pearls, Coral, Amber, or the like, are to be found only in one part of the Sea, and that of no considerable extent. In this Case there is no reason why the Borderers should not rather challenge to themselves this Happiness of a wealthy Shore or Sea, than those who are seated at a distance from it: And other Nations can with no more Justice grudge or envy them such an Advantage, than they can be angry that,

—————*Non omnis fert omnia tellus.*

India mittit ebur, molles sua tLura Sabæi, &c.^{cd}

All sorts of Goods their several Countries know,
 Black Ebon only will in India grow,
 And odorous Frankincense on the Sabean Bough.
 Mr. Dryden.

An Use of the latter kind it is, that the maritime Countries are guarded and defended by the Sea, as a Rampart. Hence the Duke of *Somerset*, Protector of England under Edward VI. in an Epistle to the Scots, which we find in *Shidan's* Commentaries^e, tells them, *Oceano claudimur undique, tanquam manibus & wallis firmissimo: We are on all sides enclused with the Ocean, as with the strongest Wall and Bulwark.* And we may with much more Justice bestow on the Sea that Name of ἀθάνατον τείχος^f, an Immortal Wall, than *Isoocrates*^g complemented the River Nile with it. Yet this Defence is not altogether certain and secure. It hinders indeed any Expedition on Foot, but lies open to the Approach of Vessels. For which Reason it must needs be a Dis-

advantage to any People thus seated, that other Nations should have free access to their Shore with Ships of War, without asking their leave, or without giving security for their peaceful and inoffensive Passage. But we cannot, with any Accuracy, determine in general how large a Space of the Sea ought to be allow'd for such a Defence, in respect of which it may be for the Safety and Interest of the Borderers to claim a distinct Dominion over it. Yet certainly it would argue a very unreasonable Fear and Jealousy, should any Kingdom barely on this account desire to extend their Sovereignty over the Sea for some hundreds of Leagues together. What *Cæsar* reports of the *Germani* may serve to illustrate this: *The particular Communities look on it as the highest Honour to make a vast Extent of Desert round about them, wasting all the Confines of their Neighbours; this they reckon the surest Mark of an extraordinary Valour, that the former Borderers have retired, and been driven to a greater distance, and that none dare seat themselves in so formidable a Neighbourhood. And then, besides, they thought themselves the safer by this Policy, having taken away all Fear of sudden Incurfions,* De Bell. Gall. l. vi. c. 23. However we see by what hath been offer'd, that there may be very weighty Reasons for a People so far to appropriate to themselves some part of the Sea, as to oblige all others to acknowledge the Use of the same Part, as a Permission from them, and an Act of Bounty and Favour.

VIII. But since all Dominion, capable of producing any Effect against the Claims of others, takes its Rise from some Act of Men; therefore how far the Bounds of any People ought to reach on the Sea, is to be discover'd either from their own right of Possession, or from their Treaties with their Neighbours. Thus *Isoocrates* (in his Panegyric. p. 111. Ed. Paris.) boasts that the *Athenians*, by their Articles of Peace with the King of *Persia*, had obliged him not to come beyond *Phaselis* with his Ships of War. Yet supposing the Matter to be dubious, and that there are no clear Memorials to be found of such Acts as might prove the Occupancy to be real, which is alledg'd; what Preiunptions are to be made in this Case, we may understand from the following Remarks. In the Beginning then, whilst we were yet ignorant of Navigation, it is not probable that the People, which had taken possession of any Territories, extended their Dominion farther than to the neighbouring Shore. For, inasmuch as the Fishing-Trade was yet but poor and barren for want of Boats, and the utmost Advantage they could make was to pick up the Shell-Fish which were left by the Tide, or to angle from the Rocks; there was no Fear that they should in this respect suffer from their Neighbours; who, being necessitated to make their Approaches by Land, might be repuls'd with little Difficulty. Nay, after the Invention of Shipping, most Nations, for a considerable time, left each other at full liberty to fish where they pleas'd: Because they imagin'd that an Imployment of so great Labour and Hardship would

^a Vid. l. xxiii. f. 1. *D. De Servitut. præd. rustic.* ^b Vid. l. viii. t. 3. *D. De Servit. præd. rustic.* ^c See *Pliny*, l. ix. c. 15. of the happy Shore about *Byzantium*. ^d Vid. *Virgil. Georg.* l. i. ver. 57, &c. ^e Lib. xx. ^f *Encom. Byz.*

Mr. BARR. NOTES on §. VII.

¹ A firm and everlasting Wall.
² Mr. de *Bynkershoek*, in his Dissertation, c. 2. says, "That so much of the Sea may be thought to be seized from the Land, as can be defended by our Arms, i. e. according as we express it, so far as is within Canon-shot." He thereupon sets down an Order which the States-General of the United Provinces gave the Captains of their Ships in 1671. to salute as they pass'd the Coasts of any Foreign Prince, that they might know that they were within Canon-shot, near the Places of that Country.

not engage such a numerous Train of Followers, as that any publick Disturbance should be apprehended from their Disputes and Contentions. And whilst hostile Heats were yet unknown, the Sea was a sufficient Defence without other Assistances. And afterwards when they began to build Ships of War, Men were contented a long while to appropriate only the Havens and Bays, leaving the other Parts of the Sea in their primitive Community. This Moderation embolden'd the Pirates to carry on their Profession with greater Liberty; whilst they were of Opinion, that 'twas a less heinous breach of the general Peace to commit these Outrages in places subject to no Jurisdiction. At length, when they had found out the benefit of Merchandise, and the conveniency of so short a Passage by Water for Goods and Traffick, some Governments seated near the Streights, or narrow Seas, challeng'd to themselves a Property in them; that, by requiring Toll and Custom¹, they might come in for a share in the Gain, or that their Towns might be frequented by the Trading Part of the World. After this, other parts of the Sea were likewise brought under Subjection, either on account of their great Plenty of Fish, or because this was a necessary Expedient for the Security of the bordering Provinces.

Yet in these times they scarce exercised any other Right of Sovereignty besides the giving out Injunctions, that all who pass'd within such Bounds should abstain from all Harm and Violence; that no Injuries should be there committed, and no Vessels of War enter without Permission. Thus when the *Lacedemonians*, in *Thucydides*², had convey'd some Forces to *Epidaurus* by Sea, the *Argives* in an Embassy to the *Athenians* complain'd, that they, having promis'd by League not to grant the Enemies of *Argos* Passage thro' their Dominions, had nevertheless suffer'd them to sail by unmolested. And accordingly the *Athenians* interpreted this Act of the *Lacedemonians* as a breach of Peace. We see it is now the receiv'd Custom, in order to the acknowledgment of this Sovereignty, that foreign Vessels, as they pass by any Fort on the Shore, or any Ship of War belonging to the Prince, who at present carries himself as Lord of the³ Sea, shall pay some mark of Respect.

It doth not seem necessary that particular Nations should make out the precise time when they obtain'd the Dominions of such or such parts of the Sea, by taking Possession of it: But, inasmuch as the Exercise of this Dominion may not at all times be of Use and Advantage, 'tis enough if they then perform'd any Act of Sovereignty, when the Interest of the Commonwealth seem'd to require it: Nay, in our Judgment, it might be no Absurdity to affirm, that when Naval Forces are once brought into common Use, the parts of the Sea, so far as they serve only for a Defence or an Appendage, do without any special corporal Act pass immediately under the Dominion of that People whose Shores they wash^b. For in this respect the Sea is to be look'd on as an Increment of the Land, as the adjoining Moors and Fens are reckon'd the Increment of a City. Now, as in the Occupancy, or the taking possession of Immoveables, it is not necessary that our Body should touch each Part, but the touching of one part only is conceiv'd to create a Property over the whole; so when a People have seiz'd on one particular Region inclosed within settled Bounds, still under the Notion of taking all the void Space about that they shall afterwards have occasion for, tho' at first they have no Design to enlarge, or exercise their Dominion farther than those Bounds, as not thinking what lies beyond to be of Use or Service to them; yet when they come at length to find, that there is a necessity of adding such a void Space to their present Possessions, their bare Intention and Resolution should seem sufficient to extend their Sovereignty over it, as a Part or Appendage of their Empire. Especially when it once appear'd, that other Nations had thus stretch'd their Command over the void Sea: Whence 'tis a fair Presumption, that the rest of the World pretend not that they should be behind with them in this Advantage^{* 3}. From which Considerations it is manifest, that in these times, when Shipping is brought to its highest Perfection, it is presum'd, that every maritime People, at all acquainted with Navigation⁴, are Lords of the Sea, where it toucheth their own Shore, so far as it may be counted a Defence, especially in Ports and other Places

¹ Lib. v. c. 56. Edit. *Oxy.*

^b Comp. *Ziegler ad Grat.* l. ii. c. 3. f. 11.

^{*} In all the Editions of the Original the Word *em* is wanting, which makes our Author very difficult to be understood.

MR. BARR. NOTES on §. VIII.

¹ See *Græc.* l. ii. c. 3. §. 15.

² Mr. *Bynkerhook* in his Discourse, c. 5 near the End, maintains, That that is not always an acknowledgment of the Sovereignty of that Person, to whom that Respect is paid, over that Part of the Sea where it is done. As for Example, says he, "The State General in their Treaties of Peace made in the Years 1654, 1662, 1674, and 1684, obliged themselves to lower their Top-pisls to the Ships of the King of *England* in all the Northern Seas as far as *Cape Finister*; but that was only, because, according to the Law of Nations, all Republicks ought to give place to a crown'd Head, and to those that represent him." In short, the Custom of saluting the Vessels of such Nations to whom they are inferior, in one manner or other, is not so new as our Author would insinuate; For we find in *Appian*, as *Justus Lipsius* has long since observed, *Elect.* i. 23. p. 729. that *Mark Anthony* and *Domitius Ahenobarbus* meeting one another, the first Serjeant of *Anthony*, thinking himself obliged according to the Custom, cry'd out, that he should lower his Standard, which was then us'd instead of a Mast (*καθελών τὸ σημεῖον*) to pay his Homage to his Master. *De Bell. Civ.* l. v. p. 1118. Edit. *Tollii*.

³ When our Author says, That they may, without taking a new Possession, seize on a thing which they had before neglected, as a thing of no Profit, it is not to be understood, that they have called to mind some new Reason, which of itself renders it necessary to acquire that which before they had not troubled themselves to make a Property of. Thus, since the Invention of Cannon, the Sea, which adjoins to a Country, hath upon that account been thought to belong to the Lord of the Country, as far as a Cannon can shoot. But yet there must be a formal Act of taking Possession necessary, without which every one may look upon those Seas and Lands to be common, because they do not appear possess'd by any; for why may not he, who finds them convenient to himself, seize on them?

⁴ See §. vii. Note 2. above. As for all that Space of the Sea which can't be defended from the Land, Mr. *Bynkerhook* thinks none can make themselves Masters of it farther than they sail, with a design to appropriate it to themselves, and he adds, That they can't preserve the Property of what they have seized on, but by constant sailing, and having always a Fleet abroad. Hence it was, that the *Romans* heretofore, when their Empire extended through *Europe*, *Africa*, and *Asia*, were Masters of the Mediterranean Sea, because they always kept four Fleets a-foot; the first at the Port of *Milene*, the second at *Ravenna*, the third at *Fregius*, and the fourth at *Byzantium* or *Constantinople*. They commanded also that part of the Ocean that is between *England* and the Continent, as well because they possess'd the Lands on both sides, as because they had a Fleet in the *English* Channel. But now, according

places where there is Convenience of Landing ⁷. In like manner the Gulphs and Channels, or Arms of the Sea, are, according to the regular Course, supposed to belong to the People with whose Lands they are encompassed. But in case different Nations border on the same Channel, the Sovereignty of each shall be conceiv'd to reach into the middle of the Water, from every part of their respective Shore; unless either all the States have agreed by Covenant to use the whole Water promiscuously amongst themselves, and to exercise a general undivided Sovereignty over it, against Foreigners: Or else, if one particular People has obtain'd a Dominion over the whole by Pact, or by the tacit Concession of the rest, or by the Right of Conquest, or because they first fix'd their Station near it, and immediately took it into full Possession, exercising Acts of Sovereignty against the People of the opposite Shore. In which latter Case, nevertheless, the other neighbouring States, their Fellow Borderers, shall be supposed to be Lords of each of their particular Ports, and of so much of the Sea as the convenient access to the Shore requires. Of the Effects of the Sovereignty (if it may be so term'd) over the Sea, *vid. Alberic. Gentil. Advocat. Hispan. l. i. c. 8, & 14. and Selden Mar. Claus. l. ii. c. 20, 21, 22.* To which we may add by the way what *Dr. Chamberlain* takes notice of in his *Present State of England, Part I. c. 4. That Persons born on Shipboard upon those Seas which are subject to the English Dominion, are accounted Natives of England, and have no need of Naturalization, as others born without the Realm.*

IX. But what shall we say of the main Ocean, which spreads itself between those vast Continents of *Europe, Africa, America*, and the unknown Southern Coasts? Was this ever brought under *Property*, or doth it still remain in its primitive state, free and common to all the World? As for the prodigious extent of it, this however doth not absolutely render it incapable of being appropriated. Yet we must confess, the Dominion of it would not be only unprofitable, but unjust; should either any one Nation challenge it all to themselves, or several States divide it into so many Shares, excluding all the rest of Mankind. Navigation, or the convenience of Water-passage, is a thing which suffers no Damage by being enjoy'd; on the bare account of which the Appropriation of the Sea is needless and superfluous; since Men may sail no

less commodiously, were the Sea common to all Nations, than if it were peculiarly subject to one. The Fishing-Trade is of no very great Consequence in the main Ocean; and since you do but vainly call a thing your own, when 'tis morally impossible to hinder others from using it promiscuously with your self; we cannot think any State would find it tantamount to maintain Fleets in all parts of the Sea, only to secure the Fishing against Interlopers. But what if a particular Nation, either through Ambition and the Vanity of being filed Lords of the Ocean; or prompted by Avarice, and the hopes of drawing to themselves all the Advantages of Navigation and Trade, should claim the Ocean as their peculiar Possession? Especially if they urged by way of Title, That they were the first who entred upon the Use of it with Sails and Shipping, and that they possess Lands in every Continent round it: And that, since the Sea was originally a void Space, he, who before the rest attempted to fix a Use and Occupancy in it, might thereby acquire a *Property* exclusive of all others. To this we answer, That Men have indeed a Privilege of making waste Places their own, by first seizing upon them: But then they are always to remember, that God gave the World not to this nor to that Man, but to human Race in general; as likewise, that all Men are by Nature equal. Wherefore, that tacit Covenant between the first Introducers of *Property*, assigning the Right of those things which did not fall under their prime Division ¹, to the Persons who should first take Possession of them, can by no means be extended to such an Object, which if one should hold alone, he might oppress all others with most unjust Slavery, or might intercept some most important Advantages, which would otherwise accrue to all Nations in common. Inasmuch as such a Case as this could not enter into the Imagination of those primitive Divisors. As then no one would deserve Censure for taking out of a common Store whatever is necessary for his own Occasions, tho' in order to future Use; so he is not to be endur'd, who out of a vain and senseless Greediness should lay claim to more than he could ever spend; and should desire infinitely to enlarge his own Dominion, for no other Reason, but to debar others from the use of those good things which Nature affords. There can then no probable Ground or Colour be alledged, why any one People should pretend to

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according to *Mr. Bynkershoek*, there is no part of the main Ocean, nor of any Sea inclos'd with Land, that belongs to any Power farther than he can command it from the Shore, because there is no Power in actual Possession after the manner we have before mentioned. As to the Question of Fact, I will not meddle with it. Our Author may be consulted about that. As for the matter of Right, altho', as I shall shew hereafter, I do not rest altogether in the Opinion of that learned and judicious Lawyer, who lays it down for a general Maxim, That, without regard had to the Laws of Kingdoms, Property is always extinguish'd with the actual Possession; yet I think he hath reason to maintain it in respect to the Sea, and other things of like Nature, which remain such as Nature has produced them. As the Industry of Man has added nothing but the bare Possession, it follows, that from the very Moment that Possession is left in any manner, the things are and may be look'd upon as quite abandoned. As for Example, suppose there be a great Extent of Land unoccupied, which is not encompassed on any side with the Lands of any State, tho' they are near, if the Master of the Country takes no care to till them, or secure them; or if he has sometimes done it, and does discontinue it, any Man may seize it as well as he, especially if the Neighbours have resigned all their Right to him; and in this case also the Renunciation of these last can't be drawn into consequence for others who would settle there, so long as they are not actually possessed. By a much stronger Reason we must acknowledge the necessity of a continual Possession in respect of the Sea, which, excepting a little Distance from the Shore, is much less in use both in itself, and by all the Care that any Man can take to make it profitable in any Manner; wherefore nothing but insatiable Avarice, and a prodigious Disregard to the Equality of all Men by Nature, can suggest such vast Pretensions, and so difficult, not to say impossible, to maintain. See §. following.

⁷ *Bodin. de Republ. l. i. c. ult.* on the Authority of *Baldus* affirms, That by a kind of common Right enjoy'd by all Princes of Maritime Countries, the particular Sovereign may command and controul those who approach within sixty Miles of his Shore.

¹ It is not necessary to have recourse to the intent of the Agreement, which, as I have shewed above, is a meer Chimera. The impossibility of seizing upon the main Ocean, and preserving a non-interrupted Possession, is sufficient to prove the Ridiculousness and Injustice of these proud Pretensions. See §. viii. n. 6. before-going. And *Mr. de Bynkershoek's* Discourse, c. 7.

the Dominion of the whole Ocean, so as by virtue of this Right to aim at excluding all others from sailing there. Not one of those Reasons, which first moved Men to the Settlement of *Property*, doth affect the main Sea. To make it fit for Navigation, there is no need (in regard to the Sea itself) of the Pains and Industry of Men. The Winds labour no more to drive all the Fleets in the World, than a single Vessel. Nor do those Tracts, which the Keels plough up, make the way rougher to those that follow them. As for the Passage to the other Continent, this is not rendered less convenient to one Nation, though another useth the same Road. And to have been the first Travellers through any Place doth by no means give a People the Dominion of it, or prohibit others from turning it to the same Advantage. It is a most imprudent Plea to urge, *That any one State, by intercepting the naval Affairs of all others, may be able to draw to it self the whole Profit of a Sea Trade, which Interest all Persons ought industriously to pursue.* As if all the rest of Mankind ought to be oppress'd by a most unjust Monopoly, to gratify the insatiable Avarice of a single Government: Or, as if all others must voluntarily turn Slaves, because the wicked Ambition of one Prince or State lusts after the Sovereignty of the whole World. Such hath been the Bounty of Providence towards Mankind, as to give an abundant Supply of all things useful to their Necessities. But as to the manner of possessing these things, Reason enjoins Men to use such Moderation in it, as to rest contented with the Acquisition of so much as is likely to suffice for the Service of themselves and of their Dependents. Nor doth the same Principle forbid them to be concern'd for the future, provided they do not, either by Envy or Avarice, hinder others from gaining a needful Maintenance and Relief. If any one carries his Pursuits further, and scrapes up superfluous Stores, to the Injury and Oppression of others, it can be no Fault in the rest, if, when Opportunity serves, they engage in a timely Enterprize of reducing him to Reason.

X. From what we have observ'd, it is clear, that to sail the Ocean in a peaceful manner both is and ought to be the free Privilege of all Nations: *It is*, because no one People have attain'd such a Right over the Ocean, as will justify them in

shutting out all others from the same Benefit: And *it ought to be*, because the Law of general Kindness and Humanity requires it. Whence it follows, that no Sovereign can hinder the Nations which border on the main Sea, and are not under his Government, from maintaining a Trade with each other; unless he have by Covenant obtain'd such a Right, as either that some particular State is bound, on his account, to exclude some certain People from all Commerce with them (of which kind was the Contract between the *Dutch East-India Company*, and the Emperor of *Ceylan* ^a) or that some whole Nation have surrendered up to him their right of sailing to another ^b. For since I may, at my pleasure, either retain or alienate my Goods, especially such as regard rather the Superfluities of Pleasure than the Necessities of Life; there is no reason but that I may, on some certain Considerations, oblige my self to dispose of them to one Person, and to none besides. And this indeed is one proper effect of Liberty, that Men may by Covenant give up their Rights between themselves; though no such Covenant shall be allowed, if really prejudicial to a third Person. Hence likewise, as a Prince may justly ordain, that no Goods, of the Growth or the Manufacture of his Dominions, shall be exported by Foreigners, unless by such as have obtain'd this Privilege, either upon Covenant, or by free Grant (tho' the Law of Nature doth not at all oblige him to strike such a Covenant, or to make such a Grant, unless some Nation abroad be reduced to such Extremity, as that without this Liberty of Commerce they must necessarily perish) so if a People of *Europe*, for Instance, have appropriated any Country in *Africk*, or the *Indies*, by such means, and in such manner as the Custom of Nations makes effectual towards the acquiring *Dominion*; they may with like Justice, if they think fit, cut off from others all Passage thither on account of Traffick, or not allow it, but under certain Conditions, or some settled Barthers and Duties. And this we now see in every Day's Practice: Nor doth it appear to be in any respect repugnant to natural Reason. For that Liberty of Commerce, on which some ground such high Pretensions, doth not hinder but that a State may allow more Favour to its own Subjects, than to Strangers.

^a Vid. *Philipp. Baldae. Descript. Oræ Malabar. & Coromandel.* c. 10. & 12.

Mr. BARRÉ. NOTE on §. X.

^b See lib. iii. c. 3. §. 6, 9, 11. above.

CHAP. VI.

Of Occupancy.

- I. The several ways of acquiring Dominion.
- II. The Original Methods of acquiring it.
- III. Occupancy is gain'd in whole, or by Parcels.
- IV. The Possession of Moveables depends on the Disposal of the chief Governour.
- V. In some Places the catching of wild Beasts is allowed to every one.
- VI. In other Places 'tis the privilege of great Men only.
- VII. Whether he that hunts contrary to the Law, has a Property in the Beast he takes.

- VIII. When things occupied are understood to be immoveable.
- IX. When they are moveable.
- X. Whether a wild Beast becomes mine as soon as I have wounded it.
- XI. Whether the Fish are ours, that are in our Ponds.
- XII. Things left become immediately the first Occupant's.
- XIII. Of Treasures.
- XIV. Of Possessions obtain'd by War.

IT follows in course, that we consider the several ways of acquiring *Dominion*¹, which, after *Grotius's* Judgment², may conveniently be divided into *originary* and *derivative*. The former are those by which the *Property* of any thing was first introduced: The latter those by which a *Property* already settled passeth from one Man to another.

Again, the *originary* way of acquiring *Property*² is either *simple* and *absolute*, as when we obtain *Dominion* over the Substance and Body of a thing: Or only *primitive* and *with respect*, as when we add to a Thing already our own some further Improvement and Increase.

¹ Lib. ii. c. 3. f. 1.

Mr. BARB. NOTES on Chap. VI. §. 1.

¹ Before we proceed farther, we must here determine a Question which Mr. *Bynkershoek* has given us an Occasion to examine. That able Lawyer maintains, "That by the Law of Nature, Property, which begins with a corporal Possession, ends with it also." According to him, that same Moment that a thing is out of our Power it becomes common. And if for a long time there has been an Usage that every one remains a Proprietor of his own Goods, although he keeps not the corporal Possession of them, this is the Effect of civil Laws, and of the Agreement of the Members of every State. "Inasmuch, *adds he*, that if a thing belonging to any Man be found in a strange Country, he being absent, and not securing it, it belongs to the first Occupant, provided there be not some particular Treaty between the two States, by virtue of which they ought to be look'd upon as Friends; for if they are only engaged not to make War upon one another, this Agreement leaves every one's natural Right entire to seize upon that which is not in the possession of the former Owner." Mr. *Bynkershoek* alludes here the Authority of the *Roman* Law, and a Passage of *St. Austin* quoted in the Canon-Law; but since he treats there only of the Light of Reason, I will not stay to examine whether those Passages are well applied, or no, as a *German* Lawyer affirms, who endeavours to confute the first Chapter of a *Dutch* Lawyer, *De Dominio Maris*. It was Mr. *Titius*, who in 1704, the Year after Mr. *Bynkershoek's* Book was publish'd, maintain'd a publick Disputation at *Leipsick*, *De Dominio in rebus occupatis ultra possessionem durante*, a Discourse which I never saw; but the Author himself gives us the Abridgment of it in his *Jus Privatam Romano-Germanicum*, &c. l. iii. c. 6. As to the Quotations of the Civil Law, I shall only observe, that the *Roman* Lawyers did not agree perfectly among themselves about the continuance of the Right of Property, as Mr. *Noodt* has proved; that they differed in the manner of getting Possession, *Probabilia Juris*, l. ii. c. 6. As for the Proofs taken from the thing it self, Mr. *Titius*, as above, delivers himself briefly thus: "1. That the Hypothesis of Mr. *Bynkershoek* destroys all sorts of Right, and particularly reduces Property to nothing. For of what Use can that Right be which is extinguish'd by the Act with which it is acquired? 2. That there is no plausible Reason to be given why such great Force should be attributed to Possession, if the continuance of Right and Property depends fully and absolutely upon it. 3. Lastly, As to human Right, perpetual Possession is impossible, and so we ought not to believe that it is necessary to preserve them. From whence he concludes, That to follow the Maxims of the Law of Nature, we must on the contrary say, That Property being once admitted continues always, tho' there be no Possession; especially if the Consent of the Proprietor himself, or the civil Laws do not order it otherwise." These Reasons, in my Judgment, prove sufficiently what they were intended for, but we must explain them a little, and add what is wanting to them. I say then, that since Property has its Original from taking Possession, it doth not follow that the Right so acquir'd ceases, when there is no Possession. The intention of Nature in making all things common to Man is, that every one should use and dispose of what he has gotten according to his own Pleasure, 'till he leaves it, and permits it a-new to be seized by the first Occupant, without which this Right will be of little Use. So that Possession is nothing else but an indisputable Mark of the Will to retain what a Man has seized. To authorize us then to look upon a thing as abandon'd by him to whom it belong'd, because he is not in Possession, we ought to have some other Reasons to believe that he has renounced his personal Right to it. Now, as I have observ'd in Note 6. §. 8. of the foregoing Chapter, we may presume this in respect to those things which remain such as Nature has produced them, especially such as are very numerous, or are of a vast Extent; tho' Mr. *Titius* does not make that Distinction, and maintains, that one may be Master of the Sea, altho' he be not in Possession. But as for other things, which are the Fruits of human Industry, and are either produced by Nature, or are put into a new Form, or are tamed, or are hunted out of their Holes; all this is done with great Labour and Contrivance usually; and it can't be doubted but every one would preserve his Right to them, 'till he makes an open Renunciation; and so they ought to be looked upon as his, tho' he does not keep them ever after, or he loses the Possession by some Accident, which may easily happen, and is almost unavoidable. In the main there is nothing but what is just in this Claim, as may appear from what is said, c. iv. §. 4. n. 4. of this Book. And Mr. *Bynkershoek* owns, that the first Men left nothing common but what they could not distinctly possess. Their Covetousness and Desire of having was so great, that to express it, the Fable of Clambering up into Heaven was invented, c. 2. p. 10. Can we then believe, that Men of this Temper would consent that the Right of Property should be always extinguish'd with corporal Possession, which can never be without Interruption? Having thus taken liberty to speak my Thoughts about Mr. *Bynkershoek's* Principle, I shall declare my Indignation against what Mr. *Titius* (as above, §. 2. 5.) has discourst so boldly. He ought in his first Lecture of that Discourse to have consider'd the Worth of the Author, and not to have accus'd him of favouring *Hobbes's* Opinions, if he had been cautious, at the End of Chap. iii.

² This Division may also agree with Acquisitions derivative. See what is said upon the following Chapter, §. 1. Farther, we must distinguish also the manner of acquiring Property, into natural and civil. Natural Acquisition is that which is made either by the Will alone of the Acquirer, in relation to such things as belong not to any Person, or by the mutual Consent of him that transfers the Property, and of him that obtains it, as to such things as belong to any Person. Civil Acquisition is that which either transfers a Property with the Consent of the particular Owner, or requires something more than the mutual Consent of Parties. *Titius's* Observ. 290. We find the like Division in the *Institutes: Quarundam enim rerum Dominium nauticemur jure naturali—quarundam vero jure civili*, l. 2. tit. 1. §. 11. See Chap. 10. §. 1. n. 1. and c. 12. §. 1. n. 1. following.

II. We have sufficiently made it appear in our former Remarks^a, that after Men came to a Resolution of quitting the primitive Communion¹, upon the Strength of a previous Contract they assign'd to each Person his Share out of the general Stock, either by the Authority of Parents, or by universal Consent, or by Lot, or sometimes by the free Choice and Option of the Party receiving. Now 'twas at the same time agreed, that whatever did not come under this grand Division, should pass to the first Occupant^b; that is, to him who, before others, took bodily Possession of it², with Intention to keep it as his own. Hence, when Grotius^c affirms, That original Acquisition antiently, whilst 'twas possible for all Mankind to meet in one place, might be made by Division also, whereas now it can be made only by Occupancy: The words ought to be explain'd in the following Sense. When Mankind first began to separate into many Families, distinct Dominions were settled by Division: After this Division, he is said originally to acquire a thing lying void and without a Possessor, who happens to be the most early Occupant of it; *i. e.* he who lays hold on such a thing before others, or gets the start of them in putting in his Claim to it. Thus

the word is used in³ Seneca Thyest. ver. 202, & 203.

In medio est scelus positum occupanti.

In Tacitus, H. l. v. c. 1. in fin. *Multi quos urbe atq; Italia sua quemq; spes acciverat occupandi principem adhuc vacuum.*

In Pliny, l. iv. Epist. 15: *In ea civitate, in qua omnia quasi ab occupantibus aguntur, quæ legitimum tempus expectant, non matura, sed fera sunt.*

III. In Relation to the Occupancy of¹ Immoveables, especially of Lands, we are carefully to observe and distinguish, whether it be made by one Person only, or by many in Conjunction. One Man is then adjudg'd to be the Occupant of Land, when he tills and manures it, or when he encloseth it with settled Boundaries and Limits: Yet still with this Proviso, That he grasp at no more than what, upon a fair account, seems tenable by one Family, however enlarg'd and multiplied. Should one Man, for Instance, be, with his Wife, cast upon a desert Island, sufficient to maintain Myriads of People; he could not without intolerable Arrogance challenge the whole Island to himself upon the Right of Occupancy, and endeavour to repulse those who should land on a different part of the Shore.

^a Chap. iv. f. 4.

^b *Quod enim nullius est, id ratione naturali occupanti conceditur*, Digest. l. xli. t. 1. leg. 3. princip.

^c *Ubi supra.*

MR. BARB. NOTES on §. II, III.

¹ We have shewn in c. 4. §. 4. n. 4. That the first Occupier makes himself a Property by that only, without supposing any Agreement either personal or common, so that taking Possession was in it self the only way of getting an original Property, as well from the Beginning as at this Day. *Quod enim nullius est, id ratione naturali occupanti conceditur*, say the Lawyers, Digest. l. xli. tit. 1. leg. 3. princip. But if several persons seize upon one thing in common without an Owner, and part it alike, that Division will then be, in relation to every one of those who make up that Multitude, the original Title of their Acquisition, *i. e.* the immediate Foundation of that particular Right, which he hath acquired by what hath happen'd to him, and to which he had before only a common Right. Mr. Titius's Observ. 291. on *Pufend.*

² What our Author means by, *Qui primus eadem corporaliter apprehendisset animo*, &c. he will explain himself in §. 8, 9. Yet we may observe with Mr. Titius, that taking Possession actually (*Occupatio*) is not always absolutely necessary to acquire a thing that belongs to no body. 'Tis only a means to let all others know, that we have an Intention to appropriate such a thing. Indeed, that which properly makes the Right of the first Occupier is, that he makes known to others his design to seize upon a thing. If then he declares his Will by some other Act, as significative, or if others have openly renounced with respect to him the Right which they had to any thing which belong'd no more to him than to them, he may then acquire the original Property without any actual possession. *Observ.* on *Pufend.* 292 and in *Lauterb.* 110. We may also add, that he must be inclined to take what he declares his design to seize on, otherwise the boundless Covetousness of most Men will render his Right unprofitable to others, and be a Foundation for perpetual Disputes and Quarrels. In fine, the Notion which I have laid down concerning the exterior Act, which is necessary to seize on a thing, so that we may acquire such a Right to it as may exclude the Claims of all others; this Notion, I say, is not altogether new. I learn from Mr. Noodt, *Probabilia Juris*, l. ii. c. 6. That among the Antients, as also the old Roman Lawyers, there were several of the most famous who were exactly of the same Opinion, tho' none took notice of it before this judicious and quick sighted Lawyer.

³ This Grammatical Remark, that the Latin word *occupare*, *i. e.* to occupy or possess, often signifies *prævenire* or to prevent others, might have been spared by our Author.

¹ We must put among Immoveables, first of all, Space, which is in its own Nature altogether immoveable. We may divide it into Common and Particular. The first is publick places, as Markets, Temples, Theatres, great Roads, &c. The other is that which is perpendicular under the Sun, from a particular Possession of Lines drawn, as well from the Center of the Earth to the Surface, as from the Surface to the Heaven. Every one hath a Right to raise a Building under the Sun, as high as he will, and nothing may hinder him but that he may carry it in a direct Line as far as the Orb of the Moon; and likewise as much from thence, if we may suppose that Planet habitable. But if we may dig as deep as we will, we must not go farther than the Center of the Earth, because what is beyond, in respect of us, belongs to the *Antipodes*, although the Civil Laws of some Countries give to the King's Treasury whatever is found in the Lands of private Men, at any Depth greater than the Plough-share reaches. We must also farther observe always, that perpendicular Lines may be drawn from the Surface of the Sun as well upwards as downwards, and so as my Neighbour may not lawfully raise a Building which by any way may answer directly to my Sun, although it be not at all supported, but born upon Beams laid in an Horizontal Line; so likewise neither can I in my turn raise a Pyramid whose Sides and Foundation extend beyond my Space, especially if there be no Agreement about it between my Neighbour and my self. After Space comes the Substance of the Earth, which we call the Ground, such as the places for Building, Meadows, Fields, and Vineyards. We may next account for things immoveable, whatever sticks fast to the Surface of the Earth; either by Nature, as the Trees; or by Man's Labour, as Houses and other Buildings; although these sort of things may be sever'd and become Moveables. Such are also not only Wind-mills, whose Foundation is fasten'd to the Earth, but also Water-mills; for tho' they may be carried about, they can't be made use of without some Anchor or Stake, which is first fixed in the Ground. Whatever also is fastened to Houses or other Buildings, as what is joined together with Iron, Lead, Plaster, or otherwise for a perpetual Continuance, is also reputed immoveable. Things moveable are consequently all things that are separated from the Earth and Water; whether they have been loosened from it, as Trees fall'n or cut down, Fruits fall'n or gather'd, Stones dug out of the Quarries; or are naturally separated as living Creatures. There are two sorts of things Moveable; the one such as live and move of themselves, and they are call'd living Moveables, or living Creatures; others are inanimate, and may be called dead Moveables. I have taken all this partly out of the Elements of *Jurispr. Universal.* of this Author, p. 87, 88. and partly out of the Civil Laws of Mr. *Daemat. Prælim.* tit. 3. Sect. 1. §. 4. &c. The Roman Lawyers often call Immoveables, *Res, quæ soli sunt. Labio scribit, ædificium ædificium Curulium de venditionibus rerum esse, tam earum, quæ soli sunt, quam earum, quæ mobiles, aut se moventes*, Digest. l. xxi. tit. 1. *De Adilitio Edicto*, &c. leg. 1. §. 1. It would be too long for me to recite here the other Passages of Lawyers to shew particularly what things they comprehend under the Name of Immoveables.

But when any number of Men jointly possess themselves of a Tract of Land, this Occupancy is wont to be made either by the Whole, or by Parcels^a.

The former happens, when Men in an united Body seize on some desolate Region, encompass'd with certain Bounds, either by Nature, or by human Appointment. The several Parcels of which Region are either granted to the particular Members of the Community, to take and to hold as each shall think fit (a Method but rarely practis'd) or what seems more convenient for the Prevention of Quarrels and Disputes, are allotted to every Person by publick Designation. For that a promiscuous Occupancy is apt to breed Confusion, we may observe from that Description which^b Livy gives us of Rome, *Forma urbis erat occupata magis quam divisa similis*; Such was the Appearance of the City, as if it had been first possess'd rather by Occupancy than by a regular Division. Tacitus and Caesar will furnish us with Instances. The former reports of the antient Germans to this Purpose^c; *Such a number of Men dwelling together (for Grotius reads Vicos, not Vices) occupy or possess such a Portion of Land, which they afterwards parcel out into private Shares, according to the Worth and Esteem of particular Persons; the vast extent of the Country making these Partitions easy and practicable. They change their arable Ground every Year, and are never at a loss on this account.* So likewise Caesar tells us of the Suevoi^d, *They have an hundred Cantons, from each of which they draw every Year a thousand Men for the Cambr-service; the rest keep at home, and till the Ground for themselves, and for their absent Friends. The next Year they relieve each other; those who serv'd in the Army return to take care of the Land; and those who tarried behind list themselves for the Wars. Thus they never interrupt either the Business of Husbandry, or the Use and Discipline of Arms. But there is no such thing as separate or private Fields known among them; nor are they allowed to inhabit any one Place longer than the Space of a Year.* And again^e speaking of the German Nations in common; *No Person, says he, hath any certain Quantity of Land, any settled or proper Boundaries. But the Princes and Magistrates every Year assign the several Tribes their Residence, in what Place, and to what Extent they judge convenient; and, the Year after, force them to remove to a new Seat.* The Design of which Institution was, no doubt, to preserve the antient Simplicity of Life, so unacquainted with Avarice and with Luxury. We find Horace alluding to this Custom in Lib. III. *Od.* xxiv. *ver.* 9, &c.

*Campestres melius Scythæ
(Quorum pluustra vagas rite trahunt domos)
Vivunt, & rigidi Getæ:*

*Inmetata quibus jugera liberas
Fruges & Cereem ferunt,
Nec cultura placet longior annua;
Defunctumque laboribus
Æquali recreat sorte vicarius^f.*

The Rovers of the *Scythian* Plains,
Whom peaceful Want inur'd of old
To wheel their Houses in their Wains,
And *Getans* stiff with native Cold,
In solid Happiness outvy
The Pomp and Pride of *Italy*.
Unmeasur'd Lands free Plenty yield,
And *Ceres* loves to shift the Scene,
A single Harvest loads the Field,
A single Year confines her Reign:
And if the Farmer weary grow,
His honest Second takes the Plough.

IV. As for this Occupancy in general, or by the whole, we are farther to observe, that it confers on the Community, as such, a Dominion over all things contain'd within the Tract which they thus possess, not only immoveable, but likewise moveable Goods and Animals; at least, it gives them such a Right of taking the latter kind, as excludes all others from the same Privilege. And such a *universal Dominion*, as is here describ'd, is so very different from the *Dominion* of private Men, that the latter may be transferr'd to a Stranger or Alien, whilst the former remains safe in the Hands of the Community^g. Nor is it necessary that all things which are first occupied in this general way, should be afterwards divided amongst particular and distinct Proprietors. Therefore, if in a Region thus possess'd, any thing should be found which is not ascertain'd to a private Owner, it must not presently be look'd on as *void* and *waste*, so that any one Person may seize it as his *Peculiar*; but we must suppose it to belong to the whole People^h. And the same Rule may, in our Judgment, be extended to such desolate Islands as lie in any Sea under the dominion of a particular Commonwealthⁱ; or such as, tho' they do not now appear, yet happen to rise afterwards in the same place; of which we find several Examples recorded by *Pliny*. Now in the disposal of such things as these, the People take different Methods: Sometimes the Profits of them are laid up in a publick Stock, to be taken out again for publick Uses; sometimes all the Subjects, sometimes those only of a certain Order or Degree; and sometimes Foreigners too are allow'd to hold and enjoy them, as Tenants of the State. Yet in all Cases, whatever Right private Persons obtain over these things, depends on the Appointment of the whole Community. But there is some Difference, as to this point, between Immoveables and Movea-

^a See *Grot.* l. ii. c. 2. f. 4.

^b *Lib.* v. in fin.

^c *German.* c. 26.

^d *De Bell. Gall.* l. iv. c. 1.

^e *Lib.* vi. c. 22.

^f Of the Inhabitants of the Island *Lipare*, see *Diodor. Sic.* l. v. c. 9. p. 292. B. Edit. *Rhodors*. The same Author, l. v. c. 34. p. 310. 311. attributes to the *Vaccæans* a more strict kind of Communion, "The Nation of the *Vaccæans*, says he, divide their Land yearly into so many Partitions, in order to the tilling it: The Fruit and Product they bring into a common Stock, out of which they assign every Man his Share. If the Countrymen imbezzle any Part, it is a capital Crime. See likewise l. v. c. 45. *Ibid.* c. 45. p. 320. *D.* Of the Commonwealth of the *Panchæans*. So too the *Apalchitæ* labour for the common, and each Householder, according to the Number of his Family, received every full Moon his Proportion out of the publick Store-house. *Vid. Rochefort. Descript. Antillar.* Part II. c. 8. n. 8. *Comp. Grot.* l. ii. c. 3. f. 4.

^g *Dio Chrysostom.* *Orat.* 31. in *Rhodiac*. "The whole Country belongs to the civil State; yet this doth not in the least hinder, but that every Man is Lord of his own Possessions."

^h *Vid. Grot.* l. ii. c. 2. f. 4.

ⁱ *Vid. Plin.* *Nat. Hist.* l. iv. c. 12.

Mr. BARB. NOTES on §. IV.

¹ *Dio's* Greek is, "ἡ χώρα τῆς πόλεως, ἀλλ' ὡδὲν ἕττον τῶν κεντημένον ἕκαστος κύριός ἐστι τῶν ἰαυτῶν." See also l. viii. c. 5. § following.

bles. The former, in regard that they lie in open View, and cannot be forced out of their Place, are by virtue of that universal or general Occupancy immediately suppos'd to belong to the People, so far as concerns the Body and Substance of them. But now, as to moveable things², some of these are so framed or dispos'd, as that the Region may indeed be the Seat of their Production; and yet there is need either of Labour in finding or gathering them, as Metals in the Bowels of the Earth, Jewels, Pearls, and the like, scatter'd about the Shores and other Places: Or else of particular Care in taking and securing them, that they may not afterwards get out of our Hands; as Beasts, Fish, and Fowl, Men having no Power over these things, so as to use them at their Pleasure, before they are found or taken; it follows, that a People by possessing themselves in this general manner of the Seat where they are to be met with, do not properly acquire a *Dominion* over them, but only a Right of obtaining such a *Dominion* hereafter, by particularly taking and securing them. Hence, for Instance, we cannot rightly say, that the wild Beasts of any Country, which still remain in their natural Freedom, are the property of the Prince: But the Prince alone hath the Right of taking them, inasmuch as he is Lord of the Soil where they run; and he may communicate this Right to others, in what Degree, and under what Restraints he pleaseth. Therefore he, who is Sovereign of the respective Lands or Waters, may grant a Right of taking and appropriating things of this Nature, either promiscuously to all Persons, or to none but his own Subjects, or still only to his Subjects of such a Quality: Or, lastly, he may, if he thinks fit, reserve the Privilege wholly to himself. For tho' the things themselves be not yet, in strict Speech, under Dominion, yet forasmuch as the Act of appropriating them cannot be accomplished without using some other things which are subject to Dominion; as suppose the Earth, or the Water; it follows, that he who hath the Sovereignty of the latter things, may, by a Decree to this Purpose, prohibit others from using them, as means of acquiring the former³.

V. Hence it is apparent, that it depends on the Will of the Sovereign, and not on any natural and necessary Law, what Right the private Members of a State shall enjoy, as to the gathering of Moveables not yet possess'd, as Hunting, Hawking, Fishing, and the like: Nay, and as to the Occupancy

of desolate Regions; which the supreme Governours may hinder any of their Subjects from entering upon. Such a Prohibition cannot indeed prejudice Foreigners¹, who by taking possession of those Regions may make them their own: But it will be a stop to the Subjects of the respective Governours, so that none of them shall acquire the said things, but those only who have obtain'd a Grant and Commission so to do. For in some Places private Men are allow'd more of these Advantages, and in some less, according as the Rulers in every State have judg'd convenient. By the *Jewish* Custom, as Mr. *Selden*^b informs us, *Whatever was found in desolate Places, or in such as were void of the Dominion and Culture of private Persons, became the Property of the Occupant; as Grass, Fruit, Wood, and the like. Also the Fish, whether in salt or fresh Water, and the wild Beasts and Birds: Yet no one was permitted to hunt or to hawk in another Man's Ground; tho' even there, if he had once taken any Game, it was his own. But to rob the Parks and Ponds was utterly unlawful.* The *Roman* Lawyers talk much to the same purpose. For thus *Gaius*²; *All Animals taken on the Land, on the Sea, or in the Air, that is, wild Beasts, Birds, and Fish, belong to those who take them: For what is yet no Body's, natural Reason assigns to the first Occupant.* On these and the like Places the Expositors of the Civil Law observe, that under the Term *Fera* are comprehended all living Creatures, which Nature hath endued with an unlimited Power of straying up and down about their proper Elements; so as to take in those likewise which have been tamed by the Use and Company of Men. Though perhaps the Distinction between wild and tame Creatures might be thus better express'd; that the former are more averse to human Society, take greater delight in enjoying their boundless Liberty, and cannot, without great Difficulty, be accustomed to live with us; nor may we, after all, depend very safely on their Fidelity: Whereas the latter are quite different in each of these respects. Yet 'tis a Saying of *Grotius*^c, *That the Reason why some Creatures fly and avoid us, is not the want of Gentleness and Mildness on their Side, but on ours: Which he grounds on the Observation of Travellers; that in the most remote Parts, where Men had scarce ever or very rarely came before, Birds have been found, which offer'd themselves freely to be taken. Some may rather choose to form the Distinction by saying, That wild Crea-*

^a Comp. *Græc.* l. ii. c. 2. f. 5. & c. 3. f. 5. & 19.

^b De Jur. Nat. & Gen. sec. *Hebr.* l. vi. c. 4.

^c *Hist. Belg.* l. v.

MR. BARRÉ'S NOTES on §. IV, v.

² This Distinction is founded upon a false Notion of taking possession. See §. 2. n. 2. above. The Truth is, we may make our selves a Property in things moveable, as much as immoveable, because they are often additional to them. See Mr. *Thomasius's Jurisprud. Dicit.* l. ii. c. 10. §. 147. &c. Our Author to maintain his Principles runs himself into manifest Absurdities. See §. 7. n. 3. following.

¹ Our Author doubtless means a desert Country, bordering upon a Kingdom, but taken into it. For every thing that is encompassed with something already occupied, must also be so esteem'd, and consequently others cannot pretend to it. So that I can't see why Mr. *Hertius*, an exact Author, should suppose the contrary. 'Tis not a Sequel of Mr. *Pufendorf's* false Hypothesis concerning the Foundations of the Right of Property. For the Agreement which he supposes necessary to make one Master of a thing, extends itself in his Judgment to every thing that has a necessary dependence on it, which appears plainly by what I have said above about the Sea, c. 5. §. 8. But as it may be the Interest of a State to keep its Members from seizing any desert Lands without its Jurisdiction, by their own Authority, the Author here observes upon this Occasion, and expresseth it in this manner; *Sovereigns may likewise*, &c. which makes it plain enough to understand. It is certainly a thing much more considerable to seize upon a large Extent of Ground, than to take a few Deer or Fish; so that this is ill placed, if he treats of any thing which belongs already to the State in general.

² The Words of the Civil Law are, *Fera igitur bestia, & volucres, & pisces, & omnia animalia, quæ mari, cælo, & terra nascuntur. si vel ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim ante nullius est, id naturali ratione occupanti concessitur.* *Instit.* l. ii. tit. 1. *De rerum divisione, & acquirendo ipsarum Dominio.* §. 12. Concerning Fish there is an elegant Passage in *Plautus's Rudens*, Act iv. Scen. 3. ver. 32, &c. *Equum esse dices*, &c. "Can you say that any one of the Fish belongs to me, whilst in its own Element? Yet those which I catch are my own, and I reckon them amongst my proper Goods. No one lays hand on them to challenge them from me; no one claims a share in the Booty. I sell them all fairly in the open Market or my honest Store." Tho' the Fisherman was somewhat out when he applied this Argument to the Bag of Money.

tures have naturally a more intractable, a more rough and stubborn Disposition than the tame.

We may here remark by the way, that in one place of the *Institutions*,^a and another of the *Digests*, Pigeons and Peacocks are falsely reckon'd amongst those Fowls which we term Wild³. The Mistake about the Peacocks hath been already noted by *Gotofredus*, on that Passage of the *Institutions*: And as for Pigeons, the Reason which in the very next Section is there given to prove Hens and Geese to be tame⁴, will reach them likewise, there being other Pigeons expressly denominated Wild. And therefore, by the *Jewish* Customs, none might take them, unless at thirty Furlongs distance from the Dove-house^b.

Yet Bees are no doubt wild by Nature⁵, since their Custom of returning to their Hive doth not proceed from their familiarity with Mankind, but from their own secret Instinct: They being in all other respects utterly unteachable. It is nevertheless one of *Plato's* Laws,^c *Whoever shall pursue the Swarms which belong to others, and by striking on the Brass shall draw them with the delightful Sound to fix near himself, let him make Restitution for the Damage.* Where he seems to presuppose, that the Owner of the Bees did not follow them, when they left his Hives^d. *Pliny*^e will have the Bees to be neither wild nor tame: Others divide them into both those kinds.^f But that, so long as they return to our Hives, they are properly our own, and cannot be hurt without our Loss and Damage, is very laboriously proved in that Declamation of *Quintilian*, entituled, *The poor Man's Bees*^g.

According to the *Roman* Laws, 'tis the same thing whether a Man take Game in his own Land⁶, or in those of others: Because wild Creatures, in whatsoever place they are found, are no Body's Property, whilst they retain their natural Freedom. Yet the Owner of Land may hinder others from coming there to follow their Sport⁷. But still what another hath taken with his Dogs or his Hawks, though against the express prohibition of the Lord of the Soil, he thereby makes his own. Indeed, as to this last Particular, *Cujacius*^h is of a different Opinion; grounding his Exception on a Law of the *Digests*ⁱ.

VI. But in most Places the privilege of Hunting is left wholly to the Governours of the Commonwealths; who in some Countries admit their principal Subjects to be Sharers with them: Only Beasts of Prey are almost every where allow'd to be kill'd by all Persons without Distinction. Many Reasons may be assign'd for this general Custom. It did not seem convenient that Country-men and Labourers

should be permitted to quit their Work, that they might ramble about the Woods; which Indulgence might have drawn them on by degrees to the practice of Robbery and Plunder^k. Sometimes too it is reckon'd unsafe to trust the common People with Arms. *Tully*^l mentions one *Lucius Domitius*, who executed a Slave only for striking a large Boar with a hunting Spear, when after the *Servile War* in *Sicily* an Order had pass'd, forbidding any Slave to appear with a Weapon. On the other side, for the Princes and Nobles, on whose Arms the Safety of the Commonwealth was to depend, Hunting was esteem'd a most agreeable Exercise, as a Representation of War, and very proper to inure them in bearing the Hardships and Labours of the Field. On which account what a high Value the *Parthians*, *Medes*, and *Persians* set on this manly Sport, we may learn from *Xenophon*^m and other Authorsⁿ. *Bajazet* the *Turk* is said to have maintain'd seven thousand Men only for the care and management of his Hawks; and to have had six thousand Dogs for the Chase. When he was taken Prisoner by *Tamerlane*, and upbraided with this Fancy by a Present of Hawks and Dogs from the Conqueror, he fiercely replied, *For me who owe my Birth and Education to Amurath the Son of Orchan, both Sovereign Princes, Hounds and Hawks are proper Diversion: Not for you a rambling Free-booter of Scythia, bred up to Thieving and Rapine*^o. And indeed it was but equitable to allow this manly Recreation to Princes and Chief Men, by whose Toils and Cares the publick Welfare is secur'd. But should the same Favour, in great and flourishing Countries, be granted promiseously to all Persons, it would be of very little Benefit and Advantage to any one in particular^p. For these, therefore, and the like Reasons, a Sovereign, if he thinks it for the Interest of the Kingdom, may against the consent of the common People abridge them of the Liberty of Hunting, without any Injustice. For he doth not hereby take from them what was their own, but barely forbids them to use certain means of acquiring things, which the meer Law of Nature, if it obtain'd without any civil Constitutions, would allow them. For as to what some ignorant Persons have urged, that the prohibition of Hunting is therefore unlawful, because God Almighty invested Men in general with the Dominion over Beasts, the poorest Subjects being no less Men than their Superiors: Or, as to that common Assertion of the *Roman* Lawyers, that Hunting is free to all by the Law of Nature and of Nations; learned Men have long since put an end to these Doubts, by distinguishing between the *preceptive* and *permissive* Law of Nature, and by explain-

^a Sect. 15. *De rer. dicis.* ^b Vid. *Constantin. l'Empereur Baba Kama*, c. 7. f. 7. Add *Selden de J. N. & G.* sec. Heb. l. vi c. 11. ^c De L. L. l. viii. p. 915. C. Edit. *Wech.* ^d Comp. l. 14. *Instit. dict. Tit.* ^e Lib. xi. c. 5. ^f Vid. l. xlvii. t. 2. *Digest. De Furtis*, l. xxvi. & lib. xl. t. 1. l. v. f. 3. ^g Lib. viii. f. 1. *D. Famil. ercisundæ.* ^h *Observ.* 4. 2. ⁱ *Leg.* 55. t. 1. Lib. xli. *D. de A. R. D.* ^k Vid. *Constitut. Frederic. II.* l. ii. feud. t. 27. f. 5. *Si quis rusticus.* ^l Lib. v. c. 3. *in Ferr.* ^m *Cyropæd.* l. i. initio. ⁿ *Cornel. Nep.* Alcibiad. c. 11. *Justin.* l. xli. c. 3. *Tacit. Annal.* l. ii. c. 2. *Sueton. Calligul.* 5. ^o *Laconick Chalcondy.* l. iii. ^p *Plin. Panegy.* " These were the Arts and Exercises in which their future Generals were train'd for their Country's Service; to contend with the swifter Beasts in Speed, with the bolder in Strength, with the more cunning in Policy and Craft: Nor was it look'd on as an inconsiderable Ornament and Triumph of Peace, to remove from the Field the Inroads of the savage Herd, and to deliver, as it were, from a Siege the Labours of the Countrymen.

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³ The Words of the *Digests* are, *Pavonum quoque & columbarum fera natura est.* See also *Digest.* l. xli. t. i. leg. 5. §. 5. & *Dion. Gotofred.* upon that place of the *Institutes.*
⁴ *Gallinarum & anserum non est fera natura, idque ex eo possumus intelligere, quod aliæ sunt gallinæ, quas feræ vocamus, item: alii sunt anseres, quos feros appellamus.* *Ibid.* §. 16.
⁵ *Apium quoque fera natura est. Itaque, quæ in arbore tua confederint, antequam à te alveo includantur, non magis tua intelliguntur esse, quam volucres, quæ in arbore tua nidum fecerint.* *Ibid.* §. 14. See *Hieron. Magii Miscell.* l. i. c. 3.
⁶ The Law is, *Nec interest, feras bestias & volucres utrum in suo fundo quis capiat, an in alieno.* *Ibid.* §. 12.
⁷ *Plone qui alienum fundum ingreditur venandi aut occupandi gratia; potest à Domino, si is præviderit, prohiberi ne ingrediatur.* *Ibid.*

ing the different acceptations of those Terms *Jus Gentium*, or the Law of Nations ^a.

But farther, it is very probable, that in many places this Right was conferr'd on Princes by the voluntary Motion and Act of the People ^b. For since there was a Necessity of assigning them some Advantages for the supporting their Dignity with a sufficient Train and Splendor; it was wisely consider'd, that 'twould be most convenient to allot them such things as might be given without the Damage or Prejudice of any Man: And of this kind are all those in which no other Person can yet claim a Property ^c.

VII. But such Laws as these did not, strictly speaking, confer on Princes the Dominion over wild Beasts, but only a Right, by virtue of which they alone should afterwards make them their Property, by seizing and possessing them. Which Right, nevertheless, had this effect in common with Dominion, that in case any other Person had illegally taken the said Beasts, they might be challeng'd at his Hands. For it doth not seem reasonable to admit the Opinion of some, who tell us, that even before actual Occupancy the Law might fix the Dominion of these things, nothing more being required towards the producing of Dominion than a legal Appointment. Thus much indeed the Law of any Country may effect, that a Dominion already established over things shall pass from one Subject to another, without any antecedent Act of the Parties. But the Law alone is not sufficient to introduce originally a Dominion over such things as have not yet been actually brought under the Power of Men: But there is requir'd farther some corporal Action; especially as to the Possession of living Creatures. But now the first constituting Dominion, and the preserving it after it hath been once constituted, are different things.

Some again there are who assert, that Prohibitions of this Nature by civil Ordinances only stop the Right of taking Game, not of keeping what hath been already taken. For two things, they say, there were which the Law of Nations allowed with reverence to wild Beasts: First, That all Men should enjoy the liberty of Hunting: And Secondly, That the Dominion of these Beasts should be acquired by the way of Occupancy. The former of which Privileges seems in this case to be restrain'd, but by no means the latter. Whence if a Person, who was forbidden to hunt, shall nevertheless have follow'd the Chase, and succeeded in it, any Game found upon him may be forced away; not because he had not made it his own, but in way of Punishment he was unworthy to possess it. In the same manner altogether, as Nets, Spears, and other hunting Instruments are seized in such Mens Hands; tho' none

can deny these to be their real Property. For which Reason, if Game, thus taken contrary to Law, be given in charge to another as a matter of best Trust, it may not be forcibly challeng'd from him by the Magistrate: As it might be, were it indeed stolen, some other Person being the just Owner of it. But the Prince cannot be call'd the Owner of these Beasts, before he hath actually caught them; and therefore he, who hunts contrary to the Royal Prohibition, doth not commit Theft, nor take away the Goods of another; but only acquires a thing which another had a private or exclusive Right of acquiring; and therefore he may be punish'd; but as for the thing which he thus got into his Possession, it ought not to be look'd on as matter of Theft, or to be challeng'd accordingly ^{d e}. But indeed 'tis very simple to imagine, that a Man is by any natural Necessity made Proprietor of the things which he first lays his Hands on; we having already shewn, that this Right is grounded on the Strength of a previous Covenant ^f. Therefore if a Prince shall forbid his Subjects to use this Method of Acquisition, in regard to some particular things; their being the first Takers shall avail them nothing in order to the obtaining of Dominion over them. And that Law of the Prince hath so far the Effect of Property, as that after it the Subject ought not to lay hands on the said Beasts; or if he doth so, he cannot thereby make them his own. Nor doth it follow, that because 'tis not usual in these Cases to challenge the Flesh, especially from a third Person, when perhaps it is ready to corrupt; therefore the unlawful Hunter was the just Proprietor of it. Again, taking must not presently be confin'd acquiring: The former being a bare natural Action, whereas the latter includes a moral Effect. It may rather be said, that the Possession of these Men is a plain Contradiction; for thus it runs, *The Right of Hunting belongs to Princes alone, and if any private Person takes Game, he thereby acquires the Dominion of it*; that is, Princes alone may use that means by which the lawful Dominion over wild Beasts is gain'd and establish'd; and yet another Person may acquire the same Dominion, whilst he cannot lawfully apply the same means.

But what if it should be demanded, Who then is the Proprietor of Game thus taken contrary to Law? We have absolutely denied the Taker himself to be so ^g; and as for the Prince, how could he fix a Property in the Game, when he was not concern'd in the Sport? It seems reasonable in this Case to affirm, that here the Hunter, tho' in a very unacceptable way of Service, labours for the Prince; and consequently, by taking the Game, he makes it the Prince's, in the same manner as other Huntsmen, who act by a Royal Commission and Deputation.

^a Vid. *Grot.* l. ii. c. 2. f. 5. ^b Vid. *Grot.* l. ii. c. 8. f. 5. ^c Of the Hunting allowed the *Peruvians* under their *Yucas*, consult at your Pleasure *Garcilasso de la Vega*, *Comm. Reg.* l. vi. c. 6. ^d Vid. *Gudelin.* de jure novissimo, l. ii. c. 2. and from him *Arnold. Vinn.* ad Sect. 13. *Instit. De rer. divis.* *Ziegler* upon *Grotius* (l. ii. c. 2. f. 5.) speaks much to the same Purpose; "That a Law may indeed hinder the taking of Game, but that no Law can hinder it, when taken, from immediately passing into Property, as acquired. For that the Right of prohibiting is consistent enough with this Right of Acquisition. That, whether a Man by taking Game acquires it as his Property, and whether a Man ought to make use of this way of acquiring, are two different Questions. That, as to the former, the Sovereign hath no Authority to interpose: Because, as he cannot make those things become some body's, which are no body's, or these to be possessed which are not possessed (l. iii. f. 14. *D. De acquir. p. ff.*) so neither can he hinder Acquisition, or cause that those things which are already acquired, shall not be acquired." But that, as to the latter of these Questions, the Sovereign is free to enact what he pleaseth. ^e Vid. *D.* l. 41. tit. 2. *De acquirend. vel amittend. possess.*

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^f We have proved the contrary, c. 4. §. 4. n. 4.

^g This Supposition, to which our Author is obliged to have recourse, and which does not appear to be the least satisfactory, is sufficient almost to shew that he reasons upon false Principles, and that he knows not how to keep himself from yielding to what we have said in the Note before quoted.

It is, moreover, certain, that a Stranger likewise is bound by such Constitutions as these; tho' perhaps in his own Country the Liberty of Hunting may be universally allow'd. Forasmuch as this is a necessary Law of all States, without which their inward Peace and Tranquillity cannot be secured, that he, who enters upon the Territories of another Prince, tho' only for a time, ought so long to conform to the Customs and Orders of the Place; at least to all those, the Reason of which will hold good against him as well as against others, and from which the Legislator hath not peculiarly exempted Foreigners^a. But, on the whole, 'tis the Admonition of wise Men, that Statutes of this kind ought with great Moderation to be put in force; unless some particular Aggravation in the Offender deserves a greater Severity of Proceedings^b.

VIII. We are then said to have occupied any thing, when we actually take possession of it; and this commenceth at our joining Body to Body, either immediately, or by a proper Instrument. The regular Course therefore is, that the Occupancy of Moveables be made with the Hands; the Occupancy of Soil with the Feet, together with an Intention of manuring it, and the Action of setting Boundaries to it, whether exactly, or with a wider Liberty. But the bare seeing a thing, or the knowing where it is, is not judg'd a sufficient Title of Possession^c. Thus *Ceres* speaks in *Ovid*, *Metamorph.* l. v. ver. 518, 519.

En quaesita diu tandem mihi nata reperta est.

————— Si
Scire ubi sit, reperisse vocas. ———

Sought for so long, my Maid, I've found thee now;
If we have found, when where to find, we know.

^a Vid. *Grot.* l. ii. c. 2. f. 5.

^b Vid. *Bæcler.* ad *Grot.* *ibid.* Sect. 4.

^c *Quæst. Græc.* 30. p. 298. *Ed. Weeb.*

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¹ This Passage, tho' quoted by *Grotius*, l. ii. c. 8. §. 3. as well as our Author, upon this Occasion, can be no farther to the Purpose, than as an Illustration, because he treats here of another thing. He might much better have mention'd that Dispute which *Plautus* feigns to have been between two Servants, one of which had fish'd out of the Sea a Cloak-bag, and the other claimed a Part, because he saw him from the Shore. For thus they argue;

Gripus. *Quemne vidulum ego excepi in mari?*

Trachal. *At ego inspectavi è littore.* *Rudens, Act.* iv. *Scen.* 3. ver. 79.

Nothing is more impertinent than this Reason. For besides that *Gripus* could not know the Intention of *Trachalion*, this last could not have any Thoughts of taking the Cloak-bag, 'till the other was possess'd of it. The Arguings that follow are not at all convincing. I shall give them in *Madam Dacier's* Translation. "Should the Man to whom the Cloak-bag belongs come now, shall not I that stood by, and beheld afar off, be counted the Thief as well as you who fish'd it up? How then can you prove, that I, who must be an Abettor in the Theft, should not also share in the Gain?"

² The Determination of the Arbitrators, and that of our Author, is not at all satisfactory. He had better have said, when two Persons at the same time declare their Intention to seize a thing that belongs to neither of them, the thing is common to both, *Titius* *Observ.* 293. Indeed, as I have already said, that which properly constitutes the Right for the first Occupant is, that he has declared before some others, some way or another, his Intention to make a thing his own; inasmuch, as soon as he hath so done, all others, who have yielded him the first Place, ought not to pass over his Bounds, because it would be as dishonest and unjust as if one over-runs another's Land; but if two Persons declare at the same time that they'd have a thing, and one makes known his Design one way, and the other another, such an Agreement gives them equal Right, in so much that neither of them can exclude his Companion; wherefore they must accommodate the Matter between themselves, and both, according to the Proverb, have a Part. See the Interpreters of the Passages quoted by *Mr. Noodt*, *Prob. Jur.* 2. 6. & *P. Vavassor*, *De vi & usu quarund. locut.* p. 165. But I am amaz'd that he did not see, that in the Example he uses there was a special Reason, why neither the Running of the *Chalcidian* Spy, nor the Dart shot by the *Andrian*, was of any Use to secure the Possession of the City that they went to for their Countrymen. They were both sent, doubtless, in Behalf of the whole Colony; so that they could not seize upon the City but in common, whatever Notion they might otherwise have of the nature of taking Possession by the Right of the first Occupier.

¹ This is always necessary, as is before proved. So that in the Example propounded by our Author, supposing that one finding a Nest, and seeing that the young ones need to remain yet with their Dam, leaves them, with a Design to come again another time; they to whom he tells it, declaring to them his Intention at the same time, do not deal well with him, if they do as the Curate, of whom *Boursault* speaks in one of his Letters, did to a Countryman; who to revenge himself went to him to put a false Confidence in him about something curious; whereupon the Curate, desirous to know all the Particulars of the Matter, to play a like Trick with the Countryman, answer'd him, *A Bubble, the Birds are gone.* By the Laws of *Saxony*, if any one has found a Swarm of Bees in the Hollow of a Tree, and makes a Mark whereby it may be known that he is gone to seek an Hive to put them in, no Man may meddle with them; they are thought by Right to belong to him that first discover'd them, as the first Occupier, because he has manifested his Design to make them his own. This Account I have from *Mr. Thomajus's* Notes upon *Huber. De Jure Civitatis*, l. ii. Sect. 4. c. 2. p. 455. where nevertheless he affirms, that this Law is not agreeable to the Law of Nature and Nations, but it does not appear to me that he has said any thing which destroys these Principles, upon which my Arguments are built, no

Whether Possession of an immoveable thing may be taken by an Instrument, we may understand from the famous Story which *Plutarch*^c relates to this Purpose: *The People of Andros and Chalcis made a Progress together into Thrace, to find out new Seats where they might fix and inhabit; and soon after their Arrival the City Sana was by Treachery put into their Hands: After this, being informed that the Barbarians had deserted the City Acanthus, they sent two Spies to discover the Truth of the Intelligence. These, as they drew near, saw the Place to be really forsaken. Whereupon the Chalcidian Spy ran with all his Force to take possession of it in the Name of his People; but the Andrian seeing himself outrun, threw the Spear which he had in his Hand at the City Gate, and as it stuck there, cried out, That by this Cast of his Spear he had taken the prior Possession in Behalf of his Countrymen. A Dispute arising hereupon, the Eretrians, the Samians, and the Parians were chosen Umpires; of whom the two former gave Judgment for those of Chalcis, and the last for those of Andros. The disappointed Party were so enraged at the Arbitrators, as to engage themselves by Oath, never to make or to allow any Marriages with them. Indeed a Spear seems a very improper Instrument for the Occupancy of Immoveables, since we may strike many things with such a Weapon which we can never approach so near as to touch with our Body².*

IX. It is the general Opinion, that moving things cannot be made our own but by bodily Seizure; and this we are to use in such manner, as to take them from the Place where they were found¹, into our Lordship, or at least into our safe Custody. Thus a Nest of Birds, tho' I lay my hands upon them, yet are not my own, unless I carry them home. If I find a Litter of young Beasts of Prey,

I then fix a Property in them, when I either remove them as Prisoners to my own Quarters; or for some time set a Guard over them where they lie, to hinder their Escape. Now this Seizure is made not only with our Hands, but with Instruments; as suppose, Snares, Gins, Traps, Nets, Weels, Hooks, and the like^a: Provided the Instruments be, as they term it, *in nostra potestate*, under our Power; that is, set in a Place where we have a Right of following the Game, and not yet broken by the Prey, but holding them fast, at least till such time as we might probably come up. And hence we may decide the noted Case of *the Boar in the Toil*, proposed in the *Digests*². For if the Beast were so entangled, that he could not possibly break thro', and the Snare were laid either in your peculiar Lordship, or in a publick Place where you had a right of Hunting, then he was certainly your own; and I, if I had loos'd him, and restor'd him to his natural Liberty, should have been bound to make full Satisfaction, whatever Name such an Action might bear at Law, or under what Head soever it might be ranked. But if the Snare were set on my Ground, as I might at first have hinder'd your Entrance thither, so if I afterwards break what you placed there without my Leave, you have no Reason to think your self injured.

X. It hath likewise been disputed, Whether by giving a Beast a Wound in Hunting we presently make him our own? *Trebatius*¹ long since declar'd on the Affirmative side; but then he supposeth us to pursue the Beast, which if we omit to do, he says, *We lose our Property, and the Right passeth to the first Occupant*. Others are of the contrary Opinion, maintaining, That we can by no other means appropriate the Beast, but by actually taking him, because many Casualties may hinder him from ever coming into our Hands. The Emperor *Frederick*

made this Distinction in the Case^b: *If the Beast were followed with the larger Dogs or Hounds; then he was the Property of the Hunter, not of the Chance-Occupant; and in like manner, if he were wounded or killed with a Lance or a Sword. But if he were followed with Beagles only, then he passed to the Occupant, not to the first Pursuer. If he was slain with a Dart, a Sling, or a Bow, he fell to the Hunter, provided he was still in Chase after him, and not to the Person who afterwards found or seized him.* According to the Constitution of the *Lombards*^c, he who found or kill'd a Beast wounded before by another, was to carry off a Shoulder and the Ribs, and to leave the Residue as the Hunter's Right: Though this Right to the Remainder continued no longer than the Space of twenty-four Hours. We judge it may in general be affirm'd, That if the Beast be mortally wounded, or very greatly maim'd, he cannot fairly be intercepted by another Person whilst we are in Pursuit of him, provided we had a Right of passing through such a Place: But the contrary is to be held, in case the Wound were not mortal, nor such as would considerably retard the Beast in his Flight². Therefore when *Meleager* in *Ovid*^d admits *Atalanta* to a Share in the Glory of killing the *Caledonian Boar*, it was not so much an Act of Justice, as of Love. But the Game which my Dogs kill, when I did not set them on, doth not become my Property, 'till I have actually taken hold of it^e.

XI. The *Jewish Customs*, as Mr. *Selden* informs us^f, decided these and the like Points in the manner following: *Fish or Beasts were not to be taken from the Repositories or Places of Store: Yet it was lawful to take Fish out of another Man's Net, whilst yet in the Sea, and Beasts out of another Man's Snare, if it were laid in a desert Place. He that spread a Net in another's Ground might possess the Game he had*

^a See *Grat.* l. ii. c. 8. f. 14.
l. 4. & 6.

^d *Metam.* l. viii. ver. 427.

^b *Godofred.* ad istam leg. ex *Radevico* de gest. *Frederic.* l. i. c. 26.

^c *Add. Alberic. Gentil. Advoc. Hispan.* l. i. c. 4.

^e *Lib. i. tit. 22.*

^f *De Jur. Nat. &*

Gen. Jec. Hebr. l. vi. c. 4.

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more than in the following Case, where he determines otherwise than I do. Suppose that one seizes upon a thing which he finds in a publick Place, but which he can't carry with him that Moment; whereupon he leaves it, declaring to some other present, that he intends to take it, and will come soon for it. In this Case, says Mr. *Thomasius*, the first can't complain, if the last takes it, seeing it is out of his Possession, and left in a publick Place; but in my Opinion the contrary must be understood, that either he that took possession of the thing has relinquish'd it, or that he may reasonably presume it, because he delays long his Return to take it, and so may be thought not to mind it. In fine, I can't but take notice, that in the Place which I have quoted, p. 452, &c. Mr. *Thomasius* confutes the Hypothesis of Mr. *de Bynkershoek*, upon which I have given my Opinion above, §. 1. n. 1. but I had not then seen the Note of that able and judicious Lawyer when I wrote mine, which I have not since changed; yet I must own, that I have not always the same Notions, tho' for the main we are agreed.

² The Words of the *Digests* are, *In laqueum, quem venandi causa posueras, aper incidit; cum eo hæeret, exemptum eum abstuli* — *Respondit Proculus, laqueum videamus, ne inter sit in publico an in privato posuerim: & si in privato posui, utrum in meo, an alieno: & si in alieno, utrum permissu ejus, cujus fundus erat, an non permissu ejus posuerim? Præterea, utrum in eo casu ita hæeret aper, ut exsedire se non possit ipse, an diutius latitando expediturus se fuerit? summam tamen hanc esse puto, ut si in meam potestatem pervenit, meus factus sit. Sin autem aprum meum feram in suam naturalem laxitatem dimississet, eo facto meus esse desisset, & actionem mihi in factum dari oportere, veluti repositum, cum quidam poculum alterius ex nave ejecisset, Digest. l. xli. tit. 1. De acquirendo rerum Dominio, leg. 55.* This Law ought not to be understood as it is by the Interpreter; no, not by *Trebatianus*. Mr. *Noodt* with his usual Sharpness has happily discover'd the true Sense of that antient Lawyer; for he proves in his *Probab. Juris*, l. ii. c. 6. §. 3. that *Proculus* was one of those who believed, that to obtain a thing by the Right of first Occupancy it was not always necessary to take a corporal Possession; and he proves it from these Words, *Ut si in meam potestatem PERVENIT, meus factus sit*, signifying, provided that he who laid the Nets, was inclined to seize it corporally, when he saw the Boar that he had been taken, (*i. e.*) That no other can loose him, though he be in a publick Place, and that if it is upon another's Land, the Proprietor may not hinder him from going on it, though otherwise he has Right to do it. Mr. *Noodt* afterward quotes, and at the same time corrects another Law; from whence it appears, that *Paul* the Lawyer, reasoning upon the same Principle, maintains, that one seizes upon a Treasure found in his Field, as soon as he knows it, and will make it his own.

¹ The Words are, *Illud quaesitum est, an fera bestia, quæ ita vulnerata sit, ut capi possit, statim nostra esse intelligatur? Trebatius placuit, statim nostram esse, & eo usque nostram videri, donec eam persequamur. Quod si deserimus eam persequi, assignere nostram esse, & rursus fieri occupantis. Itaque si per hoc tempus, quo eam persequimur, alius eam ceperit, eo animo, ut ipse lucrificeret, furtum cum videri nobis commississe. Plerique non aliter putaverunt eam nostram esse, quam si eam ceperimus, quia multa accidere possunt, ut eam non capiamus, quod verius est, ibid. leg. 5. §. 1.*

² This Distinction is not necessary. The Author always reasons from a false Notion of the Nature of taking possession. The Truth is, that 'till we cease pursuing the Beast, and so leave it to the first Occupant, it belongs to us as much as can be; so that no Man can lawfully put in a claim to it,

caught, unless it were found by the Lord of the Soil, and challeng'd as his Right, by virtue of that Property. Fish that leapt into a Ship belong'd to the Master: Inasmuch as a Ship may be esteem'd a place of firm and secure Custody, not of such as is passing and uncertain; the motion it hath not proceeding from its Nature, but from the force of the Waters. It is worth while to examine that Law of *Nerva*¹ on the same Subject, which determines, *That we are properly the Possessors of the Fish in our Pond, not of those in our Lake: And so of the Beasts in our close Park, not of those in our Woods and Forests, though surrounded with a Fence.* Which Distinction *Grotius*² dislikes, because Fish and Beasts are no less secured in the larger Prisons of private Lakes, and well fenced Woods, than in the closer, of Ponds and Parks. Yet *Nerva's* Assertion is indeed founded on very good Reason. For the Propriety both of wild Beasts and Fishes commenceth upon their being taken³. Now the Fish preserv'd in our Pond, and the Beasts in our Park, were once actually taken by us, but not the Fish which swim in our Lake, nor the Beasts which run in our Woods, enjoying thus far their natural Liberty, though perchance they are so inclos'd, as not to be able to wander without end. For to take these Creatures, and to beset them with an Inclosure for the more easy taking them hereafter, are different things; yet inasmuch as I alone have a Right to take them, I may therefore both hinder others from doing the like, and may challenge what I find in their Hands; so that as to this Effect, it is all one as if I were strictly the Proprietor. And the Beasts thus surrounded at large, may so far only be said to enjoy their natural Liberty, as that they never yet were caught by any Person; not as that all Persons without Distinction have a Right to catch them.

XII. We likewise acquire by Occupancy things in which the *Dominion* they before lay under is extinct⁴: And this happens if a Person either openly throws aside a certain thing, with sufficient In-

dications, that he desires it should no longer be his own, but should lie free for the first Taker, without designing hereby to gratify any Man else⁵: Or, if having at first lost Possession against his Will, he afterwards gives the thing over⁶; either as despairing to recover it, or because the Recovery of it is not tantamount. For otherwise, a Man, though he loseth the actual Possession⁷, yet never forfeits the Dominion and Property of a thing (unless it be taken from him in way of Punishment, or by the chance of War) but he still keeps a Right of regaining it, 'till such time as his Inclinations to that purpose have ceased, or may be presum'd to have ceas'd. Wherefore the *Dominion* of such things as these cannot be acquir'd by Occupancy, so long as the Right of the former Owner still subsists⁸. But since to make a thing compleatly abandon'd or forsaken, Two Points are necessary; First, That the Person refuse to own it for the future; and Secondly, That he divest himself of the Possession, by leaving the thing, or casting it away: If either of these Conditions be wanting, the Property is not evacuated. Thus if I throw a thing by, yet without Intention to quit my *Right* in it, I do not prejudice my self by that Action. And on the other hand, though I am resolv'd utterly to quit my Title to a thing, yet unless I actually cast it off, I am still the Proprietor⁹.

Amongst the things which by this means are brought under *Dominion*, we may reckon wild Beasts, or any sort of Game, when escap'd out of our Hands, and repossest'd of their natural Liberty. *Grotius* is not pleas'd with this Position of the *Roman Law*¹⁰, because, says he, *the losing our Dominion over wild Beasts, doth not immediately follow upon their Escape from us, but ariseth from this probable Conjecture; That by reason of the great difficulty of pursuing and recovering them, we may be presumed to have given them over.* But the same Laws hint as much as this; for they tell us¹¹, *A wild Beast is then suppos'd to recover his natural Liberty, ei-*

¹ Lib. ii. c. 8. f. 2. ² See 1 *Sam.* ix. 3. *D. l. xli. t. 2. l. 13.* & Lib. xiv. tit. 2. *princip. D. De acquir. possess. l. ii. De just. Sect. 8. l. 8. D. ad leg. Rhodiam.* ³ Vid. l. xlii. tit. 2. l. 17. f. 1. *D. De acquir. possess.* ⁴ Lib. ii. c. 8. f. 3. ⁵ *D. 13. & l. v. princip. D. de A. R. D.*

MR. BARB. NOTES ON §. XI, XII.

¹ The Words are, *Item Nerva filius ait, feras bestias, quas vicariis incluserimus, & pisces, quos in piscinas conjecerimus, à nobis possideri; sed eos pisces qui in stagno sint, aut feras quæ in silvis circumseptis vagantur, à nobis non possideri, quoniam relictae sint in libertate naturali. Alioquin etiamsi quis sylvam emerit, videri eum omnes feras possidere, quod falsum est, Digest. l. xli. t. 2. De adquirenda vel amittenda possessione, leg. 3. §. 14.* But in this Sentence there is a Word omitted, which makes this ancient Lawyer speak what he never thought. For it ought certainly to be read, *Feras quæ in silvis NON circumseptis vagantur.* And so *Nerva* opposes the wild Beasts in a Park, whether it be great or small, to those in a Forest not inclosed, and the Fish in a Stew-pond, to those which are in a Lake or Pool, which lies open to any one on all Sides. And he affirms, that by these Inclosures within certain Bounds we are in actual possession of the Beasts so inclosed. *Francis Hotman* made this Correction first, and *Mr. Nois* has solidly confirmed it after his manner, in his Observations publish'd in 1706. l. i. c. 11. See also what he says in the foregoing Chapter, p. 54, 55.

² We have sufficiently confuted this in the foregoing Notes, and consequently the Censure of *Grotius* is well grounded, if the Words of *Nerva*, recited in the Law of which he speaks, be not corrupted, as I have observ'd in the foregoing Note.

³ 'Tis a Determination of the Roman Lawyers. *Qua ratione verius esse videtur, si rem pro derelicto à Domino habitam occupaverit quis, statim eum Dominum effici. Pro derelicto autem habetur, quod dominus ea mente abjecerit, ut id in numero rerum suarum esse nolit, ideoque statim Dominus ejus esse desinit, Instit. l. ii. t. 1. De rerum divisi. Sec. §. 47.* Those things, which are forsaken, having once belong'd to a private Person, can't be thought to be any part of his Estate; but it is natural to suppose them to belong to no body, and consequently they become the first Occupant's, at least, if there be no Law to hinder private Persons from making them their own, *Titius Observ.* 296. In fine, things immovable become the first Occupant's, when they are abandoned. *Mr. Hertius* observes here, that he uses the Word *abjicere* to express a Renunciation of Property to these sort of things, and grounds it upon the Clause of a Will explain'd by *Æsop*, where that cunning Slave says, that the Harlot alienated the Lands which had fallen to her in Coparcenary, *Phæar.* l. iv. Fab. 4. ver. 42. but as the Interpreters expound it, *abjicere* signifies to sell it to the highest Bidder, and not to leave it to the first Person that shall seize it.

⁴ As when we cast Money or other things to the common People, which become the Property of those that first catch them.

⁵ See what is said, c. 12. §. 8. following about the Foundation of Prescription.

⁶ See §. 1. of this Chapter, and n. 1. on it, where I have examin'd the Opinion of such as maintain the contrary.

⁷ *Quicquid autem eorum ceperis, eo usque tuum esse intelligitur, donec tua custodia coarctatur. Cui vero tuam coarctaverit custodiam, & in libertatem naturalem sese receperit, tuam esse desinit, & rursus occupantis fit. Naturalem autem libertatem cepisse intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio, Instit. l. ii. tit. 1. De rerum divisi. & acquir. ipsarum Dominio, §. 12.* See also *Digest.* l. xli. t. 1. leg. 3, 5.

ther when he is quite out of our sight; or when, tho' he is within view, yet it would be very difficult to follow him. And again they determine ⁶, That what the Wolf takes from us, is so long our Property, as there is a possibility of recovering it ^a.

By these Restrictions we must qualify the Argument laid down by Zeigler in his Remarks on *Grotius* ^b; That since wild Beasts are made ours by losing their Liberty, therefore by regaining their Liberty they cease to be ours; and, by consequence, the Dominion of them is judg'd to consist in Actual Possession. For a wild Beast is not suppos'd to have recover'd its Freedom, so long as any Person pursues, with probable hopes of retaking it. As a Prisoner, though he be got out of hold, yet hath not clearly made his Escape, so long as the Officers are in search of him, and he remain in a place where 'tis possible for them to find him. As for what *Grotius* conjectures, that by means of some *γυψοματυ* ⁷, some Badges or Marks we may retain the Property of wild Beasts, after they have broke from our Custody, so that they shall not pass to the first Taker: We are of Opinion, that this ought to be confin'd to those only, which by the Application of Men have been divested of their native Ferity, and are therefore deservedly admitted to the same Rights as tame Creatures. Hence if *Tyrhus's* Deer in *Virgil* ^c, was thus distinguished by any proper Mark, *Ascanius* offer'd a fair occasion for the Commotions that follow'd. But those which are only kept in Parks, though they should happen to wear any such Note in Distinction, yet when they get loose into their natural Liberty, it seems more agreeable that they should pass to him who first lays hold on them. For there is need of a most strict Guard, or a kind of perpetual Occupancy, for the retaining a Creature, which is by Nature impower'd to wander with-

out Bounds ⁸, and which always struggles, and is uneasy under the Confinement of a Possessor; no Mark or Badge being in the least effectual towards the bridling this natural Disposition ^d. Therefore *Juvenal* makes the Informers about the Turbot argue very wrong, though very ornamentally to his Design;

*Nn dubitaturi fugitivum dicere piscem,
Depastumque diu vivaria Cæsaris; inde
Elapsum veterem ad Dominum debere reverti.
Si quid Palphatio, si credimus Armillato,
Quicquid conspicuum, pulchrumque est aquare toto,
Res fisci est, ubicunque natat.*

Stat. IV. 50, &c.

————— They'd swear,
The Fish had long in *Cæsar's* Ponds been fed,
And from its Lord undutifully fled;
So, justly ought to be again restor'd;
If we may take the greatest Lawyers word,
Who tells us, that all fine things in the Sea
Belong alone to *Cæsar's* Treasury.

As to the Case of fugitive Slaves, the Roman Laws particularly ordain'd ⁹, That their Masters should still retain such a ¹⁰ Possession of them as is term'd *civil* (a Possession in Right, though not in *Act*) in Opposition to the *natural* or *corporeal*; that it might not be in the Power of the Slaves to deprive the Masters of so great an Advantage ^e.

This is certain, that if we lose the Possession of any thing else, against our Will; as suppose we drop a thing by the way, the Property doth not pass from us, or accrue to the Finder ¹¹, till it appears we absolutely give it over for lost; which is usually understood by our forbearing to search or enquire after it. Hence, if a Man find somewhat which 'tis not probable the Owner should voluntarily reject, he ought to give fair notice, that upon

^a Vid. l. viii. f. 2. *D. Famil. eriscund.* ^b *DiG. loc.* ^c *Æn. vii. 483, &c.* Add *L. Salic. t. 35.* Under this Head we may take notice of what *Pliny* N. H. l. ix. c. 59. reports of the Fish *Antias*, whom the Fishers make use of to betray the rest of his Kind. "There is this advantage, says he, in knowing the Leader, that he may not be caught with the rest; the Fisherman " inspires him, that he may deceive and mislead another Company. It is upon Record, that a certain Fisherman, to do his Partner " an ill turn, against whom he had some Grudge or Quarel, took this Captain of the Shoal, whom he might easily distinguish " from others: His Partner espying the Fish in the Market, brought an Action against the Taker, and, as *Mucianus* adds, re " cover'd ten Pounds for Damage. ^d Vid. *Zeigler* in *Grot.* ubi supra. ^e *Lib. i. c. 14. D. De acquir. possess.*

^f Vid. *D. l. xli. tit. 2. De acquir. vel amit. possess. leg. 3. princip.*

MR. BARB. NOTES on §. XII.

⁶ *Et sane melius est dicere, & quod à lupo eripitur, nostrum manere, quam diu recipi possit id, quod ereptum est, Dig. Ib. leg. 44.*
^{*} *Conciliatorem nosse ad hoc prodest, ne capiatur, porcit piscator fugiturus in reliquum gregem; serunt discordem socium duci insidiatum pulere nolo cepisse maleficia voluntate, agnitionem in macello à socio, cujus injuria erat, & dati damni formulam editam condemnatumque addidit Mucianus, æstimata lite decem libris.*

⁷ As *Chün.* See *Scheffer, De Antiquorum torquibus, §. 13.* and last.

⁸ This Reason is not good. Our Author always follows his false Notions about taking possession. But we must say, that the Difficulty, or rather Impossibility, that there usually is to know these sort of Beasts, when they are escaped out of their Inclosures, is a sufficient ground to presume, that the Proprietor has relinquish'd them; but if they have any Mark by which they can be distinctly known, the Proprietor has no less right to claim them, than any other thing he has unwillingly lost, and of which he never shew'd any signs of his Neglect.

⁹ The Words of the Law are, *Namque fugitivus idecirco à nobis possideri videtur, ne ipse nos privet possessione, Dig. l. xli. tit. 2. De acquir. vel amit. possessione, leg. 13. in princip.* See also leg. 1. §. 14.

¹⁰ See c. 9. §. 7. following.

¹¹ The Roman Lawyers say very well, that it matters not, whether we know, or not, to whom the thing we have found belongs, if we take it to our own use without a Design to restore it to its Owner, or endeavouring to find him out, we really commit a Robbery. *Qui alienam quid jacens, lucrificandi causa sustulit, furti obstringitur, sive sit cujus sit, sive ignoravit; nihil enim ad furtum minuendum facit, quod cujus sit, ignoret.* *Digeit. l. xlvii. tit. 2. De Furtis, leg. 43. §. 4.* *Plautus* in his *Rudens*, or *Nursing.* *FæL.* brings in a Servant endeavouring to persuade his Master to keep his Cloak-bag till he went a Fishing on the Sea, his Master, who was an honest Man, said to him,

*Egone, ut quod ad me allatum esse alienum sciam,
Celem? Minime istuc faciet noster Dæmones.*

Although I know to whom the thing belongs,
And might conceal't? I will not, for such Wrongs
Our *Dæmones* will not bear.

The Roman Lawyers also maintain with much reason, that the Goods which are cast into the Sea to lighten a Ship in a Tempest, when Men are in danger of being lost, do not less belong to those who cast them in. So that if any one fish them up, or find them on the Shore, they can't keep them to themselves without being guilty of Robbery. *Alia sane causa est carum rerum que in tempestate levantes navis causa ejiciuntur. Hæ enim dominorum permanent, quia palam est eas non eo animo ejici, quod quis eas habere velit, sed quo magis cum ipsa navis maris periculum effugiat.* *Qua de causa, si quis eas fluctibus expulsas, vel etiam in ipso mari natus, lucrando animo abulerit, furtum committit, Instit. l. ii. tit. 1. §. 43.* See also *Levit. vi. 3.* with the Notes of Mr. *Le Clerc*, and what shall be said, c. xiii. §. 4. in the end, following.

a just Claim it may be reassum'd. But if the Owner can't be discover'd, then 'tis but right the thing should be kept by him that found it. Yet *Ælian* reports it as a Law of the *Stagirites*, ἀ μὴ κατέθε, μὴ λάμβανε; *Take not up what you did not lay down.* And elsewhere ^b he tells us of the *Bibilians*; *That if they light upon any thing in their way, they never touch it, unless they laid it there themselves: To do otherwise, they say, is not to find, but to steal.* Amongst *Solon's* Laws there was one to the same purpose; ἀ μὴ ἔθε, μὴ ἀνέλε ^c. And the *Chinese*, in Obedience to the Doctrine of *Confucius*, exactly observe the like scrupulous Nicety ^d ¹⁴. The anti-ent *Jews*, as Mr. *Selden* informs us ^e, held that the Law of *Deut. xxii. 1.* belong'd to those of their own Religion, not to a *Gentile*; yet so as if such a Beast were utterly relinquish'd by the Owner, it became his who found it and took it into his Possession. They distinguish'd likewise between those things which were mark'd, and those which were unmark'd. The latter they presumed to be given over by the Proprietor, but not the former; unless he made express and open Declaration to that purpose. So again, they thought it unlawful to keep the former, till they had been twice or thrice publicly cried, but not the latter. For which use there was a Scaffold erected in the Suburbs of *Jerusalem*, from which the Cryer made Proclamation of lost Goods. But in case they belong'd to an Apostate, they did not look on themselves as bound to restore them. As for things lost by *Gentiles*, they judg'd it reasonable to deliver them again to their Owners, only on this Consideration, that by so kind and friendly a Treatment they might purchase a like return of Humanity and Favour. Wherefore they concluded, that the Dominion of the *Gentiles* Goods did, by the Law of Nature, immediately expire upon the loss of them; but that the Restitution of the same Goods depended wholly upon the force of civil Constitutions. Which false Opinion, as many others, flow'd from the covetous Temper of that Nation, and from their extream Hatred and Aversion to all the rest of the World.

XIII. Amongst the things in which the Dominion or Property is extinct, the *Civilians* likewise reckon what they term *Thesaurus, Treasure-Trove* ¹, or Money found, the Owner of which is not known. If therefore a Man either on the Account of Fear, or for the better Defence and Security, shall have hid his Money in the Earth, it doth not fall under this Name of a Chance Treasure; and he that takes it, is guilty of Theft. As the Slave in *Plautus's Aulularia*, that carried off *Buclion's* Pot of Gold. But such casual Treasure, as we first mention'd, doth naturally and without the particular Interposition

of civil Ordinances pass to the Finder; that is, to him who first lays hands on it and removes it out of its place. Because a thing, the Proprietor of which is undiscovered, is in moral Estimation judg'd the same as if it were under no Property, or belonging to no Body, and consequently is the Right of the first Occupant. On which Point, nevertheless, this Question will arise, Whether a Person living in a place where the Laws adjudge such things to him that finds them, is bound, for the making his Title good in Conscience, to give publick notice of what he hath found, though it should appear to have lain hid a very considerable time? (For if it proves to have been lately hid, we doubt not but such a publick Discovery is always necessary.) In the Case propos'd, it seems most reasonable thus to determine: If a Man dig up Money in his own Ground, he is not in Conscience obliged to discover his good Fortune, but may enjoy it in Silence, till such time as another of his own accord makes Enquiry, and withal produceth probable Reasons, both of his hiding his Money at first, and of his omitting to speak about it till now. For here the former Owner, from whom the Land or Tenement pass'd to the present (the Finder of the Treasure) cannot be presumed to have knowingly left a secret Store in a place, which he alienated and convey'd from himself. Again, he who hath hid any such Treasure in another's Ground, without acquainting the Lord of the Soil, is judg'd to have slipt his Opportunity, and neglected his means of claiming and securing it; since there was at first good Reason for him to fear lest it should fall into other Hands, which he ought to have provided against. But if the Ground belong to another, then the Finder seems engag'd by his Conscience to enquire, at least indirectly, of him concerning the Matter: Because without this it cannot certainly be known, but that the Money was laid there by the Master of the place, only for the greater Security, or by some Persons else with his Privy and Consent.

But as for *positive Laws*, we find them in different Countries ², very various on this Point. ³ *Plato* orders, ⁴ *That neither Treasure, nor any kind of lost Goods shall belong to the Finder, but that the Oracle shall be consulted in order to the disposal of them.* Which, without doubt, was too scrupulous a Superstition; somewhat like the Humour of *Chiungai* the *Chinese* Philosopher, who, as *Martinus* observes, ⁵ *held it unlawful to touch any thing that was suspected, either to be in itself evil, or to have proceeded from evil, and unjust Men: For which Reason he refus'd to dwell in his Father's House, believing the Builders to have been wicked Persons; nor would he take his Meat from the hands of his Parents or Brethren,*

^a V. H. l. iii. c. 45. ^b Lib. iv. c. 1. p. 302. Edit. Perizon.
^d *Martin. Hist. Sin.* l. iv. c. 21. Add Edit. *Theodorici.* c. 58.
c. 8. f. 7. ^e Lib. xi. de L. L. ^h *Hist. Sin.* l. v.

^c *Diog. Laert.* l. i. f. 57. Add *Platon. de L. L.* l. xi. *fol. int.*
^e *De J. N. & G. sec. Heb.* l. vi. c. 4. ^f *Vid. Grut.* l. ii.

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¹⁴ These Opinions of the Jewish Doctors had no other Foundation, than the insatiable Avarice of that Nation, and the implacable Hatred which they bore to other people.

¹ The words of the Law are, *Thesaurus est vetus quedam depositio pecunie, cujus non extat memoria, ut jam dominum non habeat, sic enim fit ejus qui incenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa, vel metus, vel castitiae, considerit sub terra, non est thesaurus, cujus etiam furtum fit.* Digest. l. xli. tit. 1. *De acquirend. rerum Dominio,* leg. 31. See also, l. vi. tit. 1. *De rei vindic.* leg. 67. & Lib. xli. tit. 2. *De acquir. vel amitt. possess.* leg. 3. §. 3.

² Or a Workman, who is paid by an Husbandman or Maſon, for his Labour. For he acts not in his Maſter's Name, who has hired him, but in the Work that he has to do. *Nemo enim ſervorum opera theſaurum quaerit, nec ea propter tunc terram poſcebat, ſed alii rei operam inſumebat, & fortuna aliud dedit,* Digest. l. xli. tit. 1. *De acquir. rerum Dominio,* leg. 63. §. 3. See also Mr. de *Bynkerhook's* Observations, l. ii. c. 4. where he confutes the contrary Opinion.

³ See l. v. c. 3. §. 3. and Not. 1. following. *Grotius*, l. ii. c. 8. §. 7. *Philoftrat. in vit. Sophist.* l. ii. and in *Herod.* §. 2. Mr. *Dunrat's* Publick Right, l. i. tit. 6. Sect. 3. §. 7. and Mr. *Titius's Jus Privat. Romano-German.* l. viii. c. 13. §. 3. &c.

fearing it might be ill gotten. It seems to have been the Law of the Jews, That Treasure found should pass to the Owner of the Land^a, as is gather'd from *Matr.* xiii. 44. *Spartian* in *vit. Adriani* mentions a Decree of the Empevor *Adrian* to this purpose; *That if a Man found Money in his own Land, he should enjoy it all himself; if in another's, he should restore it to the Owner of the Soil; if in a Place that belong'd to the Publick, one Moiety should go to himself, and the other to the Treasury.* And to the same purpose, in *Vit. Severi. Zonaras*, Tom. ii. in *Nerva*; we read a Story of *Atticus*, *Herod's* Father, That lighting upon a vast Treasure in his House, he wrote to *Nerva*, desiring to know his Pleasure about disposing of it; the Emperor return'd no other Direction than this, *Utere quæ invenisti, Use what you have found.* And when *Atticus* in a second Letter complain'd, *That the Sum was too great for his Occasions, and quite overloaded him, Nerva* answer'd, *Abutere invento, quæ do tuum est; Why e'en abuse it, and since Fortune hath made it your own, get rid of it how you can.* ^b *Plilistratus Apollonius*, ^c in a Contention about this Point between the Buyer and the Seller of a Field, orders Enquiry to be made which was the best Man of the two; an Expedient which can never pass into a general Rule.

XIV. The *Roman* Lawycrs, to the Class of things acquired by Occupancy¹, add farther, the Goods of Enemies. For the right understanding of which we are to know, that by a State of War, as all other peaceful *Rights* are interrupted, so Dominion thus far loseth its Effect, with regard to the adverse Party, as that we are no longer oblig'd to abstain from their Possessions, than the Rules of Humanity and Mercy advise us. In War therefore the Goods of one Party, in respect of the other, are render'd, as 'twere, void of Dominion: Not that Men do, by virtue of the *Right* of War, cease to be Proprietors of what was before their own; but because their Propriety is no Bar against the Enemy's Claim, who may seize and carry away all for his own Use. As the bare taking hold of a thing, which lay void, is a sufficient ground for Dominion. Though indeed, in the Case of War, those who come to make use of this Claim, and to take a violent Possession, may very justly be resisted and repuls'd with equal Violence; as we see in daily Practice. We may therefore observe, that the Dominion of things taken in a War doth then at length gain its full Strength and Validity, when the Person, from whom they were taken, renounceth his Pretensions to them, by consenting to a Peace.

Farther, and what is very particular, this violent Seizure, in a hostile Method, may likewise initle us to a Sovereignty over Men²: Whereas otherwise³, Men do not come under the Object

of Occupancy, whether subject to a Lord, or enjoying their natural Freedom; excepting only that one antient Case of *expesed Infants*^{d 4}, who belong'd to those that found and preserv'd them. For Liberty, as well as all other *Rights*, is attend'd with this Effect, that it cannot pass without my Consent, into the Power of any other Man besides an Enemy. But now Occupancy in those things which are capable of it, supposeth no Consent; but to the completion of it these two Points only are required; *First*, The Act of the Occupant, in seizing on such things; and *Secondly*, The Ablence of all *Right* on the part of the Objects, which might else hinder them from being acquired by this means. Hence when upon the Deceale of a Man who hath no Heit to succeed him^e, either by Testament, or by Law, all those *Rights* die with him which he held over things or Persons, the things pass to the next Occupant, but the Persons recover their natural Liberty. For we can hardly imagine, that there was ever one Instance of a Wretch so basely low-spirited, as that he would voluntarily desert his Freedom, and as it were give it up to any one that would accept of the Resignation. Should Men in this Case be never so much inclin'd to continue in a servile Condition, yet, at least, they will reserve to themselves the Power of choosing their own Master.

Indeed *Grotius*^e seems to reckon Sovereignty amongst the Objects of Occupancy; whilst he tells us, *That in things which belong to no Body, there are two Rights which may be in this manner acquired, Sovereignty, and Dominion, as distinguished from Sovereignty.* But this Assertion must be explain'd with great Caution and Dexterity. For Sovereignty in proper Speech is applied only to Men; which except in War, and in the Case but now mention'd, can't be obtain'd by Occupancy: Because he who is not *Another's*, is not therefore *No Body's* but *his Own*. But we improperly use the term of Sovereignty in speaking of Places or Territories; for then the Effect of it is only this, That no one can fix in such a Place without the Sovereign's Consent; and they who come to sojourn there only for a time, are, during that Space, oblig'd to acknowledge his Jurisdiction.

But now this Sovereignty is really nothing else but the Effect of that Dominion or Property which was before establish'd over the Place, and includes a Power and Command over *Men*, indirectly, and by Consequence. Because what is *mine*, none can take to his own Use, without my Leave: And he that enters a Place belonging to me, is so far at least under my Rule and Guidance, as that I may hinder him from endamaging my Dominion, or may provide that my *Right* over the Place shall not suffer on his Account.

^a Add *Plaut. Trinumm.* Act. i. Scen. 2. ver. 141. & *Philostrat. Apollon.* l. ii. c. 15.

Lib. ii. c. 15.

^d Vid. *Hobbes*, De Cive, c. 9. f. 4.

^e Lib. ii. c. 3. f. 4.

^b Add *Constitut. Sicul.* l. iii. t. 3.

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¹ The Law is, *Item ea, quæ ex hostibus capimus, jure gentium statim nostra sunt. Bello capta — ejus sunt, qui primus eorum possessionem nactus est*, *Instit.* l. ii. tit. 1. §. 17. And *Digest.* l. xli. tit. 2. leg. 1. §. 1. See what our Author says, l. viii. c. 6. §. 17.

² *Alio quidem ut & liberi homines in servitutem nostram deducantur; qui tamen, si evaserint nostram potestatem, & ad suos reversi fuerint, pristinum statum recipiant.* Vid. *Instit.* ubi supra.

³ Although the *Turks* pretend, that when a Stranger comes into their Country, they have a Right to confiscate his Goods, and take him for their Slave, especially if he belongs not to a Nation in Amity or Alliance with them. See Mr. *de Bynkershoek's* Discourse, *De Dominio Maris*, c. 1. p. 4, 5.

⁴ See what is said, l. vi. c. 2. §. 3. following.

⁵ I have here left out a Sentence which I met with a little higher, where it is much better placed.

C H A P. VII.

Of Additional Acquirements.

- I. How many sorts of Additions there are.
- II. Additions properly belong to the Owner of the thing.
- III. How many sorts of Fruits.
- IV. The young one of Beasts belong to the Owner of the Dam or Mther.
- V. Things planted pass with the Soil.

- VI. How Buildings go along with the Soil.
- VII. The Paper goes along with the Writing.
- VIII. The Canvas with the Picture.
- IX. The Purple with the Garment.
- X. Of new Models in Things.
- XI. Of whole Countries left by Waers.
- XII. Of Fields belonging to private Persons.

MOST of those things which are subject to the Dominion of Men, have this common Affection, That they do not always continue in the same State, but abound with great variety of Increase. Some of them swell their inward Substance to larger Dimensions, some receive external Improvements; others are attended with several Fruits and Advantages of a different kind from themselves; many rise very considerably in Value, from the Fashion and Figure which human Industry hath put upon them. All these additional Profits may be comprised under the general Term of *Accessions*¹, and will for the most part fall under one of these two Classes: Those which proceed purely from the Nature of the things, without the assistance of any human Act; and those which the Labour and Diligence of Men doth either wholly, or in part, procure.

II. 'Tis a general Rule in this Case, That whoever is Owner of a thing, to him likewise belong the *Accessions* of it¹: Which evidently flows from the very Nature of Property, and from the End for which it was first introduc'd; inasmuch as the possession of many things would be vain and useless, should the Fruits of them accrue to others; and the common Peace of Mankind would be very little promoted, if other Persons might challenge these Improvements with the same *Right* and *Title*, as the Proprietor of the Substance to which they

adhere. It is needless therefore to derive the Dominion of *Accessions* from the Title of a *seign'd Occupation*, by which we should seem, through the intervention of a thing belonging to us, to take possession of any After-improvement; or by virtue of which, a Thing already our own, should be supposed, on account of its Pre-eminence, to make some other inferior thing cleave to it, as an Appendance.

III. The Increments¹, Multiplication, and Profits of any kind of things are usually stiled *Fruits*²; except that the Increase of Animals hath the peculiar Name of *Fetus*, or the *Breed*. *Fruits* are most commonly divided into those of which the thing itself is the proper Cause and Original, and those of which it is only the Occasion. The former are called *natural*: The latter *legal* or *civil*³. Amongst the *natural*, some arise from the bare Operation of Nature⁴, without the Culture or Labour of Men: In others, we assist Nature's Strength⁵, and render her more kind and fertile by our own Pains, whether in a greater or a lesser Proportion: On which account these are wont likewise to be termed, *The Fruits of Industry*. As for *civil Fruits*, we see Instances of them in *Usury*⁶, *Hire*, *Carriages*, and the like. 'Tis observable, that *Fruits* of the former kind, so long as they are not separated from the thing whence they proceed, are look'd on as parts of it; but

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¹ All that our Author means by this Word *Accessiones*, or *Accessions*, may be look'd upon as an Accessory, which follows the Principal or Foundation of the thing. For to speak with the *Roman Lawyers*, it signifies, *Quæcunque aliis adjuncta, sive adjuncta, accessionis loco cedunt*, Digest. l. vi. tit. 1. *De rei vindic. leg. 23. §. 5.* In truth, as Mr. *Titius* observes, *Observ. 297.* our Author does not well to refer additional Acquirements only to primitive Acquirements. See §. 1. of the foregoing Chapter. For it appears by the Examples there treated of, that we often acquire by the Right of accessory things belonging to others. There are also several sorts of Accessories which interpose without producing any Acquisition themselves, and which only gain an Opportunity of getting something, either by the Consent of Parties, or by virtue of some positive Constitutions of Law.

² This Rule is very uncertain and imperfect, and we may better put these two instead of it. I. If the Addition made to a thing belonging to us proceed from the thing itself, or from any Act of our own; and if coming otherwise it belongs to no body, it is naturally our Acquirement, or at least we can't be deprived of it upon the account of any other. II. But if the Thing or Work which is added to our Possession belongs wholly or in part to another, it naturally follows, that there must be a kind of Community in relation to the whole between us and him, so that one of us must transfer his Right to the other, tho' this does not often happen; for this Community ends, and consequently the additional Acquirement is then made, either by the mutual Agreement of the Parties, or by the Settlement of some positive Law, which ends the Difference according to the nature of the Circumstances and Maxims of Equity, *Titius's Observ. 298.* See also his Observations in *Compend. Lauterbach. Observ. 1018.* and his *Jus Privatum Romano German.* printed in 1709, l. iii. c. 5. §. 25, &c.

³ The *Roman Lawyers* understand by *Fruits* what remains over and above any recent Acts or Deeds. So they say, *Fruitus intelliguntur deductis expensis, quæ quærendorum, cogendorum, conservandorumque eorum gratia fiunt*, Digest. l. v. tit. 3. *De hereditatis petitione, leg. 36. §. 5.* See also *Cod. l. vii. tit. 51. de fructibus, &c. leg. 1.*

⁴ This Author observes here, that that which is brought forth by a Beast has a particular Name given it, *viz.* the *Fetus*; but this is done only in *Latin*; and we likewise (as every one knows) use the same Word, *Fœtus*, in speaking of Plants. I may add also, that the Word *Fruitus* is sometimes attributed to young Beasts, as Mr. *Noadt* shews us in his Observations, l. i. c. 10. p. 55.

⁵ Or *Legitimi*, which can't be well express'd in *French*, but imports, that they arise from a Right founded on the Law.

⁶ As for Example, Food, Fruits of Trees that grow wild, Underwoods, the Oar of Mines, and Stones of Quarries.

⁷ As Bread-Corn, and other sorts of Grain, &c.

⁸ So, according to the *Roman Lawyers*, Fruits hanging on the Boughs, which are not yet gather'd or fallen, but join'd with the Tree, are part of the Ground. *Fruitus pendentes pars fundi videntur*, Digest. l. vi. tit. 1. *De rei vindic. leg. 44.*

when separated ⁷, they are consider'd as distinct Beings : But both kinds agree in this ; That they belong to him who is Master of the thing from which they flow.

IV. As for the Breed of Animals ¹, it hath been generally determin'd, That they should follow the *Venter* ², and so should belong to the Owner of the Female, not of the Male ; not only for this Reason, because the Male is for the most part unknown, but likewise because the young was once a part of the Female, as it never was of the Male ; and because what the former contributes to the Birth, is much more considerable than what proceeds from the latter ; though we should allow them to be equal, when look'd on barely as natural Causes : For the Question here is not whether the existence of the Calf is to be ascrib'd more to the Cow, or to the Bull ; but whether the Calf belongs rather to the Proprietor of the one, than of the other. Now the Male is obliged to little Trouble, so that his Service in this respect brings very little or no Damage to the Owner. But the Female, whilst she carries her Burthen, is almost usefess to all other Purposes, and besides requires, at this time, more than ordinary Care and Charge in the keeping : Therefore, at least, the Owner of the Male cannot pretend to so much Merit as the Owner of the Female. Especially, since one Sire is sufficient for a great number of Breeders. Yet in case a Man keeps Males purely for this Use, 'tis but just he should receive some Consideration from others who shall desire to employ them ³ :

V. It is likewise a common Rule ¹, That things planted or sown shall go with the Soil ; because they are not only nourish'd by it, but growing into a most strict Union, are made, as it were, parts of the same Body. For which Reason it is far-

ther required, that they shall have taken Root ; they belonging 'till then to their first Owner ². Yet *Grotius* ^b is of Opinion, *That this Appointment proceeds only from positive, and not from natural Law ; since the nourishment of a thing already existent, being no more than a part of that thing, the Lord of the Soil can only pretend to a part in the Right over it ; which, naturally speaking, cannot take away the Right of him who own'd the Seed, the Plant, or the Tree : And therefore in this Case the thing must be held in common by them both.* But notwithstanding what is thus objected, the *Roman Laws*, in giving the former Judgment, went on very good Reason. For they did not hereby design that the Owner of the Seed, the Plant, or the Tree, provided he acted with honest Intention, should suffer an utter Loss ; nor do they forbid but that the two Proprietors may, if they please, hold the thing henceforth in common, according as the Use and Benefit of the Ground on the one side, and the Worth and Excellency of the Plant on the other side, shall assign them their fix'd Proportions. But because they would compel no Man to hold on in a common Possession against his Will, and because such things as these are incapable of Division, therefore they take the Question to be, Whether it will not be more equitable to assign the whole thing to one of the two Proprietors, with this Burthen, That he shall be obliged to pay the other the Value of what he receives from him ? Now here, since it happens most frequently, that the things we speak of, being closely knit and fasten'd to the Earth about them ³, cannot conveniently be transplant-ed, or be any way preserv'd out of their Place, it was thought fit to ordain in general, that things set or sown should go with the Soil ; yet so, as that the Lord of the Soil shall satisfy the other Party for his Seed, or his Plant, in case he acted like an

^a Add *Ziegler ad Grot.* l. ii. c. 8. f. 18. & *Felden*, *ibid.*

^b *Lib.* ii. c. 8. f. 22.

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⁷ So the Civil Law, *Prædiorum urbanorum pensiones pro fructibus accipiuntur*, *Digest.* l. xxii. tit. 1. *De usuris & fructibus*, &c. leg. 36. *Operæ quoque servorum in eadem erunt causa, qua sunt pensiones, item vecturæ navium & jumentorum*, l. v. tit. 3. *De hæredit. petit.* leg. 29. §. 31, 32.

¹ The *Roman Lawyers* do not reckon the Children of Slaves among Fruits ; because, according to the Principles of the Stoicks, it is absurd to look upon a human Creature as a Fruit, for whose Use Nature has allotted all other Fruits which it produceth. *In pecudum fructu etiam fetus est, sicut lac, pilas, & lana. Partus vero ancillæ in fructu non est*——— *absurdum enim videbatur, hominem in fructu esse, eum omnes fructus rerum natura gratia hominis comparaverit*, *Instit.* l. ii. tit. 1. *De rerum divif.* &c. §. 37. See c. 8. §. 7. following. Others say, 'tis only because a Female Slave is ordinarily bought to do the Service she is able, and not bring Children into the World ; *Quia non temere ancillæ ejus rei causa comparantur, ut pariant*, *Digest.* l. v. t. 3. *De hæredit. petit.* leg. 27. *in init.* See also *Vinnius* upon that part of the *Institutes*, which we have cited a little above.

² So the Law appoints, *Si equam meam equus tuus prægnantem fecerit, non esse tuam, sed meam, quod natum est*, *Digest.* l. vi. t. 1. *De rei vindic.* leg. 5. §. 2. See the same Title in the *Code*, leg. 7.

³ The *Roman Law* is, *Si Titius alienam plantam in solo suo posuerit, ipsius erit ; & ex diverso, si Titius suam plantam in Mævii solo posuerit, Mævii planta erit : Si modo utroque casu radices egerit ; ante enim quam radices egerit, ejus permanet, cujus erat*——— *Qua ratione autem plantæ, quæ terræ coalescunt, solo cedunt ; eadem ratione frumenta quoque, quæ sunt sata, solo cedere intelliguntur*, *Instit.* l. ii. tit. 1. §. 31, 32. As for a Tree, whose Roots spread into our Neighbour's Field, see *Hieron. Magius Miscell.* 4. 7. and *Mr. Titius on Lauterbach. Observ.* 1020, as also a curious Discourse of *Mr. Thomafius's*, *De Pretio affectionis in res fungibiles non cadente*, c. 3. §. 63. This last, from §. 38. to the end of the Chapter, endeavours to shew that the *Roman Lawyers* are very confus'd in determining the Cases which presented themselves about this Matter, because they have argued upon subtle Principles, rather than by an attentive Consideration of the nature and usage of things, or upon that plain Rule which *Mr. Thomafius* lays down, *viz.* That we ought to content ourselves with an Equivalent in such things as are capable of re-placing (*res fungibiles*) and that they ought not to be prized in this Case, as is done to him to whom they belong, for some particular Love to them.

² The *Roman Lawyers* add this Restriction about Trees and Plants, as appears from the Place of the *Institutes*, which I have quoted in the foregoing Note, and better by this Law of the *Code* ; *Si quis sciens alienum agrum sevit, vel plantas imposuit, postquam hæ radicibus terram fuerint amplexæ, solo cedere rationis est*, l. iii. tit. 32. *De rei vindic.* leg. 11. And indeed, the means of gathering the Grain which was once sown. The Law which *Vinnius* quotes, *Digest.* l. xxii. tit. 1. *De usuris*, &c. is of no worth here.

³ *Mr. Thomafius*, in the Discourse before quoted, says, that these sorts of things are of that Nature, that they may be restor'd either by other things of the same kind, or their Value may be given in Money. There are but few People but will be contented to recover them in that manner ; and it rarely happens, that there is any particular Reason which may make Men to insist upon recovering what is planted or sown in the same kind. We must add this Consideration to those of our Author.

honest Man⁴. Yet if a Person sows my Field with a meaner Grain, when I design'd it for one more generous, here I don't seem oblig'd so much as to pay him for the Seed; it being really a Damage to me, that my Ground is like to afford to ignoble a Crop. But should the Plants admit of being removed, especially if they be more in Value than the Use of the Soil amounts to, it would, no doubt, be equitable that the Owner of the Plants should be allow'd to take them away, only paying the other for the Use of his Ground. On which Point the Law of *Solon* is remarkable; *He commanded* (says *Plutarch*, in *Sol.* p. 91. Ed. *Wech.*) *that every Person, who planted the common kinds of Trees in his own Ground, should set them at five Foot distance from his Neighbours. But that he who set a Fig-Tree, or an Olive-Tree, should enlarge the Distance to nine Feet; because these not only cast a longer Root, but are very mischievous, when they stand too near some others; either by drawing away the Nourishment from them, or by sending out a Steam offensive and hurtful to them.*

VI. Most of what hath been here offer'd may likewise be applied to the Case of Buildings, rais'd either on the Ground, or out of the Materials of other Men. Indeed if the Structure be moveable, 'tis certain the Lord of the Soil can claim no Right to it¹; provided it be removed, and Satisfaction made him to the Value of what his Ground suffer'd by it. If another builds a House with my Materials, it is commonly best for me to receive the Value rather than the things themselves; since what is thus fitted to one Building will not serve again for the like Use. But if the Materials are not prejudic'd by being thus applied, and I have occasion for them, and cannot conveniently furnish my self

with others of the same kind, then I ought in Equity to be allow'd the privilege of seizing them for my own Service. And tho' this is forbidden by the Law of the Twelve Tables, yet they relieve the Owner of the Materials another way, by granting him an *Actio* for double their Value². In Case a Man builds with his own Materials upon another's Ground, if he knew what he did³, it seems hardly possible but that he must have had a dishonest Design; and it being presum'd that he purpos'd to steal the Ground, the Owner of it doth not seem oblig'd to pay the Price of the Materials, or the Hire of the Workmen; or to permit the other Party to pull down, and carry off what he brought thither⁴. If there was no knavery in the Design, and the Building cannot be removed without being utterly demolish'd, the Roman Laws enact, *That it shall go along with the Soil; yet so, as that in case the Builder be in actual Possession, the Lord of the Soil shall pay the Price of the Materials, and the Expence of the Work*⁵. For tho' the Pile which is rais'd be for the most part of greater Value than the Soil and Surface on which it stands, yet they judg'd it inconvenient, that an immoveable thing should cleave as an Appendage to another, which at least, if taken to pieces, is moveable. Yet still, if the Owner of the Ground can conveniently be without the Spot on which the Building is erected, and cannot so well purchase the Building it self, it seems most reasonable, that upon receiving the worth of his Ground, he should leave the Building to be enjoyed by the other⁶.

VII. But when the Roman Lawyers extend this Rule, *That things built and sown shall go with the Soil, to Papers and Parchments, we cannot subscribe to their Opinion*⁷. As if when I with a good and honest

¹ *Lex Longobard.* l. i. tit. 27. Sect. 1.

² *Edict. Reg. Theodoric.* c. 137.

³ *Comp.* l. 7. f. 10, 11, 12. *D. de A. R. D.*

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⁴ We must here observe this. For if there was a knavish Design in him who planted or sowed, I mean, if he knew that the Land did not belong to him, he deserves to lose both his Labour and Goods, because he has mixed them with the other. Without this every Man would be expos'd to see his Land sown or planted with Trees by some other, who would leave it, because he can't enjoy it himself. See the Law of the *Cote* cited above, Note 2. and *Instit.* l. ii. tit. 1. §. 32. We shall add a Remark made by *Thomasius*, *Instit. Jurisprud. Divin.* l. ii. c. 10. §. 227. which is this, When a Person with a good Design sows another Man's Field, if there happens a great dearth of Corn, Equity obligeth the Master of the Soil to permit the Person who sow'd it to take the Crop, and be contented to accept of Satisfaction for the Use of the Ground.

¹ This is determin'd in the *Digests*, l. xli. tit. 1. *De acquirend. rerum Dominio*, leg. 60. *Titius horreum frumentarium novum, ex tabulis ligneis factum, mobile in Seii prædio posuit. Quaritur, uter horrei dominus sit? Respondit, secundum quæ proponerentur, non esse factum Seii.* See also l. vi. tit. 1. *De rei vindic.* leg. 38.

² This *Actio* is call'd, *actio de tigno juncto*, understanding by *tignum* all sort of Materials for Building. The Reason why the Twelve Tables so order'd it was, to hinder a Building, that was a great Ornament to the City, from being demolish'd soon after it was rais'd. *Cum in suo solo aliquis ex aliena materia ædificaverit, ipse intelligitur dominus ædificii, quia omne quod solo inædificatur, solo cedit. Nec tamen ideo is, qui materiæ dominus fuerat, desinit dominus ejus esse; sed tantisper neque vindicare eam potest, neque ad exhibendum de ea re agere, propter legem duodecim tabularum, qua cavetur, NE QUIS TIGNUM ALIENUM ÆDIBUS SUIS JUNCTUM EXIMERE COGATUR, sed duplum pro eo præstet per actionem, quæ vocatur de tigno juncto; appellatione autem tigni omnis materia significatur, ex qua ædificia fiunt. Quod ideo provisum est, ne ædificia rescindi necesse sit, Instit.* l. ii. tit. 1. §. 29. But if the Building was pull'd down for any other Reason, then he, to whom the Materials appertained, might recover, if he had not already received double Damages. *Quod si aliqua ex causa dirutum sit ædificium, poterit materiæ dominus, si non fuerit duplum jam consecutus, tunc eam vindicare, & ad exhibendum de ea re agere.* The Interpreters commonly think, and the Sequel of the Discourse shews, that the Paragraph of the *Institutes* that I have quoted a Part of, grants an *Actio* for double Damages to the Owner of the Materials against the Proprietor of the Ground, provided the other had an honest Design in building, i. e. he made use of the Materials, not knowing that the Materials belong'd to another. See *Ann. Finnius* upon this Place. But *Mr. Thomasius*, in his Discourse already quoted, *De pretio affectionis*, &c. c. 3. §. 59, &c. maintains, That *Trebatianus*, in composing the *Institutes*, misapprehended the ancient Lawyers, and the Sense of the twelve Tables, which speak only of him who builds with an ill Design with another's Materials; whence it comes, that in the *Digests*, the Title, *De tigno juncto*, l. xlvii. tit. 3. is placed immediately after that, *De furtis*. See also *Jan. Vincent Gracina's Orig. Jur. Civil.* l. ii. p. 356, 357.

³ *Ex diverso, si quis in alieno solo ex sua materia domum ædificaverit, illius sit domus, cujus & solum est; sed hoc casu materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur esse alienata, utique si non ignorabit se in alieno solo ædificare, & ideo licet diruta sit domus, materiam tamen vindicare non potest, Instit.* l. ii. tit. 1. §. 30.

⁴ *Certe illud constat, si in possessione constituto ædificatore, soli dominus petat suam esse, nec solvat pretium materiæ & mercedem fabricatorum, posse eum per exceptionem doli mali repelli, utique si bonæ fidei possessor fuerit qui ædificavit. Nam scienti alienum solum esse, potest obijci culpa, quod ædificaverit temere in eo solo, quod intelligebat alienam esse, Ibid.* See *Digest.* l. xli. tit. 1. *De acquirend. rerum Dominio*, leg. 7. §. 10, 11, 12.

⁵ *Litteræ quoque licet aureæ sint, perinde chartis membranisque cedunt, ac solo cedere solent ea quæ inædificantur, aut inscribuntur; ideoque si in chartis membranisque tuis carmen, vel historiam, vel orationem Titius scripserit; hujus corporis, non Titius, sed tu dominus esse*

honest Intention have wrote somewhat on another Man's Paper, I must be oblig'd immediately to resign it to him, only receiving some Consideration for my Pains in writing. But rather, since commonly the Writing is of more Worth than the Paper, 'tis much the fairest Method that the other shall rest satisfy'd with being paid for his Paper^a. Especially, if we reflect on what some have added, and not without Reason, That Paper being used, doth, as it were, die and perish; and that therefore Writing is of a quite different Nature from Building. For the true and proper Essence of Paper seems to remain no longer than it continues clean and fair, capable of admitting any Characters. When 'tis once fill'd, it passeth in the Name of a Book, a Letter, a Roll, or the like. Therefore writing Paper is, in this respect, lost and dead to me, that I have no longer the Power of committing to it what I please. And hence, if I do but receive the Value of it, I have no Cause to complain, since I can furnish my self with new, which will serve my Occasions as well.

VIII. They are more in the right, when they determine¹, that the *Table* shall go along with the *Picture*²; the latter being usually of far greater Value than the former; and it being easy for a Man to part with so common a thing, upon receiving its Price. Yet this very Reason shews, that in some Cases Equity will direct a contrary Decision. As suppose a vulgar Dawber, whose Skill never carried him beyond a Sign-post, should have laid his vile Colouring upon some precious Wood, which we should gladly rescue, as soon as possible, from the Injury it suffer'd; or if some awkward Figures should be cut in Plates of Gold or Silver, or in Pearls and Gems. As it would be an unparallel'd

Impudence for a Rascal that rubs his Brush upon my Walls, on that account to claim my House; nay farther, since this Labour was perform'd purely for his own Humour, he can hardly require to be paid for the Work, unless perchance the Owner of the House be in so good Circumstances, as that we may think he would willingly have put himself to such an Expence^{a b}.

IX. The same Lawyers declare¹, that *Purple* applied to, or engrafted on another's Garment, shall go with the Garment, however the former may exceed the Value of the latter. Now this may be understood two ways; either that a Person shall interweave among his own viler Thread some Purple Yarn belonging to another², or that he shall fit another's Purple Cloth to his own Garment. In the former Case there is scarce the least Doubt, but that the Cloth thus made ought to be judg'd to the Owner of the Purple. For that without which another thing cannot exist³, and which is, as it were, the natural Ground to support and uphold it, is not always to be look'd on as an *Accession* to that other thing⁴; but we ought by all means to take the Value of each thing into the Account; so that if they are equal in all other Respects, that which is more precious shall draw to it that which is less. Indeed if we speak of the physical Concomitancy or Adherence of things, it is necessary that thing should go along with another, which cannot be without the other; or that the *Adjunct* shall follow the *Subject*. But in assigning the Property of things, where we are chiefly to consider the Price and the Use of them, and how easily a Person may bear the want of such or such a part of his Possessions; this Reason cannot always prevail.

^a Lib. xxxviii. D. De rei vindic.

^b Vid. lib. vi. tit. 1. D. De rei vindic.

MR. BARB. NOTES on §. VII, VIII, IX.

esse videtur; sed si à Titio petas tuos libros, traxerit membranas, nec impensus scripturæ solvere paratus sis, poterit Titius se defendere per exceptionem doli mali, utique si caram chartarum, membranarumque possessionem bona fide nactus est. Instit. l. ii. tit. 1. §. 33. See Note 22. upon §. following. "This Place, says Mr. *Darwin* in his civil Laws in their natural Order, Part I. l. iii. tit. 7. Sect. 2. "§. 15. ought to be understood of some other Matter more precious than the Paper, or of a Writing that is not more worth than the matter on which the Writing is, being used by the Writer, as what is written upon waxed Tables, to be blotted out afterwards. But as for writing on such Paper as ours is, *he says*, that the Owner of the Paper does not become the Owner of the Writing, be it so much only as a bare Letter; and much less, if they are Writings or Acts of some Consequence." This Explication solves in part the Absurdity of the Decision of the *Roman* Lawyers; but the Misfortune is, it has no Foundation. The Text is too clear to admit of a favourable Interpretation; and nothing can better prove that the Notions, which the *Roman* Lawyers have framed of what is to be look'd upon as an Accessory, are false and very ill connected together, since they make a clear different Decision as to Painting, although they be exactly the same.

² *Francis Hotman*; and it comes to the Rule of Mr. *Thomasius* spoken of before. See his Discourse, *De Pretio affectionis*, &c. c. 3. §. 65, 66. and *Vinnius* upon the Paragraph of the *Institutes*, which I have set down in the foregoing Note.

¹ *Si quis in aliena tabula pinxerit — ubi videtur melius esse, tabulam picturæ cedere. Ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimæ tabule cedere.* Instit. l. ii. tit. 1. §. 34. See *Thomasius's* Discourse, §. 67, and Mr. *Titius's* *Jus Privat. in Romano-German.* l. iii. c. 5. §. 55, &c.

² Most Lawyers pretend here, that as to what hath been sown or built in another's Ground, a good Design is necessary to give right to recover and preserve the Canvass, paying the Value of the Cloth to him to whom it belongs. And indeed, *Justinian* or rather *Tribonian* tells us in §. 34. before quoted, *Utique si bonæ fidei possessor fuit ille, qui picturam imposuit.* See *Vinnius* above. But to me this Decision seems to deserve Amendment. The Matter on which we paint, as well as that on which we write is usually of a small Value; so that we can have little Reason to suppose an ill Design, and that it can happen very rarely; and when it evidently appears, the Principle that hath produc'd it can never be so ill, but he must see so much Worth as to deserve a much greater Value than can belong to him, and so not desire that the thing which it is incorporated with should be returned to its true Owner. So that unless some extraordinary Circumstance aggravate the Fact, Equity, in my Opinion, will engage every Man to be content to recover the Value of the Paper, the Canvass, or the Board, or at least, by preserving the Picture or Writing, secure the Painter or Writer from losing his Labour, or depriving him of the things, which not being possible to be restored, would be absolutely lost as to him, with all that depends on it.

¹ *Si alienam purpuram vestimento suo quis intexuerit, licet pretiosior sit purpura, tamen accessionis vice cedit vestimento, ib. §. 26.*

² The *Roman* Law does not relate here the Case of Specification, of which our Author speaks in the following Paragraph. But in both Cases we may say with Mr. *Thomasius*, that it ought to be indifferent to the Owner of the Purple, whether he restore the Wool, or Cloth in kind, or give him another like it, of the same Nature, and same Price. So that it is just, that he content himself with this Equivalent, knowing that the other has acted with an honest Intention.

³ The Text speaks the contrary expressly, saying, That without which another can't exist, and which supports it, as we may say physically. The Author here thro' Inadvertence has confounded the Principal with the Accessory.

⁴ As the *Roman* Lawyers affirm, saying, *In omnibus igitur istis, in quibus mea res, per prævalentiam, alienam rem trahit, meamque efficit, si eam rem vindicem, &c. Digest. l. vi. tit. 1. De rei vindic. leg. 23. §. 4.* There went before immediately, *Sed necesse est ei rei cedi, quod sine illa esse non potest, §. 3.*

As for what *Grotius*^a affirms in this Matter, *That for the greater part to swallow up the less, is natural only in Fact, not in Right*; we allow it under the following Sense. In *Fact* what is stronger may draw to itself what is weaker; but 'tis not always *rightful* or *just*, that a strong Man should carry off the Goods of his weaker Neighbours; or that a Person should lose a thing of his own, which is less, if it happen to be join'd with somewhat of another's, which is greater. For he who hath but the twentieth part in a Field, is as much a Lord and Proprietor, as he who hath the other nineteen. But indeed the Question we are now upon is not strictly, whether he who hath the greater part in a thing, ought on that Score to gain the less; but what Expedient may be found out to decide the Business, in case two Persons happen to be joint Proprietors of a thing, which they are unable or unwilling to hold in common, or to divide. Now here certainly the entire thing ought to be adjudged to one of the Parties, upon Condition that he satisfy the other to the Value of his Share. And which of the two Persons ought, in this case, to carry the whole thing, is to be determin'd from the Price and Excellency of one Share above the other, and from considering which of the Men is in the greatest want of that for which they contend. Thus suppose a Man to have us'd my Purple in a Garment for himself, tho' possibly the Purple be of much the greater Value, yet 'twill be my best way to leave him his Garment safe and whole, upon receiving Satisfaction: for should the Garment be taken to Pieces, the other Party must needs be endamaged; and where's my Advantage in receiving my Cloth, when reduced to Rags? And as for the whole Garment, this being already fitted to the Body of another, is commonly disproportion'd and unserviceable for mine. So indeed in all the Compass of this Subject it is more easy to judge what's fit and equitable from the Consideration of particular Cases, than from any general Decision.

X. As for *Specification*^c, or the turning a thing into such a Form or Shape, we are first of all to observe, that it cannot strictly and properly be ranked amongst the ordinary ways of Acquisition: For since in the Course of Nature nothing can be made but out of some Matter before existing, we ought to enquire whose that Matter is. If it were our own, then upon the introducing of a new Shape, our Dominion still continues. If it were no Body's, then we should obtain the Dominion of it by the present Act of Occupancy. But if it

were another's, then the Question lies, Whether 'tis now to be adjudged to the Owner of the Matter, or to the Author of the Form? On which point the old Masters of the *Roman* Law being divided^d, at length they came to this middle Resolution; That if the Form could be reduc'd to the first rude Mass, then the thing should go to the Owner of the Matter; if not, to him who gave it the new Shape and Figure. Some have thought this Distinction to be founded on most evident Reason; *Because*, say they, *when the Shape cannot be thus unmade, the thing seems to have utterly perished, and some new Being to have risen in its Place; Wherefore it ought, in this Case, to be adjudged to him who caus'd it to exist under this new Form: Whereas, when the Figure may be reduced to the first Lump, then the thing is suppos'd still to exist, and not to have perished at the Arrival of the new Form, and consequently not to have chang'd its Owner.* Others, on the contrary, are of Opinion, that the whole Business turns on this Issue, Which of the two, the Matter or the Form, is highest in Value^e. In our Judgment, neither of these Determinations can with Equity be apply'd to all Cases; but the other particular Circumstances ought likewise to come under Consideration and Regard. Thus suppose a Man hath made Wine, Oil, or Bread out of my Grapes, Olives, and Corn, or hath taken my Honey and Wine to mix in a compound Liqueur, why should he have a Right to the Forms thus produced rather than I, only because they cannot be restor'd to their original Matter? Therefore, if the things of which we are speaking, will admit of Division, they ought to be parted according to the Value of the Matter, or the Labour in working out the Form. Yet in case the Owner of the Matter hath occasion to enjoy the thing entire, we think that his Claim ought on all accounts to be preferr'd to that of the Fashioner. Thus, if a Man casts or shapes a Work out of another's Metal, where the Form is much more precious than the Matter, 'tis but fair that however capable the thing is of being brought back to its Principles, yet it should be left in the Possession of the Fashioner; provided he either restore the like Metal in Quantity and Kind, or pay the just Value of it. But a contrary Decision seems most reasonable, if I had design'd that Metal for the very same Work, of which I stand in great Necessity, and cannot procure new Metal for that Purpose. For here Equity will favour the Owner of the Matter, though the Form or Make should perchance far excel in Value.

^a *Dist. loc.* §. 21.

^b *Vid. Connan. Comm. Jur. Civ. l. iii. c. 6.*

MR. BARB. NOTES on §. X.

¹ Mr. de Courtin (in his *Indic.*) defines *Specification* to be the Introduction of a new Form in a Matter belonging to another.

² The Words are, *Quum ex aliena materia species aliqua facta sit ab aliquo, quæri solet, quib. eorum naturali ratione Dominus? Et post multam Sabinianorum & Proculianorum ambiguitatem, placuit media sententia existimantem, si ea species ad primum & rudem materiam reduci possit, eum videri dominum esse, qui materia Dominus fuerit; si non possit reduci, eum primum lat. illi præsumitur qui fecerit; ut ecce eas constat potest ad rudem materiam æris, vel argenti, vel auri reduci, vinum autem, vel oleum, vel mellis, non potest ad uvas, vel olivas, vel spicas reverti non potest, ac ne nullum quidem ad vinum vel mel reverti potest. Quod si quis ex sua materia, partim ex aliena speciem aliquam fecerit quis, velut ex suo vino & melle alieno nullum misceat, aut ex suo & alienis ingredientibus emplastrum aut collirium, aut ex sua lana & alieno vestimentum fecerit, dubitandum non est, hoc casu eum esse dominum qui fecerit, cum non solum operam suam dederit, sed & partem ejusdem materiae præstiterit.*

³ The most plain and general Rule which can be given here is Mr. *Thomasius's* before-mentioned, according to which the Whole, or the Work which ariseth from two things belonging to two Persons, usually appertains to him that brought it into a new Form, because Matter for the most part is of that Nature, that it may be restored either in itself, or by its Value in Money. But if the Matter be something produced by Labour, for which we have some particular Reason to prize it above its just Value, as if it be a Silver Cup given us by a Prince, which we have made into a Basin, the Owner of the Cup ought to be contented with another Cup of like Weight, or with the Value of it. For if he should give him the Basin, or make it again into a Cup of the same Form, it will not nevertheless be the same Cup which the Prince gave him. The Sum of all is this, if he that turned the Cup into a Basin, knew that the Cup was another Man's, the true Owner may make him pay for the Cup according to his private Estimation. See the Discourse, *De pretio affectionis*, &c. c. 3. §. 43, &c.

Others conceive, that in the case before us we ought farther to enquire, whether the *Power* which the Matter had to receive a particular Form was *near*, or *remote*: If the former, they think the Owner of the Matter ought to be prefer'd; if the latter, the Fashioner. For Instance, That if a Ship be thus made out of the rough Wood belonging to another, then it shall go to the Builder; but if the Timber were before fitted and prepared for the building a Ship, then the Ship shall go to him who own'd the Timber: That, if a Man works my *Wool* into a Garment for himself, he shall keep it, when he hath done; but if he cuts a Coat out of my Cloth, I have a Right to challenge the Coat, and to refuse any Equivalent: That a medicinal Composition, if the Ingredients were before perfected and prepared, shall go to the Owner of those Ingredients; if not, to the Author of the Composition. But neither will this Distinction alone be always agreeable to the Rule of Equity: For if I hold any such *Matter* in my Possession, whether rude and unwrought, or whether fitted or disposed to receive a *Form*, which I either keep for Sale, or else have in such Abundance, as to be still furnish'd for my own Occasions, there's no reason why I should not leave such a thing to the Fashioner of it, upon his refunding the Price of the said *Matter*. But if I have design'd any Quantity of *Matter* to my own particular Use, and have no Convenience of procuring the like, then the Want which I am in turns the Favour of my Sentence on my side, though perhaps the *Matter* was only in *potentia remota*, had only a distant Capacity, not an immediate Fitness for this Work^a. Nay, tho' a Man should frame a thing partly out of his own *Matter*, and partly out of another's, yet even this doth not in all cases make it undubitably certain, that the thing ought to be assign'd to him that made it, on this Reason; because the Shape and Figure is not only owing to his Pains, but he likewise contributed Part of the *Matter*: For, it may be, his Pains were of little worth, and likewise his part of the *Matter* inconsiderable, so that the *Matter* belonging to the other Person exceeds both. And again, there are some things which take up a certain Quantity of *Matter*; so that in any Degree to lessen it renders it unserviceable, if not absolutely, yet however to that particular Design. In this case Judgment is to be given for him who stands most in need of the thing thus framed.

As for what remains, *Grotius's* Assertion^b is universally true, *That since things consist of Matter and Form, as their constituent Parts, if the Matter belong to one, and the Form to another, there naturally follows a Community to each, according to their respective Proportions*^c: Just as a whole Body composed by the mixture of two Parcels of *Matter* of the same kind, is common to the two Owners^d. But when a thing can neither conveniently be held in common, nor divided,

then either positive Laws or Equity must determine which Party shall resign the whole to the other, upon receiving the Value of his Share^e. It is still in all cases to be enquired, Whether the Person who bestows a Shape on another's *Matter*, doth it with an honest or with a dishonest Design? For he who acts thus out of a knavish Principle, can by no means pretend that the thing belongs to him, rather than to the Owner of the *Matter*, tho' all the former Reasons should concur; that is, tho' the Figure should be most valuable; tho' the *Matter* should, as it were, be lost and swallow'd up in the Work; and tho' he should be in very great want of what he had thus compacted. For the greater part of the two doth not draw to itself the less, barely by its own Virtue, or on its own Account; but there is required farther some probable Ground and Plea in the Owner of that part which exceeds, on which he may build his Claim. Hence, if a Man out of wilful and design'd Fraud, puts a new Shape on my *Matter*, that he may by this means rob me of it, he neither gains any *Right* over the *Matter* by this Act, nor can demand of me a Reward for his Labour, any more than a Thief who digs thro' my Walls can desire to be paid for his great Trouble in making a new Door into my House; or than one can desire a Fee, who breaks an Imposthume, otherwise incurable, with a Blow that he design'd for my Death; or than *Autolycus* could have ask'd a Price for painting the Horses he first stole. And all this doth not proceed from any positive Constitutions, but from the very Dictate and Appointment of natural Reason^e, tho' Nature doth not determine any particular Penalty in the Case. For to have exercis'd such a Villany *gratis*, is not properly a Punishment: And on the other hand 'tis most just and reasonable, that I should not be obliged to pay a Man Wages for endeavouring to do me a Mischief.

XI. What the ancient and modern Lawyers have so laboriously deliver'd concerning Increment by Rivers, depends, for the most part, not so much on any constant and natural Reason, as on the positive Ordinances of particular Nations: And therefore we may be allow'd to use more Brevity on this Subject.

The two chief Enquiries made in the case before us are, First, *Whether the Rivers, by thus secretly forsaking their Banks, do add to the Dominion of whole Territories?* And, Secondly, *Whether they improve, in the like manner, private Estates?*

The former Question is of greater Moment, in as much as it may often prove the occasion of great Controversies between Nations; it being usual for Rivers to lie as the common Boundaries of different States. Now when such a River hath any way alter'd its Course, the Point in Dispute is, *Whether the Limits of the Seignories are likewise chang'd, and whether the additional Land goes to them whose Banks*

^a Vid. l. vi. tit. 1. & l. 61. D. De rei vindic. Dig. De rei vindic.

^b *Diſt. loc. f. 19.*

^c *Ibid. f. 27. Vid. l. vi. tit. 1. leg. 3. f. 2. & leg. 5.*

^d Vid. l. vi. t. 1. l. 23. f. 2, 3. D. De rei vindic.

^e *Add Leg. Wisgeth. l. x. t. 1. c. 7.*

MR. BARB. NOTES on §. x.

^a The Latin is, *Si duorum materiae ex voluntate dominorum confusae sint, totum id corpus, quod ex confusione fit, utriusque commune est, veluti si qui vina sua confuderint, aut massas argenti vel auri confuserint; sed & si diversae materiae sint, & ob id propria species facta sit, forte ex vino & melle mulsun, aut ex auro & argento electrum, idem juris est, nam & hoc casu communem esse speciem non dubitatur. Quid si fortuitus, & non ex voluntate dominorum, confusae fuerint, vel ejusdem generis materiae, vel diversae, idem juris esse placuit.*

it augments? Here we are first of all to suppose a Distinction between such States as are *limited*¹, or encompass'd with artificial Bounds (with which we may reckon those that are parcell'd out by Measure, as by the number of Acres, being as to the present Business the same) and *arctifinian*, such as are naturally fenced against Invaders, with the Boundaries of Rivers and Mountains. After this we are to enquire, Whether the neighbouring People of the two opposite States left the River between them void of particular Dominion, and common to the Use of both; or whether they agreed to fix their respective Limits in the midst of it, so that half should belong to one People, and half to the other? And lastly 'tis to be consider'd, Whether the whole River belongs to one People, so that the Limits of their Dominions reach to the Bank of their Neighbours? If then both the States are bounded in the manner first described, by artificial Enclosures, or by Measure, which immediately touch each other, without any void Space between, tho' the River should change its Course, yet the Territories will remain of the same Extent: Nor can there here be any room for the Case before us, since whatever Space should thus happen to be left, already belongs to one or to the other State. If the River in the middle were left void and common, then the Ground added to the Bank or little Ilelets which start up, shall go to those who first take them into Possession: Yet 'tis most convenient, that both the former and the latter should be occupied by that People to whose Banks they are most nearly seated. If the whole River belong to a single State, the Ilelets rising in it shall belong to the same State only; but as for what is gotten from the River by the opposite Banks, it seems most reasonable that it should belong entirely to the other People. But it most commonly happens, as 'tis most agreeable, that the Lands reaching to the Stream on each side are suppos'd to be fenced only with these natural Bounds; and that consequently the End of each Dominion is to be conceiv'd in the Midst of the Channel: For here the Water, as it plainly separates and distinguisheth the respective Lordships, so it affords to each County a kind of natural Bulwark. Yet still it is requisite in this Case, that the River do

not, as it were, make a common Custom of drowning its Banks, and of cutting it self out a new Channel every Year. When therefore two neighbouring Nations possess Lands thus bounded by Nature (which in a doubtful Case is always presumed) the River by gradually changing its Current, changeth likewise the Limits of the Dominions, and whatever Addition it makes to either side belongs to those on whose Banks it falls, provided that this² Alteration be made by small Degrees, and that the River do not at one sudden Rupture forsake its Channel, and force a new way. For the gaining or losing of insensible Parts, or any such Change as entirely leaves the old Shape and Figure, suffers a thing to remain in all³ appearance the same as it was. And the Conveniency of a natural Boundary is too great to be slighted and forsaken upon a small Damage. But if a River, deserting the Channel it once fill'd, shall have broke up another Passage for its whole Current; and the People through whose Lands it now runs, do not think the advantage of a natural Boundary to be of so great Consequence, as that for the sake of it they should resign so considerable a part of their Territory, then the Borders shall continue as before, in the middle of the forsaken Channel. For as a Stone is used for a Boundary, not on the account of its Nature, but of its particular Position; so a River concludes and separates different Countries, not in its vulgar Notion, as 'tis a Bulk of Water gather'd from certain Fountains and Rivulets, and from other Streams of Note and Size, and then distinguish'd by a particular Name; but as it runs in such a Channel, and hath such Banks to encompass and confine it⁴.

XII. As to the Lands of private Persons in this Case, we are of Opinion it ought first to be consider'd, whether the River on which such a particular Estate happens to lie, divides the Territories of two distinct Governments; or whether it only passeth thro' the Dominions of one: And then, whether the River be publick or private. In the former Case it depends absolutely on the Pleasure of the Government, either to leave such Increments in private Hands, or to challenge them for the common¹. For at first it generally happen'd, that such or such a People seiz'd on this or that Tract

¹ Comp. *Grot.* l. ii. c. 3. s. 16. & *ad eum loc.* Bœcler. & Ziegler.

MR. BARB. NOTES on §. XI, XII.

¹ *Grotius*, from whom our Author took this Distinction, had not read carefully enough the ancient Writers, who treated upon the Bounds of Lands, which is the Cause that he has mistaken their Sense. They call that *ager limitatus*, Land bounded, which is distributed by the Order of the Prince, to every one a certain number of Acres compassed about with Fences, whence it is that they are called Lands divided and appropriated. We understand by Lands contained within a certain Extent by Measure, *per mensuram comprehensus*, a Space of Ground measured into Acres, of which a certain Number are given to Men in general, without assigning any particular Part, which from hence is called *ager assignatus per universitatem*. Lastly, *arctifinian* Lands are those which never were measured, *ager est arctifinius, qui nulla mensura continetur*, says *Frontinus, De re agraria*, c. 1. and of which the first Occupier appropriates to himself as much as he pleaseth, and he can till, from whence they are named *ager arctifinius*. These last have not always natural Bounds, and every one fixes them as he pleaseth, viz. an Hedge, Rail, Ditch, &c. Thus *Groenovius* the Father (on *Grotius*, l. ii. c. 3. §. 16.) delivers himself in general, and he is a sufficient Judge in these Matters; but his Notes of another sort, which he makes on *Grotius*, would have been much better, if he had applied himself more to the Study of the Law of Nature, and Matter of good Reasoning in general, than to grammatical Niceties and Criticism, as Mr. *L. Croke* observes in his *Biblioth. Chæsiæ*, Tom. iv. p. 266. But tho' our Author has made a Mistake here by following *Grotius* inconsiderately, yet the Fault had not been great, if he had otherwise reasoned well from this Distinction taken in the Sense he gives it.

² Hence it is, that the *Roman* Lawyers take it for certain, *Est autem alluvio incrementum lateris; per illud non potest em id venditur aliquid, quod ita paulatim adjicitur, ut intelligi non possit, quantum quoque temporis momento usufructus*, *Instit.* l. iii. c. 1. §. 20. See also, *Digeſt.* l. xli. tit. 1. *De acquir. rerum Dominio*, leg. 7. §. 1.

³ The Law is, *Quapropter cujus rei species eadem confisteret, rem quoque eandem esse existimari*, *Digeſt.* l. v. tit. 1. *De Judiciis*, &c. leg. 76.

⁴ On the contrary it is credible, as Mr. *Hertius* observes, that for the most part such as united themselves together in civil Societies, were every one in particular possessed of Lands. He alledges a Passage in *Cicero* to this purpose, *De Offic.* l. ii. c. 21. which is quoted l. viii. c. 5. §. 2. n. 1. following; but it doth not fully prove it; for they who went together to find out some uninhabited Country, did doubtless design as much to secure themselves the peaceable Enjoyment of the Lands, which should be assigned them, as those that they were already possessed of by the Right of the first Occupier. If they should unite with several other Tribes to

Traße of Land by the *Great*, and afterwards parcell'd out to each Man a particular Possession in it, usually contain'd under a certain and definite measure. As therefore what remain'd of the Territory, after this Allotment to private Persons, was still the publick Possession of the State; so whatever happens to be added to any particular Share, is likewise supposed to accrue to the Publick. Yet inasmuch as the adjoining Fields frequently suffer great Damages from the Rivers by Floods, and because the Increments we are speaking of, advancing by slow degrees, seem to be of little Consequence to the publick Revenue; therefore many Governments have thought it a reasonable Favour and Bounty to grant these Improvements to the Persons on whose Lands they happen to fall. And there is the more Equity in this Constitution, in case the respective Persons were wont to keep up the Banks at their own Charge. This *Right* is presum'd to accompany any piece of Land assign'd to a private Person, not by any determinate measure, but in gross; though perchance in the formal Delivery of it some kind of measure might be express'd^a: And 'tis the same Case, when in assigning the Bounds of any Land, the neighbouring River is mention'd at large. But if this Increment be very considerable, and far exceeding the measure of the private Possession, then it shall be adjudg'd to belong to the Community. As for the Islets which arise, these no private Man can claim to himself, without the express Grant of the State; because being plainly separated from the particular Demesne, they can on no account be esteem'd a Part or Increment of it. And their being seated next to such a Possession, is no more an Argument that they ought to pass to the particular Proprietor of it, than that any other Man should challenge a part of a Street or a publick Place, only because it lies just by his Door.

If a River separates the particular Lands of Persons subject to the same State, then, since it can add nothing on one side, but what it took from the other, 'tis by all means reasonable, that the Increment shall go to him on whose Land the Damage is committed. Thus the *Roman Laws*² rightly ordain'd, That in case the Violence of the Current adds a piece to my Land, which it hath torn from yours, it shall remain your Property as before. Which Judgment will more especially hold good in floating Lands, such as *Strabo*^b mentions in the Fens of *Euphrates*, built upon Hurdles of Reeds, and moved with Boat-Poles into their former Seat, when the Water had carried them off.

But if it hath stuck long upon my Banks, and the Trees which it brought with it have there taken Root, from that time forward it shall be deem'd an acquisition to my Estate. Whence 'tis clear, that the Owner of the lost Fragment ought to have brought it back again to its former Place, before it was incorporated with my Land, if he intend to resume the Property of it. When 'tis uncertain what and how much hath been wasted from another's Soil, the Sufferer is hereby hindered from putting in his Claim to the Increment; which yet, according to natural Law, doth not accrue to him who owns the Ground where it fastens, but to the People who are Sovereigns of the River. For 'tis in the highest manner agreeable to Reason, that not only the Water of a common River, and the things contained in it should be publick, but likewise the Channel, and the Banks, and whatever Improvement either that or these happen to gain. For it seems very improper to say, that the Channel, consider'd in it self, is a part of the adjacent Land; but that it is look'd on as publick, so long as it's cover'd with the publick River; which being once remov'd, it becomes private, according to its primitive Nature: As if 'twas only a Burthen or Service laid on the Grounds of particular Men, that they should grant the River a Passage thro' them.

If a River forsakes its Channel, or any Part of it, and cuts out a new way, since the latter is taken from the opposite Land, the former deserted Channel ought in Equity to be adjudg'd to the Owner of the Land, who now suffers, to comfort him for his Loss: And in case the River forsake likewise this new Passage, the Ground shall then return to the antient Proprietor, and not to those who possess the Country about it. But whatever is determin'd in those Cases of the Increments left by the Current, and of the Alteration of Channels; this, no Doubt, is but just, that the Burthen which before lay on any Ground, should be lessen'd in proportion to what it loseth by such an Accident. Which Point, as *Herodotus* informs us, was settled amongst the *Egyptians* by a particular Law.

It is not less equitable, that Land drown'd by a Flood should belong to the former Owner, either when the Water⁺ is gone off without trouble, by one violent outlet, or by slow degrees; or when his Pains and Labour have cut out a Passage for it. But 'twill be ask'd, *To whom shall the new Bulk of Water belong, 'till such time as the Land by draining shall be recover'd?* Here we judge it necessary to enquire, Whether the drown'd Land hath pass'd into the Form of a Lake, or a Fen, or whether it

^a Vid. l. xix. t. 1. l. 17. f. 14. *D. De act. empt. & vendit. Europe*, p. 81. Edit. *H. Steph.*

^b *Geograph.* l. xvi. p. 528. Edit. *Genev. Casaub.*

MR. BARB. NOTES on §. XII.

form the Body of a State. It does not nevertheless follow from hence, as Mr. *Hertius* affirms, that the Right which a Subject may have to appropriate such things as he finds without an Owner, within the Bounds of the State, as the first Occupier, does not depend either upon the tacit or express Will of the Sovereign. After what manner soever the State is form'd, the whole Country belongs to all the Body; and so it follows, that the Laws of Union extend so far as to give the People, or them that represent them, Right to dispose in divers manner the Goods of each particular Person, as the publick Good requires. See l. viii. c. 5. This is so much the more certain at present, because our Kings have for a long time enjoyed this Right by the consent of the People.

² The Words of the *Roman Law* are; *Quod si vis fluminis de tuo prædio partem aliquam detraxerit, & vicini prædio attulerit, pilam et eam tuam permanere. Plane si longiore tempore fundo vicini tui hæserit, arboreque, quas secum traxit, in eum fundum raíces erunt; et eo tempore vicinæ tui fundo acquisite esse.* (It ought to be read, *Videtur — adquireta*, as the *Florence MSS.* has it) See *Finnius* upon the Place, *Instit.* l. ii. c. 1. §. 21. and *Digeft.* l. xii. leg. 7. §. 2. and l. xxxix. tit. 2. *De damno infecto*, &c. leg. 9. §. 2.

⁺ These Alluvions happen for the most part thro' the Negligence of the Proprietors, who take not sufficient Care to secure the Banks of the Rivers bordering upon their Possessions. The *Roman Law* did not restore Lands overflowed to their former Owner, unless they had not chang'd their Form, i. e. when they were covered with Water for a small time, without making a true Channel. This Mr. *Nott* proves contrary to the Opinion of the Lawyers in his *Probab. Juris*, l. i. c. 1.

is added to the Channel of a publick River? In the former Case, the Lake or the Fen shall for ever appertain to the Owner of the Ground; and in like manner in the latter Case⁵, for so long time as he shall entertain any Design of reducing the Current to its former Banks. As for private Rivers, which give me in one Place as much as they rob me of in another, the Matter is clear beyond Dispute. But what if a River belonging to my private Estate shall make it self a new Channel through the Ground of another Man, shall that Part of it, which covets my Neighbour's Ground, belong to me, or to him? In our Opinion Judgment ought to be given for the latter. Yet still I retain a Right of turning the Current to its proper Place. But if I refuse thus to bring back the Current to my own Demefns, I cannot oblige the other Party to pay for the Water, nor so much as pretend that it ought to be common to us both in that Part. For those things which are our own barely on account of their being contain'd within our Limits or Space, and which therefore seem Accessions to the said Space⁶, when they once happen to get out of it, are either to be recall'd by our Care and Diligence, or else to pass out of our Propriety, and to be reckon'd henceforward the natural Increments of the new Space to which they are removed. But in all

these Cases the positive Laws of different Governments may variously determine, as shall appear convenient. In *Aggenus Urbicus's* Comment we find the following Rules laid down, *If this be done in Lands taken by Occupancy, whatever the Force of the Water hath stolen away, no one may have the privilege of recovering: which Consideration lays a Necessity on Men to keep up their Banks, yet so as not to endamage their Neighbour. But if it be done in Lands that have been meted out, and assign'd in Portions to distinct Owners, then the Possessor shall lose nothing; because every one knows the exact Form and Dimensions of what was allotted for his Share in the Hundred to which he belongs.*

Concerning the Lands which border on the *Po*, *Cassius* thus determines; *Whatever the Water washeth away in its ordinary Channel, the Possessor shall lose: Because he ought to defend his own Bank, without prejudicing other Mens Property. But if the Flood fall down with a greater Force, so as to alter its Channel, every Man shall regain his own Measure; because 'tis manifest the Damage happen'd not through the Neglect of the Possessor, but through the Violence of the Torrent. If in this Case the Water form an Islet, it shall be his Property from whose Land it was taken; but if it was borrowed from out of several Estates together, each Person shall receive his own. Comp. Grov. l. viii. c. 8. l. 8, &c. and Ziegler ad diel. loc.*

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⁵ Our Author inconsiderately mentions Lakes and Fens in this Place.
⁶ See Mr. *Thomasius's Jurisprud. Divin.* l. ii. c. 10. §. 151, &c.

CHAP. VIII.

Of Right over other Mens Goods or Possessions.

- I. A Man may have a Right over other Mens Goods diverse ways.
- II. How many sorts of Right we have over others Goods.
- III. The Right of holding in Fee.
- IV. The Right of a Ground-plat.
- V. The Right of an honest Possessor.

- VI. Services, what; and of how many sorts?
- VII. The Use with the Profits.
- VIII. The bare Use.
- IX. The Habitation.
- X. The Works of Servants.
- XI. The Services of City Estates.
- XII. And of Country Farms.

SUCH is the force of Property or Dominion, that the *Proprietor* alone hath Power to dispose of his own Goods; and all others are bound to abstain from them. Yet inasmuch as the Division of things amongst Men was not introduc'd with this Design, That all Communication of Goods should thereupon cease; it hence comes to pass, not only that we are often by the Law of Humanity engaged to grant others the Substance or the Use of our own Possessions, but likewise that others may acquire a¹ Right to them, either perfect or imperfect, and consequently may procure by

a good and just Title some Benefit or Advantage from our Peculiar.

We shall here observe in short, how many ways this may happen; the whole Subject being so largely explain'd by the Expositors of the *Civil Law*².

II. The chief Rights over the things of others, accruing to Persons who are not the Proprietors, are by some reduc'd to these five: The Right of holding in Fee; the Right of Ground-plats; the Right of Possession upon an honest Presumption; Pledges or Mortgages, and Services¹.

² To whom add *Selden*, de *Jur. Nat. & Gent.* l. vi. c. 2.

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¹ The Author expresses himself more clearly in his Abridgment of the Duties of a Man and Citizen, l. i. c. 12. §. 8. thus, either by some Agreement, or some other way, a Right greater or less to obtain some certain Profit or Advantage from a thing that belongs to us, &c.

² We may add the Right of Fealty, of which we shall speak in Note *ult.* of this Chapter. I shall also by and by shew that Mr. *Hertius* hath taken notice of this plain Omission.

III. The ¹ *Right* of holding in *Fee*, which is granted to another by the Owner of an immovable thing, upon condition of paying such a reserv'd Acknowledgment, impowers the Tenant in *Fee*, not only to use and enjoy the said thing after the fullest manner, but likewise to dispose of it; though not without some little Restraint as to the Point of Alienation. The particular Contract, by virtue of which this sort of *Right* is immediately settled, can be rank'd neither under *Buying and Selling*, nor under *Letting and Hiring*; since it doth not confer an absolute Property on the other Party, and yet a much greater Degree than in ordinary Leases; but especially since the reserv'd Acknowledgment is (commonly speaking) far less considerable than the Rent of vulgar Tenants. As the Rules observ'd either by common Law, or by particular Agreement, in the renewing of this Contract, in the paying of the settled Rent, in the Alienation of the *Fee*, and in the Continuance of it, the Civilians afford us large Information.

IV. He that either upon paying such a Fine, or engaging for such a certain Rent, hath obtain'd the ¹ *Right of a Grund-Plot*, may enjoy the same, and make any Disposal or Conveyance of it, as much as if he were the first Proprietor ²; and consequently may claim the Lordship, though not of the Soil itself, yet of all that is built upon it. It was otherwise in the former Case; where even profitable *Dominion* of the Soil belongs to the Tenant of the *Fee*: The Reason of introducing such a *Right* was this; That *Persons* were willing to admit Strangers upon their Land, yet so as not to lose any thing in the Bulk and Dimensions of it. Therefore they made a Grant of the Surface, reserving the main Soil to themselves, and requir-

ing a moderate annual Rent to be paid on this ² Consideration. If the Surface be lost, as suppose, if the Buildings fall, or are consum'd by Fire, the *Right of the Ground Tenant* ³ expires, so that the Lord of the Ground may again dispose of it as he thinks fit.

V. *The Right of Possession* ¹ upon an honest *Presumption* (belonging to those who with a good and sincere Intention receive a thing of another's from a false Proprietor, yet upon a just Title, and such as would otherwise be sufficient to convey the *real Dominion* to them) is thus far equivalent to *strict Property*, That such a *Possessor* may challenge all the ² *Fruits and Profits* as his own, may dispose of the thing as he pleaseth, and defend his Possession, nay, and ought to be maintain'd in it by the Laws against all Claimants, except the just Lord. And this Possession after a certain Term of Years will give the Possessor an irrevocable *Dominion*, and such as shall hold good even against him who was at first the lawful Proprietor. On which Point we shall hereafter enlarge ^b.

Now this *Right* was at first set on foot for the Benefit of human Commerce, and the Peace of Society and Government; to the intent that he who endeavours to obtain a thing upon a good Title, and with an honest Mind, should not afterwards be unreasonably oppress'd, or incommoded; as he must needs be, were all other Persons for such a Space allow'd to disturb him in his Hold; or were he bound upon the true Proprietor's challenging the thing to refund likewise the Fruits and Profits which he had consumed: Or, Lastly, If his Possession were always to hang in an uncertain fluctuating Condition. As indeed it is a Rule not only enacted by *civil Constitutions*, but likewise founded on natural Reason, that every Man shall

¹ Vid. *Justin.* l. xviii. c. 5. n. 14. Edit. *Græc.*

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¹ The Word *Emphyteusis*, from which this *Jus Emphyteuticum* is derived, comes from the Greek Word ἐμψυτεύειν, which signifies to engraft or plant. Since the Owners of barren Land can't easily find such as will farm them, it has been thought expedient to make over these sort of Inheritances for ever, to till, plant, and improve them any way. By this Agreement the Proprietor of the Ground reserves to himself a certain Rent for ever, and the Emphyteute or Lessee on the other side entitles himself to the Profit of his Labour and Industry by gathering the Fruits of another's Estate, which he has enrich'd by his own Care, only paying some small Rent. In the Issue the Lands are restored to the Lessor, not only fertile and in a good Condition, but the Estate likewise, which in its own Nature produce no Fruits, although it is otherwise of some Value, as Houses and other Buildings are. See *Instit.* l. iii. c. 25. *De Locatione & Conductione*, §. 3. *Digest.* l. vi. tit. 3. *Si ager coligalis*, i. e. *Emphyteutarius, petatur*, *Cod.* l. iv. tit. 66. *De Jure Emphyteuticis*, and Mr. *Dumoulin's* Civil Laws reduced to their natural Order, Part I. l. i. t. 4. Sect. 10. Mr. *Titius*, in his *Observat. on Lauterbach*, 209. affirms, That it is not necessary to make any particular kind of Contract in *Emphyteusis*. "For, says he, when we have transfer'd to another the Property of a thing either in whole or in Part, if he doth it gratuitously, 'tis a Donation; if he require a certain Price, 'tis a Sale, altho' he otherwise makes some private Agreement for an annual Rent." See the same Author's *Jus Perpetuum Romano German.* l. iii. c. 11. §. 5, &c. where he also treats of the Right of Place.

² See Chap. 4. §. 2. above.

³ This *Right* may be most properly called *Dominium utile Fundi*, and not *Jus Superficiarium*, as our Author does. For he that has this *Right* has Power to place any thing upon the Surface of that Ground, though it belong to another. Indeed, the *German* Lawyers express themselves sometimes after that manner. And Mr. *Hertius* has an entire Discourse (among his Comment. and Opusc. Tom. 3.) which he entitles, *De Jure Superficiariorum*. And the *Roman* Lawyers call him that has this *Right* *Superficiariorum*, i. e. as they expound it, *qui in alieno solo superficiesem ita habet, ut certam pensionem præstet*, *Digest.* l. vi. tit. 1. *De rei vindic.* leg. 74. 75. The Buildings also which are possess'd after that manner are named *Bona Superficiariorum*, *Digest.* lib. l. t. 16. *De verborum significatiōe*, leg. 49. and the Rent paid *Salarium*. *Vestigal enim hoc sic appellatur, Salarium, ex eo, quod pro solo pendatur*, *Digest.* l. 43. t. 8. *N. quid in loco publico vel itinere fiat*, leg. 2. §. 17. See a whole Title in the *Digests* upon this Matter, l. xliii. t. 18. *De Superficiariorum*.

⁴ Others differ in their Opinion, because, say they, this part of the Property which the Owner of the Ground transfers to him that hath *Right of Place*, *Superficiariorum*, falls in some manner upon the Ground itself. See a Book printed at *Wittenberg* in 1704. entitled, *Balthasar's Werber's Juris profess. publici, &c. Elementa Jur. Nat. & Gent.* Sc. c. 14. §. 37. And Mr. *Hertius* takes to the same side. He says, that at least, unless the Parties have agreed otherwise, and there be some Rule of the Civil Laws about it, we must believe that no Man can affirm otherwise, than that the *Right of Place* ends with the first Building. "Real *Servitus*, adds he, have not so great an Effect as *Right of Place*, and yet they must be renewed, when the Building to which they are annex'd, comes to be built again, *Digest.* l. viii. t. 2. *De Servitut. Prædiorum urban.* leg. 20. §. 2.

⁵ The Law says, *Vel etiam potest dividi possessionis genus in duas species, ut possideatur, aut bona fide, aut non bona fide*, *Digest.* l. xli. tit. 2. *De acquir. vel amitt. possessione*, leg. 3. §. 22.

⁶ The Law is, *Bona fidei emptor non dabit percipiendo fructus etiam ex aliena re suos interion facit, non tantum eos qui diligentia & opera ejus præcorerunt, sed omnes; quia quod ad fructus attinet, loco Domini pæns est*, *Digest.* xli. tit. 1. *De acquir. rerum Dominio*, leg. 43. in præcip. See also Mr. *Noodt's Probab. Juris*, l. ii. c. 7. and what will be said c. 13. §. 8. following

be left to enjoy what he hath got with honest Intention³, till such time as the Claimant shall have demonstrated a stronger *Right* than *Possession*. For what Troubles and Disquiets might be every day brought on any Person, if upon Suit of every Petitioner he should be oblig'd to relinquish what he fairly holds, and to prosecute the other Party in order to a Recovery⁴? The Case of *Pledges* or *Mortgages* will hereafter be explain'd⁵.

VI. *Services*, in respect of the Person to whom they are due, are so many *Rights* of receiving certain Profits or Advantages from things which belong to others, or of abridging the right Owner in the use of what he possesseth, so that he shall not be able to apply it to all purposes. But in respect of the Person who is to pay them, they are so many Obligations to grant another somewhat out of a Man's own Possession⁶; or, for the benefit of another to forbear using his own Property in such a particular manner. *Services*⁷, in respect of the Object towards which the Payment of them is directed, are divided into *personal* and *real*: Not as if the Benefit of each did not ultimately terminate in the Person, but because some Profits of this kind accrue to a Man, only on account of his possessing some certain Estate⁸. Which Distinction others express in this manner: *Advantages, arising from other Mens things, either come to a Person directly and immediately, on the score of his being such a Person, or else mediately, by the Intervention of something which he holds as his Property, and to which this Service is owing.*

VII. In the *List of personal Services* are commonly reckon'd those which follow, *Use and Profits, Use,*

*Dwelling, and the Works of Servants*¹. *Use and Profits* is a *Right* of enjoying freely what belongs to another, yet so as not to impair the main Substance²; or, a *Right* of receiving all such Advantages from another's *Property*, as can arise from it without injuring the Principal. For, though in the ordinary Course of Nature, he who is Lord of the Thing is also Lord of the *Fruits*, yet there is nothing to hinder, but that these two may be separated, and the *Diminion* or *Property* lodg'd in one Person, whilst another hath a *Right* to all the Benefits. And this may be ordained and appointed, either by the standing Laws of any Government, or by the occasional Sentence of the Judge; as when a thing held before in common, cannot conveniently be divided any other way³: Or by the Act of private Men, as by Testament⁴, or by Compact⁵. Only there is one Case which seems to require Service by the bare Notion of Nature and Reason; and that is, That the Father shall have the *Use and Profits* of all Goods which fall to the Son in his Minority⁶. It is evident that *Use and Profits* can be appointed properly in those things alone which afford some outward use of themselves distinct from their Substances, or which are not consum'd by being enjoy'd; provided they are really capable of yielding any Service, Ornament, or Delight. But there can be no proper room for the like Tenure in things which are no way serviceable, but in being spent: Inasmuch as the very Body and Substance, and consequently the Propriety of any thing is presumed to belong to him, who hath a *Right* to waste or consume it at his pleasure. Yet 'tis a Rule in the *Civil Law*, That Money and other consumable things may be turn'd by

¹ See the Expositors of the Civil Law, *ad t. 6. l. 2. D. De Publiciana in rem assine.*
² Vid. *Grot. l. i. c. 1. f. 4. Add. l. viii. t. 2. leg. 32. f. 1. in fin. D. De servit. præd. urb.*

³ Lib. v. c. 10. f. 13, &c.

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³ See l. ii. c. 6. n. 4. and 5. foregoing, and l. iv. c. 12. §. 9. and l. v. c. 13. §. 6. as also Mr. *Dumart's* Civil Laws in their natural Order, Part I. l. iii. t. 6. Sect. 4. §. 1.

¹ The Roman Lawyers say, That the Nature of Servitude consists not in doing something in favour of another, but in suffering or not doing certain things. *Servitutum non ea natura est, ut aliquid faciat quis, veluti curia tollat, aut amovenda prospectum præstet, aut in hoc, ut in suo pingat; sed ut aliquid patiat aut non faciat, Digest. l. viii. tit. 1. De Servitutibus, leg. 15. §. 1.*

² The Words of the Law are, *Servitutis, aut personarum sunt, ut usus, & usufructus; aut rerum, ut servitutis rusticarum prædiorum & urbanorum, Digest. ibid. leg. 1.*

³ *Usufructus est jus alienis rebus utendi & fruendi salva rerum substantia, Digest. l. vii. t. 1. De usufructu, & quemadmodum quis utatur, fruatur, leg. 1. and Instit. l. ii. t. 4. princip.* We ought to observe, that *Usufruct* or *Use* for the Profits, and other sort of Servitudes are the Rights which we enjoy gratuitously: For if we pay an Annual Rent, 'twill be then a kind of Letting or Hiring.

⁴ See l. vi. c. 2. §. 8. following.

⁵ *Constitutur ad hæc usufructus, & in iudicio familie erescunt, & communi dividendo, si iudex alii proprietatem adjudicaverit, alii usufructum, Digest. l. vii. t. 1. De usufructu, &c. l. vi. §. 1.*

⁶ *Usufructus pluribus modis constituitur, ut esse si legatus fuerit, sed & proprietatis deducto usufructu legari potest, ut apud hæredem maneat usufructus, ibid. princ. Item alii usufructum, alii deducto confundum legari potest, Instit. l. ii. tit. 1. §. 1.* So a Testator may bequeath a Property, and leave an *Usufruct*, either to an *Usufructurer* or to his Heir, or any other Legatee, as also he may make a Reserve of his *Usufruct* for a Portion, a Gift among Survivors, to be sold, exchanged, passed away, or other things of like nature. *Quævis rem aliquam donando, vel in dotem dando, vel vendendo usufructum ejus retinere, &c. Cod. l. viii. t. 54. De Donationibus, leg. 23.* See concerning this whole Matter Mr. *Dumart's* Civil Laws in their natural Order, Part. I. l. i. t. 11.

⁷ *Et sine testamento autem, si quis velit usufructum constituere, pignus & stipulationibus si fieri potest, Digest. l. vii. t. 1. leg. 3. princip.*

⁸ As an House, Land, a Slave, a Beast, &c. But Wine, Oil, Bread-Corn, Money, &c. are not capable of an *Usufruct*. *Constitutur autem usufructus non tantum in fæcis & ælibis, verum etiam in servis & juratis, & cæteris rebus, exceptis illis, quæ usu consumuntur. Nam hæc res, neque naturali ratione, neque civili recipiunt usufructum; quæ in numero sunt vinum, oleum, fenum, cætera, vestimenta, quibus proxima est pecunia numerata. Namque ipso usu assidue permutatio quadammodo extinguitur, Instit. l. ii. t. 4. §. 2. Trebonianus has very justly joined to these Habits, as *Cajatus* has observed, for they do not consume at all by their Use. See Mr. *Nodt's* *Præb. Juris*, l. ii. c. 4. and Mr. *Trentham's* Discourse, *De Præb. affect. c. 1. §. 18.* Medals, and such pieces of Money as are not current, but are desired for their Antiquity, may be bestowed as an *Usufruct*, as appears by the following Law which Mr. *Nodt* explains learnedly after his manner in his Observations, l. i. c. 5. *Nominatim novorum vel argenti, sive ætæ rerum, quibus præ gemmis uti solent, usufructus legari potest, Digest. l. vii. tit. 1. leg. 28.* We may say the same thing of Pictures and Statues. *Statue & imaginis usufructum posse relinqui magis est, quia & ipse habent aliquam utilitatem, si quis hoc pignus permutat, Ibid. leg. 41.* The Ancient Lawyers do not agree upon this Question, Whether we can have the *Usufruct* of a thing incorporeal, or of a bare Right, as a Permission to pass through another Man's Ground, or to carry Water through it, &c. As for my self I am of Opinion, that if we consider the thing in it self, without any of the Subtilties of the Roman Lawyers, there is no Difficulty in it, and we may without scruple affirm it: For these sort of Rights are valuable, and do not perish in the using. Nor is it necessary that the Ground of an *Usufruct* should be a sensible thing, and really exist any where but in the Mind. It is sufficient, that 'tis a thing that may be look'd upon as belonging to any one, and from whence we may receive some advantage, and without which it ceases to be as before. So also Debt being may be repaid a real, good, and a true Fund.*

Will⁷ into this kind of Tenure, and be given in Legacy; in which case the Money or Things are so made over to the Legatee, as to be his own; but under this necessary Condition, That he give Security to the Heir to restore the like Sum, and the like things, or the Value of the things, when the Term of his Grant is expired. So that the Security here given to the Proprietor doth, as it were, supply the place of the real Substance.

He that holds the *Use and Profits* of a thing hath a *Right* to claim all the Advantages proceeding from it, as well natural as civil⁸. Yet the *Roman Laws* excepted⁹ the Issue of a Maid-servant; probably on this Reason, That the design of granting another the *Use* of our Servants respected their Work only, and not their Off-spring. As for the other natural *Fruits*, they become the *Tenants of Use and Profit*, by taking or gathering them; that¹⁰ is, when he hath separated them from the Body or Substance, and laid them by themselves. Whence it follows, that the *Fruits* or *Profits*, if not yet separated, belong to the Proprietor; and in case the *Tenant for Use and Profit* dies before he hath gather'd them, they cannot be challeng'd by his Heir: Though, if it appear that any Pains were spent, or any Industry employ'd¹¹, in bringing the *Fruits* to Perfection, it will then be equitable to admit the Heir to a Participation of them; so far, at least, as to compensate the Pains of the Deceas'd, and to hinder him

from labouring in vain. *Civil Fruits* belong to the *Tenant for Use and Profit*, till the time is laps'd¹², for which the Grant was first made.

Further, As he who holds a thing in this manner, ought to use it like an honest Man¹³, or as becomes a good Husband, and so apply it to that particular kind of Advantage, which either the Nature of the thing, or the Will of the Proprietor requires; so is he likewise bound to guard, maintain, and keep it safe, and whole¹⁴; as also to pay *Taxes*¹⁵, *Dues*, and other Burthens, ordinary and extraordinary, at least such as do not exceed the main Profits. For all these Troubles, as well as that of Culture and Improvement, necessarily fall on him who desires to reap the Benefit and Gain: Nor is it presum'd that any Person would lay so grievous a hardship on himself, as not only to grant another the Profits of his Goods or Estate, but likewise to reserve the Burthens to be discharg'd at his own Expence.

This way of holding is said to expire at the decease of the *Tenant*¹⁶; because, commonly speaking, at the first making such a Grant, the Merit of the Party was consider'd, which cannot descend to others. And inasmuch as 'tis a great Burthen upon a Man to have the *Fruits* of his Property pass still into other Hands, therefore the Words in these Grants are to be interpreted in the strictest manner; so that if the Form ran thus, *to him and his Heirs*, it shall not be extended to the Heirs in a

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⁷ *Quasi usufructus*, 'tis an Expression of the *Roman Law*, *sed utilitatis causa senatus censuit, posse etiam earum rerum usufructum constitui, ut tamen eo nomine heredi utiliter caveatur. Itaque si pecuniæ usufructus legatus sit, ita datur legatario, ut ejus fiat, & legatarius satisfaciat heredi de tanta pecuniâ restituenda, si morietur, aut capite minuetur. Cæteræ quoque res ita traduntur legatario, ut ejus fiant, sed æstimatis his satisfiat, ut ——— tanta pecuniâ restituatur, quanti hæc fuerint æstimatæ. Ergo senatus non fecit quidem earum rerum usufructum (sic enim poterit), sed per cautionem quasi usufructum constituit, Instit. l. ii. tit. 4. §. 2. See the Title of the *Digests*, which treats, *De usufructu earum rerum quæ usi consumuntur vel minuuntur*, l. vii. t. 5.*

⁸ *Usufructu legato, omnis fructus rei ad fructuarium pertinet, Digest. l. vii. tit. 1. De usufructu, & quemad. quis datur, fruatur, leg. 7. prin.* where we may find all the Particulars at length in the rest of this Law and the next. The *Usufructuary* for example may search for Mines, Quarries, Beds of Chalk, Coal, &c. which are found in the Ground, of which he has the Profit, although the Proprietor himself knows nothing of them, provided nevertheless that he do no Damage to the Corn, Trees, Vines, and in a word, all things used in Husbandry, to which the Owner of the Ground has designed it. See Mr. *Noodt's* Observations, l. i. c. 9. This able Lawyer in the following Chapter of the same Work examines how, and by virtue of what the *Usufructuary* of the Ground, where there are Deer, may appropriate the Profit and Revenue to himself. We may read all this in the Original, and withal the Reflection which Mr. *Bernard* makes thereon in his Extract of the News of the Republick of Letters, April 1706. p. 430, 431.

⁹ See c. 7. §. 4. n. 1. foregoing.

¹⁰ *Interdum ad quem usufructus suædi pertinet, non aliter fructuum Dominus efficitur, quam si ipse eos perceperit. Et ideo licet maturis fructibus, nondum tamen perceptis, decesserit, ad hæredes ejus non pertinent, sed Domino proprietatis acquiruntur. Eadem fere, & de colono dicuntur, Instit. l. ii. t. 1. De rerum divisione, &c. §. 36.*

¹¹ This is no point of the *Roman Law*; but the *Saxon Law* follows a Maxim so just, requiring that in this last Case all the *Fruits* should belong to their Heirs. See *Balib. Wernher's* Element. Jur. Nat. & Gent. chap. xiv. §. 42.

¹² For Example, if a Rent commence at the Beginning of the Year, and the *Usufructuary* die in *October*, the Heirs shall have the Surmount of the Rent for that time, and the rest to *January* following shall return to the Proprietor. See *Digest. l. vii. tit. 1. leg. 26.* and 58. *princip.*

¹³ *Caveo autem debet usufructuarium viri boni arbitrato perceptum iri usufructum, hoc est, non detiorem se causam usufructus futuram, cæteraque fructuum, quæ in re sua faceret, Digest. l. vii. t. 6. usufructuarium quemadmodum caveat, leg. 1. §. 3. Debet enim omne quod diligens paterfamilias in sua domo facit & ipse facere. Ibid. tit. 1. De usufructu, &c. leg. 65. mancipiorum quoque usufructus legato non debet abesse, sed pecuniâ conditionem eorum uti, Ibid. leg. 15. §. 1.* So that the *Usufructuary* may neither misuse the Ground, nor impoverish it, nor change what the Proprietor hath designed for his bare Diversion, tho' it be to augment his Revenue. For Example, he may not cut up the Trees which are planted in a Walk to make himself a Garden, or sow it with Corn. *Et si forte colaptare just prædium, curcularia, vel gestationes, vel deambulationes arboribus infructuosis operari, atque amœnas habens, non debuit cœtere, ut forte hortus obiter faciat, vel aliud quid, quod ad reditum spectat, Ibid. leg. 13. §. 4.* There are several Laws with this Title that may be consulted.

¹⁴ *Eum, ad quem usufructus pertinet, facta tecta suis sumptibus præstare debere, explorati juris est, Cui. l. iii. tit. 33. De usufruct. & habit. & ministerio serv. leg. 7.* This extends to the least Reparations, and other necessary Expences to improve and preserve the Goods they have the Profit of. For if the Houe, for Example, tumble down without the Fault of the *Usufructuary*, he shall not be obliged to rebuild it. *Si quæ vetustate corruerunt, reficere non cogitur, modica igitur restitio ad eum pertineat, quoniam & alia opera agnoscit, usufructu legato, &c. Digest. l. vii. t. 1. leg. 7. §. 2.* See §. following of the same Law.

¹⁵ *Ut puta stipendium, vel tributum, vel salarium, vel alimenta ab ea re relicta. See alio Law 27. §. 3. and Lib. xxxiii. tit. 2. De usu & usufr. &c. leg. 28.*

¹⁶ *Morte quoque amitti usufructum, non recipit habitationem; cum jus fruendi morte extinguatur, sicuti si quid aliud quod personæ habet, Digest. l. vii. t. 4. Quibus modis usufructus vel usus amittitur, leg. 3. §. 3.* This hath place when the *Usufructuary* dies before the time his *Usufruct* expires, or before the accomplishment of the Condition, which should put an end to it. See *Col. l. iii. t. 33. De usufr. & habit. &c. leg. 12.* For the Reason why a certain or uncertain time is fixed, is only, that the *Usufructuary*, if he lives beyond it, may not preserve his Right; so that if he dies before, the general Rule holds in its full Force as to him. Further, our Author ought not to have forgotten another way by which his *Usufruct* may be lost; and that is, when the time of Continuance is at an end, or when a certain Condition is to be accomplished.

second Descent¹⁷; since the Property of a thing, if for ever excluded from the Use¹⁸, is utterly insignificant: In which Sense we are to take *Cicero's* Definition, *Id cuiusque proprium est, quo quisque fruatur atque utitur: That's truly the Property of every Man, which he useth and enjoys.* Hence, if a Legacy only for the Use and Profits was left to a publick Community, which in other respects may be perpetual, yet the *Roman* Laws order'd¹⁹, *That the Grant should expire at the end of a hundred Years: As it must cease before, if the State or City be dissolv'd or raz'd by the Violence of an Enemy*²⁰. From the same grounds it proceeds, that a Tenure of this kind cannot be alienated²¹; because at that rate the Proprietor's Claim might be for ever shifted off, and the thing might pass to one whom he would look upon as an Intruder into his Rights and Possessions. A grant of Use and Profits was likewise, according to the *Roman* Laws, made extinct by the two higher degrees of the *Capitis diminutio*, or Disfranchisement of a Citizen²². For as they were unwilling to let this Burthen lie on the Proprietor, after the Party, in whose favour it was at first appointed, could receive no benefit from it; so they judg'd it by no means convenient, that a Per-

son, who had forfeited the Privilege of a free Subject, should be still capable of holding such a Right over the Goods of those who were true and lawful Members of the State.

To proceed; this Right, by virtue of some publick Law, or of some private Covenant, may in a certain period of time²³ be lost by Disuse (which alters many things for the worse) or by using it in a different manner from the Rules prescrib'd²⁴; or by impairing the thing, either through design'd Wickedness, or gross Neglect. The Right is likewise extinct, if the thing happen to perish²⁵; nor doth it revive, though the thing be renewed or repaired; by reason of that strict Interpretation which this Affair demands. For Instance; *If I build a House in the same place with another which I lost by Fire, it is not judg'd to be the same as the former.* And indeed, since the Work must have put me to considerable Charges, it would be very hard, if I must raise a Building which on my side will turn to no account.

Lastly, If either the Proprietor make over his Right to the Tenant²⁶, or the Tenant resign to him, the Use and Profit expires; since a Man cannot receive Service from what's his own; or, because this,

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¹⁷ This is proved commonly by this Law of the Code, l. iii. t. 33. *Sancimus & huiusmodi legatum firmum esse [si quis fundum, vel aliam rem cuiusdam testamentum relinqueret, quatenus usufructus apud heredem maneret] & talem usufructum una cum herede frui, & illo moriente, vel alii legitimis modis cum amittente, expirare,* leg. 14. But 'tis evident, as others have observed, that he treats there of the Heir of a Testator, and not of the Heir of an Usufructuary. See *Vinnius* upon the *Institutes*, l. ii. t. 4. §. 3, and *Mr. Titius* upon *Lauterbach. Observ.* 225.

¹⁸ This is the Reason that the *Institutes* give, to shew how many ways the Right of an Usufruct may be extinguished. *Næ tamen in universum inutiles essent proprietates, semper abscedente usufructu, placuit certis modis extingui usufructum, & ad proprietatem reverti,* l. ii. t. 4. §. 1.

¹⁹ The Term is fixed on as that to which the longest Life of Man can extend. *Et placuit centum annis tuendos esse in usufructu municipales, quia is finis vitæ longævi hominis est,* Digest. De usufructu, &c. l. vii. t. 1. leg. 56. See also l. xxxiii. t. 2. De usu & usufructu, &c. leg. 8.

²⁰ The Law does not speak at all of an Enemy; it only says, If a Plough passes through a City, &c. (i. e.) if it be destroy'd any manner of way, which may happen by the Order of the Supreme Governour for the Punishment of the Inhabitants. *Si usufructus civitati legetur, & aratrum in eam inducatur, Civitas esse desinit; ut passâ est Carthago, ideoque quasi morte desinit habere usufructum,* Digest. l. vii. t. 4. *Quibus modis usufr. vel usus amittitur,* leg. 21. The Sacking of a City is expressed here with an allusion to a Custom of which *Horace* speaks, l. i. Ode 16.

Imprimeretque muris
Hostile aratrum exercitus infolens.

Th' insulting Army brought unto the Wall,
The Hostile Plough to raze it till it fall.

See the Notes of *Dion. Gothofred.* upon the Law itself, of which he treats.

²¹ i. e. The Usufruct being a Right purely personal, it can't be transferred to a third; so that he acquires and enjoys it in his own Name, as holding it immediately of the Proprietor. But this does not hinder but that the Usufructuary may not only let it out to farm, but resign, sell, or give the Enjoyment of it to a third. All that is meant is this, that the third person shall enjoy it no longer than the Usufructuary enjoys it himself, yet not so fully as if he had the proper and immediate Usufruct. *Usufructuarius vel ipse frui ea re, vel alii fruendam concedere, vel locare, vel vendere potest; nam & qui locat, utitur, & qui vendit, utitur. Sed & si alii precario concedat vel donet, puto cum uti, atque ideo retineri usufructum,* Digest. l. vii. t. 1. leg. 12. §. 2. Whence it appears, that when the Usufructuary disposeth of the Enjoyment of the Goods, of which he has the Usufruct, according to his Mind, 'tis the same as if he enjoy'd it himself; and in this Case the Right of the Usufruct remains always in the Usufructuary, though he has transferr'd the Enjoyment of the Fruits to a third, as the Expression of the *Roman* Lawyers implies, *Ut ipsum quidem jus remaneat penes maritum [qui post divorcium reddere teneretur usufructum fundi dotis nomine acceptum] perceptio vero fructuum ad mulierem pertineat,* Digest. l. x. t. 3. De Jure Dotium, leg. 66. This Law is a matter of Dispute among the Interpreters of the *Roman* Law, about which we may consult *Vinnius* on the *Instit.* l. ii. t. 4. §. 3 numb. 4. and *Mr. Titius* on *Lauterb. Obs.* 226.

²² *Finitur autem usufructus morte usufructuarii, & duabus capituli diminutionibus, maxima & media,* Instit. l. ii. t. 4. §. 3. See also the Code, l. iii. t. 33. leg. 16. §. 2. in fine. And for *Diminutio capiti*, (i. e.) the Disfranchisement of a Citizen, of which he speaks, see what I have observed above, l. iii. c. 6. §. 3. n. 5.

²³ That is to say, If he neither enjoys himself, nor by any other the Goods of which he has the Usufruct. This is what is called, *non uti per tempus,* Instit. §. 3. ut supra. *Non utitur* (say the Lawyers elsewhere) *usufructuarius, si nec ipse utatur, nec nomine ejus alius,* Digest. l. vii. t. 1. leg. 38. See Note 21. above. Before *Justinian* the Usufruct of things Moveable was lost, if they were not used for a Year, and of things Immoveable in two Years. But that Emperor order'd that the Usufruct of both should not be lost, but by Non-usage for ten Years, if the Usufructuary was in the place where the Goods were, and twenty, if he were at a distance. See Code, l. iii. t. 34. De servitute & aqua. leg. 13.

²⁴ *Non utendo per modum,* Instit. ubi supra. See Digest. l. viii. t. 6. *Quemadmodum servitutes amittuntur,* leg. 10. §. 1. & 11. *princ.*

²⁵ *Rei mutatione interire usufructum placet. Veluti usufructus mihi ædium legatus est, cædes corruerunt vel exstiterunt, sine dubio extinguitur.* In this case the Usufructuary hath neither right to the Materials nor Place where the House stood. *Certissimum est — nec arce, nec cæmentorum usufructum deberi,* Digest. l. vii. t. 4. leg. 5. §. 2. See also, leg. 8. 9. 10. 12. 23. *Est enim jus in corpore, quo sublato, & ipsum tolli necesse est,* Instit. l. ii. t. 4. in princ. But this must be some particular Usufruct, for when we have an universal Usufruct, (i. e.) over all the Goods, the Enjoyment of the rest is preferred. *Bonorum autem usufructu legato, arce [ædium incensarum] usufructus peti poterit, quoniam qui bonorum suorum usufructum legat, non solum eorum quæ in specie sunt, sed & substantiæ omnis usufructum legare videtur, in substantia autem bonorum etiam arca est,* Digest. l. vii. t. 1. De usufructu, &c. leg. 34. §. 2. Farther, the Interpreters of the *Roman* Law say, That to know whether the thing of which we have the Usufruct be destroyed, we must consider whether the Name be changed. See *Vinnius* upon the *Institutes*, l. ii. t. 4. §. 3. n. 5. 6.

²⁶ *Item finitur usufructus, si Domino proprietatis ab usufructuario cedatur — vel contrario, si usufructuarius proprietatem rei acqviserit, quæ rei consolidatio appellatur,* Instit. l. ii. t. 4. §. 3.

and all other *Services* do properly denote a Right over somewhat that belongs to another. But when a Person useth his own Possession, and receives Advantages from it; this he does by virtue of his Dominion²⁷, and wants not a new Title or Commission.

VIII. *Use*, as they term it, is when a Man receives from a thing belonging to another¹, only the daily and necessary Service, the Substance remaining as before. And this is of less Extent than *Use and Profits*, the Person to whom it is granted being only allowed to take so much Advantage from the thing, as is sufficient for himself and his Dependents; which Allotment is measur'd according to his Dignity and Condition². Thus, for Instance; *As he, who hath obtain'd the Use of another's House, may dwell in it with his own Family; so he cannot fairly receive either a Guest of long continuance³, or an Innmate who shall lodge there without being a Member of the same domestical Society; in case the Proprietor himself dwells likewise under the same common Roof; (but 'tis otherwise if the Grant runs for the sole Use of the entire Tenement) nor can he, according to the regular Course, transfer the Use to another; it being a Matter of very weighty Consideration, and of great Difference, whom a Man takes to cohabit with him. As to the Preservation and Reparation of the thing in which any Person hath thus obtain'd a Use, it seems most agreeable to Equity, that if such a Use be once granted, there remains no farther Fruit or Benefit to the Proprietor, than the User shall be obliged to keep the thing safe and sound. If the Profit accruing to both be equal, they shall maintain or repair the thing at joint Charges⁴. But if the Use be inconsiderable in comparison with the Profits which the Owner still reserves to himself; in this Case 'tis easily presum'd, that he intended not to charge it with any Burthen.*

IX. *Dwelling*, in the *Civil Law*, is a Right by

which a Man receives all the Advantages commonly proceeding from the letting out the Houses of others¹. This is of a narrower Compass than the *Use and Profits* of the same Houses; the latter taking in likewise the Benefit arising from the Reception of Goods, and many the like Causes. And yet it is of a wider Extent than the bare *Use*; inasmuch as the Person who hath obtain'd it, may let out the respective Buildings to other Tenants, instead of inhabiting them himself.

X. By the Right of *Servants Works* is receiv'd all the benefit arising from the Labour of another's Servant¹. Which Right the *Roman Laws* make more contracted, than the *Use and Profits* of the same Servant; because he is capable of bringing in Advantage by other means besides his Work.

XI. *Real Services*, due to any Person on account of some Estate or Possession, are, in general, so many Rights, by virtue of which my Neighbour's Estate is charg'd with yielding some certain Advantage to mine. The *Civil Law* divides them into *Services of City Estates*¹, and *Services of Country Estates*. By *Country Estates* are meant Lands, and inferior Buildings, erected only for the Convenience of Agriculture, and preservation of Cattle. Under the Term of *City Estates*² are comprehended all Buildings design'd for the Reception of human Inhabitants, for the Exercise of Commerce, and the like Uses, though seated at any Distance from the City. The Occasion of establishing all these Services was generally taken from *Neighbourhood*; a Relation which may justly be thought to border very near on that of Friendship. For, inasmuch as it contributed highly both to the Profit and the Pleasure of Men, that many of them should join their Dwellings and Possessions, which Convenience could scarcely subsist, should each Person go about to exclude another from the Use of his Property in every Degree, therefore Neighbours were wont

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²⁷ *Nulli enim res sua servit*, Digest. l. viii. t. 2. *De servitut. præd. urban. leg. 26. princip.* See also l. vii. t. 6. *Si usufructus petatur*. &c. leg. 5. princip.

¹ *Minus autem Juris est in usu, quam in usufructu. Nam is qui fundi nudum habet usum, nihil ulterius habere intelligitur, quam ut oleibus, pomis, floribus, feno, stramentis & lignis ad usum quotidianum utatur.* By the *Roman Laws* the User can neither sell, nor make over, nor give away his Right. *Nec ulli alii jus quod habet aut locare, aut vendere, aut gratis concedere potest*, Instit. l. ii. t. 5. *De usu & habit.* §. 1. This Right is establish'd, and ceas'd in the same manner as the *Usufruct*. *Idem illis modis, quibus usufructus constituitur, etiam nudus usus constitui solet, isdemque illis modis finitur, quibus & usufructus desinit.* Ibid. princip. See Mr. *Dawson's Civil Laws* in their Natural Order, Part I. l. i. t. 11. Sect. 2.

² *Aliquo enim largius cum usuario agendum est pro dignitate ejus, cui relicta est usus*, Dig. l. vii. t. 8. *De usu & habit.* leg. 12. §. 1.

³ All that our Author says about the Use of an House is not at all agreeable to the *Roman Law*; but I must own, that several of the *Laws* which I have quoted, and some of which our Author refers to, are confuted. See one of them corrected by Mr. *Noodt* in his *Probab. Juris*. l. iii. c. 7. who in the following Chapter of the same Work corrects and explains another which relates to this Matter. One general Remark may be also made upon all the Places mention'd in this Chapter, which is, That the *Laws* of each State, and the mutual Agreements of Parties, or the Will of him that gives freely, may be distinguished a thousand ways. So that no Rule can be made which can absolutely and unchangeably agree to all Cases, and we must seriously attend to the particular Circumstances of every Affair to decide it afterward according to the Nature of the thing and Maxims of Equity, what are the Engagements both of him that confers any of these Rights, and of him who receives them.

⁴ *Si domus usus legatus sit sine fructu, communis respectu est rei in factis talis, tam hæredis, quam usufructu. Videamus tamen ne si fructum hæres accipiat, ipse reficere debeat. Si vero talis sit res, cujus usus relegatus est, ut hæres fructum percipere non possit, Legatarius reficere cogendus est. Que distinctio rationem habet*, Digest. l. vii. t. 8. leg. 18.

¹ *Sed si cui habitatio legata, sive aliquo modo constituta sit, neque usus videtur, neque usufructus, sed proprium aliquod jus — non solum in ea degere, sed etiam alibi locare*, Instit. l. ii. t. 5. §. 5. See also the Code, l. iii. t. 33. *De usufruct. & habit.* &c. leg. 13. We neither lose this Right by Non-usage, or a civil Death. See the *Digests*, l. vii. t. 8. *De usu & habit.* leg. 10.

² *Operis servi legatis neque usus neque usufructus in eo legato esse videtur*, l. xxxv. t. 2. *Ad legem Falcidianam*, leg. 1. §. 9. This Right is lost only by the Death of the Slave, and not by the natural or civil Death of him who might so dispose of the Slave, nor by Non-usage. See *Digest.* l. vii. t. 7. *De operis servorum*, and l. xxxiii. tit. 2. *De usu & usufructu*, &c. leg. 2.

¹ The Law is, *Servitutes rusticorum prædiorum & urbanorum*, Digest. l. viii. tit. 1. *De Servitut. leg. 1.* Some Men maintain, that this Distinction is of no Use, because it shews no Difference as to the effects of Right. See Mr. *Thomasius's* Discourse, *De servit. Stultitii*, which is the fifteenth among his Discourses at *Leipfick*, §. 14. as also Mr. *Titius's* Observ. on *Lauterbach's* Compend. Observ. 243.

² The Words of the Law are, *Urbana prædia omnia ædificia accipiuntur, non solum ea que sunt in oppidis, sed & si forte stabula sunt, vel alia meritoria in villis & in vicis, vel si Prætoria voluptati tantum deserventia, quia urbanum prædium non locus facit, sed materia*, Digest. lib. l. t. 16. *De verbor. significat.* leg. 198.

wont to settle it amongst themselves, That no Man should use his own things to all purposes, and in all respects, lest others should thereby be reduc'd, as it were, to Hardships and Streights; but that each Person should allow others such a moderate use of what he himself possess'd, as they could not want without great Prejudice to their Affairs⁴. Vid. D. lib. viii. t. 6. l. 1. f. 1, 2. D. Si usus-fr. petatur. & lib. viii. t. 1. l. 15. D. De Servit. l. 10. D. De Servit. Urb. præd. l. xx. f. 2. l. 31. d. 1.

Hesiod. Op. & Dier. l. i. ver. 343, &c.

Τὸν δὲ μάλισα καλεῖν, ὅστις σέθεν ἐγγύθι νάει,
Εἰ γὰρ τοι καὶ χρῆμ' ἐγχώριον ἄλλο γένηται
Γέιτονες ἀζώνοι ἐκίον, ζώσαντό δε πῆοι
Πῆμα κακὸς γείτων, ὅσον τ' ἀγαθὸς μέγ' ὄνεικρ
Ἐμμορέ τοι τιμῆς, ὅς' ἔμμορε γείτονος ἔσθλις.

In English thus;

Call Neighbours first, when Work is to be done;
Your Kinsmen stay to dress, undress'd your Neighbours run;
Ill Neighbours Heaven for Punishments design'd,
As good for Blessings: If one good you find,
Think you have found a Treasure —

Socrates (in Xenophon. Ἀπομν. Lib. ii. p. 432. in fin. Ed. H. Steph.) reckons up these Advantages of a Neighbour's Service; To light your Fire when you have Occasion; to assist you in any good Office; to be ready at hand for the affording you his kind Succour, if you happen to fall into any Misfortune, Add. Plato de LL. lib. viii. p. 915. Edit. Francof. 1652. On the other side, 'tis a general Rule to be observ'd in the challenging these Services, that they be not carried too far, and that they be us'd with Modesty, so as to cause no Trouble or Uneasiness to those that live about us.

The particular Services of City Estates are reckon'd (for the most part) as follows: The Services of bearing a Burthen⁵, by which any Neighbour is bound to let my House rest upon his Wall or Pillar. The Consequence of which is, That the Person who owes me this Service, shall be likewise engag'd to repair the said Wall or Pillar, because otherwise, if the Support should fall, the Service comes to nothing. The Service of letting in a Beam⁶, by which I am allow'd to carry on a Rafter or Beam, or any other Piece which joins my Building together, till it enters into my Neighbour's House, and is there fasten'd.

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⁴ The Rights of Service are not confin'd to what is absolutely necessary for the Use of the Possessor of the Ground, but they extend also to whatever is for the Convenience and Pleasure of the Owner, as much as for his Profit. See Mr. Nott's Probab. Juris, l. i. c. 2. where we may find many curious Observations for the understanding of several of the Roman Laws about Services.

⁵ De servitute, quæ oneris ferendi causa imposta erit. &c. Digest. l. viii. t. 5. Si servitus vindicetur, &c. leg. 6. §. 2. Eam debere columnam restituere, quæ onus vicinarum ædium ferebat, cujus essent cedes, quæ servit, l. viii. t. 2. De servit. præd. urban. leg. 33.

⁶ Jus immittendi tigna in parietem vicini. ibid. leg. 2. See Mr. Thomasius's Discourse, De Servit. Stillicidii, §. 59.
⁷ Projiciendi. protegendive, ibid. Inter propositum & immisissum hoc interesse, ut Labo. quod propositum esse id quod in propositum, ut nusquam requiesceret, qualia mæniana & suggrundia essent: immisissum autem quod ita fieret, ut aliquo loco requiesceret, veluti tigna-trabes, quæ immitterentur, lib. l. t. 16. De verbor. significat. leg. 242. See l. v. c. 5. §. 4. infra, and Ann. Marcellinas, l. xxvii. c. 9. in fine, quoted also by Mr. Hertius.

⁸ Altius tollendi — aut non extollendi, l. viii. t. 2. ut supra.
⁹ Luminum servitute constituta id acquiritur videtur, ut vicinus lumina nostra excipiat. Cum autem servitus imponitur, ne luminibus officiat, hoc maxime adepti videtur, ut jus sit vicino invitit nobis altius ædificare, atque ita tenere lumina nostrorum ædificiorum, ibid. leg. 4.

¹⁰ Inter servitutes, ne luminibus officiat, & ne prospectui officiat, aliud & aliud obijciunt, quod in prospectu plus quis habet, ne quid ei officiat ad gratiorem prospectum & liberum. ibid. leg. 15.

¹¹ Item stillicidium avertendi in vicinum, vel arcem vicini, aut non avertendi, ibid. leg. 2. See also leg. 20. §. 2, 5, 6. See also Mr. Thomasius's Discourse on the same Subject.

¹² Ut flumen recipiat quis in ædes suas vel in arcem. Instit. l. ii. t. 3. §. 1.

¹³ Jus cloacæ mittendæ servitus est, Digest. l. viii. t. 1. leg. 7. This Service is also for Country-Dwellings. See t. 3. De servit. præd. rustic. leg. 2. princip.

The Service of jutting or shooting out⁷, which impowers me to extend any kind of Building over the House or Ground of another Man, yet so as not to make it rest upon the said House or Ground: As in Balconies, Pent-houses, and the like. The Service of raising a Building higher⁸, by which we are bound, though to our own Inconvenience, to give another leave, for his Benefit and Advantage, to raise his House; which we might otherwise forbid, or prevent.

The Service of not raising a Building higher⁹; by which a Man, for the Profit and Convenience of the adjoining Tenements, is constrain'd to keep his House low, or not to raise it beyond such a fix'd Height.

The Service of Lights¹⁰, by which my Neighbour is oblig'd to admit my Lights, or my Windows for the Conveyance of Light.

The Service of not hindring Lights; by means of which my Neighbour can attempt nothing towards the lessening or obscuring the Lights of my House.

The Service of Prospect; by which my Neighbour is bound to let me look freely into his Estate, and cannot deprive me of that Benefit.

The Service of not hindring Prospect; by which a Man is tied up from doing any thing in his Estate, which might interrupt a free Prospect on any side, especially towards any delightful Place.

The Service of receiving Dropping Water¹¹, denotes an Obligation to suffer any such Conveyances to empty themselves upon our Ground, though to our Burthen and Trouble.

The Service of not receiving Dropping Water, denotes an Obligation not to turn the same little Spouts or Gutters, which are already useful to our Neighbour, into a new Course for our own Advantage.

The Service of receiving the River¹², by which my Neighbour is bound to grant Passage to the larger Currents which flow (like a River) thro' my House in Pipes or Canals.

The Service of not turning away the River, restraining my Neighbour from diverting any such Channel or Stream which issues out of his House, so as to hinder it from passing through my Estate, to my great Benefit.

Lastly, We are to refer to the same Head¹³ The Service of employing Sinks and Kennels; of pouring out any thing upon a Neighbour's Ground, and whatever there are besides of the same kind.

XII. *The Services of Country Estates* ¹; or which are due to Lands and Hereditaments employ'd in rural Affairs, are commonly reckon'd in this Catalogue. *Passage*; the Right of a Path for Men to walk through my Neighbour's Ground into mine, for the Benefit of the latter. *Carriage*; the Right of driving Beasts or Wains. *Road, or Way*; the Right of going, walking, driving; as likewise of carrying, leading, bearing, and drawing any thing which makes for the advantage of my Estate. *Water-course*; the Right of bringing *Water* thro' my Neighbour's Field, for the Benefit of my own; whether I use this *Water* for the Ground, or for the Beasts, or only to free my Land from an unnecessary Burthen and Flood. 'Tis the Nature of these *Services*, that they cannot be granted in part ², being of no Use unless entire. For, as the *Civil Law* observes in one of these Instances; *A Road or Way is then wont to be finished, when it reacheth either to a Town, or to some high and publick Way, or to a Ferry, or to some other Farm of the same Lord.* Therefore it would be vain and useless to obtain a Passage only thro' half another's Ground,

if we were not allow'd to go farther. *Water-draught*; the Right of fetching *Water* from a Spring, or other Place, for the necessary Occasions of our Ground: Which *Grant* is presum'd to include also another ³, of free Passage to the Spring or Well. *Waterage for Cattle*; a Right to drive the Beasts which feed in our Ground, to drink at our Neighbour's Pool. To the same Head belongs, *The Right of feeding our Cattle on another's Pasture*: Concerning which Right it hath been observ'd, That the Lord of the Ground, which is charg'd with this Service, is not hereby hinder'd from feeding his own Cattle in the same Place, provided he do not over-stock it, so as to intercept the Right of the other Party. And so too he, who hath the Right of Pasturage, ought not to bring in diseas'd or scabby Beasts, which might communicate the Infection to others.

Lastly, To these are added, *The Right of burning Lime, of digging Sand, of cutting Stakes, of felling Wood, and of hewing Stone*; as they turn to the advantage of Country Estates. All which have been by others explain'd more at large ⁴.

MR. BARE. NOTES in §. XII.

¹ *Servitutes rusticorum prædiorum sunt hæc: Iter est jus eundi, ambulandi homini, non etiam jumentum agendi. Actus est jus agendi, vel jumentum, vel vehiculum. Via est jus eundi, & agendi, & ambulandi. Digest. l. viii. t. 3. De servit. præd. rustic. leg. 1.* See about this Mr. *Bynkershoek's* Observations, l. iv. c. 7. *Aquæ ductus est jus aquæ ducendi per fundum alienum. In rusticis computanda sunt aquæ hausus, præcis ad aquam adpulsus, jus piscandi, calcis coquendæ, arenæ fodiendæ — Etiam ut — pedamenta ad vineam ex vicini prædio sumantur, &c. ibid. leg. 3.*

² *Via via consummari solet, vel civitate tenus, vel usque ad viam publicam, vel usque ad flumen, in quo pontonibus trajiciatur, vel usque ad proprium aliud ejusdem Domini prædium. ibid. leg. 38.*

³ *Qui habet hausum, iter quoque habere videtur ad hauriendum. ibid. leg. 3. §. 3.*

⁴ See Mr. *Daumat's* Civil Laws in their natural Order, Part I. l. i. t. 12. As to the Right of Fiefs or Fealty (which our Author has omitted) 'tis the common Opinion, that they are derived from the People of the antient *Germany*. See *Grotius, De Jure Belli & Pacis*, l. i. c. 3. §. 23. and *Paul Haebenbergs's Germania Media, &c. Dissert. 9.* or the Extract in *Bibliothec. Univers.* Tom. vi. p. 356, &c. as also Mr. *Thomasius's* Discourſe, intit'led, *Selecta capita historiæ juris feudalis Germanici*, which is among his *Selecta feudalia* printed at *Hall* in *Saxony* in 1708. Yet some, among whom is our Author, as we may see l. viii. c. 4. §. 30. following, believe that it had its Original from the *Romans*. See Mr. *Hertius* upon the Place, and his Discourſe, *De feudis oblatiis*, Sect. 1. §. 2. which is in Tom. ii. of his Comments and Opusc. Mr. *Thomasius* himself thought formerly, that Fiefs were in use among several People before the *Germans*, tho' he could not find out the first Rise of them. See his Discourſe, *De Origine & Natura Feodi oblati*, which is the twelfth among his Disputations at *Leipsick*. But be that as it will, there are several sorts of Fiefs, of which at this time we shall speak of the most common only. A Fief then is a Right of enjoying fully an immoveable or incorporeal Estate that belongs to another, to whom we have obliged ourselves to pay Homage and Fealty with certain Services and Duties upon that account. The Right passes to the Heirs, but most commonly to the Males only in a right Line, or the collateral Relations on the Father's side; for those on the Mother's have no Title. He that grants these Lands in Fealty is the Lord, and he that receives them is called his Vassal. Where the lineal Heirs capable of Succession are extinct, or the Vassal is found guilty of Felony, *i. e.* hath broken the Engagements he was under to his Lord, or neglects certain Forms in his Tenure: Or, lastly, performs not the Conditions by which he holds his Fief, it then returns to the Lord. We may find the Customs of Fiefs in the Body of the *Civil Law*, which Collection was made about the Year 1154. But Mr. *Thomasius* has publish'd an Author more antient, *De Beneficiis*, as Fiefs are called, written before the eleventh Century, and has joined with it two fine Discourſes; the one concerning the Author and Antiquity of that Work; the other of the good Use of it; and in them proves, that the Author wrote in the twelfth Century, and at the Bottom of each Paragraph has made References to parallel Places in the *Speculum Saxonicum & Suevicum*; all which are found in his *Selecta Feudalia* beforemention'd. In fine, Multitudes of Authors all over *Germany* have published Treatises about the Nature of Fiefs.

CHAP. IX.

Of Transferring of Property in general.

- I. It proceeds from Property, that we may alienate a thing.
- II. The Consent of two Persons is required in every Alienation.
- III. Which is to be expressed by some Signs.
- IV. An Alienation is made entirely, or upon Conditions.

- V. Whether Livery be required in every Alienation.
- VI. Property is either accompanied with, or separated from Possession.
- VII. What, and how manifold Possession is.
- VIII. How Property is gained by bargaining only.
- IX. True, and feigned Delivery.

WE are now to consider the derivative Ways of Acquisition, by which Dominion or Property already establish'd passeth from one to another: Which, before we proceed particularly to examine, it may be convenient to premise somewhat about the transferring of Property¹ in general. The Power and Privileges then² of alienating our own Possessions, or of conveying them to others, ariseth from the Nature of full Property³: For since this enables a Man to dispose of his own how he pleaseth, it seems the very principal part of that Ability, that he may, if he thinks convenient, transfer the thing to another, by which means he may either procure to himself something more serviceable, or at least may have an Opportunity of obliging a Friend by his own Turn.

II. Now as the Conveyance of Rights and of Things is transacted between two Parties, the one from whom, and the other to whom they pass^a; so in those Methods of Acquisition which flow from the Force and Virtue of Property, the Concurrence of two Wills is required¹, the Giver's and the Receiver's^b: For Alienation doth especially denote, that the thing passeth from the Proprietor with his free Consent, and is not taken from him by meer Violence against his Will. Again, To make a thing change Masters, it is necessary likewise that the latter agree, as well as the former; it being inconvenient, that a thing, which, as to its natural Substance, exists separately from me, should be, as it were, join'd and united to me, unless I embrace it with my own Consent and Choice. But in Cases where the Property is said, of Right, to pass to Men without their Knowledge, as in Inheritances, there the Law is presumed to make an Acceptance by way of Fiction, in

Favour of the Heir. Of which this is an Evidence; that the Heir may refuse the Inheritance²; and unless, either in Person or by Proxy, he takes actual Possession of it, he is not affected by those Obligations which arise from it, or are charg'd upon it.

III. Farther, since Alienations ought to be made with the Consent of both Parties, and since it is inconsistent with human Society, that bare internal Acts should be allow'd a Power of producing Rights to hold valid and effectual with regard to other Men; therefore 'tis required on both sides, as well on the Giver's as on the Receiver's, that they declare their Consent by sufficient Signs, that others may be fully assur'd of it: Such as are, Nods, Gestures, Words, Writings; to which, in some Places are added, solemn Profession before a Magistrare, publick Registring, and the like¹.

IV. It is evident, moreover, that when a Transfation or Alienation hath been perfectly and unconditionally made, the Alienator retains no manner of Right or Title to the thing which was before his own. Which Consequence, though it be naturally implied in every Act of this kind, yet 'tis usual in solemn Renunciations and Surrendries, expressly to declare, That neither we our selves, nor our Heirs will hereafter make any Pretension or Attempt upon what we have now given up; and that if any such Motion happens, it shall be null and void: Because, when we have once made a thing another's, we cannot, to any purpose, claim the Disposal of it again. Yet frequently, after a thing hath been alienated, the former Owner reserves some kind of Claim, or a sort of Chance Right, which in Case of some particular Event, now unknown, exerts its Force. And this, either because in the Act of Alienation it was thus ex-

^a Vid. *Grot.* l. ii. c. 6. s. 1, 2.

^b See what has been said upon this in l. iii. c. 6. s. 15.

MR. BARB. NOTES on Chap. IX. §. I, II, III.

¹ The Words of the Law are, *Est autem alienatio omnis actus per quem Dominium transfertur.* Cod. lib. v. t. 23. *De Fundo Dotali*, leg. 1.

² *Nil enim tam conveniens est naturali æquitati, say the Roman Lawyers, quam voluntatem Domini, volentis rem suam in alium transferre ratam, haberi.* Instit. l. ii. t. 1. *De rerum divis.* §. 40.

³ To speak properly, we can't say that the Power of Alienation is the Consequence of the Right of Property, because 'tis the Property that is alienated, and one and the same thing can't be the Cause and Matter of an Alienation. The Truth is, the Power of transferring a Man's Goods to another proceeds from the natural Liberty which every one hath to preserve his Right, or make it over to whom he pleases. Whence it comes, that he may alienate not only the Property, but also all other Rights, unless there be some Law, Agreement, or such like Act, which restrains this Liberty within certain Bounds. *Titius's Observations*, 312. numb. 2.

¹ So the Law speaks; *In omnibus rebus quæ Dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium, nam sive ea venditio, sive donatio, sive conductio, sive quælibet alia causa contrahendi fuit, nisi animus utriusque consentit, perduci ad effectum id quod inchoatur non potest.* Digest. l. xlv. t. 7. *De obligat. & action.* leg. 55. See l. iii. c. 6. §. 15. above.

² See the Title of the Digests, *De acquirenda vel amittenda hæreditate*, l. xxix. t. 2.

³ Certain Marks or Signs; for Example, when any one among the Germans alienated an immoveable thing, he deliver'd a Rod called *Effluatio*, or he took up some Dust or other Piece of the Soil, and cast it upon the Folds of the Robes of the Buyer. See Mr. *Hertius's* Notes upon this Place.

preſſy covenanted; as is the Practice in Sales with Liberty of Refuſal¹, in things alienated under an Exception or Condition², and when only a diminutive or imperfect Property is transferr'd³, as happens in the Grant of *Feads*, and of *Copies* and *Leaſes*: Or, becauſe the Alienation includes a tacit Condition, which Condition coming to paſs, the Right of the former Owner to the thing thus convey'd revives; whence ariſe thoſe ſeveral Actions in Civil Law⁴, of *Falſe Debt*; of things given upon a certain Cauſe⁵, which Cauſe did not follow⁶; of the Recovery of ſpouſal Preſents upon not proceeding to Marriage; of Recovery of Dowry upon Divorce or Separation⁷.

Vulcan, in *Homer*^a, upon his taking *Venus* in Adultery^b, challengeth the *ἔδνα*, the Preſents he made his Father in Law, in proſpect of the Match. 'Tis a Rule in the *Alcoran*, That if a Suitor put away his Spouſe before Conſummation, ſhe ſhall retain half of what he gave her, unleſs ſhe choiſe to throw him back all.

V. But the chief Point uſually controverted on this Subject is, Whether or no in the transferring of Property the Law of Nature requires Delivery? For others have already well obſerv'd, That Delivery cannot rightly be plac'd amongſt the Ways of acquiring¹, ſince 'tis only an Act intervening in the Conveyance of it. *Grotius*^b is of Opinion, That, according to the Law of Nature, Property may be transferr'd by bare Covenant; and that Delivery is only requir'd by a civil or poſitive Ordinance; which being receiv'd by many States, is through miſtake ſtyled, The Law of Nations. On the other hand, the Expoſitors of the Roman Laws declare, That the Dominion of things cannot be transferr'd by bare Covenants², though this muſt be expreſſly intimated in the Tranſaction; but that Delivery is ſtill requiſite. The Reaſon of which Neceſſity they take to be this: That Dominions firſt took their Riſe from natural Poſſeſſion, and that therefore in paſſing them away, ſuch an Act muſt intervene, by which the natural Poſſeſſion of the thing may be immediately obtain'd. Some have farther remark'd, That in ordinary Acquiſi-

tions, as ſuppoſe in Occupancy, or firſt Seizure, the Title or Cauſe, and the manner of acquiring, fall in with each other. But that in derivative Acquiſitions theſe two are ever diſtinct: Delivery and Acceptance being the manner of transferring Property, or rather the Acts which occur in transferring it; whilſt Donation³, Buying, and Selling, &c. are the Titles or Cauſes upon which the Conveyance is made. Tho' we have already ſhewn, that bare Occupancy is not a ſufficient Title for Dominion, but that it muſt in all Caſes be grounded on ſome precedent Covenant⁴. Others take a middle Judgment in the Point; and as they deny that Delivery is by the Law of Nature neceſſary, ſo they maintain, that 'tis however agreeable to Reaſon; inasmuch as I cannot exerciſe Dominion over a thing, unleſs I apply it, as it were corporally, to my ſelf; which can be done only by Delivery on the one ſide, and by actual Seizure on the other⁵.

VI. In our Judgment, the Matter may be clearly reſolv'd, by obſerving, that Dominion is capable of two different Conſiderations; either as it denotes a bare moral Quality, by virtue of which we underſtand that a thing belongs to ſome Perſon, and that it ought to be ſubject to his Diſpoſal; or as it implies, farther, ſome degree of natural Power; by which we are enabled to put immediately in execution any Purpoſe that we have made concerning the ſaid thing: Or, what amounts to the ſame, Dominion is ſometimes conſider'd as abſtracted from Poſſeſſion, and ſometimes is conceiv'd as united to it; this being, as it were, the final Completion of Property; upon the Arrival of which it fully exerts its direct Effects. For the better Illuſtration therefore of the Point, it will not be inconvenient to ſay ſomewhat of Poſſeſſion in general.

VII. By Poſſeſſion then we underſtand, not the bare Retention of a thing; ſuch as a Keeper¹, an Administrator, a Borrower, or a Tenant for Uſe and Profit, have with regard to the Goods of others; but ſuch as carries along with it an Affection and Deſire of having the thing to one's ſelf². This

^a Odyſſ. l. viii. v. 18.

^b Lib. ii. c. 6. f. 1. & c. 8. f. 25. and elſewhere.

MR. BARB. NOTES on §. IV, V, VII.

¹ See hereafter, in l. v. c. 5. f. 4. ² See the ſame place. ³ See what we have ſaid in c. 4. f. 2.

⁴ *Conditio indebiti*, which is explained before, l. iii. c. 4. §. 5. n. 4.

⁵ *Conditio caſſa data, caſſa non ſecuta*. This is when a thing, which was given upon a Condition, which was not performed, is required again. See the Interpreters upon the *Digeſt*. l. xii. t. 4. and Mr. *Noodt's Probab. Juris*, l. iv. c. 4. §. 5.

⁶ See upon this Subject, *Col. l. v. t. 1. De Sponſalibus & Arris ſponſalitiis & proxeneticiis*, & t. 3. *De Donationibus ante nuptias, vel propter Nuptias, & Sponſalitiis*.

⁷ See the *Digeſt*. l. xxiv. t. 3. *Soluto Matrimonio dos quemadmodum petatur*.

⁸ This was the Cuſtom in thoſe Times. See Mr. *Le Clerc's* Notes upon *Gen. xxxiv. 12.* and Mr. *Perizonius's* upon *Ælian. Hiſt.* l. iv. c. 1. p. 301, 302.

¹ It is a Determination of the Roman Law, *Per traditionem quoque jure naturali res nobis acquiruntur*, as the Lawyers ſpeak, *Inſtit. l. ii. t. 1. De rerum acquiſitione*, §. 40.

² *Traditionibus & acceptionibus Dominia rerum, non nudis pactis transferuntur*, *Cod. l. iii. De pactis*, leg. 20. See alſo, l. vi. t. 1. *De rei vindic. leg. 50.* and the *Code* with the ſame Title, l. iii. t. 32. leg. 15, 26. as alſo l. iv. t. 39. *De heredit. vel actione vendita*, leg. 6.

³ *Nunquam nuda traditio transfert Dominium, ſed ita, ſi venditio aut aliqua juſta cauſa præceſſerit, propter quam traditio ſequatur*, *Digeſt. l. xli. t. 1. De acquir. rerum Dominio*, leg. 31. *in princip.* See *Vinnius* upon the *Inſtitutes*, l. ii. t. 1. §. 40.

⁴ I have proved the contrary above, c. 4. §. 4. n. 4. See alſo §. 8. n. 1.

⁵ See Mr. *Dumal's* Civil Laws in their natural Order, Part I. l. i. t. 2. Sect. 2. §. 10. with the Note.

⁶ The Law ſays, *Denique ait ab eo. apud quem depoſita eſt, vel commodata, vel qui conduxerit, vel qui legatorum conſervandorum cauſa, vel dotis, ventriſque nomine, in poſſeſſione eſſet, vel cui damni inſecti nomine non cavebatur, quia hi omnes non poſſident, vindicari non poſſunt*, *Dig. l. vi. t. 1. De rei vindic. leg. 9.* See l. xli. t. 2. *De acquir. vel amittend. poſſeſſione*, leg. 3. §. 20.

⁷ *Et apſeſimur poſſeſſionem corpore & animo, neque per ſe animo, aut per ſe corpore*, *Digeſt. l. xli. t. 2. De acquirend. vel amittend. poſſeſſione*, leg. 3. §. 1. *Is qui pignori accipit, aut qui precario rogavit, non tenetur noxali actione, licet enim juſte poſſideant, non tamen opinio Domini poſſident*, *Dig. l. ix. t. 4. de noxal. actionibus*, leg. 22. §. 1. See *Cujacius's Obſervat.* l. ix. c. 33. Farther, here are ſome great Diſputes (which are for the moſt part but Brangles about words) among the Roman Lawyers themſelves, but more among their Interpreters, the one fixing one Senſe upon the Word *Poſſeſſion*, and the other another, as well as to the diviſion of it into Natural and Civil. See Mr. *Dumal's* Civil Laws in their natural Order, Part I. l. iii. t. 7. and Mr. *Titius's* Obſervations on *Lauterbach. 1022, &c.* as alſo his *Jus Privatium Romano German.* printed in 1709. l. ii. c. 7, 8.

they divide into ³ *natural* and *civil*: Which Division may again be consider'd in two respects; either as to the outward *manner* of possessing or retaining; or as to the inward *Form* or *Essence* of Possession. In the former Sense we are then said to have natural Possession, when having once taken a thing, we stick to it, not only by the Inclination of our Mind, but by *actual*, and as it were, *corporal Application*. *Civil* Possession may in this Sense be kept in Mind only, when 'tis lost as to the Body. Inasmuch as national Laws, in some particular Cases, still allow the Advantages, which follow Possession, to those who have quitted their actual hold ⁴, or lost things out of their Hands. In the latter respect natural Possession is, when we have indeed a Mind and Inclination to keep a thing as our own, yet without any just persuasion of Property, such as might arise from a lawful Title. But *civil Possession* implies not only a Desire, but likewise a reasonable Ground for that Desire; which, according to the common and regular Course, is always understood in national Constitutions, when they allow any favour to Possession ⁵.

Now the proper Subject of *Possession* are bodily Substances ⁶, whether with or without Motion: The less proper or the analogous Subject, are *incorporeal Things* ⁶, as *Rights*, which we possess by using them, and by the Power of so using them; as likewise *Deeds* and *Writings*, upon which an Action may be grounded towards some certain Claims. To the constituting and compleating the Nature of Possession, it is requisite that the Person to be put into possession shall either by himself, or by Proxy ⁷, corporally take to him the Thing it self, or the Badge and Sign of it, or the Instrument of Custody, according as the Nature of the thing permits; and consequently, that the Thing be after such a manner subjected to his Power, as that he may be able actually to dispose of it. If many Bodies are united and connected to each other, then the *taking* any one part with a desire of possessing the whole, is construed for *taking* the whole, so far as it lies free and void of Owners. Thus, for instance, *he who would take possession of a Field, or of*

a House, is not obliged to walk over every Foot of Ground, or to creep into every Garret; but 'tis enoug^h for him to enter on any part ⁸. A complex Body made up of particular separate Bodies, as a *Flock*; for example; if all the Parts are present, 'tis supposed to be *taken* all by laying hold on any one: But if the Parts are divided as to place, one part of the Flock, for instance, in this Field, and another in that ⁹; here each part is to be *taken* by it self. *Incorporeal Things*, when they adhere to a *corporeal*, are presum'd to be *taken* together with it. But if they are to be acquired in the Goods of others, then they are *taken* either when we are introduced to a thing, over which ¹⁰, for instance, we design to appoint a *Right* or *Service*; or when we exercise any Act which flows, as it were, from such a *Right*.

In *negative Rights* ¹¹ it is equivalent to *Possessions*, if I forbid a Man any thing, or oppose him in his design upon it, and if he retts satisfied after my forbidding or opposing him. To proceed; such a Seizure, or the exercise of such an Act is necessarily required in the obtaining of every Possession: Though it may by *civil Ordinances* be appointed, That the Property of a thing shall otherwise by Right pass to a Man so effectually, as that he shall bring as strong an Action against one who detains the thing from him, as if he had taken corporal Possession of it ^b.

Farther; As to the acquiring a thing by *Occupancy*, it is necessary, that the thing lay free and vacant: So if a thing is to pass from another to me, with such force and virtue, as that I may be able hereafter actually to dispose of it, it is likewise necessary that he abdicate and divest himself of the Possession, and remove it, as it were, out of his Custody, that I may have Power immediately to seize on it. And this is enough to make it properly be said, that a thing is deliver'd by another; there being no need that he should directly put it into my very Hands. As I may very well be said to feed a Man, tho' I do not chew his Meat for him; and then thrust it into his Mouth, but only lay it

^a Vid. *Polyb.* l. xii. c. 7.

^b To which Point belongs what is allעדg'd by *Grotius*, l. ii. c. 8. f. 25.

Mr. BARB. NOTES on §. VII.

³ *Ut possessio non solum civilis, sed etiam naturalis intelligatur*, Digest. l. xli. t. 5. *Pro herede, vel pro possessore*, &c. leg. 2. §. 1.

⁴ See above, c. 6. §. 12. n. 10.

⁵ This is a Distinction of the *Roman Law*. By things corporal is understood every thing that is the Object of our Senses, and may be touch'd, as the Ground, Man, a Garment, a Piece of Gold or Silver, &c. Whereas things incorporeal are not obvious to our Senses, and consist only in a certain Right that Men have; such are, an Inheritance, an Obligation, a Pawn, an Usufruct, a Service, &c. *Corporales hæc sunt, quæ tangi possunt, veluti fundus, homo, vestis, aurum, argentum, & denique aliæ res innumerabiles. Incorporales autem sunt, quæ tangi non possunt, qualia sunt ea quæ in jure consistunt, sicuti hereditas, usus, usufructus & obligationes quoquo modo contractæ*, Instit. l. ii. t. 2. §. 1, 2. *Cicero* in his *Topicks* calls the first, things that really exist; and the other, things that have no Existence but in our Minds. *Essè ea dico* (says he) *quæ cerni tangere possunt, ut fundum, ædes, parietem, stillitidium, mancipium, pecudem, suppellectilem, penus, & cætera. Non esse rursum ea dico, quæ tangi demonstrare non possunt, cerni tamen antè & intelligi possunt, ut si in usucapionem, si tutelam, si gentem, si agnationem definitas, quarum rerum nullum subest quasi corpus, & tamen quædam conformatio insignita & impressa intelligentia, quam notionem voco*, c. 5. See *Mir. Nood's Probab. Juris*, l. ii. c. 3.

⁶ *Ego puto usum ejus juris pro traditione possessionis accipiendum esse*, Dig. l. viii. t. 1. *De servit.* leg. 20.

⁷ *Generaliter quisquis omnino nostro nomine sit in possessione, veluti procurator, hospes, avi us nos possidere videmur*, Dig. l. xli. t. 2. *De acquir. vel amit. possessione*, leg. 9.

⁸ *Non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet, sed sufficit quolibet partem ejus fundi, introire, dum mente & cogitatione hac sit, uti totum fundum usque ad terminum velit possidere*, *ibid.* leg. 3. §. 1.

⁹ The Interpreters of the *Roman Law* infer this from a Law, which imports, That if in an Herd which one has gotten by Right of Prescription, a Beast be found, that belongs to another who has bought it since the time of the Prescription began, to run with the others, he can't become the lawful Owner of that Beast, because he did not take possession of all the Beasts in the Flock at the same time, and of all them that afterwards should be joined to it, but only of the first. *Rorum mixtura facta an usucapionem eajusque præcedentem interrumpit, quaeritur?* — *Non autem grex universus sic captatur usq, quomodo singule res; nec sic quomodo coherentes. Quid ergo est? Est ea natura ejus est, ut adjectionibus corporum maneat idem, non tamen* (for so it ought to be read with *Halbender* and *Cujacius*) *universi gregis ulla est usucapio, sed singulorum animalium sicut possessio, ita & usucapio, nec si quid erant mixtum fuerit gregi, augendi ejus gratia, idcirco possessionis causa mutabitur, ut si reliquus grex domini mei sit, hæc quoque ovis; sed si quædam suam causam habebunt, ita ut, si quæ fortiter erunt, sint quidem ex grege non tamen usucapiantur*, Digest. l. xli. t. 3. *De usurpationibus & usucapionibus*, leg. 30. §. 2.

¹⁰ *Dare enim (hæres usufructum) intelligitur, si induxerit in fundum legatarium, eumque patitur uti, frui*, Digest. l. vii. t. 1. *De usufructu*, &c. leg. 3. *in princip.*

¹¹ That is to say, which consists in hindring a Person from doing certain things.

in such a place, whence he may conveniently reach it for his use ^a.

VIII. These Rules being laid down, it is evident, that *Dominion* consider'd merely as a *moral Quality*, and as it abstracts from Possession ¹, may certainly be transferr'd by bare Covenants; but that as 'tis understood to include likewise some degree of natural Power, by means of which it may immediately be put in Act, besides Covenants, *Delivery* is farther required: which doth not arise from the force of positive Law, but from pure natural Reason. Nor yet is it necessary to affirm, That before *Delivery* the Alienator retains some kind of imperfect Dominion; unless we would very unartificially ascribe the Name of Dominion to a bare natural Ability, actually to dispose of a Thing, without a *moral Power* or *Right*.

For after the Covenant is compleated, or after the *Right* is by Covenant transferr'd on another, the thing immediately commenceth *his*, and regards purely his Interest and Advantage; and the Alienator can lawfully exercise no Act about it, but such as tends towards delivering up the Possession to the other Party. If, before *Delivery*, he make any other disposal of the said thing, he doth this only *de facto*, and not *de jure*. And *Delivery* it self is not properly the final Act of Dominion, but the Releasement and Abdication of corporal Custody. For that only is esteem'd an Act of Dominion, which by virtue of Dominion is *freely* perform'd. But *Delivery* is made not *freely*, but upon Necessity, or Obligation. As the Resignation of a Magistrate cannot be stiled an Act of his Office, if we consider that Office as denoting a Power to command others.

But tho' a thing can no longer be reckon'd my own, when I have made over the full *Right* of it to another Man, yet 'tis somewhat different whether I still corporally detain the said thing, or whether the other Party hath already got possession of it. For in the former case he is both unable to apply it presently to his actual Use; and besides, if I refuse to deliver it, he must compel me to grant him possession in a forcible way. And if Matters stand thus, besides the Inconvenience of wanting the thing in the mean time, if you live under civil Government, you must be at the trouble of making out your *Right* to the Judge; and if he either through Corruption or Neglect shall pronounce a false Sentence, you must sit down contented: But if you are in a state of natural Liberty, you must try out the Matter by the doubtful Fortune of War.

On this account it is that the *Roman* Laws affirm ², That those Contracts which treat of the alienating of Things, do give only a *Right to the Thing*; as if before *Delivery* the Person were plac'd, as one may say, at a distance from the Thing, only with a *Right* of joining it to himself hereafter. But that when Dominion hath received its final Completion from corporal Seizure, then a *Right* is establish'd in the Thing. Yet the Law frequently supplies the former Deficiency: As for instance, by reckoning amongst the *Rights in a Thing*, the *Right* of Inheritance ³, or that which the Heirs have to the Goods of the Deceas'd, although they have not yet got Possession. As for the other distinction of the *Roman* Laws, in granting a ⁴ *real Action* upon a *Right in a Thing*, and a *personal Action* upon a *Right to a Thing*, the ground of it seems to be this, That when a thing once perfectly belongs to me, I

^a Vid. lib. xli. t. 2. l. 1. f. 21. l. 51. Dig. De acquir. possess.

MR. BARB. NOTES on §. VIII

¹ It is evident, that in this Question every body understands a moral Power, or *Right* of disposing of a thing that appertains to them, and no Man doubts, but to exercise this *Right* actually, he ought to be in possession of the thing; so that the distinction of our Author is useless, and he might better maintain the Affirmative plainly. Farther, according to the Maxims of the civil Law, a settled Possession does not require a perpetual keeping of it, nor is it necessary to have the thing possessed in our Hands, or under our Eyes. *Licet possessio nudo animo acquiri non possit, tamen solo animo retineri possit, Cod. l. vii. t. 32. leg. 4.* Why then can't a Property be gained, as it is a *Right* purely Moral, by a bare Agreement, without taking any Possession? See *Balthaf. Wberner. Elem. Jur. Nat. & Gent. c. 14. l. 50.*

² *Jus ad rem.* This distinction is not found in so many Terms in the Body of the *Roman* Law, as our Author supposes it, but it is in the Canon Law, which uses it in treating of the Collation of Benefices. "Jus vero quod secundo AD PRÆBENDAM, NON IN PRÆBENDA, hujusmodi competebat, &c. Decretal. l. iii. t. 4. De præbendis & dignit. in 6. Can. 40. Quarum gratiarum ratione tunc non erat ad collationem processum, & sic per consequens JUS IN RE non fuerat ipsis impetrantibus adquefitum, &c. ibid. t. 7. De concessione præb. n. d. &c. Can. 8. Per ordinationem seu divisionem nostram prædictam JUS AD REM expectantibus, &c. Extravag. Joan. 22. t. 4. De concess. præb. c. 1. See Mr. *Thomasius's* Discourse, intitled, *Philosophia Juris de obligat. & action. c. 2. l. 115.* 'Tis the third among his Disputations at *Leipsick*. So that the Interpreters of the *Roman* Law have borrowed their distinction of *Jus in re & ad rem* from the Canon Law, and they use it as a consequence of what the ancient Lawyers speak, that no bare Agreements transfer any Property, and therefore a thing must be deliver'd, unless there has been a Possession for some time, as it happens in Prescription. See the Law quoted above, f. 5. n. 2. Hence it follows, that when, for example, a Bargain of Sale is pass'd, no *Right* is acquir'd to the thing it self (*Jus in re*) but only a *Right* to oblige the Seller to deliver it to us, that we may take Possession of it, and by that means acquire a *Right* to it. This is what the Interpreters call *Jus ad rem*, as much as to say, a *Right* to have and acquire a thing; whereas by *Jus in re*, they understand the *Right* that they have already acquired to the thing.

³ "Omnia fere jura heredum perinde habentur, ac si continuo sub tempus mortis heredes extitissent, Dig. lib. l. t. 18. De diversis regul. juris, leg. 193.

⁴ A *personal Action* is, when we prosecute at Law a Person who is obliged to give or do something on our account, by virtue of a real and particular Obligation that he is under, whether by some voluntary Engagement, (*i. e.*) a Promise, or by a Contract, or for some Crime or Fault, as having stolen something from us, or endamag'd our Goods, &c. And this Obligation is so personal, that he can't engage himself to a third, who is Possessor by a just Title for the thing due to him, till we have actually released him. As for example, if a Tradesman, after he has sold me a Stuff, sells and delivers it at the same time to another, I have no *Right* to require that this second Buyer should let me have it; but the *Roman* Laws allow me an *Action* of Warranty against the Seller. See *Digest. l. vi. t. 2. De publiciana in rem actione*, leg. 9. f. 4. and *Code, l. iv. t. 39. De hæreditate vel actione vendit.* leg. 6. On the contrary, an *Action* real is, when a Man seizes, as we may say, upon a thing as fully belonging to us already, so that we have right to demand it of any one that has it in his Possession, and the Defendant is obliged to yield it to us not by a particular and personal, but by virtue of that general Obligation, by which every one is ty'd to restore the Goods of another. This sort of *Action* is call'd Vindication, and a bare Demand, whereas a *Personal Action* is usually stiled *Conditio*. "Omnium autem actionum, quibus inter aliquos apud Judices arbitrore de quacunque re quaritur, summa divisio in duo genera deducitur, aut enim in rem sunt, aut in personam. Namque agit unusquisque aut cum eo qui ei obligatus est, vel ex contractu, vel ex maleficio, quo casu proditæ sunt actiones in personam, per quas intendit adversarium ei dare aut facere oportere, & aliis quibusdam modis. Aut cum eo agit, qui est ei nullo jure obligatus, movet tamen alicui de aliqua re controversiam, quo casu proditæ actiones in rem sunt, veluti si rem corporalem possideat quis, quam Titius suam esse adfirmet, possessor autem Dominum ejus se esse dicat — Appellamus autem in rem quidem actiones, vindicationes, in personam vero, conditiones, Instit. l. iv. t. 6. §. 1. & 15. In the first, *Res, non persona convenitur*, *Digest. l. xlix. t. 14. De jure fisci*, leg. 19.

have nothing to do but to pursue and take it where-soever I find it; and there is no new and peculiar Obligation requir'd in the other Party to engage him to deliver it. But a bare Right to a thing presupposeth that the thing is not yet fully united to me, and that the other Party is by a peculiar Obligation tied to procure that it shall be thus united: therefore I am to urge him, that he would leave the thing, as 'twere, vacant for me, so that I may take it into my own Possession.

As to what remains, tho' it be a common Saying, That a *Thing in hand is better than an Action in the Court*; yet 'tis certain, that our Estate may be increas'd by a bare Right to a thing, and by *personal Actions*. As on the contrary, what a Man by a perfect Obligation owes to another, he cannot, to any purpose, reckon amongst his Goods and Fortunes, tho' he retains, as yet, the corporal Possession of it. Hence he, who possesseth a thousand Pounds, and owes a thousand, hath nothing; and he that owes more than he possesseth, hath less than nothing. For in the Words of the Civil Law, *Id ei abesse videtur, in quo est obligatus*²; *So much seems wanting to him, as he is bound to make good.*

IX. We are to observe besides, that *Delivery* is either *true*, or *feigned* and *suppos'd*; the latter of which is done *manu brevi*¹, in short, and without Formality, to save Time and Trouble. Now this chiefly takes place, when I make over by Grant the Property of my Goods to another, reserving, for a certain Term², the *Use* and *Profits* to my self. (Tho' in some Grants of this kind it is now an usual Practice for the Donor to deliver the Keys to the other Party, who immediately restores them again.) As likewise, when I resolve that a thing of mine, which another now hath in his Possession³, shall for the future be his Right and Property: Or when, having first lent or set out to hire,

or given in trust, a certain thing to you, I afterwards sell it you⁴, or resign it in way of Profit or Portion. This *feign'd Delivery* is likewise of use between three Persons by Delegation⁵; as if, for Instance, a Man out of Bounty or Debt would give me somewhat, and I order him to give it a third Person. For that's the same as if it had been first offer'd to me, and by me deliver'd into the other Party's Hands.

Delivery then is said to be made *manu longa*⁶, or by a round-about way, when a thing is not immediately brought to another Body, but only shewn or pointed out at a less or a greater Distance⁷. For I have, as far as in me lies, deliver'd that, of which I have quitted the Possession, and have put another in a Method of obtaining it for himself. And to this Head they refer also those Cases, in which any Sign or Instrument of Custody (as Keys⁸, for Instance) is given up. As for the Case of throwing or scattering Largettes among the common People, the Design of it is not, that the things thus dispers'd should be look'd on as *derelict*, or forsaken, and so be afterwards acquired in the way of *Occupancy*, by the first Takers; but such a piece of Bounty is really a Species of *Donation*, reach'd out indefinitely to all the Members of the Crowd; so that the thing thus thrown in common is suppos'd to be deliver'd, as 'twere, to the first Man in the Multitude that lays hands on it. Yet *Cæsar* speaks otherwise in his Complement to the Soldiers, upon granting them the Liberty of Plunder:

— — — *Neque enim donare vocabo,
Quod sibi quisque dabit.*

I call it not my Gift what each brave Man
Shall give himself.

¹ Lib. iii. t. 5. leg. 28. Dig. De negot. gest.

MR. BARE. NOTES on §. IX.

¹ Our Author, tho' he does not distinctly tell us, whether the Deliverance, *manu brevi*, belong to the real or feigned Deliverance, as the Lawyers from whence he borrows this Distinction do; but then he tells us not, that the same Lawyers make the Deliverance with a *long hand* of the feigned kind also, and so leaves the Reader in the dark. Wherefore, to clear the Difficulty, I shall shew you what a real Deliverance is, *viz.* it is a Corporal Act, by which we transmit a thing from one hand to another, *i. e.* from one Person to another; and then, to make our Author's Sense plain, the Sentence ought to be read, *Traditionem esse et certam, vel firmam, quæ [vel longa, vel] brevi manu fieri dicatur.* And in this Sense we find the Phrase *brevi manu*, Dig. l. xxiii. t. 3. De Jure Dotium, leg. 43. §. 1.

² " Quisquis rem aliquam donando, vel in dotem dando, vel vendendo usumfructum ejus retinuerit; etiamsi stipulatus non fuerit, eam continuo tradidisse credatur, nec quid amplius requiratur, quo magis videatur facta traditio, Cod. l. viii. t. 54. De Donationibus, leg. 28.

³ Si rem meam possideas, & eam velim tuam esse, fiet tua, quamvis possessio apud me non fuerit. Dig. l. xli. t. 1. De acquir. rerum Dominio, leg. 21.

⁴ " Interdum etiam sine traditione, nuda voluntas Domini sufficit ad rem transferendam. Veluti si rem, quam commodavi, aut locavi tibi, aut apud te deposui, vendidero tibi; licet enim ex ea causa tibi non tradiderim, eo tamen quod patior eam ex causa emptionis apud te esse, tuam efficio. *Ibid.* leg. 9. §. 5. Veluti si rem quam quis tibi accommodaverit — postea aut vendiderit tibi, aut donaverit, aut dotis nomine dederit. *Instit.* l. ii. t. 1. De rerum divisi. §. 43.

⁵ See Lib. v. c. 11. f. 13. following.

⁶ As when a Man tells Money on a Table to any one. " Pecuniam, quam mihi debes, aut aliam rem, si in conspectu meo ponere te jubeam, efficitur, ut & tu statim libereris, & mea esse incipiat. Nam tum quod à nullo corporaliter ejus rei possessio detineretur, adquisita mihi & quodammodo manu longa tradita existimanda est. Dig. l. xlvi. t. 3. De solutionibus & liberationibus, leg. 79. See also l. xli. t. 2. De acquir. vel amitt. possessione, leg. 1. f. 21. and Mr. *Nood's Probab. Juris*, where he also shews, that the Presence of a thing is not always necessary by the Roman Law, because it may be thought delivered to him on whose Account we paid it.

⁷ If for Example, he that sells me a Field, shews me it from the top of his House, declaring at the same time that he releases it to me, it is as much mine as if I were carried to the Place and set my Foot in it. " Aut si mihi fundum vicinum mercato venditur, in mea turre demonstrat, vacuumque se possessionem tradere dicat, non minus possidere cepti, quam si pedem finibus intulissim. Dig. l. xli. t. 2. De acquir. vel amitt. possess. leg. 1. f. 21.

⁸ " Item si quis merces in horreo repositas vendiderit, simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem. Dig. l. xli. t. 1. De acquir. rerum Dominio, leg. 9. f. 6. and l. xviii. t. 1. De contrahend. empt. leg. 74. See also the Code, l. viii. t. 54. De donat. leg. 1.

⁹ " Hoc amplius interdum & in incertam personam collata voluntas Domini transfert rei proprietatem, ut ecce Prætores & Consules, cum missilia jactant in vulgus, ignorant, quod eorum quisque sit accepturus, & tamen quia volunt, quod quisque acceperit, ejus esse, statim eum Dominum efficiunt. *Instit.* l. ii. t. 1. De rerum divisi. §. 45. Dig. l. xli. t. 1. De acquir. rerum Dominio, leg. 9. f. 7.

Sometimes only Tickets are scatter'd, upon producing of which the Bearers receive the Import and Contents of them. Thus *Titus* the Emperor in some of the Shows which he presented, threw about little round Tablets of Wood, each with some kind

of Prize inscribed, as Garments, Gold, Horses, Oxen, Sheep, and Slaves. Those who had the good Fortune to catch these Tables, upon carrying them to the Managers and Stewards, were gratified with the Purport of the Inscription.

CHAP. X.

Of Wills and Testaments.

- I. How many derivative ways of Acquisition.
- II. Grotius's Definition of a Will is examined.
- III. What is a Will to us.
- IV. Whether Wills proceeded from the Law of Nature is doubted.
- V. The Antients disposed of their Goods while they were living.

- VI. How far Wills proceeded from the Law of Nature, and how far from positive Laws?
- VII. An Inheritance given by Will, wanting due Firm, may be enter'd upon, if none oppose it.
- VIII. But the Heir may null that Will, as if his Ancestor had died intestate.
- IX. Donation in case of Death.

AMONGST the derivative ways of Acquisition, some regard the Chance of Death, and some transfer things whilst both Parties are alive¹. In both Cases the things are convey'd from one Person to another, either by express Will of the former Proprietor, or by the Appointment of some Law interposing in the Affair. Varro *De Re Rustica*, l. ii. Somewhat must necessarily intervene, before what was another's can become mine².

II. On account of Death 'tis the common Practice of Mankind to transfer things by Testament: The Nature and Origin of which Act we ought with some Care to examine. According to Grotius^a therefore a Testament is the Alienation of a whole Estate in case of Death, and before that time revocable; in the mean while the Right of Possessing and of Enjoying being reserv'd. Whereas 'tis not altogether certain, whether a Testament can rightly be call'd an Alienation, in that strict Sense under which it denotes such an Act, by which a Man makes a thing that was his own become another's. For Alienation being in this Sense a transferring of Right from one to another Person, consequently suppo-

seth the Existence of the two Parties at the time of its Date; so that henceforward the thing may be said to be estrang'd from him who thus transferr'd it. But the Testator¹, so long as he draws Breath, retains a full and absolute Right to all his Goods, without the least Diminution. Therefore, whilst he lives, he cannot properly be said to have alienated any thing: And at the Moment of his Death he loseth immediately all the Right he held whilst alive, and is reckon'd as no body in civil Consideration. Therefore an Alienation cannot be said to be made at that time, when in respect of the Party who should alienate, nothing can be call'd his own or another's. Nor is the Difficulty taken off, if we affirm, That the Alienation is indeed made when the Will is sign'd, but depends in the mean while upon the Casualty of Death, as upon a necessary Condition. For in every Act of Alienation two Parties must join Consents; the one from whom, and the other to whom the thing is transferr'd; and these Consents must be united by conspiring, as it were, together at the same time. But now nothing happens more frequently, than that a Man shall not know

^a Lib. ii. c. 6. f. 14.

MR. BARB. NOTES on Chap. X. §. 1, II.

¹ Here is a more exte^d Division of derivative Acquisitions: I. In respect to the Law, by virtue of which Property is transferr'd, we may divide them into Acquisitions; 1. Natural; 2. Civil; and 3. Mixt. Natural Acquisitions are such as are conformable to the Rules of the Law of Nature only, *i. e.* which depend only upon the mutual Consent of Parties. Thus we acquire by virtue of all Engagements, where the civil Law leaves every one at their full Liberty. Civil Acquisitions are such as transfer a Property without the Consent of the Proprietor. The principal way of acquiring here is by Prescription. See Chap. xii. f. 1. n. 1. following. Acquisitions mixt are made by the mutual Consent of Parties, either express or tacit, but yet with such regard to civil Constitutions, that if they be not conform'd to, the Act is void. Thus we get things by a Will or Contract, yet the Laws of the State prescribe certain Forms to be used in such sort of Actions. II. These three sorts of Acquisitions may be consider'd either with respect to the Time they were made, or in respect to the Thing acquired. As to the Thing, they are universal or particular, according as we acquire the Goods of a Person, in whole, or in part. As to Time, they have place either in case of Death, or in time of Life. See Mr. *Titius's* Observ. on *Puffend.* 300, &c. The first sort comprehends Wills, and Gifts in case of Death, which are treated of in this Chapter. The other comprehends all Agreements and Contracts in which any Alienation is concerned, to which we may also refer Donations among the Living, altho' our Author in his Abridgment of the Duties of a Man and Citizen, l. i. c. 12. has ranked them under a different Head, and so has not touch'd on them in this Place. But we shall supply this Defect by a Note, because he has not treated of them in this Work.

² *Quod alterius fuit, id, ut fiat meum, necesse est aliquid intercedere.* Varro *De Re Rustica*, l. ii. c. 1.

¹ See above, f. 4. n. 2. All that our Author says here proves only, that in a Will the Alienation is real and clear, not irrevocable; but that hinders not, but that the Testator's Act may be look'd upon as a kind of imperfect Alienation, and which may become perfect, and give the Heir a true Right, tho' liable to no Effect. So that there is a great Difference between an Alienation by Will, and a bare verbal Declaration of a present Design to give something one time or another, to a certain Person. For the Effect of such a Declaration depends always upon the Humour of him that made it, and can't take place without some better Assurance from him. Whereas so long as the Testator has not revoked his Will, the Right of the Heir continues, whatever Humour he is in; but if the Testator having resolv'd to change the Legacies he has made of his Goods, but for want of time does it not, or because he flatters himself that he shall have time enough when he comes to die, the Heir and Legatees have acquired a full and irrevocable Right, which they have Power to enjoy.

shall not know himself to be Heir 'till the *Will* comes to be open'd upon the *Testator's* Decease. And likewise when the *Will* is thus open'd, 'tis at the Choice of the Heir appointed, whether he will enter upon the Inheritance, or wave and refuse it.

Again, Since all the Right of the Heir by *Will* commenceth at the *Testator's* Death; he hath not, before that Moment, any Right which can be said to depend on the Death of the Party as on a Condition. Besides, when any kind of Alienation is made, though such as may be recall'd, yet it ought to transfer such a Right on the Person towards whom it is directed, that it shall not be disannull'd at the bare Pleasure of the Alienator. For otherwise, neither the Alienator can be suppos'd to have contracted any Obligation, nor the other Party to have acquired any Right, if the whole Transaction amounted to no more, for Example, than this slight Promise, *You shall have, one time or other, somewhat which I now possess, provided you don't displeas'e me in the mean while; but then you shall have no Right to hinder me from being displeas'd at any time when I think fit, or without any manner of Reason.* Such an Act as this cannot be stiled an Alienation, being a bare Declaration of a Man's present Design, without any necessity of continuing the same Resolution; which is incapable of producing any Obligation on the one side, or any Right on the other^a. But a Testament is really such a Declaration of a Man's Intentions, as doth not confer any Right on the other Party before the *Testator's* Death; such, at least, as may have the effect of full and perfect Right against the Claim of the *Testator* himself. For after the *Will* is drawn up, the *Testator* doth not only retain the most absolute Right of possessing and enjoying, making over to the Heir only the bare Property; but indeed the Property itself is still, without the least Diminution, his own. Of which we have this evident Token, That after all this he may alienate his Goods, or may strike out those who at present stand Heirs, without any Possibility of Redress. But now even revocable Alienations ever suppose some Casualty, or some Condition under which they are to be revers'd, and which doth not depend merely on the Alienator's Pleasure or Humour.

^a Vid. *supra*, l. iii. c. 5. f. 5. p. 275. Edit. *Amsf.*

^b Lib. viii. Epist. 18.

^c Lib. vii. c. 8. f. 5, 8.

^d Add *Lucian* in *Dialog. Simil. & Polykrat.* Tom. i.

^e *Comp. Isa.* xxxviii. 1.

^f Lib. ii. c. 6. §. 14.

III. We shall express the Nature of a Testament more plainly, and more agreeably to the Sense of the *Roman* Lawyers, if we call it, *A Declaration¹ of our Will touching the Successors to our Goods, after our Decease, yet such as is mutable and revocable at our Pleasure, whilst we live, and which creates a Right in others to take Place only, when we are gone.* Concerning which Mutability the Law of general Kindness commands thus much, *That no Man, unless on Account of his Demerit, be wheedled and cajol'd with false Hopes², or be ridiculed and exposed.* Whence, tho' we can hardly disapprove of what *Pliny* reports of *Domitius Tullus*, who had chous'd some hungry Rascals in the wicked Tribe of the *Hereditaria*; Others on the contrary, says he^b, *commended this Humour; in that he frustrated the evil Hopes of such Men, whom, considering the Practice of the Age³, it is a Part of Prudence thus to deceive⁴;* yet *Valerius Maximus*^d had good Reason to censure *Q. Cæcilius* and *T. Rutilius*, of whom the former put a Trick of this kind on *L. Lucullus*, the latter on *Lentulus Spinther*, their greatest Friends and Benefactors.

IV. Whether these Testaments owe their Original to natural or to positive Law, is disputed amongst the learned. The Meaning of which Question is not, Whether a Man be obliged by the Law of Nature to make a Will (for that certainly is in every Man's Choice, unless so far as it proves necessary to prevent Quarrels amongst his^e Relations) but whether after Property hath been introduc'd, it necessarily follows from the Nature of that Establishment, that a Man may effectually dispose of his Goods by Will, or whether this Power is granted to Proprietors by positive Constitution? *Grotius's* Judgment^f in the Case is, *That a Testament, as many other Acts, may indeed receive a particular Form from civil Ordinances; yet the Essence and Substance of it is nearly allied to Property, and up on Supposition of Property, belongs to the Law of Nature.* Or, that the Power of disposing effectually of what we possess, is deriv'd from the Law of Nations¹, which the *Civilians* term *Jus Primarium*, the first or principal Law; but the Restraint which lies upon us to dispose of them only after such a certain manner, is owing to civil Appointment. In regard to which Assertion, 'tis not improbable,

Mr. BARB. NOTES on §. III, IV.

¹ Their Words are, *Testamentum est voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit*, Dig. l. xxviii. t. 1. *Qui testamenta facere possunt*, &c. leg. 1. *Ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum*, l. xxxiv. t. 4. *De adimendis vel transferendis legatis*, &c. leg. 4.

² Hear what the Oracle of *Gascoigne* (which is the Title that the Abbot of *St. Real* in his Preface to *Cicero's* Epistle to *Atticus* gives *Montagne*) says, "I now see 'tis time lost to bestow much Pains in Courtships; one Word ill construed blots out the Merit of Ten Years. Happy is he that can hit the time, please their Humour at the last Gasps! The nearest Action pleases most; not the best or most frequent good Offices, but the freshest and most present do the Work. These Men manage their Wills as Apples or Rods, to encourage or correct every Action of their Dependents. 'Tis a thing of too much Attendance and Weight to be thus hurried every Moment, and against which wise Men resolve once for all, respecting, above all, Reason and publick Observation. Essay, l. ii. c. 8. p. 284, 285." See also a fine Passage in *Mr. de la Bruyere's* Characters, in the Chapter about certain Usages, printed at *Brussels* in 1697. The Character begins thus; "It is true, there are a sort of Men whose Will nothing can determine but Death, because so long as they liv'd they were never resolved nor quiet, &c."

³ The Latin is, *Alii contra hoc ipsum laudibus ferunt, quod [Domitius Tullus, cum se captandum præbisset.] sit frustratus imp' his spes hominum, quos sic decipere pro moribus temporum prudentia est.* See also what is said above, l. iii. c. 5. f. 5. n. 3. As to such Men in general, and the Right which their servile Addressees to gain an Inheritance, when they are successful, gain, read two curious Discourses of *Mr. Thomassius*; the one intitled, *De Jure injusto Hereditarum*, publish'd at *Hall* in *Saxony* in 1695, and the other, *De Captatoris Institutionibus*, in 1696, and reprinted in 1703.

⁴ The Distinction of the Law of Nations into primæval and secondary was not made by the *Roman* Lawyers, but their Interpreters. Moreover, the Power of making Wills ought to be referred to that Right of Nations which they call secondary, and not to the primæval, which is nothing else, according to them, but the Law of Nature taken in the Sense which I have elsewhere explain'd it, l. ii. c. 3. f. 2.

but that some Scruple may arise ². For since the things, over which Property was first established, are designed only to serve the Uses of Men in this Life, and since the dead lose all their Title to worldly Possessions, it seem'd not altogether so needful, that Property should contain in it a Power of ordering what should become of a Man's things after his Decease. But it might have been sufficient to have allow'd every Person

the Command of his Goods during Life, disabling him to extend it farther, and to have left to the Care of the living the Management of what belong'd to the Dead, who are no longer Members of human Society.

Farther, since Death removes Men from all Concerns below, it seem'd that the Disposals and Declarations made in their Life-time might be afterwards neglected with Impunity.

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² Our Author in my Opinion makes a Difficulty where there is none. I am mistaken if his false Notion about the Original of Property, which we have above confuted, hath not made him without Reason reject *Grotius's* Judgment, and multiply Beings without Necessity. Another Author, which I have seen since my first Edition of this Work, asserts, That the Power of making Wills is only from civil Right, a Principle worse grounded in my Judgment, as I have shewn above, c. vi. §. 1. n. 1. I shall now only speak of this Position of his, That the Right of Property ends and is extinct with Possession of itself. See Mr. *Bynkershoek's* Observation, l. ii. c. 2. The Hypothesis being then confuted, 'twill be easy to invert the Consequence. I assert then, That the Settlement of Property being neither founded on any Agreement, nor limited by the time of Possession, but depending only (as we have shewn) upon this, That every one has seiz'd for ever of a certain reasonable Portion of the Goods of this World, which naturally belong no more to one than another, it follows, that when a Man hath appropriated to himself any thing after that manner, no other Person can pretend to it, unless he abandons it anew to the first Occupant, or transfers it to some other; but he hath a Right to dispose of his Goods during his Life, and may leave them, as their Proprietor, to whom he pleases, after his Death. And truly I can't see why this should not be a consequent of the Right of Property. Suppose Men were immortal, should not a Proprietor naturally preserve the Right he has once gotten? The necessity of Dying, to which all Men are subject, will permit them to enjoy their Goods but a few Years, and then it is but natural to make up the Loss, and perpetuate as far as they can their Right of Property after their Death, by declaring to whom they will have it pass; and so the Heir taking the place of the Dead, and representing him in some manner, no other can pretend to his Goods any more than if he had possessed them himself. In the *Case* 'tis laid down as an uncontroverted Maxim, That Men can desire nothing more reasonable, than to have a liberty to dispose of their Goods at their Death. *Nihil est enim quod magis hominibus debeatur, quam ut supremæ voluntatis, postquam jam aliud velle non possunt, Liber sit sibi, & libertatem, quod iterum non redit, arbitrium*, l. i. t. 2. *De Sacrosanctis Ecclesiis*, leg. 1. See the Passage of *Quintilian* quoted below, §. 5. n. 2. All the World agree, That Men while they live, and hold as it were hand in hand, may transfer to others, either absolutely, or upon certain Conditions, the Right of Property which they have to a thing; and why then may they not do the same at their Death, and in a manner revocable or irrevocable? I can't see the great Difference there is between these two things, especially if we consider the Donations in case of Death, of which this Author treats at the End of the Chapter, and which without doubt are a Right purely civil. Further, the Goods which Men ordinarily leave at their Death being usually either the Fruits of the Industry alone of the Proprietor, or things which are cultivated and improved by Care and Labour, would it not be unskill to have them abandoned after his Death to the first Occupier; so that he can't have the Satisfaction before his Death of thinking that he shall leave them to such Persons as he loves? 'Tis true, that (as Mr. *Bynkershoek* says) the Earth was appointed for the Service of Men of all Ages, and that all Generations, that succeed one another, ought to have a Provision for themselves by their Labour and Travail. But it does not follow, that by natural Right, when a Person dies, he leaves his Goods to some body, as he must necessarily do, no Man being able to carry any thing away with him to the Grave; and there are in the World besides things enough which belong to the first Occupant, if we will take the Pains to find them out. Mr. *de Bynkershoek* himself acknowledges, that if every Man's Goods after his Death were left to the Plunder of others, it would cause infinite Disorders; and therefore the civil Laws have regulated Successions and allowed Wills. Farther, it is not necessary that they, to whom we dispose our Goods, should know and accept, when we are alive, what we intend to bequeath them at our Death. Our Author maintains, that in reality the Will of him who transfers his Right, and of him to whom it is transferr'd, ought always to be united in a mutual Consent at the same time; but in this he doth not agree with himself, for he acknowledges above, l. iii. c. 9. §. 4. That a Gift is valid, though the Donor be dead before 'tis accepted by the Legatee, if he who ought to declare it be only a bare Reporter of the Will of the third. As to the dead Persons themselves, they have nothing to do with the thing of this World; but it doth not follow that they never had, while they were yet alive, a Right to order the disposal of their Goods after their Death, but only they are not in a condition to make it of Force themselves. If the Antients, as our Author speak, made their Relations swear to perform the Orders they made when they died, 'twas to engage them more strictly by an Oath, and not that they believed no other Reason sufficient to oblige them to fulfil the Will of a Person dead. We see that in the highest Antiquity such, as were not Members of any Society, dispos'd of their Goods before they died, without Controul. *Abraham's* Example is remarkable; he had Parents in *Charran*, in *Mejopotannia*, and without going far; he had with him in *Canaan*, where he dwelt, his Nephew *Lot*; nevertheless, when he thought he should have no Children, he designed to exclude all his Relations, and make *Eliazar*, his Steward or chief Slave, his Heir, *Gen. xv. 2.* We must then conclude, that a Power of disposing of our Goods in case of Death, in a manner either revocable or irrevocable, results from the Right of Property, and by Consequence is founded on the Maxims of the Right of Nature and Nations. So that if the civil Laws prescribed certain Limitations and Form to that Power, it proceeds from the Authority which the Sovereign hath to limit the Right of Property, and to regulate the Use that Citizens ought to make of their Goods; as you may see, l. viii. c. 5. §. 3. following. In fine, what I have said is so true, that our Author himself, after an useless Circle, returns again to the same Point, and in the following Chapter builds the Succession to a Person intestate upon the Presumption of the Will of the dead Person. All the Difference is, that instead of making the Power of disposing of his Goods at his Death to depend upon the Right of Property, he refers it to a tacit Agreement of the People, by which he supposes, without Necessity, that they entered into a common Covenant to put such a Strength in Property, as according to him it had not before. This Notion is the more satisfactory to me, because Mr. *Buddeus*, in his Discourse intitled *De Testamentis Summorum Imperantium*, maintains also against the Opinion of our Author, That the Power of making Wills proceeds from natural Right, and not from civil only. He also there observes among other things, that the Disposals of the Testator can't be executed without the Consent of the Heir; yet the want of that Consent does not deprive the Testator of that Right which he hath by Nature to dispose of his Goods; a Right which hath such a Virtue and Effect, that no Man can lawfully appropriate to himself the Goods of a dead Person, before he knows whether the Heir will accept the Inheritance devised to him, or no. If this be observed, the Will of the Dead is fully satisfied, because without doubt he intended not to force his Goods upon his Heir against his Will. The Heir also has some Right during the Life of the Testator, altho' 'tis not irrevocable, nor becomes his 'till the Testator is dead, without a Change of Resolution. They, who affirm the contrary, are fallen into this Error for want of distinguishing well between Acts imperfect and not consummate, and such as are null and of no effect. It is certain, that by natural Right a Will can't be entirely fulfilled, 'till the Heir accepts of the Succession after the Death of the Testator, yet it doth not follow that before that 'tis a vain Act, and of no Force. It is valid so far as the Nature of the thing will permit, and in this, that no other Persons can claim the Goods of the Deceased, until he that is appointed the Heir refuses to inherit. The rest of Mr. *Buddeus's* Discourse is worth the reading. At present I shall only observe, that Mr. *Thomasius*, who heretofore forsook the Opinion now oppos'd, is returned to it again; but I can't find that either in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 10. §. 9, &c. nor in his Discourse, *De Origine Successionis Testamentariæ*, printed at *Hall* in 1705, he has confuted any of the Reasons now laid down. In a Word, whether it be advantageous to civil Society to leave every one at their Liberty to dispose of their Goods by Will, is a Question of a different Nature, and which our Author himself will treat of in the last Paragraph of the following Chapter.

Id cinerem & manes credis curare sepultos ^a?

Think you cold Dust and Shadows feel such Cares?

An Evidence of this it seems to be, that the most antient Men we read of in Story were wont to engage their Friends by Oaths to fulfil their last Commands, as if no human Bonds were strong enough to oblige them in this Case. See *Gen.* xxiv. 2, 3. xlvii. 29. *Diodor. Sic.* l. ii. p. 119. Ed. *Rhodom.* c. 33. speaking of *Parfodes's* Death.

Thus too in *Sophocles* (*Trachin.* 1192, &c.) *Heracles* requires an Oath from *Hyllus*, for the Performance of his last Commands.

So *Constantinus Ducas* obligeth his Wife *Eudocia* by Oath never to enter on a second Marriage after his Decease. Yet by what Stratagem she recover'd her Writing from the *Patriarch*, who had the keeping of it; and how, as if she had hereby been releas'd from her Engagement, is very strange, she marry'd *Diogenes*, we read in *Zonar.* Tom. iii. in *Eudocia*, and in *Michael Glyc.* Ann. Tom. iv.

So in *J. Josephus* (*Archæolog. Jud.* xvii. 10) *Herod's* Commands for slaying the chief of the Jews are neglected by his Sister and her Husband. So;

Jusserat hæc rapidis aboleri carmina flammis
Virgilius, Phrygium quæ cecinere Ducem.
Tucca venat, Variusque simul; tu, maxime Cæsar,
Non fuist.

Virgil those Strains which rais'd the Trojan's Fame,
Dying, bequeath'd to feed th' injurious Flame.
Tucca and *Varius* stop the rash Design,
And you, great *Cæsar*, save the Glories of your Line.

Dio Cassius, lib. lix. relating how *Tiberius's* Will was declar'd null by *Caligula* and the Senate, adds this Reflection, *That no Counsel or Foresight can prevail against the Ingratitude of Men, and the Power of Posterity.* To which may be applied that Saying of *Lucan*,

— *Nulla fides rebus post terga relictis*, l. ii. v. 628.

In vain we trust to things we leave behind.

Therefore 'twas at the Pleasure of the Survivors, whether or no a Man's Will should take effect, even after he was dead. And consequently they were to determine by some Agreement amongst themselves, how far they should comply with the Desires of those who had now lost the common *Rights* of Men. Without such an Appointment any precedent Disposal would have been vain and useles, which the *Author* could not, and others who could would not maintain and put in Execution.

But, on the contrary, it manifestly appears, that 'twas not sufficient, in order to the Peace of human Society, to introduce such a Property or Dominion of things, as should turn only to the present momentary Use; but 'twas needful to make it such

^a Vid. *Virgil. Æn.* iv. 34.

as should hold good hereafter: Man, so far as Nature allows, having no less a Right to preserve Life for the future, and to provide Means towards obtaining that End, than for the present Moment. To which if we add, That we are enjoin'd to take a particular Care of those who are allied to us in Blood, whose Race we wish may continue to an indefinite extent of Ages, it will on the whole appear to have been conducive to the Peace of Mankind, not to make the Force of Property depend on any fix'd Period of Time; since this would have created no less Confusion and Trouble than the primitive Community: But to assign it, as 'twere, an Indefinite Duration, by means of which it might pass down and be continued to others. Now as to the preserving and the continuing this Property, those who live in a state of natural Freedom, appoint Means according to their own Judgment. But in civil Governments, as it is supported by the publick Strength, so it hath been variously temper'd and retrench'd, as particular Nations have at any time thought it to be for their Interest.

As for the Notion invented by the *Author* of the *New Method of Law* ⁴. I question whether it will meet with the Approbation of sound Judges. *Testaments*, says he, *by meer Right*, that is, *without the Confirmation of civil Ordinances, would be of no force or weight, unless the Soul were immortal; but because those who are taken out of this World do really still live, therefore they remain Proprietors of their Goods; and those whom they appoint their Heirs are to be look'd on as their Stewards and Managers.*

V. But as no one will be forward to maintain, that for a Man to be able to dispose of his Goods at such a time as he is the true Proprietor, and to fix the Effect of his Disposal on a time when he shall not be Proprietor, is repugnant to the Law of Nature: So, on the other hand, it doth by no means appear that this flows by any necessary Reason from the Essence of Property.

Thus much indeed flows from thence, That a Man whilst alive may confer a Right to his Goods on another living Person, which shall not be extinct upon the Death of the Collator, being still kept alive in the other Party who survives. For inasmuch as the Efficient and the Effect are distinct and separate Beings, there's no Necessity that the latter should always die with the former. And therefore, as a Man in his Life-time may fully transfer somewhat which he possesseth on another, who shall not lose the Property of it by the Death of him from whom it was receiv'd; so nothing hinders but that a Man may make over the Property of any thing to some Person else, yet so as to reserve still to himself a certain Right over the said thing during his continuance in this World. Hence in the most antient times we find the Fathers of Families disposing of their Goods at the Approach of Death ¹; (for as to the Passage in *Gen.* xv. 3. *Abraham* seems not to have already made his Ser-

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⁴ This Notion is absurd, and contrary to what is said, *Eccles.* xi. 19. and *Luke* xii. 20. and so is justly disapproved by our *Author*. By the Title I guess the *Author* of it to be the famous Mr. *Leibnitz*, who publish'd a Werk under that Title exactly at *Frankfort* upon the *Main* in 1703; but having not seen it, I am not positive.

¹ By this it appears, that it was a Custom in the Times of the Patriarchs to dispose of their Goods as they saw fit in case of Death. But if we examine the Passages of the Old Testament which our *Author* quotes, and are set down in the Margin, we shall see that they prove not what he would infer from them, that the transferring of Property was made among the Living, and, as it were, from hand to hand.

vant's Son his Heir, but only to have thought of making him, in case he happen'd himself to die without Issue) yet so, as that they themselves open'd and publish'd their Will to their Children, that these, by acquiescing in it, might seem to confirm it by mutual Covenant amongst themselves. By this means the Right immediately pass'd from the living Parents to the living Children; and the latter were admitted presently, as 'twere, into Possession of the Goods. And 'tis probable, that those primitive Men, who follow'd so plain and frugal a way of Life, commonly were not cut off by our sudden and violent Distempers, but decay'd leisurely by the gentle wasting of the radical Moisture; so that they were Masters of their Reason to the last, and were never summon'd by Death unawares, and upon a Surprise^a.

After the same manner Cyrus, in *Xenophon*^b, allot his Sons with his own Mouth the Division of their Father's Fortunes. And indeed these last Disposals ought to obtain great Favour and Allowance; it being thought no small Comfort under our mortal Condition, that what a Man hath labour'd for in his Life, should afterwards fall to that Person rather than others, whom he particularly chooseth and desires^c. 'Tis established, says *Quintilian*^c, by the Laws and Customs of the State, that as often as it can possibly be done, the Testaments of the deceas'd should be strictly obey'd. And this upon no ordinary Grounds and Reasons. For there seems no greater Consolation in Death, than to have a Will which shall hold good after Death, otherwise a Man might think an Estate a Burthen, if he had not the full Disposals of it; and if all the Right which we are allow'd to have over it, whilst we live, were to be taken from us when we die. Nor is *Statius*'s Reflection on Barrenness unworthy of Consideration:

*O, bitas omni fugienda nisu,
Quam premit votis inimicus heres,
Optimo poseens (pudet heu!) propinquum
Fumus amico.
O, bitas nullo tumultu a fletu!
Stat domo capta cupidus superstes
Imminens leti spoliis, & ipsum
Computat ignem.*

From Barrenness, good Providence defend!
Which feeds the Wishes of th' ungodly Heir,
Begging the speedy Funeral of his Friend.
Barrenness buried with no parting Tear!
The eager Successor in th' empty Seat
Stalks like a Victor in a Fortress won,
Greedy to fasten on the Spoils of Fate;
And counts, with grudging Care, the Charges
of a Stone. *Sylv. iv. vii. 34, &c.*

Add to these a Passage out of *Pindar*, who thus speaks,

*Ἐπέι πλῆθος ὁ λα-
χὼν ποιμένα ἐπιπλὸν ἀλλότριον
Θνάσκοντι συγερῶτατος.*

Od. X. ver. 106, &c.

The Rich Man much doth grieve,
That when this World he leaves,
Strangers his Wealth receive.

VI. But the *Question* under Debate doth not proceed so much with regard to these actual Disposals during Life, as to those Testaments by which a Man so conveys his Possessions, as to retain the liberty of altering them to his last Breath, so that the Right of the Heir to the respective Goods shall not commence 'till the Testator's Decease: Which Method of Appointment many have, with very good Reason, prefer'd to that other, but now mention'd, by which Men upon the Brink of Death distributed their Goods amongst their Heirs with their own Hands. For some sudden unforeseen Fate frequently either hurries Men out of the World, or however removes them far from their Friends, so as they want Time or Opportunity to express by Mouth their last Resolution.

And again, Persons who seem'd to have had more than one Foot in the Grave, have often by some strange Turn recover'd their Health, when they utterly despair'd of it. And it was likewise judg'd more convenient, that a Man should dispose of his Goods rather whilst he was in Ease and Quiet, and Master of a sound and clear Reason, than when he was trembling at his last Hour, or when his Mind was shock'd and weakened by the force of his Distemper.

Besides, it was more advantageous for each Person to remain Lord of his own Possessions to his final Gasp, and to give no Man such a Right over them as could not, without Inconvenience, at any time be revoked, when either the Merit of the Party, or his own Inclination shall alter^d. (As the *French* tell us, 'Tis senseless to put off our Cloaths before we are near going to Bed.) For tho' the Conveyance of Right, in this Case, might be made reversible, or such as the Conveyer might disannul, upon appearance of some Condition, either casual or voluntary^e, on the part of him to whom the Conveyance was made; yet the Doubts which must necessarily have arisen about the proof of this Condition, and which each Person would have urg'd for his own Title, must have occasion'd endless Disputes. At least he, who had been once declar'd Heir, would have conceiv'd the highest and most mortal Resentment against the Disposer, should he for any slight Reason be depriv'd of what he had already seiz'd upon in Hope and Expectation. Many likewise have expos'd themselves to very great Dangers, by openly naming their Heir too soon. Thus *Caligula*, when Persons had put him down in their Wills amongst their Children, and had made open Profession of it, and yet still liv'd on, gave them the Name of *Mockers*, and sent many of them a poisonous Mef to dispatch them^e.

When *Herod* had taken up a Design of dividing his Kingdom amongst his Sons, *Augustus* forbid him to proceed, ordering him, so long as he liv'd, to

^a See *Gen. xxv. 5, 6.* — *xlviii. 22.* *Deut. xxi. 16, 17.* *1 Kings i. 35.* *Sirac. xxxiii. 24.*

^b *Cyropæd. l. viii. c. 7.*

^c *Declam. 308. princip.*

^d See *Sirac. xxxiii. 20, &c.*

^e *Sueton. Calig. c. 38.* *Add. Sueton. Galb. c. 9.* *Lic. 40. c. 54.*

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² His Words are, *Et in more civitatis, & in legibus positum est, ut quotiens fieri potuerit, defunctorum testamento stetur, idque non mediocri ratione. Neque enim aliud videtur solatium mortis, quam voluntas ultra mortem; aliqui potest grave videri etiam ipsum patrimonium, si non integram legem habet, & cum omne jus nobis in id permittatur viventibus, auferatur morientibus.*

¹ See *lib. iii. c. 8. f. 4.*

keep both his Kingdom and his Sons in due Subjection^a. As the Family of *Augustus* himself was afterwards distracted with a very fatal Emulation, upon his naming a Successor in his Life-time: It hath therefore been thought safe to take care Mens Wills should only be publish'd after their Death, that they may bring no *Odium*, and no Danger upon them, whilst they live.

On the same Ground it hath been look'd on as a most detestable and barbarous Villany to unseal and divulge a Testament during the Life of the Testator. So when *Cæsar*, upon the breaking out of the civil War, caus'd *Antony's* Will, which he had deposited in the Hands of the *Vestal* Virgins, to be rehearsed in open Senate; many took very grievous Offence at the Act. For, as *Plutarch* observes^b, they judg'd it to be most monstrous and unreasonable, that a Man should be obliged to give an Account, whilst alive, of those things which he intended should be done after his Death. Especially since amongst the *Romans* 'twas an usual thing to give Judgments and Characters of particular Persons in these last Instruments^c. As appears from frequent Instances in *Tacitus*. *Add. leg. l. f. 38. D. Depositi, l. i. f. 5. D. ad L. Cornel. De Falsis.*

Now tho' the Reasons here allegg'd, and others the like highly recommend to most Nations this way of final Disposal, yet we cannot hence evince, that such Testaments do naturally flow from the Propriety of things, and consequently are prescribed by the Law of Nature. For tho' we should suppose, that by the common Consent of Mankind such a Force was granted and affixed to Property, as that a Person might constitute whom he pleas'd to possess his Goods after his Decease; yet that this should be done in such a particular manner, whereby both the Testator's Will should remain ambulatory or changeable during his Life^d, and the Right of the Heir not begin 'till the Testator's Death, and the Party who is Heir not know so much 'till then; all this is invented and establish'd by positive Ordinances. For otherwise, in transferring Right from one to another, according to the regular Course, it had been necessary that the Consents of the two Parties should exist together at the same time^e, and, as 'twere, meet and unite: From which Union the Translation of Right is conceiv'd to arise. But now in the Case before us, 'tis so far from being necessary, that the Consents of the Testator and of the Heir should be united; that there is allow'd an Interval of Time, even between the Death of the former, and the Entrance of the latter; the

Law, in the mean while, supporting the Heir's Right, which might otherwise sink.

VII. It is wont likewise, with great Pains and Labour, to be disputed; Whether the Heir by Will can with a safe Conscience enter upon the Inheritance, when the Will was defective in any Point or Form required by civil Ordinances? As likewise, Whether the Heir at Law, or he who was to succeed in case the Party had died intestate, can honestly overthrow such a Will, upon failure of these Formalities, tho' he is assur'd that the Testator seriously design'd to bequeath his Goods to the Person there specified? Those who take the negative side of both Questions, rely chiefly on the Hypothesis formerly mention'd^f, that the making of Wills is a Precept of the Law of Nature. Whence they conceive that he, who overthrows a Will thus defective, may indeed defend his Proceeding in outward Cognisance, or in civil Courts, but not in the inward Judicature, or in the Court of Conscience.

For the thorough Understanding of these Matters we ought beforehand to observe, that national Laws are scarce in any Point more careful, or more strictly exact in requiring certain Forms and Ceremonies, than in Testaments; as well to prevent the many Frauds and Juglings which might creep in to those written Instruments, as to cut off those most grievous Contentions, which Avarice would have rais'd upon the Case; scarce any thing being gotten with less Pains than a rich and plentiful Inheritance. Hence, inasmuch as every Person of competent Years, and not stupidly rude and ignorant, is presum'd either to have known himself, or to have been able to learn from more skilful Heads, after what manner the Laws of his Country command Testaments to be made; no one is supposed to have express'd his serious Resolution in such a way as he knew would not hold good against those who should oppose it in Court; especially considering that Men are allowed so vast a Time for the settling this Business. When therefore a Testament is found disagreeable to the civil Constitutions, 'tis easily presum'd that there hath been some fraudulent Contrivance, or that the Testator either was not well in his Wits, or else drew up the Instrument negligently and hastily, and more by the Instigation of others, than by his own free Motion: So that the only End and Design of those Forms was, that a forged Testament should not be set afoot instead of a true one; or a sudden and unadvis'd Impulse be admitted for a deliberate Resolution: Especially since, without any such Act, the Law calls to

^a *Josephus* Antiq. Jud. l. xvi. c. 8.

^b In *Anton. p. 942. Dio Cass. lib. l.* calls this Act of *Cæsar*, *A res unjusta Proceeding.*

MR. BARR. NOTES on §. VI, VII.

² See Mr. *Thomasius's* Discourse, already quoted, *De Captatoris Institutionibus*, §. 10. You'll find in the following Paragraphs many curious things about the Cautions that the *Romans* took to hinder Men from being put into Wills.

³ I own, that a wise Man ought to dispose of his Goods, and ought not to change his Will rashly or out of an Humour, as they do, of whom Mr. *de la Bruyere* speaks in a pleasant Railery in the Place I referred to above. "A peevish Man as long as they live puts them into his Will, they appease him, and tear their Draught, and throw it into the Fire; they have as many Wills in their Chest, as Almanacks on their Table; they may count them by the Year." But it doth not follow from hence, that they may not by a natural Right dispose of their Goods in case of Death, but in an irrevocable manner. On the contrary, as upon the most mature Deliberation 'tis easy to mistake in the choice of his Heirs, or suffer himself to be deluded by some crafty Fellow, or change one's Mind, so also a thousand unforeseen Cases happen, from which great Inconvenience may arise, if the disposals of our Goods, which we have once made, must remain unchangeable. It is very natural, that no Man should tie his own Hands, and that Death alone should fix a Testator's Will entirely. Without this the Right of Property will be limited where it ought to have the greatest Liberty, I mean, by the Disposals of his Goods for a time, and to be inevitably strip of them through the sad Consequences of the natural Condition of Mankind.

⁴ See what is said on §. 2. n. 1. and §. 4. n. 2.

⁵ I do not see how such a Consequence can be drawn from hence in respect to the first Question; for whether the Power of making a Will proceed from natural Right, or only from civil, as it only is a bare Permission in respect of the Testator, the Forms requisite are also an Advantage to those who might otherwise pretend to his Goods, so that it belongs to them to renounce it, and they are thought to do so, when they do not require the disannulling the Will.

the Inheritance the next of Kin, those who are ordinarily suppos'd to have stood fairest in the Opinion and Wishes of the deceas'd. But though it may so happen, that one who goes about to declare his Mind in this Matter, upon serious thoughts and mature deliberation, may mistake as to the usual Forms; yet Courts of Judicature have no other means to be inform'd what was the Intention of the deceas'd, than by these Instruments. And since 'twas at first allowable for the civil Authority to put this power of making Wills under such Rules, as should render it more serviceable to the publick Good, there's no need to recede from the common Decrees, for the sake of one or two private Persons; since if such a Precedent were once admitted, endless Cheats and Quarrels would ever be starting up.

Again, He who is balk'd of an expected Inheritance upon a Failure in the Writings, cannot complain of hard Usage; For, neither can he plead the Prerogative of Blood and Birth (because then he would have succeeded without Will) nor can any Man by Testament acquire a Right which shall hold good, at least in case of Opposition, unless it be squar'd according to the Statute. Wherefore such a Person must attribute his Disappointment rather to his own Misfortune, than to any Injury of others. But, notwithstanding all this, if the Will be not call'd in Question, then the nominated Heir may fairly enter upon the Possessions. For the Flaw which the civil Ordinances suppos'd upon defect of Formalities, doth in this case vanish (it being taken for granted that the Testator seriously design'd this Person for his Heir) and really the Goods belong to him rather than to any others, after those, who according to the general Course of the Law would have succeeded by Birth, acquiesce in his Claim, and tacitly wave their own Right. Because a serious Purpose not declared with due Solemnity is so far only adjudg'd by the civil Laws insufficient to transfer Right, as it seems to require that others should be excluded, who might challenge a Right to the same thing upon another Bottom. Therefore, if the Business be not brought into Court, the want of those solemn Forms requir'd by positive Statutes, doth not in the least affect or impair it, provided it hath all Conditions besides, which otherwise, and according to the general Law of Nature, are sufficient to constitute a Right. So that the Failure in point of Form seems to prejudice the Heir by Will only, if he is oppos'd by those whom the Law would have advanc'd to the Succession, in case the Party had died without Will. But when these are silent, and forbear to plead their Title, then for the Testator to have any way signified in earnest whom he intended for his Heir, is judg'd sufficient to transfer the Property. And this some Nations which were either unacquainted, or disgusted with the scrupu-

lous Exactness of the Roman Law, have thought enough to make a Will perfectly Valid. After all, 'tis certain beyond Dispute, that they who receive any thing by Virtue of a Will, which they know to be forg'd, are really guilty of a Sin, though they were not themselves concern'd in the Cheat². Hence Tully justly censures the Act of *M. Crassus* & *Q. Hortensius*, who in the Case of a forg'd Will, because they were not conscious to themselves of any share in the Cheat, did not refuse a share in the Advantage. *De Offic.* l.iii. c.18. Add. *Valer. Max.* l. ix. c. 4. §. 1. For, in the first Place, the Testator did not intend that his Goods should come to them; and then, the same Goods were already assign'd by the Laws to others, upon the not appearing of any legal Testament of the deceas'd.

VIII. Nor (as to the second *Questiō*) doth the Heir at Law, by overthrowing such a defective Will, whatever Assurance he may have that 'twas the serious Intention of the deceased, properly do any Injury either to the Testator himself, or to the testamentary Heir. Not to the former, because he had no Right of bestowing his Goods by his last Disposal on any others than the natural Heirs, unless he had observed the Form prescribed by the Laws of the Country. Not to the latter; because no Right which shall hold good against the natural Heirs can be confer'd on him in any other way, than by a Testament fram'd as the civil Constitutions direct. Nevertheless Persons, who have courted the Fame of extraordinary Humanity, have thought it more generous to stick close to the Will of the deceased, though not exactly express'd according to the Forms of Law; either to avoid the Imputation of Avarice, or because tender and compassionate Minds are so sensibly affected with the Thoughts of Death, as not to suffer that what a Man intended for his last Appointment should be intended in vain³. *Pliny*, Lib. iv. Epist. 10. *You are wont most religiously to observe the Wills of the deceased; the bare Understanding of which (however it be express'd) is to a good Executor the same as the nicest Form of Law.* Idem, Lib. ii. Epist. 16. *I have fix'd it as a kind of private and peculiar Law to my self, to defend a Will as perfect, though deficient in some legal Point.* Idem, Lib. v. Ep. 7. *This Testament, if you regard the Law, is null; but if you consider the Intention of the deceas'd, is firm and valid. As for my Part (though I fear the Men of my own Profession will not reliſh very well such a Declaration) I am more sway'd by the Testator's Intention, than by any exactness of Law.* He that will follow this Example, ought certainly to be applauded for a noble and bountiful Spirit. For the same Reason those who desire the Character of great Benevolence, are careful to perform the last Commands or Requests of their Relations or Friends, though somewhat burthensome to themselves. On which occasion we may

MR. BARB. NOTES on §. VII, VIII.

² The Story is this; In the Time of *Cicero* certain Men brought from *Greece* to *Rome* a forged Will of *L. Manlius Bassus*, who left a great Estate; and that they might make it of Force the more easily, they made *Marcus Crassus* and *Q. Hortensius*, two Men of the greatest Reputation at that time, Heirs with them. These Men mistrusted that the Will was forg'd; but because they were not concern'd in the Forgery, they thought they might take the Advantage. But *Cicero* blames them with Reason for their Compliance, by which Means they became not only Favourers and Defenders, but Complices in the Injustice, *De Offic.* l. iii. c. 18. See also *Valerius Maximus*, l. ix. c. 4. §. 1. To this we may add the excellent Sentence which *Cicero* immediately subjoins, *Mibi quidem etiam veræ hereditates non honesta videntur, si sine malitiosis blanditiis officiorum, non veritate, sed simulatione quaesitæ, i. e.* To me those real Inheritances seem not honest which are gained by fawning Courtships and Attendance, and not by fair Dealings.

³ The Latin is, *Religiosissime soles custodire defunctorum voluntatem, quam bonis hereditibus intellexisse pro jure est. Neque enim minus apud nos honestas, quam apud alios necessitas valet.* Again, *Ego propriam quandam legem mihi dixi, ut defunctorum voluntates etiamsi jure deficerentur, quasi perfectas tuerer.* And again, *Hoc, si jus aspicias, irritum est, si defuncti voluntatem, ratam & firmum est: mihi autem defuncti voluntas (vereor quam in partem Juriconsulti, quod sibi disturus, accipiant) antiquior jure est, usque in eo, quod ad communem patriam voluit pervenire.*

take notice of that irregular Will in *Lucian*², where a poor Man bequeaths to one of his rich Friends his Mother to keep, and to another his Daughter to match her off, and to give her a Portion. Yet still on the other hand he is not to be censur'd, who doth not refuse an Advantage allow'd him by the Laws of his Country².

The Questions which remain are to be determin'd by the Customs and Ordinances of particular States³: As how far a Man may be authoriz'd to divide his Estate amongst many, either all Co-heirs, or some Heirs, and others Legatees. As likewise, Whether an Inheritance passeth down with a full conveyance of Right; or whether under the nature and burthen of a Trust? On which Points the Civilians discourse at large⁴. But this the Law of Nature manifestly requires, That the Burthens and Debts incumbent on an Estate shall lie on the Heir⁵, by whatever Man he succeeds: Yet not beyond the Value of the Inheritance, nor so as that he should be bound to make up the Deficiency out of his own separate Fortunes, unless he hath laid a particular Obligation on himself to that purpose.

IX. We usually distinguish from Testaments, Donations in case of Death; by which both Parties living and consenting¹, one transfers on the other a Right to his Goods, if he chance to die. Of these there seem to be two kinds especially remarkable.

One², When a Man conceiving himself to be under a probability of mortal Danger, so grants a thing to another, as not to make it his immediately upon his acceptance, but only if the Danger really proves mortal, as he expects: Or, when a Man makes his own Death, which he apprehends to be near, on account of the present Danger, the Condition of his Grant; so that if he escape the Danger, the Grant is void³. See an Example in *Homer*, *Odyss.* lib. xvii. ver. 78, &c. It may not be altogether improper to rank under the same Head the Act of King *Philip* in *Livy*, lib. xxxii. c. 38. who finding himself under a necessity of engaging with the *Romans* in Battle, delivered the City *Argos* to *Nibis*, as 'twere to hold in trust; to be restored in case he got the Victory, but to be kept, if he proved unfortunate.

² In *T. nar.* p. 47. t. 2. Edit. *Amz.*

MR. BARE. NOTES ON §. VIII, IX.

² See Mr. *Hertius's* Discourse, *De Collisione legum*, Sect 3. §. 2. in Tom. i. of his Comments and Opusc. Mr. *Bulsius* seems to be of a contrary Opinion in his Treatise, *De Testamentis Summorum Imperatorum*. c. 1. §. 8. but I do not see that he has answered our Author's Reasons. Another thing in question is, Whether he that has disannull'd a Will can in Conscience make void all the Legacies? And whether one may always in Conscience dispense with the Payment of some Legacies of a Testator, which are null in Law, tho' the Will is otherwise valid in itself? To this I answer, That if a Testator has given any Legacies for just Causes, as for an acknowledgment of some Services done him to procure some Advantage to Society, &c. 'tis not only Knavery but Injustice not to discharge them. The Reason is, because he knows it to be the Will of the Dead, tho' there is some defect in the Form, and his Will is so reasonable, that sometimes the Persons concerned have an imperfect, if not a perfect Right, to require the Gifts. Whereas, when he that succeeds a Person intestate, makes void his Will, he may suppose that the Testator was surpris'd, or that there was some Fraud in making the Will; and so much the more, if the Testator labours to disinherit the lawful Heir, it is very hard to observe exactly all the necessary Formalities; so that the Heir at Law may look upon it as a thing morally impossible, and by consequence count that Act null which is not agreeable to Law, by virtue of which he has a Right to claim the Succession, reserving to himself (as I have said) the Execution of all those wise and equitable Disposals which may be found in a Will so made void.

³ See about the Subject of Successions, as well by Law as Will, the second Part of Mr. *Darwin's* Civil Laws in their Natural Order, and the Interpreters of the *Digest*, l. xxviii. to xxxix. exclusive, or upon the *Institutes*, l. ii. hem t. 10. to the End.

⁴ This is when the Heir is obliged to another, either at the end of a certain Term, or in some Case, to give up either all the Inheritance, or Part of it only. See the *Institutes*, l. ii. t. 23, 24. and the Interpreters upon the *Digest*, l. xxxvi. t. 1. of *Senatusconsulto Tertulliano*. Moreover, a Feoffment in trust is often odious, because it is used to evade the Law, or to deprive the lawful Heirs. See an excellent Passage to this Purpose in Mr. *de la Beuvrie's* Characters, in the Chapter, Of venal Estates, printed at *Braffils* in 1697. The Character begins thus: "The Law which forbid Murder, doth not comprehend in it the Prohibition of a Sword, Poison, Fire, Water, Treachery, open Force, and all the means by which Murder may be effected."

⁵ See the following Chapter, in the last Section.

¹ *Mortis causa donatio est, quae propter mortis sit iustitiam* — cum re ipsa sit quae vellet haberi, quae est mortis causa, magis est cui donat, quam heredem suum, *Instit.* l. ii. t. 7. §. 1. See the Interpreters upon this Title, and upon that of the *Digest*, which is quoted in the following Note.

² *Tertium genus esse donationis ait, si quis periculo [mortis] metus a se datus, ut statim vel ad accipientem, sed tunc demum, cum mors intervenit, Dig.* l. xxxix. t. 6. *De mortis causa donat.* &c. leg. 2.

³ *Aliam esse [speciem] mortis causa donati, cum datus sit periculum, ut statim vel ad accipientem, sed tunc demum, cum*

Add. *Diodor. Sic.* lib. xv. c. 19. p. 341. C. Ed. *Rhedom.* Where he speaks of *Amynas* his Gift to the *Olythians*.

Thus *Hercules* speaks in *Euripides*, *Alcest.* ver. 1020, &c.

Γυναῖκα δὲ μοι σῶσαι λαβῶν
 Ἔως ἂν ἴππους δεῦρο Θρηῖμα, ἄγων
 Ἐλθῶ, τύραννον Βισθόνων κατακταίνῳ
 Πράξας δ' ὃ μὴ τύχοιμι, νοσήσαι, ἢ γὰρ
 Δίδωμι τήν δὲ σοῖσι πρόπολον δόμοι.

With you I leave the Dame, to be restor'd
 When I return, and lead in Triumph home
 The Trojan Steeds, when first the Tyrant's Fate
 This Hand hath seal'd. But if my Wishes fail
 (Which Heav'n avert!) then keep her as your own.
 Add a new Honour to your Family.

The other, When any Person makes over to another his Possessions after his Death, reserving to himself in the mean time the Possession, and the full Use and Profits; but in such a manner, that the Donation shall, before his Death, be revocable on some particular Cause; as if the other Party should afterwards offer some signal Injury; or if he himself, being childless when the Grant was made, shall afterwards have Issue of his own.

But, if the Donor made his Grant reverfible, not on any external Condition, but meetly of his own Pleasurè, then the Grantee shall acquire no Right, so long as the Donor retains a natural Ability to change his Mind; that is, so long as he continues Master of his Reason. For as, on the one side, he is not under any Obligation who may release himself, when he pleaseth, without any Payment or Performance; so on the other side, a bare Hope, which may be taken away purely at another's Fancy, cannot come under the Name of Right. The Right therefore of the Grantee shall commence only upon the Donor's Decease; and consequently this Act approacheth near to the case of a Testament, strictly so call'd.

But, when a Person mov'd with the Thoughts of any Danger which threatens his Life, so grants

a thing, as to make it immediately upon acceptance belong to the other Party, and doth not recal it, upon escaping the Danger, then the Promise shall be rather put in the Class of ordinary Donation⁴, or such as are made without any regard to Death. Though in case the Grant was very large, and such as will weaken the Donor's Estate, much more if it comprehend the whole Possession, it shall be presum'd to have been made

only upon his present Prospect of Death, and not to hold good, unless he so miscarried.

That kind of Grant likewise, by which a Man transfers Property on another, without the Power of retracting, yet so as to enjoy the Use and Property during his own Life⁵, is to be reckon'd amongst the ordinary Donations, or such as are made between living Parties.

MR. BARB. NOTES on §. IX.

⁴ *Ubi ita donatur mortis causa, ut nullo casu revocetur, causa donandi magis est, quam mortis causa donatio, & ideo perinde haberi debet, atque alia quævis inter vivos donati.* Ibid. leg. 27.

⁵ See what is said, l. v. c. 4. §. 1. n. 1. following, concerning Gifts among the Living.

CHAP. XI.

Of Successions to Persons who die intestate.

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| <p>I. Succession to Persons that die intestate depends upon a Presumption of their Will.</p> <p>II. Yet as it is agreeable to Reason.</p> <p>III. Children are preferred before all others.</p> <p>IV. Parents are to maintain their Children.</p> <p>V. What is meant by Maintenance.</p> <p>VI. Who are to be accounted Children.</p> <p>VII. What more than Maintenance is due to Children, and why.</p> <p>VIII. It is not necessary that Goods should always be equally divid'd among Children.</p> <p>IX. Legitimate Children are to be preferred before natural.</p> | <p>X. Provided that the Father owns them.</p> <p>XI. Or does not disinherit them.</p> <p>XII. Of the Right of Representation.</p> <p>XIII. Parents must succeed for want of Children.</p> <p>XIV. And for want of them the nearest Relations in their Order.</p> <p>XV. Whether Friends may be prefer'd before Kinred?</p> <p>XVI. Or Benefactors before Relations?</p> <p>XVII. The Order among Kinred.</p> <p>XVIII. The Civil Laws allow a larger Power of disposing Estates.</p> <p>XIX. The Heir of the deceased, how far he is obliged to pay his Debts.</p> |
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According to the disposal of the Law of Nature, without any particular express Act of the former Lord, the Properties of things are said to pass in Successions to intestates¹. For Property having been at first endued with such a Force and Power, as that by virtue of it a Man was enabled not only to do what he pleas'd with his Goods during his own Life, but likewise effectually to transfer them upon others after his Death; it did not seem probable, that if a Person was found to have made no Settlement of his Goods, whilst he lived, he was therefore willing they should after his Death become, as it were, derelict, and lie free to any that would take possession of them². In this case then natural Reason suggest'd, That Men ought to follow the *presum'd Will* of the deceas'd, or such a Disposal as he might most probably be suppos'd to have design'd. Now in doubtful Matters every one is suppos'd to have design'd that, which is most agreeable both to his *natural Inclination*, and to the Engagements of his Duty³.

II. The regular Course of *natural Inclination* is this, That we should labour to make the most plen-

tiful Provision for those who descend from our own Body, and next to these for the rest who are allied to us in the degrees of Consanguinity: For nearness of Blood commonly uniteth and engageth Mens Minds in a particular Affection; and almost all Persons have this desire implanted in them, that they especially wish well to their own Families, and would have them succeed and flourish as much as possible.

As to natural Duties, one of the chief of them is, *That we take due Care for the maintenance of those whom Nature hath oblig'd us to cherish with a peculiar Concern and Regard; as likewise, that we show our selves grateful towards our Benefactors.*

Now altho' it might so happen, that these Presumptions should often vary from the real Intention of the deceas'd, yet the Peace and Tranquillity of Mankind required, That no particular Conjectures should be easily admitted against these common Rules; since by this means a Door would be opened to endless Contentions. And therefore the present Affair in the Intentions of the deceas'd is consider'd, not so much according to what it was, as

Pindar. Olymp. Od. x.

Πλεπτος ο λαχόν ποιμένα, &c.

Those Riches grieve the dying Man

Which Strangers Hands must seize

³ Comp. *Græc. L. ii. c. 7. §. 3.*

MR. BARB. NOTES on Chap. XI. §. I.

¹ A great part of derivative Acquisition is founded upon the tacit Will of the dead Person, it is consequently natural according to the Division laid down above in c. 10. §. 1. n. 1. But because there may intervene divers Dispositions of the civil Law, which for the promoting of Peace do or ought to regulate as exactly as possible all that concerns Successions to Persons that die intestate, in this respect Acquisition is mixt, since it contains as much and sometimes more of the civil than of natural Right,

according to what it ought to have been, and agreeably to the Rules of *Duty* ¹. Amongst which one of the first Rank is this; *That no Man give occasion to Ruptures and Quarrels amongst others.* Hence it is expedient for the common Peace, that some general Method should be follow'd in this Business, though the Intention of some few should happen to be neglected, rather than that, by endeavouring to satisfy the Desire of every private Person, we should involve our selves and others in endless Difficulties.

Besides, he who would have his own particular Purpose absolutely obey'd, ought to have expressly signified thus much. Thus nothing is more usual, than for a Father to love one of his Children with a more ardent Affection than the rest: And then who doubts but he is willing an extraordinary Provision should be made for his Darling's Subsistence? Yet if he die intestate, they shall divide the Inheritance by equal shares; not as if 'twere repugnant to the Law of Nature to allot one Child a larger Portion than another, but because there would arise infinite Disputes in Families, if the Father's Affection were to be the Measure of parcelling out Estates. The same Inconvenience would follow, if a Man dying childless should leave several Brothers, to whom he express'd very different degrees of kindness in his Life-time.

Again, 'Tis no uncommon thing for a Man at his Decease to leave behind him a Kinsman in some remote Degree, for whom he had never any particular Passion, and to whom he was never obliged for any Service or Favour; whereas, on the other side, he may have ow'd all his Fortunes to the Kindness of a Stranger: Who will not say, That the deceas'd set a much greater Value on his Benefactor in this Case, than on his Relation? Yet, because to enter into a Comparison between the Ties of Blood, and of Gratitude, must have occasion'd many Controversies difficult to be resolv'd, it hath been the Judgment of all Nations, that in the case of Intestates a Kinsman shall be preferr'd to a Patron or Benefactor. Especially, since if a Person on account of a Kindness bestow'd were to

stand in the Roll of Inheritance, before the Relations of the deceas'd, he might seem to have performed the former Act more as a Usurer, than as a Friend. But if the Benefactor were preferr'd in the express Will of the deceas'd, 'tis but Equity that the said Will should be obeyed.

From all which it appears, that natural Reason in deciding the case of Succession, upon default of testamentary Disposals, regards the Intention of the deceas'd Party, not as it was strictly in itself, concerning which there is often very little Assurance; but according as it agrees with the common Inclinations of Mankind, and with the Measures of Duty, and so as that no Fuel may be administered to Controversies and Contentions ².

This Judgment of natural Reason is seconded in all States by civil Ordinances; as well that the Avarice of some Persons might not stir up desperate Quarrels amongst those who seem'd to have equal Reason on their side; as that this whole Affair might be wisely accommodated to the publick Safety.

III. In the Succession therefore to *Intestates*, by the guidance of Reason, and by the consent of all the known Kingdoms, Children have the Preference of all others, even of Parents themselves ¹. See 2 *Corinth.* xii. 14. *Rom.* viii. 17. *If Children, then Heirs.* *Aristot. Nicom.* viii. 14.

Parents have a more certain knowledge that such Persons are their Children, than Children can have that such are their Parents. And in this case there seems to commence a stronger Relation from the Cause to the Effect, than from the Effect to the Cause.*

Isaevs, Orat. V. †.

The Law it self assigns over to the Son the Goods of the Father, and allows not him to make a contrary Will who hath legitimate Issue. *Idem. Orat. ii.* *If a Man deceasing leave Daughters lawfully begotten, he can give away nothing, nor make any disposal without their Consent.* And again, a little after, *The Law says, a Man shall dispose of his Goods at his own Pleasure, if he leave no legitimate Sons; but if he leave Daughters, their Pleasure is to determine his Disposal, and not his own. Therefore with their Daughters Consent they may*

² Add *Bæcker. ad Grat.* l. ii. c. 7. §. 13.

MR. BARB. NOTES on §. II, III.

¹ This may suffice in my Judgment to answer the Difficulties which Mr. *Bynkerhoek*, *Observ.* l. ii. c. 1. propounds, where he says, "That Fathers and Sons do often not love each other, and Brothers rarely live amicably, much less other Relations: That they also who are nearest related by Blood most easily quarrel, and conceive more implacable Hatred against each other than Strangers or indifferent Persons. The same Author also maintains, That to prove that the Laws are not founded upon the Presumption of the Will of the Dead, 'tis sufficient to consider that a Wife is excluded from succeeding to her intestate Husband, although she must be supposed dearer to him than a Parent, and quotes thereupon, *Gen.* ii. 24." But besides that there are diverse degrees of Affection, and tho' he may love his Wife with much Passion, as it sometimes happens, though not often, it doth not therefore follow, that he would have her to be the Heir of all his Goods. It only proves, that in ordering Successions to intestate Persons, Regard is had to the Interest of the State, and the Preservation of Families, as well as the ordinary Inclination of private Persons, who nevertheless often agree in their Desires with the Intentions of the Lawyers. For who is there that does not desire that his Estate should go to his Family? Moreover, Mr. *de Bynkerhoek* furnishes us with Arguments that the *Roman Law* engages us to follow, if not altogether, yet at least so far as the publick Good permits the Will and Affection of the dead Person, as appears from a whole Chapter of the same Work, l. i. c. 19. where the Author explains the Law very well, which says, That a Father discharges his Duty as he ought when he makes his Son his Heir. *Perinde habebitur utique si sua manu pater tuus te heredem instituerit, FUNCTUS DULCI OFFICIO*, *Cod.* l. ix. t. 23. *De his qui sibi adhibent in testam.* leg. 1. We also know, that Wives are not altogether excluded from succeeding to the Goods of their Husband, and that the Laws call us to them, when the Relations by Father's and Mother's side are wanting. *Maritus & Uxor ab int. sibi sibi invicem pro antiquo jure succedunt, quoties deest cuius parentum liberorumve seu propinquorum legitima vel naturalis successio. sibi excluso*, *Cod.* l. vi. t. 18. leg. 1. *Unde Vir & Uxor.* See the same Title in *Digeſt.* l. xxxviii. t. 11. and the Interpreters upon it.

² *Cum ratio naturalis, quasi lex quaedam tacita, liberis parentum hereditatem adlucet, velut ad debitam successorem eos vocando, propter quod & in jure civili suorum heredum nomen iis inductum est, ac ne iudicio quidem parentis, nisi meritis de causis somnoverit ab ea successione possint, &c.* *Dig.* l. xlviii. t. 20. *De bonis damnatorum*, leg. 7. princ. See also Mr. *Bynkerhoek's* *Observations*, l. i. c. 19. above quoted.

* *Μᾶλλον ἰσασιν οἱ γονεῖς τὸ εἶ ἂν τῶν ἢ τὰ γεννηθέντα, ὅτι ἐκ τήτων καὶ μᾶλλον συνωκείσονται τὸ ἀφ' ἧ τῶ γεννηθέντι, ἢ τὸ γεννημένου τῶ ποιῶσαντι.*

† *Isæus's* Greek is, *Ὁ νόμος αὐτὸς ἀποδίδωσι τῷ υἱεὶ τὰ τῆ πάρος, καὶ ἡ διαθήκη ἐξ ἴτης ἀν ὡς καὶ αἱ γονεῖσι.* *Orat.* 5. And again, *Ὅτι γὰρ διαδέσθαι εἴτε δεῖναι εἴτε εἶναι, ἔστι τῶν ἑαυτῶ, ἀνευ τῶν θυγατέρων, ἐν τῆς καταλείπων ἡμεῖς τελευτῶν.*

give and bequeath, or appoint any Method of Succession. But without such Approbation they cannot adopt an Heir, or put their Fortunes into other Hands.

Add. Lib. xviii. tit. 20. Leg. 7. Princip. D. De bonis damnator.

Julian in Casarib. §. It is the legal Custom to let the Sons succeed to what the Fathers possess; and this is a Rule which we all desire to see observed.

Thus Valerius Maximus observes, Lib. vii. C. 7. Sect. 2. that the procreationis vinculum, the Band of Generation, is the strongest and closest Tye which can affect Mankind.

That which so highly favours the Childrens Claim is, not only the Obligation laid by Nature on their Parents to provide for their Maintenance and good Institution, but likewise that strong and vehement Affection, which can only be extinguish'd (and that very rarely) either by the enormous Wickedness of the Children, or by the unusual Barbarity of the Parents.

IV. As to that Maintenance, which Parents owe their Children¹, it hath been doubted by Authors, whether the Obligation to pay it were perfect or imperfect, or whether it belong'd to expletive or to attributive Justice². 'Tis the Opinion of some, That Parents do indeed owe their Children Maintenance, but then 'tis by the latter kind of Justice only, and not by the former; so that Parents would act very inhumanly, should they deny them this Assistance; yet Children have no Right to challenge it from them against their Wills, this being the proper Effect of expletive Justice: though civil Statutes may invest Children with a full and perfect Right in this Matter. But we are rather inclined to think, That Parents lie under a perfect Obligation to maintain their Children, so long as they are unable to maintain themselves; and this Duty seems to be laid upon them, not only by Nature itself, but by their own proper Act, in bringing them into the World³. For they would be in the highest manner injurious to their Issue, should they have given the Children Life, for no other Reason, but that they might afterwards see them perish. By the Act of Generation therefore they seem to have voluntarily bound themselves, to endeavour as far as in them lies, that the Life which they have bestowed shall be sup-

ported and preserved. And thus the Children will have a perfect Right of receiving Maintenance from their Parents. Yet this Right is hinder'd from producing all its Effects by the natural Weakness of Children under that Age, in which they cannot provide for their own Support. And consequently they do not so much want Right as Power and Strength to execute that Right; only in some Points the civil Ordinances help them out, and compel their Parents to keep and feed them, upon refusal. Though, through the wise Ordering of the Creator, the natural Affection of Parents is of so great Force, as that, commonly speaking, they joyfully undertake and discharge their Duty, without the Compulsion of the civil Government.

V. Not only those things which are necessary for the preservation of natural Life fall under the Term of Maintenance or Alimony, but those likewise which fit and prepare a Man for a social and civil Life. And the former are due, 'till such time as the Children are able to support themselves by their own Industry. As for the Measure of what ought to be spent on Education, in training up Children for a civil Life¹, it is to be stated according to the Fortunes of the Parents, and the Genius and Capacity of the Children. Thus much at least is required, That they be enabled to become honest and useful Members of human Society. But this is a general Rule in the whole Affair; That as Nature doth not command Parents to pinch and defraud their own Inclinations, and to make themselves miserable for the sake of their Issue; so a Parent placed in a high and wealthy Condition is, no doubt, in fault, if he do not take care that his Children be brought up after the most exact and accomplish'd Manner of Institution.

VI. Under the general Name of Children¹ are comprehended not only those of the first Degree, but those too of the second, &c. whether descending from Sons or Daughters; in case their nearer and more proper Parents are not able to maintain them².

Father, Maintenance is due not to legitimate Children alone; but to natural, and even to incestuous Issue³. For what Reason is there that the

¹ Vid. Grat. dist. loc. Sect. 4.

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¶ His Words are, Πᾶσι νομιμῶν ἐπιτρέπειν τὰς διαδοχὰς καὶ τὸ τοῦ πάντες εἶχοντι.

¹ Every one almost knows, that among the ancient Greeks and Romans 'twas thought that they had a Power to expose or slay their own Children, and that Christianity had much ado to abolish that barbarous Custom, as appears by Mr. Neaht's Treatise, De pœnis expositivæ & necis apud veteres, which was reprinted in 1709.

² See lib. vi. c. 2. §. 4. following.

³ See lib. vi. c. 2. §. 6, 12. following.

¹ Liberos appellatio nepotes & pronepotes, cæterique, qui ex his descendunt, continentur — Etenim ideo filios, filiasque concipimus atque edimus, ut ex prole eorum curamque diuturnitatis nobis memoriam in ævum relinquamus, Dig. lib. l. t. 16. De verborum significatione, leg. 220. See also leg. 56. and Inst. l. i. t. 14. Qui testamento tutores dari solent, leg. 5.

² Ipsum autem filium vel filiam, filios vel filias, & deinceps, alere patri necesse est, non propter hereditates, sed propter ipsam naturam & leges, quæ & à parentibus alendos esse liberos imperaverunt, & ab ipsis liberis parentes, si inopia ab utraque parte vertitur, Cod. l. vi. t. 61. De bonis que liberis in potestate patris, &c. leg. 8. §. 5. See also the Digest, l. xxv. t. 3. De agnoscendis & alienatis liberis, leg. 5. §. 1. 5. and leg. 8.

³ See Gratius, l. ii. c. 7. §. 4. numb. 4. and §. 6. and Mr. Daryal's Civil Laws in their Natural Order, Part II. l. i. t. 1. Sect. 2. §. 8. 'Tis certain that a Bastard has as near a Relation to his Father as a lawful Child; and many among the Greeks made no difference between these two sorts of Children, as Mr. Le Clerc has observed upon Gen. xxi. 10. where he alledges this Authority,

Ὁ δὲ νόμος τοῖς γνησίοις ἴσον θένει
Ἄλλω τὸ χρηστὸν γνησίαν ἔχει φῶσιν

Soph. in Alceadis apud Stob. Serm. 77.

A Bastard's equal to a lawful Heir,
An honest Man is always rightly born.

The Egyptians, as Mr. Le Clerc proves in the same Place by a Passage out of Diodorus Siculus, counted none of their Children Bastard, though they were begotten of their Slaves which they had bought. And we may observe, that the Patriarchs of the Old Testament had an equal Regard to the Children of their Concubines, as of their lawful Wives, as appears from the Example of Jacob, who divided his Goods equally between the Children he had by Leah and Rachel, and those he had by his two Concubines. The same thing is still in use among the Mahometans, as our Author observes below, §. 9.

poor innocent Infant should be suffer'd to famish for another's Sin? Yet if the latter be left together with the legitimate Issue, they shall not easily challenge to be admitted to equal Shares, unless the Parents made express Declaration to this Purpose.

In respect of these several parts of Maintenance, upon the Parents Decease during the Minority of the Children, the Inheritance is not only theirs, if he died intestate, but farther, it cannot rightly be taken from them by his express Will, so far as is necessary for the obtaining this End. For it doth not seem probable that a Child of these Years should be capable of committing any such Offence as might render him unworthy of so needful a Support.

VII. Whatever exceeds this Proportion of Maintenance, is due to the Children, when able to provide for themselves, not so much by any express Command of the Law of Nature, as upon this Principle, That, commonly speaking, Parents desire that none should fare better than their own Children¹. Therefore 'twas a very singular Disposal, that of Crates the Theban, who lodg'd his Money in the Hands of a Banker upon these Terms, *That if his Children proved ignorant, it should be restored to them; but if they happen'd to be Philosophers, it should be distributed amongst the common People*; because Men of that Profession could be in want of nothing. As to what some have advanced, That Parents get all for the sake of their Children, and therefore the Children, even in the Parents Life-time, have such a Right to their Goods, as shall be valued against them, in other Cases, beyond the Necessaries of Maintenance; this is absolutely false: For, every Man in his Gettings hath first of all an Eye to himself, and labours chiefly on his own Account. *Horat. lib. ii. Epist. 2. v. 190, &c.*

*Uvar, & ex modico, quantum res poscet, acervo
Tollam, nec metuum quid de me judicet haeres,
Quod n n plura datis invenerit.*

*Juv. Sat. xiv. ver. 136, 137.—Manifesta phrenesis
Ut locuples moriatis egenti vivere fato.*

But what remains above his private Necessaries, he is willing should pass to those who are dearest to him, as commonly, his Children² are presum'd to be. And Children have thus far only a peculiar Title to hope for their Parents Estate, as that in case of no express Will to the contrary, their Claim is prefer'd to all others; and because it very rarely happens, that Parents are induc'd to lay aside this ordinary Affection.

It is well enacted by the Roman Laws, *That every Parent, who disinherits his Child, shall be oblig'd expressly to give his Reason for so doing*; and that some certain Causes only shall be sufficient to justify him in this Proceeding. Nay farther, the same Laws gave the disinherited Children an Action³, *de inofficiso Testamento*; *Of a Will not made according to natural Affection and Duty*. The Design of which was not to bring into Dispute, Whether or no the Testator had a Power of transmitting his Goods to others, rather than to his Children, upon just Causes; but to discuss and examine the Reasons which mov'd the deceas'd to make a Settlement contrary to the common Inclinations of Mankind. And if, upon such a Hearing, it was discovered that the Father thus neglected his Issue, either through his own absurd Fanty and Humour, or through the fraudulent Intrusion of others, the Inheritance was by publick Authority avowed to those to whom it would otherwise have descended, had the Father consulted with Reason and Conscience in his last Disposal. And therefore Cicero⁴ well replies upon *Eucius*, who charg'd his Client *R. Scius* with a Design to disinherit his own Son, *It ought to have been the Business of the Accuser, to lay open all the Sins and Vices of the young Man, which might be suppos'd able to incense the Father to such a height, as that he should once entertain a Resolution of doing Violence to Nature it self, of bumping that Affection which was so deeply rooted in his Mind; and, in a word, of forgetting utterly that he was a Father*. 'Tis remarkable under what Colour the disinherited Children, by the same Laws, mov'd for Relief: For it being necessary that they should ground their Complaint on a Supposition that the Cause of their Disinheritance was unjust, they pretended in the Form of the Action, *That their Parents at the time of making such a Will had lost the use of their Reason*.

Still, as to other matters, a Father ought so to favour his Children, as not to lay aside his just Regard to other Duties. Hence, when he may be judg'd to have made sufficient Provision for his own Family, he is not in the least hindred from imploying his Goods in Acts of Gratitude and Liberality⁵, though to the lessening of his Childrens Fortunes. Thus in case a Man hath either receiv'd extraordinary Kindnesses from another, or is able by a seasonable Beneficence to put some great Genius, now struggling with Poverty, into a way of doing great Service; what reason is there but that he should be allow'd to devise some part of his Goods to such excellent Uses? It's plain, Antiquity highly celebrated the Action of King *Attalus*, who having been oblig'd by his Brother *Eumenes* with very

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¹ This short Story might have been put better in another place.

² See Mr. *Thomasius's* Discourse, entitled, *De legitima civentis*, c. 3. §. 23, &c. publish'd and maintain'd by way of Disputation at *Hall* in 1700, where it appears what we are to think of Legitimacy, or of that portion of Goods, be it greater or less, of which according to the Laws and Customs, Children can't justly be deprived by the Authentick Will of their Father. For, as *Grotius* observes, l. ii. c. 7. n. 3. Natural Right obliges to give a necessary Maintenance to Children, but what is more than that, they have no other Right to than what the Constitutions of the civil Laws give them. But if any desire to know the exact Quota of the Goods that ought to descend to Children, and other things which concern their Legitimacy, let them consult the Interpreters of the *Digests* quoted in the following Note, and Mr. *Dumort's* Civil Laws in their Natural Order, Part II. l. iii. t. 3.

³ *Inofficiosa querela*, which is when the Disposals of Parents are looked upon as contrary to their Duty. See upon this Subject, *Instit. l. ii. t. 18.* and *Digest. l. v. t. 2. De inofficiso Testamento*, as also Mr. *Dumort's* Civil Laws in their Natural Order, Part II. l. 3. t. 2. and the Observations of Mr. *de Beker*, 1702, l. ii. c. 12.

⁴ Cicero's Words are, *Id erat certi accusatoris officium, qui tanti sceleris argueret, explorare vitia vitia & peccata filii, quibus incensus parens potuerit animum inducere, ut naturam ipsam convinceret, ut animam illius peccatis ipsam ejiceret ex animo, ut denique patrem esse sese oblivisceretur.*

⁵ See Mr. *Le Clerc's* Reflections upon what he calls good or bad Luck in the matter of Lotteries, c. 12. p. 189, &c.

singular Favours, left his Kingdom to *Eumenes's* Son, though he abounded in male Issue of his own ⁷.

VIII. Neither doth a Father lie under any Necessity of dividing his Goods amongst his Children in equal Shares; but he may assign to one or two somewhat above the rest, as an extraordinary Bounty; either on account of singular Merit, or of great and illustrious Hopes, or even of particular Affection ^a. So likewise in distributing Portions, a just regard may be had to the Credit of the Family, that it may hereafter retain its Strength and Splendor. If this Interest cannot be secur'd upon an equal Division of the Patrimony between many Children, the Father may, without any breach of the Law of Nature, devise the chief part of his Goods to one, and command the rest to sit down contented with smaller Portions. Hence the Rights of Primogeniture ¹ obtain'd among many Nations, which according to the most ancient Institution, conferr'd on the eldest Son the regal Government of the Family, the domestical Priesthood ², and double Share of what his Father possessed, Which double Proportion was design'd to defray the charge of Entertainments, and of religious Ceremonies; as *Grotius* conceives ^{b c}.

On the contrary there have not been wanting Nations, where the younger Brothers succeed to the largest Share of the Inheritance, or at least have their Option, to choose what part they like.

Which Custom is built on this Principle, *That the elder Brothers have for a long time enjoy'd the Benefit of Education from their Parents; of which the younger being often depriv'd by too untimely a Loss, they deserve some Consideration to requite and comfort them under their Disadvantage.*

Tho' the latter of these Institutions seems more agreeable to low and mean Families, the former to the great and noble.

So again, when Daughters marry into other Families ³, 'tis not necessary that they should receive Fortunes out of their Father's Estate equal to

their Brothers Shares. For 'tis a very foolish Argument to imagine, that a Father must needs act contrary to his Duty, in making an unequal distribution of his Goods amongst those whom he hath equally begotten. Therefore *Pliny* ^d speaking of a Lady who had left Two Thirds of her Estate to a Nephew, and but One Third to a Niece, calls it, *Honestissimum Testamentum, A most honest and worthy Testament.*

And hence too it may be appointed not only by Statute, but by bare Covenant likewise, That Children born in Concubinage, or in such Marriage ^e as is constituted good and just only in a natural sense, not in the Eye of the Law, shall claim no more than necessary Maintenance, or at least shall be excluded from the main Inheritance ^e.

And here, by the way, we cannot but wonder why *St. Austin* ^f should pass so severe a Censure on the *Voonian* Law, by which female Issues were incapacitated to receive an Inheritance above such a certain Sum. It's plain the *Spartan* Law was far more grievous, which utterly forbad the giving Portions to Virgins; for this Reason, as *Plutarch* tells us ^g; *Lest some should remain unmarried for want of larger Fortunes; and others again be curted for their Riches; but that every Man in seeking out a Partner for himself, should look wholly into the Manners of the Woman, and make Virtue alone the Rule and Standard of his Choice.* Nevertheless, this is a Point which requires great Caution and Prudence, lest a Father should sow the Seeds of Envy and Hatred amongst his Children, if, without very weighty Cause, he should seem to have treated with unequal Favour those who were equal in Merit and ^h Degree. And the Divine Law of *Deut* xxi. 17. is grounded on the strongest Reason; lest the Father, charm'd with the Enticements of his now beloved Wife, should either frame a false Cause for discarding the First-born, the Son of a former hated one; or should catch at every little Failing to his disadvantage. 'Tis indeed altogether the safest Course ⁵,

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^a See *Gen.* xviii. 22. ¹ Add *Deut.* xxi. 17. Of the extraordinary Prerogative of the First-born amongst the *Japanese*, see *Bern. Varon. Descript. Japon.* c. 15. ² In *locum Deut. cit.* ³ *Lib.* vii. *Epist.* 24. ⁴ *Vid. Grot.* l. ii. c. 7. §. 8. *sub fin.* & *Beeler.* ad d. l. ⁵ *De Civit. Dei.* l. iii. c. 31. His Words are, *En lege quid iniquius dici aut cogitari possit, ignoro, I know not what could be said or thought of more unjust than that Law.* The Law he speaks of was made at the Motion of *Cato* the Censor, and Enacted, That none should leave a Daughter above five and twenty thousand Sesterces in Inheritance, as *Paulus Manutius* (*de L. L. Rom.*) shews from *Deo. Call.* l. 56. Though *Africanus Pædianus* (*ad Orat. Cicer. in Verrem de prætura urb.*) reports the thing thus: *Voonius* preferr'd a Law, That no Consul, i. e. no very Rich Person, should make his Daughter his Heiress. He had said before, *The Antients call'd these Persons Consuls, who own'd themselves before the Consul to be worth an hundred thousand Sesterces.* Add *Liv. Epit.* l. xli. *Quintil. Declam.* 264. *Gell.* l. vii. xii. xviii. xx. ⁶ *Apophth. Lucan.* 227, 228. *Edit. Wech.* ^h See *Gen.* xxxvii. 4.

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⁷ The Story in *Plutarch* is of *Attalus Philadelphus*, to whom *Eumenes* his Brother when he died left his Wife and the Crown of *Pergamus*: For although he had several Children by his Queen, yet he left his Crown to *Attalus* the Son of her first Husband, till that Prince came to be of full Age to reign. Neither of these Examples is much to our Author's purpose.

¹ See upon this Subject *Mr. Budeus's* excellent Discourse, intitled, *De Successione Primogenitorum.* It is the third among his *Selenæ Juris. No. & Gen.* to which we may join another Discourse in the same Volume, intitled, *De Comp. offic.* §. 31, &c.

² It is not certain that Priesthood was a Right of Primogeniture. See *Mr. Le Clerc* on *Gen.* xxv. 31.

³ See chiefly the Discourse of *Mr. Perizonius*, *De Lege Voconia*, where he shews that that Law fixed at an hundred thousand Sesterces, which make 2500 Crowns of our money, the Portion of any Woman, whether an only Daughter or Sister.

⁴ Hence it is that Princesses and other Women of Noble Families, when they marry into other Families, sometimes renounce the Succession to a Kingdom, or to the Estates of the Families from whence they are descended; so that neither themselves nor Heirs can put in any Claim to them. See *Mr. Budeus's* Discourse, *De Testamentis Summorum Imperantium, speciatim Caroli II. Hispaniæ Regis*, c. i. §. 39, &c. and c. ii. §. 10, &c.

⁵ In general the safest distribution of our Goods when we die is according to the usage of our Country, in my Opinion. The Laws have better contriv'd it than we can, and we had better commit a Mistake by their Direction, than hazard it rashly by our own Choice. They are not properly ours, since a civil Prescription made without us has designed for the good of our Successors. And though we have some liberty allowed by them, yet I take it to be the greatest and most apparent Cause, why many are deprived of those Estates to which their good Fortune entitled them, and common Justice would have given them, and so we abuse our liberty without Reason to follow our idle and private Fanly. — We take too much to heart our Successions by a Male Issue, although we could make our names eternal, and value too much our vain Conjectures of what shall be, which fill us with childish Hopes. — 'Tis meer Folly to make extraordinary Choices upon the account of such Imaginations, in which we are so often deceived. The pleasant Dialogue of *Plato* between a Lawgiver and his People (*De Legibus*, l. xi. Tom. 2.) will be a Reputation to this Passage. Is it not then, say they, lawful for us, when we find our End approaching, to dispose of

our

not to recede in this Matter from the Direction and Disposal of the Laws of our Country. Which made my Lord Bacon^a observe, That younger Brothers, tho' otherwise commonly fortunate, are seldom or never so, where the elder are disinherited.

Hence it is, that in case the Father dies intestate, and the Laws of the Land ordain nothing to the contrary, Children succeed to the Inheritance with equal Shares: Because, when the Point is doubtful, those who stand related to the deceas'd in an equal Degree, are presum'd to have been equally beloved. Now those likewise are accounted equal Shares, which, tho' not strictly so, because inferior perhaps in Value to the rest, yet have been taken by any one of the Coheirs, either by his own Choice, with the consent of his Fellows, or by their Assignment, or by the Decision of Lots. *Quintilian's* Observation (Declam. v. p. 65, 66. Edit. Lugd. Bat.) is not unworthy our Remark. *We have the same natural Affection towards all our Children, without any Difference or Degree; yet taking each one of them by themselves, we commonly find some peculiar Reason for our Fondness, and without breaking the Equality of their Endowment to us, there is somewhat again, which by a tacit Instinct of the Mind engageth us to set our Love deeply upon each in particular, as if he were the only Object of it. One is recommended by his Precedency in Birth; another by the Innocence of Infancy; a third by a sweet Aspect, and a Face that invites a Kiss: Some are specially valued for their honest Gravity and severe Planness of Temper: In some we love their very Misfortunes and Calamities, and embrace with a peculiar Pity a maim'd Limb, or a weak and disemper'd Body. But still the general Equality holds good; whilst whatever any of them seems to want to render him amiable in one respect, is made up to him by some other Advantage above the rest.*

IX. But we are obliged to add on this Subject, that not only the Laws of particular States, but natural Reason itself allows more Favour to legitimate, than to natural Children; though the latter partake no less of the Father's Blood than the former. For they who owe their Birth to a Man's irregular Lust, without any serious Intention, can on no account enter into comparison with those who were begotten for the Increase and Defense of his Family, and upon the desire of having Heirs to succeed him. But if any Person is inclined to advance a natural Son to the Station and the Rights of legitimate Issue, in a state of Nature, he may fairly do it after he hath once taken care that no Injury shall thereby accrue to his Children who

are properly legitimate, or to any who have obtain'd the next Right after them: Under civil Government he must proceed in the Affair as the Laws permit and direct^b. *Aristophanes*^c reports, it was one of *Solon's* Laws, That upon failure of legitimate Offspring, the Inheritance shall be shared by the next of Kin: But that a Bastard shall not be deem'd next of Kin, nor any Relation be supersed between him and the proper Sons. On the contrary, amongst the *Mahometans*, as to the point of sharing the Father's Estate, there is no difference observed between the Sons of the Wife, the Concubine, or the Servant-Maid.

When a Man is desirous to raise Issue rather by a Concubine^d who hath engag'd herself to be true to his Bed, than by a proper Wife, for the Benefit of his Children by a former Marriage, the Sons of the Concubine shall, even without^e any express Will of the Father, be postpon'd; and upon receiving moderate Portions, shall leave the main Inheritance to the others. Yet in case a Man hath therefore taken a Concubine, that he might avoid the Pride or the Expences of a Wife, or will not admit her to his Name and Honour, or for some other political Reasons, or on account of some Covenant or Obligation which he lies under; then the publick Ordinances of the Commonwealth are to determine, whether such Children shall be admitted to an equality with others born in lawful Wedlock; or whether upon failure of these they shall exclude the next of Kin. For if the Man were absolutely free from the Restraint of positive Laws, I see nothing that could be offer'd in prejudice of the concubinary Issue in this Case; since the Cohabiting of their Father and Mother amounted in natural Consideration to a true Marriage: Especially if the Father in the Business of their Education, and in his Actions and Expressions of Affection towards them, hath never made any Distinction. Hence I should be of Opinion, that *Jacob's* Sons, born of his Handmaids, should have succeeded to equal Shares with the rest, even upon supposition that their Father had made no such express Disposal; because we do not find that he ever treated them in a different manner. But still, if the Father shall particularly declare, that he refuseth to enter into solemn Marriage, for this Reason, *That what he hath may descend to the nearest of his collateral Kindred* (as some political Considerations may now and then move a Man to do) then even the concubinary Children in the

^a Essay 7. towards the End. *Baecher. ad Grat. d. l. Sect. 8.*

^b Vid. l. v. t. 27. l. 6, & 7. *C. De Natural. Lib.*

^c In *Atthis*, ver. 1660.

^d Add

MR. BARB. NOTES on §. VIII, IX.

“our Goods as we please? O God, what Cruelty is this! May we not, according as we find our Family or Friends have been serviceable to us in our Sickness, old Age, or Business, give them more or less, as we think fit?” To whom the Lawgiver replies in this manner: “My Friends, who must soon die certainly, it is hard for you to know yourselves, and what belongs to you according to the Inscription at *Delfos*. As for me, who make Laws, I hold, that you know not what is good for yourselves, nor what is fit for you to enjoy. Both yourselves and Goods belong to your Family, as well in present as to come; but both your Family and Goods, belong more to the State. Wherefore, for fear that some Flatterers in your old Age, Sickness, or some other Humour, should draw you to make an unjust Will unbecoming you, I must take care. For having respect both to the publick Interest of the Nation and good of your Family, I will establish Laws, and make you sensible, that no reasonable private Advantage must give place to the publick. Go you on cheerfully, where human Necessity leads you, it belongs to me, who impartially regard things, to take as much Care as I can of the common good, and secure what you neglect.” This long Passage of *Montagne*, I hope, will not be tiresome to the Reader, l. ii. See also *Character* of Wisdom, l. iii. c. 14. n. 38. and *Bacon's* Sermon. Fidel. c. 7. in fine.

¹ See *Dr. Potter's* Antiquities of Greece, l. iv. c. 15. See also §. 6. n. 5. above.

² See lib. vi. c. 1. §. 36. following.

³ In the Original Latin the Words are, *Etiam expressa voluntate patris*, which is kept in all the Editions, the last put out by *Mr. Hertius* in 1706. not excepted. But there can be no doubt but the Word *scilicet* after *etiam* is omitted, and so it ought to be render'd as the *English* Translator has, without any express Will of the Father: For certainly, if the Father had declared his Will about it, it must have been followed,

fairest Case shall be allow'd to claim no more out of the Estate than a bare Maintenance, or whatever the Will of their Father, or the Laws of the Land assign them more ^a.

As the bare Law of Nature knows no difference of Rank and Degree, so according to that 'tis the same thing whether a Man have Issue by a Wife of a more illustrious, or of a more obscure Condition, provided she is honestly betroth'd to him. If therefore in any Place the Children of a less noble Mother are allow'd less Privilege and Favour, this is wholly owing to positive Constitutions. Which likewise, as they may upon account of some Reasons of State postpone the concubinary to the legitimate Race, and not admit them with the ascending Line upon failure of the descending: So they can scarce in Equity utterly exclude them, if there was no original Fault in the Act of Generation. But then these are by all means to be distinguish'd from Children begotten in a way naturally sinful, as in Adultery or Incest: Who, how clear soever they may be of any share in their Parents Guilt ^b, yet shall on account of it be obliged to rest satisfied with Maintenance only, and shall not be admitted with the other Children, who were begotten on the hope and prospect of inheriting their Father's Possessions. But the Parties could entertain no such hope of raising Heirs, when they incur'd in these Impurities; since they wish that their Sin may perpetually lie conceal'd, rather than be the means of producing those who should, as it were, bear publick Testimony to the Shame and the Wickedness of their Parents.

X. *Grotius* ^c farther remarks, that there are two more Conditions still required in the Succession to *intestates*, That the Children appear to have been really begotten by him whose Estate they claim, and that there be no Tokens extant of a contrary Will. For no Man shews a fatherly Affection for Children begotten by others; and a presum'd Will must always give place, when contradicted by an express Declaration and Disposal. As to the first of these Conditions, that such a Person was the Father of another, cannot always be either demonstrated by indubitable Arguments, or so clearly made out by Testimony, as in the Mother's Case; especially where Women live under no other Guard or Restraint besides their own Modesty and Conscience: The main Proof therefore in this Point is, the certainty of Marriage; by which Union the Wife both engageth her Faith to be true to her Husband's Bed, and likewise is plac'd, as it were, under his Inspection, he at the same time receiving a Power over her Body. Now all Persons are presum'd both to observe the Faith they have engag'd,

and to exercise the Power they have receiv'd, unless there be direct and manifest Evidence of the contrary. So that every one seems to be, as it were, in possession of this Right, that he shall be deem'd the Son of him who appears to be join'd in Marriage with his Mother. ¹. And no Man, unless he is out of his Wits, will disturb himself in this Possession, and accuse his Mother of Adultery for the sake of finding a new Sire. *Julius Sabinus with his natural Vanity was strangely exalted by ascribing to himself the Glory of a false Original; pretending that his Great Grandmother had been very nearly acquainted with Julius Caesar in his Gallick Expedition, Tacit. Hist. l. iv. c. 55.*

Jupiter aut falsus pater est, aut crimine verus.

Jove's a false Father, or in Sin a true.

If others attempt to bring this Matter into Dispute, it shall be incumbent on them to prove their Charge: As for Instance, That the pretended Father at the time of the Conception was disabled by Sickness, or was absent in a distant Country ². In *Xenophon* (*Hist. Græc. l. iii. p. 289. Edit. H. Steph.*) *Agessilaus*, after the Death of *Agis* King of *Lacedæmon* his Brother, endeavours to prove *Leotycheides* illegitimate upon these Reasons, That his Father had some time disown'd him; that he exceeded his Father in Comeliness of Body; that he was born ten Months after the parting of his Father and Mother; that his Father *Agis* had expell'd his Mother from the royal Bed.

XI. As to the second Condition, it is judg'd another Exception against a Son's succeeding to an *intestate* Father, if it appear that his Father hath expressly desired and declared the contrary: As suppose ¹, if he hath either abandon'd (as was usual amongst the ancient *Greeks*) or dis-inherited him, as 'twas a Custom among the *Romans*.

We have before intimated, that very great and weighty Causes ² are requir'd to justify either of these Proceedings. *Grotius* adds, That Sustainance is still to be allow'd to the abandon'd or disinherited Son, unless his Crime deserv'd Death. Tho' I can hardly see how it is possible, that a Son, during these Years of Minority, in which his Father naturally owes him Sustainance, can be guilty of such an Offence, as shall deserve either capital Punishment, or *Disinheritance*.

XII. On the Proposition which we before advanced, That Parents are oblig'd to afford Sustainance to their Children, not only of the first, but of farther Degrees, in case their proper Parents, who ought to perform this Office, are extinct, is chiefly founded the

^a Add *Bædæ*. ad *Græc. d. l. Sect. 3.*

^b Vid. *Grotius*. c. 5, §. 1. *Dallæ*. 56.

^c *Diç.* loc. *Sect. 8.*

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¹ *Semper certa est mater, etiam vulgo concepta. Pater vero is est, quem nuptiæ demonstrant, Digest. l. ii. t. 4. De in Jus vocando, leg. 5.*

² The Words of *Agessilaus* are so misrepresented by our Author for want of thoroughly understanding the *Greek*, that I have thought fit to give the Reader a new Translation of them. *Agessilaus* then alledge, "That *Agis* never own'd *Leotycheides* for his Son, and that *Leotycheides* his Mother, who must needs know better than *Agis*, had disown'd that she ever bore him (for there is no such thing in *Plutarch*, as that he exceeded his Father in Comeliness of Body, as our Author translates *πολλο καλλιον εκειου* which signifies only better than he) "That by an Earthquake caused by *Neptra*, *Agis* was toss'd out of his Bed from his Wife in the sight of all the World, which evidently proves, that he was not the Father of *Leotycheides*, which was better confirm'd by the time of his Conception, which is an insupportable sign in these Matters: For when *Leotycheides* was born, it was ten Months after *Agis* had escap'd, and never after lay with his Mother." See also *Plutarch* in the Life of *Alcibiades*, p. 203. *Edit. Steph.* These Reasons are not very concluding. See upon the last Article *Juris. S. Rom. Græcæ Origines Juris Civilis*, l. ii. p. 301, &c.

¹ See Dr. *P. r. s.* *Greek Antiquities*, l. iv. c. 15. *in fine*, and *Jean Casaubon* upon *Diogenes Laertius*, l. i. §. 94.

² *Antenor* (in *Duty. Cræcæ*, l. iii. c. 26.) resolv'd to banish his Son *Glaucon* from his Family, for making one of *Paris's* Company at the stealing of *Helen*.

Equity of that Right term'd, *The Right of Representation*; by virtue of which Children are suppos'd to fill the Place of their deceas'd Father¹, so as to be allow'd the same share in the Family Inheritance, as their Father, were he now living, would receive; and consequently to succeed on the level with those who stand in their Father's Degree². And it would indeed be a lamentable Misfortune, if, besides the untimely Loss of their Father, they should farther be depriv'd of those Possessions, which either the Rule of the Law, or the Design of their Progenitors had given their Parents just hopes of enjoying³. But if in any Place the civil Constitutions will not admit of this representative Right, the Children, who have been so unhappily bereav'd of their Father and of their Hopes, must endeavour to bear the Calamity as an Affliction which Providence hath laid upon them.

XIII. Upon failure of Issue in the first, and the other descending Degrees, Reason suggested that Inheritance ought to turn back into the Line of Ascendents; as well in consideration that, for the most part, either the Possessors themselves, or at least the first Seeds and Principles of them, which the Children afterwards increas'd, proceed from the Parents, as because their extraordinary Benefits give them an especial Title to this Reward: Who since they would much rather have desired, *That their Children should inherit their Fortunes*, yet when they survived them, contrary to the ordinary course of Nature, 'twas but equitable they should receive, however, this melancholy Comfort, of succeeding to what the Children possess'd. 'Tis a Condition (as Pliny observes) abundantly unhappy, for a Father to be the sole Heir of his own Son⁴. Panegy. c. 38. Vid. l. v. t. 2. l. 15. D. De inoffic. testam. Lib. xxix. t. 4. D. Si quis, omiffa causa, &c. leg. 26. Cod. lib. iii. t. 28. De inoffic. testam. & t. 25. De Institut. &c. leg. 9. & Lib. vi. t. 56. ad Senatusconf. Tertull. & Lib. iii. t. 3. de senatusconf. Tertull.

Philo the Jew⁵, reporting, That Moses establish'd this Order of Inheritance, *That the Sons should stand first, the Daughters next, then the Brothers, and in the fourth place the Uncles by the Father's side*, useth this as an Argument to prove, that Fathers likewise may inherit what their Sons leave behind; For 'twould be senseless (says he) to imagine, that the Uncle should be allow'd to succeed his Brother's Son, as a near Kinsman to the Father, and yet the Father himself be abridg'd of that Privilege. But inasmuch as the Law of Nature appoints, that Children should be Heirs to

their Parents, and not Parents to their Children, Moses pass'd this Case over in Silence, as ominous and unlucky, and contrary to all pious Wishes and Desires: Lest the Father and Mother should seem to be Gainers by the immature Death of their Children, who ought to be afflicted with most inexpressible Grief. Yet by allowing the Right of Inheritance to the Uncles, he obliquely admits the Claim of the Parents, both for the Preservation of Decency and Order, and for the continuing the Estate in the same Family.

Some Parents too have the additional Title of an infirm and indigent old Age; under which sad Condition their Children were otherwise obliged to maintain them: As one of the Attic Laws expressly enjoind⁶. *Iseus Orat. vi. The Law commands us to maintain our Parents, under which Name we comprehend not only our Father and Mother, but our Grandfather. For these are the first of our Kinred, and from these descend the Goods and Fortunes which their Posterity enjoy. These therefore we are necessarily bound to support, even tho' they should have nothing to leave us.* Add. Grot. d. l. Sect. 5. & Ziegler ad d. l. Yet in case a Father hath without Reason grievously hated and injur'd his Son, without any subsequent Reconciliation, the Son may justly exclude him from the Right of Inheritance⁷. It's the same with him who expos'd his Son, when an Infant, utterly neglecting his Support: For here no doubt the Claim of the Foster-father, who hath undertaken the Care and Burthen of the Child's Education, ought first to be admitted. Nay, farther it seems reasonable, That an adoptive Father should in this point be prefer'd to a natural Parent; that he may recover what he hath expended on bringing up another's Child. We are likewise to observe, that the Lawyers do not admit of Representation in the ascending Line, as they do in the descending; that is, if a Man die without Issue, leaving a Father, and a Grand-father by his Mother's side, the latter of these shall not be allow'd to make Claim in the room of his Daughter. A Rule which seems to be grounded on this Consideration, That naturally the Hopes of Succession do not ascend, but descend: Wherefore, the Son had indeed Hopes of succeeding his Father, and might transmit the same Hopes to his own Issue; but the Mother had never any Hope or Desire of inheriting after her Children; and so could not, contrary to the Order of Nature, convey back any such Hope to her own Parents: And consequently, the nearer Claimant here excludes very justly the more remote⁸.

¹ Add Barclay. ad Grot. d. l. Sect. 6.

² Vid. Grot. l. ii. c. 7. f. 5. Ubiq. Ziegler.

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¹ *Sine dubio nep. filii loco succedunt*, Digest. l. i. t. 6. *De his qui sui vel alieni juris sunt*, leg. 7. *Quotcumque autem nepotes fuerint ex uno filio, per uno filio numerantur*, ib. l. xxvii. t. 1. *De exceptionibus tut. tam.* &c. leg. 2. §. 7.

² This Succession by Dekent (*successio per stirpes*) is distinguish'd from Succession by Heads (*successio per capita*) thus: In the last all the Coheirs have an equal Portion, whereas in the other several Children have no more all together than a Portion in the Inheritance equal to what their Father had, and to what every one of the Coheirs had; who are in the same Degree as he was whom they represent. See *Trojanian's Novels*, 118. c. 1.

³ *Pliny's Words are. Sic quique ab omni misera res est, pater filio solus heres.*

The Words of the Digest are, *Nam est filiorum non debet hereditas per nec est tum parentum, & naturaliter erga filios charitatem, turbat tamen illius hereditatem, nec in eo parentibus in sui locum sed rationem debet.*

⁴ *Philo's Greek is this, Καὶ τετάρτην δὲ θεοὺς πατρὸς ἀπονοίμε τῆς ἀναιτιπόμενος ὅτι καὶ πατρὸς ἴσθιοντ' ἀνοίον κληρονομοῦν πένου γὰρ ἴσθης ἵπολαβεῖν, ὅτι πατρὸς ἀδελφοὶ νέμων κλήρον ἀδελφοῦ διὰ τὴν πρὸς τὸν πατέρα συγγενειαν. αὐτὸν ἀφείλετο τὸν πατέρα τῆς διαδοχῆς, ἀλλ' ὅτι οὐκ ὄνομα φύσει ἐστὶ κληρονομοῦν τοὺς γοῦν ἐπὶ πατρὸς, ἀλλὰ μὴ τῶν κληρονομοῦν, τὸ μὲν ἀπεικταῖον καὶ καλῶφικον ἵσθησαν, ἵνα μὴ πατὴρ καὶ μήτηρ προσδοκῆσθαι δοκῶσι τῶν ἀπὸ ἀνωτέρων τίνους ἀπαρηγορητα τειθῆ, πλεονῶσι δ' ἀποτὸς ἐκείνων τοὺς θεοὺς ἐφείει, ἵνα καὶ ἀποτέρων ἐρηχόσθαι καὶ τοῦ πατρὸς καὶ τῶ μὴ τὴν ὄσθαι ἀλλοτριωθῆναι.*

⁵ *That Greek Orator's Words are. Ἐλευθεῖ γὰρ ὄνομα τρέφον τῆς γούεας γοῦν δὲ εἰς μήτηρ καὶ πατέρα καὶ τάπος καὶ τήγ, καὶ τῆτων μήτηρ καὶ πατὴρ, εἰαν ἔτι τῶσαν ἐκείνοι γὰρ ἀρχὴ τοῦ γένους ἐστὶ, καὶ τῶ ἐκείνων παραδοτοῦ τοὺς ἐγγούους. διςπερ' ἀνάγκη τρέφον κατῶ: ὅς, κῶν μὴδὲν καταλιπέαι*

⁶ See *Jean Paul's Novels*, 115. c. 4. and Mr. *Dawson's Civil Laws in their Natural Order*. Part II. l. iii. t. 2. Sect. 2. §. 4.

⁷ The Words of the Novel are, *Si autem plarumque agnoscendum, ut si quis in rebus, qui proximo gradu hereditatis, majorem esse rationem, sic patrem, sic matrem, sic*

XIV. When the descending and the ascending Lines both fail, the Succession to *intestates* devolves on the collateral Kindred. As to the order in which they are to be admitted, where the *civil Statutes* do not expressly settle it, 'tis to be determin'd by *natural Conjecture*: Which always favours that Person, whom we presume to have stood fairest in the Affection of the deceas'd; yet so, as that we measure this Affection more by the common Inclination of wise and sober Men, and according as it tends to the Prevention of Quarrels, than by the morose Humour of some few particular Persons. Now, according to the Judgment of wise Men, natural Reason in this Case pays an especial Regard to Nearness of Blood, yet so as at the same time to consider from what Source the respective Possessions seem'd to flow to the deceas'd¹, or who formerly parted with any thing², or suffer'd any Loss upon account of his coming into the World. Thus *Aristotle's* first Rule³ is, *The Affection between Parents and Children*; and his next, *The Love between Brethren, arising from their Relation to the same common Stock, and improv'd by the likeness of Years and Education*. After these follow Brothers Children, and other Relations join'd to us by virtue of that fraternal Union. And then (all these being first consider'd, whom Nature, as it were, necessitates us to love and esteem) in the last Place those are admitted, whom either past Kindnesses or Agreeableness of Temper and Manners, or peculiar Likeness of Inclinations, or known Fidelity, recommends and endears. *Tully*⁴ placeth the Degrees of Kindred in the Order following: *The first Society is in Wedlock; the next in Children; it comes then to a Family, and a Community of all things. The Relation of Brothers comes next; and after that, of Brothers and Sisters Children; who, when they are too many for one House, are transplanted into others, as into Colonies. And then follow Matches and Alliances, with increase of Kinred, consequent upon them. Now the Relation of Blood and the Kindness that ariseth from it necessarily endears Men to one another.*

XV. But the high Encomiums given to Friendship in Authors may raise a Doubt, whether Friends are not sometimes to be prefer'd to Relations? *Of all Societies, says Tully, none hath more of Excellency, or of Strength, than when good Men, alike in Manners, are united by a familiar Acquaintance.*

¹ *Nicom.* viii. c. 14.

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¹ That is to say, if the Good or Estate came by the Father, they ought to pass to the collateral Kindred on the Father's side; but on the contrary, if they came by the Mother, the collateral Relations of her side ought to be preferred.

² That is to say, That what Right a Man hath parted with to another Person, as soon as he is dead, it shall return to the same Man again, or to his Heirs. See §. 17. following.

³ *Off.* i. c. 16. Of the Relation between Brothers see *Platarch.* *De fratern. amor.* and *Xenophon*, l. viii. *Cyrop.* in *Cyrus's* last Speech, and l. ii. *Serat. Memorab.* Add *Baeler.* ad *Græc. diſt. loc.* f. 9, 10, 11. Towards illustrating the Obligation between those of the same Blood it may not be improper to mention the Law received in the Kingdom of *Touquin*, by which all Quarrels arising amongst Persons thus allied, are refer'd to the decision of their common Kindred, and not brought into the ordinary Courts of Justice; as we are told by *Alexander de Rhodis, Itiner.* l. ii. c. 7, 8. Mr. *Hertius* adds, That there is a Law of the like Nature at *Padua*, about which *Marcus Antonius Plancus* has composed a Book on purpose.

⁴ The Original of these Quotation is, *viz.* Of *Tully, Omnium societatum nulla præstantior, nulla firmitior, quam cum viri boni, moribus similes, sunt familiaritate conjuncti.*

Of *Homer.*

Οὐ μὲν τι κακογνήσιοι χερσίων
Γίνεσθαι δὲ κεν ἑταίρος ἂν πεπνυμένα εἶδη. *Odysſ.* 8 ult.

And of *Euripides.*

"Ὡς ἀνὴρ ὅστις τὸ ποιοῖσι συντακῆ, θυραῖος ἂν
Μυρίων κρείσσων βραμιόνων ἀνδρῶν κενήσθαι φίλος. *Orest.* 806.

Further, we may consult upon this Question Mr. *Buddeus's* Discourse, intituled, *De Comparatione obligationum, quæ ex diversis bonis in partibus oriuntur*, §. 35, &c. among his *Selecta Jura Nat. & Gent.*

⁵ *And* *Gellius's* Words are, *Conveniebat autem facile, constabatque ex moribus populi Romani primum juxta parentes locum tenere pupillos delatoris fidei, tutelæque nostræ creditos [si necesse esset in opera danda facienâq; officio alios aliis anteferre] secundum eos proximum locum, cum aut habere, qui sese itidem in fidem, patrociniumque nostrum dediderent, tam in tertio loco esse hospites, postea esse cognatos adfinesque.* *Ibid.* v. c. 13.

So *Homer*;

A hearty Friend deserves a Brother's Love.

And *Euripides*;

———— A Stranger to our Line,
If once in Mind and Manners firmly tied,
Is worth a thousand Kinsmen. ———

And indeed it frequently happens, that we take more Satisfaction in the Company and Conversation of an indifferent Person, than of one related to us in Blood, and intrust many things with the Secrecy and Fidelity of the former, which we conceal from the latter. In fine, we address our selves more readily to serve the Friend than the Relation; because he, on the other side, is the more ready of the two to assist us in any Difficulty.

But it cannot hence be concluded, That by virtue of a general Custom, coming up almost to the Force of a Law, a Friend is to take place of Relations, though the deceased Party should chance to have expressed more Tokens of Affection towards him, than towards them. For in the Business of transmitting an Inheritance, we are not guided only by Kindness and Good-will, but we consider farther, on whom 'tis most proper and convenient that our Fortunes should descend. And since Men are carried on by a general Propension to wish the Family in as good a Condition as possible, from which they derive their Original, therefore 'tis commonly most convenient that our Goods should continue in our own Line. Besides, 'tis no necessary Consequence to say, I was highly delighted with this Person's Familiarity and Converse, therefore 'twas my Inclination likewise to transfer my Possessions upon him. For this Friendship between Persons not allied in Race, generally extends no farther, than to a mutual Signification of Good-will, a Communication of Designs, and the ordinary Services and Offices of Life. But before I can be conceiv'd to have join'd Houses, as it were, with a Stranger, by conveying to him my Estate, 'twill be necessary to produce an express and legal Will to this Purpose. Thus, although according to the ancient Manners of the *Romans*, in the Order of common Duties, *After Parents and Children, the first Place was given to Pupils or Wards; the second to Clients or Dependents; the third to Guests; and the last to the Kindred by Blood and Marriage, accord-*

ing to the Degree of Nearness in which they stood ; yet in transmitting Possessions this Method of proceeding was not in the least regarded. Farther, if Friends, in the case of *intestates*, were at any time to have the Advantage of Kinmen, this would open a wide Field for Quarrels and Contentions, as well amongst the Friends themselves, if they happen'd to be more than one, as between them and the Relations. For to take more Pleasure in a Man's Company, or to communicate Affairs more freely with him, is not presently to be look'd on as an infallible Token that he stands highest in our Affection. Many times a jocosè or easy Temper, Equality of Years, or Sagacity of Judgment, render the Acquaintance of a Friend more pleasant or more profitable to us, than that of a Relation, who possibly may want the same Advantages. Yet when we are about to dispose of our Goods, we are seldom sway'd by this Consideration to favour the former more than the latter. *Hesiod's* Advice will here be good,

Let not thy Friend thy Brother's Rights invade 3.

Lastly, The Degrees of Kindred are easily distinguish'd and reckon'd up ; but who will undertake to settle the Degrees of Friendship in so exact an order, as to leave no room for Cavil and Dispute ?

XVI. But still 'tis urg'd with better Pretence, That those Friends at least are to be prefer'd to Relations in the case of Succession to Estates, by whose Bounty, Counsel, or Assistance the respective Estate was acquit'd ; it being but equitable, that the Goods should return to the place whence they originally flow'd. Yet here likewise there will be most plentiful Matter for Contentions ; the cutting off of which ought to be made the chief Aim and Design of all Laws. For a Friend putting in his Claim with such a Plea, might be well answer'd to this Purpose : That either what he takes for Merit was not the conferring, but the returning a Kindness ; or, that if he was the first Benefactor, he hath since receiv'd a sufficient Requital ; or, that he gave without any hope or prospect of Return ; and desired, that his Bounty should reach not to the Person only, but to the Family of his Friend ; or, that what he did was undertaken upon the Principle of Glory, or of present Advantage ; that, in case we had not found his Assistance, we did not want Opportunity of being reliev'd in our Distress by other Means ; that it cannot certainly be determin'd how much his Aid contributed to our acquiring those Goods which he demands to inherit : And then again, that he, who hath been only useful to us in getting a thing, cannot presently require, that we should admit him to hold the thing in common with us. Farther, That the good Offices of Friends would be turn'd into a mercenary Service, or rather into perfect Usury, if they were to be advanced to the Estate of *intestates*, before the Relations of the deceas'd : For then a Kindness to another could not be suppos'd to be conferr'd with any other Design, than that

the Receiver should only for a little time be the Steward and Keeper of what was bestow'd, or should restore it with large Increase at his Death. Therefore, when there is no express Disposal extant in Favour of the Friend, the *Right* of the Kinmen shall obtain : Yet so as that, together with the Goods of the deceas'd, they shall likewise take upon themselves his Obligation towards this great Benefactor ; and shall endeavour, as far as in them lies, to repay it in a most grateful manner, acknowledging by whose Assistance they arrive at so ample an Inheritance. Nor is it reasonable for any Man obstinately to urge against this Judgment that Saying of *Aristotle* ¹ : *We ought rather to requite a Benefactor, than to oblige a Friend, if both cannot be done together* : Or that of *Cicero* ² , *There is no Duty more necessary, than that of repaying Kindnesses*. And again ; *There being two Kinds of Liberality, one of bestowing, the other of returning a Benefit ; whether or no we will bestow, depends on our own Choice ; but not to return the Favours of a good Man, is absolutely unlawful, provided it may be done without injuring any other Person* : Or that of *Phocion* ³ (in *Plutarch's* Apophthegms) who being several times called upon to give somewhat towards the Expence of a Sacrifice, whilst all the rest contributed that were about him, answer'd, *It would be a Shame to give you, before I pay this honest Man* ; pointing to a Creditor of his that stood by. *Add. lib. xxxix. t. 5. leg. 12. D. de Donation.* Because indeed, the Business of Successions to *intestates* by no means can be, or ought to be exactly squar'd in all respects according to the Rules observ'd in conferring and in returning Benefits. For the latter are guided by the Virtues of Humanity and Bounty, and, properly speaking, are vouchsafed to those only, who had no ground to expect them from us, but what is owing to the Suggestions of these Virtues in our Mind. Whereas the former are built on other Foundations, on the Obligation we lie under of making Provision for some particular Persons, on nearness of Blood, and on that Propension to advance, improve, and preserve our own Family, enjoin'd by the Dictate of Nature. *Isaus* Orat. 6. †. *All Persons, as they approach near their End, are provident in disposing of what they possess, lest they should bring their Family to Ruin and Desolation.* And in this Affair, that which ought to be our principal Care is, That we establish so clear a Method, as shall be expos'd, as little as possible, to Controversy and Doubt. Now, there can be no such Way or Method more ready than this, That in default of an express Disposal by Will, the Inheritance shall pass down according to the different degrees in which the Relations of the deceas'd stood nearer to him one than the other.

Hence Authors have remark'd, That Successions to *intestates* proceed in a contrary course to the Rule of common Kindness ; it being in the former the more necessary *Duty to give*, in the latter to *repay* : As, in the Case before us, our Children have the Preference of our *Parents*, to whom we are much more indebted and engaged. *Lilian* Ab-

Mr. BARB. NOTES on §. XV, XVI.

³ *Hesiod's* Words are, Μηδὲ κασιγνητῶν ποιεῖσθαι ἑταῖρον. See also Mr. Sacy's Treatise of Friendship, p. 155.

¹ *Aristotle's* Words are, Ἐυεργετῆ ἀνταποδοτέον χάριν μᾶλλον, ἢ ἑταίρω δοτέον ἢν ἀμοιβῶν μὴ ἴσχυρηται.

² *Cicero's* Words are, Nullum officium referenda gratia magis necessarium est. Alio, Cum liberalitatis genera sint, unum dicitur beneficii, alterius reddendi, demus necne in nostra potestate est, non reddere bono viro non licet, modo id facere possit sine injuria.

³ *Phocion's* Words are, Puderet me vobis dare, εἰ huic, (δανεισῶν demonstrans) ἢν reddere.

⁴ *Isaus's* Greek is, Πάντες οἱ τελευταῖοι μίλλοντες πρόνοια ποιεῖν τι σφῶν αὐτῶν, ἕως μὴ ἐξουκασασι τῆς σφαιτέρης ἀπὸ τῶν ὀφειλῶν.

dicat. 'Tis the Ordinance and Appointment of Nature, that the Affection of Parents towards their Children should exceed that of Children towards their Parents. Comp. *Bæcler. ad Gron. d. l.* Yet in what hath been here offer'd, we would not be understood to insinuate, as if the Duty of Gratitude were to be allow'd no Place in the last Disposal of our Fortunes; but only that 'twould be inconvenient to go about to settle a general Method for the Estates of *ineftates* to be guided by, taken barely from the presum'd Will of the Party deceased, touching the Exercise of this Virtue.

XVII. From what hath been laid down, it appears, that of all the collateral Line the Brothers stand nearest to the Inheritance; as well on the account of the most sweet and hearty Affection by which they commonly are engag'd to us, as because they, on the score of raising their Brother's Fortunes, receiv'd smaller Portions out of their Father's Estate. *Quintil. 1 Declam. 321. pag. 509. init. Edit. Lugd. B. U. What Friendship can be so happy as that which imitates brotherly Affection? Certainly, when we would complement those whom we take for our Friends, Flattery itself cannot invent a higher Endearment than the Name of Brothers.* With whom the Sisters are likewise to be admitted, at least to those Goods which were either brought by the Mother, or lately acquit'd; but they have not the same Title to the Father's Possessions, which are usually design'd to preserve the Splendor of the Family; whereas Women, for the most part, marry out of their own Line. Brothers by the Father's side, in the paternal Inheritance, exclude those by the Mother's side; as again, in the Fortunes left by the Mother, the latter have the Preference of the former. In Goods newly gotten since the time my Father married the Mother of my Half Brother, 'tis convenient that I should carry off the largest Share; since toward the acquiring these Goods the Man usually contributes more than the Woman. Upon Default of Brothers, the Brother's Sons shall come in; tho' it should seem that these ought at the same time to let in the Great-Uncles, because they too had smaller Fortunes, on account of dividing the Estate with the Father of the deceased. The same is to be said of Sister's Sons, and their Great-Uncles by the Mother, with regard to the Mother's Goods. And this Order and Method shall be continued down in all other Instances; but still with this Proviso, That where the paternal Line fails, there the Mother's Kindred shall be admitted to the Father's Estate, and so the Kinsmen by the Father, to the Mother's Goods, upon failure of her own Line.

XVIII. But we ought well to observe, That the Rules which we have propos'd for the determining this Matter are stiled *natural*, not because they are so exactly preferib'd by any Precept of the Law of

Nature, as that they cannot be alter'd; but because they are in the highest Manner agreeable to the Law of Nature, and seem to be the most ready Means of cutting off all Dispute, in cases where either the express Will of the deceased, or the national Laws are silent. Yet indeed in the whole Subject and Compass of the civil Ordinances, there is scarce any thing about which they are found more careful and solicitous, than about the Disposal of Inheritances, not only for the Prevention of Quarrels amongst Relations, but likewise because 'tis the Interest of the Publick to have this Business settled, and moderated according to the Ends and Reasons of particular Governments. Hence in some Places the Power of making Wills is left very free and wide; in others it is more or less abridg'd and restrain'd. Amongst the *Romans* 'twas one of the Laws of the Twelve Tables¹, That whatever a Master of a Family settled or bequeath'd with regard to his Family, or to his Fortunes, should so stand. Which was borrow'd from the System of *Antic Laws* composed by *Solon*: For thus *Plutarch*² reports, That the Ordinances of his, by which he gave free Subjects the liberty of making Wills, which they never enjoy'd before, was most greedily embrac'd, and was esteem'd most just and right. Now the Reason which mov'd *Solon* to the passing this Act, was not that he intended to defraud the nearest Relations of their Right of Kindred, but that by setting before Mens Eyes this common Advantage, he might engage them all to contend with each other in good Offices, and that Relations might keep the greater Affection and the stricter Ties amongst themselves, considering that they must exceed Strangers in Kindness and Good-will, if they desired to be admitted before them to the Wealth of the Family. *Demosthen. advers. Leptin. p. 374. Edit. Genev. When Solon enacted by Law, That every Man who wanted legitimate Issue, should appoint for his Heir whom he pleas'd: he did not rob the next of Blood or Affinity of their Right of Kindred, but that by proposing this common Advantage, he might engage Men to contend with each other in good Offices*³. Besides, it seems more suitable to Liberty, and to the full Extent of Properties, That no one should be forced to leave his Goods, but to those only whom he loved more than others. To which we may add, That we often conceive more probable Hopes, that a Stranger to our Blood may better employ our Possessions in the Service and Assistance of Virtue, than some near Kinsman, whom the Expectation of a rich Inheritance frequently seduceth to Luxury and Illness⁴. And lastly, That 'tis some Comfort, under the Necessity of a mortal Condition, if a Man may consign over what he hath got by his own Labour, to those whom he looks upon as his dearest Friends⁵. This Exception only there was in *Solon's*; That those should not be permitted to make Wills, who had legitimate Male Children living, to whom the paternal

¹ *Theoric. Idyl. vii. 59, The Living waste the Fortunes of the Dead.*

² *Iher. ut. Ægine.*

MR. BARB. NOTES on §. xvii, xviii.

¹ *Quintilian's* Words are, *Quæ potest amicitia esse tamen felix, quæ insitatur fraternitatem? Certe quoniam blaximi volentur: his qui esse amici voluntur, nulla adulatione procellere ultra hoc nomen potest, quam ut fratres vocentur.* Read *Cyrus's* Speech to his Children in *Demosthen's* *Cyropæd.* Lib. viii. *Fal. Maximus*, l. v. c. 5. and *Stobæus*, Term. 82.

² See this Law quoted, lib. i. c. 6. §. 6. n. 6. foregoing. See also two Discourses of Mr. *Thomasius* about the Original of Wills, and the Formalities used in making them, &c. intitled, the one, *Prima & initia successiois testamentariæ apud Romanos*; the other, *De sensu legis Decemviralis testamentariæ*; both printed at *Hall* in 1705.

³ *Plutarch's* Words are, *Ὅ δὲ, ὃ βύλεται τις ἐπιτρέψαι, εἰ μὴ παῖδες εἴεν αὐτῷ, δοῦναι τὰ ἀποπέφλην τα εὐγεγείας ἐπίσημο μάλλον, καὶ ἄλλοι ἀνάγκης, καὶ τὰ κτήματα τῶν ἔχόντων ἴπο ηος.*

⁴ *D. porphyrus's* Greek is, *Ὅ μὲν Σολὼν ἐθηκε νομον, ἐξῆναι δοῦναι τὰ ἐκ τοῦ ἔργου ἂν τις βούλεται, εἰ μὴ παῖδες εἴεν γυήσιοι, ἕχ ἰν' ἐπισημοί ται, ἰγγύτατα τῷ γένει τῆς ἀρχιγείας, ἀλλ' ἵνα εἰς τὸ μίσην καταθείς τὰ ἀφίλοισι, ἐφάμιλλον ποιήσῃ τὸ πρὸς ἄλλοις ἴν.*

Inheritance was beyond all Controversy due. It cannot be denied, but that under this ample Power of disposing of Goods by Testament, there crept in, as well at Athens as at Rome, a prodigious Spawn of Cheats, like a pestilential Infection; such as parasitical Flattery and Inveigling, especially of old and childish Persons, Circumventions, Forgery of Writings, and the like.

Bodin^a chiefly objects against these testamentary Constitutions of Solon, That they allowed Men to bequeath by Will Real as well as Personal Estates. By which means, as he observes, whilst many of those Estates might happen to fall on one Person, there arose a vast Inequality of Wealth between the Subjects, whence the Poor grew envious towards the Rich; the Rich proud and insolent towards the Poor; Mischiefs that have a peculiar Tendency to the disturbing and subverting of Government: Especially since the Proverb is often made good, That *the more a Man hath, the more he shall have*. But Bodin^a observes, That 'tis the Interest of States, where the supreme Power is lodg'd in the People, to take care that some few Persons do not exceed the rest by too vast a Disproportion. Which likewise was the Reason of that Jewish Law^b, forbidding the perpetual Alienation of Land; and of that other, by which Women who had receiv'd Land in Inheritance, were enjoin'd to marry into their own Tribe, lest otherwise the Land should pass from one Tribe to another^c.

Aristotle^d, amongst his Rules for preserving a democratical Government, gives this as one, That Inheritances should descend not by Testament, but by Kindred, and that no Person shall have more than one Inheritance, because thus the Fortunes of Men will be kept more upon a Level. What Mischiefs were introduced into the Spartan Commonwealth by that Liberty of Testaments, which Epitades the Ephorus set up in opposition to Lycurgus's Laws, may be read at large in Plutarch's Life of Agis^d. Amongst other Nations Men were allow'd no Liberty in this Point; or if they had any such Privilege, it was very much abridg'd, and restrain'd.

Of the Hebrew Laws in this Particular, Selden^e and Grotius^f give a full Account. Of the antient Germans Tacitus^g reports, That they had no such things as Wills or Testaments, but every Man's Children were his Heirs and Successors; and, in default of Children, those of the next Degree, as Brothers and Uncles by both Parents. Which Place of the^h Historian, why we should interpret with some in this manner, that the Germans, who had not yet learnt the Use of Letters, did not make use of formal and written Wills after the Roman Custom, which Tacitus for the most part hath an Eye to in that Description, we cannot yet find sufficient Reason. For amongst the Romans themselves Testaments by Word of Mouthⁱ, and without Writing, were also

allow'd. And therefore if Tacitus had design'd to observe, That only written Wills were those with which the Germans were unacquainted; he would have express'd himself more particularly and distinctly.

Besides, That the Rights of Kindred were honour'd with the highest Reverence and most sacred Veneration amongst those People, appears from what the same Historian afterwards remarks. *The greater number of Relations any Man hath, whether by Blood or by Marriage, the more Respect is paid him in his Old Age: Nor are any Rewards allow'd to comfort Persons under the Misfortune of being childless. Every one looks on it as his necessary Obligation, to undertake the Quarrels of his Father or of any near Kinsman, as well as their Friendships and Alliances.* In many parts of Germany at this Day, if a Man hath a Son born to him, 'tis an usual Expression to say, *He hath got an Heir*.

Again, It doth not appear why a Nation, such as the old Germans then were, quite ignorant of the ways of heaping up Wealth, content with the poor accommodation of household Conveniences, and scarcely desiring any farther Advantage from their Fields, their Cattle, and their Pains in hunting, than a daily Subsistence; why such a Nation should have any Reason to desire the privilege of Testaments. It being an idle and unnecessary Care, for those who follow this way of Life, to covet to themselves any large Extent of Land. Nor is the making of a Will so necessary a consequence of Property, but that a State or People may introduce some one uniform Method of Inheritance, without any such express Disposal. And this will especially hold good of that People, who, as Tacitus informs us, assigned such a Tract of Land to such a number of People; who afterwards parcel'd it out into private shares, according to the Worth and Esteem of particular Persons. If it be said, That these Men were wont, however, at their Decease, to leave some sort of Orders and Injunctions to their Family, we deny that every Act of this kind comes up to the nature of a Testament^h.

This method of Succession, as 'tis the most plain and simple, and most agreeable to the common Inclinations of Nature, so hath it an especial Tendency to the keeping up an equal Proportion in the Wealth of the Subjects, to the securing a Supply of Natives in a just and proper Number, and to the preserving the Estates and the perpetuity of Familiesⁱ.

It hath likewise been the common Opinion, that this must prove a new Bond of Affection between Relations, and engage them more heartily to promote each other's Good, whilst they consider'd, that they were of necessity to succeed each other in their Possessions. To this Point belongs the Passage of Plutarch, lib. xi. *De Legibus*, quoted by Grotius, and explained by Bæcker. Also that Pliny in

^a Lib. v. c. 2. *De Republ.* ^b Levit. xxv. 10. Upon which see Mr. Le Clerc's Comments. ^c See Numb. xxxvii. 8.
^d Add *Aristot. Polit.* xi. 9. ^e *De Successionibus ad bona Hebræorum*, especially in c. 24. ^f Add *Numb.* xxvii. 8, &c.
^g Cap. 20. ^h The Arabian Impoitor hath likewise publish'd Laws to regulate Successions, in his *Al-Furû* under the Chapter of Wives. ⁱ See *Bacon's Hen.* VII. p. 127.

MR. BARRÉ'S NOTES ON §. xviii.

³ Aristotle's Words are, Καὶ τὰς κληρονομίας μὴ κατὰ ὄνομα εἶναι, ἀλλὰ κατὰ γένος, μηδὲ πλείων ἢ μίας τὴν ἀπὸ κληρονομίας ἕνε γὰρ ἂν ἐμαλύετο αἰεσίαι εἶναι, καὶ τῶν ἀτόρων εἰς εὐπορίαν ἂν καθίστατο πλεονεξία, *Arist. Polit.* l. v. c. 9. *in fin.* See also, l. iii. c. 9. p. 329. See Mr. Thomassin's Discourse, *De origine successuum testamentariorum*, §. 30, &c.
⁴ Viz. Mr. Bæcker upon Grotius, c. vi. p. 235. See Mr. Bæcker's Discourse, *De Testamentis Summarum Imperatorum*, &c. c. 1. §. 9.
⁵ We call these sort of Wills, *Testamenta Nuncupativa*, or Nuncupative Wills, because the Testator *nuncupabat* *hæredem aut tutelatum suum*, i. e. he named his Heir or his Will. By the Roman Laws they were as good as written Wills, provided that the Testator declared his Will by word of Mouth in the presence of seven Witnesses, *Inst.* l. iii. t. 10. §. 14.

his Panegyric. c. 37. so highly commends, that the twentieth part was released to the Heirs of Families, *Quod manifestum erat, quanto cum dolore larum, distringi aliquod, &c.* because 'tis plain, that Men would bear it with great Grief, or rather never endure it, to have any defalked and taken from those Goods which they by Blood and Relation merited, and which they looked upon as their own, and to descend to the next akin, as their Inheritance. And *Publius Syrus*⁶ saith, *Hæredem scire utilius est, quam querere*, i. e. It is better to know than seek an Heir, ver. 255. And yet those Governments seem to have settled the Matter with most Prudence, which left Men the Privilege of disposing by Will those Goods only which they acquired by their proper Industry, ordaining, That whatever they received from their Parents or Ancestors, should pass down again to their nearest Relations. For by this Method all the Reasons produc'd on both sides of the present Question are most happily brought to a Temperament and Union.

It is altogether strange to the Manners and Customs of us Europeans, what we are told of the People of the Kingdom of Siam, That those who are Men of Substance amongst them, are commonly oblig'd to parcel out their Wealth into three Divisions, one of which goes to the King, another to the Priest (whence likewise the funeral Charges are defray'd) and the third only to the Children. And no less strange is the Practice of the Ethiopians on the Coasts of Guinea; where the Goods of either Parent do not descend to their Children, but to the nearest of their other Kindred.

⁴ On which Reason depends that disposal of the old Roman Law, which we meet with in l. xxix. t. 2. l. 8. *Dig. De acquir. vel omit. hæred.*

MR. BARB. NOTES on §. XVIII, XIX.

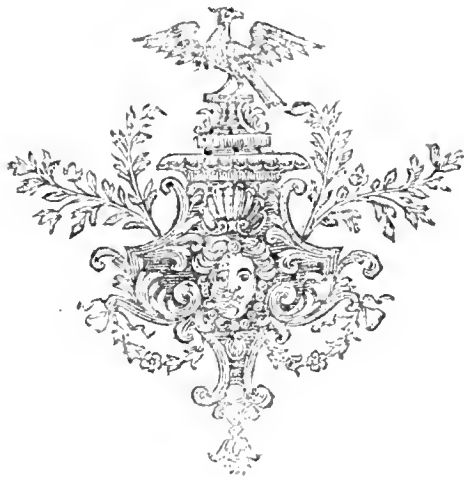
⁶ *Gruter* in his late Edition of *Publius Syrus* reprinted in 1708, reads these Words diversely thus, *Hæredem ferre honestius est, quam querere*. It is more prudent to resolve to leave that Person for an Heir, whom the Laws appoint for our Successor, than to seek for another to whom to give our Goods, which is a different Sense from the other reading.

¹ *Quintilian's* Words are, *Nam patrimonii in alium transituri ea ratio est, ut primum credito satisfiat*. The same Author had before said, *Bona ferro que sunt? ut opinor, ea que detractis alienis deprehensa sunt*.

² So the Law teaches, *Il enim bonorum cujusque intelligitur, quod æri alieno superest*, *Digest. l. xlix. t. 14. De jure fisci, leg. 11.* See l. iii. t. 6. *De calumniatoribus, leg. 5. in princip.* Lib. xi. t. 7. *De religiosis & sumpt. javerari, leg. 14. §. 1.* Lib. xvi. t. 3. *Depositi vel contra, leg. 7. §. 1.* *Lex Wisigothorum, l. vii. t. 2. c. 19.*

XIX. The Heir by Will, and the Heir at Law, though they succeed in a different manner to their respective Estates, yet have this Obligation common to them both, That they shall discharge the Debts of the deceas'd. And that not so much on account of any tacit Engagement which they have entered into to this purpose^a, as because these Debts are a necessary Barthen affecting the Possessions in the manner of a tacit Mortgage. For, as *Quintilian* observes¹, *Such is the Nature and Condition of Inheritance, that the Creditors must first be satisfied before it can effectually take place*. And so much only is to be reckon'd a Man's Estate, as remains when all are paid their own². Whence, likewise, 'tis most highly agreeable to natural Equity, that the Heir be not charged with Debts above the Value of the Inheritance. Nor should we omit what *Gabriel the Sionite* tells us in his Book of the Manners of the Eastern Nations, *That the Mussulmanni, when they make their last Will, are bound to restore all that they have taken by Robbery or Violence, to the proper Owner, from whom they receive a formal Discharge in Writing: And if they know not the Person to whom Restitution should be made, they lay out the Sum in publick Buildings, as Hospitals, Mosques, or Bagnio's, or else bequeath it to the Poor, or to some religious Order*.

In *Ferdinand Pinto*, Cap. 21. the Chinese Hermit adviseth *Antony de Faria*, who had been guilty of Sacrilege, to do these three things for his Soul's Health; to restore what he had taken away, to beg pardon for his Offences with Tears, and to distribute largely in Charity to the Poor. Add. Cap. 60.



CHAP. XII.

Of Usucapion or Prescription.

- I. How Usucapion and Prescription differ.
- II. What Usucapion is by the Roman Laws, and where it takes place
- III. How far honest Dealing is required in Usucapion.
- IV. Continual Possession is required.
- V. The Reasons of introducing Usucapion.
- VI. Whether the Law for Usucapion be penal.

- VII. Many refer Usucapion to civil Right.
- VIII. Whether Usucapion can arise from a tacit Dereliction of the Proprietor.
- IX. It seems to depend upon the tacit Agreement of Nations.
- X. How Usucapion may be prejudicial to Child or not yet born.
- XI. Usucapion is also in use among divers Nations.

IT belongs to our present Design to enquire likewise concerning that Method of Acquisition, by which he who hath gotten Possession of what was really another's ¹, by a just Title, and with honest Intentions, and hath also held it for a considerable time without being disturb'd or oppos'd, obtains the full Propriety of the thing thus possess'd, so as to extinguish all the Rights and legal Claim of the former Owner. This the Roman Law terms *Usucapio*, because the thing is, as it were, taken and acquired by long Use or Possession.

The Word *Prescriptio* in the Sense of the same Law imports strictly ² that Plea, Demur or Exception, by which the Person thus in Possession invalidates the Claim of the first Proprietor. Though

these different Names are frequently taken for the very same Notion: and the latter now prevails in common Use, and is the Term by which we render the former.

It may be worth our while to premise, what the Roman Law appointed or directed in this matter; because we shall hence easily gather how far the Business depends on positive Constitutions, and how far on the Laws of Nature.

II. *Prescription*, as *Modestinus* ³ defines it, is the Addition of a Property, by means of long Possession continued to the Term of Years fixed by the Law. *Cujacius* and others, on the Authority of *Ulpian*, use the Word *ademptio* instead of *adjectio*, Acquisition instead of Addition; but we do not apprehend that

² Digest. l. xli. t. 3. l. 3. D. De Usucap. leg. 3.

MR. BARB. NOTES on Chap. X. §. i, ii.

¹ This is a very considerable sort of Acquisition. See n. 1. upon §. 1. of chap. x. It hath also a place among several People in the manner, which shall hereafter be explained. The Author in his Abridgement of the Duties of Man and Citizen, l. i. c. 12. §. 14. speaks of two other kinds of Civil Acquisitions. The first is that which is gained by the Sovereign, or the Laws, which deprive a Criminal of all, or at least part of his Goods, and confiscates them or gives them to the Person damaged, which is treated of at large, l. viii. c. 3. The other is obtained by Arms, or Right of War. But see what is said of this, c. 6. §. 14. above.

² The word *Prescription* will best express the Latin *Usucapio* in our Language, and therefore we shall treat of it under that Name, unless some special Reason oblige us to use the Word *Usucapion*.

³ Besides, Prescription has not only respect to Property, but it destroys other Rights and Actions, when Men are not careful to maintain them, and preserve the use of them during the time limited by the Law. Thus a Creditor, who has not demanded his Debt during that time, discharges the Debtor. And he that has enjoy'd the Rent of certain Lands so long, can't be dispossessed, though he has no other Title but his long Possession. See Mr. *Dawson* upon this Subject in his Civil Laws in their Natural Order, Part. II. l. iii. t. 7. Sect. 4. and Mr. *Titius's* Observations on *Lauterbach*, Obs. 1033. As also, in his *Jus Privatum Romano-German.* l. ii. c. 9. We shall hereafter explain, how far Prescription is of natural Right, and what Civil adds to it. As to what we have to say about the Prescription of things Incorporeal and their Rights, we are to observe, that by Natural Right alone Prescription does not abolish Debts; so that tho' neither the Creditor, nor his Heirs have demanded any thing for a long time, his Right is not extinguished, nor is the Debtor fully discharged. This Mr. *Thomasius* proves in his Discourse, *De Perpetuitate debitorum pecuniarum.* printed at *Hall* in 1706. "Time, says he, in it self is of no force, either to get or lose one's Right; it must be accompanied with something else, which must give it that Power. For no Man can be deprived against his Will of that Right he has got by the consent of another, but by his own free Release. He does not disengage himself by acting contrary to his Engagements; and in delaying to execute them, he lays no new Obligations upon him to indemnify the Person interest'd; so that the Engagements of a bad Paymaster become greater and stronger every day, and can't be judg'd by Natural Right alone to change their Nature, and come to nothing at a certain Period of Time. It is alledged in vain, that it is the Interest of all Mankind, that Proceedings in Law should not be eternal: For 'tis no less the common Interest of Man, that every one should keep his Word, and that bad Paymasters should not enrich themselves without contradiction at the Expence of the Lender; that Justice be done, and every one obtain his own Right. Moreover, 'tis not the Lender that troubles Mankind in requiring what is due to him, but the Debtor who owes, and will not pay. For if he paid his Dues, there would be no ground for an Action. Nor is that Pretence better grounded, that 'tis the Negligence of the Creditor in not demanding his Debt, that is the Cause of his losing his Right, and authorizes his Prescription. This can only have place among such as live one with another in the independent State of Nature. Suppose the Creditor be very negligent, can his innocent Negligence deserve more to be punish'd than the noxious Malice of the Debtor? Or ought he not rather to be punished for his Injustice? Did he defer the Payment so long a time without any ill design, yet is he not as much to be blamed for his Negligence? Does not the Obligation of keeping Word oblige the Debtor to seek for his Creditor, rather than the Creditor for the Debtor? Why then, if so much Prejudice must come by Negligence, why should it fall rather upon the Creditor than the Debtor? Or rather ought not the Negligence of this last to be punished; and so much the more, because this gets by Prescription, and the other loses? But if we consider things abstractly from the Civil Laws, which require that a Debt shall be demanded within a certain Space of time, the Creditor can't reasonably be accused of Negligence, because he forbears the Debtor; since when he lent the Money, a time was fixed when it was to be paid. And every Man is free to allow more time than he has promised, and 'tis sufficient for the Debtor, that the time is come, when he agreed to pay. Besides, the Creditor may have many commendable Reasons for his Action, viz. Prudence, Necessity, and Charity; for which he deserves rather to be praised, than accused of Negligence, as Mr. *Thomasius* proves particularly. Lastly, There is no cause to believe that the Lender has renounced his Debt, as a matter subject to Prescription; since the Debtor being not obliged to pay a thing in kind, but the value of what he borrowed, he does not properly possess the Goods of another; and so can't be thought to keep it as his own. On the contrary, he must be esteem'd to be always in possession of his Right, till he has renounced it expressly, and confirmed it under his Hand." After this, Mr. *Thomasius* explains how a Debt may be lost by Time for want of Proofs, and shews, that without that, Prescription can have no place by the Laws of all People yet known to us, nor by those of the Romans as far as the Emperor *Constantinus's* Time. This whole Discourse is worth our reading.

this makes the least difference in the thing. For he, that having got Possession of a thing with honest Intention, continues his Possession to that determinate Period which the Law expresseth, may be said to have somewhat *added* to him, which he hitherto wanted. And again, he, to whom the Law thus *adds* any new Property, may be said to have *acquired* or obtained it.

To proceed; as every Man, who is otherwise capable of acquiring Dominion, is likewise capable of prescribing; so by this *Right of Prescription* we may acquire Dominion over both sorts of things, moveable and immoveable, unless they are particularly excepted by the Laws.

And *First*, Freemen are thus excepted²: For since Liberty is so sweet a Comfort, as no one can be presum'd to have neglected any Opportunity of recovering, 'tis justly suppos'd that the Party in this Case continued so long under Servitude, and did not put in his Claim to be releas'd, only out of Ignorance of his present Condition, not that by this Continuance he tacitly consented to be a Slave. So that this long Patience under his Misfortune ought rather to make him a more worthy Object of Pity, than to be interpreted to his Disadvantage. Things consecrated or set apart for the Service of Religion are likewise excepted; and so too are the Goods of Minors, during their Non-age: For by reason of their unexperienc'd Years the neglect of challenging what is their own cannot be so far charg'd upon them, as that they ought on this account to lose it; and it would be too hard and severe, if they were to suffer for the carelessness of their Guardians. Further, the Law excepts stolen Goods, runagate Servants, and things gotten by³ Violence, tho' some third Person hath obtain'd the Possession of them by honest Means.

Thus the Laws of the Twelve Tables ordain, *Rei furtivæ æterna auctoritas esto, Let the Claim against Things stolen hold good everlastingly*. For, as to the Robber himself, his Crime hinders him from prescribing. And the third Person, the honest

Possessor, is likewise stopp'd in his *Right*, by that Fault which is suppos'd to affect and attend the thing arising from the unjust Means by which it was before acquired: For though, properly speaking, there is no Fault or Blemish in the thing considered by itself, yet inasmuch as it was taken from the former Owner in an unjust and villainous manner, it seem'd equitable to enact, That his *Right* should not hereby cease or be extinct; and at the same time to take effectual Care, that no one should be a Gainer by his Wickedness. For since three Years Prescription is sufficient for moveable things, it had been easy for Thieves so to secure their Booty, by carrying it off, and putting it into other Hands, as that the lawful Owner should not be able in a search of three Years to discover it.

Besides, amongst the Reasons on which the *Right of Prescription* is founded, one is the Negligence of the Owner, in seeking after them. But now, since stolen Goods are usually concealed with the strictest Caution and Cunning, this Reason cannot take place against the Persons who lost them. Yet notwithstanding all this, since it was by some subsequent Laws enacted, That all Actions, after a constant Silence of thirty or forty Years⁴, should utterly drop, and be extinct, the *Prescription* likewise of stolen Goods, as well as other *Prescriptions*, shall be valid, at Civil Law, after so long a Period⁵, and shall overthrow the Claim of the former Proprietor: Which, how unreasonable soever it may appear to some, who look upon it as very absurd that Injury and Impunity should, by length of time, turn into a Foundation for Equity and *Right*; yet it deserves Excuse on Account of the general Advantage arising from it to the Publick. Because it highly concerns the publick Peace, that Suits and Quarrels should at length be finally quash'd, and not suffer'd to run on for ever, and that the Propriety of things should not hang perpetually in Uncertainty and under Dispute⁶. And because within the Compass of

MR. BARB. NOTES on §. II.

² In general, all that is not concerned in Commerce. Our Author has forgotten in his enumeration of things not subject to Prescription, as publick Places, Goods that belong to the Publick, what is due to the Treasury, and the Prince's Demesnes, which are all mention'd in these Laws. *Sed aliquando etiam si maxime quis bona fide rem possederit, non tamen illi usucapio ullo tempore procedit, veluti si quis liberum hominem, vel rem sacram, vel religiosam, vel servum fugitivum possideat*, Instit. l. ii. t. 6. *De usucapionibus & longi temporis prescrip. §. 1. Fortiora quocumque res, & que ei possessæ sunt, nec si prædicto longo tempore bona fide possessæ fuerint, usucapit, ibid. §. 2. Res fidei non potest, ibid. §. 9. Usucapionem recipiunt maxime res corporales, exceptis rebus sanctis, sacris, publicis populi Romani & civitatum, item liberis hominibus*, Dig. l. xli. t. 3. leg. 9. *Prescriptio longæ possessionis ad obtinenda hec jura gentium publica concedi non solet*, ibid. leg. 45. *Veluti si pupilli sit, &c. ibid. t. 1. leg. 48. We may also except such Goods as fall by chance to an Heir, which the Father had alienated before his Son was of Age, Cod. l. vii. t. 40. D. annali except. leg. 1. §. 2. Things which a Testator has forbid to alienate. See Cod. l. vii. t. 26. *De usucapione pro emptore*, &c. leg. 2. An Estate in Dower, Dig. l. xxiii. t. 5. *De fundo dotali*, leg. 4. 16. and such like things.*

³ *Quæ subreptim erit, ipsa rei æterna auctoritas est*, as the Athenian Law speaks, mention'd by *Aulus Gellius*, l. xvii. c. 7. and taken out of the Twelve Tables, where we may see that *Auctoritas* signifies a *Right of Property*, or a Right of claiming Goods again. See Cod. l. vii. t. 26. *De usucapione pro empto*, leg. 7.

⁴ *Quæ erit antea pro maiore parte actio, triginta annorum iugi silentio, ex quo jure competere ceperunt sciendi alterius non habeant facultatem*, Cod. l. vii. t. 39. *De prescrip. 30. & 40. annorum*, leg. 3. as also the following Title, *De annali except. &c. leg. 1.* and *Cujacius's* Observation, l. xi. c. 12.

⁵ *Prescriptio longissimi temporis*, so called to distinguish it from *prescriptio longi temporis*, the ordinary Term, Cod. l. vii. t. 22. 33. 34. 35. and which was regulated by the Measure mentioned, §. 4. n. 6, 7. following. The Emperor *Justinian* being overpersuaded by the Clergy of *Emessa* or *Emisa*, a City of Syria, who by reason of some feigned Titles contrived to plunder some of the richest Families of the City, made a Law, That the Goods of the Church, City, Hospitals, and other Places set apart for religious and charitable Uses, should not prescribe under the Space of an hundred Years, Cod. l. i. t. 2. *De Sacrosanctis Ecclesiis*, leg. 23. But the Fraud being discovered, and this new Law causing a great number of Actions, *Justinian* himself corrected it, and reduced the Privileges to the Term of forty Year, at least in the Eastern Churches, Nov. 9. 111. See *Cujacius's* Observations, l. v. c. 5. and a good Discourse of Mr. *Walter*, Professor at *Hebraicis*, intitled, *Vindicte Gratiani Dignitas de prescrip. inter liberas gentes*, §. 30. Yet we must not confound Prescription of an hundred Years with Time immemorial, though they often come much to the same. See *Grut.* l. ii. c. 4. §. 7. and the Discourse above quoted, printed in 1606, §. 13. &c. In fine, it was *Theodosius* the younger, and not *Theodosius* the great, that establish'd the Prescription of thirty and forty Years. See the same Discourse, §. 29. and Mr. *Thomson*, *De Perpetuitate Debitor. Pecun.* §. 27.

⁶ 'Tis upon this Reason, as well as upon the Negligence of the Proprietor to claim his Goods again, that the *Roman* Lawyers have form'd the *Right of Prescription*, *Bono publico usucapio intrudita est, ne possit querendarum rerum diu & sere semper incertum esse, &c. ibid. t. 3. leg. 1.*

thirty Years Mankind seem to put on a new Face, it was thought very inconvenient that the following Age should be disturb'd upon every slight occasion.

Besides, when a Man had been without such a part of his Goods for thirty Years together, he was justly suppos'd to have sat down quietly under the Loss; so that there was no need of troubling so long a Possession on his account. The same Reason will hold for that ⁷ Prescription which is sometimes allow'd in criminal Cases; it seeming unnecessary to bring to the Bar Offences committed almost an Age since, the ill Effects of which Time itself hath sufficiently purged and effaced; so that the true end of Punishment is superseded.

III. But that Prescription may effectually proceed, 'tis requisite that the Party, receiving the thing at the Hands of a false Proprietor, do obtain this Possession by a just Title ¹, or upon such grounds as are esteem'd sufficient in other Cases for the transferring and the acquiring of Property: And consequently that he acts in this Matter *bona fide*, with fair and honest Intention; that is, that he be able to alledge a sufficient Reason why he thus possesseth it, and be persuaded in his Mind, that the Property was transferr'd really on him, and himself constituted true Owner ². *Liban. Declam. i.*

pag. 194. Edit. Paris. *A Man d' th not become just Possessor of a thing barely by taking it to himself, but by holding it innocently.* Hence when the Lands, which formerly belong'd to King Apion, were left to the Roman People, and every Man seiz'd on what part he liked best: Tacitus calls this way of Proceeding, *Diuinalicentia, A long continued Licentiousness and Injustice.* According to the civil Law, 'tis enough if a Man had this *bona fides* ³, this Uprightness and Integrity of Thought at his first entering on the Possession, though he happen afterwards to discover, that the Person who convey'd it to him was not the just Proprietor. But the Canon Law requires the same Integrity through the whole Term of Years on which the Prescription is built ⁴; so that if a Man comes in the mean time to know, that the thing was made over to him by one who had no Right to dispose of it, he begins immediately to be obliged to restore it to the lawful Owner, and from thenceforward detains it *mala fide*, foully and dishonestly; especially in case he go about to hide it from the Owner's Knowledge by Craft and Design. Which Judgment seems to approach nearest to the Strictness and Sanctity of the Law of Nature ⁵; Inasmuch as, upon the introducing of distinct Pro-

MR. BARRÉ'S NOTES ON §. II, III.

⁷ *Querela falsæ temporalibus prescriptionibus non excluditur, nisi viginti annorum exceptione, sicut cetera fore crimina, Cod. l. ix. t. 22. Ad legem Corneliæ De falsis, leg. 12.* See l. i. c. 9. §. 6. above, and what Mr. Titius says, *Observat. on Lameriac's Observat.* 1124. Also Mr. Thomajus's Discourse, intitled, *De Prescriptione Bigamice*, which is the eighth among those at Leipzig.

¹ *Ut qui bona fide ab eis qui Dominum non erat, cum cresceret cum Dominum esse, rem emerit, vel ex donatione aliæ quavis jura carjâ accepit, is — i. propter, Instit. l. ii. c. 6. princip. Diutina successio tantum jure successione, sine jure titulo obtenta, prædesse ad prescriptionem hac sibi ratione non potest, Cod. l. vii. t. 33. De præscript. longi temp. Sec. leg. 4. Nullo jure titulo præcedente possidentes, ratio juris quærevens Dominum prohibet. Adcirco cum etiam usucapio cesset, intentio Domini nunquam abjicitur, Lib. iii. t. 32. De rei vindic. leg. 24.*

² *Libanius's Grec. l. 1. Οὐ γὰρ ἐν τῷ λαβεῖν ἐστὶ τὸ δικαίως κτήσασθαι. ἀλλὰ τῷ χωρὶς ἐγκλημάτων ἔχειν.*
³ *Ut in his omnibus casibus ab initio cum bona fide capiat — Quod & in rebus mobilibus observatum esse censemus, ut in omnibus jure titulo possessionis antecessoris jura detentio, quam in re habuit, non interruptatur ex posteriore forsitan aliæ rei scientia, licet ex titulo hereditario ea cepta est, Cod. lib. vii. t. 1. De usucapione transformanda, & sublata differentia rerum mancipi, & nec mancipi, &c. leg. 1.*

⁴ *Un'è oportet, ut qui præscribit, in nulla temporis parte rei habeat conscientiam aliæ, Decretal. l. ii. t. 26. De præscript. Can. 20. See also Can. 5.*

⁵ Mr. Thomajus maintains, That by natural Right an honest Intention is not necessary to make a Prescription even in the beginning of Possession, provided so long a time is run out, that it may reasonably be presumed, that the true Proprietor has relinquish'd his Possession of his Goods. "For, says he, in whatever manner we get into the Possession of the Good, that belong to another, from the moment that he to whom they belong, knowing that they are in our Hands, and being able, if he pleases, to claim them, declares either expressly or tacitly, that he will let them rest there, we become the lawful Owners of them as much as if we had a just Title to them originally. Theodosius the younger, who establish'd the Prescription of thirty Years, did not require any good intention in the Possessor; 'twas Justinian, who at the persuasion of his Counsellors added that Condition in certain Cases, and the Canon Law afterward improving, the civil required a perpetual good Intention in all sorts of Prescription. The Clergy of the Roman Church by this means found out a way to recover sooner or later all the ecclesiastical Revenues that had been alienated, altho' the Possessors had peaceably enjoy'd them by an immemorial Custom. Ambitious Princes also made their Advantage of this Hypothesis to usurp the Lands which they pretended to recover to their Estates, under this Excuse, that the Lands of the Crown could not be alienated; and so those, who enjoy'd those Goods which had been alienated, possess'd themselves of them by a bad Design; since they ought to know, that in such Cases no good Purchases can be made. Hence it appears, that the Maxim of the Canon Law, whatever shew of Piety it may seem to carry, is built on a Foundation contrary to natural Right, since it creates many disturbances among Men, whose Quiet requires that there should be an end of all Actions and Differences, and at the end of a certain time Possessors by fair dealing should be secure against all Claims." These are Mr. Thomajus's Notions, which I have collected from divers parts of his Works. See his Discourse concerning the Perpetuity of pecuniary Debts, §. 3. in Not. lit. K. & §. 27. 32. Also his *Instit. Jurisprud. Divin. l. ii. c. 10. §. 193, 195, 201.* with the Chap. *Fundamenta Jur. Nat. & Gent.* which answers it, §. 14, &c. As for my self, I own, that if the true Master of a thing bought, or usurped and gotten from him, in a word, by foul Dealing, doth not put in his claim, nor declare any Desire of recovering it for a long Space of time, though he knows very well in whose Hands it is, and there is nothing to hinder him from obtaining his Right; in this Case, I say, the unjust Possessor becomes the lawful Proprietor, provided that he hath some way or other declared that he was ready to restore it, if it had been demanded: For then the ancient Owner acquits him, and manifestly renounces, tho' tacitly, all his Pretensions to it. And thus our Author determines it in his *Elegant. Jurisprud. Univerf. p. 76, 77.* But if he that takes Possession honestly of the Goods of another comes to discover his Error before the time of Prescription is expired, he is obliged to do the Duty of an honest Possessor. See what is said in the next Chapter. But if, continuing always in his honest Intention, he come to the time of Prescription, whether it agree with the Maxims of the natural Law only, or the civil Laws have reduced it to something less, the Right of the ancient Owner is entirely extinct, as I shall hereafter shew. The whole amounts to this, That as the honest Possessor who prescribes in the Occasion, tho' innocent, that the other is debarred of all his Pretences, he ought to assist him as far as he can to revenge the Wrong done by a third Person, who sold him the Goods which he knew were not his own, and so was the cause of this Prescription. In fine, tho' a good Intention is always necessary to keep the Conscience quiet, yet this is no Impediment but that human Laws may overlook this Condition either wholly or in part, to avoid great numbers of Actions. And to obtain this End, it may be very fit not to require a good intention in Prescriptions, to which they have fix'd so long a time, or to demand it at least in the Beginning of the Possession; and so the Maxim of the Civil Law in my Judgment is better grounded than that of the Canon Law. The Artifice of the Clergy consists not so much in this, that the Determinations of the Popes require a perpetual good intention in him that prescribes, as in this, that they will have the Goods of the Church look'd upon as not capable of being alienated, either absolutely, or under such Conditions as will make all Prescriptions void. As for what Mr. Thomajus speaks of Princes, who affirm that the Demesnes of the Crown cannot be alienated justly, and that Prescription has no place among such who have no dependence one upon another in a state of Nature, see the last Paragraph of this Chapter, and Lib. viii. c. 5. §. 9.

pe ties, all Men were supposed to enter into an Obligation, *That they would, to the utmost of their Power, let every Person enjoy his own again, when they should happen to be in Possession of it without his Consent.* But the Compilers of the Civil Law were contented with securing the outward Innocence of Mens Actions; and authoriz'd the Possessor quietly to enjoy what he had honestly gotten; leaving to the respective Owners the whole Care of seeking after their Goods, and of challenging them upon a timely Discovery.

IV. Another necessary Condition, in order to Prescription is, *That it be founded on constant Possession, such as hath not been interrupted either naturally¹, as if the thing hath remained in the mean while to the former Owner, or hath at any time lain abandon'd or forsaken: Or civilly², as if the Owner hath been actually engaged at Law with the Possessor for the Recovery of what he lost; or, at least, by solemn Protestations hath put in a Salvo to his Right.*

Baecher and Ziegler, in their Annotations on Gro-tius³, observe farther on this Subject, *That the Space of Time, during which the prime Possessor holds the thing of which we speak, shall be reckon'd to the Benefit of him that succeeds³ in the Possession; provided that both the former and the latter first entred upon it with honest Minds, and upon a just Title: For otherwise the prime Possessor shall not be allow'd to make over his Time to the next Holder; and consequently if the former came to the Possession by dishonest Means, the Time he pass'd in it shall not be computed towards the Prescription of the latter, tho' he, for his own part, obtain'd the Possession fairly and justly.*

And this Rule takes place as well in a general Successor, an Heir, as a particular, a Buyer, a Grantee, &c. But then here is the Difference between these two kinds of Successors; the last of 'em, tho' he cannot reckon the time of the dishonest Acquirer to lengthen out his own, yet in case he himself was not privy to the wrongful Dealing, the Fault of the said Acquirer, if it cannot be used for his Advantage, shall not turn to his Prejudice; but he shall be allow'd to compleat the Term of Prescription in his own Person⁴. Whereas 'tis otherwise in the case of a general Successor, or an Heir⁵: For he cannot, by his own Ignorance

and honest Intention, atone for the Fault of the deceased whom he represents, and whose Rights he takes in full upon himself.

A longer Space of Time is required for prescribing against one that is absent, than one that is present⁶.

So again, moveable things may pass into Prescription sooner than immoveable^b. The reason of which latter Constitution seems to be, *That immoveables are judg'd a much greater Loss than the contrary; that they are not so frequently made the Subject of Commerce between Man and Man; that 'tis not so easy to acquire the Possession of them without knowing whether the Party that conveys them be the true Proprietor, or the false; and consequently, that they are likely to administer much less Occasion to Controversies and Suits.* *Plato's* Rules for the Prescription of moveables are as follow; *If a thing of this kind be used openly in the City, let it pass into Prescription in one Year; if in the Country, in five Years; if it be used privately in the City, the Prescription shall not be compleated in less than three Years. If it be thus held with Privacy and Security in the Country, the Person that lost it shall have ten Years allow'd him to put in his Claim^c.* As for the Prescription of immoveables, this the Constitution of *Plato's* Commonwealth was not acquainted with.

V. The chief Reasons, which the Learned in the Roman Law assign for the first introducing of Property, are to this purpose; *That in order to the avoiding of Confusion, and the cutting off of Disputes and Quarrels, it is of great Consequence to the publick Welfare, that the Proprieties of things should be fix'd and certain amongst the Subjects.* Which would be impossible, should perpetual Indulgence be allow'd to the Negligence of former Owners, and should the new Possessors be left in continual Fear of losing what they held.

Then again, Trade and Commerce could not otherwise subsist in the World: For who would ever contract with another? Who would ever make a Purchase, if he could never be secur'd in the quiet Possession of any thing convey'd to him? Nor would it be a sufficient Remedy in this Case, *That if the thing should be thus challeng'd by a*

¹ Lib. ii. c. 4. §. 9.

² Vid. *Instit. ubi supra.*

³ De LL. l. xii. p. 990, 991. Edit. *Werb.*

MR. BARB. NOTES on §. iv.

¹ See the *Digest*, l. xli. t. 3. De usurpat. & usucapion. leg. 5. & 15. Thus we lose a thing, or are depriv'd of it.

² *Utramque autem possessionem ita demum esse legitimam, cum omnium adversariorum silentio & taciturnitate firmatur; interpellatione vero & controversia progressa, non potest eum intelligi possessorem, qui licet possessionem corpore teneat, tamen ex interposita contestatione, & causa in judicium delata saper jure possessionis vacillet ac dubitet, Cod. l. vii. t. 33. De acquir. & retinenda possessione, leg. 10.*

³ *Plane tribuuntur accessiones possessionum his, qui in locum aliorum succedunt, sive ex contractu, sive voluntate; hæredibus enim & his, qui successionem loco habentur, antur accessio testatibus, Dig. l. xlv. t. 3. De diversis temporalibus præscript. & de accessionibus possess. leg. 14. §. 1. Præterea ne vitiose quidem possessioni ulla potest accedere, sed nec vitiosa ei quæ vitiosa non est, l. xli. t. 3. De acquir. vel amitt. possess. leg. 13.*

⁴ *Si quis loci vacantis possessi non propter absentiam aut negligentiam Domini, aut quia sine successore decesserit, sine vi nanciscatur, quancvis ipse mala fide possidet (quia intelligit se absentem fundum occupasse) tamen si alii boni fide accipienti tradiderit, poterit ei longa possessione res acquiri, Instit. l. ii. t. 6. §. 7. Dicitur possessio quæ prodesse cæperat defuncto, & hæredi & bonorum possessori continuatur, licet ipse gerat prædium alienam esse. Quod si ille initium justum non habuit, hæredi, & bonorum possessori, licet ignorant, possessio non prodest, ibid. 12. Cum hæres in jus omne defuncti succedit, ignorantia sua defuncti vitia non excludit — usucapere non poterit, quod defunctus non potuit, Dig. xlv. t. 3. De divers. temp. præscript. &c. leg. 11.*

⁵ The honest Possessor prescribes in ten Years against a Person present, but not under twenty Years against one absent, altho' he that keeps the thing be possessed of it unjustly, *Cod. l. vii. t. 33. De præscript. longi temporis decem vel viginti annorum, leg. 11. & Novel. Justin. 119. c. 7.* See the next Note.

⁶ Prescription for moveables is gained in three Years, whereas for immoveable 'tis not gained under ten Years against a Person present, and twenty against a Person absent. *Ne Domini maturius suis rebus æsraudentur — cautum est, ut res quidem mobilis per triennium, immobilis vero per longi temporis possessionem (i. e. inter præsentis decennio, inter absentes viginti annis) usucapiantur, Instit. l. ii. t. 6. princ.* By such as are present, is meant such as are in the same Country. See *Cod. l. vii. t. 33. De præscript. longi temp. &c.*

third Party, the Person from whom we receive it should be obliged to make it good ¹; for after so long a course of Time thousands of Accidents might render him incapable of giving us this Satisfaction. And what grievous Commotions must shake the Commonwealth, if at so vast a distance of Years, so many Contracts were to be disannulled ², so many Successions to be declared void, and so many Possessors to be ejected? It was therefore judg'd sufficient to allow such a Space, as large as in Reason could be desired, during which the lawful Proprietors might recover their own. But if thro' Sloth and Neglect they suffer'd it to slip ³; the *Prætor* might fairly reject their too late Impor-tunity. And tho' it might so happen, that now and then a particular ⁴ Person lost his Advantage of recovering his Goods utterly against his Will, and without his Fault, only because he was unable to find out the Possessor; yet the Damage and Inconvenience arising from that general Statute to some few private Men, is compensated by the Benefit it affords to the Publick. But we ought well to observe, That before we can charge the antient Proprietor with Carelessness and Sloth, we must suppose, That he had a convenient Season to exert his Diligence.

Hence it is highly agreeable to Reason and Equity, That the time during which a Country hath been the Seat of War, shall not avail towards Prescription: As *Honorius* particularly decreed, *Ti ar no one should reckon towards the procuring of Prescription that Space of Time in which the Vandals staid upon the Roman Ground* ⁵.

VI. But there's no Necessity, that, in order to assert the Justice of civil Governments, in establishing the Right of *Prescription*, we should have recourse (with a certain *Author* ^b) to that Power of executing Punishment on the guilty, with which the chief Magistrate is invested. As if the Law denied an *Action* to those, who for so long a time forbore to challenge their own, for this Reason only, because the Parties deserve to be put into the List of Criminals, for suffering *Prescription* to be pleaded against them; whilst by thus neglecting their Property, they not only prejudice the common Good of the Society, but likewise sin against their own Nature, which hath in all Cases an especial Regard to the publick Advantage: And that therefore as *Solon* ordain'd a Penalty against those who were idle and negligent, so here the

Neglect of the Proprietor is punish'd with the Loss of his *Property*.

But indeed the principal Aim and Design of the Law concerning *Prescription* is not to punish Mens Defaults in this respect, but to provide, that the State be not disturb'd by uncertain Titles, and by Properties in constant Doubt and Suspence. Though it's true, that by a Person's being denied to sue for Recovery, when he hath long neglected it, he suffers some Loss or Damage as a necessary Consequence.

Besides, to be excluded from some Advantage, lying open to those only who are vigilant and industrious in their own Affairs, doth not come up strictly to the nature of a Punishment. For we certainly use a Figure when we say, *That an idle Temper is a sufficient Revenge to itself: Or, That 'tis Punishment enough to the slothful and unactive, that being shut out from all Posts of Honour, they are constrain'd to pass their Days in Obscurity.*

Besides, the Assertion is not true, *That those who suffer their Goods to be with-held from them by Prescription, are really Offenders against the Commonwealth.* They indeed do manifestly injure the Publick, who either abuse and squander away their Substance, or whilst they sit brooding over it, and are Proprietors only in Name, let it grow useless for want of Application. But now a thing that is gain'd by Prescription, is however under the Care and Management of some Person; so as still to be serviceable to the Occasions of the Community. And 'tis altogether the same thing to the State, whether such a Piece of Ground, for Instance, be in the Hands of this Man, or of that, provided it doth not lie quite neglected, without any one to cultivate and improve it.

To these Reasons we may add farther, That when any private Person receives Advantage from another's Punishment, 'tis necessarily supposed, that he was before considerably hurt or endamaged by the Party offending. Whereas he who commenceth a Proprietor by the Right of *Prescription*, can on no Account be said to have suffer'd Harm from the Neglect of the Party, whom he thus succeeds. Nor doth he rightly apply to the present Purpose those Words of Book xvi. t. 3. *D. Deposti, &c. Male meritis publice, &c.* "He that hath deserv'd ill of the Publick by em-bezzling what was deliver'd to him in Charge, ought to be left to struggle with Poverty, that

^a *Procop. Hist. Vandal. l. i. c. 3.*

^b *Hugo de Roy, de eo quod iustum est, l. iii. t. 3, 4.*

MR. BARB. NOTES on §. v.

¹ See Lib. v. c. 5. §. 5. following, at the End.

² It was a judicious Reflection made by *Aratus* of *Sicyon* in *Tully's* Offices, l. ii. c. 23. *Et quinquaginta annorum possessiones moveri non nimis æquum putabat, propterea quod tam longo spatio multa hæreditatibus, multa emptionibus, multa dotibus tenebantur sine injuria.* He did not think that Possessions of fifty Years should be disturbed, because in so long a time many things in Inheritances, Purchases, and Portions might be held without an Injury to any.

³ The *Rom* Lawyers hold, That they who suffer their Goods to become subject to Prescription, may be thought to alienate them. *Alienationis verbum usucapionem continet. Vix est enim ut non videatur alienare, qui putitur usucapi.* Dig. 50. t. 16. *De verb. signif. leg. 38. in princip.*

⁴ The Ignorance of the antient Owner hinders not the Prescription. The Civil Law orders things so, that he that loseth the Possession of his Goods may claim them again, if he can discover in whose Hands they are: but it doth not suppose it a thing absolutely necessary that he should actually discover them. The Proof of that Condition, says the Emperor *Julianus*, would run us into new Perplexities. *Ut homo in initio possessionem tenentis, & utriusque partis domicilio requisito, sit expedita quaestio pro rebus abicunq; positis, NULLA SCIENTIA VEL IGNORANTIA EXPECTANDA, ne altera dubitationis inevitabilis oritur occasio.* Cod. l. vii. t. 33. *De præscript. longi temporis, &c. leg. 12.* It is sufficient then in general to presume, that he against whom the Possessor prescribes has a competent Knowledge; and it was upon the account of this Presumption, that the same Emperor took himself obliged to prolong the time of Prescription, which according to the Laws of the Twelve Tables was but one Year for Moveables, and two for Immoveables. *Sed & si quis res alienas, Italianis tamen, bona fide possidebat per biennium, nulli rerum Domini excludebantur. & nullus eis ad eas referebatur regressus, quæ & inscientibus Dominis præcedebant, quo nihil inhumanius erat. Si Homo ABSSENS & NESCIENS TAM ANGUSTO TEMPORE SUIS CALEAT POSSESSIONIBUS,* Ibid. t. 31. *De usucap. transform. &c. leg. 1.*

“ he may serve for an Example to deter others
“ from Wickedness.

Since then the Law concerning *Prescription* is not a *penal Statute*, 'tis idle to dispute, why the Negligence of the *Proprietor* should be rather punish'd by the Loss of the neglected Goods, than by some pecuniary Mulet. Though it is very evident, that such a Mulet could not procure the true End of the *civil Constitutions* in this Affair, which was, “ To cut off all those Suits and Quarrels that “ would for ever have been springing up, and to “ ensure, at least, a quiet Enjoyment to long Possessors, whose Case entitles them to more than “ ordinary Favour.

For in the first Place the Matter must have been brought into Court by the Claim of the former Proprietor, where the Cause would have been the more difficult and perplex'd, by reason of the things continuing so long in other Hands; and then the present Possessor was to be ejected, whence a new Hardship would arise. For if the Fine were to go to the Magistrate, then the Possessor's just Title and honest Intentions were likely to stand him in no stead. Nor if the Possessor himself were to receive the Fine for a Comfort and Recompence, would all the Doubts be hereby resolv'd. Because, should the Fine be less in Value than what the Possessor loseth by quitting his Hold, he must still be, in part, a Sufferer: But were it as much, or more, then the ancient Claimant would get little by his Suit. Therefore there cannot be, in the Point before us, a more ready way to Peace and Quietness, than to declare, that after the Term of Years appointed for *Prescription*, the Right of the former Owner shall cease and be extinct.

VII. By what Law *Prescription* was first set on Foot, the learned are not well agreed: Most ascribe its Original to *civil* or *positive Law*, and oppose it to these Methods of Acquisition, which are commonly said to proceed from the *Law of Nations*. Nay, *Cujacius*^a goes so far as to affirm, *That Prescription doth really contravert the Law of Nations, in that it takes a Man's Property from him, without his Consent: That it interferes likewise with natural Equity, tho' only for the Sake of publick Good; whilst it endamageth private Owners, but turns to the Benefit and Advantage of the Community.* To which *De Roy* answers, ^b*That each particular Proprietor, in*

subjecting himself to those Laws which establish Prescription^c, doth at least implicitly consent to that Translation of his Right. Another Reason urg'd by *Cujacius*, to prove this Establishment to be contrary to the Law of Nations, is as follows: *That, according to the said Law, no Man can constitute another as the true Proprietor of a thing, unless he were himself so before: Whereas, by the civil Law, he who receives a thing from one who was not the Proprietor, may yet obtain the Property of it himself, if he can prescribe for it in the usual manner. To which De Roy*^c again replies, *That in the Business of Prescription the Seller, or any other Non-proprietor, conveys nothing more than the Title and honest Possession; but that the Property is wholly added either by the standing Law, or by the publick Magistrate, who even according to the Law of Nations is invested with just Power to make new Ordinances, and to transfer Properties from one Person to another, out of a fair and reasonable Regard to the publick Good; the Party who thus suffers for his own Neglect, really consenting to this Conveyance of his Property, or at least being presump'd to consent by his long Silence.*

Some maintain *Prescription* to proceed from *civil* and *positive Law*, upon the Strength of this Argument; that in case a Man hath not originally obtain'd a Right on some other Bottom, the bare Length of Time can give none, as being destitute of all Power to produce any Effect. *For tho' every Thing, say they, is done in Time, yet Time itself can do nothing.*

Now as to the Reason here proposed, thus much indeed is certain, *That it depends wholly on the Determination of positive Law, why Prescription should be rather compleated at the Tenth or Twentieth Year (for Instance) than at the Ninth, or the Sixteenth: Yet no one can deny but that the Consent of all Nations, to which they were moved by the Care of the common Peace, might be able to assign some moral Efficacy to the Course of Years; at least so far, as that in Proceess of Time some certain Presumptions and Favours, on the side of Persons in Possession, should be granted to defend and confirm their Right, though attributed to other Causes than the bare Time it self. For tho' pure natural Reason, and the Agreement of all the World, do not fix any one Point of Time as the necessary Condition of obtaining a future Right, yet they*

^a Add Leg. i. Dig. De Usucap.

^b Dict. loc.

^c Lib. iii. t. 4. f. 8.

MR. BARB. NOTES on §. VII.

¹ This is a very good Reason. For the Laws may limit the Right of Property many ways, and make them pass from one to another without express Consent, nay, sometimes against the Will of the ancient Proprietor. So that though Prescription had no Foundation besides natural Right, yet 'tis not unjust, that the Laws give it an Authority among Members of the same Kingdom. For, as I shall shew hereafter, 'tis so far from being contrary to natural Equity, that it is very conformable to it, and answers the End and Design of Property itself. Upon the whole, a good Design is necessary to prescribe with a good Conscience, as I have said §. 3. n. 5. whether the civil Laws require it, or no. I also suppose, that Prescription is fixed at a time long enough, as we ordinarily reckon it. For, in my Judgment, an honest Man could less help himself among the *Romans*, when the Prescription for moveable Goods was made in one Year, and immoveable in two, in which the Emperor *Justinian* did acknowledge there was some Injustice, as I have shewed above, §. 5. n. 4. Upon this ground Prescription is not an odious Right, nor conformable to natural Right, although Mr. *Puffendorf* say 'tis, and in his Treatise of Restitution, l. v. c. 6. compares it to an unjust Arrest, which yet does not free from the Obligation to Restitution. He asserts, “ That the Law of God does not admit of this Right, and that “ the Jubile always restored the ancient Proprietors to the Possession of their Goods, though voluntarily alienated. ” But this has no relation to the Right of Prescription. God, for Reasons arising from the Constitution of the *Jerusalemitic* Republick, forbade the perpetual Alienation of their immoveable Estates; and not of their Goods in general, as Mr. *La Placcette* expresses it. See l. v. c. 5. §. 4. following. In fine, there is nothing in the Law of *Moses* that condemns Prescription as an unjust Establishment, and we can no more infer it from the Example he brings, than we may conclude that the perpetual Alienation of Lands is odious, and not conformable to natural Right. The other Example which this Author adds, is not better apply'd. Although the *Jebusites* had maintain'd themselves several Years in the possession of the City of *Jerusalem*, after God had given the Children of *Israel* all the Land of *Canaan*, yet *David* drove them from thence. This is a special Case, from which no Consequence can fairly be deducted; and Mr. *La Placcette* ought to remember, that when the *Ammonites* claimed certain Lands, which they affirmed to be theirs, *Jephtha* opposed them with this Argument, That the *Israelites* had enjoyed the peaceable Possession of them three hundred Year, which was enough to secure the Property to them. See *Judges* xi. 25.

might allow this Effect to a space of very considerable Extent and Latitude.

Others have chose to exprefs themselves doubtfully and timorously in the matter; being sensible of the vast Advantage which the Law for Prescription brings to the Publick; they thought it probable, that from the very Nature of the thing, and its antecedency to any positive Ordinance, *Prescription* is of Force to transfer *Property*; since natural Reason in the strictest manner commands the doing of those things which conduce to the common Benefit and Peace. But then they qualify this Assertion, by adding, *That though the Light of Reason suggests, that the Thing is highly fitting, and that 'tis expedient it should be enacted by a positive Constitution, yet 'tis not altogether so necessary, as to be immediately establish'd by the meer Law of Nature.*

Again, many do not stick to acknowledge, that *Prescription* is not repugnant to the Law of Nature, and consequently, that it may be pleaded as a fair Title amongst those who are wholly govern'd by the said Law, in relation to each other, and lay the Foundation of it in the *tacit Dereliction* of the former Proprietor: For the Proof of which¹, they suppose before-hand, "That Nature allows every Man to renounce and abdicate his Right, when he thinks fit to hold it no longer. Now, that this Desire of abdicating should be able to produce any Effect, in relation to others, 'tis necessary that it discover itself by some certain Tokens; it being incongruous to human Nature to derive any outward Efficacy from the bare internal Acts of the Mind. These Tokens are either Words, or Deeds. If the Will be express'd by Words, then there is no need of waiting for the Term of Prescription, since the Right is immediately transferr'd on the other Party. And it is the same when a Man declares his Resolution concerning a thing by some positive Deed; as suppose, if he either cast it from him, or abandon it; unless the Circumstances be such, as that we ought to conclude, that he either rejected, or relinquish'd it only for a time, with Intention to demand and resume it again hereafter². Thus if the right Owner of a thing shall knowingly deal and bargain about the same thing, with another who hath the actual Possession of it, he shall justly be deem'd to have given up his own Right, so that it shall fall and be extinct upon the very Moment of compleating any such Bargain and Transaction. Prescription therefore can take place in those things alone, which the former Owner hath not renounced either by Words, or by any express Deed, or overt Act; but in which we presume his Inclina-

tion to leave them, from his neglecting to enquire after them, and to challenge them again. For even Non-performances or Omissions, consider'd with their due Circumstances, do, in moral Account, pass for actual Deeds, and may prejudice the Non-performer³. Put before we can presume upon a Man's Intention from such an Omission, 'tis necessary that the Omission did arise from pure inculpable Ignorance. Wherefore those, who are in Possession of other Mens Goods, do then only gain the Property of them by the tacit Consent of the former Owner, when he knows them to be thus possess'd, and yet forbears to challenge them upon a convenient Opportunity. For there can no other Reason be assign'd, why a Person who thus knows the Matter, and hath his free Choice to determine accordingly, should yet be utterly negligent and silent in it, but this, that he hath no longer any Care or Concern for the thing detain'd, nor will reckon it his own for the future⁴.

Farther, As to the raising this Presumption of a Man's voluntary Neglect to demand his Property, length of time affords a very reasonable Conjecture: For 'tis hardly possible, but that in a course of many Years we should gain Intelligence that our Goods are in other Hands, and have Opportunity of recovering them, or at least of interrupting the Possessor's Title, by declaring and protesting against it.

Again, If we were at first hinder'd from putting in our Claim thro' Fear, this Fear too will in time vanish, and we shall be likewise able to provide so well for our own Security, as to be in no Danger of suffering from the unjust Detainer.

As to the Objection⁵, *That no one can easily be presum'd to throw away his own*; 'Tis answer'd by affirming on the other Hand, that no one can be thought willing, that a thing which for so vast a while he hath not at all regarded, nor given any one Indication of Care about it, should any more appertain to him.

Tho' all this be very plausibly alledg'd, yet 'tis certain that a long continued Silence doth not always give us sufficient Ground to suppose a *tacit Dereliction*. For, as it may happen, that a Man, for the longest Space we can fix, might either have been ignorant of his Right, or hinder'd from asserting it thro' want of Power and Apprehension of Danger; ⁶ so again, if he claims his Goods, tho' after never so long a Season, 'tis manifest that he did not before absolutely abandon and give them over. And consequently this Foundation for *Prescription* will not be such, as shall hold universally, or extend to all Cases.

¹ Add *Grot.* l. ii. c. 4. f. 9. *Bæcler.* & *Ziegler.* ad dict. loc. f. 1. ² Lib. ii. c. 4. f. 3, &c. ³ Add Lib. xli. t. 1. l. 9. Sect. ult. D. De A. R. D. f. 8. Lib. xiv. t. 2. ad L. *Rhod.* l. 8. Lib. xvii. t. 2. leg. 43. f. 11. D. *De furtis.* Lib. ii. t. 14. l. 2. f. 1. D. *De pactis.* ⁴ Vid. *Numb.* xxx. 5, 12. D. lib. xxii. t. 1. l. 17. f. 1. *De Ujaris,* &c. Lib. xli. t. 1. leg. 44. D. De A. R. D. ⁵ Add *Bæcler.* ad *Grot.* d. l. Sect. 5. & *Ziegler.* ad l. d. ⁶ Vid. *Can.* xiii. xiv. *Cauf.* 16. *Quæst.* 3. in *Gratian.*

Mr. BARB. NOTES on §. VIII.

¹ We may consult Mr. *Wherlhop's* Discourse already quoted, *viz. Vindiciæ Grotiani Dogmatis de prescript. inter gentes liberat.* §. 9, &c. where he makes a kind of Comment upon that Place of *Grotius*.

² *Grotius* comes at length to the Conclusion, and having answer'd directly in opposing the Reason which our Author himself confutes afterwards, he infers, that we ought to suppose every Man honest 'till the contrary appears.

As to that other Reason offer'd by *Grotius* ³, to prove that a *Dereliction* may be presum'd from long Silence, *Because we must not believe that Men are so uncl-witably dispos'd towards each other, as that they would suffer any Person to continue in a perpetual Course of Sin, for the sake of a perishable Enjoyment*; this doth not at all affect the present Question. For, besides that it seems a little too simple to flatter ourselves with so large Promises of Mens Consciences and Piety; ^a he that comes to a Possession by honest Means, and with Innocency of Intention (and him only we have pronounced capable of commencing Proprietor by *Prescription*) is really in no Sin; because the manner of his obtaining the Possession fully persuades him, that he obtain'd the Property together with it. And it doth not appear that any Man is oblig'd voluntarily to call in question his own Right, established upon a lawful and probable Title. But if the detaining of another's Goods after this manner were indeed in it self sinful, the Guilt were to be taken off, not by the Silence of the Owner, but by his express Confession, and the Renunciation of his Right, did he resolve to give full Relief and Satisfaction to the Conscience of the Possessor. But in this Case the Possessor's Right would not be owing to *Prescription*, but to the solemn Act of the former Proprietor.

IX. Amongst these different Opinions this seems to be clear and evident, That as the Propriety of things was introduced out of a regard to the common Peace, so it flows as a Consequence from the same Principle, that they who have been let in to the Possession of any thing upon a fair and honest Presumption, should at length be secured in the Enjoyment of it; and that others should not be allowed to raise perpetual Suits and Quarrels about their Title. But the particular Space of time

^a Add *Ziegler ad Grot. loc. citat.* Sect. 8.

within which such an innocent Possession grows up to the Force and Strength of Property, we do not find precisely determined, either by natural Reason, or the universal Consent of Nations; but it is to be adjudg'd by the Opinion of good and true Men upon the Case, not without some considerable degree of Latitude. Yet so as that this Latitude shall not be cavill'd and pick'd at, with the like Sophistry as *Ilræce* hath used on another Occasion:

*Scire velim chartis pretium quotus arroget annus :
Scriptor abhinc annos centum qui decidit, inter
Perfēctis veteresque referri debet, an inter
Viles atque novos? excludat iurgii fuit.
Est vetus atque probus centum qui perficit annos.
Quid, qui deperit minor uno mense vel anno,
Inter quos referendus erit? v. tere fine poeta,
An quos & presens & postera respicit ætas?
Iste quidem veteres inter ponetur honeste,
Qui vel mense brevi, vel toto est junior anno.
Utor permissis, caudæque pilos ut equine
Paulatim vello, & demis unum, demo etiam unum, &c.
Epit. iii. lib. i. ver. 35, &c.*

I'd know what Years an *Author's* ripe for Fame;
Suppose a Century gone; where shall his Name
Be fix'd? I th' antient Roll of finish'd Wit,
Or the vile modern? Let the Bounds be set.
He's old and staunch at a full Century's Date.
What if he dropt a Month, a Year too late;
With the old *Hercules* shall he share the Prize,
Or sink with those our Children shall despise
Upon their Father's Judgment? *We'll presume
Him of full Age, who comes so near the Sun.*
I'll hold you ro't, 'till by Degrees I clear
The Horse's Tail, and pick it Hair by Hair.

MR. BARB. NOTES on §. VIII.

³ In truth the Silence of the Proprietor proceeds commonly from these things only, *viz.* either he knows not who hath his Goods, or he is ignorant of his own Right to them, or he hath some Reason, more or less strong, why he doth not put in his Claim. So that we can't lay it down for a Principle in general, that there is a tacit forsaking of Goods properly so called. 'Tis almost always against a Man's Will that he is deprived of his Possessions; and if the civil Laws suppose the voluntary Negligence of the antient Owner, they suppose no less the Possibility, which I have observed above, §. 5. n. 4. Men are not commonly so careless as not to know their Interests, nor if they appear, to maintain them, especially when the thing they are about is any thing considerable. And the *Prescription* is made most commonly not only against the Proprietor of the thing himself, but against his Heirs, who are subject to be ignorant of their Right, or are unable to preserve it by a simple Contest, which has place at least in a *Prescription* of time immemorial. We must find out some other Principle which supposes rather the Sentiments that the antient Owner ought to be of, than what he really is. And this, in my Opinion, will not be hard to find, if we attend to the Nature and Design of Property itself. I say then, that the natural use and effect of the settling of Property of Goods is not to assure every one of a perpetual Right of what once belonged to him for so long a time as he shall be dispossessed against his Will. In reality the Duration of the Right of Property depends not absolutely on the Right of Possession, as I have shewed above, c. 6. §. 1. n. 1. This would reduce Right to nothing, and destroy the End for which it was establish'd. But yet it is not less contrary to that End, that the long Possession of another should destroy his Claim, who has not voluntarily renounced his Right to such Goods as are not in his Power. All our Goods, which we enjoy are of that nature, that a thousand Accidents can deprive us of them against our Will, and make them pass innocently into another's Hands. They are designed to circulate in Commerce in the World, and so to remain no longer in the Patrimony or Family of the Proprietor, to whom they are often of little use in themselves, than he can part with them for something he wants. Moreover, if the End of Property requires that the Proprietors should enjoy what they have peaceably, and not be in danger of losing their Right from the Moment that they are in Possession of a thing, it is no less requisite, in my Judgment, that he who believes, and has Reason to believe himself the lawful Proprietor, should never be subject to be deprived of what he has honestly got, and to which he has a just Title. It may be every one's Case, and no Man can be certain that there is no secret Fault in the Acquisition he is possessed of. Besides, in things of a moral Nature we must judge according to appearance, and according to the common Proverb, *Not to be, and Not to appear*, are all one. So that when a putative Property, if I may so speak, produces the same effect as a more real and more incontestable one, because the Right of the true Owner does not appear, these two sorts of Property may well pass for one and the same in time, and the Right of the putative Proprietor may quite exclude the Claim of him who might receive one. This is the more just, because the contrary would produce a thousand Troubles in Society; and the more honest the Possessor are, through whose Hands the things have pass'd successively, the greater Right will the last Possessor be thought to have, how small a time soever the others may have kept it. From whence I conclude, that the antient Owner, and much more his Heirs, ought at the end of such a considerable time to renounce freely all their Pretensions, and that if they do not, the Right of the honest Possessor is not a whit the less well founded. There is nothing to be perceived, as we suppose it, neither in the Nature of the thing itself, nor in the Quality of the Person of whom he held it, that can give him occasion to suspect that there is any defect in his Title; and 'tis not his Fault if he, to whom it appertains, without knowing it, has not discover'd, or not been earned in searching into it. In a Word, it is a great Misfortune for the antient Proprietor, for which he has Reason to comfort himself: And if the Possessor becomes afterwards the true Owner, he is sometimes oblig'd to restore the thing, not by the Rigour and Rule of Justice properly so called, but by a free Motion of some of those Virtues that require us to release his Right, as if a rich Man should prescribe against a poor Man, or one in mean Circumstances, &c.

But in fixing the particular Period, a Regard shall be had both to the antient Owner, and to the new Possessor. To the former, lest he should be too soon excluded from the Privilege of following and finding out what he hath lost. In which point natural Equity requires that *Prescription* should not be completed in so little time between absent Parties, as between those who are both on the Spot. To the latter, lest he should undeservedly suffer Damage, when 'tis too late for him to gain Redress by convicting the first injurious Detainer², from whom the thing was honestly receiv'd; or when the thing is so riveted to his Fortunes and Estates, as to make the chief Bottom upon which they depend. Hence, inasmuch as moveable things pass in Commerce to others more frequently than immoveables, so that having gone thro' so many Hands, 'tis more difficult to find out the Person by whom they were first convey'd, 'tis but reasonable to allow a longer Space for the recovering the former than the latter; especially, since those likewise do much sooner suffer and decay by Use than these: For it would little avail the former Proprietor to receive his Goods when impair'd, and wasted, and render'd unfit for his Service. And tho' a Man at his first gaining such a thing of another's, may have made a very advantageous Bargain, or tho' his Title cost him little; yet it seems hard, and an obvious matter of Complaint, that any one should be forced to part with a thing that hath now a long time grown, as it were, into his Patrimony and Inheritance: And the rather, because on the other hand we have reason to believe, that he who hath contentedly wanted a thing during a great part of his Life, within which he hath been able to make sufficient Provision for himself by other means, will not think it an Injury or Hardship that he be oblig'd to want it for ever. To which may be apply'd that of *Tully*, Off. ii. c. 22. *Where's the Equity, that an Estate, possess'd many Years before, should be got by him that had it not, and be lost by him that had it?*³ See the Story of *Aratus the Sicyonian* in the next Chapter. So that upon taking in all these Considerations, it will be no difficult Task for a fair and honest Arbitrator to find out such a Term for *Prescription* in particular Cases, as shall be agreeable to natural Equity. Tho' 'tis the better way in civil States, that all the points of Controversy may be brought within a narrow Compass, to fix in general some certain and necessary Bounds, at which *Prescription* shall commence valid, according to the Nature of the Subject. We are therefore altogether of Opinion, that *Prescription*, as it abstracts from the points of Time establish'd by civil Ordinances, is, as it were, the Corollary or Appendix of Property. And by Consequence, that when the Property was first introduc'd⁴, it was likewise agreed upon by general Consent, for the sake of the pub-

lick Peace, that he who possessed a thing in his own Name, neither by violent Detention, nor by fraudulent Concealment, nor by a precarious Title, should be presum'd the true Proprietor of it, 'till any one was able to prove the contrary: And that he who had held a thing honestly obtain'd, a very long Season, during which any Man of ordinary diligence would have enquired after his own, should defend his Hold against the tardy Claimant, who so long neglected to make his Challenge.

X. Upon these Principles, and if we place the Reason of *Prescription* not barely in the Dereliction of the former Owner, we may with the more Ease resolve this very intricate Question, *Whether or no, or after what manner, Children, not come into the World, can lose their Right by the tacit Dereliction of their Parents and Ancestors?* Which we may understand two ways; either of such *Prescription* as was completed before the Children were born, or of such as only commenced in their Father's Time, and was completed at his Death. In the former Sense, if we take the negative side, we are encounter'd with this Difficulty, that *Prescription*, thus understood, will not in the least contribute to the Peace of Empires and Dominions; most Goods being in their Nature capable of descending by Inheritance to Posterity; and therefore 'twould be in vain for the Prescriber to overthrow the Claim of the Father, if the Son might afterwards renew the Suit. But if we incline to the affirmative Part, it will seem strange, how Silence or Negligence should prejudice those who were unable to prefer an *Action*, or so much as to speak a Word, and indeed, who were not yet in Being; or how the Default of one Person should thus turn to the Damage of another. Which Doubt *Grotius*⁵ hath taken off by the following Remark: *That a thing not yet existent can have no Accidents, so a Person, who is as yet no part of Nature, can have no Right, and consequently nothing can be said to be taken from him*⁶. By him, who is as yet no part of Nature, we mean him who is not conceiv'd, not he who is conceiv'd, but not born: Because the latter, in many Instances of Right⁷, is already suppos'd to be a Member of human Society⁸. It may be added in Confirmation of this Judgment, That the Goods of Parents do only then begin to belong to their Children, when the Parents themselves hold and enjoy them, 'till the very time at which the Children ought to inherit them. Which Rule may be thus extended to a larger Compass: He that is not yet in Being can acquire no Right, unless by the Intervention of another already in Being, from whom the Right shall be deriv'd to him upon his coming into the World, yet so as that it shall obtain no Effect in relation to him, 'till after he is actually born. And this happens when any thing is acquir'd or deliver'd to another, to be held in such a manner as

² Lib. ii. c. 4. f. 10. n. 2.

³ M. Senec. *Controver.* l. i. c. 6. p. 93. towards the End. *Edit. Gronov. Bes. re see clariora any actual Existence, Nature hath the whole Government of us, and casts us into what Fortune she pleaseth. Our true Rate and Value then commenceth, when we are at our own Disposal.*

⁴ Vid. lib. xxxviii. t. 9. l. 7. princ. D. De ventu in poss. n. 1. & Lib. xxxviii. t. 16. l. 7. D. De suis & legitim. hered. & Lib. l. t. 16. l. 231. D. De verb. signif.

MR. BARB. NOTES on §. ix, x.

² The Original in all the Editions of it has *per Evictionem*. This is an Inadvertency of our Author, who doubtless meant *per Evictionis praestationem*.

³ The Latin of Cicero is, *Quam autem habet aequitatem, ut agrum multis annis, aut etiam seculis ante possessum, qui nullam habuit habeat, qui autem habuit amittat?*

⁴ There needs no Argument to be suppos'd. See what is said upon the former Paragraph, Note 3. The Author argues upon the false Notion he has formed to himself of the Original of Property, which we have contuted in its Place

⁵ See l. i. c. 1. §. 7. n. 4. above.

that he shall be able to transmit it to his Successors. Yet here there is an observable Difference; for some things are so conferr'd on another, as that the Interest of the Giver is not at all affected, whether the thing descend to the Heir, or not; though, so far as he is concerned, he grants the Receiver free leave thus to transmit it. But other things are conferr'd after such a sort, as that the Donor retains a *Right* over the manner of holding, which he himself appointed, so that it cannot be altered without his Consent. Now which soever of these ways we suppose a thing possessed by any Man, with the power of transmitting it to his unborn Posterity, if it happen by any means to be intercepted or alienated before the Birth of the Heir, he is not the least injured thereby; unless the Title or Pretension to it (if not the thing itself) were expressly left him in the manner of an Inheritance. For in the former case, since both the thing holden, and the way of holding it are fully in the Possessor's Disposal, if he convey it away from himself; or if, by any change whatsoever, it cease to be his, all the *Right* he had to it is immediately extinguished; and consequently cannot be derived upon his Heir as yet unborn, who can claim no Right to Goods of this Nature held by his Ancestors²; but what they deliver to him, as it were, from hand to hand, after he is actually in Being. But in the latter Case, inasmuch as the prime Donor still reserved to himself a Power over the Tenure³, if his Consent be obtained, the Possessor doth not at all damnify those that come after him, should he either alienate the thing, or give it over for lost, by whatever Accident it was convey'd from him. Tho' all this be true, yet *Pijstratus* was of another Opinion, as appears from his Epistle to *Solon*, where he gives the following Reason amongst others for his seizing on the Government; *I have not usurped what belong'd to others; I only claim that by my own just Right and Title, which the Athenians, having first confirmed by Oath to Codrus and his Family, afterwards took away*⁴.

The Question taken in the latter of the two Senses, which we observed it to be capable of, is denied by the Civilians; for they say, *That Prescription heretofore begun, stops during the Years of*

*Minority*⁵, and upon their Expiration runs on effectually again. Yet I am of Opinion, there may be a Case, in which the Favour of Possession shall over-balance the Favour of Minority: As for Instance, suppose it should so happen, that when I want only a Month or two of completing my *Prescription*, and it is morally certain that the ancient Proprietor will not within that Space give me any Trouble about the Title, and if he should then decease, leaving an Infant Heir, it would be unreasonably hard, if after five and twenty Years Possession I should be thrust out of my hold for want of those two Months: Especially, if it be now impossible for me to recover Damages of him, from whom I received what is thus challenged; as I might have done, had the Dispute been started before the Goods devolv'd upon the Minor. Here certainly, if the Business be refer'd to the Arbitration of an honest Man, and one who knows that the Grounds and Reasons of *Prescription* are not to be drawn barely from the Neglect of the former Owner, he will give Judgment for me rather than for the other Party. Nor doth it seem so very grievous, that a *Right* which under the Father was, as we may say, at its last Gasps, should utterly expire under the minor Son: And especially, because Men esteem it a much greater Hardship to let go a thing which they have held a considerable time, than to be debarr'd of what is not yet come to their Hands.

XI. From hence it appears, that they too⁶, who are subject to no common Law besides that of *Nature and of Nations*, may alledge against each other's Claim, a long, uninterrupted, and honestly obtained Possession: And so much the rather, as publick Possessions cannot be disturbed without far greater Confusion and Danger than private. Though it must be confessed, that in Controversies between Princes and States it is frequently not altogether so necessary to appeal to *Prescription*, since the *Right* of the Possessor⁷ may, or at least should be deduced more solidly from other Foundations. And *Bæcker*⁸ hath observ'd before us, *That those who in this Business of Prescription mention only the Point of Time, often intend to sum up their whole Claim in this short Expression: Under which are*

² *Diogen. Laert. in Solon. l. i. f. 53.*

³ Add *Grot. dict. loc. Sect. 2.*

MR. BARB. NOTES ON §. X, XI.

² The Words of the Roman Law are, *Item Liberos scribit etiam cum, qui post mortem patris senatoris natus sit. quasi senatoris filium esse. Sed — non proprie senatoris filius dicitur is, cujus pater senatus motus est, antequam iste nasceretur. Si quis conceptus quidem sit, antequam pater ejus senatus moveatur, natus autem post patris amissam dignitatem, magis est, ut quasi senatoris filius intelligatur, tempus enim conceptionis spectantur plerisque placuit, i. e. An Infant that is born after the Death of his Father, who was a Senator, shall be esteemed a Senator's Son, if his Father kept his Dignity to his Death; but he shall not be esteemed a Senator's Son, if his Father were removed from the Senate before he was born; but if he were conceived before his Father's Degradation, but not born, he shall be accounted as if he were a Senator's Son in regard to his Conception.*

³ See l. viii. c. 5. §. 9. following.

⁴ The Words of the Civilians are, *Non est incognitum id temporis, quod in minore etate transmissum est, longi temporis prescriptioni non imputari. Ea enim tunc curere incipit, quando ad majorem etatem Dominus rei pervenerit, Cod. l. vii. t. 35. Quibus non obicitur longi temporis prescriptio, leg. 3.*

⁵ The famous Father *Du Puy*, Counsellor and Library-Keeper to the King of France, maintains the contrary, in a Discourse, intitled, *Whether Prescription is of force amongst Sovereign Princes?* It is found in a Collection of several Treatises touching the Rights of Christian Kings, printed at Paris in 1655, and at *Rouen* in 1670, but Mr. *Wberthof*, Professor at *Helmstaüt*, has confuted it fully in his *Vindiciæ Grotiani dogmatis de prescriptione inter gentes liberas contra illustrem scriptorem Gallicum Petrum Puteanum*. This Work, quoted before, is worth the reading, tho' after what I have said in my Notes, as well as this Author in the Text, 'tis easy to see on which side the Truth lies. I shall only observe, that Mr. *Wberthof* requires that he would explain by what Right the Crown of France has pass'd to the *Carlovingians* by the means of *Popin*, and to the *Capetians* by *Hugh Capet*, if it be true, according to the Principle of that French Author, That the Successors of an Usurper can never acquire a lawful Right of Force against the Posterity of the King unjustly dethroned.

⁶ But it is true also, that most times the other Titles are not sufficient, because in passing from one Possessor to another, and by different Titles, we shall find at last some of them dishonest and faulty, which will destroy and render useless all that depend on it, how good soever they be in themselves, if the length of time, which has passed ever since, will not purge the foulness of the Original.

likewise to be understood the Adjuncts of Time, as the quitting the thing which is now the matter of Dispute, or the Intention of quitting it, or any Tokens of renouncing the Right and Title. And since the Plea of Time is in the main plausible, especially with vulgar Hearers as (if it gave an Advantage to other Proofs) it is a politick Stratagem to urge this Notion in general, and in gross, wilfully avoiding all Explications or Additions which might be able to give Strength to such a thing as Time, which of itself can produce no Effect; and, instead of them, to heap up Instances and Examples of former Disputes, that the Discourse may seem more full, and may carry a fairer Colour as to the main Point.

Tacitus^a calls it by no better Name than *Vani-loquentia*, *Impertinence* or *idle Talk*, in *Antibannus*, when he laid claim to the ancient Bounds of the *Persian* and *Macedonian* Empires.

Sapores, as *Ammianus Marcellinus*^b informs us, renewed the same Claim many Ages after; to whom *Constantinus* gave this Answer in his own way; *But 'twas strange he should forget how the Persians were enslaved by the Macedonians; the latter of which Nations being subdued by the Roman Power, their Bondsmen could not but fall under the same Dominion*^c.

Thus likewise *Solyman*, the great *Turk*, would often say, *That he had a Right to the City of Rome, and to all the Western Empire, as being the lawful Successor of Constantine, who had remov'd the imperial Seat to Byzantium.* Yet in the most noble Ex-amples upon Record, you will find, that besides the Argument of long continued Possession, some Title or other capable of producing Sovereignty hath been at the same time alludg'd.

Thus *Isocrates*^d, under the Person of *Archidamus*, having shewn in the first Place that the *Lacedemonians* became Masters of *Messene* by the Title of a just War, afterwards brings in the length of Possession, as a kind of secondary and inferior Proof: *Nor are you ignorant, says he, that all the World agree, Possessions, whether publick or private, shuld after a long Period of Time be fix'd and confirm'd, and pass as lawful Inheritance.* To which he subjoins, that the Title of his Country to *Messen* was not controverted heretofore, when a fair Opportunity was offer'd to that Purpose^e. And

indeed, in Causes of this Nature, 'tis always a fair Presumption in favour of the *Possessor's Right*, that, during so long a Space, no Person else hath put in his Pretensions. For these Matters are usually of so very great Importance, and are transacted so openly and in broad Day, that if a third Party hath any Right in the Case, he can neither be long ignorant of it, nor want occasion of preserving it, at least by declaring and protesting against the *Usurper*.

Therefore there can happen very few Cases, in which *Dominion* and *Sovereignty* shall not be the Consequences of *Prescription*, when a State or People have possess'd themselves of any thing upon a peaceful Title. And as for what they gain in War, it is hardly necessary to plead *Prescription* on that Account. For so long as the Hostility continues, the Possession of all that hath been won from the Enemy is supported only by Force and Violence; and at the same time the Enemy hath a Right of recovering his Losses by any means he can use; Especially if, having given any unjust Occasion of the Quarrel, he is ready to make Satisfaction. Hence, inasmuch as a War may be protracted for more than Fifty Years, they, who lost any Place at the first breaking out of the Difference, may regain it by Force at any time before the Business is adjusted by a Peace.

The *Numidians*, in *Livy*^e, pleading *Prescription* against the *Carthaginians* for a Tract of Land (which bore the Name of *Emporia*) talk to this Purpose; *That the Right was sometimes held by the State of Carthage, and sometimes by the Kings of Numidia, as either had Opportunity to seize upon it; and that the Possession was always in the Hands of those who appear'd strongest in the Field.*

When a Peace is concluded, 'tis easy to see what both sides are to hold for the future; and then what is yielded up by one Party, the other immediately acquires with full Right, and hath no need to wait for the Title of *Prescription*. If any third Person lays claim to the same thing, he will be sure to declare his Pretensions in good time; and if possible, whilst the Treaty is in agitation: For afterwards Warriors will not easily be prevail'd upon to restore what they have won by the Sword, to those who were idle Spectators of the Quarrel^f.

^a Ann. vi. c. 31.

^b Lib. xvii. c. 5.

^c In *Zenarai*, Tom. iii. ad ann. 354. See likewise *Herodian*, l. vi. c. 6.

^d Add *Alberic. Gentil. De Jure Belli*, l. i. c. 22.

^e Lib. xxxiv. c. ult.

^f Vid. *Græc.* l. iii. c. 6. Sect. 7.

MR. BARB. NOTES on §. XI.

³ *Isocrates's* Words are, Ἰσώτα μὲν εἶδ' ἐκείνο ὑμῶς λέληθεν, ὅτι τὰς πατρῆεις, καὶ τὰς ἰδίας, καὶ τὰς κοινὰς, ἢ ἐπιγένηται πολὺς χρόνος, κυρίας, καὶ πατρῆας ἅπαντες εἶναι νομίζουσι.

C H A P. XIII.

Of the Obligations which arise immediately from Property.

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| <p>I. Every one is obliged to abstain from another's Goods.</p> <p>II. Others Goods kept by us are to be restored.</p> <p>III. Which is proved.</p> <p>IV. And illustrated.</p> <p>V. Contrasts made about others Goods are void, as soon as they are known.</p> <p>VI. What is gained by another's Goods must be restor'd.</p> <p>VII. An honest Possessor is not bound to restore, if the Goods are decayed, or lost.</p> <p>VIII. But he is bound to restore the present Fruits.</p> <p>IX. And such as are spent, if he must have spent others of the like Value.</p> | <p>X. But not them he has neglected to gather.</p> <p>XI. He is not obliged, who has given away what was given him, but with a Distinction,</p> <p>XII. Nor if he has sold what he bought with a Distinction also.</p> <p>XIII. How he may recover the Price, who has really sold another Man's Goods.</p> <p>XIV. Whether if a Man buys another's Goods, he ought to restore them to the Seller?</p> <p>XV. He that has another's Goods, and knows not the Owner, may keep them.</p> <p>XVI. Whether what's given for a bad Reason must be restored.</p> |
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HAVING enquired into the Nature and Origin of Property, as likewise into the several ways by which it is establish'd, it follows that we consider those Obligations, which, upon the introducing of Property, affect Mankind immediately¹ and on their own Account, without the Intervention of other Duties. Of these the first is, That every Man shall suffer another, who is not engaged in Hostility against him, to dispose of his own Possessions, and likewise quietly to hold and enjoy them; nor shall, either by Force or Fraud, impair, divert, or draw them to himself. Whence it appears, that Theft², Rapine, removing of Boundaries, and the like Crimes are forbidden by the bare Law of Nature. Euripides³ speaks excellently to this Purpose;

*God hates the violent, commanding all³
To live on what their honest Pains procure;
And not to feed their Wants with mutual Spoils.
Oppressors sh^uld be banish'd human Race,
Unworthy of the Name. One common Heaven
Gives Light and Air to Man; one Earth a Seat,
A Scene of Industry, where all may strive
To raise their Stock, and spread their Fortunes wide;
But not to rob, or force their Neighbour's store.*

¹ Helen. ver. 909, &c.

² Vid. D. Lib. x. t. 4. l. 1. c. 3. De fugitivis. We speak here all along of the innocent and well-meaning Possessor; for the Obligations which lie on the dishonest Possessor are open'd in another Place. See the next Paragraph towards the End.

MR. BARB. NOTES on Chap. XIII. §. 1.

¹ The Duties which concern Property may also be considered with Relation to the Owner himself, who is obliged to observe, according to the Usage of Right, all the Law of Nature. And so he'll do very ill to abuse his Goods in any manner, which may redound to the Contempt of the Deity, or Prejudice of his Neighbour. On the contrary, he ought to make use of them to the Glory of God well understood, and to the putting his Laws in Practice; and lastly, to procure an Advantage to other Men, as well as to our selves. Titius's *Observ.* 313.

² The Roman Lawyers say positively, that Theft and Robbery are contrary to natural Right. *Furtum est contrahatio rei fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisque, quod lege naturali prohibetur: est admittere*, Dig. lib. xlvii. tit. 2. De furtis, l. 1. §. 3. See also lib. 1. tit. 16. De verb. signif. l. 42. Salmassius in his Treatise De Usuris, c. ix. raises great Difficulties about it, but in Mr. Hertius's Judgment not worth repeating.

³ Euripides's Greek is, Μισῆ γὰρ ὁ Θεὸς τὴν βίαν, κτητὰ δὲ
Κτάσθαι κελύει πάντας, ἢ ἐς ἀρχαγὰς
Ἐατίος ὁ πλῆθος ἀδικίης τις ὄν
Κοινός γὰρ ἐστὶν ἕρανός τ᾽ αἰ βροτοῖς
Καὶ γὰρ, ἐν ἧ χρῆ δώματ' ἀνακληρημάτους
Τ' ἄλλοτρια μὴ χεῖν, μηδ' ἀφαιρετῶσαι βίαι.

We have also two fine Fragments of Menander upon this Subject, both of them recited by Clement of Alexandria, *Stromat.* lib. v. p. 605, 606. and by Eusebius, *Præp. Evang.* l. xiii. c. 13. and which are also found in Mr. Le Clerc's Collection lately publish'd. They are the more remarkable, because they confirm what I have proved at large, l. ii. c. 4. §. 3. note 4. before going. For we may see by the common Notions of the Heathens deliver'd in their Plays on the Theatre, that, to please the Gods, we must not covet other Men's Goods, nor debauch our Neighbour's Daughter, or Wife, but be kind, servicable, charitable, &c.

by others *sine pactione*, without some Bargain in order to give the Finder Satisfaction ^a; whilst they affirm at the same time, *That he who takes up any thing of another's with a Design of converting it to his own Use, is guilty of Theft, whether he knows the particular Owner, or not* ^{b c}. Yet if I become Master of a thing upon a just Title, and with an honest Intention, I am not bound to call my own Right into dispute, and to give publick notice that such a thing is in my Custody, to the end that it may be challeng'd, if it should happen to belong to another. For when the manner of my getting the Possession was in no respect faulty ^d, my Innocence and Integrity clear me from all Imputation of Guilt in detaining another's Goods.

This farther Restriction is likewise to be understood in the present Duty; *If he who was before the true Owner, hath still any probable means left of his recovering what he lost*; that the Obligation we are now asserting, may not be thought to overthrow the Right of Prescription ^d.

III. Now that this Obligation is sufficiently founded in the bare Notion of Property, appears evident. For since a Person may happen, by many Accidents, to lose his hold, and be thrown out of the Possession of what is really his own; our Goods, and especially those which are moveable, would be in a very slippery and uncertain Condi-

tion, if, when they stray into another Man's hands, he might intercept or conceal them from us; much more, if he might detain such a thing openly, and repulse us with Violence, when we attempted to make good our Claim. And therefore, as in a State of Communion 'tis a matter of Right that each Person shall be allow'd to use the common Store as fully and freely as the rest; so upon the first appropriation of things, when all other Persons did, as it were, renounce their Right to what any one had received as his private Share, the distinct Proprietors are supposed to have made this Agreement amongst themselves ^e, *That he who chanced to be in possession of another's Goods, after he knew it to be another's, should cause it to return to its Owner*. For the Power and Virtue of Property would be too weak, and the keeping of things would require too much Expence, as well as too much Care and Trouble, if these stray'd Goods were only then to be restor'd, when the Owner made a formal Challenge of them; because he must very frequently be ignorant which way they are gone, or where they are lodg'd.

As to a Man's being bound to restore a thing, when claim'd by the Owner, 'tis altogether the same Case, whether he got Possession by honest, or by dishonest Means: For this Obligation doth not arise from any Default, or any Fact of ours, or

^a Vid. Lib. xvii. t. 2. l. 43. f. 9. D. De furtis. Lib. xix. t. 5. l. 15. D. De Prescript. verbis. & Lib. xii. t. 5. l. 4. f. 4. D. De cond. ob turp. caus. ^b Josephus Antiq. iv. c. 8 He that takes up Gold or Silver in the Ways, let him seek out the Person who lost it, and by the Help of the Cryer let him restore it in the same place where 'twas found; and let him be persuaded, that 'tis a very ill way of gaining Profit, to enrich himself by the Damage of other. ^c Concerning this, see c. 6. f. 12. ^d Comp. Grot. in the Place above-cited.

MR. BARB. NOTES on §. II, III.

¹ The Edition of this Work put out in 1706 adds, after *Vitijs*, these Words, *Aut suspecti*, i. e. faulty or suspicious, Words too important to be left out; for if we have the least Suspicion, that the thing belongs not really to him, who is about to make it over to us, we must not take it; and if we do receive it, we reduce our selves to a Necessity of restoring it fully, least our Suspicion should prove true.

² There is no need of supposing such a general Agreement, as we have proved upon c. 4. 6. The Obligation of restoring the Goods of another is as natural a Consequence of Property, as it is not to take them. But this Obligation ought to be understood in such a Manner as not to destroy the Rights of an honest Possession, or a putative Property, which, as I have before observed, §. 8. Note 3. produces the same Effect as a Property more real and incontestable, so long as the real Owner appears not. This neither *Grotius*, nor our Author, nor any other that I know of, were aware of, and therefore have been puzzled very much to determine several Cases which have fallen in upon this Subject, and so many times their Solutions were inconsistent one with another, which proves sufficiently, that their Principle upon which they argued, was not found. I say then, that one of the principal Uses of our Goods being to trade withal, and that Use requiring that the honest Possessor should be reputed in all respects the lawful Proprietor, such a Possessor can be obliged to restore only what is in Being, i. e. what he has not parted with, nor is in any manner perished; for he then has nothing, and so can restore nothing, as our Author himself acknowledges, in respect to what is given away, or sold again, as it was acquired, and to what is spent or lost. Moreover, all that the honest Possessor hath done, or performed, as such, upon the account of the Goods of another, which he believed his own, is as valid, as to him, as if he had disposed of a thing to him, of whom no other Person can claim any thing, and the Profit, which might redound to him by such Goods, while he was in the Possession of them, or when he parted with them, belongs to him by Consequence. For as he was, and ought to be supposed the true Proprietor, the Rights and Profits of the Property did absolutely accrue to him, so long as he had no Reason to suppose otherwise. And then if the ancient Owner recovers his Good, he begins again, as we may say, all new Expence, to follow his Business. The peaceable Enjoyment of the honest Possessor is as a kind of *Interregnum*, which has interrupted the Power of the true Proprietor, but insures to the putative Proprietor the Effects of his Management, while he was in full Authority. This being agreed on, we may see in my Judgment how far the natural Obligation of restoring the Goods of another extend, when Men have had an honest Possession with a just Title. If he hath disposed of them by any good and irreversible Act to a third Person, who has honestly received them, he is only obliged to assist, as much as he can, the old Owner to make him, who has wrongfully taken and retain'd his Goods, to give him Satisfaction, and to declare to the new Possessor the Right of the true Proprietor, that he may do what he ought in the Case. But if the thing is yet in the hands of the honest Possessor, or he has got the Possession of it without Charge, or it has cost him something. In the first Case, as when a Person has obtained a thing by Free-gift, or has found a thing, he ought to return it fairly and readily without any Demand, at least if it has occasioned no greater Expence to him than is made up by the keeping of it. In the other Case, if one has bought it, or taken it by purchase, 'tis just that the true Owner, who would recover his Good, should repay the honest Possessor what he has given, otherwise he may keep the thing; and if the other do not redeem it before the time of Prescription is come, it then entirely changes the Owner, so that the first can have no Title to it. By these Principles it is easy to determine clearly all the Questions, which can concern this Matter, as we shall see in the Notes upon the following Paragraph, where I shall rectify our Author's Notions. Although he is not of the true Sentiments with *Grotius*, yet he reasons in general according to the Notions of the great Man, whose Authority seems to overshadow him here. This I mention not by mere Conjecture; for in his Elements of Jurisprudence, which was the first Work that I attempted to comment on, he took notice of the Weakness of *Grotius*'s Opinions, and delivered them in such a Manner, as can't be well grounded but by supposing the Principles that I have distinctly established; for he says, "That as yet the civil Laws of several People permit any one to take Goods where he finds them; nevertheless, if we could find out a Right, the true Proprietor may not take it immediately from the honest Possessor, though he may from the Person who deprived him of his Good; for, *quid he*, why should the honest Possessor lose it, or be prevented more than the true Owner, being it is not his Fault? Lib. i. Dof. 5. §. 25. p. 77, 78.

from any particular Covenant made with the Claimant, but from the thing itself; or rather from that general Covenant to this Purpose, which we suppose to be the necessary attendant of Property. He then, who obtain'd the thing honestly, is barely oblig'd to make Restitution; but he who procur'd it dishonestly, besides the necessity of Restitution, hath likewise contracted a Guilt, and is on that account liable to Punishment. *Good Faith*, or honest Intention, doth then cease, at least, in the Court of Conscience, when a Man hath full Assurance, that what he holds belongs to another^a. Though it is enough to secure him from human Punishment, if he were thus well-meaning and sincere only at his first entering on the Possession.

IV. This is confirm'd and illustrated by the Divine Law itself, *Deut. xxii. 1, 2, 3.* And lest any should imagine that the Duty there enjoined is to be paid to Friendship only, 'tis expressly added, *Exod. xxiii. 4.* that the same ought to be perform'd to an Enemy.

Josephus^b hath given us this Gloss on the Law which we are now mentioning: *If any Man, says he, find Gold or Silver in his way, let him seek out the Party who lost it, and restore it by the Hands of the publick Coyer, in the very place where he took it up, judging with himself, that no Advantage can be good, which ariseth from another's Damage. The same he must do with regard to the stray Sheep and Cattle he meets with in the Desert. If he cannot presently find out the Owner, let him retain the things in his own Custody, calling God to witness, that he intended not to make a Gain of what belonged to his Neighbour.* Yet the mortal Hatred which the Jewish Nation profess'd against all others, afterwards turn'd this natural into a civil Law, to be put in practice only towards their own Country-men^c.

One of the most remarkable Instances of *Restitution*, which History affords, is that of the Emperor *Theophilus*, who, when a Woman cry'd after him in his Progress, and claim'd the Horse on

which he rode, finding upon Enquiry that the Governor of a certain Province had taken it away, and presented it to him in his own Name, he immediately gave back the Horse to the poor Woman; and having no others at hand from his own Stable, was content to make use of the next he could borrow. Which, they tell us, was the Rise of that Custom, which afterwards obtain'd, for the Emperors to carry in their Train a great Number of Horses, for Supplies, in case of any such Accident^d.

The Example of the *Spartans*, which *Grotius* mentions^e, who condemn'd their General *Phabidas* for seizing on the *Cadmean* Fort, and yet still kept the Place in their Hands^f, doth not come up to our Point: For they were, no doubt, injurious and dishonest Possessors, and therefore were bound to Restitution by another Principle. Nor is the Story of *M. Crassus*, and *Q. Hortensius*, more proper in the present Question, as *Tully*^g gives the Report: *Some Persons, says he, brought out of Greece to Rome a forged Will of L. Minutius Basilus, a very wealthy Man; and the more easily to carry their Point, put down M. Crassus, and Q. Hortensius, two who had the greatest Power and Interest in the City, as Joint Heirs with themselves. The two Gentlemen, though they suspected the Deed to be counterfeited, yet relying upon their own Innocence in the Matter, did not refuse to make this small Advantage of the others Wickedness. What then? Is it enough that they appear to have had no Hand in the Fact? I am not of that Opinion: For he certainly is to be censur'd as unjust, who not only forbears to drive off an Injury from another, but aids and encourages it.* Here the Gentlemen had as great a share in the Crime of Forgery, as Receivers are said to have in that of Theft; inasmuch as they apprehended themselves to have been put into the Will for no other Reason, but that their Name and Authority might protect the Authors of the Cheat.

From the same Head we may discover the Custom of awarding *Wrecks* to the Prince^h, or to the State, to be disagreeable to Equityⁱ. As we may

^a Vid. Lib. xvi. t. 3. l. 1. Sect. ult. D. l. ii. l. iii. l. iv. *Depositi, vel contra.* ^b *Antiq. l. iv. c. 8.* ^c Vid. *Seld. De Jure Nat. & Gen. l. vi. c. 4. & Grot. in Annot. ad d. l. Sect. 1. Add. Polyb. l. vi. c. 31. princip.* ^d *Car. p. 104. de Off. Coadjut. & Coadjut.* ^e *Ubi supra, n. 3.* ^f *Plutarch. & Cornel. Nep. in Pelopid.* ^g *Off. iii. c. 18.* ^h Vid. *Grot. l. ii. c. 7. f. 1. & Bæcker. ad d. l. Jac. Golefred. De Imperio Maris, c. 11. Jo. Loccenus De Jure Maritimo, l. i. c. 7. l. 9. Böttin. De Republ. l. i. c. 10. Gramond Hist. Gall. lib. xvi. and others.*

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¹ See Mr. *Hortius's* Note on that Place, and his Discourse, *De Superioritate Territoriali*, §. 56. in Tom. ii. of his *Comment. de Op. p. b.* There are some places in *Germany*, where the Preachers scruple not to pray to God in the Pulpit, that he would make many Shipwrecks upon their Coasts. And Mr. *Thomasius* maintains, that neither these Prayers, nor the Custom itself are absolutely unreasonable, or disagreeable to the Rules of Charity or Justice: for though, as he say, in the time of the Wreck there is no Delight to abandon utterly what is cast away, yet there is no hopes ordinarily of recovering it, and we know that there is as much Reason to fear that the Goods are utterly lost, as if they had been cast into the main Ocean: Besides, the Owner of the Coasts may, at the place where he has a Right to demand Customs of Strangers, use all means to repay himself for the Expences he is at in maintaining the Port and Shore. We may add to this, that it is often very hard to know whose Goods and Merchandizes those are, that the Sea throws upon the Shore. So that they are a kind of Alluvions, which, by the Right of Nations, is a lawful way of getting. The publick Prayers, made on this Subject, ought not to be understood as if they begged of God that he would make a great number of Shipwrecks, but only that he would cause that the Sea should not retain the Goods cast into it, but discharge itself of them by casting them upon their Coasts rather than any other; for what Reason is there for us to suppose, that such holy Church-men should every Day beg God's Help for a thing contrary to all natural Right; or, at least, that some of their Brethren should not charitably advise them of such a detestable Sin, which they had been guilty of so long a time? These are the Reasons of the Author of whom he speaks, which he delivers in his Discourse, *De Statum Imperii potestate Legislatoria contra Jus commune*; printed at *Hall* in 1703. §. 42. The manner in which he justifies the Prayers is manifestly absurd (to speak no worse of them) would make us believe that he is not in earnest, and that he diverts himself with want of Conscience in the Clergy. As for the Confiscation of the Goods belonging to such as have suffered Shipwreck, the Proprietors who cast them away, do not look upon them altogether lost, but that they reserve to themselves a Right of claiming them, if ever they happen to be cast upon the Shore, as they know it often comes to pass. See above, c. 6. §. 12. And 'tis not by these Misfortunes, that the maintenance of Ports and Shore ought to be upheld: The Toll would be too exorbitant and odious; such as lose their Goods would at this Rate pay for those that have the good Luck to save them, and get to the End of their Voyage. That it is no less a Shipwreck, than if it happened in the main Sea, as Mr. *Thomasius* says, shews plain enough how frivolous the Pretence of making

may likewise gather the Absurdity of that Practice in some Countries, by which the stolen Goods, when discover'd ², are not restor'd to the Owner, but are claim'd by the publick Treasury ^a.

V. Inasmuch as this Engagement to restore the Goods of others ariseth from a general Agreement amongst all Mankind, a Bar is hereby put to all particular Contracts made about a thing which is any way kept from the true Owner; the Effect of which is, that when the thing is known to be another's, any Bargain about the conveying it to a third Party becomes null and void ¹. And this too is the ground of *Diogenes's* Jest on two Thieves, one of which had plunder'd the other; *One*, he said, had stolen *something*, but the other had lost nothing ^b.

As to that Law of the *Digest* ², produced by *Ziegler* ^c, to prove that a Contract made after such a Discovery is not always evacuated or hindered by the Force of Property, it is really no prejudice to what we now assert: For in the Case there alledg'd the Interest of the Creditor is more concern'd that the Pledge should remain safe, than the Interest of the Debtor who owns it; and the Debtor cannot challenge the Pledge, unless upon Payment ^d.

The Judgment of *Tryphoninus*, in the same place of the *Digest*, upon the other Case which he there proposeth, doth not to me appear satisfactory. *A Man cast for a capital Crime*, says he, *hath deposited an hundred Pounds in your Hands; the Man is afterwards transported, and his Goods confiscated; the Question is, Whether you shall restore the hundred*

Pounds to him who gave it you in Charge, or whether you shall pay it into the Treasury? If we regard only the Law of Nature and of Nations ³, the Money is to be given back ⁴ to the Party who committed it to your Trust; if we consider the End of civil Government, and the Rule and Method of positive Laws, you ought rather to throw it into the publick Stock. For he, who hath deserv'd ill of the whole State, should be left to struggle with Poverty too amongst his other Inconveniences, that his Example may deter others from offending.

But, indeed, since sovereign Rulers have even by the Law of Nations a Power to punish Criminals in their Fortunes and Estates; when such a Penalty is justly agreed against a Malefactor, 'tis agreeable to the very Law of Nature, that all his Goods should be forfeited to the Government: Yet that the Confiscation of Goods should attend any one particular Crime rather than others, is purely owing to the Appointment of positive Constitutions. The consideration of that Benefit which accrues to the Publick from Penalties duly inflicted (the Reason urged by *Tryphoninus*) did indeed shew that such a penal Sanction ought to be approved of; but it was not properly the Cause, why the ⁵ Treasury should have the advantage of the Criminal, as to challenging the Sum which he had lodg'd in other Hands. For by the Sentence of the Court all the Right and Property of the condemn'd Criminal over his Goods was taken from him, and conferr'd on the Government; and consequently what he formerly gave in Trust is to be deliver'd back, not to him, but to the publick

^a Vid. *Ant. Matthæ, De crimin. tit. De furtis, c. 4. f. 4.*

^b *Dig. Lact. l. vi. f. 54.*

^c *Add. Gret. d. l. Sect. 1.*

^d See a full Instance in *B. xvi. t. 3. l. 31. f. 1. D. Depositi vel contra.*

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making Satisfaction is, and the Difficulty of knowing the true Owners of the Merchandizes, which the Sea casts up, proves only, that they ought to be adjudged to the first Comer, without examining if there be Reason to demand them; and if the Owner can't be found, they belong to the Lord of the Country as first Occupant: In a Word, the Custom, of which we are speaking, can't be justify'd, but by supposing that Property is lost with actual Possession; an *Hypothesis*, which I have sufficiently confuted above, *Chap. vi. §. 1. Note 1.*

² See *l. iii. c. 1. §. 11. Note 3. foregoing.*

¹ This is only when there is no honest Intention. But when the Contract is performed already, before we are assured that the thing belongs to another, we neither can, nor ought to break the Bargain. And the ancient Proprietor hath nothing to do to demand his Goods of him, who is not in Possession of them, and had a full Right to dispose of them, as I have shewed above, *§. 3. Note 1.*

² The Words are, *Item Pomponius, l. xxxiv. scribit, parvi referre res nostras, an alienas intulerimus, si tamen nostra intersit saltem esse. Etenim nobis magis, quam quorum sunt, debent solvi, & idem si pignori merces acceperis [ob pecuniam nauticam] mihi magis, quam debitori, nauta tenebitur, si ante eas suscepit, Digest. Lib. iv. tit. 9. Nautæ, Cæpones, Stabularii, &c. l. 1. §. 7.*

³ *Incurrit hic & alia inspectis, an bonam fidem inter eos tantum, inter quos contractum est, nullo extrinsecas assumptis, colligere debeamus, an respectu etiam aliarum Personarum, ad quas id, quod geritur, pertinet; exempli loco, latro sp. l. n. que mihi abiecit. possit apud Seium incivem de malitia deponentis, utrum latroni an mihi restituere Seius debeat? Si per se dantem, accipientemque intuemur, hæc est bona fides, ut commissam rem accipiat is, qui dedit, si totius rei æquitatem, quæ ex omnibus personis, quæ negotio inter contingitur, implatur, mihi reddenda sunt, quæ (hor to we must read with *Grævus*) factis selectissimis adempta sunt, & proba bene esse justificari, quæ seum cuique ita tribuit, ut non dirabatur ab ullius personæ justitæ repetitione, Digest. l. xvi. *Depositi vel contra, Leg. 31. §. 1. See l. iii. c. 6. §. 11. at the End foregoing.**

⁴ *Reus capitalis Judicis deposuit apud te centum libras, is deportatus est, bona ejus publicata sunt; utrumne ipsi hæc reddendæ, an in publicum deferendæ sunt? si tantum Naturale Jus & Gentium intuemur, ei, qui dedit, restituendæ sunt; si Civile Jus, & Legum ordinem, magis in publicum deferendæ sunt. Nam malè meritis publicæ, ut exempla aliis ad deterrenda maleficia sit, etiam egestate laborare debet. Ibid. princip.*

⁵ See *Mr. Noat's Probabilia Juris, l. iii. c. 2.* As to the thing itself, there ought, as I think, some Distinction to be made; if we speak of a truly wicked Person, who is guilty of enormous Crimes, and who appears to be hardened in Sin, 'twill be a means to make him go on in his evil Courses to restore what he has intrusted us with. But if the Criminal be condemn'd for things which are not evil, but only as they are forbidden by the Laws; or if some violent Passion, Temptation or Habit, assist'd by his Temper, has hurried him into the Commission of an Action heinous in its Nature; we may not only, but we ought, in my Judgment, to restore our Trust faithfully to the unhappy Person. And in this he doth nothing contrary to the Duty of a good Citizen. For the End and Design of the Laws, which punish with a general Confiscation of Good, requires that all that appears, or can be discovered, should be confiscated; but it doth not require that every one should go and declare what he has in his Hands, belonging to the Criminal. This were to enlarge the Severity of the Law, whereas it ought to be mitigated as far as possible; and if it expressly command, that none shall conceal any thing that is his, it ought to be interpreted in such a manner, as to imply, that he shall be guiltless if he undergo the Punishment to be inflict'd on such as have the Courage to run the Hazard of serving an unhappy Person. The Ties of Relation and Friendship, which it is the Interest of the publick to favour and cherish, make this Interpretation reasonable, since it is common to trust a thing with a Relation or Friend; and if he had, that by putting the thing intrusted to him into the Treasury deprives Children or other innocent Persons of a thing that ought to defend to them, how great a Criminal soever the Offender may be whose Goods are confiscated, and how horrid never the Crimes which have brought this Punishment on him, there is no human Law can be so understood as to oblige him in Conscience to discover the Secrets, or betray the Interest of them who ought to inherit the thing intrusted to us, and have done nothing to deserve to be disappointed of it.

Receivers.

Receivers. Because all kind of Property, whether it ariseth from positive Ordinances, or from the Law of Nations, hath this effect amongst others, That he, who is in possession of any thing over which the said Property extends, shall be bound to restore it to the Party who at present appears to be the true Owner⁶. What Demurs and Exceptions the Law of restoring things given in charge admits in other Cases upon account of particular Circumstances, is frequently shewn by Authors. Vid. Cic. Off. iii. c. 25. Seneca De Benef. l. iv. c. 10. Ambr. De Off. l. i. c. ult. To which may be added what Polybius (in excerpt. Peirisc. p. 172.) reports of Ariarathes King of Cappadocia, who having recover'd the Kingdom from Oropernes, demanded of the Prieniens the forty Talents which Oropernes had put into their Hands; and upon their refusing to deliver them to him, fell upon their City with Fire and Sword, in Polybius's Opinion very unjustly. Tho' this Action of Ariarathes may be commended, if we first suppose that Oropernes had injuriously depriv'd him of his Crown.

Upon this natural Obligation to Restitution, the Compilers of the civil Law have built a great number of additional Rules⁷. And this too is the Ground of claiming by judicial Process⁸, what is detain'd from us, together with all the Actions which border on that Claim; and in some sort, the Action of false Debt⁹; the Action for Recovery of what we have given¹⁰, either upon some Reason, which Reason hath not been made good, or else upon no Reason at all¹¹. Though these Actions are said likewise to depend upon a kind of imaginary Contract¹². For when we deliver a thing without intending it for a matter of pure Bounty, it is suppos'd to be given by the one Party, and receiv'd by the other on this Condition, That it shall be delivered back, in case there appear no Reason why it was given.

What hath been said about the Restitution of the main Thing or Substance, extends likewise to the Fruits or Profits of it, such as are now remaining;

so much still being deducted as amounts to the Charges of producing, gathering, or preserving them.

VI. But if what we have honestly gotten, tho' really belonging to another, hath been as honestly spent, then it seems most agreeable to natural Equity, that we should not pay the whole Value of it to the Owner, but only the Advantage they brought us, or so much as we were made the richer by it; provided still that the Owner hath not been requir'd for what he lost, some other way. For if I honestly acquire and consume what was stolen from you, when you have already received full Satisfaction from the Thief, you can then demand nothing of me, how much soever I have been a Gainer by my Bargain. The Ground and Reason of this Assertion is not so much to be taken from the End of Property^b (which was establish'd that every Man might, according to Proportion, enjoy his own: whereas he, who gains by what is mine, hath more than his Proportion, as I on the contrary have less) as from the following Consideration; That a thing in which I have not lost my Property, either by my own free Consent, or by Default, or by the Right of War, still belongs to me; as doth likewise all the Fruit and Product of it. When such a thing therefore hath fallen into another Man's Hands, who hath made an Advantage by spending it; his Honesty and good Intention secure him indeed from all Guilt and Censure; yet he can on no Pretence withhold the Profits, when I lay claim to them^c, because they are to be look'd on as the Residue, or the surviving part of the thing, at least they are the proper and necessary Fruit proceeding from it. Hence it is one of the most common and proverbial Sayings^d, That no Man ought to gain by another's Loss; that is, by such a Loss as he did not himself procure, either by his Consent or Default, so as to be the Cause of the Damage, or to have it any way imputed to him. For it can be no Sin in me to take an Occasion of Advantage from the Loss or Damage of another^e, when it was not

of

⁶ Cic. Off. l. iii. c. 25. D. D. c. 3. rerum an. l. 1.

^b Vid. Græc. l. ii. c. 10. l. 2.

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⁶ There are, adds our Author here, other Cases, in which the Law, which commands to restore our Trust, admits of Exceptions; as when a Man who has put his Sword into our keeping becomes delirious, and then comes to demand it; or when he, that hath put a Sum of Money into our Hands, raises War against the State.

⁷ *Rescindit* &c. See D. Græc. l. vi. t. 1. and what I have said above, c. 9. §. 3. Note 4.

⁸ See above, l. iii. c. 4. §. 5. Note 4.

⁹ See Chap. ix. of this Book, §. 4. Note 5.

¹⁰ *Cic. Off. l. iii. c. 25.* is, when we promise or give a thing for a Cause which is superseded, or upon a Condition which was never performed; as if one receive a Portion in order to a Marriage, which was never accomplished, but was dissolved.

¹¹ In the Opinion of the Roman Lawyers there is no Obligation to another, which is not founded on the Consent of him, who is bound by it; when there appears no signs of a Consent in certain things, wherein Men are nevertheless obliged, they suppose it, and call it a *Quasi Contractus*. But in all the Cases that they allege on this Occasion, and which respect the Management of another's Business by Commission; the transacting of publick Affairs in Societies; the Administration of a Guardianship; the Addition or Acceptation of an Inheritance, and the Payment of a thing not due. In all these Cases the Obligation proceeds either from a tacit Agreement, properly so called, or from a positive Law, or from some Maxims of moral Equity only, and there is no need of feigning the formal Consent of a Person wholly ignorant of what passes. See what I have said above, l. iii. c. 4. §. 2. Note 7. and *D. Græc. l. x. t. 28. De obligationibus, quæ quæ ex contractu nascuntur.*

¹² He may very well dispute with it, since, as I have shew'd above, §. 3. Note 1. all the time that he was the honest Possessor, he had a full Right, and so was really; so that the Profit he had from it was a Part or Revenue which came from the Goods of another, but was an Acquisition made by virtue of his Right of Possession, and it ought to remain his with so much the greater Reason, because it is almost always one way or other the Fruit of his Industry.

¹³ The Words of the *Disputans*, *Jure Naturæ æquum est, nemi-nem cum alterius detrimento, & injuria fieri locupletiorum.*

¹⁴ Democritus, the *Abolition*, condemn'd a Man of his City, who profess'd an Art of selling things, necessary for Funerals, upon the score of taking too much Profit, and because that Profit could not be compass'd but by the Death of many Men. This Judgment seems to have been ill given, because he made no Profit but by some Man's Damage, and by the same Reason all Gain may be condemn'd. The Merchant can't manage his Business but by corrupting of Youth, the Husbandman does his by the dearth of Corn, the Builder by pulling down of Houses, the Officers of Justice by Law-Suits and Quarrels, the Grandeur and Calling of the Clergy is supported by Mens Deaths and Vices; no Physician is much pleas'd with the Health even of his Friends, as an ancient Greek Comedian speaks; nor a Soldier with the Peace of his Country, and so of the rest. And which is worse, if every

of my own procuring^a. It is observable, that in the Books of the *Roman* Laws many Cases are determin'd according to the Equity of this general Rule⁺, with some difference from the ordinary Tenure and Strictness of the Letter. Vid. *Instit.* lib. iv. tit. 7. Upon the same Foundation the *Action* which they term⁵ *de in rem verso* seems to depend. Vid. *D. lib. xv. tit. 3.*

VII. From the Rules already proposed may be drawn a satisfactory Decision of many Points usually controverted as well by Lawyers as Divines; which we think it may be proper to transcribe out of *Grotius*: First, *He that honestly and innocently gains Possession of what is another's (for of him only we would here be all along understood; inasmuch as the dishonest Possessor doth not only stand obliged on account of the thing us'd, but is farther obnoxious by his own Crime) so long as he continues in this Integrity^b, is bound to no Restitution, in case the thing perish or be lost; because he neither enjoys the Substance, nor any Fruit or Advantage of it^c.* We add, That he doth not stand bound, though it should have happened to perish by his Default: For his honest Intention was to him in the Place of Property¹. Now a Proprietor, tho' he lose his Goods through his own Neglect², yet is thought to sustain sufficient Damage by the Loss, and is liable to no farther Punishment: But we are to pronounce otherwise, if the Person in Possession, understanding the thing to be another's, voluntarily made away with it to avoid *Restitution*.

VIII. Secondly, *Such a Possessor through honest Mistake is bound to restore, not only the thing it self, but likewise such Fruits or Products of it as are still remaining; because, in natural Estimation, he that is Owner of the thing, is Owner too of the Fruits^d.* Yet here they do distinguish between the Fruits of the thing, and the Fruits of the Man's own Labour. *Grotius* is of Opinion, that the former only ought to be given up, and not the latter; because these are not due to the thing itself, tho' perhaps they could not have been procured without it. Others think, that even the latter Fruits should be restored, and alledge a Law of the Code^e in favour of their Assertion^f. And indeed this Judgment seems to come nearest to the Rule of Kindness and Humanity; provided this Clause be subjoyned, That the honest Possessor may in this Case deduct, as well the Expence which the thing hath put him to, as a due Reward for his Labour¹: As likewise that, to prevent troublesome Suits, the Proprietor upon claiming his own should not be too raking and greedy, should not (as we say) *sweep Dust and all*: For after the Business hath been quality'd by these two Alleviations, it will seldom happen that the honest Possessor shall have much to give up out of the Advantage he made by his own Industry.

IX. Thirdly, *Such a Possessor is bound not only to restore the thing, but likewise to satisfy for the Fruits which he hath spent¹, if it appear that he would have spent as much otherwise²: For he is judged to be so much the richer, whilst by spending another's Goods he*

^a See *Montaigne's* Ess. l. i. c. 20. *Cicero*, Off. iii. c. 5. 'Tis against Nature to increase our own Advantage by the Damage of another Man. Which is borrowed from that of *Terence*, *Andr. A.* 4. Scen. 1.

*Hocine est credibile aut memorabile,
Tanta uxor cordia innata cui quam ut stet,
Ut malis gaudeat, atque ex incommodis
Alterius, sua ut comparet commoda?*

Is this to be believed, or can't be thought
That any one can be so vile and naught,
As to rejoice in th'ills of other Men,
That to themselves Advantage they may gain?
See *Digest.* lib. l. t. 17. *De diversis regulis Juris*, leg. 206.

^b Comp. *Ziegler*. ad *Grot.* d. l. ^c *Vid.* *D. l. v. t. 3. l. 40. D. De hered. petit.* § l. vi. t. 3. *D. De rei vindic.* ^d *Ad.* l. vi. t. 1. l. 20. 50. *D. De rei vindic.* ^e *Lib. iii. t. 32. leg. 22. De rei vindic.* ^f *Vid.* l. 5. t. 3. l. 36. f. 5. l. 58, 39. *D. De hered. petit.* § lib. vi. t. 1. l. 27. f. 5. l. 31. l. 48. l. 65. *D. De rei vindic.* ¹ *Vid.* lib. ubi sup. l. 25. f. 8, 9. *D. De hered. petit.* § l. vi. t. 1. l. 52. *D. De rei vindic.*

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one would search themselves, he'd find that our Wishes inwardly are for the most part raised and supported by the Expence of another; which being consider'd, it comes into my Mind, that Nature does not in this siverve at all from her general Course; for Physicians hold, that the original Growth and Increase of every thing is the Alteration and Corruption of another; for as *Lucretius* says, lib. ii. ver. 752, 753.

*Nam quodcumque factis mutatum finibus exit,
Continuò hoc mors est illius, quod fuit arte.*

This Chapter of *Montaigne's* Essays, to which the Author refers us, and which is the twenty first of the first Book, was so short, that I thought that the Reader would no more grudge to read it, than I have done to copy it out. See *Seneca De Benef.* l. vi. c. 58. from whence 'tis almost all taken.

⁴ See Examples of this in *Grotius*, B. 2. c. 10. f. 2. n. 2, &c.

¹ The Words are, *Quod cum eo, qui in aliena potestate est, negotium gestum esse dicitur, & Digest.* l. xv. t. 3. *De in rem verso.*

¹ This Approbation of the Author is remarkable, but he saw not the Consequences of it, and it follows from all the other Principles of his Decision of the following Cases.

² The *Roman* Law also dispenses with the honest Possessor in restoring what is lost through his Negligence, and what he has consumed, or lavishly spent, believing it was his own. *Quemcumque igitur sumptum fecerint ex hereditate, si quid deliquerint, perdidit, dum re sua se abuti putant, non præstabit, Digest.* l. v. t. 3. *De Hereditatis Petitione*, l. 25. §. 11. *Sicut autem sumptum, quem fecit, deducit, ita si facere debuit, nec fecit, culpa hujus reddit rationem nisi bonæ fidei possessor est, tunc enim, quia quasi suam rem neglexit, nulli querelæ subiectus est ante petitam hereditatem, Ibid.* leg. 31. §. 3. Mr. *La Piazette* nevertheless in his Treatise of Restitution, l. iv. c. 5. p. 257. adds this Restriction, At least if there be no Fault in the Getter. Indeed this appears more agreeable to the common Principles, but yet we may discern from hence that those Principles are not sound.

¹ The Truth is, the honest Possessor may keep both, as belonging to him by a full Right according to the Principles that we have above established, §. 3. n. 1. So that let the Rules of the civil Law be what they will, I believe, that considering natural Right only, upon the whole Matter a good Intention produces the same Effect as to the Possessor as a real Property, as the *Roman* Lawyers themselves have agreed by this Maxim (making only an Exception in such Cases, as the Law has ordered otherwise.) *Bona fides tantundem possidenti præstat, quantum veritas, quoties Lex impedimento non est. Digest.* lib. l. t. 17. *De offic. Reg. Jur.* leg. 136.

¹ If the honest Possessor may lawfully keep the Fruits produced by Nature, as I have asserted in the foregoing Note, by a much stronger Reason is he excused from restoring the Fruits spent. The Interpreters of the *Roman* Law do not agree, that the civil Laws oblige to Restitution in this last Case, although the Author cites some Texts for it. See *Vinnius* upon the *Institute*, l. ii. c. 1. *De Rerum Dictione*, §. 35. Num. 9, 10.

hath saved his own^a. Yet here we are of Opinion, That besides the Limitation above added, it should be likewise considered, whether the well-meaning Possessor be able to recover of the Party, who sold him the thing, so much as he loseth upon it's being claim'd by the true Owner². If this is impossible to be done, the Possessor is ne'er the richer by the Bargain, when he is forced to restore what he bought, and yet cannot make himself whole by recovering the Price he gave. As to the Example of *Caligula* produced from^b *Sueton*, who tells us, *That when he restor'd any exil'd Princes to their Dominions, he gave them up likewise the Revenues, which had been brought in the mean time into the Roman Treasury*. We may observe, that he believed their Kingdoms to have been unjustly taken from them, and consequently himself to be in dishonest Possession. Or if he did not condemn his Predecessor's Act in this Matter, yet it may still be questioned, whether he restored these Fruits and Profits out of supposed Duty and Conscience, or out of meer Generosity. So that we take it to be the truer Judgment to affirm, that the innocent Possessor is obliged to restore the Value of what he hath spent, when he cannot recover Damages of the Person who cheated him with this false Title. For in that Case he cannot be supposed to have enriched himself by the Purchase. And it seems a greater Hardship to pay the Value of a thing that is spent and gone, than to restore the thing itself, were it forth coming.

X. Fourthly, *Such a Possessor is not bound to make good those Fruits or Profits which he neglected to take; because he neither hath them, nor any thing else in their Room*. And his Negligence about what was his own, or in all Respects the same as if it had been his own, is adjudg'd to be a sufficient Prejudice to him^c.

XI. Fifthly, *If such a Possessor, having receiv'd the thing as a free Gift, shall have afterwards bestow'd it on another, he is not obliged to make Satisfaction to the Owner, unless it appear that he would have given as much some other way^d; for then the sparing his own Stock will be reckon'd a matter of Gain and Advantage to him*. This Account seems to suppose a Distinction between Donations out of Duty, and Donations out of meer Bounty; as that the former only are to be made good in the Case before us, and not the latter. Because, ordinarily speaking, no Man is presum'd to give in this gratuitous manner, unless he thinks himself to have some-

what superfluous; and consequently his Inclination to give is judged to have proceeded from his Opinion, that the thing which he thus disposed of, and which proved to be another's, was more than he wanted for his own Use. And as to that Obligation which ariseth from such a Bounty in the Receiver, it is by no means reckon'd amongst those things which are capable of being rated at a set Price; and therefore he, who only expects an uncertain Return for what he hath actually bestow'd, doth not in the least appear to have been made richer by what he parted with on this Prospect^e. But it is to be considered likewise farther, whether the Present be still remaining in the last Receiver's Hands or not: If it be, the Proprietor shall claim it directly of him, and not trouble the intermediate Receiver: If not, the main Burthen shall still fall on the Person who either now possesseth the thing, or hath been made richer by it. But the intermediate Possessor shall only come in for a small Share in the Burthen, inasmuch as he too perhaps had an Opportunity of making some Advantage^f.

XII. Sixthly, *If such a Possessor, having first bought the thing, shall afterwards have alienated it, he shall not be bound to give the Owner any more than the Overplus of the prime Cost^g; or so much as he hath gain'd by his Bargain*. But if it first cost him nothing, and yet he hath sold it, he shall then be obliged to give up the Price received^h, in case the Owner cannot recover the thing itself of the present Possessor; and unless the former Party hath squander'd away the Price he took, which, if not so easily gotten, had not been so prodigally spent. But he, who puts a thing off for just so much as it cost him, is no Gainer, being supposed only to recover his own. Nor can it be said in this Case, that the Price supplies the room of the thing; unless he parted with it out of a knavish Design: Because otherwise the Owner is to challenge his Goods from the hands of him who is now in Possession.

There is a Law of the *Digests*ⁱ urged in the present Case, which runs thus; *If after a Thief hath sold the Goods he stole, the Owner of them shall by violent means get the Price out of his Hands, he seems to be guilty of Robbery as much as the other Party was before, and to be equally obnoxious to the Law*. For all agree, that the Advantage of a stolen thing, or the Money into which it is turn'd, is not itself likewise stolen. But this Law properly respects civil Governments. For those who live

^a *All. lib. xvi. t. 3. l. 47. f. 1. D. De solution.*

^b *Calig. c. xvi.*

^c *Fid. lib. vi. t. 1. l. 8. D. De rei vindic.*

^d *Fid. lib. v. t. 3. l. 25. f. 8. D. De hered. petit. Comp. Ziegler. ad Grot. d. l. f.*

^e *Add. Struc. Exercit. xi. f. 13.*

^f *Fid. lib. xviii. t. 2. l. 48. Sect. ult. D. De furtis.*

Mr. BARB. NOTES on §. X, XI, XII.

² Either this Exception is ill grounded, or it may be extended to other Cases, which the Author does not. From whence it appears that these Determinations are not very coherent.

¹ It is true, 'tis of some Advantage, but then 'tis as true, that as he might receive the Present, and make it his own, so he had also Right to alienate it in what manner he pleased. And so what he spared of his own Goods is lawfully gotten by him, and consequently all the Distinctions, which our Author hereafter makes, are needless.

¹ From what has been said in the foregoing Notes it follows, that the honest Possessor is not obliged to restore the Value of the thing, nor the Gain he has made by parting with it, whether he bought it, or it was given him. So that the Author's Distinctions here are also superfluous.

² 'Tis for this Reason that Mr. *La Placette* maintains, and upon this Supposition says, "That as it is agreed that we must restore a thing if it be in Being, he is persuaded, that we can't keep the Price that arose from it." *Treat. of Restitution*, l. iv. c. 5. Observe whither unground Principles will carry Men, when they are once engaged in them!

in a State of natural Liberty, may as fairly seize by Violence the Price of what hath been stolen from them, as the thing itself.

XIII. Seventhly, *Such a Possessor, though he purchas'd the thing at a considerable Expence, yet is bound to restore it, and cannot require his Charges of the Owner, but of the Seller. For, otherwise, the Right of challenging would turn to no Account¹, if the Challenger were to refund the Price. And he who buys a thing of another, whom he might suspect not to be the true Proprietor, ought to have provided particularly for his own Security, in case the thing should afterwards happen to be claim'd: Though this Condition of securing the Buyer's Title is indeed impl'd in all Contracts of Sale, according to natural Equity².*

To the Rule above-mention'd the following Exception ought to be added; *Unless in a case where the true Proprietor could not in all Probability have recovered Possession of his own, without some Expence: As suppose the Goods were detain'd in the hands of Thieves or Pirates, and from them purchas'd.* For here the honest Man, who delivers the Goods, may fairly deduct so much as the Proprietor would have gladly spent to regain them: Because the actual Possession, especially when not to be recovered without difficulty, is capable of being rated at a certain Value, and the Proprietor, when re-inflated in it, is adjudg'd to be, on this account, so much the richer³. Whence arose the Custom for Persons who have lost any thing, to promise Μίσυτρον, a Reward and Encouragement to the Finder.⁴ For the same Reason, though the buying of what's already our own be void, according to the ordinary course of the civil Law, yet *Paulus* affirms it to be good and valid⁵, if it be first agreed upon, that the Possession of what's our own may be purchas'd, when remaining with another.

'Tis propos'd as a farther Question on this point, *Whether a Man who buys a thing thus detain'd, purely with Design to convey it to the Owner, may demand the Price to be refunded?* Some take the negative part; because, say they, *The Right accruing to the Proprietor cannot be taken off by this Allegation of the Buyer.*⁶ But indeed, if such a Purchaser foresaw with fair probability, that the true Owner would

hardly recover his Goods by other means, and if the Price which he gave do not rise above what the actual Possession which he restores may be valu'd at, then 'tis absolutely requisite that what he expended should be repaid him. But whether he who redeems the thing in this Case shall be allow'd an Action⁷ against the Proprietor, such as they term *Negotiorum gestorum*, or to recover the Charges he hath been at in the Proprietor's Business, it is the Province of the Civilians more nicely to state and enquire.⁸ The Reason, which *Gratius* offers for his omitting to determine that Matter, is, *Because the aforesaid Action ariseth purely from the Civil Law, having none of those Foundations to rest upon, from which bare Nature introduceth an Obligation in the Case.* But tho' 'tis not indeed the Concern of the Law of Nature to examine, or determine, to what particular Action at civil Law the present Case may be, or ought to be reduced; yet it cannot be deny'd but that the very Action above specify'd, of recovering Charges on account of Business manag'd for another, hath a Foundation in natural Equity, and in tacit Compact. For it cannot on any pretence be requir'd of me, that I should by my kind and generous Assistance preserve or improve another Man's Goods altogether gratuitously, and without receiving what I am out of Pocket in his Service⁹. It seems therefore the most plain and natural way of resolving such Cases, that the Party who redeems a thing after this manner, as likewise he who transacts any Business on another's Behalf, be suppos'd to hold the thing which he hath redeemed, or about which he hath employ'd his Money or his Pains, as a Pledge or Mortgage, till such time as he receives Satisfaction. Yet if there be no Fruits of his Labour remaining, which he might take hold on for his own Security, and if the other barbarously deny to pay him for his so useful and profitable Assistance, I am not of opinion that he may apply the same means towards asserting his Right as are used in that other kind of Right which ariseth from express Contract; but all he can do shall be to expose the ungrateful Wretch to publick Hatred and Detestation, as one who doth not deserve the least Instance of good Will

¹ *Vid.* Lib. v. t. 3. l. 22. & *D. De Hered. petit.* l. 25. princ. Sect. 1. & Lib. xviii. t. 1. *De Contrab. Emp. &c.* leg. 16. &c. C. Lib. vi. t. 32. l. 3. & C. *De rei vindic.* Lib. xxi. t. 2. l. 1. *D. De evict. &c.* Lib. xiv. t. 2. l. 2. f. 3. *D. De L. Rhodia.* & Lib. viii. t. 45. l. 16. *D. De evict.* & Lib. vi. t. 2. l. 2. C. *De furtis.*

² *Vid.* Lib. l. t. 17. l. 11. *D. De dicors. reg. juris.* ³ An *Actio negotiorum gestorum* is, when one Man has done for another a Business unknown to him, without any Commission or any express Order from him. See B. iii. t. 5. *D. De Negotiis gestis.*

MR. BARB. NOTES on §. XIII.

¹ It is sufficient, that the Proprietor can always recover the same thing in Specie from whomsoever is in Possession of it by an honest Intention. We are sometimes glad to recover our Goods at any Expence, either because the things are rare, or we have great need of them, or because we take singular Pleasure in the Possession. Further, Either we know not that the thing belongs to us, and in this Case we do or ought to count that 'tis all Profit, if we obtain Restitution; or we know not what's become of it, and in that Case we ought to look upon it either intirely lost, or very hard to be recovered, so that we ought to be satisfied in paying the honest Possessor that which he has given. But if we believe that it is bought very dear at the Price, and so had rather leave it in the hands of the honest Possessor, 'tis not the Fault of this latter; and there is no Reason why he ought to lose his Money rather than the other his Goods. You'll say perhaps, he should have taken better Security. But we suppose he hath taken all the Care he ought, or could. The Necessity and Nature of Commerce in this Life permits us often to have no certainty, that the Person of whom we buy, for Example, or take a thing to pawn, is the lawful Proprietor of it, or can make a valid Contract with us about it, much less require personal Securities, and make them in force in case of Ejection. See above, § 3. not. 1.

² See the Interpreters of *Petroneius*, Chap. xvii. *Exar. Burman.*
³ The Words are, *Rei sine culpa tunc calet, cum ab initio agatur, ut possessionem eruat, quam sine conditio habuit, & in iudicio possessoris potior esset*, Digest. lib. xviii. t. 1. *D. Contrahen. Emptione*, &c. l. 34. §. 4.

⁴ *Actio negotiorum gestorum* is when one does the Business of any Man upon his own Head, without any Commission, or express Order on his part. See *Digest.* l. iii. t. 5. *De negotiis gestis*, and l. v. c. 4. §. 1. following.

⁵ This tacit or feigned Agreement is no ways necessary. It is sufficient to say, that if we do not repay, nor satisfy him, who out of his meer good Will has done some Business for us, we shall do him Wrong, which is forbidden by the Law of Nature, *Tutus*. Observat. on *Lauterbach.* 96. See above, § 3. not. 11.

from Mankind⁶. The Roman Laws have consider'd the Equity of such a Restitution in handling the like Cases^a. And in the whole Compass of this Affair Terence's Remark ought to pass for a general Caution, that *Jus summum summa saepe est malitia*^b; The highest Right is very often the highest Wrong.

XIV. Eighthly, In the Opinion of Grotius, He who buys another Man's Goods cannot return them upon the Hands of the Seller, and demand back his Money in their stead. Because so soon as ever they came under his Power, there commeth in him an Obligation of restoring them to their true Owner. In which Case we are of a different Judgment: For certainly I am not bound to purchase a thing which I know to be another's, only that the true Master may recover his Goods, and that I may lose my Money^c. When therefore I find the thing which I bought to belong to another Owner, and am unwilling the Claim should be directed against me, either to avoid the trouble of the Dispute, or because I despair of getting my Money again of the Seller, I should think that I might fairly recede from such a Bargain (provided it were not too late) to avoid the drawing upon my self an unnecessary and unprofitable Contention; yet so as that I should be at the same time obliged to discover to the Owner, upon his Demand, where his Goods are lodg'd, that he may have an Opportunity of regaining them^e.

^a Vid. lib. xi. t. 7. l. 14. f. 13. *D. De religio. & sumpt. sanctorum.* & Lib. iii. t. 5. l. 6. f. 3. *D. De regit. gest.* & Lib. xiv. t. 2. l. 1. *D. De lege Rhodia.* ^b *Heautontim.* Act. iv. Scen. 5. ver. 47, 48. ^c Vid. Lib. vi. t. 1. l. 17. princip. *D. De rei vindic.* & Ziegler. ad Grot. d. l. Sect. 10. ^d See 1 Sam. xii. 3, 4. Where *Saul's* Intention seems to have been, not to make shew of any extraordinary Sanctity, but to declare by that solemn Protestation, that he had in no respect transgress'd the common Duty of a Judge; and consequently, that he had not deserv'd by any Fault of his to be thrust out of his Office by the creation of a King. See before, B. iii. c. 7. Sect. 9.

MR. BARR. NOTES on §. XIII, XIV, XVI.

⁶ David in 1 Sam. xxv. 7, 15, 21. sent his Men to demand a Reward for his Mens Pains in guarding *Nabal's* Flocks, and was angry at his Denial, which he resolv'd to revenge, and not a verbal Affront only.

¹ But he treats not here of a Bargain of Sale, which never was perform'd; for no body, I think, can imagine, that in this case we ought to pay the Money; and having got the thing to be sold, cause it to be restored to the true Owner. The Author seems to leave us to guess at his Sense, which consists in a tacit Consequence from what he has before formerly asserted, and seems to be this; One is not oblig'd to hold to his Bargain, when he discover that the Goods are not the Seller's own; nay, he may endeavour to break it, tho' he has already paid the Price agreed on, and received the Goods. 'Tis not yet altogether the same thing, especially if we argue from the Author's Principles. He had better, as the Commentator upon *Grotius*, have applied the Proverb, *True Charity begins at Home*; and what I have spoken of the honest Possessor will put the thing out of doubt. The Law quoted by the Author makes nothing to his purpose, as will be discern'd at the first Sight.

² See what is said above, l. iii. c. 7. §. 6. Note 2.

³ Our Author quotes here 1 Sam. xii. 3, 4. upon which see Mr. *Le Clerc's* Comment.



OF THE

LAW of NATURE

AND

NATIONS.

BOOK V.

By WILLIAM PERCIVALE, M. A. Student of *Christ-Church*.

CHAP. I.

Of PRICE.

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| <p>I. <i>After Property, the Measure of Things must be introduced.</i></p> <p>II. <i>What is the moral Quantity of Things.</i></p> <p>III. <i>How many kinds of Price.</i></p> <p>IV. <i>What is the Foundation of the common Price of Things.</i></p> <p>V. <i>Many profitable Things have no Price, and why?</i></p> <p>VI. <i>Why the Prices of Things rise.</i></p> <p>VII. <i>Of the Price of Fancy.</i></p> <p>VIII. <i>Of the lawful Price.</i></p> <p>IX. <i>Of the common Price:</i></p> | <p>X. <i>The Causes why the common Price rises and falls.</i></p> <p>XI. <i>The common Price is not sufficient for the Commerce of Man's Life.</i></p> <p>XII. <i>Hence an eminent Price was set in Money.</i></p> <p>XIII. <i>Which, for the most part, was made of Metals.</i></p> <p>XIV. <i>How far the Governours of Societies may set an Estimate upon Money.</i></p> <p>XV. <i>In so doing, they ought to have respect to Land.</i></p> <p>XVI. <i>The Value of Money is also subject to an Alteration.</i></p> |
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SINCE Things that are the Subject of Property are of different Natures, and administer differently to human Necessities; and since it often happens, that either the same Thing belongs to many (the Parts of which are not in all respects alike) or that ¹ Things of a different Nature are to be exchanged for one another: Hence it becomes necessary for Men to agree upon some common Mea-

sure, by which Things of a different Nature may be compared together, and made equal to one another. Now Things are thus compared, and found to be equal, or unequal, in respect of their Quantities; for Equality is nothing else but an agreement of Quantities: And therefore we must consider the Quantity of Things and Actions, as far as they are useful to human Life, together with the Foundation and common Measure of that Quantity.

H. We

Mr. BARB. NOTES on Chap. I. §. 1.

¹ Commerce is a Consequence of Property of Goods, and Price is the Consequence of Commerce, or a Thing necessary to accommodate each other by way of Exchange, to which all Commerce in general is to be reduced. So that the *Roman* Lawyers have Reason to refer the Settlement of Commerce to the Law of Nations, understood in the manner that I have explain'd it elsewhere, *Lib. ii. cap. 3. §. 23. note 3. Ex hoc jure gentium* ——— *Dominia distincta, agris termini positi, ædificia collocata: commercium, emptio, venditio, locatio, conductio, obligationes institutæ, exceptis quibusdam, quæ [a] jure civili introductæ sunt.* Digest. lib. i. tit. 1. De *Justitiâ & Jure*, leg. 5. Mr. *Thomasius* nevertheless maintains, that Commerce is not the Law of Nations farther, than by assuming that Right from such general Custom as have proceeded from the corrupted Manners of Mankind, and which are settled by corrupted Reason; seeing that the Necessity, Diversity, and great Increase of Commerce is the Effect of Vice, and the Growth of it. See the Discourse, *De Jure Statuum Imperii dandæ Civitatis*, §. 14. and that, *De Pretio æstimationis in res fungibiles non cadente*, Chap. i. §. 5. both printed at *Hall in Saxony*. But this respects another Question, which rather relates to Divinity, than the Civil Law. (See *lib. i. cap. 1. §. 11.* foregoing.) It is sufficient, that in the State that Things now are, Commerce, as well as Propriety of Goods, is necessary among Men in the Condition they are; so that we may say, that the Settlement of Commerce in general is very conformable to the most pure Reason, and the Law of Nations, so called in the most agreeable Sense. Lastly, As Commerce is a Consequence, and one of the chief Uses of Property, we must be careful not to extend the Rights of Property

II. We find then, that Things are said to be equal, not only as they agree in *three Dimensurs*, but in some other respect. Thus Honour, Labour, and Wages are said to be equal, or unequal, not by reason of their agreeing or disagreeing in Dimension, but upon some other account. And therefore there must be some other Quantity, besides that which is term'd Physical and Mathematical, tho' Philosophers have hitherto talk'd of no other. Which is evident, if we consider, that the Nature of Quantity in general does not consist in the Extension of Substance, but in Things being capable of having a Value put upon them, and consequently of being compared together. But since things receive a Value, not only from their natural Substance, but also in respect of some moral Consideration; it follows, that besides the natural there must be also a moral Quantity^a. However, Things of the same Nature and Goodness receive a Value even from their natural Quantity, as a great Diamond, *ceteris paribus*, is more valuable than a small one; which yet we have not always a regard to in the Valuation of Things of a different Species, or Goodness; for a great Dog is not always more valuable than a little one, or a great Mass of Lead than a small Piece of Gold.

How Persons are morally valued according to Opinion^b; and their Actions, according as they are productive of Merit or Demerit, has already been discours'd of in its proper Place^c. My Design here is only to treat of the moral quantity of Things and Actions, as they are conceiv'd to have some use in the common Affairs of Life, and as they are capable of being compared together in order to Commerce. This we call *Price*, which is the *moral Quantity or Value of Things or Actions, by which they are usually compared together in order to Traffick*.

III. *Price* may be divided into ¹ *proper* and *eminent*; the *first* is placed in Things and Actions, so far as they are capable of procuring either the Necessaries, or Conveniences, or Pleasures of Life: the *other* is placed in Money, which is supposed to contain *virtually* the Prices of all Things else, and to be the common Measure and Standard of them.

IV. For the right understanding the Nature of the *proper Price*, it is necessary to consider distinctly,

first, upon what it is founded; secondly, what it is that raises or sinks it. The Foundation of the Price or Value of any Action or Thing is, ¹ *Fitness to procure either mediately, or immediately, the Necessaries, or Conveniences, or Pleasures of human Life*. Hence, in common Discourse we call those Things that are useless, Things of no Value; and those Men too we say are of no Value, that are unprofitable Burthens of the Earth. Thus the Cock, in the Fable, set no Value upon the Jewel, because of no use to him. *Grotius*, l. ii. c. 12. § 14. is of Opinion, That *Want is the most natural measure of the Price of Things*. Where if he means, that *Want*, in its own nature, is the Foundation of Price, or that therefore Men only value a thing, because they want it, it will not universally hold true. For, if so, those things that are subservient to our superfluous Pleasures would bear no Price, which yet the Luxury of Man has set a great Rate upon. For we do not really want any thing, but what we cannot, unless with great Inconvenience, be without, *Mat. ix. 12*. But if his meaning be, that the Want of the Buyer raises the Price, I own it is commonly so; but that it is the natural measure of Price, that the more a Man's Necessities press him, the more may be justly exacted of him, no honest Man will admit: Nor does that ² Place of *Aristotle*, cited by *Grotius*, make for the purpose; for the *χρησι*, or ³ *Want*, he speaks of there, which in a manner preserves and holds together all Commerce, is not the Foundation of Price, but of Bartering only. For if Men wanted nothing but what they could supply themselves with, there would be no bartering, or exchanging Commodities, but every one would keep and enjoy his own⁴.

V. Yet it is observable, that some of the most useful things of human Life have no Price set upon them; either because they are and ought to be free from Property, or because they are excluded from Commerce, or lastly, because they come within the reach of it, no otherwise than as Appendages of some other thing; besides, the Law has remov'd some Actions from Commerce, and thereby exempted them from Price. Thus the Air, the Sky, the heavenly Bodies, and the vast Ocean not being appropriated, can bear no Price, how serviceable so-

^a See B. i. c. 1. §. 22.

^b See B. viii. c. 4.

^c See B. i. c. 8. See B. viii. c. 3. §. 18, &c.

Mr. BARB. NOTES on §. III, IV.

so far as to do a considerable Hurt to Commerce. We have seen the Use of this Remark in the two last Chapters of the preceding Book; and 'tis probable that it may serve elsewhere to decide several Cases better than they usually are.

¹ The Author saith *Pectus vulgare*; but if we should translate it so, *viz. a vulgar or common Price*, we should confound that sort of Price with the other that is treated on at §. 9. *Pretium commune*, i. e. the Genus with the Species. Moreover, the Terms *Proper*, or *Intrinsic*, do in themselves much better express the Notion in which our Author understands the Word *vulgare* in this Place, as any one may easily perceive.

² It is one of the general Reasons; for that which is of no Use, passes commonly for a Thing of no Value. But whence comes it then, that Water, and some other things very useful for Life, are not rated at any Price? as our Author speaks a little lower. We must therefore add another Reason here, I mean, That things that are capable of Price ought to be not only of some Use, if not truly, yet at least in the Opinion and Affections of Men; but also of such a Nature, as not to be sufficient for the Needs of all the World. And so the more useful and rare a thing is in this last Sense, the higher or lower the proper and intrinsic Price will be. If the Fashion of a thing passes away, or few Men esteem it, then it becomes a good Bargain, how dear soever it was before. On the contrary, if a thing that is common, and costs little or nothing, becomes rare, nothing more needs to set a Price on it, and sometimes to make it very dear; as appears, for Example, by Water in dry Places, and at certain times, as in a Siege, &c. By this Principle we must explain and rectify all that our Author hath said concerning the Foundation of Price in general. See *Titius's Observations on Puffendorf*, CCCXXI, and on *Waterbach's Objere*. DIII. as also Mr. *Thomasius's Jurisprud. Divin.* Lib. ii. c. 11. §. 33. &c. and his Discourse *De Preti. Aff. Finib.*, c. 1. §. 10, &c.

² *Aristotle's* Words are, Δεῑ ἄρα ἐν τιμῇ πάντα μετρεῖσθαι. — τὸ δ' ἐστὶ τῆ μὲν ἀληθείας ἢ χρείας ἢ πάντα συνέχει.

³ So *Aristotle* expressly speaks. Ὅτι ἡ χρεία συνέχει ἕν τι ἐν. δηλοῦ, ὅτι ἐν μὴ ἐν χρείᾳ ἂν ἀλλήλων, ἢ ἀμφοτεροῖ, ἢ ἑτεροῖ, ἢ ἀλλάττονται. i. e. *Want includes one thing; which shows, that if Men stood not in need of one another, neither both, nor either of them would change.* *Nicom.* lib. v. c. 8.

⁴ *Arb.* P. lit. i. c. 6. (9) *Bartering obtains in every thing, and began naturally from some Peoples having more than they had occasion for, and others having less: For then they were forced to exchange, till they had furnish'd themselves with what they wanted.*

ever they may be to human Life. And the Law having forbid¹ things sacred to be brought into Commerce², has thereby exempted them from Price, although some of them have nothing in their own Nature to render them incapable of it. Nor can any Price be assign'd for a Freeman's Head; it being a Contradiction to be free, and at the same time expos'd to Sale; for he is no sooner expos'd to Sale, but he ceases to be free: And therefore, even upon this Account, Liberty is said to be an invaluable Thing, because the Advantages of it are so great, as to exceed all Value. Here 'tis worth observing what *Philo Judæus, De Spec. Leg.* p. 597. *Edit. Genev.* delivers, *Prices were set upon those who had devoted not only their Goods, but themselves; not according to their Beauty, or Stature, or such like, but according to their Age and Sex: for the Law fixes two hundred Silver Pieces as a Price for a Man, from the twentieth to the sixtieth Year of his Age, and one hundred and twenty upon a Woman; from the fifth to the twentieth Year eighty for a Man, and forty for a Woman; from Infancy to the fifth Year twenty for a Man, and twelve for a Woman; if past the sixtieth Year for a Man sixty, for a Woman forty. All of the same Age and Sex are rated at the same Price, for three good Reasons; first, because the Dignity of the Vow is the same, whether great or mean Persons make it. Secondly, in the case of a Vow Persons ought not to be rated upon the same Terms with Slaves expos'd to Sale; for those are more or less esteem'd, according to the Beauty and Vigour of their Bodies. Thirdly and chiefly, because with God there is no respect of Persons, as there is with Men.* See *Levit.* chap. xxvii.

Many things also have no Price, because they are not capable of being possessed separately by themselves, which yet very much enhance the Price of the thing they appertain to; as the want of them takes from it not a little³. Thus the lying open to the Sun, a clear and wholesome Air, a pleasant Prospect, the Winds, Shades, &c. consider'd separately in themselves, bear no Price, because they cannot be enjoy'd without the Land they belong to; but yet of what Moment they are in the Purchase of Lands and Tenements, no Man is ignorant.

Pliny, Nat. Hist. lib. xii. cap. 1. says of the *Plane-Tree*, That the People pay Taxes for the very shade of it. Thus in *Holland*, those that have Windmills pay a yearly Tribute for the publick Wind, as is pretended. And hence, by the way, it appears how

the Cause that⁴ *Demosthenes* pleaded before the Judges, about the shadow of the *Afs*, ought to be decided: For he that hired the *Afs* could not hinder the Owner from lying down where the shadow of the Beast fell, but might immediately have taken it away, by driving the *Afs* to some other Place. Lastly, whatsoever Actions either divine or human Laws command to be done *gratis*, or forbid to be done at all, and so exclude from Commerce, cannot be brought under any Price. Of which nature are those several Actions which have some supernatural Effect assign'd to them by divine Institution; as Remission of Sin, by the Absolution of the Priest; the Application of spiritual Benefits, by means of the Sacraments; and such like: Which whoever conters upon another for any valuable Consideration, is guilty of Simony; and to measure such things with Money, is look'd upon as Impiety and Irreverence towards the divine Author⁵. Unlawful too it is to bestow ecclesiastical Preferments for Money, upon unworthy Persons, which ought to be given to deserving Men *gratis*⁶. Neither ought the rewards and testimonials of Virtue and Learning to be sold to those that don't deserve them; not only because by this means they grow cheap, but because such Men are often by a pompous Title recommend'd to publick Employments, to the great prejudice of the Commonwealth⁷. And indeed 'tis a shame to the Men of Letters, that some should take such Liberty, as *Fabius of Bentiveglio*⁸ express'd in Jest, who, going to make a certain Person a Doctor, met by chance an *Afs*, that yawning with an open Mouth, look'd as if he were laughing: To whom, *Why laugh you*, says he, *you silly Creature? We can make you a Doctor too, if you have but Money*⁹: The Practice of the *Chinese* is otherwise, of whose Examinations and Preferments, *vid. Neuhof. in Gener. Descript. Sina.* c. 3. *Plin. Nat. Hist.* l. xvi. c. 4. "Oaken Crowns were the noble Badge of the *Soldiers* Valour, but now of late are Marks of the Emperor's Clemency; since, by reason of the licentiousness of our civil Wars, it seems meritorious not to kill a Subject. O happy times! which have rewarded such noble Services with Honour only, and, when other Crowns were valued for the Gold they were made of, would not allow the preserving a Subject to be rewarded with any thing that might bear a Price; thereby clearly professing, that they thought it a Sin even to save

¹ See *Afs* viii. 20. ² *Ad. Decretum Gratiani, Caus. 1. Quæst. 1, 2, 3.* ³ *Vid. Plin. Nat. Hist. l. xvi. c. 4.*
⁴ *Vid. Janum Nicium Erstbræum, Pinacotheca 2. c. 29.* ⁵ *Ovid. De Arte Amandi, lib. ii. ver. 163. Secum habet ingenium, qui, cum libet, Accipe dicit.*

MR. BARB. NOTES on §. v.

¹ By *Res Religiosæ* the Roman Law understands principally Places where any thing had been buried. See *Instit. B. ii. t. 1. c. 8, 9.* and *Dig. B. xi. t. 7. De Religios. & Sumptib. Funerum, &c.*
² This Privilege, which is granted to things sacred, belongs not only to Temples, and other things set apart immediately to the Service of God, but what's necessary for the Maintenance of Ministers, and all that appertains to them. This Privilege, I say, owes its Original to the pious Fraud of the Ministers interrelled; and in the Christian Church the Clergy have not only imitated the Pagan Priest: in that respect, but have perhaps outdone them. See Mr. *Thornastus's* Discourse *De Bonam Sæcularisfactorum Natura, §. 2, &c.* printed at *Hull* in 1707.
³ *Libertas inestimabilis res est, Digest. lib. 1. tit. 17. De Div. Reg. Juris, leg. 106.* I rather quote this Law, than that Passage of *Philo*, cited by the Author at large, because it speaks only of the Valuation of Persons devoted to God, which are to be redeemed; a Valuation made according to Age and Sex, without any regard to Stature, Beauty, or such like things. But tho' free Persons are not the Subject of Commerce, it doth not follow that they can't be made so, as Mr. *Hertius* observes, in respect of the Advantages to their Freedom. See lib. iii. chap. 1. §. 7, 8. before-going. The Right of governing free Men is also capable of Valuation, and is of a Nature that may be alienated, if we will. See *Gratius, lib. i. chap. 3. §. 12.* and what this Author says, lib. vii. chap. 6. §. 16. following.
⁴ See *lib. iv. c. 5. §. 2.* above.
⁵ See *Plenarib. de Dec. Oratoribus*, and the Scholiast of *Aristophanes de Vespijs* ver. 191.

“ a Subject for the sake of Lucre.” Thus a Judge ought not to sell that Justice which he should administer gratis⁶.

^a Non bene conducti vendunt perjuria testes,
 Non bene selecti judicis arca patet.
 Turpe reos empti miseris defendere lingua,
 Quod faciat magnas turpe tribunal opes.
 Turpe tori reditu census augere paternos,
 Et faciem lucro prostituisse suam.

Plutarch, in the Life of Remulus, p. 25. talking of the Duty of Patrons towards their Clients, adds, 'Tis accounted a mean and sordid thing for those who are rich to accept of a Fee from those that are poor. From whence the Cincian Law afterwards had its Original. *Hic clemensi rabi sa fori Jurgia vendens improbus, iras & verba locat*, Sen. *Herc. fur.* ver. 171, &c. Vid. Quint. *Instit. Orat.* l. xii. c. 9. The Roman Laws thought it mean to set a Price upon Philosophy and civil Knowledge. Vid. *Dig.* lib. l. t. 13. leg. 1. §. 4, 5. *D. De extraordin. cognit.* and *Gror.* in *Flor. Sp. r.* in *h. l.* and Quint. *Instit. Orat.* l. xii. c. 7. where disputing whether a Price ought to be set on Eloquence, among other things, he says, *It may be a means of rendering things cheap to put a Price upon them.* A Russian, or a Soreerer, can't justify his being hired for Money to kill a Man. A Scholar ought not to debase his Style and Learning in writing Scandal; nor ought any Man to prostitute his Credit, by maintaining an unjust Cause, or ruining a just one by Perjury; and many more of the same Stamp.

VI. There are several Reasons why the Prices of things should rise, or fall; why one thing should be prefer'd before another of as great, or greater Use. For here the necessity of the thing, and the eminency of its Use does not always take place. Nay, we generally find the most necessary things are cheapest; because, by the peculiar Providence of God, Nature affords a greater Increase of them. "Whatsoever is necessary for Mankind, the divine Providence has contriv'd that it should not be dear, or hard to be got, as are Pearls, Gold, Silver, and other Things, which neither our Body, nor Nature requires; but as for those things we cannot safely be without, she has plentifully dispers'd them throughout the World^b." That which chiefly raises the Price, is Scarcity. *Those things that are scarce, says Sextus Empiricus^c, are valued: those that grow amongst us, and are every where to be had, are quite otherwise. If Water were difficult to be met with, how much more valuable would it be than the things we most value now? Or, if Gold lay in the Streets as common as Stones, who do you think would value it, or lock it up?* And therefore some have thought it a Master-piece in Trade to procure a Scarcity. As the Dutch, in many Parts of the Indies, root up the Cloves and Nutmegs to prevent too great a Plenty of those Spices. "The Egyptians do not permit their Paper-reed to grow

in many Places; by which they procure a Scarcity, and consequently raise the Price, but hinder the common Use and Advantage of it, *Strabo*, lib. xvii. p. 799. *Edit. Par.* That which is scarce is valuable: Water is not valued, altho' the most useful thing in the World, *Plato Euthyphemo*, p. 211. *C. Ed. Wech.* Curious Dainties are not valued for their Taste, but for their being hard to be gotten, *Mamertin. Paneg. Julian.* c. xi. n. 3. *Ed. Cellar.* Besides, a thing is still more valuable, when 'tis not only scarce, but also comes from remote Places. *Pliny^d* tells us of two Boys, the one born in *Asia*, the other in *France*, who were wonderfully alike, and whom therefore the Merchant set a prodigious Rate upon, and the Purchaser look'd upon nothing in his whole Estate to be more valuable. For the Ambition of Mortals esteems those things most, which few Men have in common with them; and on the other side thinks meanly of those which are seen in the hands of every one. Nay, so perverse we often are, as to esteem a thing the more, because it is forbidden; its being forbidden whets our Curiosity. And therefore *Lucian^e* with Reason ridicul'd those, who in Winter load themselves with Ruffs, and are pleas'd with them when scarce and out of Season; but nauseate and despise what is in Season, and agreeable to Nature.

But generally we set a great Value upon nothing but what raises us, in some measure, above the rank and Condition of others; and for this Reason Honours particularly are more valuable for being scarce. "The Rewards of Virtue ought to be chaste and sacred, not to be communicated to wicked or mean Persons; for things that are scarce and difficult, are recommended to Men by the Rewards that attend them^f." Tho' indeed it proceeds from the Corruption and Pravity of human Nature, that we value real Goods more or less, according as few or many possess them in common with us. For my Goods are never the worse, because others possess the like; nor the better, because others want them. Thus my Health is not the less valuable to me, because others also enjoy theirs; nor the more, because others are sick. Nor is my Knowledge less worth, because others are knowing too; nor would the Value of my Wisdom rise, should other People prove Fools. He therefore that prides himself in seeing others want the good things which he is Master of, seems indeed to take pleasure in other Mens Misfortunes: And, on the other side, he that thinks his own Goods the worse, because others possess them in common with him, seems to be moved with Envy^g.

But indeed, as in many things, so in this, the general Course of Mens Lives deviates from right Reason. Hence it is, that the Luxury of Man has set most unreasonable Rates upon many things, which human Nature could easily be without: Which some think were contrived on purpose, that there might be some Use in vast prodigious Riches.

^a Ovid. *Amor.* Lib. i. El. x. ver. 37, &c. c. 14. p. 29. *Ed. Genev.*

^b Vitruv. *De Architect.* l. viii. in the Preface.

^c Pyrrhon. *Hypoth.* lib. i.

^d Lib. vii. cap. 12.

^e In *Nigrino*, p. 38, 39. *Ed. Amst.*

^f Cic. *De Invent.* l. ii. c. 39.

^g See *Narb.* xi. 28, 29.

^h *Mark* ix. 38, 39.

MR. BARB. NOTES on §. v.

⁶ The Words of the Digest are, *An & Philosophi Professorum numero sint? Et non putem — quia hoc primum profiteri eos oportet, mercenariam operam spernere. Proinde ne Juris quidem Civili Professoribus jus dicent: est quidem res sanctissima Civili sapientia, sed quae pretio nummario non sit aestimanda, nec debonestanda*, lib. l. tit. 13. *De Extraordinariis Cognitionibus*, &c. l. 1. §. 4, 5. We may add, That the Roman Law allowed neither the Immunities, Privileges, nor Rewards to Poets, that it did to the Professors of other Sciences, of which *Montf. Le Clerc* gives the Reasons in Tom. i. of *lib. Parrhasiana*, p. 51, &c.

What mighty Rates some Pearls bear, *Whose Goodness consists in such a degree of Whiteness, Largeness, Smoothness, and Weight, Qualities so hard to be match'd, that never any two of these Pearls are found alike!* Plin. Nat. Hist. l. ix. c. 35. Pearls bear the greatest Price of anything; they were first brought to Rome when Alexandria was taken, not long before Sylla's Time; but a little after were so much in Fashion, that even ordinary Women affected to wear them; for they used to say, *A Pearl to Women, when they appear'd in publick, was as good as a Liſtor,* Idem. *ibid.* Some Jewels are so valuable, that no Price can be set upon them, Id. l. xxxvii. Proœm. Our Coral amongst the Indians bears as great a Price as their Jewels do amongst us, Idem. l. xxxii. c. 2. Ad. Idem. c. xvii. 34. l. x. c. 29. l. xii. c. 14, 17, 19. l. xiii. c. 5. l. xxxvii. c. 4. l. vi. c. 7. Of Silk. *With so much Pains, and so far is it brought, that Women, when they appear in publick, may be seen through.* At this Day Amber with us bears a moderate Rate, in the East it is vastly dear. ² Nay, the Folly of Men fancies there must be something extraordinary in what costs much. *Heliogabalus* ordered the Prices of the Dainties provided for his Table to be represented to him greater than really they were; for that, he said, created an Appetite to them — *magis illa juvant, que pluris emuntur,* Juv. Sat. xi. ver. 16. *Luxury* has impos'd a Price upon the very Dregs that the Sea casts up, Curt. l. viii. c. 9. n. 19. Ed. Cellar. *Old Plate* receives a Value from the Fame of the Workmen; *Brass* from a few Mens Folly, Sen. Consol. ad Hely. c. xi. *Janus Nicius Erithraus* ³ tells us of *Tulips*, that thirty Years ago (when he writ this) they lay upon the Top of the Alps, without any Care or Notice taken of them: Yet, when they were brought to Town, the People fond of them for their Rarity, set such a Price upon them, as that every Root fold for above a hundred Crowns. But after they had increased and grew common, their Price sunk so low, that hardly any thing was cheaper. *As our Desires are, so are our Esteem of things; and there's no End of raising the Prices of things, unless we first set Bounds to our Extravagancies,* Cicero in Verrem, l. iv. c. 7. *China and Earthen Wares* are the dearer for being brittle: For 'tis an Argument of Riches, and a glorious piece of Extravagancy to have a thing that shall immediately be wholly destroyed, Plin. l. xxxiii. *The Brittleness* makes Crystal the dearer: For among unskilful People the Danger, which ought to sink the Price, raises it, Sen. De Ben. l. vii. c. ix. Strab. l. ii. p. 87. Ed. Genev. Of precious Stones, that are so much valued, that those that have them not, are as happy as those that have them. For Mankind

is so whimsical and silly, as to think those happy who possess Superfluities, rather than those who abound in all the Necessaries and Conveniencies of Life. And therefore it ought to be rank'd among the senseless Opinions of the commo. People to value things either for their being new, or scarce, or hard to be gotten, or brought from far, unless their Goodness also and their Usefulness recommend 'em. *Charron de la Sageſſe*, l. i. c. 39. num. 11. and l. ii. c. 9. num. 2. *Agatharchis de mari rubro*, c. xlix. speaking of the *Alitai* and *Cassandini*, whose Country abounded in Gold, says, *They barter'd Gold for a triple quantity of Brass, but gave double for Iron.* For they proportion'd their Rates according to the Plenty or Scarcity of the Commodities, in which we have not so much Regard to the Nature of the Thing, as the Necessity of its Use. But those things that are of daily Use, and especially such as relate to Provision, Apparel, and Arms, rise in their Price, when they become necessary as well as scarce; as in a Dearth of Corn, or in a Siege, or in slow Voyage, where Hunger and Thirst are craving to be satisfied, and Life must be preserv'd upon any Terms. *Plin. Nat. Hist.* l. viii. c. 57. *Quinctil. Declam.* xii. p. 176. *Ed. Lugd. Bat.* In a very great scarcity any thing that can be bought is cheap. When *Hannibal* besieged *Capsicum*, a Mouse was sold for two hundred Pieces of Gold; and he that sold it died of Hunger, whereas he that bought it was preserv'd. The Prices of artificial things, besides the Scarcity of them, are much raised by the ³ Neatness of the Art. "In which *L. Mummius* was so ignorant, that when he had taken *Corinth*, and thereby got possession of the Statues and Pictures drawn by the ablest Masters, he proclaimed to those whom he had hired to transport them into *Italy*, that if they lost them, they should find him new ones, *Ull. Par.* l. i. c. 13. The Reputation of the Artificer adds Credit to some, and others are the more valuable for the Character of their former Possessor. As *Lucian* ^b mentions one, who had bought *Epictetus's* earthen Lamp at three hundred *Denarii*, hoping, no doubt, to get *Epictetus's* Wisdom, by studying by that Light. Thus the City *Cusco* in *Peru* was in so great Request, that even the Seed that grew near it, tho' really no better than any other, was yet of more Value than that which grew elsewhere ^c; In short, the Difficulty, the Elegancy, the Usefulness, and Necessity of the Work, the Scarcity of Workmen, their being ^d Masters in the Art, their not being under a Necessity of Working, all contribute to the raising of the Price. *That sort of Work is most artificial, which depends least upon*

^a *Pinacoth.* lib. iii. c. 17. in the Life of *J. Barclay*, who was a great Admirer of them. *Alciphron Indotum*, p. 386. *Ed. Amstel.* ^b *Garcilasso de la Vega*, Comment. Reg. l. iii. c. 20. ^c "The *Athenians* had more need of good strong Roofs to their Houses, than the famous Ivory Statue of *Minerva*; yet I had rather be *Phidias* than the best of Carpenters. For a Man must be rated, not according to what he can do; but according to what Reputation he is in; especially since few can draw or carve finely; but any one is capable of being a Carpenter, or a Potter." *Cic. in Verrem*, c. 73. "Thus *Mela* gave a Talent for a Servant to look after his Silver-Mines." *Xen. Mem. Socrat.* p. 435. in fin. l. 2.

MR. BARRÉ'S NOTES on §. VI.

⁴ *Et enim qui modus est in his rebus cupiditatis, idem est abstinentiæ: Difficile est enim finem facere pretio, nisi libidini feceris:* i. e. In these Things the Value of them is according to Mens Desires. 'Tis hard to set Bounds to the Price 'till you have limited your Desires after them. *Cicero in Verrem*. lib. iv. chap. 7.

² Hence it was, that by the Roman Law an Eunuch-slave, which was above ten Years old, and understood some Art, was valued at more than a Slave that pretended to Physick. See *Cod.* lib. vi. tit. 43. *Commun. de Leg. 1. & l. 3. princip.* and Mr. *Thomassin's* Discourse, *De Pretio Affectionis*, Sec. chap. ii. §. 15.

³ 'Tis because curious Works are rare. So that the Author improperly distinguishes between the Rarity of such things as are relate with it; as is evident from other Examples alledged by him. See Mr. *Thomassin's* Discourse, *D. Pretio Affectionis*, and chap. i. §. 11.

Fortune; that the most sordid, which most defiles the Body; that the most servile, which is of most Labour to the Body; that the most ignoble, which requires the least Virtue, Arist. Polit. l. i. c. 7. (11.) And again, That Exercise, Art, or Discipline is to be reputed mean, that renders either the Body or the Soul unfit for the Practice of Virtue, Polit. l. viii. c. 2. (4) As for the more noble Arts, some are more worth than they cost: you purchase of a Physician Life and Health, Things invaluable; of a learned Tutor the liberal Sciences, and the Adornment of the Mind: And therefore, in such Cases, we do not pay for things they teach us, but for their Labour, Sen. De Ben. l. vi. c. 15.

VII. But sometimes it happens, that some certain things are valued at an high Rate by some particular People only, which may be call'd *The Price of Fantasy*. It was a Saying of a certain Arabian, *Whatssoever is dear, altho' it be dear, yet if I have a Fantasy for it, it is not dear; nor can any thing that pleases be said to cost too much*, Leo Afric. l. iii. *All Gifts are valued, as they are acceptable to the Receiver*, Liban. Declam. xli. p. 870. D. Edit. Paris. And this, where Animals are the Object, proceeds from a sort of Acquaintance with them¹; or, because they know how to suit themselves with our Humour; or because we have escaped some imminent Danger by their Assistance; or perhaps they are the Remembrancers of some signal Event. Besides, some things are recommended by the Friend that gives them, so that we would not part with them for several others of the same Goodness.

— *Mibi linteam remitte,
Quod me non movet astimatio,
Verum est μνησθῆσεν mei sodalis,*
Catul. Carm. xii. 11, 12, 13.

— *Acceptissima semper
Munera sunt, Author quæ pretiosa facit.*
Ovid. Epist. xvii. ver. 71, 72.

Many also put a Value on things, because some great Man, whom they are willing to compliment, has express'd an Esteem for them. Thus, this or that Provision or Apparel rises in its Price, when the King is pleas'd to be taken with it. But here

some observe, that the Fancy of the Buyer ought not to raise the Price of the Commodity, unless some other Causes concur. The² Roman Laws make no allowance for the Fancy of the Party in the Restitution of Damage done by Chance³: And yet Merchants frequently raise the Price, when they see the Buyer fond of the Commodity. *Dionorus Siculus*^b observes what an advantage the Italian Factors made of the Drunkenness of the Gauls: *They brought them Wine, and sold it at most unconscionable Rates; for they had a Boy for a Hoghead, and so exchange'd their Wine for a Butler.*

However the Affection of the Seller may fairly raise the Price, if so be he signifies it to the Buyer; for to part with a beloved thing, for the sake of the Buyer, deserves some Consideration^c. Lastly, The Price of things is somerimes enhanced by some vitious Habit of Mind, as Vain-glory, Cruelty, and the like^d.

VIII. And these always raise the Prices of things, as their Contraries always lower them. But, in order to regulate the Prices of particular things, *pro hic & nunc*, and to reduce them to a just Standard, we must remember, that in the state of Nature every one has Power to put what Price he pleases upon his own Goods, as being, in that state, the sole and supreme Matter of them. For, in this Case, should another prize my Goods, it would still be in my Power to accept or reject it; and thus I should, in the end, put the Price upon them my self: and tho' I lay never so extravagant a Rate upon them, no Man can have any Cause to complain; for no one ought to be concern'd how much I magnify my Riches in my own Fantasy; and they who think the Price too great, may let it alone. And therefore, if any one has a mind to my Goods, 'tis fit I should put what Price upon them I please; as, on the other side, should I force my Commodity upon another, I must take what the Buyer, who is indifferent, will be pleas'd to give me. Indeed, if any one thro' ill Nature, or Hatred, or Envy, refuses a Man in want, either to sell at all, or at least sells upon hard¹ unreasonable terms, then, and only then there is Cause to complain. From whence it follows, that in a state of Nature, the

^a Vid Lib. ix. t. 2. l. 34. D. ad L. Aquil. & lib. xxxv. t. 2. l. 36. ad Leg. Falcid. ^b Lib. v. c. 26. p. 304. The same d. l. c. 17. relates, "That the People of *Baleares* valued one Woman at the Rate of four Men, they were so prone to Venery." ^c *Ald. l. lxii. f. 1. l. 63. D. ad L. Falcidiam.* ^d What Rates the old Gauls set upon the Heads of their Enemies, see in *Diod. Sic. l. v. c. 29. p. 307. and Strabo, l. iv.*

Mr. BARB. NOTES on §. VI, VII, VIII.

⁴ *Respondetur, quædam pluri esse, quam erantur. Enis à M. dico non inestimabilem, vitam, & valetudinem bonam: à bonarum artium præceptis studio liberalia, & animi cultum. Itaque his non Res pretium, sed Opera solum, quod deseruiant, quod à rebus suis avocati nobis vacant. Mercedem non meriti, sed Occupat. usque ferant. See Quintil. Instit. Orat. l. xii. c. 7. in fin. Pythagora blamed those that took Money of young Men for teaching them such things as were not to be valued: *Μισθὸν τῶν ἀτιμῆτων πρᾶττοντας*, Jamb. de Vit. Pythag. c. xxxiv. num. 245. Ed. Kuster.*

¹ I have a little corrected this Place to make it agree with what he has said in his *Abridgment of the Duties of a Man and a Citizen*, lib. i. c. 14. §. 4. and have also been obliged to make some small Alterations a little farther; for this Paragraph, and some others in this Chapter are very disorderly placed.

² The Words are, *Si servum ricum occidisti, non affectum nec astimandus esse putas (velati si filium suum naturalem quis occiderit, quem tu magno captum velles) sed quanti omnibus valeret. Sextus quoque Pedius ait, Pretia rerum non ex affectione, nec utilitate singulorum, sed communiter fungi. Digest. lib. ix. tit. 2. Ad Leg. Aquil. leg. 35. See also lib. xxxv. tit. 2. Ad Leg. Falcid. leg. 62, 63. and Mr. Thomassius's Discourse De Pretii Affectione, &c. c. iii. §. 12, 13.*

³ Mr. Thomassius, in his *Jurisprud. Divin. l. ii. c. 11. §. 13.* distinguishes between a thing of the same kind, and a thing which is capable of an Equivalent; for only the first can be valued as high as we please. As for the other, if in a Loan, or Exchange, for Example, one pretends to value his Wine or Corn at a higher Rate, altho' in reality they are of the same Nature and Goodness as that of the other Bargainer, Mr. Thomassius says, "That he offends against the natural Equality of Men, which doth not allow us to weigh our own and other Mens Goods in an uneven Balance, and judge differently of them, or of what appertains to them, without a just Cause." We may also add, That the Nature of Commerce, by which Prices are settled, requires Equality; for there is a visible Inequality, when things of the same Kind and Goodness are estimated at a different Rate: Whereas, when we are treating about Things of a different Nature, besides that they can't be so exactly equalled, the Esteem which the Proprietor hath for it may be respected in the Valuation as a part of the Price, and to reduce the Exchange to a just Equality.

Price of every thing is to be determined by the Agreement of the Contractors ; nor can any one be said to have offended against the Law of Commerce for making the best of his Market, provided he has not been inhuman towards the necessitous ^a.

But in a regular Government the Prices of things are determined, either by an Order from the Magistrate, or some Laws, or else by the common Judgment and Estimate of Men, together with the Consent of the Parties : The former may be call'd the *legal*, the other the *natural Price* ^b. The *legal* is always presu'd to be consonant to Justice and Equity, unless the contrary does evidently appear : for sometimes gross Ignorance, and more frequently Hatred or Favour towards the Buyer or Seller, or some other Corruption, or private Interest, interposes. The *legal Price* is fix'd, as it were, in a Point, and admits of no Latitude, but the least Excess becomes Injustice. And when 'tis fix'd (as most commonly it is) in Favour of the Buyer, the Seller cannot in Justice demand more ; but the Buyer may, with the Consent of the Seller, sink below it, provided he does not fall short of the lowest Degree in the *natural Price* : and the Seller may lawfully take less, provided it does not tend to the Prejudice of others of the same Trade. But if the Price be fix'd in Favour of the Seller, then the Buyer cannot lawfully press the Seller to take less, who yet, if he thinks fit, may take it ² ; for any Man may recede from his own Right : However, in this Case, the Seller may take more, provided it does not exceed the ³ highest Degree in the *natural Price*. On Labour, the Price is generally fix'd in Favour of the Labourer ; on Commodities, in Favour of the Buyer. In some Places, a more subtil Method is taken to prevent unreasonable Prices ; as in *Greece*, the *Fishmongers* were not permitted to sit, but obliged to sell their Fish standing, that so, by the tediousness and tiresomeness of the Posture, they might be forced to sell them while they were sweet, and at a moderate Rate.

IX. But the *natural Price*, which is not fix'd by Law ^c, admits of some Latitude, within which more or less may be demanded and given. Of this Price *Seneca* is to be understood, when he says, ² *What matters how much it is, since the Buyer and Seller agree upon it ?* The Value of things is according to the Market ; when you have commended them, they are worth so much as they can sell for, and no more. *De Benef. lib. vi. c. 15.* And *Law* 63. of *Book xxv. 1, 2.* of the *Digest. ad L. F. d.* *The Prices of things are not fix'd according to the Fancy, or Use of particular People, but as they are valuable to every body.* See also *Law* 33. of *Book ix. r. 2.* of the *Digest. ad L. Aquilia.* In some Places (says *Aristotle. Nicom. ix. 1.* towards the End) *the Latins are so Averse to voluntary Commerce : thinking it reasonable that the Creditor should entirely depend upon the Honesty of the Debtor : For they thought the Debtor fitter to judge how much ought to be paid, than the other. For many things are differently rated by those that are in Possession, and those that desire to be in Possession of them ; every one setting a great Rate upon his own. But a Return ought to be made according to the Opinion of him that is to make it, which perhaps ought to be adjusted, not according to the Value he puts upon the things, when in Possession of them, but according to the Value he put upon them before he had them* ^c. By reason of this Latitude they generally divide the *natural Price* into three Degrees ; the lowest or favourable, the middle or reasonable, the highest or rigorous : within which Degrees any thing may be bought or sold dearer, or cheaper. But of what Extent this Latitude may be, it is not easy to give a Rule that will reach all Cases : But that may be said to be the just Price, which is generally agreed upon by those who sufficiently understand the Market and the Commodities. Hither may be referred that of *Varro de Ling. Lat. lib. iv. * Pretium est, quod aestimatis emptionisque causis constituitur : dictum a peritis, quod si soli possunt facere recte id.* Yet *Salmasius, De Usuris*, ridicules this Derivation, and that with Reason.

^a See *Gen. xli. 49. & xlvii. 13. &c.*

^b That is, as Mr. *Barleynat* has it, the ordinary or current Price.

^c *Vil.*

Grot. l. ii. c. 12. f. 14. & Cicero. Verrin. De Signis. Qui modus est in his rebus cupiditatis, Veri est aestimationis.

Mr. BARB. NOTES on §. VIII, IX.

² It is not always allowed to give a Price lower than what is set by the Law ; and 'tis taken place chiefly when the Taxation is fixed, not for the Interest of private Persons only, but for the publick Good, and as a sumptuary Law. Nor may we always content ourselves with less ; which ought principally to be observed, when the Magistrate, by fixing a Price, endeavours to hinder Monopolies, or to encourage Merchandise and Commerce in general, as Mr. *Thomasius* has very well observed in his *Jurisp. Dico.* ubi supra, §. 56, 57.

³ See *Atheneus, l. vi. c. 2.*

¹ The common Price, according to Mr. *Thomasius*, ubi supra, §. 24. hath also Place among those who live in the independent State of Nature. For, as he says, it would be very hard to maintain any Commerce, if every one should always over-value his own Goods, and under-value another's. The best way to preserve an Equality between Persons naturally equal, is, that every one submit himself to the Judgment of the greater Number ; and so there is Reason for such an Establishment in Nations as this, That both Bargainers should ordinarily govern themselves by the Estimation which their Equals make of things of a like Nature. So that if Men do not follow that Estimation, they may be thought to offend, not truly against the Law of rigorous Justice, but against the Law of Humanity, and natural Honesty. 'Tis also a great Imprudence in Trading to value our Goods at so high a Price, as to find no Buyers ; as it often happens, when Men over-value their Goods at more than they are thought worth by such Men, as commonly deal in them, and understand them. See the same Author's Discourse, intitled, *De Equitate Corporina*, leg. ii. *Cap. ii. De Rejectione Venditione*, c. ii. §. 24.

² *Seneca's* Words are, *Quid interea quantum fiet, cum de pretio inter ementem & vendentem conveniat. — Pretium cujusque rei pro tempore est. Cum bene sit vendentis, tantum pretium quantum vendere non possunt.*

³ He treats here of the Value of a Damage, and not of what may be given or required in Buying and Selling, or making any other Contract. See the Discourse quoted c. ii. §. 31.

* A Price, in Latin *Pretium*, is that which is appointed upon the Account of the Value and Buying of a thing ; 'tis so called from *Peritis*, i. e. such as are skilful, because they only are able to fix it.

X. In regulating this *natural Price*, Regard is to be had to the Labour and Expence^a of the Merchant, in importing and taking Care of his Goods; for upon this ground it is that a Merchant can justify his selling so much dearer than he bought: But this Regard is only to be had to those Expences which they are usually put to; extraordinary Chances have nothing to do here. And therefore it can be no reason for a Merchant to raise his Rates, because he happen'd to break his Leg, or to fall sick, or because part of his Goods were cast away, or stolen; unless such Accidents contribute to the Scarcity of the Commodity; much less can he bring in his own extravagant and superfluous Expences. But his Time, his Study, his Care, in getting, preserving, and sorting his Commodities, as also his Servants Wages, may fairly be rated by him. And it would be inhuman, and tend to the Discouragement of Industry, to allow a Tradesman, or a Man of any other Calling, no more Gain than just enough to supply him poorly and sparingly with the Necessities of Life. The Difficulty also, and Length and Danger of the Voyage, may be brought into the Account, as also the different Value of Monies and Commodities in different Countries. Besides, the way of Sale may alter the Case; for they who sell by Retail may demand somewhat more than those who sell by Wholesale; their Trouble being greater, and it being more advantageous to have a good round Sum paid down at once, than to receive the same by little and little. But what sudden and frequent Alterations the Markets admit of by reason of the Plenty or Scarcity of Buyers, Money, or Commodities, is well known. For the Scarcity of Money and Buyers proceeding from some particular Cause, meeting with a Glut of Commodities, sinks the Price^b. As, on the other side, the Plenty of Buyers and Money, or the Scarcity of the Commodity, raises it^c. Besides, it helps to lower the Price, when the Seller forces his Commodities upon us of his own Accord, as if they lay upon his Hands^d, for that proceeds from a Scarcity of Buyers; and besides, in this Case, the Purchaser has often no Occasion for the thing, nor would buy it, but that he thinks it a good Bargain: And indeed, in such a Case we often buy, not so much for our own, as for the Seller's sake. And therefore, when things are sold by Auction, or Inch of Candle, they often go off for less than otherwise they would sell for; it being the Condition of that sort of Sale, that the Ware should go to the highest Bidder: And yet, sometimes, the Warmth and Emulation

of the Company rises above the ordinary Price; which is indeed, at all times, rais'd by the Plenty of the Buyers. Again, the Seller ought to have Allowance made him for the Loss ensuing, or the Gain he foregoes, by selling at that time when the Buyer is importunate: For it would be unreasonable to expect me to part with my Goods, but upon such Terms as to be no Loser by them. Besides, the Loss or Gain, by reason of slow or prompt Payment, may be, and indeed always is, brought into the Account: For + a Day is part of the Price; which is more if paid down upon the Nail, than if paid some time after; for in the mean time I might perhaps turn and apply it another way to my Advantage^e. And therefore^f *Polybius* commends the Generosity of the younger *Sipio*, for paying his Sisters their Portions forthwith, which he was not obliged to do 'till two or three Years after, and that too at Rome, a City where no Man gives away any thing at all, or pays a Penny before it be due; so diligent is every Body in getting Money, and so much Advantage do they make of the Time.

^g Lastly, We may add what *Themistocles*, when he was going to sell his Farm, gave a publick Advertisement of^h, *That he had a good Neighbour. A House, says Sallust, that has got such a Neighbour as you* (speaking to a rascally Jew) *may possibly sell for ten Drachmæ of bad Money; but there is hopes, that when you are gone, it may be worth an hundred.* A good Neighbour therefore raises the Price of a Farm; especially in a Country where the good old way of the Spartans obtainsⁱ, who made free with their Neighbours Servants, Dogs, and Horses, as if they were their own: And when a Man wanted any thing that his Neighbour was Master of, he need but to open his Store-house, and to furnish himself from thence with what he had occasion for. The Cause of raising the Price of Slaves, in *Justin*, was very unusual, and not a little owing to Cruelty: *The Price of the Theban Captives was rais'd*, says he, *not for their being serviceable to the Buyer, but out of Hatred to the Enemy*^j.

XI. But, when most Nations had degenerated from their primitive Simplicity, 'tis easy to imagine that this proper Price could not suffice for the Dispatch of Business and Commerce, which daily increased: For Commerce consisted in Bartering only; and Work was paid in Work, or else in Commodities. But after our Luxury had increased our Necessities, and we, not content with the Produce of our own Soil, had a mind to the Delicacies of other Nations, it was hard for any one to possess such Goods, for which any other would be

^a See *Græc.* in the Place above-cited.

^b "Cheapness proceeds from a multitude of Sellers." *Tacit. Ac.* vi. c. 17.

^c *Vid.*

Socrat. Hist. Eccles. l. iii. c. 17. in the Beginning.

^d *Vid. Mart.* l. vi. c. 30.

^e In excerptis *Perrelianæ. Ald. Græc.* l. ii.

c. 12. f. 14.

^f *Plut. Apophtheg.* p. 185. D

^g *R. Jar. Perf.* c. 15.

^h Mention'd by *Plutarch, In vit. Laconicis.*

p. 238. *Ed. Weob.*

ⁱ *Ju. l. xi. c. 1.*

Mr. BARB. NOTES on §. X.

¹ I have added this Period taken out of our Author's Abridgment *De Officiis II in & Civ. B.* l. i. c. 14. f. 6. where 'tis said, a high Price is set upon a thing, when 'tis sold only to please one importunate to have it, and without which Intreaty it would not have been sold. Any one may see that this ought not to have been omitted.

² Especially, where *Cato's* Rule of good Husbandry is observed, which *Plutarch* relates in his Life, "Nothing is cheap that is superfluous; and what we have no Occasion for, although 'tis sold for a Farthing, come dear." 'Tis a Proverb, *Merx ultranea patet*, Proffer'd Ware stinks. *Plutarch's* Words are, "Ουδὲν δὲ μὲν εὐρανοῦ εἶναι τῶν περιττῶν ἀλλ' ἕτ' εἰ δὲ δέται, καὶ ἀσπίδος περιττοῦ τὸ πᾶν οὐκ εὐρανοῦ." In vit. *Caton.*

³ See Chap. v. §. 6. following.

⁴ *Nam Dies solationis, sciti summa pars est stipulationis.* Digest. l. ii. tit. 13. *De E. Inst.* l. 1. §. 2. See also l. viii. t. 2. *De in Drem actione*, l. 4. §. 6. & l. 15. in fin.

⁵ In all this Paragraph the Author treats only of the outward Circumstances, which help to raise or lessen the Price of things. But we ought always to suppose that the natural and internal Qualities of the things themselves do very much alter the Value, because these intrinsic Qualities or Circumstances increase or lessen the Benefit we may have by it. To this the Example of *Themistocles*, alludg'd by this Author, is to be referred, &c.

ney to have it new coined ; and, when he had coin'd it, he order'd every Piece to go for double ; and so gain'd half of the Money, without doing Wrong to his People. Indeed, such a thing as this may admit of some Excuse, in case of Necessity, if remedied when that is over. But what *Zonaras* and others tell of *Nac. Phraas*, cannot be palliated : For he having coin'd a Quantity of light Money, besides the weighty that was current, would receive none but the weighty into his Treasury, but made all his Payments in the light ^a. Some Legislators indeed have taken this Course, to extirpate Covetousness, Luxury, and such Vices, by introducing base Money. *Lycurgus* *ord' d down all the Gold and Silver of Sparta, and allowed nothing to pass but Iron, having assign'd a small Price to a just Weight and Bulk of it ; so that 10 l. would take up a large Room, and require a Team of Oxen to bring it home. By this Means he utterly rooted out several sorts of Villany. For who would steal, or cheat, or receive a Bribe which could not be concealed, and which no Man was the better for having in his Possession, since it could not be apply'd to any other Use ? For, they say, he made all the Iron red hot, and quenched it in Vinegar, which, by that means, became brittle, and good for nothing.* By the same Methods were all idle superfluous Arts rooted out, when nothing could be got by them : For the Iron Money not passing in Greece, none of the foreign Delicacies could be imported from thence into *Sparta*, which cut the very Nerves and Sinews of Luxury. *Lysander* ^c brought back Gold and Silver into *Sparta*, and with them Avarice. Indeed, among other Nations too, Covetousness crept in with the Use of Money. For as long as their Riches consisted in Corn, Cattle, and such like, the Cumberfomeness of their Goods, together with the Difficulty of managing and preserving that which was so liable to Corruption, was sure at length to put a stop to their boundless Desire of increasing their Store. But now, since the Use of Gold and Silver has been found out, a covetous Man may embrace his Millions. *Plato* ^d in his Commonwealth, to take off his Subjects from too great a Thirst after Lucre, commanded, *That no private Man should have any Gold or Silver : That the Money which the Subjects make use of, should be such as passes no where else. But yet that the Publick should have in Possession some of the current Money of Greece, in case they should have an Occasion of waging War, of Travelling, or of sending an Embassy : That Travellers, at their Return home, should pay into the Publick all the foreign Money they bring with them, and receive that of their own Country for it.* The

Great *Cham* at *Cambala* put his royal Stamp upon a vast Sum of Money made of the Bark of Mulberry-Trees, which no Man in his Dominions, upon pain of Death, dared to refuse, or to coin and use other ^e. The Foreigners too, who traded into those Parts for the Gold, Silver, and the Jewels which they imported, were forced to take that Money, which they converted into the Commodities of the Country, and so exported again. By which means that Prince heaped up a prodigious Quantity of Gold and Silver. The *Persians* call the Leather-Money, which an unjust King had imposed upon them, *Shaherun*, i. e. Money imposed on the Subject at the Pleasure of the Prince. The Memory of which has made such an Impression upon them, that when they would denote the Injustice of any King, they express it by saying, *He imposes Leather-Money upon his People* ^f. On the other hand, the Care that the *Roman* Senate took of their Subjects is much to be commended : For when the small Money had been debas'd, and a vast Quantity of it crept in among them, that Calamity not being removeable any other way, the Senate made a Decree, That whosoever within such a time should bring in their bad Money, should have it exchang'd for good. Upon which account, above five hundred thousand Crowns were disburs'd out of the Treasury ^g.

XV. But since Money is the common Measure of the Value of other things, its Value ought by no means to be altered, but where the Interest of the Publick does evidently require it. And then too, ^h the more moderate the Alteration is, the less will the Peoples Accounts be confounded. And therefore such a sort of Matter was chosen for the carrying on of Commerce, the publick and unalterable Value of which, constantly applied to the same Quantity, might be able to relieve and supply all the Inconveniences that were found in simple Barter ⁱ. But yet, as to the unchangeable Value of the Money, we must observe what *Grotius* ^j asserts, *That the Currency of Money is not naturally derived from the Matter only, nor yet from this or that particular Form and Denomination ; but from its Capacity of being compar'd with all other things, or at least all those that are most necessary.* The Meaning of which Place is, that it does not proceed from ^k the Matter ^l of the Money only, e. g. its being Gold or Silver, that a certain Piece goes *pro hic & nunc*, for so much, and is equivalent to such a Commodity (for the Currency of Money does not only depend upon one Piece's being equivalent to another of the same Quantity and Quality, for

^a *Ant. J. Mariani, Hist. Hispan.* l. xv. c. 9. ^b *Plat. de Legib. p. 44, 45. Ed. Weh.* ^c *Vid. sup. in Lysander.*
^d *De Legibus*, l. 5. p. 848. ^e *See M. Paul. de Fer.* l. ii. c. 21. ^f *See Grotius ad Stat. Reip. in Persiam*, c. iii. *Ant. Buchanan. Hist. Scot.* l. xii. p. 450. ^g *Ant. Muratori Hist. Font.* l. xiv. p. 241. ^h *W. n. observe out of Plat. Nat. Hist.* l. vi. c. 22. "That the King of *Taprobanes* very much admired the Justice of the *Romans*, in that the *Dramas*, which he had taken, were all of equal Weight, whereas the Stamp made it appear that they had been coined at different times." *Phil. Solon.* c. lvi.
ⁱ *Vid. lib. xviii. t. 1. l. 1. D. De contrab. Emp.* ^j *B. n. c. 12. l. 17.* ^k *Philos. B. supra.*

MR. BARB. NOTES on §. XV.

¹ See the End of the foregoing Note. Mr. *Hunter* also quotes here the History of Mr. *Tobacco*, l. viii. in the Year 1551, about the End; and lib. cxxix. in the Year 1602. *De Reide, Acad. Belg.* l. v. in 1586. and *Gen. Hist. Belg.* lib. v. in the Year 1595.
² This is not the Sense of *Grotius*; but this great Man mean, as *Grotius* explains him, and as will appear easily by attending to his Words, and the Sequel of his Discourse, That if Money be capable of an Equivalent, it may only be so because we may give Dollars, for Example, for Pittoles, or Pieces of fifteen or thirty Shillings for Dollars, but because we may give Money for Corn, Wine, &c. for, says he, we must pay, unless we have otherwise agreed, for Things as much as they are worth at the Time and Place of Payment. *Quæ æstimatio, si alia non conveniat, justiora erit temporis & loci pretium.* The another thing to say, that if we must have regard in exchange to the intrinsic or extrinsic Value of the Species, it happens at the Beginning of the Debt: This Question shall be handied a little lower, ch. vii. §. 6, 7. The Author does not speak here, at least directly, of the Value of Money, with respect to the Rareness or Abundance of other things. He speaks only of it in that part of the End of the Paragraph, when he explains the Words of *Michael* of *Ephesus*, a Commentator on *Leviticus*.

all *consumable Commodities* are such) but upon its containing virtually the Prices of any thing else ; nor from any particular Denomination, as that it is call'd a Ducat, Crown, Dollar, or Florin ; nor from its having such a certain Stamp⁴ ; but from its Capacity of being compared, in respect of Plenty or Scarcity, with other things, especially those that afford the more necessary Supports of human Life. Now Land does this ; for from it, mediately or immediately, proceed most things that human Life subsists on. And the Product of it being one Year with another pretty equal, it may be presum'd to have its natural Value fix'd and certain, to which the Prices of other things, at least of such as have not received their Value from the Luxury or Folly of Man, are refer'd, as to a Standard. For 'tis very reasonable, that the Prices of such things as are the Product of Land, or are maintain'd by it, should be regulated by the Price of the Land itself. Since therefore the Land every where is in private Hands (most Mens Estates being now in Land) the Value of Money must needs rise or fall, according as it is scarce or plentiful, in proportion to Land. For every civiliz'd Nation consisting chiefly of two sorts of Men, the *Farmer*, and the *Tradesman* or *Labourer*, if, in a great Plenty of Money, Land and its Product should sell cheap, it must needs break the *Farmer* ; and on the other hand should Money be scarce, and Land and its Product dear, it must needs beggar the *Tradesman*. Which in Fact we find true ; for when a plentiful Harvest makes Corn cheap, if the Work of the *Tradesman*, and those that earn their Living by their Labour, stand at the same rate as in fruitful Years, the *Farmer* is found to get little by his plentiful Crop. And the same Inconvenience presses the *Tradesman* and *Labourer* when Corn is dear, if still their Labour keeps its old Price. Since therefore, in indifferent Years, the Commerce between the *Labourer* and the *Farmer* is best adjust'd, and there is then least Complaint between them ; it is evident, that in fixing the Price of Money the greatest Regard ought to be had to Land, especially where the Country does not subsist upon Merchandise only, but chiefly upon its own Produce.

XVI. From what has been said, we may judge, whether a Farm, that was rated at a hundred Pounds two hundred Years ago, ought not, *ceteris paribus*, to be rated more now ; and whether the Wages, that were large enough then, are not in all Reason a little too scanty now. For it will not suffice to say, that the Pieces of Money have the same Weight, Goodness, Name, and Shape, which they had formerly ; but we must consider, that within this two hundred Years such a vast quantity of Gold and Silver has been imported into *Europe* from *America* and the *Indies*, not to mention the many Silver Mines of *Europe* itself, that the Value of Money has, by degrees, sunk very much ;

inasmuch that (as *Bodin*^b observes) Commodities bear ten times the Price they did formerly¹, by reason of the Plenty of Gold and Silver. And therefore the old Price of Land and Wages ought to rise, *ceteris paribus*, in the same Proportion². For suppose Commerce to be carried on by pure Barter in any Country which affords very little Wine, but Abundance of Corn ; here, for a small Parcel of Wine, we shall receive a great deal of Corn ; but if, by good Management, the Vineyards should happen to produce a larger Vintage, without doubt, for the same Quantity of Corn, we must give a greater Proportion of Wine than formerly. In like manner, when Money is scarce in Comparison of other things, a great many things will be purchas'd with a little Money ; but Money, on the other hand, increasing, more of it must be given for the same things. For since the Metal, as to its *natural Price*, may be, and often is brought into Commerce as well as other Commodities, its Value must rise and fall according to the Scarcity or Plenty of it. And the *eminent Price* of Money must necessarily follow the *natural Price* of the Metal : For it is unreasonable, that a Quantity of Silver, consider'd as a Commodity, should bear a very different Price from what it does when consider'd as Money. For so the same thing, consider'd as its own Measure, would be greater or less than itself, consider'd as the thing measured. And this is the Reason why, when the Prices of almost every thing else have been altered by reason of the Plenty of Money, Gold and Silver have still kept their old Price, an Ounce of Silver being worth a Crown now, as well as formerly. For if the Price of Bullion, like the Prices of other things, had been *v. g.* quadrupled, an Ounce of Silver now would cost four Crowns, so that little would be got by coining Money.

When therefore the Price of a thing happens to be changed, we must carefully distinguish, whether that Change be made in the Value of the thing, or in the Value of Money. The former happens, when the Plenty of Money standing as it was, the Commodity begins to be more plentiful, or scarce, than usual ; the latter, when the Commodity remaining as usual, the Plenty of Money has increas'd, or decreas'd. Thus, when in a plentiful Season I can buy a Bushel of Wheat for one Crown, which in a Dearth I cannot have under three ; the Reason is, because the Value of Wheat, and not of Money is changed ; but when a Farm now lets for two hundred Pounds, which an Age ago let but for an hundred ; the Value, not of the Farm, but of the Money, is altered³. But altho' Money admits of vast Changes, and a common Measure ought to be fixed and unalterable, Money nevertheless is capable of being made a common Measure. For this Change in Money is never

¹ Vid. l. i. *D. De contrab. Empt. ubi supra*, "Money is of Use, not so much for its Substance, as its Quantity." Also l. xvi. t. 3. l. 94. l. 1. *D. De Soluton.* "In Money the Species is not so much consider'd as the Quantity." ² *D. Rep.* l. vi. c. 2. p. m. 1028. ³ *Add. Val. Max.* l. iv. c. 3. l. 12. ⁴ "The royal Treasure being brought into the City at the *Alexandrian* Triumph, caus'd such a Plenty of Money, that the Interest of it sinking very much (*Orghus* says Half in Half) the Price of Land was rais'd." *Suet. n. August.* 42. *Alid. Joseph. De Bello Judaeo*, l. vi. c. 32. *Fran. Lopez. de Gomara. H. l. Gen. Ind.* c. 117.

Mr. BARE. NOTES on §. XVI.

¹ Mr. *Hortius* quotes a *Dutch* Historian, who relates, that the City of *Arnhem* gave a splendid Entertainment to a Duke call'd *Aemilius*, with his Datchets, and an hundred and sixty six of his Retinue, at no greater Expence than fifty seven Dollars of that Country Money. *J. Isaac Pontanus*, in his *Hist. of Gelderl.* l. ix. Hence it comes also, that there are Places of publick Employments which have such small Revenues. Salaries also remain in the same State that they were appointed two or three hundred Years ago, not considering that a thousand Dollars now are of little more Value than an hundred were then.

so sudden, as in other things, which depend very much upon the Uncertainties of the Weather, Storms, and other Casualties; but the Value of it

is lessen'd by such insensible Degrees, that we do not perceive it, while it decreases, but, after a long time, find that it has decreas'd.

* Add. Jac. Godofredi Dissert. De mutatione & mutatione & augmento Monete aureae.

CHAP. II.

Of Contracts in general, that presuppose the Price of Things.

- I. The Difference between Bargains and Contracts, according to Mr. Hobbes.
- II. According to the Interpreters of the Roman Law.
- III. Some Advice about what they have delivered.
- IV. Our Opinion about the Difference.
- V. Contracts are divided into such as oblige; 1. One Party only; and 2. Such as oblige both Parties.

- VI. And into real, of bare Consent, verbal, and in Writing.
- VII. In some particular Name, and without a Name.
- VIII. Beneficial and chargeable.
- IX. How many sorts of chargeable Contracts.
- X. Of mix'd Contracts.

WE come now to treat of such Contracts as presuppose Property and Price. And first, We will enquire into the Difference between simple Pacts, and Contracts. Hobbes^a defines a Contract to be the Action of two, or more, making over their Right to one another. But since in every Contract either both Parties perform their Bargain upon the Spot, so as neither trusts the other; or one performs, and the other is trusted; or neither performs, but each trusts the other: To the first of these only he gives the general Name of Contract. The other two sorts, where either one or both Parties are trusted, he calls Pacts. But this Difference does not concern the intrinsic Nature of Contracts and Pacts, but regards the Execution of them only: And 'tis against common Sense, that a Sale, v. g. where the Goods are deliver'd for ready Money, should be call'd only a Pact.

II. The Roman Lawyers almost all agree in making Pact the general Term which comprehends all the Affairs, wherein Men are concern'd with one

another, and they define it in general to be¹, The Agreement of two or more in the same thing. Then they divide Pact into Pact properly so call'd, and Contract: The former is, when the Object is some Matter of no Consequence, and, in its own Nature, incapable of bearing an Action in the civil Court. This they again divide into simple Pact, and not simple; which latter they again subdivide into legal and additional. They say farther, That an Agreement may become more than a simple Pact, either by its own intrinsic Nature, or by the external Confirmation of the Law; for it is that that properly renders Agreements legal Pacts. Moreover, they tell us, that this intrinsic Nature may be of two sorts, for some do not retain the general Name of Agreements, but are call'd by some particular Name of Contract; others, altho' of no particular Denomination or Form, yet exceed the Limits of simple Pact, by having a Matter of Consequence for the Object of them, as the Performance of a Promise, the Delivery of Goods, or

^a De Cive, c. 2. s. 9.

Mr. BARB. NOTES on Chap. II. § 1.

¹ Pactum autem à pactione dicitur — Et est Pactio duorum, plerumque in eodem placitum consensus. Conventio nis verbum generale est, ad omnia pertinens, de quibus negotii contrahentium transigendæ causa consentiunt, qui inter se agunt. Digest. l. ii. tit. 14. De Pactis, l. 1. §. 1, 2, 3. Cujacius's Observ. l. ii. c. 15.

² Nec obesse tibi poterit, quod dici solet, Ex pacto actionem non nasci. Cod. lib. ii. tit. 3. De Pactis, leg. 10. Nam si conventio, placiti sine sitit, ex vultu pacto perspicis actionem jure nostro nasci non posse. Lib. iv. tit. 65. De Locato & Conducto, leg. 27. But simple Conventions always afford a valid Exception, as our Author observes in the next Paragraph; I mean, That when a simple Promise is made to any one, to require nothing of him, or not to sue him at Law, which might rightly be done, if, after that we lay an Action upon him, we have debarred ourselves immediately of our Action, altho' the Agreement was not confirmed by an Engagement in Form, and the Plaintiff has done nothing on his Part to free himself from it. Sed cum pactum conventum exceptionem perpetuam pariat, &c. Digest. l. xx. tit. 6. Quibus modis pignus, vel Hypotheca solvitur, leg. 3. princip. Igitur nulla pacto obligationem non parit, sed parit exceptionem. lib. ii. tit. 14. De Pactis, leg. 7. §. 4. Si pactum ne pro judicatis, vel in eorum ædium agatur, hoc pactum valet. — Nam & de furto pacisci lex permittit. Sed & si quis paciscatur, ne depositum recipiat, hoc pactum valet. Pomponius, valet pactum. Ibid. §. 13, 14, 15. Quaedam actiones per pactum ipso jure tolluntur: ut injuriam, item furtum. De pignore jure honorario nascitur pacto actio, tollitur autem per exceptionem, quotiens paciscor. Ne Petam, leg. 17. §. 1, 2. See also leg. 27. §. 4. In this there is much Inconsistency: for why should a simple Contract be of force to hinder us from obtaining what we might otherwise lawfully sue for, more than give a Right to sue for any thing? That which can discharge an Obligation, is it not capable of producing a new one?

³ Ubi obiter mendum cordatione, velle obtinere à cotribulis Pactorum vestitorum. Non enim quæ dicitur, c. 3. ex vultu gratia, et vultu benevolentia, etiam dicendum fuerit ex gratia velle.

⁴ As that of Sale, Hire, Society, Loan, Pledge, &c. Conventions, quæ parient actionem, in seipsum non sunt, sed transferunt in proprium nomen contractus, ut emptio, venditio, locatio, conductio, societas, commutatio, sponsio, & actioes similes contractus. Digest. l. ii. t. 14. De Pactis, l. 7. §. 1. See §. 7. following.

⁵ Sed si in alium contractum res non transeat, subsit tamen causa, elegantior An? Cetero responso, esse obligationem, ut patet. Dedi tibi rem, ut aliam mihi dares, dedi, ut aliquid facias, hoc contractus est, & hinc nasci debent obligationem. Ibid. §. 2.

Hands, or comb their Head, or change their Linen for such a time (as some Slovens have done) what need would there be to trouble a Magistrate upon the Breach of such Agreements? Which indeed are scarce allowable by the Law of Nature.

IV. In my Opinion, the Difference between *Pact* and *Contract* may be best taken from the Object, so as to call that *Contract*, which concerns those Things and Actions that are the Subject of Traffick, and so presuppose Property and Price; and that *Pact*, by which we covenant about other things. By this means *Pacts*, strictly speaking, will take in all negative Agreements, by which we covenant not to do, or not to demand, what otherwise we might do or demand: As also those Agreements that have for their Object the Exercise of our natural Faculties, so far as they barely tend to the promoting mutual Profit and Advantage, consider'd merely by themselves, without any regard to Price, or any valuable Consideration; in a Word, when we agree to do some Work that is not mercenary: Tho' some Agreements there are, which not being conversant about things, may indifferently be called either Pacts, or Contracts, as that of Matrimony.

V. All Contracts may be divided into three Sorts, First, Those that lay an Obligation upon one Party * only, which Condition cannot be † changed by any thing *ex post facto*; as in the Loan of a consumable Commodity, and ‡ Stipulation. Secondly, Those that equally oblige both Parties †, as in buying and selling, letting and renting, Partnership, &c. Thirdly, Those of a middle Nature, as the Loan of a thing not consumable, a Trust,

a Pledge, &c. which naturally, as appears from the principal End of the Contract, oblige me only that am the Receiver; nor can they originally affect the Giver. But Accidents may fall out so as to lay an Obligation upon him also; as if I should be at necessary Expences for the thing, or suffer Damage by it, for which the Owner ought to be answerable. In this Case the Expences are to be repair'd, and the Damage made good.

VI. Again, the *Roman* Lawyers frequently divide Contract ¹ ⁴ into *real*, *consensual*, *literal*, and *verbal*. The *real* is so call'd, not because it is conversant about some real thing, for all Contracts are so; but because ² a Pre-delivery of some real Commodity is necessary to intitle us to a Demand of that, which gives this Contract its Denomination ^b. Thus I must have received something of my Creditor, before I can stand oblig'd as a Debtor ^c: Nor can a Trust, or Loan be demanded, before it has been deliver'd to me. But, by the way, the Contract of lending is one thing; a Pact, or Promise to lend, another. A Trust, one thing; a Promise to take in Charge, another.

Consensual are so call'd ³ ^d (not because they alone require the Parties Consent) but because they immediately oblige, upon each Party's declaring his Consent, by proper Signs. Nor is it necessary, that one thing should be first delivered, or some Work first done.

A *verbal* Contract, or Stipulation, ⁴ ^e as it consists in usual Forms of asking and answering Questions, is unknown to the Law of Nature.

Nor is it more agreeable to that Law, that a Man who has not received a thing, should be ob-

* *μονόπλευρος*. † *δίπλευρος*. ^a *Obligationum quæ ex contractu sunt, quatuor sunt species. Aut enim re contrahuntur, aut verbis, aut literis, aut consensu*, Instit. l. iii. t. 14. *De Obligat.* ^b *Vid. l. ii. t. 14 l. 17. D. De Pactis.* ^c *Add. Val. Max. lib. viii. c. 2. f. 2.* ^d *Vid. Institut. lib. iii. t. 23. De Obligat. ex consensu.* ^e *Vid. Institut. ubi supra, t. 16.*

MR. BARB. NOTES on §. III, IV, V, VI.

Vinnius upon the *Institutes*, lib. iii. t. 14. §. 2. 'Tis in this Sense, almost, that the Word *Causa* ought to be taken, when we speak of a person's Action, for a thing given, and the Cause follows not: *Constitutio causa data, causâ non secuta*. In fine, 'tis certain, that in the *Roman* Law, when we say, for Example, that we ought to restore the Goods of another, with the Fruits and Revenues that the Proprietor hath received from them, we make use of the Word *Causa*: *Nec enim sufficit, corpus ipsum restitui, sed opus est, ut & causa rei restituatur*, Digest. l. vi. t. 1. *De Rei vindicatione*, l. 20. And so we must understand it in t. 1. l. 22. *De usuris, & fructibus, & causis*, &c.

¹ See what I have said Note 6. on l. iii. c. 5. §. 9.

² Every Man is at liberty to distinguish and range his Notions, as he thinks good. But, in truth, there is no Difference in the main between Contracts and simple Agreements, according to the Law of Nature alone.

³ The *Roman* Lawyers do not nevertheless give the Name of Contract to Marriage, as Mr. *Hortius* observes, tho' they say, *Contrahere Matrimonium*, Digest. l. xxiii. tit. 2. *De Ritu Nuptiarum*, leg. 22. But the Agreement made upon the account of Marriage, as to what concerns Goods, may form a Contract, according to the Sense of the *Roman* Law, and the Definition of our Author. Whence it is, that *Juriniun*, Novel. ex. c. 1. puts a Gift upon the account of Marriage among private Contracts.

⁴ This Division is not found formally in the *Roman* Law; but there is a Law, *Digest.* lib. l. t. 16. *De verborum Signif.* leg. 19. which seems to intimate, that every Contract, properly so called, is obligatory to both Parties. But see *Vinnius* upon the *Institut.* l. iii. t. 14. §. 2.

⁵ To understand this, we ought to read what the Author says a little lower of mixt Contracts. See *Vinnius* on the *Institutes*, l. iii. t. 15. §. 2. *nam. 2.*

⁶ In a Stipulation one of the Contractors must demand, and the other answer positively, after this manner: *Doſt thou promise to give me, or do such or such a thing for me? Yea, I do promise it. Verbis Obligatio contrahitur ex interrogatione & responſione, cum quid dari fieri nobis stipulamur.* ——— *In hac re olim talia verba tradita fuerunt, SPONDES? SPONDEO. PROMITTIS? PROMITTO. Fide jubes? Fide jubes. Dabis? Dabo. Facies? Faciam.* *Institut.* lib. iii. t. 16. *De verborum obligationibus*, princip.

⁷ *Obligationum quæ ex contractu sunt, quatuor sunt species. Aut enim re contrahuntur, aut verbis, aut literis, aut consensu.* *Institut.* l. iii. t. 14. *De Obligat.* §. 2.

⁸ *Re enim non potest obligatio contrahi, nisi quatenus daturus sit,* Digest. l. ii. t. 14. *De Pactis*, l. 17. in princip. See t. 15. of lib. iii. of the *Institutes*, *Quibus modis re contrahitur Obligatio.*

⁹ Such are the Contracts of Selling, Hiring, Society, and Commission. *Consensu sunt obligationes in emptionibus, venditionibus, conductionibus, societatibus, mandatis. Ideo autem istis modis obligatio dicitur consensu contrahi, quia neque scriptura, neque præsentia omnimodo opus est. At nec dari quicquam necesse est, ut substantiam capiat obligatus, sed sufficit esse, qui negotia gerens, consentire.* *Institut.* l. iii. t. 23. *De Obligationibus ex consensu.*

¹⁰ See Note 3. upon the §. foregoing.

liged by bare Writings⁵ as much as if he had. But yet, there is good Reason why this should obtain in the Roman Law: For since the Magistrate cannot be satisfied of the Truth of a Debt, but by Instruments and other Proofs, when Writings appear owning the Debt, he must presume upon it, till the contrary be prov'd. Indeed there are no Contracts, but what may be express'd in Writing; and this may be done two ways: For either the Contract may be made, and the Consent of the Parties declared in Writing; and, in this case, the Contract is then finished, when the Writings are in all respects perfected; which obtains chiefly in *consensual*, and such sort of Contracts: or else the Writing is only an Evidence of a Contract already finished. Which last is to be presumed, if the case be doubtful^b.

VII. Again, Contracts are divided into *named* and *nameless*. The former sort are those, which by reason of their daily Use have a particular proper Name assigned them, expressive of the Form and Contents of the Business; and which being mentioned, immediately signifies what was done (for altho' Bartering, which is reckoned amongst the *nameless* Contracts, seems to have a Name, yet 'tis a general one, and does not express, whether it be the Contract of *Goods for Goods*, *Buying*, *Selling*, or any other.) And therefore in the Roman Law these had certain fixed Forms of proceeding; whereas others of less frequent Use, containing

no more than what was expressly mentioned, had no proper Form of their own, but one accommodated to the Thing; and therefore an Action, upon Account of these was always express'd in a certain Form of Words^c.

VIII. The Division of Contracts into *gainful* and *chargeable* makes most for our Purpose, whereof the first brings some Advantage to one Party *gratis*, as in the Case of a Loan, Commission, or Charge. The latter binds both to an equal Share of the Burthen; for here we act, or give, in order to receive an Equivalent. Upon this seems to be founded the Distinction of Contracts into those that admit of Equity, and those that are tied up to the Rigour of the Law. In the former the Magistrate has Liberty to weigh and estimate the thing, according to *Equity and Conscience*; in the latter he is oblig'd right or wrong³ to proceed according to the stated Forms of Law. Now Reason tells us, that *chargeable Contracts* are of the former sort, and admit of a more loose Interpretation in the Courts of Equity; for since the Obligation is mutual, neither Party ought to be over-burthened. But *gainful Contracts* belong to the latter, and do not allow of such a loose Interpretation, or that any one should be bound to do more than he has expressly declared; for else a Man's Generosity might prove too great a Burthen to him^d.

^a Vid. *Instit. ubi sup.* t. 22. ^b Vid. *Grot.* l. ii. c. 16. f. 30. and hereafter in c. 5. f. 2. in fin. *ibiq. not.* ^c Vid. *Grot.* l. ii. c. 12. f. 3. ^d *Contractus beneficis.* ^e *Contractus onerosus.* ^f Add. *Ann. Vinnius ad. l. 23. Instit. de Actionibus*, l. iii. t. 4.

MR. BARR. NOTES ON §. VI, VII, VIII.

¹ Before *Justinian*, Men might, for 5 Years after the Date of a Note Obligatory, plead and maintain, that he had not received the Money or Good mentioned; but that Emperor confined it to two Years. See *Instit.* l. iii. t. 22. *De Literarum Obligationibus*. The Protestation or Declaration of not receiving, (t) which the Owner of the Note has recourse, is called *Querela*, or, *Exceptio non operatio Pecunie*; and it belongs to him, or whom it is said to be received, to prove that he did really receive it. The Reason for it was, as it is express'd in the Code, because the Denial of a Fact is not capable of a Proof. *Quum inter eum, qui factum a se accepit, non habet probationem, & negationem numerationem (cujus naturalis ratio probati nulla est) & ab hoc ad Petitorem ejus rei non statim transit actio, in rem sit differentia*, l. iv. t. 30. *De non numerata Pecunia*, leg. 10. May we not say, that 'tis managed as a Debate in the Philosophy School? And if we examine the Thing well, is it not really the Author of the Note that affirms and maintains the Falsity of the Fact, of which the other is furnished with a Proof, reputed valid, till the contrary appears? and by virtue of which this last ought to be supposed to hold to the Negative, and consequently is exempted from Proof, according to the Maxim treated on? Further, as Mr. *Hartley* observes, 'Tis very rare that any Man puts a Note into the Hand of him to whom it is made, before he has received the Money or Thing which is acknowledged due by it; and if he is so ill-advised, 'tis his own Fault. It may also happen that the Money may be lent without Witnesses, and so the false Debtor may thereupon think to keep the Goods of the Creditor; and so much the more, because the Space allow'd to the first to maintain that he has not received, and to oblige the other to prove it, is too long. Upon the whole, it appears, that our Author represents the Idea's and Maxims of the Roman Law very imperfectly.

¹ See §. 2. Note 4, 5. above.

² As for Example, if we give a Thing to a certain Person to sell for us, upon Condition that he shall keep to himself all that he gets above a certain Price let him. This is a Contract without Name, which yields an Action in a Form prescribed. *Cum desolent vendidit, ut per aliam ad eum nomina, praescriptis verbis agendum est, in quam necesse est conficere, quotiens contractus existant, quorum appellatio non valde fore debet praestata sent. Natura enim rerum constituta est, ut plura sint negotia, quam vocabula --- Si tibi rem vendendam certi pretii desolent, ut quo pluris vendidisset, tibi haberes, placet, neque mandat, neque pro loco esse utilitatem, sed in factum, quali alia negotia*, l. i. *Digest.* l. xix. t. 5. *De praescriptis Verbis*, *Sec.* leg. 2, 3, 4, 13. princip. Lastly, As to what concerns the Nature of Contracts without Name, see Mr. *Titus* on *Lauterbach*, Obi. 620.

³ See *Digest.* l. xix. t. 4. *De Roman permutatone*, leg. 1. §. 2.

⁴ Our Author has forgot to mention *Denations male by living Parties*, as well in Chap. iv. as in this; but Mr. *Barbeyrac*, in his first Note upon the first Sect. of this Chapter has supplied this Defect.

⁵ *Tantumdem in bona fidei iudicis officium iudicis valet, quantum in stipulatione nominatum ejus rei facta interrogatio*, *Digest.* l. iii. t. 5. *De negotiis gestis*, leg. 7. Moreover, in the Roman Law, the Number of honest Contracts, call'd, *Bona Fidei*, is not determin'd clearly. See *Instit.* l. iv. t. 6. *De Actionibus*, §. 23, 29 nor do the Interpreters agree about them. See *Titus* in *Lauterbach*. Obi. 1148, &c.

⁶ This goes so far, that if we require, for Example, one Dollar more than appears to be due, we lose our Cause. *Hic tu si omnia. His nummos petisti, quam tibi debitum est, consilium perdidisti, propterea, quod aliud est J. Civium, aliud Arbitrium*, Cicero. *Orat. pro Q. R. Cicero*, c. 4. *Si quis agens, intentione sua plus complexus fuerit, quam ad eum pertineat, causa valetat*, i. e. *Rem amittit, nec fide in integrum restituitur à Praetore, nisi minus erit viginti quinque annis*, *Instit.* l. iv. t. 6. *De Actionibus*, §. 33. See *Plin.* l. vi. c. 1. *Plin.* A. l. iii. *Sen.* l. §. 123. *Sueton. Claud.* c. 14. *Sueton.* ep. xlviii. *init.* Moreover, this nice Exactness was enjoy'd, because those who had the Cognizance of Civil Affairs were commonly inferior Judges, whose Power was limited by the Praetor. See Mr. *Barbeyrac*'s Treatise *De Jurisdictione & Imperio*, lib. i. c. 13.

IX. All chargeable Contracts are reducible to four Heads; First, † Goods for Goods; Secondly, * Work for Work; Thirdly, ‖ Goods for Work; Fourthly, * † Work for Goods. Where the Word Work is taken in a large Sense, so as to comprehend even the Deed of another Man. Grotius^a admits of but three, leaving out Goods for Work; for that, he thinks, falls in with Work for Goods; and indeed there is no real Difference between them, for both express that Goods and Work are barter'd for one another: But in one, the Contract in a manner begins upon the Delivery of the Goods; in the other, upon doing the Work. So that in the one the Doer seems the Author of the Contract; in the other, the Giver: For in some Contracts, tho' both sides are equally oblig'd, yet they take their Rise from one only; as in *buying*, the Buyer begins the Contract; in *letting*, the Tenant, &c.

To the first Head belong all those Contracts, where one thing is exchanged for another, as in Bartering strictly so call'd. Where we may observe a Distinction nice enough, which some make between the general Contract of Goods for Goods, and Bartering. The former is, when the things exchanged are indefinite, as an Ox for a Mule; or where, at least, one Part is so; as a Horse for this particular Ox; Oil for Corn in general. But when the Goods in Contract are determined, v. g. this Ox for this Horse, it becomes Bartering^b. Hither may be referred the giving Money for other Money of different Species, or in a different Place; which is now call'd Exchange^c. Sometimes indeed Money is given for Money, so as to make it perfectly Buying and Selling; as the Money stamp'd with Victory, which Pliny^d tells us, before it had received that Stamp^e, was accounted a Commodity. If Goods are given for Money, the Contract is call'd Buying and Selling. Sometimes the Use of a Commodity is given for a Commodity, as if I lend my Horse for a Book. Sometimes the Use of one thing for the Use of another, as if I let you live in my House, upon condition that you let me enjoy your Land. Sometimes the Use of a thing for Money, which is properly call'd Letting and Renting. Some things too we give, in order to receive as much of the same sort some time after.

Of the second Head, Work for Work, there are innumerable sorts, according to the infinite Variety of useful or pleasant Actions, which may, in a manner, be exchange'd and perform'd for one another. In *Anm. Marcellinus*, l. xvi. c. 15. this sort of Contract is call'd *Pactum reddende vicissitudinis* And in *Apuleius* in Apolog. *Mutuaris operas cum vicinis cambire*³.

To the third sort, Goods for Work, belong the letting-out, or hiring Work, or Day-labour for Money, as also that sort of Contract, by which Goods are secur'd and freed from Danger for Money, which is call'd *Insuring*. As also, when any Commodity, consumable or not consumable, is given for the Performance of any Work.

To the fourth Head, Work for Goods, belong those Contracts, by which any Work is done for any thing, or for the Use of any thing, or such like⁴. Besides, there may be Contracts not reducible to any of these Heads, as implying Disjunction⁵. Such as were the nuptial Donatives among the *Muscovites*, of which *Sigismund Baron of Herberstein* gives this Account: *Those that are invited to the Wedding, present the Bride; all the Presents the Bridegroom marks, and lays up carefully; when the Wedding is over, he reviews them, and those that he likes, he sends to the Market to be priz'd; as the rest he returns back with Thanks. Those that he keeps, he makes awards for, at the End of the Year, according to the Value of them, either in Money, or something equivalent. If any one puts a greater Value upon his Gifts, the Bridegroom appeals to the sworn Appraisers, and forces him to stand to their Valuation. But if, in a Year's time, he does not make a Return, or send back the Gift, he is fined double. And if he forgets to have it valued by the sworn Appraisers, he is forced to repay it at the Value of the Giver. And this Custom the common People observe in all sorts of Donatives.* The same thing is related of the Presents the *Persians* give liberally to Strangers⁶; for which, if they do not receive a greater Return, they not only complain, but often revoke what they had given, or the Value of it.

All these sorts of Contracts have this in common, that when they are perform'd on both sides, the Parties have no longer any thing to do with one another upon this Score. And therefore⁶ Grotius^h calls them *Dimentorii*, and opposes them to

† Do, ut des. * Facio, ut facias. ‖ Do, ut facias. * † Facio, ut des. ^a In the aforesaid Place.
^b Vid. *Mornacium ad lib. v. D. De prescriptis verbis.* ^c In Latin *Cambium*. in Greek *Κάλλυβος.* ^d Nat. Hist. lib. xxxiii. c. 3. ^e Vid. *Tiam*, t. 5. l. 19. *D. De prescript. verbis.* ^f As also the *Contractus assinatorius, de quo vid. l. xix. t. 3. D. De assinatoria actione. Add. Plant. Captiv. Act. ii. Scen. 3. ver. 18, &c.* ^g Vid. *Petrus della Valle Itin. Part ii. Epist. 1.* ^h In the aforesaid Place.

Mr. BARB. NOTES on §. IX.

¹ So the *Digests* distinguish them, *Totius ob rem dati tractatus --- in his competet scilicet. Aut enim ut des, ut des; aut do, ut facias; aut facio, ut des; aut facio, ut facias*, l. xix. t. 5. *D. De prescript. verbis*, &c. l. 5. princip.

² See Mr. *Nood's Probabilia Juris*, l. iv. c. 4. where he recites a Law of the *D. P. lib. xii. t. 4. D. De conditione cuius dati, causâ non sequenti*, leg. ult. which being corrected by an happy Conjecture, which he proposes, shews, for Example, that the Lawyers looked upon it as an Exchange, and not a Sale, to give foreign Money for a Slave. See also *Bern. Broxon. lib. 2. Atropit. lib. i. c. 8.*

³ The last of these speaks of those who went up and down to do Husbandry Work the one for the other. *Epist. de iure. Et non habebas ad agrum colendum, an ipse mutuaris operas cum vicinis tuis cambias, neque des, neque laboras*. Apolog. p. 208. cum nuntio Pili-cæi. And *An. Marcellinus* treats of certain auxiliary Troops, hired on condition of assisting as long as there is need. *His stipendiantur potestate proximi reges numero quinquæ, regalesque decem, & optumatum foris magna, armaturarumque nullis triginta & quatuor, ex variis nationibus, partim mercede, partim pacto vicissitudinis reddendæ quæritæ*, l. xvi. c. 12.

⁴ This is, when one trusts a thing to another to sell at a certain Price, on condition, that he either returns the thing again, or the Value, according to the Price set on it. *Cum res estimata vendenda datur --- estimatio periculi in factis operis, ut si cesset. Ad igitur ipsam rem debeat incorruptam reddere, aut estimatum de pæi conventu*, *Digest. lib. xix. t. 3. D. De assinatoria.* See *Plant. Captiv. Act. ii. Scen. 3. ver. 18, &c.*

⁶ Grotius's Division is into *Dimentorii* and *Communicatorii*, and not *Commutatorii*, as our Author has it, which he makes the two kinds of Contracts, which he calls *Permutatorii*. Moreover, there is another considerable Mistake in the Original: for we may observe that our Author understands Grotius's Words, *Actus permutatorii aut dimentorii partes, ut commutatio non est permutatio*, as if *dimentorii partes* signified to divide the Parties or Contractors, and cause them to have no Dealings one with another. But Grotius was too nice to use such a barbarous Expression; for if we examine his Word, we shall find his Notion to be this, that these sorts of Acts either regulate the Part that each Contractor ought to have, or make the things about which they treat common.

those Contracts which he calls *Commutatorii*, the Completion of which consists in having Dealings continued between the Parties, as in that of Partnership, where, for one another's Advantage, two or more join, either Work or Goods, or Work on one side, with Goods on the other. And these, together with those which we call *gainful*, are generally *simple* Contracts.

X. But some Contracts are *mixt*, and, as it were, compounded of two sorts: as if I designedly buy a thing for more than the Value, and so give the Overplus of the Price to the Seller; or ¹ sell a thing for less than the Value, and so give what is wanting of the Price to the Buyer: This is partly giving, partly buying and selling. Thus *Cæsar* sold vast Farms to *Servillia* for a Trifle ². If I give greater Wages than the Work is worth, it will be partly Gift, partly Hire: which great Men sometimes do out of Grandeur, thinking it for their Honour to reward any Man's Work more than it deserves; and this is partly Liberality, partly Contract ^b. And on the other side, a Man may accept of Part of his Wages, and forgive the rest ^c. If I bargain with a Goldsmith to make me Rings out of his own Gold, it will be partly *buying*, partly *hiring* ^d. Tho' some look upon it to be only *buying*; since in buying, we not only pay for the Materials, but for the Workmanship too. And there is little Difference whether the thing is already made, or to be made ^e. Nor can I be properly said to hire, where the Person of the Workman remains at his own Disposal ^f. When Land is let out for Rent, it is a *mixt* Contract of *selling* and *hiring*, tho' the Law of *Zeno* makes it a Species of itself. A *Grant by Fee* is so far a *gainful* Contract, as being much greater than the *military Service* that is due for it. Indeed, as far as this *military Service* may be exacted for the Protection that the Lord gives his Vassal, it partakes something of the *second* sort of Contract, *Work for Work*; yet that which is the Principal in the Contract, belongs to the *third* sort, *Goods for Goods*. But if this *Fee* be charged with the Incumbrance of a certain Quit-Rent, so far it partakes of Land-renting. Lastly, *nautick Interest*, or what we call *Bottomry*, which vastly exceeds all other common Usury, is mixt of borrowing and insuring. But in Partner-

ship, tho' one contributes Money and Work, another only Money, yet it does not seem to be a *mixt* Contract. For it does not become mixt from the different Performances (for if I hire a Man to dig in my Vineyard, to sow my Ground, and plant my Orchard, it is all but the simple Contract of Hiring) but from our Agreements in Matters of a different Nature, by one and the same Covenant.

Grotius ¹ is of Opinion, that a Contract becomes *mixt* by the *Accession of one Act to another*, as in Suretiships and Pledges. But in this he seems not so very accurate; for a third Species must result from a Mixture properly so call'd: Whereas in Suretiship the Security is not mix'd with the principal Contract, but is only added to it, as an extrinick Confirmation. For the giving Security makes no Alteration in the Debt; but only makes Provision for the Creditor, in case the principal Debtor should prove insolvent. However, to speak more accurately, there are in Suretiship two Contracts, which seem to be but one, because the same Surety hath to do with both Creditor and Debtor; for there pass'es but a bare Promise between the Surety and the Creditor; and yet, strictly speaking; that Promise only shews that he is obliged to make good the Debt, and is not that which obliges him; for that which obliges him is the principal Contract, whereby the Surety by his Promise has brought an Obligation upon himself to supply the Failure of the Debtor: So that his Promise partakes of the Nature of the Contract itself. Now this Suretiship is no Gain to the Creditor; for he gets nothing by it, but a proper means of recovering his own. And altho' his Security is hereby provided for, yet not the Creditor, but the Debtor is beholden to the Surety; for without this Security the Creditor had never enter'd into Contract.

But when the Surety pays the Debt, then there arises an Account between him and the Debtor. For in this Case ² he is supposed to have lent the Debtor the Money, or, which is all one, to have paid it by his Order and Commission. Now this Act of Suretiship cannot be reckon'd an Act of Liberality; either in respect of the Debtor or Creditor; for the Debtor gets nothing by it, and the Creditor without it had not entred into any Engagement.

¹ *Suetonius Julius*, c. 50.

^b *Add. Mart.* xx. 9. &c. lib. xxvi. t. 7. l. 12. f. 3. *D. De administr. & pecun. tutorum.*

^c *Add. Val. Max.* l. v. c. 2. f. 10.

^d So says *Grotius* in the above-mentioned Place, f. 5.

^e *Vid. l. xviii. t. 1. l. 20.*

D. De contrah. empt. & Lib. iii. t. 25. f. 4. Instit. De locat. & conducti.

^f In the above-cited Place, f. 6.

MR. BARB. NOTES on §. X.

¹ That is to say, if the Sum be inconsiderable, in comparison of the real Value of the thing, altho' it be much below the true Price. For if one gives, for Example, as much for a Dollar as is worth thirty or forty, then the Gift so much exceeds, that it swallows the Sale; and if the Disproportion be yet greater, it can't be call'd a Sale but in Jest. This was the pretended Sale practis'd among the *Romans*, when, whatever Price the Goods were of, which one was said to buy, he gave to the Seller, with certain Formalities, a final Price of current Money, which was call'd, *Nemmo iudicare*. Altho' *Ulpian* says in the Law quoted by Mr. *Hertius*, that a Sale, such as is last mentioned, is not good and valid in such Cases, as there ought to be a true Sale; whereas, when a Man sells a thing at a very low Price, the Sale is valid, and is only look'd upon as a kind of Gift at least, if it be not between such Men as are forbidden to give any thing to each other. *Si quis donationis causâ minoris vendat, venditio valet. Totiens enim dicitur in totum conditionem non valere, quotiens universa venditio donationis causâ facta est; quotiens vero eilore pretio res, donationis causâ, distribuitur, dubium non est, conditionem valere. Hoc inter ceteros, inter virum vero & uxorem, donationis causâ venditio facta pretio viliori nullas momenti est.* Digest. lib. xviii. t. 1. *De contrahentia Emptione*, leg. 38. See lib. xix. t. 2. *Locati conducti*, leg. 47. & lib. xli. t. 2. *De aliquando vel annuenda possessione*, l. 10. §. ult.

² The Words of the Digest are, *Nec posse ullam lectionem esse, ubi corpus ipsorum non detur ab eo, cui id fit.*

³ These Fictions of Law are nothing but an empty Circle, us'd unecessarily: For the Rules of Equity are sufficient to shew, that the Debtor ought to have paid rather what the Surety paid for him to do him Service, otherwise he was the Cause of the Damage.

CHAP. III.

Concerning the Equality which ought to be observed in chargeable Contracts.

- I. The Equality to be observed in chargeable Contracts.
- II. The Faults of a thing are to be discovered.
- III. The Nature of a Contract requires it.
- IV. Whether what concerns not the thing itself, must be discovered?
- V. The Faults known on both sides need not be mention'd.

- VI. No Man is to be scared into a Contract.
- VII. In gainful Contracts Equality need not to be observed.
- VIII. In a chargeable Contract nothing is supposed to be given.
- IX. How Inequality not foreseen is to be corrected.
- X. Whether over-reaching in Buying be lawful.

IN all ¹ Contracts that are purely chargeable, and have nothing of the gainful mixt with them, where the Law, or the Market has fix'd the Prices of things, an Equality ought to be observed; or, one Party ought to receive as much as the other; and if one happens to receive less, he has a Right to demand the rest ². And this is plain from the End of such Contracts; for therefore a Man enters into them, that for his Goods or Work he may receive an Equivalent; which, for certain Reasons, he prefers to his own Goods or Work.

But yet this admits of a more accurate Demonstration; for since Contracts are necessary for my obtaining those things which I had no Right to claim; and since it is presumed that a Man gives nothing gratis, which he parts with upon Contract: We cannot therefore think, that any one designs to give away, by Contract, more than he supposes he receives; and consequently a Contract can give a Right to another Man's Goods, no farther than as they are equivalent to something which that other Man receives ³.

II. Now to find out and adjust this Equality, it is necessary that the Parties contracting be each of them alike acquainted with the Commodity and the *Qualities of it ⁴.

† Consule de geminis, de tincta murice lana, Consule de facie corporibusque diem. Ovid. De Arte amandi, l. i. ver. 250, 251.

And therefore he that is going to make over the Property of a thing, ought to expose, not only the good Qualities, but also, to the best of his ² Knowledge, the Defects and Faults of it; for otherwise a just Price cannot be assigned ³. To this Place belongs B. xix. t. 1. l. 1. f. 1. *D. De A. empt. & vend.* L. xviii. t. 1. l. 43. f. 2. *D. De contrab. empt.* As also the whole first Title *De adilit. edict.* B. xix. Where the Faults are reckon'd up one by one, which ought to be told in Sale of Cattle and Slaves; and which, if concealed, makes void the Bargain: So that the Seller must either take his Goods again, which is call'd *Redhibition*, or abate in the Price; but the first was not observ'd, if the Fault or Ail was inconsiderable. *Res bona fide vendita, propter minimam causam inempta fieri non debet*, Dig. l. xviii. t. 1. *De contrab. empt.* l. 54. So Mr. *Noodt* explains this Law very well in his *Observat.* l. ii. c. 11. Add. *Gell.* l. iv. c. 2. ⁴ *Cicer. Off.* l. iii. c. 16. It is an Ordinance of the Civil Law, in the Matter of Estates, that the Vendor should first tell the Purchaser the Defects or Inconveniencies of the Estate;

^a Vid. *Deut.* xxv. 13, &c. Lib. xvii. t. 2. l. 52. f. 22. *De furtis.* l. vi. f. 1, 2. *D. De extraord. crimin.* l. xxxii. f. 1. *De leg. Cornel. De falsis.*

MR. BARB. NOTES on Chap. III. §. 1, II.

¹ Here is a plain Reverse of the Order; for our Author does not treat of gainful or free Contracts till the next Chapter; and so he ought to have treated of chargeable Contracts, and the Equality to be observed in them. He is guilty of the same Carelessness in his Abridgment of the Duties of a Man and Citizen, l. i. c. 5. but I easily helped that, by only changing the third and fourth Paragraph for the sixth and seventh; but since I must change two Chapter here to do it, I dare not use that Liberty, and so have thought it enough to advertise the Reader of it.

² Add, or break off the Contract quite.

* That are of any Consequence.

¹ In *Euripides's Cyclops*, when *Silenus* came to sell *Ulysses* Cheese and Mill. *Ulysses* bid him bring it out of his Cave; because Contracts ought to be made in the open Day; *Ἐμφέρτετε Φῆς γὰρ ἐμπράγματι πρῆπει.* ver. 137.

† This Passage of *Ovid's* concerns the Prudence of the Buyer, and the Caution he ought to use, that he be not cheated, rather than any Obligation the Seller is under to discover the Faults of his Goods.

² The Roman Law requires that it be done plainly, and without any Equivocation. *Dolum malum à se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi causa obnoxe loquitur, sed etiam qui insidiose loquitur, alioquin asseruatur.* There is also another Law to this Purpose, which treats of the Services of Inheritances; *Venditor, si cum sciret debet servitutem, vel aliam rem evales ex empto alii nom; si modo cum rem emptor ignoravit. Omnia enim, quæ contra bonam fidem fiunt, evadunt inempta, vel non, sed scire venditorem & celare, sic accipimus, non solare si non admittit, sed & si negavit servitutem quam debere, cum esset et ei præstitum.* About this whole Matter consult Mr. *Dumoulin's* Civil Laws in their natural Order, l. i. t. 2. §. 11. Part I.

³ It had better have been said, Otherwise the Buyer will not give so much. Our Author seems to suppose a Price, below which nothing is to be sold. But of this see what is said §. 9.

⁴ *Cicero's* Words are, *Ac de jure quidem prædiorum sanctorum est, apud nos jure civili, ut in his vendendis citra discernantur, que nota essent venditori. Nam cum ex duodecim tabulis factis esset, ea prædiorum, que à bono Longi venduntur, que prædiorum prædiorum parvam sciret, à Jurisperitis etiam reticentia pœna est constituta. Quæ prædiorum esset in prædiorum citra, id prædiorum, si venditor sciret, nisi nominatim dictum esset, prædiorum oportere.*

for it being sufficiently provided by the twelve Tables, that every Man should make good what he promises, or declares by Word of Mouth, upon Penalty of double Damages for denying it; the Civilians have set a Punishment upon Concealments too, by enacting, that if the Seller of an Estate knew any Fault or Error, without expressly acquainting the Purchaser with it, he should be obliged to make it good. Add the Example that follows in Cicero. Ambros. de Off. l. iii. c. 10. In Contracts the Faults of the Commodity ought to be expressed; which, if it be neglected, although the Goods be in the Possession of the Purchaser, yet the Bargain may be vacated by an Action of Deceit. (Although what he there says of an Action of Deceit does not rightly agree with the Roman Laws.) Laſtant. l. v. c. 17. He who does not correct the Error of the Seller (as suppose he sees him deliver, by a Mistake, a more precious Commodity than was agreed for) or who does not warn his Servant to be a Run-away, or his House to be infected, consulting his own Profit and Advantage, is not a wise Man, as Carneades would have it, but a crafty Knave.

Plato makes it a Law, that if a Physician buys a Slave, who labours under any incurable Distemper of Body, or Mind, he must stand to the Bargain: But if an unskilful Person makes the Purchase, the Seller that imposes upon his Ignorance, must be fined double: But if one unskilful Man buys of another, the single Price is to be restor'd^b.

III. This Necessity of discovering the Faults arises from the Nature of the thing, because otherwise a just Price could not be assign'd; and not from the common Bond of Humanity (as if that received a closer Tie by Contract) nor from the Contractors¹ entering into some sort of Acquaintance, which may seem to oblige them to other Duties than those that are required by the Nature of Contracts; for when the Conditions are performed on both sides, we don't think our selves more obliged to him we dealt with, than to any other Man, tho' indeed such an Occasion may sometimes be the means of an Acquaintance and Friendship with him. And therefore, it is no Consequence, that, because it is not against the Law of Humanity to conceal a thing, therefore it is not

against the Law of Contract. For if I be not engaged in Contract, I may lawfully conceal from others several things, tho' I alone am Gainer by it, which if I should discover, other People would share with me. As in case I should find a Treasure in a desert Place, without any Owner, no Law obliges me to tell another, that he too may partake of it^c. Vid. 2 Matt. xiii. 44. For here if the Purchaser had told of the Treasure, he had not bought the Field so cheap. Vid. Græc. l. ii. c. 8. f. 7. Hither may be referred the Story of Anicas, who first discovered the Samojedes, and settled a Trade with them, related by Lindopius in his continuation of Meidan, ad an. 1607. Cic. Off. iii. c. 10. says well, That we ought not to neglect our own Advantage, when we can improve it without Injury to another. For as Chrysippus elegantly observes, He that runs a Race, ought to endeavour might and main to get the Victory, yet he must not lay hands on him that he runs with, or use any other foul Play. And just so it is in human Life; any one may lawfully endeavour to better his Condition, but not at the Expence and Injury of another. Ambr. has express'd this Passage, Off. l. iii. c. 4. In Contracts that of^d Val. Max. l. viii. c. 2. f. 1. ought to take place. A fair Dealer ought, neither to magnify the good Qualities, nor conceal the ill ones of his Commodities. Hither may be referred that of Plato de Leg. l. xi. p. 966. The Law which provides against the Seller's Over-reaching, ought also to be extended to the Workman: And therefore he had best take heed that he does not rate his Work at more than 'tis worth, for he cannot be ignorant of the Value of it. And certainly it ought to be allow'd, in a free State, that a Workman should make use of Art, which is a plain Thing, and far from Deceit to impose upon the unskilful. Hither too may be apply'd that which^e Socrates says he heard of Aspasia, Good Match-makers, that are sincere in their Commendations of others, do good in making Alliances between Families; but those that are false, do no good in commending. For when the Parties are undecor'd, it so happens that they hate one another; and those too that were instrumental in the Match. Xen. Mem. l. ii. p. 439. Et. H. Steph.

IV. But as it cannot be doubted but the Faults of the thing itself ought to be declared; so whe-

^a De LL. l. xi. p. 965. Ed. Weck
^b Plato in the same Place, "Let no Commendation or Oaths attend the Sale of any Commodity."
^c See above, B. iv. c. 6. f. 13. and Mr. Barclay's second Note upon this Section.

MR. BARB. NOTES on §. III.

¹ Our Author seems here to refer to *Græci*, tho' he names him not; but he mistakes his Sense: For that great Man says, l. ii. c. 12. §. 9. That Bargainers enter a more particular Society, than that of Men in general, which only signifies, that they who deal together, engage themselves thereby to certain things, to which they are not oblig'd as Men; because, as he says a little lower, Contracts are made for the mutual Advantage of the Contractors. But we must not infer from hence, either that these Engagements extend further than the Nature of a Contract; or, that besides this Contract, the Contractors, as such, are oblig'd to one another in any other thing, more than those who never had any Dealings one with another.

² This Example is only proper here, supposing that the Treasure belongs of Right to the Owner of the Field; for if the Laws of the Country adjudg'd it to him (as *Græci* conclude from that Place, that the *Jeser* Law did) the Buyer was guilty of a criminal Artifice, or indirect Robbery, if we consider the Action in itself, without any relation to the Parable, whose Circumstances, we know, are not at all to be neglect, nor more in this, than in the Parables of the unjust Steward, *Luk.* xvi. 1. and Judge, *Luk.* xviii. 2. But to speak my Thoughts, 'tis very uncertain whether it was in Use among the *Yews*, that the Master of the Field should have the Treasure found in it, but *Græci* allow'd no other Proof than the Circumstance of the Parable, which can't be truly depended on. Supposing then, that by the civil Laws the Treasure, unknown to the Owner, ought not to be left to the Proprietor of the Place where it is found, nor to be kept for the Prince; in this Case I cannot see any Cheat in the Silence of the Buyer; for inasmuch as the Owner himself hath not discovered the Treasure, he has no more Right to it than any other Man, and the Buyer is not oblig'd to tell him of what Discovery he has made. See l. iv. c. 6. §. 13.

³ *Val. Maximus's* Words are, *Vendor sibi non licet nec committere sibi nec argere, nec inconvictam cognitionem obscurare*. Plato forbids Sellers to advance their Good too much; and above all, to swear that 'tis worth so much, or cost so much, *παντος δὲ ἕρκος τε περί παντος τὰ πωλιμῆν ἀπέσθαι*. *De Legib.* l. xi. He orders a little higher, not to pitch two Prices, but to set the true Price first. *Ὁ πωλὼν ἐν ἀγορᾷ, ἴσθην μή ποτε εἰπὴ δύο τιμὰς. Σὺ δὲ πωλῆ.*

⁴ *Plato's* Words are, *καὶ ἀνομιμῶν δὲ λόγων ἐπιβουλή τις νῦν μοι ἄτερ τοῦ πωλῶντι ἐπιβουλέει μὴ πλεονος τιμῶν διαπειρώμενον, ἀλλ' ὡς ἀπλόστα τῆς ἀξίας, ταυτὴν δὲ προσάττει, καὶ τὸ ἀνομιμῶν. Εἰρηόσκει γὰρ ἴσθαι δημογῶς τὴν ἀξίαν, ἐν ἐλευθέρῳ ἢν πολέσιν ἢ δὴ ποτε χρῆ τέρην, σαφῶς δὲ καὶ ἀφελῶς φῶσι πρῶτα διαπειράσθαι τῶν ἐν τῶν τεχνάσωντα ὡστ' ἢ τὴν δαμωρῶν.*

⁵ *Socrates's* Words are, *τὰς ἀγαθὰς προμηθεύει μετὰ μὲν ἀλλήλῃσι τ' ἀγαθὰ διαγελλήσας, δεινὰς εἶναι συνέσεις ἀνθρώπων εἰς κηδείαν. ταυτομένως δ' ἐκ ἀφελῶν πωλιέσθαι. Τῶς γὰρ ἐξ επατηθέντας, ἄλλο μισθὸν ἀλλήλους τε, καὶ προμηθεύειν.*

treme Want of it. But this was not the Case of the Rhodians, they wanted Corn indeed, but not Money; for they were famous among the Antients for their Riches. Besides, I am not obliged to do a Kindness, when 'tis like to tend more to the Detriment of the Giver than the Benefit of the Receiver. But, in this case, the Merchant would have lost more than the Purchasers would have got by the Intelligence. For if he vended it to a great many Purchasers at the Market-price, each would have felt it but little; and if any one Man had engross'd the whole, he might thank his own Avarice, if he lost by it; and indeed we cannot expect, in the common way of the World, that Men should be so very exact in the Performance of this Duty: For, provided the Love of Money does not tempt the Merchant to cheat us, we may easily excuse them from what the Law of Courtesy and Good-nature may seem to oblige them to.

V. As for Faults already known to the Buyer, they need not be mentioned, for in this case both Parties proceed upon the same Foot^a. So likewise, where the Seller has told the Faults, the Bargain ought to stand good, for then 'tis manifest that the Buyer consents to them; ¹Cicero has a Case^b to this Purpose. Gratidianus sold to S. Orata those very Houses which he himself had bought of Lim but a few Years before. These Houses paid a Duty to Orata (which was out of his Mind) but Gratidianus made no mention of it in conveying his Right. The Cause was brought into the Court. Crassus was for Orata, and Anthony for Gratidianus. Crassus insisted upon the Law, that the Seller knowing it ought to have acquainted the Purchaser with the Incumbrance, but did not do it. Anthony insisted upon matter of Equity, that the Incumbrance was not unknown to Orata, who had sold the Houses, which made it needless for Gratidianus to say anything of it; nor could Orata be

said to be deceived, that knew what Title he had bought. For as Ulpian says, lib. xix. t. i. l. i. f. i. *D. De Act. empt.*² He does not seem to have the thing concealed, who knew it, nor ought he to be advertised of it, who was not ignorant. Add. l. xviii. t. i. l. xliii. f. i. l. lvii. f. 3. *D. De contrah. empt. Lib. ult. D. De Aedil. editio*³. Upon the same Principle was founded the Sentence that *Alvius* gave in the Case of *Fannia*, who had been married to *Timinus*; but upon a Divorce demanded back her Dowry, which was considerable. He objected Adultery against her. The Cause was brought before the Consul. After a Hearing on both sides, it appearing, that she had been an immodest Woman, and that her Husband, knowing her to be such, had yet ventured to marry her: The Consul reprov'd them both, and order'd him to restore her Dowry, and her to be fined four *Aesses* for her scandalous Behaviour⁴.

VI. Besides, as in all Pacts, so especially in Contracts, neither Party should be forced into a Bargain by an unjust Fear. The *Lacedemonians* therefore did right in rescinding the Purchase of the Land that the *Elians* had extorred from the Possessors thro' Fear: For they were of Opinion, To force a Title from the weaker under the Pretence of Purchase, was no better than downright Robbery⁵. Thus when *Cicero*¹ objected against *Verres*, the Pictures and Statues which he had brought out of *Sicily*; *Verres* thought he could answer the Accusation in a Word, by saying², I bought them. But *Cicero* replies, That their Ancestors had wisely enacted, that whosoever should be sent Governor into a Province, should not be allowed to make any Manner of Purchase: And for that Reason Money and Equipage was provided them by the Publick. Slaves indeed were not, because there was scarce any Man of Figure in *Rome*, but had some of them. And yet no

^a Vid. *Grat.* l. ii. ubi sup. n. 3. ^b *De Off.* l. iii. c. 16. ^c *Plutarch in Mario*, p. 427. *Ed. Weck. and Val. Max.* l. viii. c. 2. f. 3. ^d *Vid. l. xlviii. t. 5. l. 13. f. 9. 10. D. Ad L. Jul. De adult.* ^e *Xenoph.* l. iii. *Rer. Græcarum*, p. 238. ^f *Vid. Grat.* l. ii. c. 12. f. 10. ^g *Orat.* ix. l. 4. c. 5.

MR. BARB. NOTES ON §. IV, V, VI.

“ of Gain? On this Account (says Mr. La Placette) I dare not condemn the Merchants, who make their Gains by the Advices which they receive from their Correspondents in other Countries. As their Correspondences cost them something, it is just they should gain by them, nor can I think that they are bound in Conscience to discover them to any body.

¹ *Jus Crassus urgebat* (says *Cicero*) quod vitu venditor non dixisset servens, id oportere praestari; æquitatem Antonius, quoniam id vitium ignotum Sergio non fuisset, qui illas aedes vendidisset, nihil jusse necesse dicit, nec cum esse deceptum, qui id, quam emerit, quo jure esset tenent. Moreover, to understand the Cause of this Suit, we must suppose that *Sergius* demanded an Abatement in the Price, upon the account of the Right of Servitude, which had been heretofore apparently relerred upon the House, when it was sold to *Marius*, which made it of a less Value; for he affirmed, that since that Servitude was known, no body asked the Price of it.

² *Ulpian's* Words are, *Hæc ita vera sunt, si emptor ignoravit servitutes, quia non videtur esse celatus, qui scit; neque certiorari debuit, qui non ignoravit.*

³ To this belongs that of *Horace*, Lib. II. Ep. ii. ver. 14, &c. where he brings in a Fellow selling a Slave; who, after having reckoned up his good Qualities, adds,

— Semel hic cessavit; & ut fit,
In fœcis latuit, metuens penitentis habere.
Dei nummis, excepta nihil te si fuga lædat,
Ille ferat pretium, pœnæ securus, opinor.
Prudens emisti vitiosum: aucta tibi est lex.

This Boy was faulty once, he stay'd at Play,
And, when he fear'd the Lash, he ran away;
Buy, if you like him now, his Faults are told,
The Dealing's fair, and he may take your Gold,
And ne'er be thought a Cheat for what he told.

}
Mr. Creech.

Ad. l. xxix. t. 5. l. 1. f. 33. D. De Senatuj. Silianiano. Lib. xxi. t. 1. *D. De Aedil. t. editio*, l. 17. f. 10.

¹ *Plutarch's* Words are, *Γινόντες μηδέν δικαιότερον είναι βία πριαμένους, ή βία ἀφελόμενους, παρά τῶν ἡττητῶν λαμβάνειν.*
² *Cicero's* Words are, *Verbo jam uno repellat, Emi, inquit. — Primum si id quod vis, tibi ego concedam, ut emeris — quæro, cujus in tu judicio Romæ putaris esse, si tibi hoc quæquam concessurum putasti, te in Prætoris, atque imperio tot re, tam pretiosas, omninoque denique res, quæ alienius pretii fuerint, tota ex Provincia coemisse. — Quare Majorum diligentiam, qui nihil dum etiam istiusmodi suspicabantur, circumstantem ea quæ parvis in rebus accidere poterant, providebant. Neminem, qui cum potestate, aut legatione in provinciam esset profectus, tam avansem fore putaverunt, ut emeret argentum; dabatur enim de publico, ut vestem, præbatur enim legibus; mancipium putaverunt, quo & omnes utimur, & non præbetur à populo. Sanxerunt, NE QUIS EMERET MANCIPIUM, NISI IN DEMORTUI LOCUM, si quis Romæ esset Æmorteus? Imo, si quis ibidem: non enim te instruere domum tuam voluerunt in provincia, sed illum usum provincie supplere. Quæ fuit causa, cur tam diligenter nos in provincia ab emptionibus removerent? Hæc, Judices, quæ putabant ereptionem esse, non emptionem, cum venditori vendere quo arbitrata non liceret. In provinciis intelligebant, si is, qui esset cum imperio & potestate, quod apud quemque esset, emere vellet, idque ei liceret, fore uti, quod quisque vellet, sine esset auctore, sine non esset, quanti vellet, auferret.*

Man, in his Province, could buy a Slave, but in the room of a dead one; for they look'd upon it to be plundering, and not purchasing, when the Seller could not sell at his own Rate. And in a Province, they were convinc'd, that if the Governor, back'd with Power and Authority, should be permitted to buy what he pleas'd, it would be brought to that pass, that he would have whatsoever he had a fancy for, whether expos'd to Sale, or no, and at his own Rates. Add. *L. xviii. t. 1. l. xvi. l. xii. D. de contr. empt. & l. xviii. t. 1. l. penult. D. ad L. Jul. repetund. L. vi. l. 2. t. 20. l. 1. l. de his que vi metusque causa, &c. Constitut. singularium, l. 1. t. 88. f. 1. Tacitus, Ann. xiv. c. 14. in fin.* "When the Purchaser can force him to it, the Seller lies under a Necessity of parting with his Goods. Hither may be refer'd what Dio Cassius relates of Cesar, l. xlii. who, after Pompey's Defeat, seized upon that Money, which he had no other pretence of Levying, than under the specious Name of a Loan, tho' otherwise he had taken it by Force, as if it had been his Due, and never had any design to restore it." But yet sometimes the Subject may be forced by the Government in Matters of Sale or Hire: As when Merchants are obliged to sell that which the Government is in great Want of; or when their Waggons or Ships, or they themselves are prest; which, when the Good or Necessity of the Publick requires, and a just Rate is paid, may be fairly allowed of. Sometimes too, the State obliges us to buy such a sort of Commodity, of this or that Man only, and no where else.

VII. But 'tis plain, that in *gainful Contracts* this Equality does not take place; for where an Equality is to be observed, the Contract ceases to be *gainful*. But when a Present is made by way of Recompence, the Contract is something like Hiring.

And yet, in a Charge, or a Commission, an Equality may sometimes be regarded, tho' inditec'tly, and by Accident; for if any thing, besides Labour, has been laid out in soliciting the Business, or managing the Charge, it ought exactly to be refunded. And the Reason is, because in such Contracts as these the Labour is given *gratis*, but the Expence tacitly agreed upon to be repaid.

VIII. But in *chargeable Contracts* an Equality is to be so strictly regarded, that if one Party has received more than his Due, he must not retain the Overplus, upon presumption that it was design'd for a Gift. For Men do not enter into such sort of Contracts, with a Design to give any thing. And therefore such a *mixt Contract* must not be presumed, unless the Party expressly consents to it, or it appears that he knew the Thing to be under-rated. An Example we have in *Pliny*, l. vii. Epist. 11, & 14. where he says, "He had, upon the score of Friendship, sold Lands for less than they are worth. It was generously done of *Saxvola*, who being upon a Purchase, bid the Proprietor tell him, in one Word, what he would have for the Estate; who when he had done it, *Saxvola* told him he had undervalued it, and gave him 10000 *Sesterces* more than his Bargain." *Cic. Off. l. iii. c. 15.*

IX. From what has been said, it follows, that altho' all the Faults have been expos'd, and nothing demanded more than what was supposed to be the Value; yet if afterwards there appears to have been an Inequality, without any Fault of the Contractor (as suppose some Blemish lay undiscovered, or they mistook the Price) it ought to be corrected, and Amends made to the Sufferer. Nor is it necessary by the Law of Nature, that this Inequality should exceed the half of the just Price. For that famous Law, which

Mr. BARBEYRAC'S NOTES on § VII, VIII.

¹ The Words are, *In summa sciendum est, mandatum, nisi gratuitum sit, in aliove formam negotii cadere. Nam mercede constituta, incipit locatio & conductio esse; & (ut generaliter dicamus) quibus casibus sine mercede suscepto officio, mandati licet depositi contrahitur negotium, in casibus intervenienti mercede locatio & conductio intelligitur contrahi.* *Vid. S. Fin. instit. de Mandato, l. 3. t. 27. f. 13. & D. l. 16. t. 3. l. 1. f. 9. D. Depos. &c. l. 1. § 9.*

² The Roman Lawyers call it *Honorarium*. See *Digest. l. 11. t. 6. Si mensur falsum dixerit, leg. 1. princ. & l. 50. t. 13. De extract. linearis cognitionib. &c. leg. 1. § 10.*

³ This Fiction of Law is no ways necessary. The Maxims of Equity are sufficient only to secure to him, who has received a Trust, or who is charg'd with another Man's Business, his Damages and Expences, which he is at in serving the Person that has entrusted him, or given him a Commission.

⁴ See the foregoing Chapter, § 10. Note 1.

⁵ See *l. 3. c. 3. § 12. above.*

⁶ *Vid. l. 12. prin. D. depositi d. l.*

⁷ *V. Grot. l. 2. c. 12. f. 12.*

⁸ *Add. l. 19. t. 1. l. 13. Princ. f. 1, 2, 3, 4. D. de act. emp. & l. 21. t. 1. l. 1. f. 2. D. de acilit. et libto. Cod. lib. 4. t. 1. 44. l. 2. C. de rescind. vendit.*

Mr. BARBEYRAC'S NOTES on § IX.

The Words of the Code are, *Rem majoris pretii, si tu vel pater tuus minoris dispraxerit; bonarum est, ut vel pretium te restituant emptoribus, si mandum emanatum recipias, auctoritate Judicis intercedentes; vel si emptor elegerit, quod deest justo pretio, recipias.* Mr. *Thomasis* has publish'd a curious Discourse upon this Law in 1706. under this Title, *De Equitate celebranda Legis 2. Codicis de rescind. vend. & ejus usu practico*: Of which this is the Abridgment of the most considerable Matters in it; A Sale or Contract made null for the Smallness of the Price, altho' there was no Deceit or Force otherwise used, was not known before *Dioclesian*. From that time it hath been a Maxim current among the Lawyers, that by the Law of Nature every one may make as advantageous a Market for himself as he can, and to that End may make use of all innocent Artifice: Whence they began to make use of such sharp Terms as these, *circumscribere, circumvenire*, which are commonly taken in the worst Sense. See the Notes 1, 2. of the following Paragraph. After *Dioclesian*, the Emperors *Constantine the Great, Gratian, Valentinian* and *Theodosius, Honorius* and *Arcadius* repeal'd that Law of that Pagan Emperor. *Venditionis acq. emptoris filium, nulla circumscriptiois violentia factam, rumpi minime decet. Nec enim sola pretii vilioris querela, contractus sine alia culpa celebratus, litigioso strepitu turbandus est, Leg. 1.* See also *Leg. 4. and 7. Dioclesian* himself seems to have retract'd it at length, as appears by another Rescript, which is found under the same Title of the Code, and which is cited in the next § Note 5. 'Tis true, that at the End of that Law we find a Clause conformable to the 2d Law there treated on; but when we examine the foregoing Discourse, 'tis only a Clause put in by *Tribonian*; for if the Reasons alleg'd in the 8th Law be good, as they really are, they prove that a Contract ought not to be null'd, unless one of the Contractors has paid more by the half, or received one half less than the Thing is really worth. There are all the Signs in the World that the End of the 2d Law, where the Meanness of the Price, which nulls a Contract, is fixed to half the full Value of the Thing, is an Addition of *Tribonian's*: For besides, that it might have been better placed among the foregoing Words, the Laws of the *Theodosian* Code contradict it, and simply and in general disallow the Nullity of a Contract, upon the Account of the Smallness of the Price alone; and there appears no Footsteps of any Distinction of what is above or below the true Price. *Tribonian* having found in the *Gregorian* and *Hermogenian* Codes, whose Compilers not dreaming to bring the Civil Law into the Form of a System, had gathered together all the Imperial Constitutions and Ordinances before

which refuses Relief, but where the Inequality is fo notorious, is purely positive, and founded principally upon this, That it would be impossible to dispatch Business, if the Magistrate might be appeal'd to for every little Injury of this kind. And besides, the Nature of the Market requires that we should look about us, if we would not be deceived for whatever Rate the Seller puts upon his Goods, the Price is ultimately determin'd by the Buyer^a; tho' indeed the Determination of this Law is too gross. For tho' the Magistrate ought not to be troubled for every Trifle, yet I see no Reason why he should not relieve me, if I have been very much injur'd, altho' not half in half: As if I should sell a House worth 900*l.* for 600*l.* 'tis hard I should be debar'd the Benefit of the Law, for the Recovery of the 300*l.* when in much less considerable Cases an Action is allowed me. And therefore, as a small Damage, even in the Law of Nature, is not sufficient to break off a Bargain; so where the Damage is great, altho' it amounts not to half the just Price^a, the Bargain ought to be rescinded, or the Price made up. And this Greatness of the Damage is to be estimated, either by the Exorbitancy of the Price, or the Poverty of the injur'd, which sometimes renders the Loss intolerable to him, which a richer Man would not be sensible of. Nay, even where the said Law is in Force, the Buyer is oblig'd, in Conscience, to make up a very great Damage, altho' it comes not up to

half the Price; for that Law only designs the Ease of the Magistrate, and not that one Man should be a Gainer at another's Loss. Indeed they do well to extend the Benefit of the Law to the Buyer^a, as well as to the Seller; which too, they tell us, is to be extended to all other sorts of Contracts.

Among the Jews^b, if one defrauded another, whether Buyer or Seller, the Law afforded no Relief, if the Cheat came under the Sixth Part of the just Price. But if it exceed'd the Sixth Part, the Buyer might either immediately, or at any time during the Negotiation, rescind the Bargain, and recover the whole Price: But if the Seller had been the Sufferer, he was never barr'd from making a Recovery. And the same Law obtained in the Bartering of consumable Commodities, as of Fruit, Corn, and such like. But the Jew only, if injur'd, enjoy'd the Benefit of this Law; and not the Gentile, if injur'd by a Jew.

X. To what has been said, the Roman Lawyers have taken a great deal of Pains to reconcile a Passage in the Digests^c, which says, *That in Buying and Selling the Parties may naturally over-reach one another.* Of which Grotius^d seems to give a good Explication. For he shews, that *may* and *must* do not always denote that it is lawful, but only that it is so far permitted, as that the Sufferer can have no Remedy, in case the other insist upon the Bargain, and, being tax'd of Injustice, replies, that it was nothing but what was agreed upon betwixt them:

Constantine, not troubling themselves whether they agreed one with another, or not. Tribonian, I say, having found these two Rescripts of Dioclesian, of which the first was directly contrary to the first, but appearing to him nevertheless equitable, believed that they might be reconciled by a Dinction, which he annexed to each of them. After this he suppress'd the 1st and 7th Laws of the Theodosian Code, because they could not easily be accommodated in any suitable manner, to his Notions; and tho' he retain'd the 4th, which is now the 15th in the Title of the Justinian Code, he made several Alterations in it, that it might make for his Purpose evidently, as among others this: Instead of *Repetitio in Reliquum, PRETII NOMINE VILIORIS, copiam minime consequatur*, as the Laws of Gratian, Valentinian, and Theodosius import, he put, *PAULO vilioris pretii nomine, &c.* This manifest Corruption made all that he had to say of Dioclesian's two Rescripts plausible. And I will add, tho' Mr. Thomassius did not observe it, that there is Reason to believe, that in Book VIII, the Word *Paulo* is also inserted in the second Period, before *Autore pretio*. The Canon-Law having afterward approved the Foundation of the Law of the Justinian Code, it was look'd upon as a Conclusion flowing from indisputable Equity, and pass'd for a Rule in all the Courts, except Magdeburg; where such Political Ordinances are almost quite abolished. Nevertheless Mr. Thomassius maintains, that it can't be brought into Practice, because the common Price, by which the Damage must be regulated, is very changeable and uncertain; so that it is very hard to fix a Moiety or a Quarter, &c. Further, a great Damage, such as that we are speaking of, can't be done in a Contract, without some great Grievance to one of the Contractors at least, and then there's no need of Dioclesian's Law; or the Fault may be on both Sides; and then we must judge according to the Principles established above; *Lib. 3. c. 6. § 6.* See more in the following Note.

^a But Mr. Hortius observes here and in his Discourse *De Lytro*, Sect. 2. § 22. How doth this agree with what our Author says, c. 1. § 8. of this Book? Grotius also says, That as to outward Action, the Inequality to which both Parties have consented, and there has been no Lying nor Concealment of any thing that ought to have been discovered, such an Inequality pass'd for Equality; so that in the Civil Law, no Action in Justice lay before the Constitution of Dioclesian (*i. e.* before Law 2. spoken of in the foregoing Note.) Likewise, between such as are united only by the Law of Nations, no Restitution can be required, nor any Man be forced to make good such Damages, *l. 2. c. 12. § 26. n. 1.* It is true that he adds, that this is only an outward Permission, which is of no Force in *Foro Conscientie*, tho' it may be strengthened by Custom. But this supposeth, that the fixing a Price in Contracts is grounded on the Nature of Things themselves, or depends on the Will of a third Person; whereas the Truth is, that laying aside all Fraud, and all Orders of the Civil Law, 'tis the Consent of Parties that fixes the just Price; so that after their Agreement, there is no Injury done contrary to justice, properly so call'd. See Mr. Thomassius's Discourse, quoted c. 2. § 15, &c. 'Tis another Case to determine, whether we may commonly use this Right (See c. 1. § 9. Note 1.) or whether we do amiss in using it against the Laws of Liberality and Bounty, which require our Help to our Neighbour in his Need, and not to make an Advantage of his Want or Misfortune. Upon which Account he that compos'd Dioclesian's Rescript, may be freed from the Blame which Mr. Thomassius charges on him, *sup. § 32.* that he confounds the Rules of Humanity and Justice: For in the Style of the Roman Lawyers, *Humanum q. l.* signifies, 'Tis Just, Equitable, and Reasonable, &c. See, for Example, *Code l. 1. t. 14. De Legib. & Senat. cons. & Leg. 8.*

^b Cajacius maintains, *Objevat. xvi. 18. & xxiii. 32.* that it was not allowed by the Roman Law.

^a To which may be applied that of Cicero, *Off. l. 3. c. 17.* "Laws and Philosophers provide against Frauds different Ways; the Laws regarding only Matters of Overt Act, whereas Philosophers judge according to Equity and Reason." ^b *Selden de J. N. & G. l. 6. c. 5.* ^c *Add. l. 19. t. 2. l. 22. f. 3. D. locati, &c.* ^d *L. 2. c. 12. f. 26.*

MR. BARBEYRAC'S NOTES on § X.

¹ *Ulem Pomponius ait, in pretio emptiois & venditionis naturaliter licere contrahentibus se circumvenire.* Digest. l. 4. t. 4. De Minoribus, Leg. 16. § 4.

² This Explication of the Word, *Naturally*, is not proper; for it is never taken by the Roman Lawyers so far as I know, for Custom; and tho' it may signify so in Authors, yet it follows not, that we may so explain it here. Nothing is more common in the Body of the Law, than to signify by *Naturaliter*, a Thing agreeable to natural Reason, or the Law of Nature; and so it is to be understood here. And so *circumvenire* (or as another Law has it, *circumscribere*) signifies here any Innocent Art to get as good a Bargain as we can. The Word *Dolus* here is taken in a good or bad Sense; and so Lucretius uses the Word *Decipere*, in these Verses:

*Ut puerorum ætas improvida ludificetur,
Deceptaque non capiatur.*

That th' careless Age of Boys may so be cheated,
And being deceived, may not be defeated.

them: And he that won't open his Eyes, as the Saying is, must open his Purse. *Add. Lex Cujavior. t. 15. c. 9. f. 1. and Capitulare Caroli, l. v. c. 210. In Xenoph. de Memorab. Socr. l. ii. towards the End, this Rule is given, 'Tis a Piece of good Husbandry, when a valuable Thing can be bought cheap, to buy it.* Add a witty Saying of Cicero's in Gellius, l. xii. c. 12. *Vid. Sen. de Beneficiis, l. vi. c. 38.* Where he disputes whether Demades did well at Athens, in condemning one who got his Livelihood by providing Things necessary for Funerals, having prov'd that he desir'd a quick Trade, which could not be without the Death of a great many People. *Add Capitulare Caroli, l. i. c. 131.* As for the Instance of Jacob³, his Craftiness is the more excusable, because he had to do with a designing Man, who endeavour'd every way to over-reach him,⁴ and who impos'd hard Conditions upon him, giving him only half of the Young for keeping his Sheep, and yet making him stand to all Accidents. So also the Word naturally^b does not always signify what ought to be done by, or what is congruous to the Law of Nature, but what is customary, as, 1 Cor. xi. 14. *Doth not even⁴ Nature itself teach you, that if a Man have long Hair, it is a shame unto him?* Yet here the Word *ἄκουσιν*, to have long Hair, may be taken for too nice a Care in adorning the Hair, which Women seem to claim as their Right, and which seem too effeminate in a Man⁵. Tho' indeed it is disagreeable to the Dictates of natural Reason for a Man to assume that Habit, which Length of Time has appropriated to Women, and by which their Sex is distinguish'd from ours. But to return to the Matter in hand. *Lib. iv. t. 44. l. xlviii. C. de rescind. vendit. 5.* "It is the constant Way of Buying and Selling, for the Buyer to beat down the Price, and the Seller to raise it, till after many Words on both Sides, the former rises in his Bidding, and the latter falls a little from his

"Demands; at last they agree in a certain Price." *Anacharsis in Diogenes Laertius, B. i. f. 105.* did not absurdly call the Market, "A Place to cheat one another in, and desin'd to Covetousness." *Add. l. xviii. t. 19. D. de edilit. edicto.* Every Man has naturally a great Desire of increasing his Stock, and therefore Trade could hardly be carried on in a Society, were there not some Encouragement for Industry. *Vid. l. xvii. D. de Contrab. empt.* "He deserves to be laugh'd at, who suffers himself to be impos'd upon." *Plin. l. i. c. 24. princip.* "To make a bad Bargain is the more ungrateful, because it exposes the Folly of the Maker."

— An tibi maris
Infidias fieri, pretiumque avellier ante,
Quam mercem ostendi?

Hor. Sat. l. i. f. 2. v. 103, 104, 105.

Would you be cheated? the Occasion's fair,
Since you would buy before you see the Ware.

Mr. CREECH.

Besides, each Party seems by tacit Consent (since an exact Equality, even by the nicest Scrutiny, is so difficult to be determin'd) to indulge one another the Liberty of deviating a little from the true Price. And therefore it seems to be the received Law of the Market, that every one should be free to make his best Advantage of Buying and Selling, provided there be no Deceit in the Commodity itself^d. For if there be, the Opinion of *Fulgentius*^e will take place, who says, *That Mercury was therefore supposed to be the God of Trade and Thievery, because there is no Difference between the Cheating and Lying of a Tradesman, and the Robbery and Perjury of a Thief.* "The Ephori fined a Young Man for Buying a Farm at a cheap Rate; and the Reason they gave, was, Because so young a Man was so much given to Lucre." *Æl. V. H. l. xiv. c. 44.*

Mr. *Thomasius supra* § 29. prefers another Explication. but not so exact or natural, tho' in the End it comes much to the same. It seems also to me, that in the Law of the Digests, *l. b. 19. tit. 2. licet. &c. Leg. 22. § 3.* These Words, *quod plus & minoris sit*, signify that which is worth more or less, and not what the Buyer esteems less worth, and the Seller more, at the Beginning of a Market, as that able Lawyer understands them.

³ See Mr. LE CLERK's Note upon *Gen. 31. 12.*

⁴ St. Paul speaks there only of the Custom that was settled in his Time; from which he could not depart without a Mark of Singularity, and offending against common Decency. The Word, *Nature*, is often oppos'd to Instruction, and we know that Custom is a second Nature; so that we have no need of a Master to teach us, what has been once settled in a Country.

⁵ It will be convenient to set down the Law entire, for the Reason alledged by me Note 1. of the preceding Paragraph: *Si voluntate tua fundum tuum filius tuus vendidit, dolus ex calliditate, atque infidelis emptoris argui debet, vel motus mortis, vel cruciatus corporis imminens detegi, ne habeatur rata venditio. Hoc enim solum, quod paulo minore pretio fundum venditum significat, ad rescindendam venditionem invalidum est. Quod si videlicet CONTRACTUS emptionis, atque venditionis cogitationes substantiam, & quod emptor viliore comparandi, venditor cariore distrabendi votum gerentes, ad hanc Contractum accedant, utique post multas contentiones paulatim venditore, de eo, quod petierat detrabente, emptore autem hinc, quod obtulerat, ad lence, ad certum consentiant PRETIUM, profecto perspiceres, neque bonam fidem, quæ Emptionis atque Venditionis conventionem tectur, pati, neque ullam rationem concedere, rescindi propter hoc consensu finitum contractum, vel statim, vel post pretii quantitatis disceptationem, nisi minus dimidiâ justî pretii, quod fuerat tempore Venditionis, datum esset, Electione [jur] emptori præstitâ servandâ. Cod. l. 4. t. 44. De rescind. Vendit. Leg. 8. See the Title De Ædilitio Edicto, Leg. 18, 19. & de contrahendâ emptione. Leg. 71.*

^a *Gen. 31. 39.* ^b *Mornacius* upon the Words *naturaliter licet circumvenire*, explains *naturaliter* by *εὐφροσύνη* dexterously; but he is in the wrong: For that Word does not belong to *circumvenire*, but to *licet*. ^c According to that of *Ovid*, *Æp. 4. Heroid. v. 75.* *Sine procul à nobis juvenes, ut femina, empti.* ^d Add *Mich. Montaigne, Eff. B. 1. c. 20.* ^e *Mytholog. l. 1. c. 23.*

CHAPTER IV.

Of gainful Contracts in particular.

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| <p>I. <i>What a Commission is.</i>
 II. <i>The special Respect had to it by the Romans.</i>
 III. <i>The Person Commissioned ought to be very diligent.</i>
 IV. <i>How far he ought to be indemnified.</i></p> | <p>V. <i>Whether a Commission can be satisfied by an Equivalent?</i>
 VI. <i>Of a Loan, and how it differs from a voluntary Grant.</i>
 VII. <i>Of a Charge.</i></p> |
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WE come now to consider some of the principal Contracts more particularly; which, tho' they have been handled very copiously by the *Roman* Lawyers, yet, since most of what they have said, has been taken from the Law of Nature and Nations, may fairly be brought back to their proper place. Of *gainful Contracts* ¹ the chief ^a is a ^b *Commission* ², whereby one Man undertakes *gratis* another Man's Business, at his Request, and upon his Authority. This Contract

indeed does not directly and in itself, presuppose Property and the Price of Things, but only by Accident, so far as the Person giving the *Commission* is concern'd to repay to the Person receiving it, whatsoever Charges he happens to be at in the Management of it: for his Labour only is suppos'd to be promis'd *gratis*. Now, if any Man undertakes another's Business, unknown to him, and manages it with Success, the *Roman* Law allows him ³ an *Action for Business done*, which is founded upon

^a Here our Author, as has been observed in another Place, has forgot to mention *Donations between Parties living* as Principal Contracts. See his first Note upon this Section. ^b *Mandatum*. • See what we have said upon this in B. 3. c. 9.

Mr. BARBEYRAC'S NOTES on Chap. IV. §. 1.

¹ Donations or Gifts ought to have been treated of first; and I wonder this Author has said nothing of them. I speak here of Gifts among the Living; for Gifts among the Dead are discourg'd of l. 4. c. 9. §. 9. This Author in his Abridgement of the Duties of a Man and Citizen, l. 1. c. 12. §. 13, 14. opposes a free Alienation of Property or Gift to a Contract. That which made him not to range Gifts with Contracts, was, without doubt, the great Respect he paid the *Roman* Law in that Place, which nevertheless calls them sometimes a Contract, as in Code, l. 2. t. 20. *De his quæ ei, metuque causâ, gesta sunt*, Leg. 7. & l. 7. t. 39. *De Præscript.* 30. aut 40. annorum, Leg. 8. princ. which, according to Mr. *Thomæus*, *De Arbis Emptionum*, § 51. is the Effect of the Carelessness and Harshness of the Language of the Lawyers at that Time. I shall therefore briefly treat of Gifts among the Living in this Place. A Donation then is a Contract, by which we transfer freely the Property of a Thing that belongs to us, to another Person, who accepts the Benefit, whether we release it to him the same Moment, or reserve to ourselves the Use and Possession; so that the Contract is an Effect of Liberality, and the Giver actually parts with the Property of his Goods before his Death. By the *Roman* Law itself a bare Agreement makes the Act valid. See c. 2. § 2. Note 6. above. If the Gift be truly and lawfully made, it can't be revoked without very great Reason. *Aliæ autem Donationes sunt, quæ sine ullâ mortis cogitatione fiunt, quas inter vivos appellamus* — *quæ si fuerint perfectæ, temere revocari non possunt. Perficiuntur autem, quum Donator suam voluntatem scriptis, aut sine scriptis, manifestaverit*, Instit. l. 2. t. 7. *Dat aliquis eâ mente, ut statim velit accipientis fieri, nec ullo casu ad se reverti. Et propter nullam aliam causam facit, quam ut liberalitatem & magnificentiam exerceat. Hæc proprie Donatio appellatur*, Digest. l. 39. t. 5. Leg. 1. princ. *Absenti, sine mittas, qui ferat, sine quod ipse habeat, sibi habere eum jubeat, donari recte potest. Sed si nescit* — *Donatæ Rei Dominus non fit*, &c. ibid. Leg. 10. *Non potest liberalitas nolenti acquiri*, ibid. Leg. 19. § 2. 'Tis, for Example, a good Reason, 1. When the Receiver does not satisfy the Charges and Conditions upon which the Gift was bestowed. *Generaliter sancimus omnes Donationes lege confectas firmas, illibatasque manere, si non* — *quædam conventiones, sive in scriptis donationi impostas, sive sine scriptis habitas, quas Donationis Acceptor spondit, minime implere voluerit*, Cod. l. 8. t. 54. *De revocand. Donat.* Leg. 10. We must also place in the same Rank, 2. The great Ingratitude of the Receiver, viz. If he makes an Attempt upon the Life or good Name of the Giver; if he has offered to him any great Wrong or Violence; if he has maliciously caused him any considerable Loss or Damage; if the Giver, being reduced to great Necessity, he refuses to relieve him; altho', according to most Interpreters, this last Case is not contain'd in the following Law. *Si non donationis Acceptor ingratus circa Donatorem invenitur, ita ut Injurias atroces in eum effundat, vel manus impias inferat, vel jacturæ molem ex insidiis suis ingerat, quæ non levem consensu substantiæ Donatoris imponat, vel vitæ periculum aliquid ei intulerit*, ibid. We may add also, 3. The unexpected Birth of a Child, which happens to the Giver; for it is to be presumed, that he would have kept his Goods for his Children, if he had had any; and so he gave with this tacit Condition, that if he had any Children, his Gift should be null. *Si unquam libertis Patronus filios non habens, bona omnia, vel partem aliquam facultatum fuerit Donatione largitus, & postea susceperit liberos, totum quicquid largitus fuerat, revertatur in ejusdem Donatoris arbitrio, ac Ditione mansuram*, ibid. Leg. 8. Yet several Interpreters maintain that he speaks only of the Case express'd, viz. A Gift bestow'd on a Freeman, by him who had been his Master, and given him his Freedom. See *Vinnas* on the *Institutes*, l. 2. t. 7. § 2. But were it so, 'twould be a pure civil Constitution; for if we consider the Law of Nature only, the Reason which authorizes a Revocation here, ought to be of Force as to all other Persons. But it is true only, when the Giver bestows all his Goods, or the most Part; for when the Gift is inconsiderable, in comparison of what the Giver has left, we may reasonably presume that he may not do it, and that he had some Hopes of Children, especially if the Receiver is not well furnish'd himself. 4. A Gift may be revoked in part, when the Giver has not reserved Goods enough to portion such Persons as he ought not to disinherit: for in this Case the Receiver ought to return enough to make up a Portion for such as have a Right, and of which the Giver can't dispose to their Prejudice. See *Code* l. 3. t. 29. *De inofficiosis Donat. nibus*, & t. 30. *De inofficiosis Datibus*. But chiefly Mr. *DAUMAT*'S Laws, in their Natural Order. *Part* 1. l. 1. t. 10. ought to be consulted.

² See Mr. *NOODT*'S *Probabil. Jur.* l. 4. c. 12. & *alt.* where he distinguishes between a Commission, and certain Things which may be confounded with this sort of Contract, tho' they have no relation to it.

³ The Expression of the *Roman* Law, *Utiliter gerere*, signifies only to do a thing for the Advantage of him for whom we manage, which Prudence engages us to do, and 'tis likely he would have done himself; so that provided it is not our Fault, we need not warrant the Success, and we have Right to demand all necessary and needful Expences, tho' the Business has not so good an Event as was hop'd for. *Is autem, qui negotiorum gestorum agit, non solvitur, si esse factum habuit negotiorum, quod gestit, nisi bene ipsi utatur*, § 2

on what we may properly call a [†] *tacit Commission*^a, as is the [§] *Obligation* between a Guardian and a Minor^b.

II. The old Romans were extremely exact and conscientious in the Discharge of this Trust. For they look'd upon it to be founded upon good Nature and Friendship¹, the great Bands and Cements of human Society; and therefore deservedly had those in Detestation, who under such specious Pretences should deceive one who lays himself open to their Mercy, by having too good an Opinion of their Probity^c. [†] *In private Affairs*, says Cicero, our Ancestors thought guilty of the highest Crime, not only him that managed his Commission knowingly for his own Gain and Advantage, but even him who was wanting in his Care; and therefore judged the Breach of Trust to be as bad as Theft. For where we cannot be present our selves, the Fidelity of our Friends is presumed to supply our Place; which, whosoever violates, impugns the Safeguard of every Man, and, as much as in him lies, disturbs Society. We cannot do every thing our selves; at some things some are better than others. And therefore we contract Friendships, that by mutual good Offices our common Advantages may be

carried on. *Why do you undertake a Commission, if you design to neglect it, or to make a Gain of it? Why do you intrude your self into my Concerns, and by your pretended Kindness clog and hinder my Designs? Stand off, I can get another to do it for me. You undertake the Burthen of an Office which you think you can go through with, and which never seems heavy to those who are not light themselves: This therefore is the basest of Crimes; because it violates the two most sacred Things, Friendship and Faith. For no Man commits his Business, but to a Friend, nor trusts any, but whom he thinks faithful. The greatest of Villains therefore must be he, who breaks in upon Friendship, and at the same time cheats him who had not been capable of being thus cheated, had he not believed the Villain honest.* Cic. pro S. Roscio, c. 38, 39. ³ *Plautus Mercatore*, Act. ii. Sc. 3. v. 42. A Young Man says to his Father, "I have heard you often say, That every Wise Man ought, in the first Place, to look after a Commission entrusted to him.

III. For the same Reason¹ the Roman Laws require, that a Commission should be executed with the utmost Diligence, altho' undertaken purely for the Benefit of the Person intrusting it

sed sufficit, si utiliter gessit, & si effectum non habuit negotium, & ideo, si insulam fulsit, vel seruum agrum curavit, etiam si insula exusta est, vel servus obiit, agat negotiorum gestorem. Digest. l. 3. t. 5. De negotiis gestis, Leg. 10. § 1. *Negotium gerentis alienum non interveniente speciali facto (and not pacto, as Mr. Bynkerhook has prov'd well, Obf. 1. 7.) casum fortuitum præstare non compelluntur*, Cod. l. 2. t. 19. De negot. gestis. Leg. 22. It is not so with him who has gotten Possession of what belongs to another dishonestly, who has been at some Expences for his Maintenance; for if the Work he has employ'd them in comes to nothing, 'tis so much the worse for him, for he can't retain the Thing, till he has recovered his Damages; because he must be thought to act for his own Interest only, without any Regard to the lawful Proprietors. On the contrary, he is answerable for all things that are lost thro' his Negligence; and the Owner of the things has an Action against him for managing his Affairs. This is the Determination of the Roman Lawyers. See Mr. Noodt's *Probab. Juris*, l. 3. c. 9. I further say, That by the Law of Nature only, such a dishonest Possessor deserves, in Strictness, to lose all his Expence, tho' he had some regard to the other's Profit, and the Effect continued so that the Proprietor got by it.

⁴ See what hath been said above, l. 4. c. 13. § 5. note 11.

⁵ It is not necessary to suppose here either a tacit Commission, or a Quasi-Contract, as the Roman Lawyers speak. The great Maxim of the Natural Law is, That we ought to do no Man a Damage; and if we have done any, to make it good again. This Law is so general, indisputable, and indispensable, that it is sufficient to establish all relative Obligations, as well of Guardians and Pupils, as of those who have taken upon them the Care of others Affairs at their Request, and such as have faithfully discharged it. It were easy to prove it, if the thing were not clear in itself. See what is said l. 3. c. 6. § 2.

Mr. BARBEYRAC'S NOTES on § II.

¹ *Mandatum, nisi gratuitum, nullum est; nam originem ex officio & amicitia trahit, contrarium ergo est officio merces: interveniente enim pecuniâ, res ad locationem, & conductionem potius respicit*, Digest. l. 17. t. 1. Mandati vel contra, Leg. 1. § 4.

² Tully's Latin is, *In privatis rebus, si qui rem mandatam non modo malitiosius gessisset, sui questus, aut commodi causâ, verum etiam negligentius, cum majores summum admisisset dedecus existimabant.* Itaque mandati constitutum est judicium, non minus turpe quam furti. Credo propterea, quod quibus in rebus ipsi interesse non possumus, in his operæ nostræ vicaria fides amicorum suppeditur, quam qui lædit, oppugnat omnium commune præsidium, & quantum in ipso est, disturbat civitæ societatem. Non enim possumus omnia per nos agere, alius in alia est re magis utilis. Idcirco amicitie comparantur, ut commune commodum mutuis officiis gubernetur. Quid recipis mandatum, si aut neglecturus, aut ad tuum commodum conversurus es? Car mihi te offers, & meis commodis officio simulato officis, & obstas? Recede de medio, per alium transigam. Suscipis onus officii, quod te putas sustinere posse, quod minime videtur græce iis, qui minime ipsi leves sunt. Ergo idcirco turpis hæc est culpa, quod duas res sanctissimas violat, amicitiam & fidem; nam neque mandat quisquam ferre nisi amicis, neque credit ei nisi quem fidelem putat. Perditissimi igitur est hominis, simul & amicitiam dissolvere, & fallere eum qui læsus non esset, nisi credidisset.

³ *Plautus's Words are, Sæpe ex te audivi, Pater, rei mandatæ omnes sapientis primum prævorti decet.*

^a See above in B. 4. c. 13. f. 7. ^b Vid. l. 44. t. 7. l. 5. princ. f. 1. D. de Obligat. & Action. ^c Vid. l. 3. t. 2. l. 1. D. de his qui not. infam. & l. 17. t. 1. l. 1. f. 4. D. mandati, &c.

Mr. BARBEYRAC'S NOTES on § III.

¹ The Words of the Code are, *Suæ quidem quisque rei Moderator, atque arbiter, non omnia negotia, sed pleraque ex proprio animo facit; aliena vero negotia exacto officio geruntur, nec quidquam in eorum administratione neglectam ac declinatum culpâ vacuum est*, l. 4. t. 35. Mandati, vel contra, Leg. 21. The Interpreters do not agree about the Degree of Care and Exactness, for want of which the Person concerned is authorized to require Damages of him who has undertaken his Affairs, either at his own Instance, or the other's Request. Some affirm that he is answerable both in the Management of the Affairs, and in the Commission, for the least Fault; but others say 'tis sufficient to attend the Affairs of another with that Application that he ordinarily does his own. See *Vinnius* upon the *Institutes*, l. 3. t. 27. § 11. num. 2. & t. 28. § 1. num. 3. and Mr. *Hertius's Paræmiæ Juris Germanici*, l. 1. c. 35. § 2, 3. Nor may we wonder at such a Difference of Opinions, since the Roman Lawyers themselves do not fully agree about the Nature and Degree of Negligence for which we are responsible in most Contracts, or, at least, they express themselves very ambiguously in the Writings that we have left us. This Mr. *Theomastus* makes appear at large in his Discourse Printed at Hall in 1705, entituled, *De usu prædicto Doctrinæ difficillimæ Juris Romani de culparum præstatione in Contractibus*. He also observes there, that by reason of the infinite Variety of Circumstances, it is impossible to settle any general Rule, which may extend to all Cases in this Matter. As for myself, 'tis my Opinion, that in what manner soever we have taken in hand another's Business, or are charged with their Affairs, we are always obliged by the Law of Nature, independent on the Civil Laws, to do all we can in them, but not more, at least, if we have not thrust ourselves improperly

it a. Of this Cornelius Nepos gives us Atticus² as a perfect Pattern b. He never made any Promise, but with great Care and Caution; for he did not think it a piece of Generosity, but rather Levity, to promise more than he could perform. But when once he had undertaken any thing, he was as indefatigable in the Prosecution of it, as if it had not been his Friend's, but his own Concern: In such a Case he look'd upon his Reputation to be at stake, than which nothing was more dear to him c.

But if we hope to succeed well in giving a Commission, we ought to consider and form our Opinion of the Man from his past Diligence, and the Tenor of his former Life: For he that trusts a profligate Person may thank himself for his Disappointment, unless he particularly takes upon him to be more diligent than ordinary³, and is capable of being so. We read a pleasant Story of a Man^d who had fore Eyes, and came to a Horse-Doctor for Relief; the Doctor anointed his Eyes with the same Ointment he us'd amongst his Horses; upon which the Man falls blind, and the Cause is brought before the Judge, who acquits the Physician; For if the Fellow, says he, had not been an Ass, he had never applied himself to a Horse-Doctor.

IV. On the other hand, the e Agent ought to be repaid whatever Charges he has been at in the Execution of the Commission. For having promis'd Nothing gratis but his Care, Diligence, and Fidelity, a tacit Compact is suppos'd to have been made for the Repayment of Charges: And indeed it would be hard to render a Man's Kindness ex-

pensive to him f. And the same holds good of any Loss that happens by reason of the Trust, but not of such a Loss as is only occasioned obliquely by it: And therefore those Damages only are to be made up, which directly proceed from the Commission, and not those which happen only by the Bye, whilst the Business was on foot. To this Purpose is that Passage in the¹ Digests g: The Agent shall not account to the Person employing him all the Expences, tho' perhaps some of them he had not been at, were it not for his Commission², as if he has been plunder'd, or shipwreck'd, or put to Charges by his own, or his Servant's Sickness: For such Expences as these ought to be imputed to Chance, and not to the Commission. Indeed, when a Man of his own accord, upon no other Motive than his own Good-will, takes upon himself the Management of another's Business³, he is suppos'd willingly to run the risque of all Casualties, that unexpectedly happen in human Affairs. But the Case is alter'd, when a Man is commanded to manage another's Business; for there he that commands is concern'd to bear him harmless, since, in this Case the Person in Commission had not Power to act otherwise. But when a Man undertakes a Business in its own Nature hazardous and dangerous⁴, he is suppos'd (unless he expressly declares against it) to take upon him the common Accidents that usually attend such a Business^h.

V. It is a celebrated Question, Whether a Commission can be satisfied by an Equivalent? which we find elegantly debated in Gelliusⁱ. The Question, says he, is, Whether having a Commission given, and Orders

and unnecessarily upon a Thing, in which we could have no Prospect of Advantage, or the Nature of the Engagements, either express or tacit, into which we are entred, does not require a certain Degree of Ability and Accuracy, whether we can attain to it, or not. For I understand, by what we are capable of, all that a Man can do for himself in the Things which he is most concerned for. (See § 6. note 2 following.) But let it be well understood, that we must not extend this beyond the End and Nature of a Contract; for we never engage to take care, or be at Expences extraordinary, nor to neglect other Affairs less important in themselves, to attend other Mens, as perhaps one would do, if he acted for himself. These Principles being laid down, it will not be hard, in my Opinion, to determine, after an attentive Examination of Circumstances, when Men are responsible for the Faults they have committed, in relation to Contracts.

¹ His Words are, Quod si rogabatur, religiose promittit, quod non liberum sit, sed legis arbitratum esse pollicent, quod prestare non debent. Item rogatus, quod si non admittit, tamen curat, ut non mandatum, sed suum remanere agere. Nunquam si rogatus non sit, curat, ut non admittit, tamen curat, ut non mandatum, sed suum remanere agere. Nunquam si rogatus non sit, curat, ut non admittit, tamen curat, ut non mandatum, sed suum remanere agere.

² Our Author had better have observed, That, when we do not know the Character of a Person, we can't require greater Care than he usually bestows on what he loves best; for he can't be thought to engage himself farther; and it is not his Fault, if we have too good an Opinion of him, especially if he has not contributed to begot it.

MR. BARBEYRAC'S NOTES on § IV.

¹ The Words are, Non enim, qui in operis non sunt, mandatum agunt, sed quod pollicentur sit à latronibus, aut naufragis res accipiunt, sed legem non solummodo approbant, sed etiam eam agunt. Nam hoc magis est quam mandatum imperari debet. See also Mr. DAUMAR'S Civil Laws in their Nat. Order, P. 2. l. 1. c. 15. Sec. 2. § 6.

² But when he makes a Journey on purpose, as we suppose, the Losses which happen by Chance ought to be look'd upon as the real Consequents of the Execution of the Contract; for if he had staid at home, he had not been expos'd either to the Tempest or the Thieves. And so they ought to be put among the Expences of attending upon his Commission. Another thing is, when he falls sick; for it is not a sufficient Proof that it was an Effect of the Fatigues of his Journey; but if it were, he ought also to repay his Agent the Charges of his Sickness. But I am positive that he ought not to regard what it cost him more than if he had been at home. See the following Note.

³ Upon which the Presumption grounded? I should rather assert, that he that takes upon himself a Commission, will expose himself to his own Charge; for, according to the Author, there is no Agreement to give his Labour only; and since Misfortune may happen every Day, the Commission may be very chargeable, if it be upon the Account of the Agent. So that I do not see how he can engage himself to bear the Losses to which he is expos'd, more than the Charges he must be at in discharging his Commission. The Prætorial. We may on the contrary hold, that no Man willingly runs the Risque of unforeseen Accidents, which, if it is possible, would not have happen'd to him without the Commission, especially if he has not fairly consented to it, which is not common. Such as accept Commissions, in the Execution of which they are subject to the like Accidents, will not, unless they be servicable in that Case; and those who have Power and Will, may as well do it out of mere Liberty, as to require no Satisfaction for their Misfortune, nor any Repayment of the Expences they have been at in executing their Commission.

⁴ Not at all, unless he be declar'd. See the foregoing Note. On the contrary, The more dangerous a Thing is known to be, we have the less Reason to believe that he would meddle with it, if he did not think he should be indemnified from all ill Accidents.

^a Val. Max. Græc. l. 1. ad Leg. 23. D. de Div. rez. juris. ^b I. Vita Attici, c. 15. ^c Ter. And. Act. 4. Sc. 1. v. 5. &c. ^d Sen. l. 1. P. 1. c. 7. ^e Mandatarius, &c. ^f See Græc. B. 2. c. 12. f. 13. ^g B. 17. l. 1. l. 26. f. 6. D. Mandati, &c. ^h Wilm. Mornac. ad l. 26. f. 6. D. Mandati, & l. 17. l. 2. L. 52. f. 4. pro Sicut. ⁱ L. 1. c. 13.

MR. BARBEYRAC'S NOTES on § V.

¹ His Words are, In Officiis capiendis, consentis, judicandisque, quæ Græcè, Καθήκοντα, Philosophi appellant, quæri solet, an negotio tibi datus, & quid tibi faceret definito, contra quid facere abbas, si eo factu cederet tibi recuperationa prosperitas, exque utilitate tui;

“Orders how to manage it, you ought to act
“counter, if it seems for the Advantage of him that
“gave it? Those that hold the negative, argue,
“that many have determined to have their Business
“done after such a particular manner; and there-
“fore he whose Business it is, having deliberated
“and fixed upon a Method, it ought not to be
“done otherwise, altho’ some sudden unexpected
“Accident should promise a better Issue; for fear,
“in case of Disappointment, the Guilt of Disobe-
“dience, and the Punishment due to it, should un-
“avoidably follow: Whereas, should the Thing suc-
“ceed right, Thanks be to Providence: But yet an
“ill Precedent would be introduc’d, for breaking in
“upon well-laid Counsels, and the Sacredness of a
“Commission.” Others, on the contrary, are of
“Opinion, “That the Inconveniences that may hap-
“pen, upon acting Counter to Order, ought to be
“compared with the Probability of succeeding; and
“if the former appear lighter and less than the lat-
“ter, then ought we to proceed accordingly; for
“fear of losing an Opportunity, which Heaven in
“this Case seems to offer: Neither need we fear
“such a Precedent, if those that follow the Example
“never do it, but with the same Reason.” Then
“follow some Precepts of Prudence, “Particularly,
“Regard is to be had to the Temper and Nature of
“him from whom the Commission is receiv’d; that he
“be not of a cruel, rough, untractable, inexorable
“Disposition ^a, for in such a Case, the safest way
“would be to stick to his Orders.” He adds as an
“Example, *Crassius Mutianus*, “Who sent an
“Architect for the greater of two Beams, to raise
“his Battering Ram with; but the Architect think-
“ing the lesser the fittest, brought that; upon which
“Account *Mutianus* order’d him to be scourged, for
“he imagined that Discipline would be trampled
“upon, and Authority despis’d, if a Man, under

“Command, instead of obeying the Orders of his
“Superior, should impertinently interpose his own
“Judgment:” Tho’ this is to be said for the
“Architect, that *Mutianus* sending a Man skillful in
“the Art, and signifying to him what Use he design-
“ed the Beam for, seem’d, in a manner, to advise
“with him about it ^{a b}. On the other side, we have
“an Example of Mildness in the Emperor *Adrian* ^c;
“for when the People had demanded something in a
“tumultuous manner, he order’d the Crier to pro-
“claim Silence. But he fearing the Consequence of
“such an harsh and unusual Word, stretch’d out his
“Hand, and having thereby procur’d Silence, cry’d
“aloud, *This is what the Emperor would have*; with
“which the Emperor was not offended. “One time,
“when *Commodus* found the Bath too warm, he or-
“der’d the Keeper of it to be thrown into the Fur-
“nace: But the Servant who had received the Or-
“der, threw in a Sheep-skin, by the Stink thereof to
“induce the Emperor to believe his Order to be put
“in Execution.” *Lamprid. in Commod. c. 1. Gro-
“tius* ^d is of Opinion, that a Commission may be dis-
“charged by an Equivalent, provided it appears
“that it was not prescribed to be manag’d under any
“particular Form, but under the general Considera-
“tion and Prospect of some Advantage, which may
“be obtain’d as well one way as the other.

In short, the State of the Case is this: In some
“Commissions the Business only is specified, and the
“Management of it left to the Discretion of the Agent:
“Sometimes the Management too is prescrib’d, but ra-
“ther by way of Advice, as seeming best to him that
“gives the Commission; but yet so as not to exclude
“the Agent from using his own Method ^e, if it should
“seem best at the Point of Execution. But lastly, The
“Method is sometimes so strictly prescribed, that the
“Agent cannot depart from it, let what will happen.
“Here ’tis plain that a Commission is satisfied with an
“Equi-

*qui tibi hę negotium mandavit? Anteps quęstio, & in utramque partem à prudentibus viris arbitrata est. Sunt enim non pauci, qui
sententiam suam undè in parte defixerint, & re semel statuta, deliberatęque ob eos, eius negotium in profectumque efferet, nequaquam
putaverint contra dictum ejus esse faciendum. etiam si repentinus aliquis casus rem commodius agi posse polliceretur; nę, si ipse ję-
sellisset, culpa impareritę. & pœna inexcusable subcumbat efferet; si res fortę melius evertisset, Diis quidem gratia habenda, sed ex-
emplum tamen intromissum videretur, quo bene consulto consilia Religione mandati soluta corrumpentur. Alii existimaverunt in-
commoda prius, quę metuenda essent, si res gesta aliter foret quam imperatum est, cum emolumento spei pensanda esse, & si ea le-
viora, minoręque, utilitas autem contra gravior & amplior spe quantum potest firma ostenderetur, tum posse adversum mandata feri,
censuerunt; nę oblata divitiis rei bene gerendę occasio amitteretur. Neque timendum exemplum non parandi crediderunt, si rationes
contaxat hujusmodi non adessent. Cum primis autem respiciendum putaverunt ingeniam naturamque illius, cujus res, præceptumque
esset, nę ferox, durus, indomitus, inexorabilisq; sit, qualia fuerunt Posthumiana imperia & Manliana; nam si tali Præceptorę
ratio recedenda sit, nihil faciendum esse nonnerunt aliter, quam præceptum est. But our Author did not understand these Words,
Sunt enim non pauci qui sententiam, &c. for he alleges them as the Foundation of their Reasons who held the Negatives, as if
they signified, That there are many Men, who having espoused one Party, will never forsake it, &c. whereas *A. Gellius* says
only, That there are some Men, who determine in Effect *Pro* and *Con* in the same Question, &c. we ought to observe, that
in the Sentence which begins with *Neque timendum exemplum*, &c. there is something corrupted, tho’ the Sense does not clearly
discover it. See *J. Fred. Gronovius’s* Note upon it.*

^a Mr. *Montaigne* speaks something to this Purpose; blaming Two *French* Ambassadors, who under a Pretence of not en-
gaging the Matter on the worst Side, would not give him a true Account of Affairs, and then goes on: “However that be, I
“would not be so used in my low Sphere. We are ready to withdraw Obedience upon every Occasion, and usurp upon our
“Masters. Every one aspires naturally to Liberty and Authority, and therefore to a Superior no Advantage is to be so prized,
“as sincere and native Obedience. The Office of a Commander is ruin’d, if Men may obey at Discretion, and not thro’ Sub-
“jection (which is *A. Gellius’s* Notion, who says, *Corrumpi & dissolvi officium omne imperantis ratus, si quis ad id, quod facere*
“*justus est, non obsequio debitis, sed consilio non desiderato respondeat*) as *Crassus Mutianus* shews, &c. But if we ought to confi-
“der that such a strict Obedience belongs only to positive and precise Commands, Ambassadors have more free Orders, which
“in many Things depend principally on their Management. They don’t barely execute them, but frame and fashion their
“Master’s Will according to their own Judgment. I have known some Persons acting by others Commands, reproved for fol-
“lowing the Instructions of the King’s Letters, rather than the Opportunity of dispatching Affairs. Men of Understanding
“blame the Custom of the King of *Persia* now in use, which ties up their Agents and Lieutenants so strictly to their Orders,
“that they can’t do the least Thing without them. This Delay, in a Kingdom of so vast an Extent, has produced great De-
“triment to their Affairs. So *Crassus* writing to an Artist, and telling him to what use he designed the Mast; Did he not forbid
“him to make use of his Advice, or interpose his Determination?” *Essays l. 1. c. 6.*

^a *A. was Piso in Seneca de Ira. l. 1. c. 16.*

^b *Add. Mich. Montaign. Ess. l. 1. c. 16.*

^c *Vid. Xiphilin. Epit. Dioc.*

Ann. 118. & Zonare, Tom. 2.

^d *L. 2. c. 16. f. 21.*

^e *As in the Proverb, Mette sapientem.*

& ipse nihil dicat.

Equivalent in the second Case, not in the Third. To this Purpose we have a Case in the *Digests*:³ *I commission you to be Surety to Sempronius for Titius, you don't make yourself a Surety, but give Sempronius a Commission to trust Titius. If you have been at Expence upon this Account, the Question is, Am I responsible? Which is declared in the affirmative. For I gained my End, which was, that Sempronius should trust Titius, and whether he does it by your Suretyship, or your Commission, it is all alike to me; and I am obliged by one, as well as the other, to repay what you have laid out upon this Account.*

But, as I observ'd above, we must carefully distinguish^b between the *Commission of a Superior* and the *Commission of a Friend*; which two are widely different, and agree in nothing but the Name: And therefore what the *Civilians* have said upon the latter, are very injudiciously apply'd to the former. For, in private Affairs, 'tis easy to presume, that the Method is prescribed only by way of Advice, so as to leave room for the Discretion of the *Agent*. But when a Business is enjoin'd by a Superior, the bare Execution of it is suppos'd to be meant; and, in this Case, it will not be lawful to depart from the Method prescribed, unless Leave be given (as frequently it is) by an express Clause to deviate from it, as Occasion shall require; or unless the Words, interpreted according to Reason, and the received Rules of Speech, so as to answer the Design of the *Commission*, can warrant the doing of it. For that Sense that the Meaning of his Words fairly imports, is to be presum'd the Mean-

ing of the Person: Yet this Liberty is not to be taken, but in Cases of Necessity, † for all the Force of Authority would be elud'd, and the Commonwealth would be often brought into Danger, if a Minister, of his own Head, should take upon him the Part of the Governor. So *Otho* in *Tacitus*, H. L. i. c. 73. speaks; In every Man, when he is commanded, is allowed to ask Questions, there is an End of all Authority. And again, l. ii. c. 39. 'tis a poor Commendation for a Soldier to comment upon, rather than execute the Commands of his Superior. *Add lib. xlix. t. 16. l. iii. f. 15. D. de re militari, & Liv. l. xlv. c. 34.* Yet Ministers of great Abilities do well in neglecting the foolish Orders of their Prince. See 2 *Kings* xviii. 6. Vid. *Valerius Maximus* Lib. iii. Chap. 8. Sect. 1. *Cor. Nepos*, *Epam.* Chap. 7, 8. "Thus *Bacchan* did wisely in not putting in Execution the "Murther of *Cliffon*, which his Master, the Duke of "Breague, had intrusted him with." See the Story in *Bassier's Hist. Franc.* l. xi. p. m. 391. and *Mezzeray*, p. 526. tom. 2. *Par. Edit.* "'Tis remarkable, that the Vice Roy of the *Indies* had a fair Opportunity of seizing upon the City *Aden*, but yet "did not do it, because it was against the King's "Command, when yet the Taking of that Place "was of the greatest Importance." *Hier. Ofsr. de gestis Emmanuel.* l. xi.

VI. † A *Loan* (that is, when we allow another *gratis* † the Use of any Commodity not consumabl.) carries along with it these Conditions; that it be † carefully preserv'd, and with the same Diligence that

³ The Words are, *Mandati in hæc verba, Lucius Titius Gaius suo salutem. Peto & mando tibi, ut si cum aliis pro Publio Mæcio apud Sempronium, quæque à Publio solata tibi non fuerint, me repræsentaturum hæc epistola tua manu scripta, ratum tibi facio, quæro, si non siue iussisset, et mandasset creditori, & alius egresset, quam [quod] ei mandatum esset, an actione Mandati teneretur?* See *Ann. Finnius* upon the *Institutes*, Lib. 3. c. 27. *De mandato* § 8.

⁴ *Otho's* Words are, *si, cur jubentur, quære singulis liceat, perente obsequio, etiam imperium intercedit.* See also *Lib. 2. c. 39. Tit. Liv. l. 44. Ch. 34. & Digest. l. 49. t. 16. De Re militari, Leg. 3. § 15.* A Vice-Roy of the *Indies*, having a good Occasion to take the City of *Aden*, would not do it, tho' it had been a considerable Advantage, because he had no Order for it from his Master, the King of *Spain*, as we are told by *Hieron. Ofrias*, *De Gestis Emmanuelis*, l. 11.

^a *L. 17. t. 1. l. ult. f. 1. D. Mandati.* † Which *Bæcler* takes Notice of in his *Dissertat. de religiose mandati.* • *Commodature*

Mr. BARBEYRAC'S NOTES on § VI.

¹ The *Roman* Law defines *Commodatum* or a Loan thus, *Commodatum autem Res sine pretio intelligitur, si nullâ mercede accepta, aut constitutâ Res tibi utenda data est, aliqui mercede interventente, ut usus tibi usus Res datur: Gratuitum enim esse debet commodatum.* *Instit.* l. 3. t. 15. § 2. *i. e.* A Thing lent is properly then, when a Thing is granted to thee to be used, without any Reward accepted or agreed for, otherwise if there be any Reward, the Use is hired, for Lending is free. See Mr. *DAUMANT'S* Civil Laws in their Natural Order. *Part. 1. l. 1. tit. 5.*

² The *Digests* thus speak in this Case, *Alius tamen [is, qui utendum accepit] ex 2. Tit. non diligentiam custodit, sed rei præstare compellitur, nec sibi sed ei cuius diligentiam adhibere, quam satis non habet, et, si non diligentiam custodit, petetur, l. 44. t. 7. De Obligat. & Actio. l. 1. § 1.* Here let us apply and explain at the same Time what we have said, § 3. *Note 1.* If we consider the Thing in itself, he that has borrowed a Thing, is bound to take more Care of it than he does of such Things of his own, as he most esteems: I say, as he most esteems, because we must observe, that the most negligent Persons are very careful of some Things, which affect them much. Their Care itself usually does their Affairs proceed from this, that they do not affect them enough to make them resolve to conquer their Inclination to Ease, or to divert them from some Business they are about, or to keep them from some Pleasure, that they love better. As to such Objects as offer themselves to their Embrace, or when something extraordinary stirs them up, and rouses them, they know how to put forth themselves and take good Method, and just Measures enough, unless they be Men very dull; so that the Rule I give, serves not to authorize or excuse their Negligence. Every one has commonly Care enough of the Affairs and Goods of another, when he does as much as he would do for himself in Matters of the greatest Concern to him, and I require such a Degree of Exactness, whereas the Lawyers allow Men to come short of it in some Contracts. A Man can't dispose of another's Interests, as he may of his own; and so when he has the Affairs or Goods of another in his Hands, he is thought to be engaged not to neglect any thing that concerns them. But when he hath enlarged his Care and Diligence so far, 'tis all our Interests can require, if he is not evidently engaged in any thing more; but if the Care of our own Goods and Affairs interferes with the Care of another's Goods and Affairs, that we can't attend both at the same time, it is natural for the first to prevail, every one being more thoughtful (all Things else being equal) of himself than of others; so that this Order ought not to be reversed, unless he is to satisfy some special Engagement, either express or tacit. We will now return to the Contract, of which he has spoken. I say then, that altho' a Man be not mindful of his own Concerns, but abandons all, yet is he no less answerable for his Negligence, when he has hurt, or lost what he has borrowed; for it is certain, that if such a Thing had belonged to him, and he loved it much, or had some extraordinary Reason to keep it well, and do all he could to preserve it, he would have taken more Care of it. But when he has done all he can in this Case, the End and Nature of a Loan, considered in itself, can require no more of him, tho' other more fit and wiser Persons might have managed better, and secured it more from Mistakes, unless there be some tacit Agreement, not only to indemnify the Proprietor, in case the Thing borrowed should be lost or much damaged, but also to pay for it, if it happen to perish in our Hands, especially if it be by our Fault; provided, that it might have been safe in the Lender's Hands, and indeed few Persons will lend otherwise, especially, if they turn'd by the Loss. We borrow, tho' with Trouble, and are uneasy to see a Thing defaced or abused, provided we can make use of it as formerly, or can restore it at a small Charge; but when 'tis quite spoiled, or lost, we trouble not ourselves in the least to distinguish, whether it was by the Fault of him, to whom we lent it to do him a Pleasure, or not. We believe it sufficient to consider, that if he had taken Care of it, it had escap'd that Accident, and that it was not our Fault, that it was exposed to it, while it was in the Hands of him that us'd it.

that prudent Men keep their own ^a; ³ that it be not put to any other Use, nor made use of any farther than the Person *lending* design'd it ^b; lastly, that it be return'd in the same State and Condition, as when it was borrowed ^c; indeed what Detriment it necessarily receives ^d from the ordinary use of it, need not to be repair'd, for that the *Owner* is suppos'd to give *gratis* ^d. Besides, if I *lend* a Thing for such a certain Time, and in the mean while by some unforeseen Accident want it my self, the *other* is obliged to deliver it immediately upon Demand: For no Man is presum'd to *lend* his Goods, but so long as he can conveniently be without them. And he must be either very careless, or have a Design to impose upon another, who *lends* those Things which he is likely to want himself. And therefore a *Loan* for a certain Time is upon Condition, that the *Owner* shall not, in the mean time, have urgent Occasion for the Thing himself; but without such

an urgent Necessity a *Loan* ought ^e not to be demanded before the Time ^e.

Let us see therefore in what such a *Loan* as this and ^f a *Grant at Will and Pleasure* differ and agree. In respect of the Object and the Use they agree; for the same Thing that may be *lent*, may be *granted* during Pleasure, and the Use, in both Cases, is given *gratis*. But they differ, in that the *Loan* is a Contract, the *Grant* is not; the *former* obligatory on both Sides, the *latter* only on one. The *Loan* is given for a certain Time or End; the *Grant* only during the ^g Will of the Giver. The Receiver of the *Loan* must make good all Damages; the Receiver of the *Grant* only those that happen by his ⁷ Knavery, or gross Negligence ^g.

It may indeed be doubted, whether the Receiver of a *Loan* is bound to stand to those Chances which it was not in his Power to prevent, and this ^h is generally held in the negative ^h. But, in my Opinion, we ought

³ To use it otherwise is a kind of Robbery according to the *Law* a Lawyer, whose Expression here are a little extraordinary. *Sive is, qui rem utentiam accepit, in alium usum eam transferet, quam cujus gratia ei data est, sicutum committit; eubati si p. argentum utentium accepit, quasi canis ad carnem invitaturus, & ad peregr. sicum tulerit: aut h. p. equum, ut dicitur, ut dicitur, datum sibi longius aliqui duxerit; quod veteres scripserunt de eo, qui in usum equum perduxisset. Institut. l. 4. t. 6. De obligation. quæ ex delicto nascuntur. § 6.* But the same Lawyers add, that if the *Owner* of the Thing borrowed permits us to make another Use of it, than was expressly agreed for, and knows what is done, he is not then to blame. *Placuit tamen eos, qui rebus commodatis aliter uterentur, quam utendas ac cepissent, ita sicutum committere, si se intelligant id invito Domino facere, cumque si intellexissent, non permissuram; at si permissuram credunt, extra crimen videtur, optima sane distinctione, quia sicutum sine affectu iurandi non committitur.* Institut. ubi sup § 7.

⁴ The Words of the *Digests* are, *Si reddita quidem sit res commodata, sed deterior reddita, non videbitur reddita, nisi quod interest, præstetur.* Lib. 13. t. 6. *Comod. vel contra, l. 3. § 1.* *Si commodavero tibi equum, quo uteris ad certum locum, si nullâ culpâ tuâ intercurrente, in ipso itinere equus deterior factus sit, non teneris commodatis; nam ego in culpâ ero, qui in tam longum iter commodavi, qui eum laborem sustinere non potuit.* Ibid. l. 23.

⁵ Without which he must take other Measures to provide himself. *Sicut autem voluntatis, & officii magis, quam necessitatis est commodare, ita molium commodati, finemque præscribere, ejus est, qui beneficium tribuit. Cum autem id fecit (id est postquam commodavit) tunc finem præscribere & retro agere, atque intempèstè usum commodatæ rei auferre, non officium tantum impedit, sed & suscepta Obligatio inter dan'tum, accipien'temque, geritur eorum Negotiorum intericem. Igitur si pugillares mihi commodasti, ut debitor mihi eaveret, non recte facies importune repetendus; nam si negasset, vel omissionem, vel testes adhibuisset. Digest. ut supra, Leg. 17. § 3.*

⁶ So the *Digests* direct, *Precarium est, quod precibus petenti utendum conceditur tandem, quamdiu is, qui concessit, patitur.* Lib. 43. t. 26. *De Precario, Leg. 1. Princ.*

⁷ So the *Digests* order, *Illud admittatur, quod culpam non præstat is qui precario rogavit, sed solum dolum præstat; quanquam qui commodum suscepit, non tantum dolum, sed culpam præstat. Nam immerito dolum solum præstat is, qui precario rogavit, cum totum hoc ex liberalitate descendat ejus, qui precario concessit, & satis sit si dolum tantum præstetur. Culpam tamen dolo proximam contineri, quis merito dixerit.* Ibid. Leg. 8. § 3. See *CUJACIUS Obsèr.* 4. 7. But Mr. THOMASius in his Discourse, *De culpam præstatione in Contractibus*, Chap. 1. § 48, &c. shews, that the Distinction between a *Loan* and *Grant at Will* is grounded only upon the Subtilties of the *Roman Law*, and that there is something of Humour, in the Reason, that *ULPIAN* alledges here, as well as in the Comparison, which he elsewhere makes between a *Grant at will*, and *Gifts between the Living*.

⁸ They are grounded upon this Law among others: *Quod vero Senectute contingit, vel morbo, vel ei Latronum ereptum est, aut quid simile accidit, dicendum est, nihil eorum esse imputandum ei, qui commodatum accepit, nisi aliqua culpa intercurrent. Proinde et si incendio, vel ruina aliquid contingit, vel aliquid damnum fatale, non tenebitur, nisi forte, cum possit res commodatas salvas facere, suas prætulit.* Digest. Lib. 13. t. 6. *Commodati, vel contra, Leg. 5. § 4.* See also, *Leg. 19. & l. 44. t. 7. De Obligat. & Action, l. 1. § 4.* But from these Words, *Nisi forte, cum possit*, &c. several Lawyers infer, That in a common Dinger a Man ought rather to save a Thing borrowed, than his own Goods; and they add this Proviso, If the first be not of less Value. Whereupon Mr. *TITIVS* maintains, that these words, *suas prætulit*, mean not, That he chose rather to save his own Goods, than what he had borrowed, but only that when he could have saved both, he took not care of any but his own, and so it became his Fault. Indeed all that goes before, shews, that *ULPIAN* will have the Borrower answerable for his own Negligence only, and not for Misfortunes, which he could not foresee; so that these last Words must be explained by supposing some Circumstance, by which it may appear, that the Borrower was in fault; for he is not always obliged to prefer the Preservation of another Man's Goods before his own. The Interpreters generally hold, that the Thing borrowed ought to be of a greater Value; for otherwise, if we save it with a Prejudice to our own Goods, he that owes it ought to pay the Overplus. But this Determination is plainly false; for upon what Account is he, to whom the Thing borrowed belongs, obliged to pay the Value of that which is lost, to save his? He is in no wise the Cause of the Damage received; and he has not promised to indemnify us in case such a Thing happens, which are the Foundation of every Natural Obligation to make good the Losses of any other Person; nor is there any Civil Law that authorizes such a Determination. And, indeed, who is there who would rather suffer his own Goods to be lost than preserve them, on the Condition of paying a Thing of a greater Price, than what he sacrificed, to save them? Lastly, suppose, that the Borrower should prefer the Preservation of his own Goods before what he has borrowed, altho' they were of less Value, 'twould only follow from thence, that, since he has only used his own Right, the Owner of the Thing borrowed, can lawfully demand nothing in this Case; as on the other side, if he neglects to use his own Right, he can lay the Fault on himself only. But it is ridiculous to affirm, that, because he has preferred the Saving of the Thing borrowed before his own, that the Lender ought to account to him for it, and make good his Loss, since he recover no more than his own. Wherefore Mr. *TITIVS* concludes, that as often as it happens, that there is not time to save Two Things of equal Value, and alike exposed, which ever of them he serves, 'tis so much the better for the Owner, and so much the worse for the other. *Obs. on Lauterbach, Obs. 392.* Moreover, the Author before quoted, alledges a Passage in *Virgil*, where the Word, *Præferre*, bears much the same Sense, by a like Figure, as he affirms it doth here. Mr. *NOODT* makes use of it in his *Observat, l. 2. c. 15.* to explain another Law taken out of *ULPIAN*, 'tis in *Lib. 12. of the Æneids*, where *Juno* speaks to the Nymph *Juturna*, That she was loved

^a L. 13. t. 6. l. 5. f. 5. *D. commodati.* ^b *Vid. Val. Max. l. 8. c. 2. f. 4.* And *Gellius, l. 7. c. 15. Val. l. 13. t. 6. l. 5. f. 8. in fin. D. commodati, & l. 47. t. 2. l. 54. f. 1. De furtis.* ^c *Fid. l. 13. t. 6. l. 3. f. 1. D. commodati.* ^d *Add. l. ult. D. commodati.* ^e *Vid. D. ubi sup. l. 17. f. 3, 4. D. commodati.* ^f *Precarium.* ^g *Vid. Wissembach ad D. Disp. 24. f. 19.* ^h *Vid. l. 13. t. 6. commodati, & c. & l. 19. & l. 44. t. 7. l. 1. f. 4. D. de oblig. & act.*

ought to distinguish, whether or no the Damage had happen'd, if the Thing had continued in the *Owner's* Custody ^a; for if it had, no Restitution is due, but if it had not, it seems due in Equity; for otherwise a Man's Generosity and good Nature might be too expensive to him, if, besides ^b the free Use of his Goods, he must be depriv'd of the Perpetuity of them, which he had not been but upon this Account. Nor is there any Reason why he, rather than the other, ^c should bear the Burthen of the Misfortune, since the *other* ^d was the Occasion of it. The *Roman Law* ^e gave the *Lender* Damages, if the *Loan* was stole; and yet such a Robbery might be committed without any Fault in the Person robb'd. Indeed if a Man, by Fire, should lose all, and be reduc'd to extreme Poverty, it would be inhuman to demand the Value of the *Loan*; and since Fire, Shipwreck, and such Chances often happen, the *Lender*

may be presum'd willing to run the Risque of them. And thus I think that Law the 18. *prin.* and l. v. f. 4. & 7. *D. commodati* ought to be limited. Neither can I well approve of what is said in l. xix. *D. dict. tit.* which does not seem to agree with what is said in l. xii. f. 1. *D. dict. tit.* But yet if the *Borrower*, when he might have sav'd the *Loan*, preserves something more valuable of his own, he becomes responsible. Fortho' no Man can blame him for letting that perish which was less valuable, yet since it might have been sav'd, and was lost for the Benefit of the *Borrower*, there is no Reason, why the *Lender* should stand to the Loss ^e. ^f On the other side, it is but reasonable, that if any Expence has been laid out upon the *Loan*, besides what was necessary for the Use of it, ^g the *Owner* should repay it ^d.

VII. ^e A Charge is ^f when we commit to another's Trust and Custody any Thing belonging to us, to be

loved by her Husband better than all his other Mistresses, because she was troubled at, and persecuted him with all her Force, *Sis, ut te comitis* — *PRÆTULERIM*. See *Servius*, who also alleges a Passage in *Saly's* of the like Import with *Curthius's*, *Lib. 6. c. 4. num. 18. Mare Caspium dulcius ceteris*. 'The *Caspian Sea* is sweeter than the other, as if they were a certain Sea of sweet Water. See the Art of Thinking, *Part 2. c. 10. &c.* where it is proved, that in Comparative Propositions, the Positive doth not always agree with both Members of the Comparison. Mr. *NODD* treats upon this Matter more at large in his *Julius Paulus* c. 7. where he produces other Examples of like Nature. But notwithstanding all this I do not think it necessary to join in the Explication of Mr. *TIRTUS* upon these Words. *Nisi forte cum possit res commodatas salvas facere, suas præstatit*, which is also found in the *Receptæ Sententiæ* of *Julius Paulus*, l. 2. c. 4. § 3. with this Difference, that there he reads, *rem commodatam & servam*, the Singular for the Plural, as if this Maxim had passed into a general Rule, that every one is responsible for the smallest Faults (*culpe levissima*) in such Things, as are borrowed for his own Advantage only. (See *Digest. Lib. 13. t. 6. Leg. 5. § 2.*) The Lawyers look upon it as an Omission, which amounts to the greatest Fault and Neglect for a Man to prefer the Saving of his own Goods before what he has borrowed, tho' there was no way to preserve both at the same time. It is sufficient according to them, that he might have saved another's Goods, if he would, and they have no regard to the Concurrence of the Interest of the Owner, who hath lent, and that of the Borrower. If *Ulpian* had only affirmed, that the Thing borrowed ought to be paid for, when it might have been secured, as well as a Man's own, he need not have added that Restriction, which was understood of itself. It had been sufficient for him to have said, *Nisi forte res commodatas salvas facere poterit*, since, whether he hath saved, or no, the Thing belonging to us, that Circumstance alters not the Nature of the Fault, since the Thing borrowed might at the same time be saved. We then see that the Sense of the Word mentioned, comes to this: At least, if he might have saved the Thing borrowed, whereas at the same time he suffer'd it to be lost. But here the Lawyers are not aware that they make a special Case, which must be determined by some other Principle than their *Culpe levissima*, and since they will have the Owner of the Thing borrowed to bear the Loss, when it happen'd by Chance, and without the Fault of the Borrower, they ought to esteem, as a Thing of the greatest Force, the Impossibility of saving the Thing borrowed, without sacrificing our own Interests. Wherefore let us consult what is said Note 2. of this §, where we shall find more natural and more coherent Decisions of this Matter.

⁹ This Reason, Mr. *TIRTUS*, *Orat. on Pudentor's*, 365. says, proves nothing, because the Lender knows well, or at least ought to know, that these sort of Accidents may happen, and so tacitly consents that they be subject to these Hazards, Dangers, and Misfortunes. Otherwise it may be answer'd, that the Borrower had better have hired the Use of the Thing lent, than to be oblig'd to pay for the Thing, if it may be spoil'd without his Fault. But besides, that there is almost ever a tacit Engagement, that the Thing shall be paid, and I have said Note 2. we ought to believe that the Borrowers live at ease (for if they are in Satisfaction they may prefer to the Owner of the Thing borrowed, would generally take upon himself all fortuitous Accidents, and not to take any account, since the Usage of what is lent them gratis, either spurs them a Buying it, or is very necessary to them, and they could not, for the present, be accommodated any other way, or, after all, the Benefit may be returned to the Lender, by obliging against the Danger of unforeseen Accidents. And it is more grievous for him who lends, to lose his Goods, than for him who borrows, to restore the same Thing, or the Value, in case any Accident happens, which takes them in use. The Maxim used by the *Roman Lawyers*, upon another Occasion, may be applied here, *Beneficentia non est officium suum*. *Digest. l. 29. t. 3. Testamenti quemcumq. aperiantur. l. 7.*

¹⁰ The Reason of this is, says Mr. *TIRTUS*, *ubi supra*, that when a Thing is spoil'd without any Man's Fault, the Proprietor is bound to the Proprietor, if provided all things else be equal. See the Note foregoing.

¹¹ The same Reason, when the Lender of the Thing borrowed, has freely consented to it, as Mr. *TIRTUS* says, but a Loan is not the same as a Hire Account, and I have observ'd several Times before. The Laws of the ancient *Germans* order expressly, that the Thing borrow'd, or be lent, while 'tis in the Possession of the Borrower, he must pay the Owner for it, as Mr. *TROMA-SIUS* tells us in his Discourse already quoted, *De calparum præstatione in Contractibus*, c. 2. § 18.

¹² Mr. *Puffendorf* says, *If a Man borrow ought of his Neighbour, and it be hurt or die, the Owner thereof not being with it, he shall pay for it; but if the Owner thereof be with it, the Borrower shall not pay for it*. The Reason of this, without doubt, was, that the Owner being absent, could not take care of his Goods, nor see whether they were encl. maged or lost by the Fault of the Borrower. Besides, if the Borrowers were discharg'd of the Loss in the Absence of the Owner, it might give an Occasion to use the Thing borrowed ill, or to neglect it, and feign it lost, when 'tis not. As to the Law of the *Digests* cited here by the Author, he entitles it *Commodati vel contra*, and it should be *Depositum*, &c. As it is here determined, that all Chances are sometimes to be put to the Account of the Person entrusting another, Mr. *Puffendorf* informs us, "That there is more Reason that the Borrower should indemnify the Proprietor for the Loss that happens by a like Accident." See also *Exa. xxii. 13. 14. 15.* And *d. l. 18. prin. D. commodati*.

¹³ So he that has borrowed a Horse or a Slave, ought to maintain them at their own Charge; but if either of them become sick, the Charge of the Cure must be born by the Owner. *Possunt justæ causæ intervenire, ex quibus cum eo qui accommodasset cogi deberet, velati de impensis in calcatationem servi factis, quæcæ post fugam requirentur, reducendæ ejus causâ factæ essent; nam ob vitiorum impensæ, naturali scilicet ratione, ad eum pertinent qui utentium accepisset*. *Digest. ubi supra. § 2.*

^a Vid. *Grat. l. 2. c. 12. f. 13. n. 1.*
^{ab. supra}, l. 18. f. 2. *D. commodati*.

^b Vid. *D. ubi supra*, l. 21. 22.

^c Vid. l. 5. f. 4. *D. commodati*.

^d *Add.*

^e *Depositum*.

Mr. BARE. NOTES §. VII.

¹ So the *Digests* define it, *Depositum est, quod alicui custodientiam datur, et, — si vestimenta servanti dalmatori data perierint, si quidem nullam mercedem servandorum vestimentorum accepit, depositum esse teneri, & debent tantam præstare de bono putat, quod si accepit ex conducto*, *Dig. l. 16. t. 3. Depositum vel contra*, *Leg. 1. princ. & § 8.* See Mr. *DIXON*'s *Civil Laws in their Natural Order*, Part 1. l. 1. t. 7.

be kept gratis ^a. And here the Trustee is bound to preserve it diligently, and to return it upon ^b Demand. Yet sometimes Circumstances may so happen, as to excuse him from making a Return even then. A Charge ^c, which you have received from a sober Person, you shall not ^d return when he is drunk, or extravagant, or mad; for in such a Condition he is not fit to make use of it. Nor shall you return it to Debtors or Slaves, whose Creditors and Masters lie in wait for them; for this would not be to return, but to betray the Charge. Suppose a ^e Man, in his Senses, leaves a Sword in your Keeping, and demands it when he is mad; in such a Case, to restore it is a Crime, and the Refusal of it a Duty. What if you should receive Money in Trust for him, and then find that he is taking up Arms against his Country, would you return the Money? Certainly not, because it would be against the Commonwealth, which ought to be preferred. To restore ^e a Charge is in itself a commendable thing; yet all Times and Places may not be proper for it. Sometimes the restoring it may be as bad as the disowning it. The Owner's Advantage ought to be consulted, and if the restoring it tends to his Prejudice, it ought to be withheld. *Ambr. Offic.* l. i. c. ult. brings these Instances: "If a Man, who had entrusted Money to you, joins with the Barbarians against his Country; or, if any present be likely to rob him of it; or, if he be mad, and cannot keep it, you ought not to restore it. Would it not be a Breach of Duty to give a mad Man his Sword? Or to restore any thing stolen, to the Prejudice of him that lost it?"

But if I had agreed to call for the Charge at such

a certain time, I may, nevertheless, if I please, change my Mind, and demand it ^f sooner. A Passage in *Quintilian* seems counter to this. Some Charges, says he, are depos'd to be return'd at Demand; some at such a time. How was this depos'd? To be paid when you had left off being extravagant: But when you demanded it, you had not parted with your Extravagancies, and therefore it was not due; nor can he be said to have broke his Trust for refusing to restore it at a time, when you yourself own he could not be forced to it. To this I answer, If he that demanded it was the very Person that depos'd it, it ought not to be withheld; but if another had depos'd it, suppose him whose Heir the Demandant is, the Trustee could not be oblig'd to restore it, before the Conditions required were performed ^h.

As for the Degree, it is allow'd on all Hands, that ordinary Diligence is sufficient; for the Contract is not for the Trustee's, but the Deponent's Advantage, and it is his own Fault, if he deposes his Goods in the Hands of a careless Person: And for this Reason the Trustee does his Duty, if he takes the same Care of the Charge, as he does of other Things, and applies the same Diligence about that as about his own Affairs ^g, be it never so small ⁱ. But since, in a Charge some Offices of Friendship do usually intervene (for no Man deposes but with a Friend, or one that he has a good Opinion of) I think, generally speaking, that Care is required in the Management of a Charge, which diligent, industrious Men usually take about their own Affairs. Nay sometimes a more exact Care is necessary, not only when it is expressly promised, but when the Condition of the Charge requires

^a *Præterea* & is apud quem res aliqua deponitur, re obligatur (teneturque actione Depositi) quia & ipse de eâ re, quam accepit, restituenda tenetur, *Instit.* l. 3. t. 15. Quibus modis re contrahitur obligatio, § 3. See also *Digest* ubi supra, Leg. 12. § 3.

^b *Seneca's* Words are, Depositum reddere res est per se expectanda, non tamen semper reddam, nec quolibet loco, nec quolibet tempore. Aliquando nihil interest, utrum inficiet, an palam reddam. Intuebor utilitatem ejus cui redditurus sum, & noveram illi depositum negabo, l. 4. c. 10. de Benef.

^c *Cicero's* Words are, "Neque semper deposita reddenda; si quis apud te gladium sancte mente deposuerit, repetat infans, reddere peccatum sit, non reddere officium. Quid? si is, qui apud te pecuniam deposuerit, bellum inferit Patriæ, reddere Depositum? Non credo; facies enim contra Rempublicam, quæ debet esse carissima." *Plato* explaining that Maxim of *Symonides*, That Justice consists in rendering to every Man his Due, says, "A Thing entrusted, is due to him of whom we hold it; yet we ought not to restore it to him, if he be not in his Senses; because among Men, who are not Enemies, this is not to render a Man his due, when it may tend to the Prejudice both of the Giver and Receiver." His Words are, Τί φησὶ καὶ Σιμωνίδης, λέγοντα, ἐρῶς λέγειν περὶ δικαιοσύνης; "Ὅτι (ἢ δ' ἔσ) τὸ πρὸς θεοὺς ἐλάττωμα ἐκείνου ἀποδοῦναι δίκαιον εἶναι. — Αἴτιον γὰρ ὅτι ἐστὶν ἄλλοις λέγειν, ὅτι ἀρετὴ ἐλάττωμα, τὸ πρὸς παρακατασκευῆν ἢ ὄπην, μὴ σωφρονῶς ἀποδοῦναι, καίτοινα θεοῦ λόγον παρὰ τὸ εἶναι, ὃ παρακατέθετο — τοῖς γὰρ φίλοις οἷον ὀφείλειν τὸ φίλος ἀγαθὸν μὴ ἢ δρῶν, καὶ ὃ μὴ εἶναι. Μανθάνω, ὡς δ' ἔρω, ὅτι ἐπὶ τὸ θεοῦ λόγον ἀποδοῦναι, ὃ δὲ τὸ χρεῖστον ἀποδοῦναι παρακατασκευῆν, ἔάνπερ ἢ ἀπόδοσις, καὶ ἢ λύσις βλαβερὰ μὴ εἶναι, οἷοι δ' ὄπην, ὃ, τε ἀπολαμβάνων καὶ ὃ ἀποδοῦναι. *De Republ.* l. 1. t. 2. This remarkable Authority may be added to what *Mr. Noort* in his *Probabil. Juris* has alleg'd, l. 3. c. 2.

^d The Words of the *Digests* are, Si deposuero apud te, ut post mortem tuam reddas, & tecum & cum hærede tuo, possum depositum agere, p. s. m. enim mutare voluntatem, & ante mortem tuam depositum repetere. But this hinders not, but that we may refuse to return to our Trust, unless he who put it into our Hands order'd it to be given to some third Person, after a certain Term of Time. As for Example, If any one command us to deliver such and such a Thing to his Heir after his Death, unless he be debauch'd. And thus we may allow what *Quintilian* hath said here. For as for the Person who hath entrusted us, we can't lawfully refuse to deliver it at his Request.

^e The Words of the *Digests* are, "Sed is [apud quem rem aliquam deponimus] etiam si negligenter rem custoditam amiserit, securus est; quia enim non sua gratia accipit, sed ejus à quo accipit, in eo solo tenetur, si quid dolo perierit. Negligentia vero nomine ideo non tenetur, quia qui negligenti amico rem custodiendam committit, de se queri debet, magnam tamen negligentiam placuit in doli crimine cadere, l. 44. t. 7. *De Obligat. & Action. Leg.* 1. §. 5. Quod *Nerva* diceret, latiore culpam dolum esse, *Proculo* displicebat, mihi verissimum videtur; nam etsi quis non ad eum modum, quem hominum natura desiderat, diligens est, nisi tamen ad iuum modum curam in deposito præstat, fraude non caret; nec enim salvâ fide minorem iis quam suis rebus diligentiam præstatit," l. 16. t. 3. *Depositum, &c.* l. 7. §. 2. *Mr. Thomastus*, in his Discourse *De culp. præst. in Contract.* c. 1. §. 42. observes very well, "That 'tis not without Reason that the *Roman* Lawyers, who require of a Proctor the greatest Exactness, make not a Person entrusted answerable for the most gross Negligence: For a Contract of Commission is not made more for the Interest of a Proctor, than a Thing entrusted of the Person to whom it is entrusted; for a Trust is a kind of Proctorship, by which a certain Person is obliged to keep what he is entrusted with. It is true, that in both these Contracts we ought to take the greatest Care and Exactness which we are capable of, i. e. as I have explain'd it above, as much as we would have for our own Interests, about things we most prize. The Laws of Society and Necessity of Commerce engage us to it; so that any Man who leaves his Goods in the keeping of another may expect it. If the Trustee will not do all he can for him that depends on him, he ought to refuse the Trust; but since he willingly accepts it, 'tis just that he should take the same Care which he would readily do in his own Case.

^f *Vid.* lib. 16. t. 3. *Depositum, &c.* leg. 1. *prim.* l. 8.

^g *Vid.* *Instit.* l. 3. t. 15. & l. 12. l. 3. *D. depositum, ubi supra.*

^h *Philo Jud. de plantatione Noach.*

ⁱ *Cicero Offic.* l. 3. c. 25.

^k *Vid.* *Sen. de Benef.* l. 4. c. 10.

^l *Vid.* lib. 16.

^m t. 3. l. 1. f. 45, 46. *D. depositum.*

ⁿ *Declam.* 245.

^o *Add Val. Max.* l. 7. c. 3. l. 5. *inter externa.*

^p *Vid.* lib. 44.

^q t. 7. l. 1. f. 5. *D. de obligat. & act.*

quires it, as if it be very valuable, or if one's whole Fortune depends upon it^a. Which Carefulness does not consist in having it Day and Night before our Eyes, but that we lay it up in the safest Place we can, and where it is likely to receive least Damage. And therefore although I satisfy the Laws of Friendship, if I take the same Care of my Friend's Goods as I do of my own, nor can any one in Modesty desire more; yet it is fit, when I cannot save both, that I neglect my own, if of little worth, to preserve my Friends that is more valuable; for Instance, in a Fire, I ought to preserve a Chest of Gold and other precious Things, or full of Deeds and Writings of Moment, rather than some of my own poor Household-stuff. But then the *Deponent* will be obliged to pay me the Value of those things which I suffered to perish for the Preservation of his, as well as other Expences and Losses received upon the Account of the *Charge*. But if a Man should prefer the Preservation of his own mean Goods to the more valuable *Charge* of his Friend (if it has not been covenanted to the contrary) he can be thought only to have^s violated the Laws of Friendship and good Nature, and cannot be forced to make good the Value of the Thing; for he is no Gainer by it, and the Intermission of Acts of Friendship and good Nature does not oblige to the Restitution of what Losses may happen thereupon. But the Reason why the *Roman* Lawyers require a less Degree of Diligence in a *Charge* than in a *Commission*, is, because the latter is managed by our own peculiar Act, and which therefore we have in our own Power to direct in every little Circumstance

of it. But in the *former* no body desires that I should be obliged to sit up, and watch by my *Charge* Night and Day, it being enough if I lay it up in a convenient Place, and never view it, unless when some particular Occasion requires, as I use to do with such Things of my own². To the Law in *Exod. xxii. 12. If it be stolen from him, he shall make restitution unto the Owner thereof; Grotius* adds this Gloss, *Provided it be by palpable Negligence, which does not much differ from Knavery*¹².

It may bear a Question, *Whether the Trustee may make use of the Thing entrusted with him?* To which I answer, That if the *Charge* can possibly receive any Damage in the Use, he ought not to do it without the Owner's Consent. *Scævola* in *Gellius*, l. vii. c. 1. "He that uses a Thing that was simply committed to his keeping, or puts it to other Uses than the Owner gave him leave, is guilty of Theft"¹¹. But if the Thing be never the worse for being us'd, as if I should lay a silver Cup for Ornament on the Side-board, or make some use of it for the Entertainment of some extraordinary Guest, I don't see any Harm in this, provided the Owner is not particularly concerned, that no Body should see it, and the *Trustee* knows that he is to stand to whatever Risque it may run by being us'd. But when the *Owner* has lock'd or seal'd up the *Charge*, we ought not, upon any Account, to open it^b. Nay, a *consumable Commodity* given in *Charge*, altho' neither lock'd nor seal'd up, may not be made use of by the *Trustee*¹², unless he be able to restore the same in Quantity and Quality upon De-

^s *Thomasius*, in his Discourse aforementioned, § 44. does not think this Determination good; for he says, "We do not offend against the Laws of Humanity, unless there be no Engagement." And since, according to our Author, when one suffers the Loss of his own Goods to save a Thing of greater Value, with which he is entrusted, he may make him pay for his Loss: We must own, that in Strictness he is obliged to save a Thing committed to his Trust at the Expence of another of less Value, which belongs to him, as he is also obliged to be at all necessary Expences to preserve his Trust. As for me, I believe that this last Case, and some others, are out of the Extent of our Engagement to general Contracts. The interfering of our own Interest with that of a Person whose Business we have voluntarily taken in hand, or Goods to keep, begets a tacit Exception, which may not take place; but then it must be judged of by other Principles. I am not indispensably obliged to neglect my own Affairs, tho' less considerable in themselves, to attend another Man's, that I have undertaken; at least, I am not expressly engaged to such a Preference, or the Nature of the Thing itself doth not require it necessarily. Nor are we any more obliged in Rigour to save what is committed to our Charge, to the Damage of a Thing of less Value that belongs to us: for besides that, whatever Disproportion there may be, if we consider the Things in themselves, what is of less Value, may be of greater Worth to the Trustee than the other is to him that has entrusted it to him. He may have sometimes a very great Occasion for the Thing he must sacrifice, or he may set a great Esteem on it for some particular Reason, or the Loss can't easily be made good. As therefore we do not commonly engage to do all we can for the Security of our Trust, inasmuch as at the same time we do not think of the Preservation of our own Goods, we are not, properly speaking, in rigour obliged to suffer the Loss of any Thing that belongs to us for this Reason only, because it is of less Value than that which we have in our keeping. To this we may add, that in the Trouble into which we fall by an unforeseen Accident, we have not so much Presence of Mind, for the most part, as to consider what Things are best worth saving, or if we shall have time enough to save this or that. We generally run to that which comes first into our Mind; and as it is natural to think of our own more than of another's Goods, no Man can think it an Injury, if we prefer the Preservation of our own Goods, tho' of less Value, before that of another's. It is also very often hard to know whether we can preserve our Trust, tho' we neglect our own Goods. I conclude, All must be left to the Conscience and Friendship of the Trustee.

² But says Mr. *Thomasius*, *ubi supra*. § 43. "As there are divers sorts of Affairs which require a different Care, and more or less Application on the part of the Proctors; so there are divers sorts of Trusts, which must be differently kept, and with more or less Watchfulness. One sort of Care we must have of an House, another of a Slave or Domestick Servant, another of a Jewel, or some other precious Thing, another of such things as are not portable; and therefore we are satisfy'd to place them in a Court, or some such Place, &c. so that 'tis not true to speak generally and without Restriction. 'Tis sufficient to put a Thing in a convenient Place; and when that's done, we can't any more conclude that a Trustee is only answerable for his Knavery and gross Negligence, than we may infer, for the same Reason, that the Seller, before the Delivery of his Goods, is also responsible for his Knavery, and the same Degree of Negligence, and nothing else."

¹⁰ Mr. *LE CLERC* fully shews, by the Connexion of the Discourse, that it is understood, that the Theft was committed either in the Sight, or with the Knowledge of the Trustee.

¹¹ The Words are, *Sic est apud quem res deposita est, ea re utatur — fortum committit.*

¹² Mr. *SACY*'s Decision upon a Case which he propounds in his *Treatise of Friendship*, appears a little too severe, not to say very sour. "I am not afraid to say (*these are his Words*) that he, to whom a Thousand Livres are entrusted, may not make use of them to save the Life of his Friend, who is fallen into the Hands of Thieves, who threaten to take it away, if that Sum be not paid by a certain time. This is a Case, in which we ought to forget that we have any Trust, because in having such a Sum entrusted to us, 'tis as if we had none: For it is not lawful for us either to open or force the Chest where it is. And if we dare to do it, we commit no less Crime, than if we broke open our Neighbour's House, and took that Sum; the only Difference is, that the Law punishing this last with Death, and taking no Notice of the other, leaves our Punishment to Infamy tho', in the main, 'tis the same thing. The Sum entrusted, is in the Hands of the Person trusted, not as in his House, but in his House to whom it belongs; and so when the Trustee makes use of it, he steals it no less than if it were not entrusted to him,

"he

^a *Ad. Ambr. Off. l. 2. c. 29.*

^b *Ad. lib. 16. t. 3. l. 1. f. 36. D. deposit*

Demand: For we are often in so great want of such sort of things, that we cannot part with them on any Terms. Lastly, 'tis well ordained in the Roman Law, that whosoever should disown a Charge, which the Deponent, in Distress, had reposed with him, as being in danger of Fire, Shipwreck, Tumult, or such like, should be fin'd double; for such inhuman Villany deserves to be severely¹³ punished, which does not scruple to make a Gain of those Men who are the Objects of Compassion. *Vid.* l. i. f. 1, 2, 4. *D. depositi*, d. l. *Quinctilian*, Decl. 245. adds, "A Charge ought to be restored the sooner for being deliver'd secretly and without Proof." Add *Exod.* xxii. 7, 8, 9. *Lev.* vi. 2, &c. Nay, I think it a worse Crime to disown or withhold a Charge, than to commit a Robbery; for here only Justice and Property are violated, but there Friendship and good Nature

too suffer^a. Nor does it extenuate the Crime, that the Trustee, having the Charge put into his Hands, has an Opportunity of playing the Knave (which is otherwise tempting enough) laid in his Way; whereas the Thief has no such Tempration, but of his own Accord seizes upon other Mens Goods, and, which is more, breaks in upon that common Security which makes every Man's House his safest Sanctuary. Nor is a Guardian guilty of a less heinous Crime, who debauches an Orphan committed to his Trust, and received into his House^b.

Since the Keeping only is given *gratis*, it is plain that all the Expences laid out upon the Charge ought to be repaid, Upon which Ground it is rightly declared in the Digests^c, *That if a Charge be received at Asia, to be restor'd at Rome, it must be at the Expences of the Owner, not of the Trustee.*

"he took it out of the House of the true Proprietor." *Pag.* 125, &c. This Author does not distinguish whether he be able or not to pay the Sum entrusted to him, which he made use of to save the Life of his Friend; all that he says tends only to prove, that, let the Reason be never so important and pressing, for which the Thing entrusted is made use of, he is guilty of Theft for this alone, that he made use of what he had in keeping. But this is one of the Cases of Necessity, which are above the common Rules, and whose Exception is included in all Engagements. Whatever a Man can do for himself, that he can certainly do in the like Circumstances for his Friend, who is his second self; and we ought to have such a good Opinion of him who trusts us, as to believe that he would lend us his Money for that Use freely, and so he may be thought tacitly to consent to it. I proceed further, and say, That supposing the Sum deposited be inconsiderable, in respect of the Estate of him to whom it belongs, I can't see but that it may be made use of to save the Life of a Man and a Friend, tho' we do not think him rich enough to pay so great a Sum under a long time, if ever. If it be allowable, as I have prov'd above, l. 2. c. 6. not only to take the Goods of another, but also to run the Hazard of one's Life to preserve his, is it not much more excusable to take the Liberty of disposing of a Thing trusted to us, in such a pressing Necessity of a Friend? And yet there is a great deal of Difference between this Action and that of a Man who robs to save his Friend; for this last commits a manifest Violence and Injustice, whereas the other only makes use of the Opportunity that Providence has given him, where he may presume upon the Consent of him who has committed that Money to his Keeping. It is much like, as if a Man, being pursu'd by his Enemies or Thieves, takes the first Horse he lights of to make his Escape, tho' the Master is neither present, nor knows it.

¹³ The Words of the Digests are, *Prætor ait, quod neque tumultus, neque incendii, neque ruinae, neque naufragii causâ depositum sit, in simplex, ex earum autem rerum, quæ supra comprehensæ sunt, in ipsum in duplum - - cum extante necessitate deponat, crescit perfidie crimen.*

^a In *Pisidia* the Breach of this Duty was Capital, *Nicolaus Damascenus.* ^b Add. *Arist. Prob. Sect.* 29. *Qu.* 2 & 6. Also l. 1. f. 2. & 67. *princ. D. de furtis.* ^c *Lib.* 16. t. 3. l. 12. *princ. D. depositi.*

CHAP. V.

Of chargeable Contracts in particular; and, First, of Bartering, Buying and Selling.

- I. Of Exchanging or Bartering.
- II. When a Contract of Buying and Selling is compleat.
- III. Of the Loss or Gain of a Thing sold.
- IV. Of Agreements commonly join'd with Sales.

- V. What the Buyer ought to perform to the Seller, and e contra.
- VI. Of Buying in Hope and Expectation.
- VII. Of Monopolies.

OF chargeable Contracts, Bartering is deservedly esteem'd the Chief; for in Days of Yore¹, before Money was found out, there was no other Method of maintaining Commerce. The Dutch made use of the simple and antient way of Bartering Commodities, *Vid. Tacit. de Morib. Germ. c.* 5.^a Now Bartering may be made two ways; either the Commodities may be valued for Money, and then, instead of Money, exchanged for one an-

other; or the Commodities may be immediately compar'd together. The first sort is, in a manner, Buying and Selling, for here the Things are rated according to their Prices on both Sides; which Sort of Bartering is at this Day very frequent.

And therefore there is no Reason to conclude, that pure Bartering was in use at the time of the Trojan War, as most do from that Passage in *Homer, Iliad.* v. 472.

^a *Er. Sep*

^a See *Græc. B.* 2. c. 12. f. 3. n. 3.

Mr. BARBEYRAC'S NOTES on Chap. V. § 1.

¹ See about this Dispute *Mr. Gravina*, Professor of Law at *Rome*, his *Origines Juris Civilis*, l. 2. p. 248, &c.

Ἐνθα ἄρ' ἀνίζοιτο κερηκομένους Ἀχαιοί,
 Ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἶθωνι σιδήρῳ,
 Ἄλλοι δὲ ξυνοῖς, ἄλλοι δ' ἀπείσι βέεσσι,
 Ἄλλοι δ' ἀνδραπέδεισι.

The Grecian Chiefs their chearful Bowls prepare,
 And barter Brafs and Steel for sumptuous Fare.
 Some truck with Slaves or Skins of slaughter'd Kine,
 And some the Ox ic self exchange for Wine.

For, says Pliny ^a, I wish we could quite lay aside the Use of Gold, which all good Men speak against, and which was found out to the Destruction of Mankind. How much happier was it when one thing was exchange'd for another? As (if Homer may be believed) was done at the time of the Trojan War: For then, I suppose, Commerce was set on Foot for the Conveniences of Life. He tells us, That some purchas'd with Hides, some with Lion, others with Plunder: Tho' he himself was an Admirer of Gold, yet he so rated Things, as to make Glaucus exchange his golden Arms of a hundred Oxen Price, for Diomedes's of nine. Hence it is, that the Fines inflicted by the old Laws consisted of Cattle, even at Rome. Indeed, at this Day, nothing is more common than for Soldiers to exchange their Booty for other Commodities; for their Booty does not always consist of Money, and they do not scruple to take other Things that come in their way. And therefore it does not follow, that Money was not in Use at the Time of the Trojan War, because the Soldiers purchas'd Wine with their Plunder: Nay, there is mention made of Talents of Gold in Homer; for in *Iliad*. i. v. 122. *Agamemnon* promises to give *Achilles* δέκα δ' χρυσίου πικύων, Ten Talents of Gold, & *Odys.* θ. v. 393 Each of the Phœacian Princes give *Ulysses* χρυσίου πικύων πηλίου, A Talent of venerable Gold. And altho' that Gold in *Odys.* v. 11. is call'd, χρύσος πολυδαΐεσσιν, yet it is not probable, that all Gold was then wrought, or us'd only for Cups and such sort of Vessels. Nor does it appear why Homer should give such a high Value to Gold, if it had not been then the Standard Price of other Things. Besides, πορδαία & μόνι signify any Materials capable of being finish'd upon. As for Homer's calling *Glaucus's* golden Arms ἐκατόβοια, or worth an hundred Oxen, and *Diomedes's* Brafs ones, ἐναυβοια, or worth nine Oxen, without doubt he did it, because in old Times, the greatest Riches consisted in Cattle, of which Oxen being the chief, because of the absolute Necessity of them in Husbandry, it was usual to refer the Price of other Things to them; which common way of speaking did not immediately grow out of use, after Money had been made the Measure of all things. And therefore it is observ'd ^b, that Maidens, who by

reason of their Beauty received great Presents from their Gallants, were call'd παρθένας ἀλορηχοίας, Virgins who gain Oxen: But granting that Coin'd Money was not then known among the Grecians, yet the Use of Gold and Silver, by weight, might possibly have obtain'd in Commerce. Indeed, that many Nations used Money before the Trojan War, is plain enough from Holy Writ.

This Place of Homer puts me in mind of the Controversy between *Cassius* and *Sabinus* ^c, Whether before Money was in use, or now, since the Use of it, it might be call'd Selling, if v. g. I should give my Cloak for a Coat? *Sabinus* asserted that it was, from this Passage of Homer, as if the Grecian Army had bought Wine with Brafs, Iron, and Men; but ἀνιζέει does not properly signify to buy Wine, but to procure it by any means whatsoever, as among the Latines, *pabulari*, *lignari*, *frumentari*, signify to forrage, to get Wood, and Corn by any Method whatsoever ^d. The other Opinion indeed seems more feasible, because it is one thing to buy, another to sell, the Buyer one Man, the Seller another; the Price one thing, and the Commodity another; but for the same Man to be Buyer and Seller, and the same Thing both the Commodity and Price, seems absurd. But to this we reply what we just now said of the two Sorts of Bartering; for if we suppose the Things to be first rated by Money, the Buying will be reciprocal, and therefore not absurd for the same Person, in a different respect, to be both Buyer and Seller.

Under the Name of Bartering may be brought the reciprocal Donations which commonly pass between Friends; which not being a Contract, do not require Equality ^e. And to this may be refer'd the changing of Arms between *Glaucus* and *Diomedes* ^d, which, for the Inequality, may perhaps be call'd Foolishness on *Glaucus's* side, but cannot be call'd Injustice in *Diomedes*. *Maximus Tyr.* *Dilect.* 23. says, "*Glaucus* rated his Purchase from the Occasion, not according to the real Value." And again, *Dilect.* 24. "Nor had he that receiv'd the golden Arms more than his Due, nor he that received the brafs, less; but both did generously; the Inequality of the Matter being made up with the Equality of the Design that each had of obliging the other." *Add. Ilocr. ad Nicocl. in princ.* Among the *Russians* there is a Market for holy Images, which they do not pretend to sell, but to exchange for Money ^e.

II. But since Money has been introduc'd, the Contract of Buying and Selling has been most in Use ^f, whereby the Property of a Thing, or some Right equivalent to it, is acquir'd for a certain Sum of Money: And here the first Enquiry is, *When the Contract is so compleated, that nothing remains but that the Seller relinquish the Thing, and the Buyer take Possession*

^a Of this Opinion the *Dionysii* speak thus, *Sed verior est Nervæ & Proculi sententia, permutatiōnem, non emptiōnem hoc esse. Nam ut aliud est vendere, aliud emere, aliud emptor, aliud venditor; sic aliud est pretium, aliud merx, quod in permutatiōne discerni non potest, uter emptor, uter venditor sit, ubi sitra.*

^b *Men.* *Tyrinus's* Greek *ἵ.* Οὐδὲν γὰρ ἔπε τῷ λαβόντι χρυσὸς πλέον, ἔπε τῷ δαμάξαντῳ ὁ χαλκὸς ἑλαπτόν, ἀλλὰ ἀμορτοῦσι χαλκὸς ἔρει ἐκάτεσσιν ἐν πῶ ἀνίσω τ' ἕκαστος, ἰσοῦσι τῆ γνημῆ δοθέντα. See Mr. *Davis's* Notes on it. We may also add here, That by the Roman Law an Exchange is a Contract without a Name, for which there lies no Action in Justice but the Delivery of the Thing exchanged is made on both Sides. See *Digest.* l. 19. t. 4. *De rerum permutatiōne*, and Mr. *DAUMAR's* *Civil Laws in their Natural Order*, Part 1. l. 1. t. 3.

^a L. 33. c. 1. ^b As *Dydimus* remarks, *ad Hom.* II. ζ. v. 236. ^c *Vid.* Lib. 18. t. 1. l. 1. *D. de contrab. empt.* ^d *Vid.* *Hom.* II. d. l. ^e *Olearius itin. Perf.* l. 1. c. 1.

MR. BARB. NOTES on § II.

^f The Words of the *Digests* are, *Et si quidem pecuniam dem. ut rem accipiam, emptio & venditio est.* So we may sell a Service, an Inheritance, a Debt, in a Word, all Sorts of Rights, Names, and Actions. See *Digest.* *De hereditate, vel actione tradita*, l. 18. t. 4.

Session of it? According to the *Roman Laws*² the Contract is completed as soon as both Sides have agreed upon the Price; and then the *Buyer* can force the *Seller* to deliver up the Thing; and the *Seller* can oblige the *Buyer* to take it, and to pay down the Price immediately, or at the Time appointed².

But the Contract may be *incomplete*, and not capable of bearing an Action, either upon a general or a particular Account. The *First* is, when the *Buyer* and the *Seller*³ are not agreed, but still endeavour to bring one another to their own Terms; where they are both free to give back and break off the Bargain, having not yet contracted an Obligation, provided there be no Deceit nor Design in either Party to elude the other; which indeed obtains in all Contracts. The *Latter* is, when the Bargain turns upon some Conditions⁴ either express or understood; as if the Ware is first to be seen or tasted^d, for here the Bargain goes upon a Supposition, that the Thing will not only appear as the *Seller* had represented it, but that it will then please too. For

indeed the Knowledge of the Thing is always necessary for the determining of the Price; and it is imprudent to buy without seeing it, where we cannot depend upon the Word of the *Seller*.

The determining of the Commodity by Weight, Measure, or Number⁵, is not properly a Condition of Sale, unless the Thing be so, as not to serve my Turn, but in such a Quantity. However, for putting the Contract in Execution, it is necessary to measure, number, or weigh⁶; for we cannot otherwise specify the Thing, and set it apart from those of the same sort. Nor, without this Measuring can the Goods be deliver'd, or Property transferr'd; for I have no other way of determining what belongs to me, and what to the *Seller*. Sometimes indeed we buy at a Lump; and then Measuring is only for Experiment, not for the rating of the Commodity; for in that Case, the Measure does not precede the Delivery; it being one thing to sell this Vessel of Wine that holds ten Gallons, and another to sell ten Gallons out of this Vessel⁸.

Lastly,

² Altho' the Buyer pays nothing down, nor gives any Earnest. *Est autem emptio Juris Gentium, & ille contractus peragitur, & inter absentes contrahi potest, & per mandatum & per literas, Digest. de contrahendâ Emptione, Leg. 1. § 2. Emptio & venditio contrahitur simulatque de pretio convenitur, quatenus emptio & venditio mandatum sit, ac ne arrha pignora data fuerit, Instit. l. 3. t. 24. princ. See also *Digest. ubi supra. Leg. 10. § 4. § 6. & 35. § 5. 6. 7.**

³ As when they have not agreed upon the Price, but only have said, We shall well agree, I'll sell it at a reasonable Price, &c. It is the same, according to the *Roman Lawyers*, when we say, I'll sell it for what you please, for what you think reasonable, &c. *Ubi constat imperfectionem esse negotium, cum emere volenti sic venditor dicit, Quid ANTIQUELUS, quanti equum putaveris, quanti asinum materis, valebis emptum. Digest. ibid. Leg. 35. § 1.* Some ask, Whether a simple Contract to sell or buy, obliges to any thing by the Law of Nature and Nations? Mr. THOMASius, in his *Dissertation De Arrhis emptionum*, § 23. denies it absolutely; and the Reason, says he, is clear, "There is only a loose Consent which is come to no Determination, and which gives no Right to him to whom the Promise is made, to demand any thing: For how can he pretend that he hath bought or sold any thing actually? But if one has no Mind to sell, 'tis easy to evade his Promise by exacting an enormous Price, or by annexing such Conditions as we think fit; and if one has no Mind to buy, he can as easily get off by very small Offers, or by engaging him to very hard Terms. Or how can a Man pretend to be endangered, since there is neither any good, nor Price fixed; and he hath nothing to do but to declare that he is ready to conclude the Bargain, if he resolves to go on with it; and to take away all Ground of Complaint, he may allege that he has broken his Word, and so lay all the Blame on him that the Bargain is not completed?" But if we will judge of the Thing by the sole Right of Nature and Nations, I do not think that any Man can come fully into the Satisfaction of THOMASius. I distinguish here between an uncertain Promise, which neither obliges, or engages any Man, and a real Promise, upon which the Person, to whom it is made, may depend: The first sort may be eluded after the manner that this same Lawyer hath represented, because we have promised so far only as we please to keep it; and to him, to whom the Promise is made, has no Right, but the other ought certainly to be ordered so, as not to come to Nothing, and the Promise to conclude it at his own Pleasure. Let us clear this by an Example; I see a Thing useful to me in another's Possession, I ask him whether he'll sell it to me? He answers, Yea. Whereupon I go away without bargaining, or requiring him to lay aside for me. In this Case, I am, tho' if the Owner of the Good, sells them to another, and resists, to sell them to me afterward, when I come again to desire it, he does me no Injury, for he is under no Engagement to me, no otherwise than that we might have agreed, if I had at that instant bargain'd; but since I neglected it, 'tis so much the worse for me. And this hath chiefly a Place, when he that declared his Price at that instant, is a Trader by Profession, and deals in Things of that Nature; for we know well, that if we do not take such Men at their Word, when they offer to sell a Thing at such a Price, we do nothing; by a much greater Reason they are free to sell, or not, when nothing is said. But suppose that I say to a Tradesman by Profession, My I depend upon it that you'll sell me such or such a Thing? And he thereupon positively promises me that he'll keep it for me, then he tacitly engages that he'll sell it me at a reasonable Rate, if I deal with him for a Thing whose Price often varies, or at the usual Price. If then he raise the Price for it; provided that I come soon to buy it, or in the time agreed on; for if I let the Time pass, or, if it were not so, I stay a long time before I come again, the other Contractor is released of his Word, by reason of the Occasions which he makes use of selling his Goods to Advantage; for before this he was not free to recant, because I might fall of accommodating myself elsewhere.

⁴ The Words of the *Digest* are, *Conditiones inter condiciones tunc perficiuntur, cum impleta fuerit conditio.* But this is not appropriated to a Bargain and Sale only. All sorts of Agreements follow the same Rule. See what is said above, *Lib. 3. c. 4. Quia si sub conditione res contrahitur, si quidem defecerit conditio, nulla est Emptio, sicuti nec est Stipulatio. Digest. l. 18. t. 6. De Periculo & commodo Rei venditæ. Leg. 8.*

⁵ *Gestus enim ubi hoc proficit, ut Imperator Legat. Digest. lib. 18. tit. De contrah. empt. Leg. 34. § 5. Difficile autem est, ut quisquam sic emat, ut non sit hoc. Ibid. tit. 4. De periculo & commodo rei venditæ, Leg. 4. § 1.*

⁶ As for Example: I buy some Cloth for a Suit, and the Piece holds not out so many Ells as it ought.

⁷ *Si id, quod venditur, appareat, quibus quibus, quantum sit, & pretium, & quid venit, perfecta est emptio. Digest. De periculo & commodo Rei venditæ. Leg. 3. princip. In his que ponere, numero, mensuræ constant, — si omne vinorum, vel oleorum, vel frumentorum, vel argenti, quod utroque est, non pretio venditur, item juris est, quod in cæteris rebus. Quod si etiam ita venditur, ut de singulis amphoras, item aliter, ut de singulis metretas; item frumentum ut in singulis modis, item argenti ut in singulis libras certum pretium distinetur, — & si illique numero constant, si pro numero corporum pretium sit paratum. Sabinus & Cassius tunc perfecta emptio venditio est, cum a mensurata, ad mensuram, ad pondus sint; quia venditio, si hoc casu, non videtur fieri ut in singulis metretas, & modis, & cæteris, quæ quævis namentis eris vel appenderis, Lib. 18. t. 1. De contrah. empt. & Leg. 35. § 5.*

⁸ This is not appropriated to Sales, but to all sorts of Agreements. *Contractus venditionum, vel permutacionum, vel donationum, quas instrumentariis est necessarium, distinkto etiam Arrharum, vel alterius cujusvisque casus, [casus tunc] in se, non solum per ut, transactionem etiam, quas in instrumentariis non solum, non aliter esse habere licet, nisi sit in instrumentariis, non solum in scriptis, sed in scriptis, et si per talia non contrahantur, etiam ab ipso completo, & si per talia non solum, sed etiam per talia non solum, Cod. lib. 4. tit. 21. De fide instrumentorum, & Leg. 18. See *Instit. l. 3. t. 24. De Expon. & Testam. & c.* We ought to observe that in this §, altho' the Author pretend only to relate the Determinations of the Civil Law, he no mixes his own Notions with their; which he endeavours to rectify and reduce to the Simplicity of the Law of Nature, that 'tis not possible to disentangle them in a Translation.*

² *Add. lib. 19. t. 5. D. de prescript. verbis, & c. Leg. 5. f. 1. Sine pretio nulla venditio est. Lib. 18. t. 1. & l. 19. l. 34. f. 5. 6. l. 35. f. 1, 5, 6, 7. D. de contrah. empt. & c.* ³ *Ubi supra. Leg. 35. f. 1.* ⁴ *Ubi supra. Leg. 7. t. 1.* See above in B. 3. Ch. 8. ⁵ *Ubi supra. Leg. 34. f. 5.* ⁶ *Ubi supra. Leg. 34. f. 5.*

Lastly, the Bargain is *incomplete*, if the Parties^a particularly agree to have one another's Consent express'd in Writing, and the Writings be not yet finish'd. But 'tis another thing, if this Writing is design'd only for a Help of the⁹ Memory, or an Evidence of the Thing. What the *Hebrews* observ'd, in relation to this Contract, is curiously taken notice of by *Selden*, *De J. N. & G. secund. Heb. l. vi. c. 1 & 4*. Add a Place of *Theoph. in Job. Serm. 42*.

III. And here we must take special Care to distinguish between the *Contract itself*, and the *Execution* of it. The *Contract* is completed as soon as the Commodity and Price is agreed upon, provided there be no Condition added, that can suspend the Obligation, or any thing else, that can leave room for either Party to recede from the Bargain; but the *Execution* of the Contract consists in the actual Delivery of the Money by the *Buyer*, and of the Commodity by the *Seller*. It is indeed most natural, that as soon as the Contract is completed, it should be put in Execution; or that as soon as the Price is agreed upon, the *Buyer* should deliver the Money, and receive the Commodity; which they call *Trucking with ready Money*¹. *Vid. Plaut. Afin. Act. I. Sc. iii. v. 47*. As also *Plato de Leg. l. xi.* in his Commonwealth enacts, "That whatsoever is bought and sold, be done in such a certain Place of the *Forum*, the Seller delivering the Commodity, and the *Buyer* paying down the Price immediately."

But when there is some time between the Completion of the Bargain, and the Delivery of the Thing; it may be demanded to whom the Damage, or the Profit of the Commodity belongs in the mean time, to the *Buyer* or to the *Seller*?² 'Tis well known that the *Roman Law*, as soon as ever the Bargain is completed, imputes the Risque of the Commodity

to the *Buyer*,³ altho, it be not yet deliver'd, and altho' the *Seller* remains Master of it. By *Risques* they mean the Accidents 'tis liable to, from external Injuries, as Theft, &c. or internal Decay proceeding from natural Causes⁴. But how can the Damage belong to the *Buyer*, when he is not yet the Owner, whereas the Loss of a Thing is to the Owner? To which some answer⁵; that that trite saying, *The loss is to the Owner*, is true, when the *Owner* is oppos'd to those who have barely the Use and Custody of the Thing; and not to those who have Right in it, and a Power to call for it as their own. Which Distinction is founded upon this Reason, that the *Buyer* might, and ought to have immediately taken Possession of the Commodity, and to have paid down the Money; which if he had done, it had perish'd in his own keeping; and therefore his Delay and Negligence ought not to turn to the Loss of the *Seller*. Besides, the Risque belongs to the *Buyer*, not only because he is the *Owner*, but because the *Seller*, after the Completion of the Bargain, in respect of the *Buyer*, is not consider'd an *Owner*, but as *Trustee* of such a particular Commodity, for which, if it be lost without his Fault, he ought not to be responsible.

⁶ But after all, since it is the *Seller's* Business to give the *Buyer* Possession, if he has not discharged this Duty, I do not see why he, rather than the *other*, should not stand to the Loss of it. For the Answer, *That a Person, having promis'd another a Thing, does not stand oblig'd in case the Thing be lost*, does not come up to our Case^d: For there the *other* Party was to have gain'd the things *gratis*; and it would be hard and unjust for a Man that had promis'd a certain Species, upon the Loss of it, to be bound to make good the Value. But in such Dealings as admit of no Latitude, the Case is altered; for why should

⁹ This is commonly presumed till the contrary appear. *Fiant enim de his [obligationibus quæ consensu contrahuntur] scripturae, ut quod actum est per eas facilius probari possit, & sine his autem valet, quod actum est, si habeat probationem, sicut & nuptiæ fiunt, licet testatio sine scriptis sit habita.* Digest. lib. 22. tit. 4. de fide instrumentorum, &c.

^a This not only respects Contracts of *Selling*, but likewise all other Contracts. *Vid. C. lib. 4. t. 21. De fide instrumentorum. &c. Leg. 17. Vid. Instit. lib. 3. t. 24. De emptione & venditione princip.* ^b *Vid. d. tit. de peric. & commod. rei venditæ.*
^c *Vid. C. lib. 4. t. 24. De Pignoratitia actione, Leg. 9.* ^d According to *lib. 45. t. 1. leg. 33. l. 83. f. 7. D. de verb. oblig. & lib. 35. t. 2. l. 30. f. 4. D. ad L. Falcid. in fine, & lib. 4. t. 3. Leg. 18. f. 5. D. de dolo mal.*

Mr. BARB. NOTES on § III.

¹ This is what is called *Gracia fide mercari*. See *Plaut. &c.* as in the Text.

² The Words of the Law are, *Quoniam autem emptio & venditio contracta sit, - - periculum rei venditæ statim ad emptorem pertinet, tametsi caris tradita emptori non sit. Itaque si homo mortuus sit, vel aliqua parte corporis letalis sit, aut cadens tota, aut aliqua ex parte, incendio consumptæ fuerint, aut fundus ei floribus totus, vel aliqua ex parte ablatas sit, sive etiam inundatione aquæ, vel arboribus turbine dejectis, longe minor, aut deterior esse corporis, emptoris damnus est, et nocere est, licet rem non fuerit multo, pretium plerumque. Quicquid enim sine dolo & culpa venditur, necesse est, necesse est. Instit. lib. 3. tit. 24. § 3.* The Negligence for which the Seller is responsible, if there be no Cheat, is, what the *Roman Lawyers* call a small Fault, which is oppos'd to the Care which a good Master of a Family commonly has of his own Affairs; for they require such a Degree of Exactness in all Contracts, as may be for the Advantage of both Parties. *Si nihil appareat convenit, res in culpa est, et culpa est à venditore, qualis bonus Paterfamilias jais rebus adhibet, quam si præstitit, & rem non perdidit, periculum esse debet.* Digest. lib. 18. tit. 1. De contrah. empt. Leg. 35. § 4. *Sed ubi utriusque utilitas contrahitur, ut in specie, ut in dote, ut in societate, & abbas, & culpa præstatur.* Lib. 23. tit. 6. *Circumstantiæ venditoris, Leg. 5. § 2.* As for me, I hold to what I have said in the foregoing Chapter; and, without having regard to that Distinction about the Advantage, which accrues by a Contract, either to the Parties only, or to both together, I believe, that the Seller, and every other Person, who is engag'd expressly or tacitly to preserve a Thing that belongs to another, in any wise is responsible for what ever happens, if he has not done as much as he could or would for himself, and his own Interests, in things which he values good.

³ Yea, when he has delivered it, provided he has not received the Payment, or when Credit is given some Pawn, or accepted a Security. *Sane qui nondum rem emptori tradidit, ab hoc ipse dominus est.* Institut. lib. 2. tit. 1. *De re pignoratitia, § 41.*

⁴ *Res domino perit*, say the Lawyers; a Maxim taken out of this Law of the Code, *Lib. 1. tit. 24. De pignoratitia actione, Leg. 9. Pignus in bonis debitoribus permanere, idcirco ipsi perire in dubium non venit.*

⁵ In Mr. *HERTIUS's* Edition these Words are inserted here, "This hath not Place but in Contracts, wherein one of the Contractors hath in his Hands the thing that belongs to another, and not in these, wherein one of the Contractors owes the other a certain thing in specie. Or, as others express it, the Loss is the Owner's, when, &c." The *English* Translator has heal'd this Breach by skipping it.

⁶ We may add here what *CUIACIUS*, and some other Lawyers affirm, that, according to the *Roman Law*, all Accidents, before Delivery, must fall upon the Seller. See *CUIACIUS* upon *Leg. 33. of the Digest. Tit. de re pignoratitia*, in his *Treatise of Pignoratitia*, *Lib. 8.* Mr. *VAN ECK*, Professor at *Utrecht*, observes in his *Principia Juris Civ.* under the Title, *De periculo & commodo rei venditæ*, § 10. "That the Learned can't reconcile this Law with the common Opinion; and as for himself, he declares freely, that he may say, without any Injury to the *Roman Lawyer* Population, that they never were perfectly agreed about that Matter.

should the *Buyer*, who has not yet had the Delivery made him according to the Contract, be deprived of the Goods, and yet pay the *Seller* the Price of them ^a?

The best way to discover natural Equity, in this Point, is to distinguish whether the Delay was absolutely necessary, ⁷ for the Delivery of the Commodity; or only occasion'd through the Default of one of the Parties; and if occasioned, whether by the *Buyer*, or the *Seller*?

The first Case may be put thus; suppose I buy Cattle, which at present are at some distance, and the *Seller*, in driving them to me, happens to have them intercepted by Robbers, Wolves, or some other Accident; in this case no doubt the Loss is the *Seller's*.

Where the Delay has not been necessary, but occasion'd by the *Seller*, ⁸ then too the Loss lies at his door.

But if the *Buyer* be the Occasion of it, then he stands to the Loss of it. For the very Moment that the Commodity was due, and the *Seller* ready to make Delivery of it, the Property pass to the *Buyer*, and the Thing then began to belong to him only ^b. And therefore, if the *Seller* out of Kindness keeps in Custody the Goods, which the *Buyer* did not so much as commit to him in Trust, 'tis unreasonable to expect, that he should stand to the Casualties that may attend them. But in Case the *Buyer* had committed them to his Custody, then must they be look'd upon as a *Charge*, and consequently the Receiver must be free from whatever Casualties may happen to them. In which Case, the Delivery of the Commodity ought to be made by a Fiction *brevis manus* ^c, but otherwise than is done in the *Loan*,

or *Letting* of a Thing. For there, by the Delivery we alienate our own, but here the Alienation is made to us. What has been here said of the Damage may be apply'd to the Gain also ^d.

IV. Moreover 'tis usual for this Contract to be qualified with the Addition of several other Pacts, according to the Pleasure of the Contractors, or the Law of the Land. In which the Law of Nature is concern'd no farther, than that each Party stands to his Agreement, provided nothing absurd, or unjust is contain'd in it, and that every Subject conform himself to the Law of his Country, as he expects to have his Contract valid in it. Thus nothing is more common, than to agree upon Payment of the Money sometime after the Delivery of the Thing; and also, that the Thing shall not be deliver'd till such a time; the Property, in the mean time, together with the Gain or Hazard attending it, lying in the *Seller* ^e.

Besides, we frequently practise what the *Civilians* call ² *Additio in diem*, which gives the *Seller* Leave to accept of any better Bargain, that shall offer it self by such a day. This may be done ³ two ways: First, when the Bargain is completed, but upon Condition that it shall be null, if better Terms offer themselves; or secondly, if it be only agreed *de futuro*, that it shall be a Bargain, if better Offers are not made ^f. In the former case, the Property passs over to the *Buyer*; in the latter, it remains in the *Seller*, till the Completion of the Contract.

What they call ⁴ *Lex Commissoria* makes ⁵ void the Bargain, if the Price be not paid by such a Day. And in this Case, either the *Seller* may immediately deliver the Goods, and in Default of the Payment, claim

⁷ The *Roman* Lawyers say also, That in this last Case the Seller is bound to Damages and Gains, *i. e.* he ought to indemnify the Buyer from the Loss he has had, or the Profit he has mis'd of by his Delay. *Si res vendita non tradatur, in id quod interest, agitur; hoc est, quod rem habere interest emptoris, — cum per venditorem steterit, quo minus rem tractat, omnis utilitas emptoris in aestimationem venit; quæ modo circa ipsam rem consistit. Neque enim, si potuit ex vino (pata) negotiari, & lucrum facere, id aestimandum est, non magis quam si triticum emerit, &c.* Dig. lib. 19.

⁸ In this Case the Lawyers affirm, "That if one buy Wine, upon Condition that he'll come and measure it, and, being measured, will draw it at a certain Time; the Seller, after the Term, may pour out the Wine, to make use of the Hogsheads, having given Notice to the Buyer first." *Licet autem venditori vel effundere vinum, si diem ad metiendum præstituit, nec intra diem admensum est; effundere autem non statim poterit, priusquam testando denunciaverit emptori, ut aut tollat vinum, aut sciat futurum, ut vinum effunderetur.* Digest. lib. 18. tit. 6. De periculo & commodo rei venditæ, Leg. 1. § 3. It is true, that the Seller is more to be commended, if he uses not his Right, but sells the Wine as well as he can, or buys other Vessels for his Use, to favour the Buyer. *Si tamen, cum posset effundere, non effudit, laudandus est potius — commodius est autem conduci vas, nec reddi vinum, nisi quanti conduserit, ab emptore reddatur, aut vendere vinum binâ fide, i. e. quantum sine ipsius incommodo fieri potest, operam dare, ut quam minimo detrimento sit ea res emptori.* But it is doubtless a Precept of Right, opposite to the Rules and Laws properly so called, of which Mr. NOODT treats in his *Julius Paulus*, c. 10. & 11. The Permission is evidently unjust, and yet is not less full and entire in the foregoing Words; and it is noted with Reason, that GROTIUS did amiss in placing this Example in the Number of Things good and innocent, altho' it be commendable to abstain from it. *Interdum enim licere dicitur, id quod rectum ex omni parte, piusque est, etiam si forte aliud quid fieri possit laudabilius, Lib. 3. ch. 4. § 2. num. 1.* See J. SAMUEL STRYKIJ *Traçt. de Jure Liciti sed non Honesti*, Ch. 2. § 97. &c.

⁹ He that suffers the Loss, ought to have the Gain, according to the indisputable Proverb. If, for Example, a Piece of Ground be sold, and a Flood adds something to it, 'tis the Purchaser's Gain. *Sed & si post emptionem fundo aliquid per alluvionem accesserit, ad emptoris commodum pertinet. Nam & commodum ejus esse debet, cujus periculum est.* Inst. Lib. 3. tit. 24. De empt. & vend. § 3.

^a Ziegler ad *Grat.* l. 2. c. 12. f. 15. ^b *Vid. supra*, l. 4. c. 9. f. 5. ^c See above in B. 4. c. 9. f. 9. ^d *Commodum ejus esse debet, cujus est periculum, Vid. Instit.* l. 3. t. 24. f. 3. *De empt. & vendit.* ^e *Vid. Instit. ibid. Vid. Caton. de re rusticâ, c. 80.* ^f *Vid. lib. 18. t. 2. l. 2. D. de in diem additæ.*

Mr. BARB. NOTES on § IV.

¹ The Words are, *Quod si fignrit homo, qui venit, aut surreptus fuerit, ita ut neque dolus neque culpa venditoris intervenierit; annuacertendum erit, an custodiam ejus usque ad traditionem venditor suscepit. Sanè enim si suscepit, ad ipsius periculum is casus pertinet: Si non, locusus est.* Instit. *ibid.*

² This is what the Lawyers call, *Additio in diem*, of which the Digests treat, *Lib. 18. tit. 2.* and thus define it, *In diem additio ita fit: Ille fundus centum tibi emptus, nisi si quis intra Kalendas Januarias proximis meliorem conditionem fecerit, quo res à domino abeat.* Leg. 1. *ibid.*

³ *Nam si quis in hoc actum est, ut meliore aliâ conditione, discedatur, erit pura emptio, quæ sub conditione resolvitur: si autem hoc actum est, ut persisteret emptio, nisi melior conditio asseratur, erit emptio conditionalis.* *Ibid.* Leg. 2.

⁴ *Lex Commissoria* is treated of *Digest. Lib. 18. tit. 3.* thus, "SI AD Diem Pecunia soluta non fit, ut Fundus inemptus sit, ita accipitur, inemptus esse fundus; si venditor eum inemptum esse velit, quia id venditoris causâ caveretur: nam si aliter acciperetur, exusta villa in potestate emptoris futurum, ut dando pecuniam inemptum faceret fundum, qui ejus periculo fuisset. Nam legem commissoriam, quæ in venditionibus additur, si volet, venditor exercebit: non etiam inuitus. — Sed si fundus reventisset, Aristò exstimabat, venditori de his [iuribus] judicium in emptorem dandum esse: quia nihil penes eum residere oporteret ex re, in quâ fidem sefellisset. *Digest. ubi supra, Leg. 2, 3, 4.*

⁵ That is to say, if the Seller think fit, for 'tis for his Sake, that this Clause is added; otherwise when a Thing sold with a Commissory Clause happens to be lost, it renders the Sale null, so as not to pay for it, and so the Seller loses both his Money and Goods.

claim them again with the Emolument ^a; or else the Goods may be kept in Possession, till the Payment be actually made; which last seems to be the safest Way, for generally this Clause is design'd in Favour of the Seller, to ^b save him from being put to any Trouble in quest of his Money; whereas, the Trouble would be the same, were he to recover his Goods out of the Hands of an ill Paymaster ^b.

⁷ Sometimes too either the Laws of the Land, or the Parties themselves grant one another the Liberty of breaking off the Bargain ^c, which is done several ways; for sometimes a Clause is ^d added, that upon Tender of the Price at any time, or by such a certain Day, the Buyer shall be obliged to restore the Goods to the Seller, or his Heirs ^d. And this certain Day may be express'd with a different Design, either to signify the Term, after which the Seller may have Power to break off the Bargain: or the Term, to which, and not longer, such a Liberty shall be granted. Where 'tis observable, that as this Power of redeeming is design'd in Favour of the Seller, who sometimes, upon urgent Occasions, is forc'd to part with that which he would not willingly lose for ever: So the fixing a Term to that Power, is in Favour of the Buyer; for it is to his Advantage, if he be not forc'd to quit the Possession of his Purchase in some short time, to be at length sure of the Perpetuity of it ^e. Sometimes too, when the Sale is made in Favour of the Seller, the Buyer is allow'd the liberty to bring back the Commodity whenever he pleases, or at such a certain time, and the Seller is oblig'd to refund the Money ^e. "The Emperor Marcus, in want of Money, having sold all his Imperial Furniture, afterwards gave leave to the Purchasers, for any of them, to bring back their Purchase, and receive their Money." *Jul. Capitol.*

Another more easy sort of Redemption, is what they call *Jus recipiendi*, or, the Privilege of the

first Refusal, that is, if the Buyer be hereafter dispos'd to part with the Commodity, ¹⁰ he must let the Seller have the first Refusal at the same Rate he would sell it to another. In many Cases certain Persons pretend to this Privilege by Law; as the Landlord in ¹¹ the Sale of his Tenant's Stock, the Creditor in his ¹² Debtor's Goods, the Neighbour ¹³ in the Purchase of a neighbouring Farm, ¹⁴ any Member in a Thing that belongs to the Society, and the next of Kin, in the ¹⁵ Goods of their Relations, which is peculiarly call'd *Retrañtus Gentilitius*, or the Family Privilege ¹⁶.

Usual too it is, at the selling of Land, to except one Spot, and the Use of it; as Prodigals, when they sell their Estates, do sometimes reserve a Title to as much as may serve for their Grave, to which many think *Virgil* alludes, *Ecl.* 3. v. 104, 105.

*Dic quibus in terris, & eris mihi magnus Apollo,
Tres pateat cæli spatium non amplius ulcus.*

Tell where the Round of Heaven, which all contains,
To three short Ells on Earth our Signat' retains.
Tell that, and rise *Apollo* for thy Pains.

Thus *Menius*, when he sold his House to the Censors for a *Basilicon*, reserved the Right of one Pillar to build upon, that from thence he and his Posterity might see the *Gladiators* that used to fight in the *Forum* ^f.

What the Divine Law prescribes about Redemption, may be read in *Lev.* xxv. 13, &c. &c. The ¹⁷ Reason of which Injunctions was taken from the particular Constitution of that Commonwealth founded by *Moses*; for his Design was that an equal Degree of Liberty should flourish amongst them; to which End it was necessary to hinder any from engrossing to themselves so much Land,

⁶ Or rather we run no Hazard here, whereas the other way there is great Hazard.

⁷ *Retrañtus*, seu pactum de Retrovendendo, as the Lawyers speak, and our Author terms it. *Retrañtus* comes of the Word *ret-ahere*, which according to the Roman Lawyers signifies, to resume, what has been alienated. See the *Digests*, lib. 50. tit. 8. *De adm. nistrat. rer. ad Cicil. pertinentiam*. Leg. 9. § 1. The Custom of Redeeming a Thing sold, allowed by the Law, is called a Legal Retrañting, but that which is done by the Agreement of Parties is a Conventional Retrañting. Some think this has a near Relation to a Bargain of Pawn. See Mr. THOMASIU'S Discourse, Intituled, *De usu pratico accuratæ distinctionis inter emptionem cum pacto de Retrovendendo, & Contractum Pignoratitium*. Printed at *Hall*, in 1707.

⁸ So the *Code* speaks, "Si fundum parentes tui eâ lege vendiderunt; ut sine ipsi, five hæredes eorum emptori pretium quantumcunque, vel intra certa tempora obtulissent, restitueretur; teque parato satisfacere conditioni dictæ, hæres emptoris non pareret, ut contractus fides servetur, actio præscriptis verbis, vel ex vendito tibi dabitur." *Cod. lib. 4. tit. 54. De pactis inter empt. & venditores compositis*. Leg. 2.

⁹ The Words of the *Digest* are, *Si convenit, ut res quæ venit, si intra certum tempus displicisset, redderetur, ex empto actio est, &c.* *Digest. lib. 18. tit. 5. De rescindenda vendit. &c.* Leg. 6. See tit. 1. *De contrah. empt.* Leg. 3. & lib. 21. tit. 1. *De Edictis edicto, &c.* Leg. 31. § 22.

¹⁰ The Laws is, "Qui fundum vendidit, ut eum certâ mercede conductum ipse habeat; vel si vendat, non alii, sed sibi distrahat, vel simile aliquid paciscatur: ad complendum id, quod pepigerunt, ex vendito agere poterit." *Digest. lib. 18. tit. 1. De contrah. Empt.* Leg. 75.

¹¹ So the *Code* has it, *Et si quidem hoc dominus dare voluerit, & tantam præstare quantitatem, quantum ipse revera emphyteuta ab alio recipere potest, ipsum dominum omnimodo hæc comparare.* *Cod. lib. 4. tit. 66. De jure emphyt.* Leg. 3.

¹² In this last Case, the Creditor, to whom much is due, must be preferred according to the Roman Law. *Cum bona veniant debitoris, in comparationem extranei, & ejus qui creditor cognatusve sit, potior habetur creditor cognatusve: magis tamen creditor quam cognatus; & inter creditores potior is, cui major pecunia debetur.* *Digest. lib. 42. tit. 5. De rebus Auctoritate Judic. possid.* &c. Leg. 16.

¹³ See the Greek Novel of *Romanus* called *Lecapene*, which is abridg'd by *Cajacius*, *Feud. lib. 5. tit. 15.* By a Law of the *Code* the Inhabitants of a principal City could not sell their Possessions to any, but to one of the same City, *Lib. 11. tit. 55. N. licere habitatoribus Metrocomiæ, loca sua ad extraneam transferre.*

¹⁴ As for Example, those that are Legatees in common. See *Cod. lib. 8. tit. 54. De Donationibus*, Leg. 34. §. 2. & *Fiduciæ Lib. 5. tit. 14. &c.*

¹⁵ See the Law quoted above Note 12. of this §. and *Digest lib. 4. tit. 3. De Minoribus*, &c. Leg. 35. & *lib. 10. tit. 1. De contrahend. Emptione*. Leg. 62. *Princ.*

¹⁶ Here the Quotation out of the Law of *Moses*, and what our Author says upon it, ought to be placed.

¹⁷ For, says our Author lower, in a Parenthesis, I do not approve the Reason alledged by *Grotius* upon v. 23. that it is more easy to find a Dwelling and Subsistence. But *Grotius* explains here only how one might sell the Fee-simple of an House in a City, and not a Country House.

^a *Vid. Lib. 18. tit. 3. leg. 5. D. de lege Commissor: de pactis inter empt. & vendit. compositis*, leg. 2.

^b *Vid. L. 2. 3. D. d. t.*

^c *Vid. Liv. l. 31. c. 13.*

^c *Retrañtus.*

^d *Fid. C. lib. 4. t. 50.*

^e *ad hæcisse creditur. Alcon. Ped. in Divin. Cicer. c. 16. p. 328. Ed. Græc.*

^f *Unde Menianorum nomen ejusmodi projectis*

^g Upon which place see Mr. *Le Clerc*.

Land, as might make others, divested of their Patrimony, dependent on them; for so by degrees, Lordship and¹⁸ Tyranny might be introduc'd. The same End did^a *Lycurgus* propose to himself, when he divided the Territories of *Sparta* into 39000 Parts: which he distributed among the People by Lot; and forbid them to increase, diminish, subdivide, or sell. Among the *Lacedemonians* it was held unlawful and dishonourable to sell Land that had been a long time in the Family. *Heracl. de Pol.*

Besides, there is another common way of Selling, which they call *per aversionem*, where Things of different Value are not rated separately, but sold together.

Lastly, Things are sometimes so sold, as to return again to the *Seller* after a certain Term of Years, without his being oblig'd to refund the Price. Thus, in *England* Gentlemen sell their Ground for 30, or 35 Years, upon Condition that the *Buyer* shall build upon it after such a particular manner; when sort of Contract is something like that of *Renting*.

V. As for any other Obligations between the *Buyer* and the *Seller*, they easily appear from the Nature

of the Contract, and the additional Pacts. The *Buyer* is oblig'd to pay the *Price* agreed for at the time appointed, and to give the Receiver a good Title to it, I mean, 'to pay him with his own, and not another Man's Money^b. And if he pays another Man's Money, and it happens to be challeng'd by the *Owner*, he is oblig'd to pay it over again, and as much more as the Receiver loses, by having it thus challeng'd. As for the *Seller*, he is oblig'd^c to deliver the Goods bargain'd for with such Qualities as the common Nature of Contracts, or^d the particular Agreement requires, and that too at the time appointed^e. And if, between the Completion of the Bargain, and the Delivery of the Goods, the *Seller* should repent, and be desirous to return the Money with Amends, 'the *Buyer* nevertheless is not oblig'd to accept it; but may force him to stand to his Bargain, unless in point of good Nature he be otherwise persuaded; but if, through the Default and Knavery of the *Seller*, the Delivery cannot be made, the Money together^f with Damages is to be restored. What the Law is, when the *Seller* is not in the Fault, we have said above.

¹⁸ Our Author here relates a Sale in gross, and chiefly, *per aversionem*, as the Lawyers speak; but, besides that he speaks something of it in the beginning of § 6. we may see that 'tis not fitly placed here, where he treats, not of the divers Sorts of Sales, but only of the Terms and Conditions added to a Bargain and Sale, whether by Wholesale or Retail. Wherefore I have been bold to leave out this short Period, equally superfluous, and fit to confound our Understandings.

^a *Pleat. in Vitul.* ^b *Vid. D. lib. 19. t. 1. leg. 11. f. 2. & C. lib. 49. leg. 7. & leg. 13. f. 19. D. ubi sup.* ^c *Vid. l. 11. f. 1, &c. D. de A. empt.*

MR. BARB. NOTES on §. v.

¹ *Emptor autem nummus traditoris facere cogitur.* Digest. lib. 19. tit. 1. De actionibus empti, & venditi, Leg. 11. § 2. See Cod. lib. 4. tit. 49. Leg. 7. For want of Payment at the time, the Buyer ought to pay the Interest of his Money. *Ex vendito alicui venditori competit ad ea consequenda, quae ei ab emptore prestari oportet. Veniant autem in hoc iudicium infra scripta: In primis pretium, quanti res venit: item usurae pretii post diem traditionis: Nam cum re emptor fruatur, aequissimum est eum usuras pretii pendere.* Dig. Lib. 13. § 19. 20.

² The Interpreters of the *Roman Law* do not agree here; for some think the same thing ought to be delivered, if it be in our Power; but others affirm, that if we do not put it into the hands of the Buyer, yet he is discharged from paying Damages or Interest. See *Vinnius* upon the *Institutes*, lib. 3. tit. 24. *prin.* where he recites and confutes, at the same time, the Reasons of the last. Mr. *Van Eck* nevertheless takes their Part, but observes, at the same time, in his *Principia Juris Civilis*, under the Title *De Actionibus Empti & Venditi*, § 9. "That this Case ought not to give any great Trouble to the Judges or Lawyers, because the Damages and Interests may surpass the Value of the Thing itself; and in so doing it becomes very hard to keep what "is sold up to the Price it was sold for." Mr. *Thomasius* says, "That he fell into this Mistake by misunderstanding some Laws, "where 'tis said, that the Seller, for want of delivering his Goods, ought to bear the Loss and Interest." These Laws suppose that the Thing sold either can't be deliver'd, because it is perished, or is grown worse by the Seller's Fault, or that it ought not to be delivered, because the Buyer has no occasion for it; as when Provisions are not brought in at the Time agreed on, and so the Buyer has no way but to be contented with reasonable Damages. Whereupon some imagine, tho' improperly, that a Seller has his Choice, either to deliver the Goods, or pay Damages and Costs. See the Discourse, *De Pretio affectionis*. Sec. c. 2. §. 8. However this be, this Choice is directly contrary to the natural Intention of a Bargain and Sale, and very hurtful to Commerce.

³ The Law is, *Ex empto actione is, qui emit, utitur; & in primis sciendum est, in hoc iudicio id demum deduci, quod praestari convenit. Cum enim sit bonae fidei iudicium, nihil magis bonae fidei convenit, quam id praestari, quod inter contrahentes actum est: Quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt hujus iudicii potestate. Et imprimis ipsam rem praestare venditorum oportet, id est, tradere: Quae res, si quidem dominus fuit venditor, facit & emptorem dominam. Si non fuit, tantum evictionis nomine venditorem obligat; si modo pretium est numeratum, aut eo nomine satisfaciunt.* Digest. Lib. 19. tit. 1. § 12.

⁴ On the other Side, the Buyer can't, unless the Seller consent to it, avoid taking the Thing sold, and pay for it. This Consent is so necessary by the *Roman Law*, that unless we will pay double, or can obtain a Rescript from the Emperor, the other Contractor can't be oblig'd against his Will, to forsake his Bargain, and neither the Treasury nor Soldiers have any Privilege here. *De contractu venditionis & Emptionis jure perfecto, alterutro invito, nullo recedi tempore bona fides patitur; nec ex Rescriptis nostris, quo jure filium nostrum uti, sepe constitutum est, ----- Quamvis enim duplum afferas pretium emptori, tamen invitus ad rescindendam venditionem urgeri non debet.* Cod. Lib. 4. tit. 44. De rescind. Vendit. Leg. 3 & 6. See Leg. 7. which is a Rescript directed to *A. A. Maraculus*, and other Soldiers. But as sometimes Pledges must be given (a Circumstance which our Author ought not to forget) it is good to know what Liab'd they produce. Mr. *Thomasius* hath published a Discourse on this Subject in 1702, quoted once before, and which is reduced to this in general: He says, "That it belongs to the Seller alone to give Earnest commonly, "and this is at the same Time a Proof that the Bargain is made, and a Security of executing the Engagements entred into. As to the last, either they oblige to the Penalty imposed in case of Delay, either in the Seller, who delivers not his Goods at the Time, or in the Buyer, who pays not at the Term fixed; insomuch that the one loses his Earnest, and the other pays double, and yet is no less bound to stand to his Bargain; or they leave a liberty to recant, so that a Man is discharged from all Losses, and this is presumed in a doubtful Case, or when the Parties are otherwise agreed. But if the Bargain be broke by Consent, he that has received the Earnest is oblig'd to restore it: But if the Engagements on both Sides be performed, the Earnest must be restored or deducted in the Payment. Mr. *Thomasius* looks upon it as certain, that Earnest is never given but when the Market is ended, and the Bargain made; which he shows as to agree well with the Principles of the *Roman Law*, altho' the Interpreters of it usually draw other Conclusions from it. I shall content myself to recite what is said in the *Institutes*: *Nam quod arrha nomine datur, argumentum est emptoris & venditoris contractus ----- Ita tamen impud. eis (emptori & venditori) recedere conceditur, nisi jure arrharum nomine aliquid fuerit datum. Hec enim subsequitur, sive in scriptis, sive sine scriptis conditis celebrata est. Is qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit: Si vero venditor, duplum restituere compellitur, licet super arrha nihil expresserit.* Lib. 3. tit. 24. princip.

⁵ The Words of the *Digests* are, *Nec videtur abesse [dolos malus] si per eum factum est aut fiet, quo minus fundum emptor possidet. Erit ergo ex empto actio, non ut venditor vacuum possessionem tradat; cum multis modis accidere poterit, ut tradere possit, sed ut ----- dolus malus ejus aestimaretur.* Dig. lib. 18. tit. 1. De contr. empt. Leg. 68. § 2.

6 But if a Man *sells* the same Thing to Two, and has as yet deliver'd it to neither, without doubt the first Bargain ought to take place; and much rather, if the Thing has been already deliver'd to him. But yet, in this case, the knavish *Seller* ought to make Satisfaction to the last *Purchaser*, for whatsoever Loss he is at by being thus disappointed. But supposing the Delivery to have been made to the *last*, he, upon the Grounds of the Civil Law, will be prefer'd to the *other*: For he receiv'd the Thing of the *Owner* upon a just Title; and the *first* can have no Action against him; not a real one, for he was not yet Master of the Thing; nor a personal, for no Intercourse had pass'd between them; neither can the *Seller* have any Pretence to revoke the Bargain ^a ^b. *Grotius* ^c too, in this Case, prefers the Title of the last, *Because by the Delivery of the Thing, the Buyer makes over all his Right, which is not done by promising to sell it.* But here *Grotius* does not seem to be consistent with himself; indeed the Promise to *sell* is not *selling*, but yet he had asserted, that the Property is made over at the very Moment of Contract, altho' the Thing be not delivered: And therefore after such a Sale, no Right can remain in the *Seller*, any further than what tends to the Delivery of the Thing into the Hands of the *Buyer*; and consequently whatsoever Bargain the *Seller* concludes afterwards, it is null, and cannot stand in Prejudice of him, who before has got a Right to it. And this being granted, I question whether the favourable Plea of Possession, thus unjustly acquired, can always hurt the Title of the first *Purchaser*. Moreover, since a Man does not lose his Right in a Thing by being deprived of the Possession of it, and since a Man may honestly come by the Possession of another's Goods; if therefore such a Possessor *sells* a Thing to a third Person, he does not extinguish the Right of the *Owner*; nor can he transfer to another a better Title than ⁷ he had himself. And therefore, although the Design of the *Buyer* be to acquire a Property in the Thing, yet since the Thing, which is thus sold, either ignorantly, or designedly, is another Man's, it is as much as can be expected, if the *Seller* ⁸ gives the *Buyer* free Possession, and puts him in Power of using it, and bears him harmless, ⁹ if his Title be disputed ^d.

VI. There is also a peculiar sort of Sale, where the Purchase is no certain Thing, but *Hope* and *Expectation* only, on which, by Agreement of the Parties, a *Price* is laid. Nor is there ¹ any Default in

this sort of Sale, altho' afterward the Thing happens to be above, or below the Price. The same obtains at *Auctions*, and where Things of different *Prices* are sold altogether ² at a Lump; for all such sort of Bargains have something ³ of Chance in them ^e: Such as was the Cast of a Net ^f, bought of the *Milesians* Fishermen, which occasioned a famous Suit between the Fishermen and the *Buyer* of the Cast; for they having drawn out a golden Table in their Net, the *Buyer* claim'd it as his, for that he had bought whatever should be taken, or the Fortune of the Cast: whereas the Fishermen, on the other side, contend'd that the Bargain had regard only to what Fish should be caught. And indeed they seem to have been in the right, for in explaining any Contract we ought to consider the Intent of the Contractors; and here 'tis evident, they had no Thoughts of Gold, but of Fish only; nor does it make for the *Buyer*, that it was a Purchase of Chance; for that was only design'd to extend to the Quantity of Fish, and not to any Thing else, which by great Fortune might come to the Net. And therefore the Table ought to be look'd upon as a Treasure found by Chance.

As for the Decision of the Oracle, which adjudg'd it to the wisest, that plainly favour'd of the ⁴ crafty Covetousness of the Priests, who there by bid fair for the procuring such a glorious Prey to themselves: For what Mortal would arrogate to himself the Title of the *Wiseest Man*? According to that of *Sophoc.* *Antigone*, 257. Edit. *H. Steph.* All Priests are greedy of Gain. See *Val. Max.* l. iv. c. 1. f. 7. *inter externa.* Mornac. *add.* l. xii. *D. de Act. emp.* &c.

VII. In this place something may be expected to be said concerning *Monopolies*, *Whether any, or all of them be against the Law of Nature, or no?* For 'tis an odious Name, and the Laws of many States brand it grievously. But here we must exempt several Things from the invidious Title of *Monopolies*, which indeed are not such. For sure 'tis prohibited by no Law, nor can it come under the Name of a *Monopoly*, if only one Man, in any Town, has got the way of making some sort of Manufacture, or if one Man only has got such a sort of Grain in his Ground, or if some certain Commodity be the Produce only of one particular Country. "Since there is no such Produce of *Alume* in any other Country, which yet is of great Use, it is not to be wonder'd at, that the *Lipareans* have the Monopoly of it, and setting what Prices they please upon it, make vast

" Re-

⁶ So the Code tells us, *Quotiens duobus in solidum praedium distrabitur iure: manifesti juris est, cum cui priori traditum est, in detinendo dominio esse potiore.* Cod. lib. 3. tit. 32. De rei vindicatione, Leg. 15. See *Digest.* lib. 6. tit. 2. De publicana in rem actione, Leg. 9. § 4.

⁷ The Words of the *Digests* are. *Traditio nihil amplius transferre debet, vel potest, ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert: Si non habuit, ad eum qui accipit nihil transfert.* *Digest.* lib. 41. tit. 1. De acquir. rerum Domin. Leg. 20.

⁸ *Sive tota res evincatur, sive pars, habet regressum emptor in venditorem.* *Digest.* lib. 21. tit. 2. De evictionibus, &c.

⁹ *Quod sine ullius damno pars, quae putatur esse vendentis, per longam possessionem ad emptorem transit.* *Digests* lib. 41. tit. 2. De acquir. & amit. Possess. Leg. 43. princ.

Mr. BARB. NOTES on § VI.

¹ Tho' there comes nothing of it: *Aliquando tamen, & sine re venditio intelligitur, veluti cum quasi alca emitur: quod fit, cum captus piscium, vel avium, vel missilium emitur. Emptio enim contrahitur, etiamsi nihil inciderit: quia spei emptio est.* *Digests* lib. 18. De contrah. empt. Leg. 8. § 1.

² *Per averfionem*, an Expression of the Roman Law: As for Example, in Law 62. § 2. of the Title last mentioned, *Res in averfione emptae, si non dolo venditoris factum fit, ad periculum emptoris pertinet, etiamsi res assignata non fit.* See *Cujas Observ.* 8. 15.

³ *Veluti cum futurum factum retis à Piscatore emittitur, aut indaginem plagis positus à venatore, aut pantheram ab aucupe.* *Dig.* lib. 19. tit. 1. De actionibus empti & venditi. Leg. 11. § 18.

⁴ The Greek is, τὸ μάκιστος γὰρ πρὶν φαίεσθαι γένεσθαι. *Soph.* in *Antigon.* p. 257. Edit. *H. Steph.* See Mr. *Vandale*, in his *Treatise De Oraculis, & de Idololatria & superstitione*, or Mr. *Fontenelles* *History of Oracles*.

^a *Adl.* lib. 6. t. 2. l. 9. f. 4. *D. de publicana in rem actione.* ^b *Adl.* C. lib. 3. t. 32. *De rei vin lic.* leg. 15. ^c *Adl.* d. l. f. 15. ^d *Adl.* *Plant. Perf. Act.* 4. Sc. 4. ^e *Vid.* l. 39. t. 4. l. 9. princ. *D. de Publicanis.* But yet add *Plin.* l. 8. Ep. 2. See *Sueton.* in *August.* c. 75.

^f Concerning which see lib. 18. t. 1. l. 8. *D. de contrah. empt.* l. 11. f. 18. l. 12. *De ad. empt.* ^g *Plut.* in *Solon*, p. 80. Edit. *Wech.* says between the Fishermen of *Cos*, and a *Milesian* Stranger, *Dio. Laert.* lib. 1. t. 23. between some young Men of *Ionia*, and the *Milesian* Fishermen in *Theleto*.

“ Returns. *Diod. Sic. l. v. c. 10. p. 293. Ed. Rhodom.* For *Monopolies*, as such, imply that others too would sell the same, did not one Man ingross the whole Trade to himself. And therefore, he who alone brings a Commodity from a foreign Country, cannot be said to set up a *Monopoly*, provided he does not hinder others from importing the same. Nor is it unlawful for any Nation, that abounds in one particular Commodity, to bargain with another Nation to let them only have the Trade of it ^a, for any one may sell his own when and to whom he pleases; indeed when we happen to have a Superfluity of what another cannot be without, then the Law of Humanity requires, that we should not make such a Bargain to the Prejudice of others. But if a Man, without contracting with the *Owners*, should of his own Head aim at a *Monopoly*, by hindring some by Force, and others by clandestine Contrivances, from coming to the same Place, and by that means lay a Necessity upon all others to buy of him, it is plain that he offends against the Law of Humanity, and impudently breaks in upon the Liberty of the rest.

As for *Monopolies* among private Citizens, it cannot be accounted illegal, or oppressive, that every one is not allowed to set up what Trade he pleases, but those only who have gain'd a right by the Charter of the Corporation; thus in most Cities of *Europe* no Man can open a Shop, or betake himself to any particular Trade, but he who has served some time an Apprenticeship at it, for it is not enough that he is expert in it.

Besides, the Magistrate may give one Man, or one Company of Men the sole Power of Importing certain Commodities from certain Places, exclusive of all others. And there may be several good Reasons for the granting such a Privilege. For it requires vast Charges to settle a Trade with a very remote Nation, and perhaps after great Expenses it may not succeed at all; and therefore the Authors of such a Commerce ought in reason to have Security, that others may not intercept *gratis* what they have establish'd at their great Risque and Charge; and besides such privileg'd Companies are better able to assist the Publick with their Riches, upon any Emergencies, than private Persons: By this means too a greater Trade may be carried on, and with better Credit: Nor is this Method liable to so many Tricks and Shifts, since the Gain comes into the common Bank to be divided proportionably amongst them all. But as for these Privileges, a prudent Government will not grant 'em, but where the Commodities are imported from remote Places, and with great Hazard; and which do not so much concern

the Necessaries as the Superfluities of Life. Nor even then must the Merchants be allowed to enhance the Price of those Things at their Pleasure; for it is against Reason to give a few an opportunity of scraping up exorbitant Riches out of the Fortunes of the rest, when the Publick gets nothing by it.

Lastly, It seems unjust that Tradesmen, or Farmers should be forced to sell their Manufactures, or the Produce of their Ground to certain People only, who sell the same to others by Retail; for by this Means the Riches of the State may come into the Hands of a few, to the Detriment and Oppression of the rest.

I cannot but take notice, by the way, that *Grotius* ^a brings the Example of *Joseph*, when he was Viceroy of *Egypt*, in Justification of *Monopolies*; tho' that Example is not much to the Purpose: For neither did the King hinder others from buying up the Corn in the Years of Plenty, nor any from selling, who had too much: Neither had the *Alexandrians* in *Strabo* ^b the *Monopoly* of *Indian* and *Ethiopic* Commodities from any Privilege, but from the Situation of the Place.

But a *Monopoly*, properly so call'd, as having the Force of a Privilege, cannot be set on foot by private Men: For how can a private Man justify his hindring others from meddling with their share of Commodity, when he has no Command over, nor can lawfully use Force against them? and therefore the *Monopolies* of private Men are spurious and illegal, and do not depend upon Rights and Privileges, but are generally carried on by clandestine Frauds and Combinations: As if some few by a Trick should debar others from Trading to those Places from whence they have their Commodities, or should hinder those that have them from bringing them to Market: Or, if they should enter into a Combination to buy up all such sort of Commodities, and then stifle them, that so the Scarcity may enhance the Price. Against whom may be apply'd that of *Apollonius Tyanicus* in *Philostr.* l. i. c. 12. in the Beginning ². “ The Earth is the Mother of all, for she is just; but you being unjust have made her only “ a Mother to your selves.” The Knavery of such ought as much to be corrected, as those who ^c enter into Compact to raise extravagantly the Prices of other Things, by agreeing privately to sell nothing under such a Rate: Which piece of Roguery Labourers and Workmen are sometimes guilty of ^d.

I cannot discommend the Sagacity of *Thales*, who rented all the Olive-yards, having foreseen by his Skill in *Astrology*, that there would be great Plenty of *Olives* that Year ^e ^f.

MR. BARB. NOTES on § VII.

¹ See above *Lib. 3. c. 3. § 6. Et lib. 4. c. 5. § 10.*

² The Greek is, Ἡ γῆ πάντων μητέρα, δικαιοτατός τε ἔστιν ἡμῶν ὅτι ἀδικίας ὄντων, παροίκαται ἡμῶν ἀποφύμνον μὴδέα, *Philostrat. de vita Apoll. Tyan. lib. 1. c. 15. in fin. Ed. Olear.*

^a L. 2. c. 12. f. 16.

^b L. 17. p. 549. Ed. Gen. Casaub.

^c Ut in Velabro Olearii de quo vide Erasim. Adag.

^d Add. *Plin. l. 8. c. 37. de crinaceo, L. un. C. de Monopol. l. 6. D. de extraord. crim. and Cujacius Obs. 10. 19.* • *Arist. Pol. l. 1. c. 7. (11) Diog. Laert. l. 1. f. 26.*

^f Vid. *Cicero. de Divinitat. l. 1. c. 49.*

CHAP. VI.

Of Renting and Hiring.

- I. What Things Hiring hath common with Buying.
- II. The certain Use of a Thing, if it be intercepted, tends to the Loss of the Lessor.
- III. The uncertain regularly to the Loss of the Lessee.
- IV. Whether the same Work may be Let to many together.

Renting and Hiring^a, whereby the Use of a Thing, or Labour is granted for a certain Rate^b, bears some Affinity to Buying and Selling, and may be brought under almost the same Rules^c. For the Rent or Wages answers the Price; and the Use of the Thing or the Labour answers the Property which is acquired by Buying; and as the Contract of Buying and Selling is compleated, when the Price is agreed upon, so is this of Renting and Hiring, when the Parties are agreed about the Rent and Wages^d. And as a Thing sells the cheaper, when sold in Favour of the Seller, and the dearer when in Favour of the Buyer; so in Renting and Hiring, if a Man is at a Loss for a Tenant, or wants Work, he is contented with small Rent or Wages; but if his Land or Work is sought after, he may demand much greater. Lastly, as in Buying and Selling 'tis generally the Seller's Business to name the Price^e, and the Buyer ultimately resolves upon it; so is it also in Renting and Hiring^f. "Whose Business is it to assign the Price? He who delivers the Thing, or he that receives it? He who delivers it seems to leave it to the other: As they say Protogoras used to do, for whatever he taught, he left it to the School to set a Value upon what he learn'd, and was paid accordingly." *Arist. Nic. l. ix. c. 1.* Tho' concerning this Custom of Protogoras he himself thus speaks in *Pluto*, in the Dialogue that bears his Name. "My way is this, when I have taught any one, if he pleases, he gives me as much Money as I demand; if not I bring him into the Temple, and make him declare upon Oath what he thinks my Teaching is worth, and so much I receive." But as he who buys any Commodity, without a-

greeing upon the Price, is suppos'd to oblige himself to the common Price of it; so in this Contract, if Terms are not agreed upon, it is left to the Equity of the Person Renting or Hiring, who is nevertheless oblig'd to give as much as is usually given^g. That way of paying for a Work of Pleasure, which *Aristotle*^h mentions, is a perfect Cavil. *A certain Person promis'd a Musician the better he play'd, the more he should be rewarded. The next Day, when the Musician claim'd his Promise, he reply'd that he had repay'd Pleasure with Pleasure*ⁱ. But *Aristotle* was right in saying, *He had as good received nothing, since he did not receive that which he expected. Rectius similem cavillationem adhibuit Bochoris apud Plutarchum, Demetrio, pag. 901. D. Quum quidam amaret Thonidem meretricem, poposcit illa ingentem pecunie summam. Adolescens inde, cum in somnis suis visus esset cum illa concumbere, liberatus est libidine. Ob id mercedem ab illo infisit Thonis judicio exigere. Cognita causa jussit Bochoris illi quantum pestulaverat Thonis argenti in vas numeratum huc atque illuc manu jacture, ac meretricem umbra frui. Quanquam sententiam hanc arguit Lamia iniquitatis. Neque enim, inquit, ademit meretrici umbra pecunie cupiditatem, somnium vero amore adolescentem expedivit.* In this Contract also, if any Damage happens to the Labourer, whilst he is about his Work^j, 'tis his own Loss, and not the Hirer's^k. Among the *Ephesians* there was a remarkable Law concerning Architects, that if the Charge in Building amounted to a fourth Part more than what the Architect had computed it, he was bound to make it good out of his own Pocket^l.

Mr. BARB. NOTES on Chap. VI. § I.

¹ The Words are, *Locatio & conductio proxima est emptioni & venditioni, utriusque juris regulis consistit. Nam ut emptio & venditio ita contrahitur, si de pretio convenerit, sic & locatio & conductio ita contrahi intelligitur, si merces constituta sit: Et competit locatori locati actio, conductori vero conducti. Instit. Lib. 3. tit. 25. Quæri solet de locatione & conductione, si forte rem aliquam utendam vel fruendam tibi aliquis detulit. Ibid. § 2. At cum de ut facias, si tale sit factum, quod locari solet, puta ut tabulam pingas, pecunia data, locatio erit. Digest. lib. 19. tit. 5. De Præscriptis verbis, &c. Leg. 5. § 2. See more of this Matter in Mr. DAUMAT'S Civil Laws in their Natural Order. Part. 1. lib. 1. tit. 4.*

² The Contract of Hiring may be renewed by a tacit hiring anew, when the Time being expired, the Tenant continues to enjoy the Thing hired without any Opposition from the Lessor; for, in this Case, both of them are supposed to enlarge the Contract for the same Time, and on the same Conditions. *Qui impleto tempore conductionis remansit in conductione, reconduxit præsumitur. ----- ipso jure, sed non in perpetuis annis. Digest. lib. 19. tit. 2. Locati, &c.*

³ *Plautus's Latin is, § A. In illa sic pretium. DO. Tua merx est, tua indicatio est. And Aristotle's Greek is, Ὅ γὰρ αἰσίο- πος ὁ ἄλλοις ὄντιν τῶν ἐπιτην (τῶ ἀρχαίων)*

⁴ Here, as in a Matter of Sale, every one may make his Market as advantageous as possible for himself. *Quemadmodum in emendo & vendendo naturaliter concessum est, quod plaris sit minoris emere; quod minoris sit plaris vendere, & ita in locum se circumferre, ita in locati verbis & conductionis juris est. Dig. lib. 19. tit. 2. Locat. & Cond. Leg. 22. § 3.*

⁵ This was done by *Dionysius* the Tyrant, to one that played on the Flute to him, to whom he had promised a great Reward.

⁶ *Aristotle's Greek is, Ὅταν γὰρ τῶ ἄλλοις γινώσκων, ἔταν δ' ἰσίοι μὴ τυχεύων.*

⁷ For Example, If a Smith, in working for us, break his Hammer or Anvil, we are not bound to pay for them. *Nam etsi Faber inciderit aut malleum fraxerit, non imputaretur ei, qui locaverit opus. Digest. lib. 14. tit. 2. De Lege Rhodiâ, &c. Leg. 2. § 1.* In like manner, if a Transport Ship, being shattered by a fierce Tempest, is forced to put in at some Place to amend any Defect, the Expence must fall on the Owner of the Vessel, and not on the Passengers. *Naves adversâ tempestate depressæ, cum fulminibus deultis armamentis & arbore, & antennâ, Hippomen delata est, ibique tumultuariis armamentis ad præsens comparatis Offitium navigavit, & onus integrum pertulit: Quæsitum est an hi, quorum onus fuit, navis pro damno contære debeant? Respondit, Non achere. Hic enim sanctus infraen le magis navis, quam conservandam mercium gratia factus est. Ib. Leg. 6.*

^a *Locatio & Conductio.* ^b *V. Instit. ibid. & l. 3. t. 25. princ.* ^c *V. Instit. ibid. & l. 19. t. 2. D. locati.* Which yet how it may be usefully prolong'd. *V. l. 13. f. 11. l. 14. D. b. t.* ^d *Plaut. Pers. Act. 4. Sc. 4. v. 37.* "Tis your Ware, you ought to set the Price." ^e See *Mit. 20. 4. 7.* ^f *Nicom. 1.9. c. 1. V. l. & Plut. de avatione, p. 41. D. & de fortuna Alexandri, p. 333, 334.* ^g *Vid. lib. 14. t. 2. l. 2. t. 2. l. 2. f. 1. l. 6. D. de lege Rhodiâ.* ^h *Vid. Vitzuz. l. 10. princ.*

II. But

II. But if a Man *rents* a Thing, and any Accident intercepts the Use of it, or renders it worse, *Ought the Loss to be the Landlord's, or the Tenant's?* To which some answer, in short, that if the Thing itself perishes¹, the Loss belongs to the Landlord; but as for Barrenness and other Mischances, which intercept only the Use of it, they are, unless provided against by Covenant, generally at the Loss of the *Tenant*: And the Landlord may justly demand the full *Rent* agreed upon, although perhaps the *Tenant* has not made so much of his Land as was expected. For, the Landlord gave the *Tenant* Power to make the best of it; and the Hopes of the Produce, when they made the Bargain, was really worth so much; and therefore since *he* made good his Part, 'tis but fair that the *other* should also make good his.

But to canvas this Question more nicely; 'tis manifest, ² when the Thing perishes without the *Tenant's* Fault, he is not oblig'd to make it good, but from that time his *Rent* ceases. For the Title to the whole *Rent* is founded upon Presumption that the Thing be in Being, during the Time included in the Contract; but if the Thing ceases

to be, the Contract ceases also³. And upon this is founded the Law of *Sesstris* an Egyptian King: *That if the Violence of the River should wash away any part of the Land, the Tenant should be proportionably abated in his Rent*^b. Again, we must distinguish between those things, where the Landlord may and ought to assign⁴ a certain and determin'd Use; and those, whose Use, as to Quantity, is uncertain, and depends upon Chance, and which, upon that Account, neither can, nor ought to be determin'd. To instance in the former sort; I hire a House to dwell in, which my Landlord is oblig'd to make habitable, and therefore if the Violence of a Storm, or my Neighbour's Fire should intercept the Use of it⁵, I may fairly withhold in Proportion so much of the *Rent*. For the *Rent* was determin'd for the Use, which the House, in the Condition it was in at the making of the Bargain, was capable of affording during the whole Time I had hired it for; the Use being lessened without any Fault of mine, the *Rent* ought to be lessened also, and if the House be immediately repaired without any extraordinary inconvenience, or Loss to me^c. And so, if

M. BARB. NOTES on § II.

¹ This is the Opinion of GROTIUS, lib. 2. c. 12. § 18. where, to take notice by the Bye, *Græcæ* has been very badly. *Structures non no perit*; for he makes that great Man say, That if a Thing be bought, and once deliver'd to the Buyer, it must be accounted to him who is actually the Owner of it, and not his whose it was. A strange thing! as it is here questioned it! He need not be very acute to see, that GROTIUS speaks, on the contrary, of a Thing sold, but not deliver'd; and nevertheless, according to what is said in the beginning of § 15, is to be at the Hazard and Peril of the Buyer, whose Loss it makes parallel with that of Fruits, which being sold, and entered, as we may say, delivered to the Farmer, yet the Loss belongs to the Owner: Even so a Thing sold is supposed to be delivered to the Buyer, altho' it remains some time in the Seller's Hands.

² The Words of the *Digests* are, *Si ager terræ motu corruperit, ut nunquam sit, damno domini esse; operere enim agrum præstare conductori, ut frui possit.* Dig. lib. 19. tit. 2. locati & cond. Leg. 15. § 2. *Si casus latrones citra tuam fraudem abegisse probari potest, judicio locati causeri præstare non cogeris: atque temporis, quod insecutum est, mercede ut indebitas recuperabis.* Ibid. Leg. 9. § 4.

³ As the Author applies himself only to treat of the Question about Accidents, that happen to the Thing hired, and does only by the Bye, and in an imperfect manner, shew the Engagements of him who lets his Goods or Labour, I shall supply this Defect in a few Words. I. He then that lets out his Estate, ought, 1. To put the Thing into a Condition to be serviceable for what it is hired, and for the Time fixed, as also in the Manner and Way agreed on. 2. To uphold it in that Condition, as long as it depends on him, and to that end, to be at all necessary Expenses, or reimburse the Tenant for them, at least, if he be not engaged by Contract to do them himself. See *Law*. 15. § 1. *Tit. locati, conducti*, quoted Note 5 below. *In conducto si quis, si conductor pro operâ aliquid necessario vel utiliter auxerit, vel ædificaverit, vel inlaturit, cum id non concernisset, ad recipienda ea quæ impendit cu conducto cum domino fundi experiri potest.* Ibid. Leg. 55. § 1. See also *Leg.* 61. of the same Title. 3. To leave the Thing to the Tenant, till the Time that 'tis hired for is expired, at least, if there happen no Case which may probably be expected, if it were foreseen; as, if the Master of an House hath need of it himself, or will make some necessary Repair, if the Tenant pays no Rent for a considerable Time, or pulls down the House, or useth it so that it may be feared he'll set it on Fire, or does in it, or suffers some unlawful Trade to be maintained. *Ædii, quar te conductum habere dicis, si pensionem domino in solidum solvisti, invitum te expelli non oportet, nisi propriis visibus Dominus eam necessariam esse probaverit, aut corrigere domum malaverit, aut tu male in re locati versata es.* Cod. lib. 4. tit. 65. De locato & conducto, Leg. 3. See also *Leg.* 15. & *Digest.* lib. 19. tit. 2. *Leg.* 30. *prin.* 35. 54. § 1. 56. 61. & *Nov.* 14. c. 1. A Sale, and in general every Alienation of Property, made in Favour of him who is not the Heir General, dissolves also the Contract of Hiring (see Mr. HARTWELL'S *Paræmia Jur. Germ.* lib. 1. c. 47.) but so that the Land sold, and those that represent him, are obliged to make good the Damages and Costs of the Tenant, if the Purchaser, for Example, or the Legatee, will use their Right. *Qui fundum fructuum, vel habitationem alicui locavit, si aliqua ex causa fructuum vel ædes vendat, curare debet, ut apud emptorem eadem pactione & colono frui, & inquilino habitare liceat, alioquin prohibitus is, aget eum eo ex conducto.* Digest. lib. 19. tit. 2. locati, &c. Leg. 35. § 1. See also *Col.* lib. 4. tit. 65. Leg. 9. *Qui fundum colendum in plures annos locaverat, decessit, & eum fundum legavit: Cassius negavit cogi posse colonum, ut eum fundum coleret, quia nihil hæredis interesset. Quod si colonus vellet colere, & ab eo, cui legatus esset fructus, prohiberetur, cum hæredæ actionem colonum habere, & hoc detrimentum ad hæredem pertinere, &c.* Digest. ibid. Leg. 32. See Mr. TITTIUS'S Observations on *Lauterbach*, 597, &c. Lastly, The Landlord ought to indemnify the Tenant for any Faults he suffers by reason of the Faults of the Thing hired, which he knew, or ought to have known. As for Example, if a Man hires Hogheads leaky, and loses his Wine by it. But 'tis not so, if a Man hires a Pasture, where there grow such Weeds as burst the Farmer's Cattle; for, in this Case, it is sufficient to demand no Rent, at least, if he prove a Mixture of good Grass with the Weeds. *Si quis solia vitiosa ignarus locaverit, deinde vinum efflaverit, tenebitur in id, quod interest, nec ignorantia ejus erit excusata. Et ita Cassius scripsit. Aliter, si saltum pasuum locasti, in quo herba mala nascatur; hic enim si præra vel demortua sunt, vel etiam deteriora fuerint, quod interest, præstabitur, si scisti; si ignorasti, pensionem non petes.* Digest. ibid. Leg. 19. § 1. Thus much for the Hiring of Things. II. He that lets out his Labour, ought, 1. To attend faithfully to his Business, or the Work he undertakes. 2. Finish it in the Time agreed on, if possible. 3. Not to leave it without some great Reason, such as may be credibly thought an Exception to his Engagement, if it had come into his Mind. 4. To make good the Damages which he may cause to him for whom he labours, either by his Negligence or by his Ignorance, at least until he knew his Inability, and did not for that Consideration pass him by; for then he can blame none but himself, and the other is discharged from doing better than he was able. See Note 3 of the following §.

⁴ So the *Digests* order, "Si vitiatum ædificium necessario demolitum esset, pro portione, quanti dominus prædiorum locasset, quod ejus temporis habitatores habitare non potuissent, rationem duci, & tanti litem æstimari." Ibid. Leg. 30. *prin.*

⁵ So the Words are, "Habitatores non, si paulo minus commodè aliquâ parte cœnaculi uterentur, illam deductionem ex mercede facere oportet; eâ enim conditione habitatores esse, ut si quid transversarium incidisset, quamobrem dominum aliquid demoliri oporteret, aliquam partem parvulum incommodi fuissent; non ita tamen ut eam partem cœnaculi dominus aperuisset, in quâ magnam partem usus habitator haberet." Ibid. Leg. 27. *prin.* Moreover, that the Proprietor is obliged to make necessary Reparations, appears from *Leg.* 15. § of the same Title.

^a *Vid.* lib. 19. t. 2. leg. 15. f. 2. *in fin.* & *ibid.* l. 9. f. 4. *D. locati.* ^b *Vid.* Herod. *Euterpe*, l. 4. c. 7. f. 12. ^c *Vid.* l. 15. f. 1. l. 30. *D. b. t.*

or a *Farmer*,⁶ by force of Arms, be drove out of his House, or Farm, 'tis manifest, the *Rent* from that time ought to cease; for, in this case, the Thing is morally lost to the Owner, till the Enemy be ejected. But if the Corn be gathered in, and then plundered by the Enemy, the case is altered; and the *Tenant* is then obliged to stand to the Loss.

As for *Labour*; if a Man be hired only for the Dispatch of some transient Business, and any Mischance hinders him from performing it, he can have no Title to his *Wages*: But if a Man takes another into his Service for a continued time, and such an Accident happens, in common Humanity he ought not to discard him, or to abate his *Wages*,⁷ especially if there be Hopes that he may make Amends by his future Diligence for the time he has lost; or if his former Behaviour has deserved such Favour.

III. But as for those Things, whose Produce is uncertain, as Fields, Orchards, Vineyards, Rivers for Fishing, and such like; as a plentiful Produce is to the Benefit of the *Tenant*, so a bad one is to his Loss: Nor in Strictness of Justice can he desire any of the *Rent* to be abated by reason of a poor Harvest, especially since the Barrenness of one Year is made up by the Plenty of another; for a good Husband is not used to let or rent such Things for one Year only.⁸ Nor can that common Objection well place here, That no Body ought to grow rich at another's loss: For the *Landlord* might as well be the same in a plentiful Year for the raising the *Rent*, whom in that Case the *Tenant* would have no Regard to. For, because the Produce is more one Year than another, the *Landlord* had rather be sure of such a *Rent*, than depend upon the Uncertainty of the Season: And, on the other side, the *Tenant* lays out a Certainty for the Hopes of an uncertain Gain, for which, if it fails him, he can blame no Body but himself. However that *Medium* proposed in the² *Digests*^b

may be rightly applied here, *If the Produce happen to perish by Floods, or by Birds of Prey, or by the Inroads of an Enemy, or by a Blight, or Drought, the Landlord ought to make Allowance, and the Reason added is, lest the Tenant, besides the loss of what Corn he had sowed, should be forc'd to pay the Rent of the Ground too, and so bear a double Misfortune. But if the Corn proves bad, and nothing happens more than ordinary, the Loss is then the Tenant's.* Where it appears, that this *Medium* consists in a Division of the Mischances to which the Produce is liable, into ordinary and extraordinary^c, for if the *Rent* was to be abated for every little Loss, it would give continual Occasion for impertinent Law-suits. And therefore the *Rent* of Land is determined according to the middle Produce, computing one Year with another, lest the *Farmer* upon every little Loss should have Occasion to complain; and yet 'tis difficult to lay down precisely how great the Loss ought to be for the Abatement of the *Rent*, which may better be left to the Discretion of an honest Man, considering all Circumstances, than to the Determination of any general Rule.

Sometimes a *Farmer* takes Land upon Condition to pay his *Landlord* the whole Produce of it, deducting first the Value of his Labour. And here the *Farmer* is, as it were, an *Hireling*, and if the Year prove barren, the loss is to the *Landlord* only.

If the *Tenant* should by any Accident have the Use of the Land intercepted, and the *Landlord* should, in the mean time, let it to another, or reap the Profit himself, which otherwise would be due to the *Tenant*; whatsoever Gain he makes of it, he ought to refund it to the first *Tenant*, or else to receive it in part of Payment for the *Rent*. The Duty of the *Tenant* and *Landlord* in respect of any Thing or Labour let out to³ Hire, is

⁶ See in the same Title, *Leg. 33. in fine, & 35. princ.*

⁷ See *Digest. lib. 40. tit. 7. De statu liberis, Leg. 4. § 5. & Collumella de re Rusticâ, lib. 12. c. 1. in fin.*

MR. BARB. NOTES on § III.

¹ *Pliny junior* nevertheless pleases himself much in several Places of his Letters, in the Releases which he made to his Farmers in that very Case. See *lib. 8. Ep. 2. & lib. 9. Epist. 38. & lib. 10. Ep. 24.* But it appears by those Letters, that, besides the Vanity, he had some future Interest in so doing.

² "Servius omnem vim, cui resisti non potest, dominum colono præstare debere ait; ut puta, fluminum, graculorum, stur-norum, & si quid simile acciderit, aut si incurtus hostium fiat. Si qua tamen vitia ex ipsâ re oriuntur, hoc damno coloni esse: veluti si vinum coacuerit, si raucis aut herbis segetes corrupte sint. Sed et si labes facta sit, omnemque fructum tulerit, damnum coloni non esse, ne supra damnum seminis amissi mercedes agri præstare cogatur. Sed si urdo fructum olæe corruperit, aut solis fervore non adjueto id acciderit, damnum domini futurum. Si vere nihil extra consuetudinem acciderit, damnum coloni esse. Idemque dicendum si exercitus præteriens per lasciviam aliquid abtulit." *Ibid. Leg. 15. § 2.* See *Cujac. Obsere. 15. 28.* Mr. *TITIUS* on *Lauterbach, Obsere. 610.* believes, that this Circumstance in the last Law, unless the Loss of the *Farmer* be insupportable, ought to be chiefly regarded: For a bad Harvest is so far from being prejudicial to the *Farmer*, that we may see that the holders of great Farms love a Year of Scarcity more than one of Plenty, because the less Provision there is, the dearer they sell their Corn; so that according to this Author, all that is said of Abatement of *Rent* must have respect only to little Farmers. But when certain Provisions become very cheap, for Reasons independent on a good or bad Harvest, there is no Cause that an Abatement of *Rent* should be desired upon that Account, because the Price of Things is commonly very chargeable. This is determined by the following Law, understood in the manner that Mr. *Bynkerhoeke* hath explained it learnedly and judiciously, according to its Custom. *Cum qui, cum de fructuum exiguitate quereretur, non esse rationem ejus habendam, Rescripto Digni Antonini continetur. Digest. ubi supra, Leg. 15. § 5.* This Lawyer explains, at the same time (*Obsere. lib. 2. c. 12.*) another Rescript of *Justinian*, recited in the same Place. *Item alio Rescripto ita continetur: NOVAM rem desideros, ut propter veteris rem esse non Rescripto Digni Antonini, ibid. i. c.* A Man that hath taken an old Vineyard to farm, ought to impute it to none but himself, if it bear not as much as he expected, because he might have known that before he hired it.

³ The Words are, "Conductor autem omnia secundum legem conductionis facere debet, & si quid in lege prætermisum fuerit, id emendo & proprio præstare. Qui pro usu autem vestimentorum, aut argenti, aut jumenti, mercedem aut dedit, aut pronunt, ab eo culto rem talem desideratur, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, & aliquo cum fructu eam rem amiserit, de restituendâ eam non tenebitur." *Indit. lib. 3. tit. 25. §.* "Cælius etiam imperitiam culpæ adnumerandum tenet. Si quis vitulos pascendor, vel faciendum quid, poliendumve conduxit, culpam eum præstare debere, & quod imperitiâ peccavit, culpam esse, quippe, ut artifex (inquit) conduxit." *Digest. ut supra, Leg. 9. § 5.* See also § 2, 3, & *Leg. 11, 12, 13, 25. § 3, 4, 7, 8, 27, 30. § 4, 38, 55. § 1, 2, 60. § 2, 61. princ.* I have said at the End of Note 3. upon the § here going, how it is to be understood, That we must judge by the Principles of the Law of Nature only, what is here said of the Ignorance and Insibility of him who takes upon him a Work or Labour. As for the Care that the *Tenant* ought to have of what he hires, the Lawyers are not well agreed about it; some will have him answerable for the least Negligence, and other for small Faults only. See Mr. *THOMASTUS*'s Discourse *De Culparum Præstatione in contractibus, c. 1. § 22.* What I have said of a Bargain and Sale in Note 2. upon § 3. of the foregoing Chapter, ought to be applied here.

^a *Vid. D. ubi supra.*

^b *L. 15. f. 2. D. h. t.*

^c *Vid. l. 25. f. 6. D. h. t.* Where it is well added, "The *Tenant* ought to bear contentedly a moderate Loss, when an immoderate Gain is not taken from him."

is shew'd in *Instit.* l. 3. t. 25. f. 5. & in *D. ubi supr.* l. 9. f. 2, 3, 5. l. 11. l. 12. l. 13. l. 25. f. 3, 4, 7, 8. l. 27. l. 30. l. 4. l. 38. l. 55. f. 1, 2. l. 60. f. 2. l. 61. *prin. D. h. t.*

Hither may be refer'd the Law in *Egypt*, relating to Physicians; who, if they took care of their Patient, according to the Direction of the publick Book, were not answerable if he died under their hands; but if they acted against those Directions, they were tried for their Lives^a. *Alexander de Rhodes*^b relates, that in the Kingdom of *Tunquin* they agree with the Physician for a certain Rate at the beginning of the Distemper, but which he does not receive, till he makes his Cure: and if the Patient miscarries, he has nothing for his Pains: By this means they think to quicken the Diligence of the Physician. The same Author tells us of a Physician, who being consulted and bargaining for his Fee, said, That were the Patient a young Man, he would not cure him under 100 Crowns, but since he was old, he would be contented with 20; because the Life he should restore was not likely to last long.

IV. But if my Labour, suppose in a Journey, can be serviceable to many, and I am hired by one Person to the full Value, Can I exact the same Price from others also? *Grotius*^c is of the Opinion I may, if the Law of the Land does not interpose; for it has no Relation to the Contract which I made with the first: Nor is my Labour the less valuable to him by being serviceable to others also. However such a Contract as this does not seem agreeable to Equity and good Nature, tho' perhaps it is not strictly unjust. For when one Man alone has paid for the whole Labour, if it can do service to others also, without being the more painful to the Performer; in respect of them^d it ought to be rankt among those Favours, which are of no Expense to the Doer, and are yet beneficial to the Receiver. But yet since 'tis hard that the first Contractor shou'd bear the whole of the Burden, it is^e but reasonable, that the others shou'd contribute to him their Proportion. Thus if I hire a Ship to my self, the Owner cannot take in others without my Leave; and if I am dispos'd to admit of it, the Advantage redounds to me only.

But yet in Arts and Sciences, which receive a Value from the Scarcity of such as understand them, the whole Price may be fairly demanded of each, though the same Trouble would inform many; for such sort of Arts, the more common they are made, the cheaper they grow: And therefore though my

Labour be never the greater to me by being apply'd to many, yet I can^f demand a Price upon Consideration that my Knowledge will be less worth, the more it is communicated. Some indeed are not willing that the Salary, which a Man receives for teaching the liberal Sciences, should come under the Denomination of *Hiring*, because Learning cannot be sold for Money; and so they are for making this one of those Contracts which want a Name, reducible to the 4th general Head, *Work for Goods*^g. Be it as it will, it seems to have this in common with *Hiring* of Labour, that the Honesty and Industry of the Party only, and not the Event, is to be regarded; so that although one's Labour happens to be in vain, yet the Salary agreed upon may be demanded.

Mercedem appellas? Quid enim scio? Culpa docentis Scilicet agitur, quod lex in parte mamille Nil salit Arcadico juveni. *Juv. Sat. vii. v. 159, &c.*

Pay, Sir, for what? The Scholar knows no more At Six Months End, than what he knew before. Taught or untaught, the *Dunce* is still the same, Yet still the wretched Master bears the Blame.

Sometimes that which *Pliny* mentions of the *Terandus* or *Buff*, *N. H. l. viii. c. 34.* may be applied; when he appears in his own genuine Complexion, he is like an *Ass*. 'Tis an excellent Master that can make a Fool wise, *Eurip. Hipp. Coron. v. 921, 922, Nature is too violent and powerful for any Discipline, Lib. Decl. 29.* Though sometimes that may be reply'd which *Lucian* mentions in *Hermotim. Tom. 2. p. m. 293.* The Speech which *Aureng-Zebe* the great *Mogul* made to his Tutor, is worth observing, *Vid. Bernier de rebus in regno Mogoris gestis, Part. ult. p. m. 57.*

¹ *Eschines* acted directly counter to this sort of Contract, for he gave People money to come and hear him^e: And so did the pompous and ambitious Rhetoricians at *Rome*, who by Intreaties and Entertainments did what they could to get themselves Auditors. *Socrates* did not demand Money of his Auditors, but wondred, That a Man professing himself to be a Teacher of Virtue should insist upon so mean a Reward, and not rather look upon himself to be the greatest Gainer, in having procured a good Friend; that such a Man ought not to fear, lest he, whom he had made good and honest, should forget to be grateful to his Benefactor^f.

⁴ We follow the Notions of the *Roman* Law, which looks upon the Tenant (*Conductor*) as he that undertakes a Work or Labour, and the Landlord (*Locator*) as he that lets it at a certain Price to be paid him. But 'tis the Impropriety of Language which makes the Notions confus'd: For, in the main, he that lets his Labour and Work for Wages to a Person, who is to find Matter for him to Work on, is no less a Landlord, than he that lets an House or Land. As for Bargains at a Price agreed on, where the Undertaker finds the Materials, and is at all Expenses, this is properly Selling. See *c. 2. § 10.* above.

MR. BARB. NOTES § IV.

¹ This only proves that we can require no more of another than he has expressly agreed to pay. But if after the former is engaged, some other Person can make an Advantage by it, nothing hinders but that some Recompent^e may be made to the latter for the Care he takes of his Affairs, unless there is some Reason from Humanity and Charity, which requires that the Service be done to him freely.

² This is not always necessary; for, provided that the Person hired doth not neglect the Affairs by him undertaken, if at the same time he can attend upon another's, he may be allow'd to make that small Gain, as a little Perquisite, which we are contented he should have.

³ Sometimes also that which every one gives is so small a Thing, that what is paid for the Labour of all together, is little enough for the Labour of teaching one only.

⁴ This Story is founded only on a bad Translation of these Words, *Ἐπιτιμῶν δ' ἀνεπίστου πικρῶν*, which signify the contrary, That *Eschines* took Money of his Auditors, as *Aldobrandinus* observes.

^a *Diad. Sic. l. 1. c. 82.* ^b *Itin. Part 2. c. 30.* ^c *L. 2. c. 12. f. 19.* ^d *Vid. l. 50. t. 13. l. 1. f. 4. D. de extraord. cogn. Vid. Sen. de Benef. l. 6. c. 11.* How poor Schoolmasters are often cheated of their Wages, is shew'd in *Lucian, De mercenario conduct.* ^e *Vid. Diog. Laert. l. 2. f. 62.* ^f *Vid. Xenoph. Apornum. l. 2. p. 426. Ed. II Steph. in fin.*

C H A P. VII.

Of the Loan of a consumable Commodity.

- I. What a Loan is, and what a consumable Commodity.
- II. A double Use of these Things.
- III. For what Things we are wont to be credited.
- IV. Of tacit Lending.
- V. Whether Lending be an Alienation.
- VI. What if Money be altered in the intrinsic Value?
- VII. Or in the extrinsic Value?

- VIII. The Doctrine of the Jews about Usury.
- IX. That Usury is not contrary to the Law of Nature is proved.
- X. The Arguments to the Contrary are answered.
- XI. Some Contracts are much the same as Usury.
- XII. The Evasions used to avoid the Disgrace of Usury.

THE Loan of a ^a consumable Commodity is founded upon this Condition, that the same Quantity and Quality be returned in kind ^b. Things thus lent are called ^c consumable, because they are consumed and perish in the Use: ² And therefore 'tis enough, if the same Sort of Things, tho' not the self same Individuals, be returned. The ^d Loan of a consumable Commodity differs from the ^e Loan of any other Thing not consumable, and from the ^f Use of a Thing let out to hire, in this respect: In the two latter, the self same numerical Thing that was lent, or let out, is to be restored, and no other without the Consent of the Creditor: And that, not only because the Value of such Sort of Things is not always capable of being exactly adjusted ^g, but because it was expressly the Condition of the Loan or Letting. Whereas in the Loan of a consumable Commodity; if, for Example, my Neighbour borrows a Bushel of Wheat, and returns me another Bushel of the same Goodness, I am suppos'd to have received my own.

These consumable Commodities are said to consist of Number, Weight, and Measure, as being thereby determin'd and specified; whereas other Things have their Quantities determin'd by Nature. And therefore consumable Commodities are peculiarly termed Quantities: But other Things, which don't come under this Sort of Loan, are call'd Species. And here we must observe, that, v. g. Oxen are not therefore a consumable Commodity, because 50, or 100 of

them may be sold by Tale; for the Number, in that case, does, not specify them, but only denotes the Quantity of the Species ^h.

II. The use of these consumable Commodities is either ordinary or extraordinary. The latter is when a Man borrows ⁱ to make an Appearance of being better provided than really he is; for sometimes 'tis of great Importance to be thought rich; as if a Man, in order to gain upon the Affections of his Mistress, should borrow a Sum of Money, and shew it for his own; in this case, the Money is not taken up as a consumable Commodity, nor is the Borrower ever Owner of it; and therefore he ought to return the very same in Specie. But the ordinary use of such Things consists in the Loss of them; or, in other Words, I can't directly apply them to my use, unless they be consum'd, and so become lost to me. This is plain in Corn, Wine, and other Things that turn to Nourishment; and Money itself I can't make use of in buying Necessaries, and paying Debts, unless I part with it: So that altho' the Substance of the Money remains, yet as to me it is utterly lost. And therefore, when such Things as these, to the end they may be put to their ordinary use, are made over to another, not with a design to barter, but with a design to have the same return'd again; since the Species that was deliver'd must be consum'd, the Restitution must necessarily be in the same kind ².

III. Money

^a Res fungibilis. ^b Vid. Inst. l. 3. t. 15. princip. ^c Vocantur res, quæ mutuo dantur, fungibiles, seu quæ functionem in suo genere recipiunt, ideo, quia quodlibet ex isto genere vice alterius ita fungitur, seu alterius vicem subit, ut qui ex eodem genere, eadem qualitate, & quantitate receperit, idem recepisse censetur, D. L. 12. t. 1. l. 2. f. 1. quæ functionem, &c. ^d Mutuum. ^e Commodatum. ^f Locatum. ^g Vid. D. ubi supra de rebus creditis, leg. 2. f. 1. ^h Add. Jac. Gothofredi Dissert. de æqualitate & functione in mutuo.

Mr. BARBEYRAC'S NOTES on Chap. VII. §. I.

¹ The Word of the Institutes are, "Mutui autem datio in iis rebus consistit, quæ pondere, numero, mensura constant; veluti vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro, quas res aut numerando, aut metiendo, aut adpendendo, in hoc damus, ut accipientium fiant. Et quoniam nobis non eadem res, sed aliæ ejusdem naturæ & qualitatis redduntur: inde etiam mutuum appellatum est, quia ita à me tibi datur. ut ex meo tuum fiat." Inst. lib. 3. tit. 15. See Cujas Obs. 11. 37.

² Res fungibiles. See what is said Lib. 1. c. 2. § 10. Note 3. The Word Fungibilis is not found in the Roman Law; but Fungis is used in the same Case, tho' it may be doubted whether the Antient Lawyers called, Res quæ in genere suo functionem recipiunt, what the Modern have abridg'd into Res fungibiles. The Law upon which it is grounded, is plainly corrupted, and ought to be read, in all Appearance, as Mr. Bynkershoek explains it, Observ. 1. § 10. Mutui datio consistit in rebus, quæ pondere, numero, mensurâ constant; quoniam eorum datione possumus in creditum ire. Quæ in genere suo solutionem recipiunt per functionem, quam specie. Digest. lib. 12. tit. 1. De Rebus creditis, &c. Leg. 2. § 1. i. c. (if we understand tam --- before quam specie). In these sort of Things we pay what we owe, by restoring another Thing of the same Kind and Quality, as well as by returning the same we have received.

³ The Word of the Digests are, Nam in cæteris rebus ideo in creditum ire non possumus, quia aliud pro alio invito creditori prestari non potest. Digest. lib. 12. tit. 1. De Rebus creditis, &c. Leg. 2. § 1.

Mr. BARB. NOTES on § II.

¹ So the Law speaks, Non potest commodari id, quod usu consumitur, nisi fortè ad pompam vel ostentationem quis accipiat. Sæpt. et. c. ubi hæc commodantur pecuniæ, ut dicis gratiâ nonærationis loco intercedant. Dig. l. 13. tit. 5. Commod. vel cont. Leg. 3. § 6. 4.

² The true Character of Things, call'd consumable Goods, is, that they perish in the using, as our Author says. Now there are two sorts of Consumption: 1. Natural. 2. Civil. Natural Consumption hath place either in such Things as are lost in the Use, as these are: such we eat and drink; or in such as are subject to be easily destroyed, tho' we do not meddle with them, as the Branch of Trees, &c. For as for those which decay insensibly as we use them, but don't altogether perish, as Cloaths, Earthen Ware,

III. Money, which commonly goes by Number, or Counting, Gold and Silver in Bullion, Bread, &c. (which passés by Weight) Corn, Salt, Wine, Beer, Oil, &c. (which are specified by Measure) and, in general, all sorts of Provision; as Flesh, Eggs, Milk, and even intire Animals, consider'd as Provision, come under the Name of *consumable Commodities* ^a. For suppose I am to make an Entertainment, and have not Provision enough at Home, or Money to buy it, I may borrow of my Neighbour, not only Eggs and Flesh, but Fish, Lobsters, Hares, Hens, Geese, and even Sheep and Calves, upon Condition to repay him again in kind ^b. Fair Paper may likewise be brought under the same Denomination, as being *consum'd* in the Use; for Paper once scribbled upon is lost for any other Writing. In short, under this Denomination may be reduc'd any sort of Commodity, which can be determin'd by any certain Measure, and which (if after it has been apply'd to its genuine and principal Use, it cannot be intirely restored again to its former Condition) is capable of being repaid in kind. For such sort of Things, altho' they are generally the Matter of Sale, yet sometimes happen to be borrow'd. As if, *v.g.* I should procure a certain Quantity of Cloth for my own Use, and should let a Friend, who has immediate Occasion for some of the same sort, and has not wherewithal to buy it, make use of it, upon Condition to return me as much and as good of the same kind.

IV. And this Contract is perform'd not only expressly, but sometimes tacitly: As suppose I should pay a Man Money by Mistake, which I did not owe; or should give a Man Money for some Reason which afterwards does not appear; in this Case the Roman Law admits of an *Actio for Money paid where not due, and for some Reason which does not appear*. For since such Money was not paid as a Gift, but as a Debt, or for the procuring an Equivalent, and yet the Receiver became Master of it; it is the same Thing ^c as if it had been bor-

rowed, and may be demanded back as such. And therefore the Foundation of these Actions may not improperly be call'd a *tacit Borrowing* ^d. Thus *Mauritius* the Emperor having given *Childebert*, the French King, Money to drive the Lombards out of Italy, after he had made Peace with them, demand'd it back: *Childebert* indeed would not so much as vouchsafe him an Answer, but that was because he was more powerful than just. *Paul Warnefrid*. de gest. *Longobard* ^e.

V. Some Years ago *Salmasius* and some Civilians had a Dispute, *Whether the Loan of a consumable Commodity was an Alienation?* Now it is plain, since the ordinary Use of such Things consists in the Consumption of them, they must be made over to the Receiver, with full Power to dispose of them as he pleases; which cannot be done without investing the Property in him. But because the Creditor gives, in order to receive back, and the Debtor receives, in order to refund; therefore neither is the Estate of the one lessen'd, or the Estate of the other increased by it. Unless the Creditor may be rather thought a Loser, having only an Action against the Debtor's Person, in lieu of his Money, which, by Reason of the Trouble and Uncertainty attending it, may be reckon'd less worth than the Money it self. And hence it is, that as Debts, due to any Man, are look'd upon as Part of his Fortune; so a Man is suppos'd to be worth only so much as remains to him after his Debts are paid. And he that owes more than his Estate comes to, may fairly be said to be worth less than nothing. To this Purpose was that Saying of *Cicero's*, that he wanted 2500 *H. S.* to be worth nothing, *App. de bello civil. l. ii. p. 432. B. Ed. H. Steph.* Hence Money borrowed is call'd *as alienum*, another Man's Money; not that the Person borrowing has not the Property of it, but because he receiv'd it upon Condition to return as much. On the other side, he who is out of Debt, may say, *Meo sum dives in aere*, The Money that I have is my own. In a word, he that lends Money does in-

Ware, &c. they don't belong to this Place; and 'twas an Oversight of *Tribonian* to exclude Cloaths from the Number of an *Usufruct*, properly so call'd. *Institut. lib. 2. tit. 4. § 2.* Consumption Civil hath Place in Things, whose Use consisteth in being alienated, altho' they have a continual Being. Such are not only Money, but all Things we barter with, as also Things made use of in Building, and all other Materials for Compositions, and Work. See *lib. 4. c. 7. § 10.* above. Upon this Foundation there are two sorts of Things call'd consumable Commodities: One, which are such in their own Nature, and unchangeably such; the other, which depend upon the arbitrary Will of Men, and mutable Appointment. The first are such whose ordinary Use consists in their Natural or Civil Consumption: I say, ordinary Use; for tho' the Owner may lend sometimes, for Example, a Sum of Money, merely for Firm and Appearance, and a Beam only to support a Building; yet, as that is rare, it has no regard to Laws, which respect Things that commonly happen only. The other sort of consumable Things contains such, as tho' they may be used or lent without Consumption, are often appointed to be sold, or are dealt in after some other Manner; so that according to the Design of him of whom they are borrowed, they are sometimes for Consumption, and sometimes for Use. As for Example, when a Man who has a Library for his own Use, lends me a Book, he intends that I should return the same Copy again; so that if I would give him another as good, he is not oblig'd ordinarily to accept it: But if he of whom I borrowed the Book, be a Book-eller, or Trader in Books, 'tis sufficient that I return him another Book as good; because, as he keeps it for Sale only, 'tis indifferent to him, whether I restore him the same Book, or another as good. 'Tis the same in other sorts of Goods, unless they be such as are very rare, or curiously wrought, as some sort of Drugs not common, a Watch, Mathematical Instruments, an Air-Pump, or other Instruments to try Experiments, &c. because 'tis hard to find others of the same Nature and Goodness, which may be returned for what's borrowed. This is taken out of Mr. *THOMASUS's* Discourse before quoted, *De pretis affectionis in res fungibiles non cadente*, c. 1. § 16, &c.

MR. BARR. NOTES on § III.

¹ We may give Gold for Silver, and pay it in other Kinds, unless it be otherwise agreed on. See *Corn. Van B. Keyser's* Observ. 1. 9.

MR. BARR. NOTES on § IV.

¹ It is not necessary to suppose a tacit Lending. The Nature of the Thing sufficiently shews the necessity of Restitution, as appears by the Author him. self. But if it be sufficient to render an Equivalent, yet it does not follow that it should be by virtue of a tacit Loan; but 'tis because it can't be otherwise restored, or because 'tis all one whether the Thing be restor'd in specie, or by an Equivalent. See what is said of Quasi-Contracts in several Notes above, and among others on *lib. 4. c. 13. § 15.*

² The Lawyer call'd *Procurator*. See *Collectio* Old. 8. 33.

³ "By the way we may observe, that *Plinius* says, why the *Gnostians* us'd to take away forcibly the Money which they borrow'd at Interest. Perhaps, that the Creditor might evade the Law against *Ujury*. For should the Debtor refuse paying Use for what he thus took away, he would have an Action of Robbery against him. *Quæst. Græc.* p. 303. Edit. *Wab.*

⁴ *Vid. D. ubi supra. l. 2. f. 1. D. de reb. cred.* ⁵ *Adi. Plin. N. H. l. 9. c. 55.* ⁶ *Civilis. l. 1. tit. 1. § 1. et l. 1. tit. 1. § 1. data, causa non facta.* ⁷ Which is otherwise call'd by the Civilians Quasi-Contractus.

deed *alienate* it, yet so as neither to lessen his own Estate, nor ¹ to add to that of his *Debtor*.

VI. It is a Question of greater Moment, *Whether, if a Change happens in the Money, between the Borrowing and the Payment, regard must be had to the Value of Money, as it was ¹ at the time of Payment?* Here most think fit to distinguish between the *intrinsic* Goodness of Money, and the *extrinsic*; whereof the former consists in the certain Quantity of such, or such a Metal; the *latter* in the publick Rate, or Value impos'd by the Magistrate. If the Change happen in the *intrinsic* Value, as suppose the Metal becomes baser or lighter (for the Change in Money is generally for the worse) then they think the Money ought to be reduc'd to the Value it bore at the time of Borrowing. For this Contract obliges not only to restore the same Thing in kind, but in Goodness also ²; indeed otherwise the same Quantity would not be restor'd. And therefore, if, for Example, in Money newly coin'd a fourth Part of the *intrinsic* Goodness be wanting, for 100*l.* lent in old Money, I ought to receive 125*l.* in the new. In like manner, if I lend another 100*l.* half of which is perfectly Alloy, I ought to receive only 50*l.* when the Baseness of the Coin is redress'd. For tho' it be in the Breast of the Government to raise or lower the Value of Money, yet if the *extrinsic* Valuation differs very much from the *intrinsic* Goodness of the Coin (since Regard must be had to Foreigners, unless we would reduce our Commerce with them to pure Bartering) the Price of Commodities will be determined rather by the ³ *intrinsic* Goodness, than the *extrinsic* Value and Denomination of it. For supposing the Money diminished a 4th Part, we should give 125*l.* for that which we us'd to pay but 100*l.* And therefore if a Man should pay me an old Debt of 100*l.* in so much new Money, he would really pay me a 4th Part too little.

VII. But if, without any Alteration in the *intrinsic* Goodness, the *extrinsic* Value should rise or fall; then Regard ought to be had to the Value of the Money, as it was at the time of Contract, and the increase or decrease of it ought to be at the Gain or Loss of the *Debtor*. For Example, if I should

lend 100 *Guineas* in Specie, when they go for 26*s.* and afterwards they should rise to 30*s.* I can't demand more than 26*s.* the *Guinea*, if my Debt be paid in Silver, and if the Payment be made in *Guineas*, I must deduct 4*s.* from each, and so receive not much more than than 86 *Guineas* in Specie.

And on the other hand, if they sink to 22*s.* and my Payment be made in Silver, I can demand 26*s.* for every *Guinea*. But if I be paid in *Guineas*, I ought to have an Addition of 4*s.* to each, and so to receive above 118 *Guineas* in Specie.

But yet this does not clear the Business, for against the former Determination the *Creditor* may make his Exceptions; for had he kept his *Guineas*, the Increase had been to him; which if he be now forc'd to lose, another makes a Gain at his Loss: And the same Plea may the *Debtor* have in Bar of the *latter*.

And therefore we must enquire further, 1st, Whether any certain Sort of Money was lent, *v. g.* *Guineas* in Specie, upon Condition that so many should be return'd in Specie, and in no other Money; or 2^{dly}, Whether they were paid as common current Money; or 3^{dly}, Whether all the Money of the Nation, or 4^{thly}, Only that Particular Species has undergone a Change. In the 1st Case, without Dispute, the Number of *Guineas* is to be return'd. In the 2^d, the former Decision takes place, and therefore the Value of *Guineas* in such a *Loan* must be refer'd to some other Species as a Standard; *v. g.* so many *Guineas* of 26*s.* The 3^d Case, where the Change affects the whole Body of the Money, in Comparison of the Plenty or Scarcity of other Things, may be determin'd from what has been said in *Chap. 1. S. 16.* although it hardly ever happens in Fact, that this general Change in the Money affects the Payment of an old Debt. As for the 4th Case, when the Value of any one Species rises without any *intrinsic* Alteration, all the other Money ¹ must needs have been debas'd. Thus *v. g.* when *Guineas* rose from 26*s.* to 30*s.* it was a sign that the Silver Money in its *intrinsic* Value was grown worse. And therefore in this Case, if *Guineas* were lent in Specie, and the Payment be made in Silver, *Guineas* ought not to be valued as lent at 26*s.* but at 30*s.* But

Mr. BARB. NOTES on § v.

¹ That is to say, as Mr. PLACETTE, in his Treatise of *Interest* observes, *Chap. xii. p. 133.* "If he that lends, transfers the Property of a Thing to another in Specie, yet he reserves the Value." Now the Value always exists, and we know what it is: We put it into the hands of the Debtor, but he is not the Owner; for if it were so, he might dispose of it as he pleas'd, by giving, squandering, or playing it away, which he is not certainly allowed. But the Creditor, on the contrary, can make a Present of it to the Debtor himself, or any other. He may call it in, forbear it, spend it, or dispose of it as he pleases. See the rest of this Chapter, and the foregoing, of the Treatise from whence I have taken it. Hence it is, as our Author observes, that a Debt is called *Es alienum, i. e.* Another Man's Money; not but that a Debtor acquires a Property to the *Species* he has received, but because he gets it on Condition to render the like Value again. On the contrary, a Man who owes nothing may say, *Meo jum dives in are.*

Mr. BARB. NOTES on § vi.

¹ See FRANCIS HOTOMAN'S *Quaest. illustr.* Qu. 15, 16. upon this Question, where it is determin'd otherwise than it is here, but not from solid Principles.

² So the *Digests* speak, *Cum quid mutuum dederimus, etsi non cavimus, ut aequae bonum nobis redderetur, non licet debitori deteriorem rem, quae ex eodem genere sit, reddere; veluti vinum novum pro veteri: nam in contrahendo quod agitur, pro cauto habendum est; id autem agi intelligitur, ut ejusdem generis, & eadem bonitate solvatur, qua datum sit.* *Dig. Lib. 12. tit. 1. De Rebus credit. &c. Leg. 3.* We may add to it, that if the Money had remained in the hands of the Creditor, he had lost nothing by lessening the Species; and so in the Alienation, this Consideration passes into a Rule: *Alienatio quum fit, cum sua causa dominium ad alium transferimus, quae esset futura, si apud nos ea res mansisset: Alique toto jure Civili ita se habet, praeterquam si aliquid nominatim sit constitutum.* *Digest. lib. 18. tit. 1. De contrah. empt. &c. Leg. 67.* In fine, In all this we must suppose that the Time for Payment was not pass'd; for if the alteration of the value of the Species was made when the Debtor delayed the Payment, or after the Creditor would not receive the Payment, it so much the worse for him to whom he was bound, that the Money was not paid in a Species of the Goodness and Value, according to the Rule of the Law: *Unicuique sua mora nocet.* *Digest. lib. 50. tit. 17. De diversis regulis Juris. Leg. 173. § 2.*

³ This appears by the following Law: *Pro imminutione, quae in aestimatione solidi forte tractatur, omnium quoque pretia specierum decrescere oportet.* *Cod. lib. 11. tit. 10. De veter. numismatis potestate, Leg. 2.*

Mr. BARB. NOTES on § vii.

¹ Mr. HERTIUS says here, That the Text is corrupted in all the Editions. It is true, that in the *Swedish* and *Frankfort* Editions it is read *Valore augetur*, for *augetur*; but the Fault is so manifest, that he might without Scruple correct it in his own. As for what he says, that *OB* ought to be added after *augetur*, I see no Reason for it, but think it contrary to the Reason and Sense of the Author.

But if common Money was lent, the *Debtor* gets the Advantage of the *Rise*, unless the Largeness of the Sum, or the Enormity of the Change may plead for some Consideration in behalf of the *Creditor*.

As for other *consumable* Commodities, provided they be return'd at the Time and Place appointed^a, 'tis little regarded whether their Price has risen or fallen; but the Advantage of the *Rise*, and the Loss of the *Fall* belongs to the *Creditor*, unless they had agreed about it otherwise.

But when the *Debtor* is backward in his Payment, and the Price, in the meantime, happens to be altered, the *Roman* Lawyers are at a Loss to what Time or Place the Valuation ought to be assigned: It seems most reasonable that it be adjusted according to the Time and Place of Payment. But, if it be through the *Debtor's* Fault that the Payment is protracted; and the Price in the mean time alters, it ought to be to his Loss^b.

VIII. *Whether Usury, which is generally given for the Loan of Money, be repugnant to the natural and divine Law,* is a Question that has been warmly debated^c. Which ought to be canvast more nicely, because most People are not of the *Persians* Opinion, *Who*, as *Plut.* relates in his Book against Borrowing, among their Sins, give the second Place to Lying, but the first to Borrowing, because it often happens that they that borrow, lye. Tho' *Herodotus*, in *Clio*, in my Opinion better assigns the first to Lying, the next to Borrowing. How the old *Hebrews* explain the Divine Law^d, relating to *Usury*, *Selden*^e gives a large Account; viz. they thought it^f was unlawful not only to receive, but even to give *Usury*; and that the very *Scrivners*, *Notaries*, *Witnesses*, and *Procurers* of such Bargains contracted a Guilt. However, the Money of *Orphans* was allowed to be put out to *Interest* to a rich Man, provided he gave the Gain to the *Orphan*, but bore the Loss himself.

Now they had two Sorts of *Usury*, the one was^g *Usury properly so called*, which was covenanted for, and received at the Beginning, or during the Contract; and this was suppos'd forbidden by the Divine Law: The other was called the^h *The Resemblance of Usury*, and was forbidden only by the Decrees of the Elders.

A Man was guilty of *Usury properly so called*, not only when he received back a *consumable Commodity* with Increase, but if by Reason of such a *Loan* he lived in another's House *Gratis*, till he was paid; or gave less Rent for it, than otherwise he would have done; or if he received an *Emolument* from a *Pawn* left with him upon Account of the Debt. And yet a Man never suffered in their Courts for receiving *Usury*, as was usual for the Violation of other Di-

vine Laws, but was obliged to Restitution only. But, if the *Usurer* himself was Dead, his Heirs were not so much as obliged to that; for they did not refund Money, or any other *consumable Commodity*, but only Plate, Cloaths, Instruments, Cattle, and such like, which had been received upon that score. And this was done in Honour of the Deceased, and out of Respect to his Memory, and that too only, if it appear'd that he repented of it, and had Thoughts of making Restitution before he died; for otherwise the Heirs were not oblig'd to refund at all. Besides, Private Men were not permitted so much as to receive a small Present from their *Debtor*, while he continued such; the *Lawyers* indeed might, for they were presum'd by no means willing to violate the Precept against *Usury*, but to receive it purely as a *Gift*, and not as *Interest*.

By that which they called the *Resemblance of Usury* they were forbidden to receive any Profit, or Acknowledgment of the Kindness (altho' utterly beside the Contract, and after the Expiration of it) except the Payment of the Principal before the time appointed. And this again they divided into two Sorts; the *One* which related to the difference of the Time, in which something was perform'd by the *Debtor*, to the Profit and Advantage of the *Creditor*; the *Other*, which related to the different manner of Contract.

The former they again divided into *antecedent* and *consequent*. By that they understood whatsoever a Man, designing to borrow, gave to the Person, upon whom he had this Design, in hopes to bring him to it the more easily: By this, whatsoever the *Debtor* after the Receipt of the *Loan* bestowed upon the *Creditor*, in order to prolong the Time of Payment. Nay, they would not so much as allow the common Offices of Humanity to be perform'd by the *Debtor* to the *Creditor*, unless what was used to pass between them before the *Loan*.

The latter sort was thought to have Regard to such a Contract as this; says the Seller, if you buy to Day, you shall have it for 90*l.* but if you put it off till to Morrow, you shall pay a 100*l.* Here the Delay, together with the Increase of the Price, seems to intimate, that 100*l.* is to be paid as Use. In this Case the Law did not oblige to a Restitution, nor did there lie an Action against the Party in the civil Court. Yet he, who offended against these Decrees of the Elders, was liable to corporal Punishment. He likewise that received a Farm in Pledge, was not allowed to let the same to the Owner for Rent, for that lookt like *Usury*. But these obtain'd only between *Hebrew* and *Hebrew*; of a *Gentile* they might lawfully demand *Usury*, from *Deut.* xxiii. 20. Nay, they thought themselves commanded to do it, in

^a The Words of the *Digests* are, *Vinum, quod mutuum datum erat, per judicem petatum est: quæsitum est, cujus temporis æstimatio fieret.* ----- *Sabinus* respondit, *Si dictum esset, quo tempore redderetur, quanti tunc fuisset; si non, quanti tunc cum petatum esset.* Interrogavi, *Cujus loci pretium sequi oporteat?* Respondit, *Si convenisset, ut certo loco redderetur, quanti eo loco esset; si dictum non esset, quanti ubi esset petatum.* Dig. lib. 12. tit. 1. De rebus credit. &c. Leg. 22. See Lib. 13. t. 3. De conductione triticaria, Leg. 4. & tit. 4. De eo quod certo loco dari oportet. Leg. 3. lib. 17. tit. 1. Mandati vel contra, Leg. 37. lib. 45. tit. 1. De verbor. Oblig. Leg. 59.

MR. BARB. NOTES on § VIII.

¹ This Passage of our Author might have been left out, because the Question here debated refers directly to the Lender, and not to the Borrower.

² This is certain; and God forbid it for some special Reasons, which our Author speaks of a little lower; so that nothing is more ridiculous than the blind and malicious Zeal of certain modern Authors, who, to shew their Reading, have blinded the Eyes of the People, by quoting the *Talmud* and *Spanish* Rabbins, who explain the Law in *Deut.* xxiii. 19. strictly. I shall speak upon the Passage in *S. Luke* vi. 35. in Note 6. upon § 9.

^a Instance in Wine, lib. 12. tit. 1. l. 22. D. de reb. cred.

^b *Add. lib. 13. t. 3. ult. D. de condict. Triticaria. § t. 4. D. de eo quod certo loco, &c.*

^c Which is extant, *Exod.* xxii. 25.

^d *Lev.* xxv. 37. *Deut.* xxiii. 19.

^e *De J. N. & G. sec. Heb. L. 6. c. 9.*

^f *עבור קצורה* i. e. *Usury fixed and determined.*

^g *אבק רבוי* i. e. *The Dust of Usury.*

in order to drain them of their Riches, and weaken those Nations which God had otherwise destin'd to Destruction. Yet *Leo of Modena*^a says, That *Text* is to be understood of the seven Nations only that dwell in Canaan; and not of the other Gentiles: of whom it was not lawful to receive Usury. But yet that many, by reason of the Miseries of a long Captivity, and their Lands being withholden from them, and for want of a better Way of getting a Livelihood, had degenerated from the Integrity of their Forefathers. But he protests that to be false, which soon spread abroad, That the Jews every Day take an Oath to do what they can to cheat the Christians; and, he says, it was invented to render them odious.

IX. Let us now consider, whether what has been thus punctually observ'd among the Jews, be the dictate of the Law of Nature; or the positive Law of God; and that not peculiarly calculated for the Jews, but for all Nations. As for what has been added by the *Jews*' Elders, 'tis plain, that is altogether positive; and imposed only to prevent Cavils, which designing Men had found out to evade the force of the Law. But in general our Opinion of Usury^b is this; provided it does not oppress and grind the Poor, but answers the Advantage which we ourselves might have made, or which the *Debtor* does actually make of our Money (especially if he borrows not out of Necessity, but in order to make a Gain of it) the Law against it is neither that of Nature, nor that of God universally obliging all Nations; but a positive Law to the Jews only, founded upon Reasons in a manner purely politick. And it was generally the Opinion of the *Rabins* themselves, that Usury was neither Theft, nor against the Law of Nature, as being founded upon Consent and free Contract.

But the same may be evidently proved from Reason; for tho' the Jews were by the Divine Precept join'd together in a closer Tie of Amity than ordi-

nary, yet they were oblig'd to exercise towards others all the common Duties of the Law of Nature^c. And therefore, if Usury be against the Law of Nature, I don't see how the God of Holiness could indulge that Nation, which he had peculiarly sanctified, in the Practice of it, and in a manner charge them to violate a Precept of the Law of Nature, in Prejudice of those who had never injur'd them; if indeed that Passage in *Deut.* xxxiii. 20. ^d ought to be expounded not of the *Canaanites* only, but of any other Nation.

There seem to be several good Reasons why such a Law against Usury should more especially obtain amongst the Jews. The first may be taken from the Genius of the People; for they were as much addicted to the scraping up of Riches then, as now; in which they thought their greatest Happiness to consist. And therefore, that their Thirst after Riches might not tend to the Oppression of the Poor, God seems to have provided by this Law. But yet lest too great a Violence should be offer'd to their Inclinations, he permitted them to use greater Liberty among Strangers.

Besides, ' the Constitution of that Commonwealth required such a Law. For 'tis evident, *Moses* design'd to have it democratical (for such a State may admit of a Chief at the Head of it) and nothing contributes more to this than to preserve, as much as possible, an Equality of Riches amongst the Members; and to this end, were the Laws of *Jubilee* and *Remission* inflicted, and those against alienating Land for ever. *Lev.* xxv. 14, 31, 35, 36. *Deut.* xv. 2. Add *Num.* xxxvi. Which the Law of *Solon* resembles, That an Heiress should marry her next Kinsman by her Father's side.

And the very Condition of those Times furnishes us with another Reason for the Law against Usury. For that Nation had then a more plain way of Trading, which consisted in Pasture and Husbandry,

MR. BARB. NOTES on § IX.

¹ I use the Word *Usury* to avoid the ill Phrase of Lending at Interest. But some Authors who retain some Relicks of Popery, declaiming against the common Opinion of the Protestant Divines and Lawyers, maliciously affect to use the Word *Usury* alone, and say, for Example, that *Usury* is allowed, or not allowed, because that Term is become odious through the Abuse which is often made of a Contract innocent enough in itself, and originally denoted by it.

² This appears by the Law of *Moses* itself; for it forbids to oppress the Stranger and to do him any Injury, *Exod.* xxii. 21, xxiii. 9. *Deut.* xxiii. 7, xxvii. 19. See Mr. NOODT, *De favore & usuris*, lib. 1. c. 10. p. 66, &c.

³ And therefore they are deservedly censured by *Juvenal*, *Sat.* 14. v. 103, 104.

*Non manifestare vias, calum nisi sacra colenti;
Quæritur a fonte solo deducere verpos.*

Ask them the Road, and they shall point you wrong,
Because you do not to their Tribe belong:
They'll not betray a Spring to quench your Thirst,
Unless you shew them Circumcision first.

MR. DRYDEN.

⁴ " If they were (as with Mr. *la Placette*, in his Treatise *Of Interest*, God would not have excepted the poor Strangers, as they are not excepted among those that are condemn'd to Death without Mercy. See *Lev.* xxv. 35, 36. But tho' God doth not approve the Interest should be taken of any poor Stranger, he doth not formally forbid any part; for the Law cited here concerns Prodiges, who were, as it were, naturalized, and enjoyed the same Privileges as the *Hebrews*." See *Exod.* xii. 48. &c. *Numb.* xv. 14, &c. and Mr. NOODT, *ubi supra*, p. 60. We should rather say, as Mr. *la Placette* also does, that the Expression of the Law, which allows giving of Interest, is general, and there is no Reason to restrain the Sense. 'Tis to no Purpose, that St. *Ambrose* supposing of his own Authority, that the Permission only respected the seven Nations of the *Canaanites*, who ought to have been destroyed, faith in his Book of *Tobias*, chap. xv. " That it was a lawful Act of Hospitality, and that since they might have slain those Nations by the Right of War, by much greater Reason they might be allowed to spoil them of their Goods; for he says, Lending on Usury was an easier Way, and pleasanter Means to impoverish and ruin them." Mr. NOODT answers this, p. 65. " That when one lends to, or makes any other Contract with an Enemy, he treats with him, not as an Enemy but as a Man, towards whom consequently he ought to observe the Law of Nature and Nations, and on that Account suspend all Acts of Hospitality. Further, God allowed the *Jews* also to take Money at Interest of Strangers; and then we may as well say, That God would have Strangers to impoverish and ruin his own People by it." Mr. NOODT urges many other Things, which utterly overthrow St. *Ambrose's* Notion, and which obviate all the Evasions which that Father, and such as are of his Opinion, could devise. We may observe also, that at one Time, the Lending at Usury was forbidden at *Rome*, from one Citizen to another, altho' it was permitted in respect to the *Latins*, who were their Allies. See *Tit. Liv.* lib. 35. c. 7.

⁵ We may find these two Reasons unfolded, and supported with several other Remarks, in the forementioned Chapter of Mr. NOODT's Book *De favore & usuris*, p. 62, &c. We should also do well to read what *J. F. B. G. G. G.* says in his Treatise, *De Contractibus & Usuris*, Antexeg. 1. p. 467, &c. which follows his Book *De Sacerdotio*, &c. *lib.* 1691.

^a *De Rebus*, lib. 1. c. 5. ^b See Mr. *la Placette's* Treatise upon Usury. ^c *A. Selden* in the aforesaid Place informs us, ^d See Mr. *la Clerc* upon the Place abovecited.

dry, or Manufactures; *Merchandise* was simple and moderate, the Secrets of Trade and Navigation being not known to them; and in such a State no one borrows, but when he is prest with Necessity. And therefore *Deut.* xxviii. 12. it is mention'd as an Argument of the greatest Happiness; *Thou shalt lend unto many Nations, and thou shalt not borrow* ^a. Since the Gains in such a Case, could not but be very small, the least *Usury* imaginable must needs be very burthenfome. And where the Money borrowed is laid out upon the Necessaries of Life, it will be next to impossible ever to recover it; for how can your Labour be able to bring you out of Debt, when it was not sufficient to support you from Borrowing? "Upon this Account the State of *Athens* was involved in such Troubles, by means of *Usury*, that it could not be remedied otherwise than "by Means of *Solon's* *σεισάχθεια*, i. e. *Shaking off the Burthen*". Vid. *Plut. Solone*, which *Milchief Rome* also felt in its Infancy,

Grotius ^b brings this as one Reason among others of the Law in *Deut.* xxviii. 19. *That the Chief Riches of the Jews lay in Husbandry and Money, whereas most of the neighbouring Nations made vast Returns by Merchandise: And therefore Usury was allowed the Jews in their Dealings with them, which, with very good Reason, was forbidden to be taken of one*

another; for Usury laid upon Husbandmen is every where oppressive. Besides, *Moses* endeavour'd by that Law to endear them to one another; and they had the more frequent Occasion to put it in Practice, because then only small Sums were borrowed, and those too by the meaner sort, and such as struggled with Want and Poverty. From hence *Philo Judæus* ^c inferees the Exercise of Charity and Liberality among Fellow-Subjects ⁶. Which Virtue the great *Legislator* has indeed established by several other Laws. See *Exod.* xxi. 10, 11. xxii. 22, 23, 25, 26, 27. xxiii. 4, 5, 9, 11, 12. *Lev.* xix. 9, 10, 13, 33. xxiii. 22. xxv. 6, 10, 11, 35, 36, 37, 39, &c. *Deut.* xiv. 28, 29. xv. 2, 4, 7, 8, 9, 10, 11. xxiii. 24, 25. xxiv. 10, 11, 12, 13, 14, 15, 19, 20, 21. xxvi. 12, 13.

But now Money is borrowed for other Ends, viz. in order to increase and improve one's Wealth. When a Man borrows for this Purpose, why should another lend for Nothing? Nay, 'tis an unreasonable Thing, when you vastly improve your Fortune with my Money, not to admit me into some ⁷ Share of the Gain: For I, in the mean time, am debarr'd from making that Advantage which I might otherwise have expected by applying it to my own Use. Besides, I have parted with something valuable, which ought therefore to be consider'd: for in lieu of my Money

^a Add. *Deut.* xv. 7, 8.

^b Upon *Luke* vi. 35.

^c *De Caritate.*

⁶ From all that has been said, it appears, that *David*, *Pl.* xv. 5. and *Ezekiel* xviii. 13. xxii. 12. give this Character of a good Man, *That he giveth not his Money upon Usury*; but they treat only of the Lending forbidden by the Law, so long as the Government of the *Jews* was in Being, i. e. that which was done by one *Jew* to another. As for the Words of our Saviour *JESUS CHRIST*, *Luke* vi. 34, 35. they seem to me, if we consider them in themselves, or with their Connexion, not to respect Lending upon Usury. His Divine Words are, *If you only love them that love you, what thanks have you? v. 32. And if you do good to them that do good to you, what thanks have you? Do not Publicans and wicked Men the same? v. 33. And if you lend to them of whom you hope to receive, what thanks have you? Sinners lend to Sinners, that they may receive as much again: But love your Enemies, and do good and lend, hoping for nothing, and great shall be your Reward, and you shall be Children of the most High, for he is beneficent to the Unthankful and Sinners.* This Phrase, *Hoping for nothing*, doth not in the least refer to loving your Enemies, and *Doing good*, to Lending; and I wonder that no Man, so far as I know, hath taken notice of it. So Lend, hoping for nothing, plainly signifies, Lend, tho' you can't expect that he that borrows should do the like in his Turn. The Reason which our Saviour uses, is taken from the most noble Motive, and that is, to imitate God, who doth Good to the unthankful and unholly, which makes the Thing very clear. But if we desire a greater Plenty of Proofs and Arguments, let us read *Mr. NOODT's* First Book *De Fænore & Usuris*, and *Mr. LA PLACETTE's* Chap. 3. of his Treatise of *Interest*. The Truth is, *JESUS CHRIST* in that Text neither forbids nor approves giving of Usury, nor had he any Occasion to do it, since the *Jews*, to whom he spake, according to their Law, could not lend one to another, but freely. It belongs therefore to them, who condemn all Usury in general, to prove, that it is unlawful in itself, and disagreeable to our Gospel Dispensation. But they'll never compass their Design, seeing, that tho' they have studied the Natural and Moral Law with so much Care, yet some of them shew not only gross Ignorance, but at the same time Weakness and Presumption. A famous Casuist, *Bannes* 2. 2 *Quæst.* 78. *Art.* 1. *Dub.* 1. owns (as *Mr. LA PLACETTE* observes) that the Proof which the Words of *JESUS CHRIST* afford, takes its Force, not from the Words themselves, which may have another Sense, but from the Authority of the Popes and Councils, which have so explained them. Thus the Knot is loosed, and they, who, tho' Protestants, dare let out themselves into gross Invectives against the Opinions of their own Party, shew, that 'tis the Credit of the Fathers that they most value. But they make a Noise to no Purpose. All their Declamations and fierce Contentions serve only to shew that the Reading of the Fathers is capable of biasing their Thoughts, especially when it meets with a serious Temper, and such as are more careful to improve their Memory than their Judgment: For had these Men so much Zeal for the Honour of the Fathers, as to judge of them so long after their Death, as freely as they would of an Author of the last Age, they ought to prove by good Reasons, either that the Fathers were infallible, or are not guilty of the Errors imputed to them. And I am willing that they begin, for that End, with Lending upon Usury, wherein they think themselves to triumph; and let them see whether they can confute the two Treatises before quoted, the one of a *Divine*, the other of a *Lawyer*. Waiting for what they'll do, I say boldly of those Works, and some others, that have discover'd the Errors of those ancient Christian Doctors, That they are Iron, Steel, and Diamond for them. See what shall be said lower in the Note on § 10.

⁷ This is what is called *Interest Lucrative*, or *Gainful Interest*: whereas *Compenfative Interest* is only a simple indemnifying a Man for a Profit ceasing, and a Damage arising. There is no Difficulty of any Consequence, but in the last; and he must shut his Eyes, that will not see the Justice of such an Interest, since in requiring it, no more is demanded, than what we had when we lent it. If any doubts of it, he may be fully convinced by reading of the 5th, 6th, and 7th Chapters of *Mr. LA PLACETTE's* Treatise of *Interest*. As to *Lucrative Interest*, something may truly be alledged more specious to oppose it: But if we bring a Mind free from Prejudice, we shall easily find that this Interest is neither less innocent nor lawful than the *Compenfative*. What *Mr. LA PLACETTE* has said upon it is solid, and from him I shall borrow some Reflexions. As it depends on the Creditor to lend, or not; so 'tis at his Pleasure when he purposes to lend, whether he will pay his Money into the Hands of the Debtor for several Years, or for one only, or for a Month, or for a Week, or for one Day only. Supposing then that he can lend for a Day, or a Week, yet he is willing to lend for one or two Years, engaging himself not to demand it sooner, why may not such a Renunciation, which depends upon him, and is beneficial to the Debtor, be settled at a Price? When one has a Right of Service upon an House or Field, he can renounce it for a Time, or for ever, and set a Price upon such a Release. The same Thing hath a Place in the Business of Homages and Redemptions. Upon what Account then is it forbidden to be used in the Right we have to call in what is borrowed? 'Tis no Purpose to alledge, that when the Sum lent remains in our Hands, 'tis very probable that it affords us no Profit; and is it not then an Injury to our Neighbour to make him pay for the Use of it, when we lose nothing ourselves? This Answer supposes two Things, and both of them alike false: 1. That in treating with our Neighbour, he may enquire what we shall lose by lending him. 2. This is a Consequence of

Money I have only an Action against your Person, which can't be prosecuted without some Trouble. For every Body does not consider that of *Martial*, B. 2. Epig. 13.

*Et Judex petit, & petit Patronus :
Solvas, cenfeo, Sexte, creditor.*

It may also happen by some Accident or other, that my Debt may be lost. "My Slowness, in paying what I promised, has made me ashamed of my Debt; however, I may avoid the Censure of the world by paying it with Interest." *Pind. Olymp. Od. 10.* Nay some times the Debtor must be courted and caress'd, that it may not be lost. And some borrow on purpose to make their Creditors dependent on them. As the *Mareschal de Rochelaure*, when he was tax'd by *Lewis XIII.* with taking part with the Duke of *Mayenne*, pleaded in Excuse, That he did not follow the Duke, but his Money: For his Debt would be but in a desperate Condition, if he did not stick close to his Debtor^a. Besides it is not seldom that we lend to Persons who are utterly unable to pay. To whom that of *Martial* may be apply'd, L. 1. Epig. 76.

*Dimidium d'nare Lino quam credere totum
Qui mavult, mavult perdere dimidium.*

And therefore some are of Opinion, that it would be for the advantage of the Publick, to allow none but Merchants to take up Money at Use; for this would make the Poor industrious, and force them to Frugality, who, some of them, are not afraid to pay

Interest for Money to maintain their Extravagancies. And monied Men, rather than let their Money lie dead, would either take to Merchandize themselves, or would put out their Money to those that do; which would make Trade flourish, to the great Benefit of the Commonwealth^b. *Grotius*^c is of Opinion, That the legal Interest ought to be stated, not according to the Gains of the Borrower, but the Loss that thereby accrues to the Lender; as in Buying and Selling, and other Contracts, no regard is had to what the Receiver may make of the Commodity, but what goes away from the Seller. And, in this Case, so much goes away as every Man, in his own Calling, might and usually does make of his Money; Allowance being made for Hazards, which in some Cases are more, in others less. With whom I so far agree, that no Man can complain, if his Debtor makes a vast and unexpected Return of his Money: But yet there is no doubt but I may demand higher Interest of him that makes a very gainful Trade, than I can of another who drives a poor one.

X. The Arguments which are brought against Usury are easily answer'd. It is urged, That the Loan of a consumable Commodity ought to be given Gratis, because the Loan of all other Things is so. But I answer, That as I have a Power of granting the Use of my Goods, that are not consumable, either Gratis or for Rent, whereof the one is a Loan, the other a Letting; so what should hinder me from granting the use of my Money also, either Gratis, or for a certain Recompense? But if you should insist, That that only is a Loan which is lent out gratis; the Consequence would be, that Money lent upon Interest ought to be called by some other Name, and not that

the former, That every one is bound to do all he can for his Neighbour, if it costs him nothing. If the first be allowed, Commerce would be essentially unjust, for it consists only in endeavouring to get by what one sells; but if the Profit made hath nothing contrary to Charity or Justice (which is not impossible) nothing hinders but that we may lawfully pursue it. If the other Supposition be true, we must condemn a Thousand Things every Day, and have nothing to oppose. As for Example: I have two Houses, of which one is of no Use to me, but a Charge, because no Body dwelling in it, it runs to Decay. Again, I have two Copies of the same Book, of which one is of no Use. Does it follow from thence, that I may not sell or let out that House or Book? There are a Thousand such Instances, where it can't be taken ill, if one sell the Property or Use of certain Things which cost nothing, and are useless to such as sell them, tho' profitable to such as buy them. Why then may we not do the same with Money, in lending it, as innocently as in other Things? But there is another Proof more exact, and taken from the same Matter. A Creditor allows his Debtor to make use of his Money lent him; this is sufficient to entitle him to pay him Use. In short, If we may lawfully let an House, an Horie, Oxen, Tools, and an hundred other Things of that nature, why may we not do the same with Money, and, in general, with every Thing that is used in Commerce? Divers Things are answered to this, of which we may find a Solution in the next Paragraph, and in the Treatise from whence this is taken. We shall now only add the five Conditions which *Mr. La Placette* lays down to make lucrative Interest lawful: 1. That the Creditor is not otherwise bound to lend his Money freely. 2. That the Debtor obliges himself willingly to pay such Interest. 3. That the Debtor may probably get by the Loan. 4. That the Interest is not greater than the Advantage he hopes to gain by it. 5. Lastly, That he does not go beyond the Bounds fixed by the Laws. Let us also observe, with the same Author (*Chap. 18.*) that there are two sorts of Profit: 1. Positive, when a Man gets that by his Money borrowed, which he could not otherwise have had. 2. Negative, which consists not in getting what one has not, but in keeping what we have already, or may at length have, not in growing more rich, but to prevent being poorer. Borrowing is most commonly of this last Use, which happens several Ways. As for Example: A Man owes a considerable Sum, which he can't pay, and pays 6*l.* per Cent. for it; I lend him the same Sum at 4*l.* per Cent. he really gets nothing, but he actually spares 2*l.* per Cent. which, were it not for me, he must pay to his first Creditor. Another hath need of Money, and not getting it, is forced to sell at a low Price those Goods, which he was sure to sell dear in a little Time; I lend him Money, which he could not be without, and so prevent the Loss he should have had by his Goods. On these and the like Occasions it can't be unlawful to take Interest; for indeed 'tis as good an Office to prevent a Loss, as further a Gain. Moreover, this is the only, or, at least, the principal Foundation of the Interest paid to the Directors of the Bank called *Monts de Pitié*, an Establishment which all the World has found so useful and profitable to such as are in Necessity. We ought only to observe, that tho' this sort of Interest is not so contrary to Justice as the other, yet it commonly is more opposite to Charity. The Need of the Borrower is such very often, that he is obliged to borrow either without Interest, or content himself with an Interest Compensative, which hath not Place so commonly in such Loans as are made to them who borrow to make a positive Gain. To all that has been said, we may join *Chap. 5* and *6*, of the 1st Book of *Mr. NoODR's* Treatise.

^a *Gramond. Hist. Gal. l. 5. Diodor. Sic. l. 19. c. 24. Plat. Eumene. p. m. 591. C. Edit. Franc. 1620.*

^b *Vil. Lud.*

Septalium, de ratione status, l. 2. c. 15.

^c *Ad Lucan. 6. 35.*

MR. BARRP. NOTES on §. X.

¹ See *Mr. NoODR's De Fœnore & Ujuris, lib. 1. c. 6. p. 37, &c.*

that it is unlawful. Another Objection is, That Money is a barren Thing, of no use to human Life, as are Cloaths, Buildings, Cattle, &c. and therefore nothing ought to be demanded for the use of it. To which I answer, That tho' Money is so far barren, as not to produce its like; yet after an eminent Price has been set upon it, by the Industry of Man it gains a faculty, which naturally it had not, and becomes productive of those Things which are both in natural and civil Respect fruitful. And therefore Usury is not to be look'd upon as a natural, but as a civil Increase. Or which however Seneca speaks severely enough: "I see, says he, Deeds, and Bonds, and Writings, the Emblems of Covetousness, which deceive our vain Minds. For what are Usury and Accounts, but Names unnaturally imposed upon Things for the support of human Avarice? What are these Bills of Contract, these Computations, these Prices set upon Time, this cruel Interest upon Interest? They are all Evils of our own making, and depend upon ourselves, they have nothing in them of Solidity, that can be either seen, or held, but are the empty Dreams of a covetous Mind. De Benef. l. vii. c. 10. Aristotle too is severe enough upon Usury: "The Art of Usury, says he, is deservedly odious, for it makes a Gain of Money itself, and not of that for the sake of which it was found out; for the use of Money is to carry on Traffick, but Usury increases it, and is therefore call'd Τὸ κέρδιον, for the Thing begotten is like the Thing that begets; but in Usury Money is both the Thing begetting and begotten; and therefore this sort of Gain is unnatural." Pol. 1. 7. towards the end. Besides, Money let out to

Interest is not apply'd contrary to its proper use; for he who borrows Money does it at least for the sake of Bartering. And Property itself was first settled with a Design, that every Man's Goods should be immediately beneficial to himself; and yet it is not against Nature, to let out our Goods to another for Rent.

There is another Objection, which is somewhat nice; In consumable Commodities the Property cannot be distinguish'd from the Use, and therefore the Use can't be made over, but the Property must too, and vice versa. For as the Substance of Corn, Wine, and Flesh, perishes in the Use of them; so the Money that I expend perishes to me, as being remov'd out of my Estate. And therefore since the use can't be distinguish'd from the Thing, nothing ought to be demanded for the use; it being enough, if the Thing be restored in kind. To this I answer, that indeed the Use of a consumable Commodity does not properly differ from its Substance; but yet it does not therefore follow, that the Power to make use of it upon an Obligation to return the same in Kind some time after is not worth something. Now 'tis a Condition in every Loan, that the Thing be not return'd till some time after: But if I borrow Money for such a certain Time, I may lay it out upon other fruitful Commodities, or make a Gain of it some other way. And thus suppose I borrow Provisions, or other Necessaries, my Gain consists in this, that I am not necessitated to part with my Goods upon ill Terms to procure Bread: Or my Money, which must otherwise have been thus expended, may now be laid out to more Advantage.

2 Here the wicked and lazy Servant says to his Master, I knew that thou wert an austere Man, who reapest where thou hast not sown, and gatherest where thou hast not scattered. But the Sense is not, that it is Cruelty to take Use for Money lent, which is a Thing barren in itself; but it is a Proverbial Speech, which implies only, that some Men require more than others can do. See the Interpreters upon the Parable. It may be better observ'd from the Parable, that it proves, that lending at Interest is very innocent; for if it were sinful, we can't think that JESUS CHRIST would have put into the Mouth of the Master in the Parable, who represents GOD himself, these following Words, Thou wicked and lazy Servant, thou knowest that I reaped where I had not sown, and gather where I have not sowed, you ought to have put my Money to the Bankers, that at my Return, I might have received my own with Usury, ver. 26, 27. See further Mr. NOODT, lib. 1. c. 7, 8. De san. & usur. where he confutes at large the Objections which our Author propounds here, and some others. The same Lawyer also examines in Chap. 9. a Passage in Seneca, De Benef. lib. 7. c. 10. quoted also here, and proves it only meer Declamation.

3 Some answer, That true it is, that the Debtor finds Means to improve the Money borrowed; but that's from his Industry only, and so conclude, he only ought to have the Profit. But (as Mr. PLACETTE speaks, ch. 10.) his Industry is not the only Cause of the Profit made by the Money; for tho' Money without Industry would bring no Profit, no more would Industry without Money; and so one Part of the Profit must be imputed to the Money, and another to Industry. This is also visible in some Contracts of Letting: Land will bear nothing, if it be not tilled; Tools, let to an Artist, will do nothing, not only if they be not used, but also if there be not Skill to use them. Nevertheless, all this is no Hindrance but that the Rent may be paid for the Land, and Use for the Tools: And why then may not Interest be paid for Money, as well as for other Things?

4 ARISTOTLE'S Greek is, Ἐπιτοκία μισθὸς ἢ ὀφελιστικὸς, διὰ τὸ ἀπὸ τοῦ κέρματος εἶναι τὴν κέρματα, ἢ ἐκ ἐφ' ὅπου ἐκ ποιεῖται. Μισθὸς δὲ τὸ ἐκ τῆς ἀπορίας τὸ ἐκ τῆς ἀπορίας ἀπὸ τοῦ κέρματος εἶναι τὴν κέρματα, ἢ ἐκ ἐφ' ὅπου ἐκ ποιεῖται. De Republica, lib. 1. c. 10. Mr. NOODT, De Fan. & Usur. lib. 1. c. 7. p. 43. hath observ'd that Aristotle may be confuted by Aristotle, who, in the Chapter immediately foregoing, says, "That all Things which we possess have a double Use, one proper and natural, the other improper and strange. As for Example, says he, Shoes are properly made to wear on the Feet, nevertheless we use them to get Money, or some other Thing in exchange for them." Εἰς τὴν γὰρ κέρματα διπλὰ ἢ χερσὶς εἶναι ἀμείβεσθαι ἢ καὶ αὐτὸ μὴ ἀλλ' ἕκ' ἄλλοις καὶ αὐτὸ αὐτὸ ἢ οὐκ εἶναι, ἢ δὲ καὶ εἰς τὸ κέρματα τὸ κέρματα εἶναι τὴν κέρματα, ἢ ἐκ ἐφ' ὅπου ἐκ ποιεῖται, ἢ μεταλλικὴ ἀμείβεσθαι γὰρ κέρματα γίνονται. Καὶ γὰρ ὁ ἀπορίας τὸ κέρματα εἶναι τὴν κέρματα, ἢ ἀμείβεσθαι γὰρ κέρματα τὸ κέρματα, ἢ ἐκ ἐφ' ὅπου ἐκ ποιεῖται, ἢ μεταλλικὴ ἀμείβεσθαι γὰρ κέρματα γίνονται. chap. 9. init.

5 A Sum of Money (say Mr. LA PLACETTE) which is lent to a Man to be traded with, is not any more spent by that, than a like Sum which is put into the Hands of one that acts by Commission, to be employed for the same End, or a like Sum trusted to a Partner, to act according to our Directions. All of them act after the same Manner, and with the same Intentions. We confess that he that gives another a Commission, and trusts a Partner, is still Owner of the Money, and always in Possession of an Equivalent. And why then may not the same Thing have Place with respect to the Creditor and Money lent? We lend not to the Man (says Mr. DE BEAUVAIL very well, Hist. de oper. Doll. Orob. 1691. p. 66.) but to his Goods. We reckon upon the Ability to pay, and not upon the Industry and Fidelity of the Borrower. A Reflection, which MARTIAL puts into the Mouth of his Friend, Lib. 12. Ep. 25.

Quod mihi non creditis, credite, siquid mihi, Creditis colliculis, arboribusque meis

You trust not me, altho' your ancient Friend, 'Tis on my Lands and Trees that you depend.

2 See Mat. 25. 24. 3 Pol. lib. 7. c. 5. l. 1. and 2. D. de Usur. cor. que usu consumantur.

4 See Mr. BARBEYRAC'S

And here we may observe by the way, what *Aristotle*^a relates of *Cypselus*, who having devoted all his Goods to the Gods of Corinth, the first Year paid the tenth Part of them, and so for ten Years together. But in strict Justice this did not satisfy his Vow, unless for the relief of such a rash one, any favourable Interpretation may be allow'd. That Saying of *Cato* in *Cicero*^b, who thought Usury as bad as Robbing and Murther, is to be understood only of Extortion, which reduces the poorer Sort to Extremities, and administers to the covetousness of the rich. Our Ancestors, says the same *Cato*^c, enacted in their Laws, that a Thief should be condemn'd to pay double, but an Usurer quadruple. And yet he himself, if we may believe *Plutarch*^d, did craftily enough exercise that sort of Usury which we now call *Bottomry*. *Augustus* very justly censur'd some Roman Gentlemen, for taking up Money at low Interest, and letting the same out at high^e. The old Romans and Greeks^f abhor'd Usury, as being burthensome to the Poor, and the foundation of Suits and Quarrels: The Persians, as being not very far removed from Deceit and Lying. And certainly 'tis unbecoming a Christian for a small Sum to accept of Interest from those whom it is in a manner Charity to relieve^g. The Greeks took an excellent Method to support their Friends in distress: For several entred into a Society, and had a common Chest, to which each contributed a certain Sum every Month; and out of this they lent Money without Interest, to any one of the Society that should happen to be reduc'd to Necessity; upon Condition to refund it, if his Circumstances should ever happen to grow better^h.

XI. In confirmation of what has been said for the lawfulness of Usury, it is observable, that those who are against it, allow of someⁱ Contracts, which in effect amount to the same thing. Thus, suppose *Caius* is furnish'd with Money enough to buy a Farm, which *Seius* has a mind to, but wants Money for the Purchase; *Caius*, at the request of *Seius*, buys the Farm, and lets it to *Seius*. No body can deny but that this Contract is lawful. But if *Caius* should lend *Seius* the Money to buy it himself, and *Seius* should pay so much for Interest as he must otherwise have paid for Rent, I don't see but that the Contract would be very just. Nay, this latter Contract is much more for the Advantage of *Seius* than the former, for here he purchases the Property of the Farm.

Again, Should any one put his Money into an honest Man's hands, upon Condition to be admitted into an equal Share of the Gain which he should make of it; no Man certainly would call this Contract unlawful. But in Equity 'tis the same Thing, if, instead of this uncertain Gain, he bargains for a certain Sum, which will never be the less lawful for being called by the Name of Interest.

The *Alcoran* forbids Usury, and yet the *Moors* borrow Money to carry on Trade, and allow the Creditor half the Gain; but if the Principal happen to be lost, the Debtor refunds that only; but if only part of the Principal perish, the whole must be made up out of the Gain of the Remainder.

A Mortgage, whereby a Man receives the Produce of Land given in Pledge for the Loan of Money, is acknowledged to be lawful^k: But if no Pledge be given, why may not the Creditor receive something^l answerable to the Produce of it^m?

*Grotius*ⁿ rejects the Name of Usury, but allows the Thing. For, says he, there are some things which look like Usury, but are Parts of another Nature: as the Amends that ought to be made a Creditor for the Loss he is at by being out of his Money, and the regard that ought to be had to the Gain he might have made of it; still Deductions being made for Uncertainties and Accidents, and the Pains he must have taken in the Management of it. Thus it is not properly Usury to demand a Consideration for the Charges he is at, who lends much Money, and provides it on purpose; and for the danger of losing the Principal where good Security is not given. Now the Interest for Money lent, not to a poor Man, but to one that makes a Gain of it, we demand upon this very Account, because we are debarred from making that Gain of it, which otherwise we might; and because it is worth some Consideration to have, instead of our Money, only an Action against the Creditor; and certainly 'tis reasonable we should be admitted into Part of the Gain made of that Money, which we were not oblig'd to lend, either in Justice or Charity. What Honest Man therefore will quarrel about words? And who would not laugh at those who pretend they don't take Usury for their Money, but^o only what they themselves might have made of it? Besides, this superstitious Nicety is not at all consistent with the Decrees of

MR. BARRÉ'S NOTES on § XI.

^a We may add to those spoken of here, a Contract between three Contractors, about which see Mr. PLACETTE'S Treatise of Interest, chap. 14. See also Mr. NODD, *De Fœn. & Usur.* lib. 1. c. 12. of which the Title is, *Mores rigorem Juris Canonici circa Usuras inflexisse ad æquitatem Juris Gentium, non omnino improbantibus ejus Juris interpretibus.*

^b We shall treat of this, chap. 10. § 14. following. *Cum debitor (say the Roman Lawyers) gratuitâ pecuniâ utatur, potest creditor de fructibus rei sibi pignoratæ ad modum legitimum usuras retinere.* Digest. lib. 20. tit. 2. *In quibus causis, &c.* Leg. 8. See Mr. NODD *de Usuris & Fœn.* lib. 2. c. 9.

^c *Id quod interest.* And they understand by it as the Roman Lawyers do, as well the Profit that was not made, as the Loss that positively accrued. *Si commissæ est stipulatio, ratam rem Dominum habiturum, in tantum competit, in quantum modò interfuit, i. e. quantum mihi abest, quantumque lucrari potui.* Digest. lib. 46. tit. 8. *Ratam rem haberi, &c.* Leg. 13. See also *Cod. lib. 7. tit. 47. De Sententiis, quæ pro eo quod interest, proferantur,* and Mr. NODD, *ubi supra,* lib. 1. c. 12. l. 2. c. 6.

^a *Oeconom.* l. 2. c. 1. *August.* c. 39.

^b *Off.* 2. in fin.

^c *De re rusticâ, princip.*

^d *Cato Major.*

^e *Suet. in*

August. c. 39. ^f *Appian,* l. 1. *de Bello Civili,* p. 382. B. Edit. H. Steph.

^g *Vid. Siracid.* 29. 1. 2. &c. *Psalm.* 15.

^h That Contribution-Money was called *æxvæ*.

ⁱ *Vid. Cicero, de Offic.* lib. 2. in fin. See *Cæcilius*'s Comment upon

the 16th Chapter of *Theophrastus*'s Characters.

^k *Alid.* lib. 20. t. 2. l. 8. *D. in quibus causis pignus tacite contrahitur.*

^l See hereafter, Chap. 10. § 14.

^m Among the Persians Usury is forbidden, but Mortgages allowed even under the

Lex commissoria, Olear. Itin. Perf. L. 5. c. 36.

ⁿ *L.* 2. c. 12. § 21.

the civil Law : for, according to them, the Usury ⁴ is ascertain'd and agreed upon beforehand : And the Damages allowed the Creditor, for what he might have made of his Money, are, among other Reasons, demanded for failure of Payment at the time appointed, which ought to be stated according to the Loss sustain'd, be it what it will ; but because it would be difficult to prove and adjust it exactly, it is therefore generally ⁵ reduc'd to regular Interest ^{a b}.

Since therefore 'tis lawful to demand Damages for tardy Payment, or because we lose by not having our Money paid in at the time appointed; why may we not bargain for something certain beforehand, upon consideration that our Money is in another Man's Power, whereas we were not oblig'd

for his Benefit to venture the Loss, or to neglect the Gain that might be made of it ^c?

XII. Lastly, It being evident that 'Men could not be found who would lend as much Money *gratis*, as human Necessities and Commerce (as carried on now adays amongst most civiliz'd Nations) requir'd, several Shifts were found out and allow'd of to evade the Decrees of the canon Law against Usury : Among which may be reckon'd the ^d Purchase of a yearly Income ^e ; where, for so much Money, I have such an immoveable Thing made over to me for the payment of it ; out of which I receive a certain Rent for ever, or for such a limited or unlimited Time, or for Life. And this Income may, upon Payment of the Principal, sometimes be redeem'd, sometimes not. Nay,

⁴ In Contracts of rigorous Right, the Engagements must be made exactly in the Forms. *R spondit [Africanus] pecunie quidem creditæ usuras, nisi in stipulationem deductas, non deberi.* Digest. lib. 10. tit. 5. De præscriptis verbis. Leg. 24. *Si pactum nudum de præstandis usuris interpositum sit, nullius est momenti.* Paul. Sentent. lib. 2. tit. 14. A bare Agreement gives no Title to Interest in Justice, unless it be to Bankers, or Exchangers, or to Communities, or such as run great Hazards with their Money, and lend in a Way something like it, or to such as lend Wheat or Barley. Neither can any Thing be required, when we say only that we lend upon Interest, without settling what the Debtor shall pay. Such an Agreement was only valid with Bankers, and *Justinian*, who gave them that Privilege, ordain'd that they shall be look'd upon to lend at 8 per Cent. But for a long Time before that Emperor, Money might be lent at 12 per Cent. which was called, *Usura Centesima*, but not higher, except, 1. When it was lent at great Hazards; for the Laws prescribed no Bounds, no more than in certain conditional Agreements, 2. In lending Provision; for a Law of *Constantine*, cited in the *Theodosian Code*, allowed an Exaction of Three Bushels of Corn, for Two lent. 3. When any one was fined a certain Sum by the Judges, and paid it not within two Months after the Sentence, he was obliged to pay Interest from that Time, at the Rate of 24 per Cent. if the Creditor summoned him to pay it, when three Months were ended; but it was by the Force of the Law, and not from the Agreement of the Parties. As for honest Contracts, a bare Agreement made on a sudden empowers a Man to require Interest. See about this whole Matter Mr. N O O D T, *lib. 2. c. 3, &c. lib. 3. c. 1, 2, 3, 4, 5.*

⁵ The Words of the *Digests* are, *In ejusmodi stipulationibus, quæ quanti res est, promissoribus habent, commodius et certam summam comprehendere: quoniam plerumque difficultis probatio est, quanti cujusque interit, & ad exiguum summam deducitur.* Digest. lib. 46. tit. 5. De stipulat. prætoris, Leg. 11. ----- When one owes a Thing in Specie, as the Use of it is determined, so the Damage which arises from a Delay in such and such a Case may be fixed, and so 'tis not commonly necessary to limit the Value at a certain Rate, which may be a Rule in all Cases. The Creditor, for want of Payment at his Time, may suffer a Loss many Ways, which the Debtor can't imagine, and as to him may seem only fortuitous; so that all that the Creditor can prove to be his Due upon Account of Delay, is only the Interest of the Sum desired. Mr. N O O D T, from whom this Remark is taken, *lib. 2. c. 6.* shews also *lib. 3. c. 6.* that while the *Roman Commonwealth* stood, no Interest could be demanded in Justice, for the Debtor's Delay of Payment, unless some Advance was agreed upon by Contract. But some Lawyers having introduc'd a Custom chiefly in Matters of Companies, the Emperors enlarged it to all honest Contracts without Exception, as also to Legacies and Trusts. In Contracts of rigorous Right, there must be always an Agreement in Form, or nothing can be demanded, altho' a Process be entred. In fine, if we add to this excellent Work of Mr. N O O D T's, so many times quoted, the Treatises of the Learned SALMASIUS, entitled, *De Usuris, De modo Usurarum, & De Fœnore Trapezitico*, nothing more concerning the History of Lending upon Usury, the Phrase and Decisions of the *Roman Law* about this Matter can be desired. See also J. VINCENT. GRAVINA'S *Origines Jur. Civil.* lib. 2. p. 333, &c.

Mr. BARB. NOTES on § XII.

¹ Some, says Mr. LA PLACETTE, *ubi supra, chap. 1.* can't live without Lending, and others have need of Borrowing. 1. If it were not allowed to take Interest, what would become of a great number of Persons whose Estate is all in Money? They'd spend it in a few Years, and how then should they subsist? 'Tis to no purpose to say, they ought to learn some Art or Trade, and apply themselves to Husbandry or Commerce. This is quickly said. But do we not really observe, that there are Labourers, Tradesmen, and Merchants enough in the World? Are not Lands sufficiently till'd throughout all *Europe*, unless it be in Places expos'd to the Ravages of War? And is it not plain, that there are Merchants and Tradesmen more than enough, since many of these Professions can't get a Livelihood, and many of them that do, are forc'd to search out new Inventions to excite and nourish Mens Vanity and Intemperance. 2. But (and this Consideration renders Lending upon Interest more necessary) how many miserable Men are there, who live only upon borrowing at Interest? What would become of many Merchants, whose Trade depends entirely upon Funds of borrowed Money? How many Citizens and Labourers, who are press'd from time to time with want of an hundred Things, which they could not obtain any other Way? Could they find always Persons ready to lend them what they want freely? This might be perhaps, if all Men were charitable, but since there are so few truly such, and among those that are, few are in a Condition to lend, whereas many more are in Necessity than can lend; it's plain that this Remedy has no Proportion to Mens Necessities: Nay, we may say, that what charitable Persons can and ought to do freely, is not the hundredth, nay, not the thousandth Part of what a great Number of Men are continually in want to borrow. So that it is of less Importance to Mankind that we should be permitted sometimes to lend upon Interest, than it is to confine that Permission to certain Bounds, beyond which none may go. See also Mr. N O O D T *De Fœn. & Usur.* lib. 1. c. 6. Experience heretofore convinced an Emperor of the Necessity of Lending Money on Interest. *Byl the Macedonian*, out of an inconsiderate Zeal, and ill-informed Piety, having absolutely forbid it, *Leo* the Philosopher was oblig'd to abolish that Ordinance, and allow Lending at 4 per Cent. knowing, says he, that his Predecessor's Prohibition was prejudicial to the State, because those that had Money would not lend it to those that needed it, so that that Law was above the Attainments of the human Nature. *Propter paupertatem res illa non in melius (quem tamen finem Legislatores proposuerat) sed contra in pejus vertit. Qui enim ante usurarum spe ad mutuandam pecuniam prompti erant, post latam legem, quod nihil lucri ex mutuo percipere possent, in eos qui pecuniis indigent, difficiles atque immites sunt. ----- Propterea quod humana Natura ad illius [legis] sublimitatem non perveniat, egregium illud præscriptum abrogamus.* Novel. 83.

^a *Fid. l. 17. f. 3. l. 22. t. 1. D. de Usuris.*

worthy to be consulted.

^b Concerning this, *Salmasius de Usuris*, and Mr. *Placette de l' Interet*, are

^c *Add. Baco. Serm. Fid. l. c. 39.*

^d *Emptio Censuræ annuæ.*

^e See Mr. *Barbeyrac's*

sometimes if the Thing given for Security happens to be lost, the Person of the Debtor is responsible for it. But that such a Purchase as this differs only in Name and Shew from *Usury*, no Man is so blind as not to see ^a.

Nay, in Consideration of the Usefulness of moderate *Usury*, the ² *Popes* themselves permitted, under a specious Title, *Mountains*, as they call them, *of Piety*; that is, they did not allow either Pledge or Interest to be taken for three Crowns lent to a poor Man; but for larger Sums Pledges might be taken for Security, and every Month some small matter paid as Interest: and if the Pledge were not redeemed in a Year, it was to be sold by *Auction*, and the Remainder, after Payment of the Debt, restor'd to the Owner. "*Alex. Severus* lent publicly at 4 per Cent. but gave many poor People Money without Interest to buy Land, and was contented to be paid out of the Produce. *Vid. Lamprid.* Something of the same Nature (but that they part with nothing *gratis*, or without Security) is still practis'd in *Lombardy*, so called because formerly most of the Usurers in *France* were *Lombards* and *Jews*, who afterwards were so odious as to be expelled the Kingdom. *Vid. Hen. Steph. introduçt. ad apolog. pro Herodoto, l. 1. c. 6.* After much Debate, *Usury* was allowed of in *Holland*, as a Thing beneficial to the State, and even those who took it were permitted to enter into holy Orders.

How much the Laws against *Usury* are evaded by ^b *dry Exchange* ^c (as they call it) is well known among the Merchants. To which may be refer'd that sort of Contract, which is called in *Spanish*, *Mobatra* ^d. When a Man takes up Goods upon Trust at a high rate, and immediately sells them again to his *Creditor* at a low one. 'Tis more tolerable when Goods are bought dear, by reason that a long time is allowed for the Payment, and immediately sold to a Third something cheaper for ready Money: For hereby a Man may avoid the Necessity of taking up of Money at unreasonable Interest: or, in the mean time, may make so much Gain, as to be well able to pay the Debt at the time appointed. And this is common in *Muscovy* ^e.

It is requisite indeed, that private Men should be hindred by Law from exacting what Interest they please, and that it should be fix'd at such a certain Rate. Yet a Man may fairly expect something more when his Money is lent but for a short time ^f g.

The *Egyptian* Law ^h did not permit the *Principal* to be more than doubled by *Usury*, and allowed the *Debtor's* Goods to be seized upon, but not his Person: Whatever they got by their Labour, or any other just Title, was look'd upon as their Goods; but as for their Persons they belong'd only to the Publick, to be dispos'd of in its Service, according as they were best qualified for the Duties of War, or Peace.

² They were formally allowed by Pope *Martin V.* *Extrazagant. commun. lib. 3. tit. 1. De Empt. & Vendit. c. 1.* and by *P. Calixtus III.* *ibid. c. 2.* See *JUSTINIAN'S Novels* 161. and *MR. NOODT'S, lib. 1. c. 12.*

³ This is, when Payment ought to be made in the very Place where the Sum had been told, so that it is really a true Interest. It is oppos'd to real Exchange, which is divided into Minute and Local; Minute consists in the Change of Species, when for Example, Silver is given for Gold, and Gold for Silver, for a small Advantage. Exchange Local is, when one takes a certain Sum to return the like in another Place. See *MR. PLACETTE* about all this, in the last Chapter of his *Treatise of Interest.*

⁴ The Reason of it is, and the Author ought to have mentioned it, that tho' the Interest seems excessive, yet it is a small Matter to the Borrower, who usually employs the Money to such Uses as produce a much more considerable Profit than he gives the Creditor for small a Time. Further, besides Sums that are borrowed for a little Time, there are also small Sums, whose Interest, according to the common Rate, comes to nothing, and is not worth the Creditor's Trouble (See *MR. LA PLACETTE'S* *Treatise, c. 22.*) it may happen, that in that little Space, he may lose the Opportunity of putting out his Money for a long time, or make some considerable Advantage of it, for which he would receive no manner of Recompense, if he received not greater Interest than he would receive of a Person who takes his Money for a longer time. In the Conclusion the Author recites a Custom of the Inhabitants of *Cnossus* in *Candia*, § 4. above, to shew how they eluded the giving of *Usury*. At that Place such as borrowed Money at Use, took it by Force, that if they refused in earnest to pay Use to the Creditor, he might have an Action of Assault and Battery, and cause them to be punish'd severely. Before we conclude this Matter, let me add one Word of what is called Bottomry, ----- or Great Adventure, which consists in Lending Money upon a Merchant's Ship, upon this Condition, that the Creditor loseth his Money, in case the Vessel and Goods, upon which it is lent, be lost. As the Creditor runs great Hazards, he requires more Interest than ordinary, proportionable to the Dangers he is expos'd to. The civil Law allows it, and there is nothing to oppose it in the Law of Nature, *Digest. lib. 22. tit. 2. De nautico fœnore.* For the Danger to which the Lender is expos'd is capable of Valuation, and consequently he may, on the one Hand, expose himself to it by the Mediation of a certain Price, and on the other, agree for the Price with them for whose Sake he runs the Hazard. In a Word, such a Treaty hath nothing in it oppositè to Justice, more than a Bargain of Assurance, of which we shall speak in *Chap. 9. § 3.* See *MR. NOODT De Fœn. & Usur. lib. 2. c. 7.*

^a *Add. Fran. Hotoman. obs. l. 2. c. 1. & Jo. Labard. Hist. de Reb. Gall. l. 6. p. 393.*

^b *Cambium Siccum.*

^c Concerning this, see *MR. LA PLACETTE'S* last Chapter of *Usury.*

^d *Vid. Montaltii Lit. provincial. 8. & ad cam Wendrock.*

^e *Olear. Iun. Perf. l. 3. c. 7.*

^f *Vid. Leonis Novel. 84.*

^g See *MR. BARBEYRAC'S* Fourth Sect. of

this Chapter. ^h *Diodor. Sic. l. 1. c. 79.*

C H A P. VIII.

Of Partnership.

- I. How many ways Partnership may be begun.
- II. Money and Labour are balanced several ways.
- III. Irregular Partnership.
- IV. A Partnership in all Goods.

Partnership is a Contract ^a by which two, or more, join together their Money, Goods, or Labour, upon Agreement, that the Gain or ^b Loss shall be divided proportionably between them ^a. And here, if every Man contributes equally, each must receive an equal Share in the Gain, or Loss: but ^b if they contribute unequally, their Shares must be adjusted according to the Laws of Geometrical Proportion ^b. And the same obtains, if two, or more, join ^c Labour; or one ^d Labour, and the other Money ^c; or each Party both Labour and Money ^d.

II. Upon breaking of Partnership, if each Party contributed only Money, 'tis plain upon a Division, each must receive according to his Contribution. But if both ^e Money and Labour was contributed, it must be consider'd after what manner the Collation was made: For when Labour is contributed

on one Side, and only the use of Money on the other, he who contributed the Money does not admit the other to a Share in the Principal; but only to his Proportion of the Gain ^e that might be made of the Money and Labour join'd together. And, in this Case, as he that contributed only Labour has no Title to any Part of the Money, when they break off Partnership; so the other alone, as Owner, is concern'd in the Risque that the Money is exposed to; and, in such a Partnership as this, not the Money itself, but the Risque that it runs, and the Gain that may be probably expected from it, is compared with the Labour. And therefore when the Gain is to be proportion'd, we must not compare the Labour with the Principal (as if one having contributed Work to the value of 100*l.* and the other 1000*l.* in Money, the former were to receive only a tenth Part of the Gain) but to the Risque and Hazard that

Mr. BARR. NOTES on Chap. VIII. §I.

^a *Grotius* believes it to be a mixt Contract; but see what is said above, c. 2. § 10. We must observe that a Partnership is contracted sometimes tacitly, when, for Example, a Thing being bought in common, 'tis not parted, but without explaining themselves further they enjoy it equally, each taking the Profit that arises, and contributing their Part in the necessary Expences for its Maintenance: *Societatem coire, & RE, & Verbis, & per nuncium, posse nos, dubium non est*, Dig. lib. 17. tit. 2. Pro Socio, Leg. 4. princ. See Mr. *Hartius's* Discourse, entituled, *De Societate facta contracta*, which is found in Tom. 3. of his *Commentat. & Opuscula*.

^b The *Digests* order, *Sicuti lucrum, ita damnum quoque commune esse oportet, quod non culpa socii contigit*. But if the Loss comes by the Fault of one of the Partners, he is responsible for it, and so he must not expect a Recompense of the Loss which came by his Negligence, in not doing what he was oblig'd to by the Contract: For so the *Digests* appoint, *Si socius quaedam negligenter in societate egisset, in plerisque autem societatem auxisset, non compensatur compendium cum negligentia*, *ibid.* Leg. 26. See also Leg. 73. and about this whole Matter M. *DAUMAT's* Civil Laws in their natural Order, Part 1. lib. 1. tit. 8. As for Leg. 60. § 1. which our Author quotes, it contains a Decision very harsh and unjust; for it requires, that a Partner who has been hurt by his Servant, whom he pursued, and who belonged to the Partners, should be cured at his own Expence; because, says it, tho' he was engaged upon that Expence for the Partnership, yet it was not done in the Partnership: *Socius, cum resisteret communibus servis venacibus, ad fugam exumpentibus, eademerat is eis; impensum, quam in curando se fecerit, non consequatur pro socio actione*, *Labo* ait, *quia id non in societatem, quareris propter societatem, impensum sit*. But was it not in the Business of the Partnership that he was hurt? The contrary Opinion ought to prevail with Reason; for there is another Law under the same Title, where 'tis said, That if a Partner going a Journey about the Business of the Partnership, falls among Thieves, who take away his Baggage, or Money, or hurt his Servants, he shall be indemnified at the common Charge: *Quidam sagariam negotiationem coierunt: alter ex his ad merces comparandas profectus, in latrones incidit, suamque pecuniam perdidit: servi ejus vulnerati sunt, resque proprias perdidit: Dicit Julianus, damnum ei commune, ideoque actione pro socio damni partem dimidiam agnoscere debere, tam pecunie, quam rerum ceterarum, quas secum non tulisset socius, nisi ad merces communi nomine comparandas proficisceretur*, Leg. 52. § 4. The Law here mentioned, which is the Lawyer *Pomponius's*, is corrected by the following one of *Ulpian*; *Secundum Julianum tamen, & quod melius pro se natum est, recipere potest. Quod verum est.* *ibid.* Leg. 61.

^c *Aristotle's* Greek is, *ὁ ἕκαστος ἐν κοινῷ κέρει καὶ ἀπὸ κοινῆς ἐπιμέλειας*, &c. *Arist. Eth. Nicom. lib. 8. cap. 16.* And the Words of the *Digests* are, *Conventus est civi boni arbitrio, ut non utique ex æquis partibus socii finis, veluti si alter plus opera, industria, pecunie in societatem collaturus sit*. See also Leg. 80. of the same Title.

^d The Words of the *Digests* are, *Qui societatem coierunt, ut Grammaticam docerent, & quod ex eo artificio quaestus fieri solent, contrivans eorum esset*. *Digest.* ubi supr. Leg. 71.

^e The Words of the *Legislator* are, *Nam & ita coiri posse societatem non dubitamus, ut alter pecuniam conferat, alter non conferat, & tamen lucrum inter eos commune sit; quia jure opera alicujus pro pecunia valet*. *Instit. lib. 3. tit. 26. De Societat. § 2.* See *Digest.* ubi supr. Leg. 29.

^f As when two Merchants are Partners, and are both concerned in the same Business. See Leg. 52. § 4. quoted Note 2. of this §.

Mr. BARR. NOTES on § II.

¹ What the Author says of Money must be understood of Effects, Goods, and every Thing that is different from Labour, and whatever may be reckon'd to be the Stock of the Partners.

² Not more than he that lets Land to be till'd, makes the Labourer a Proprietor of the Lands, tho' he lets him part of the Fruits; or he that commits a Flock to a Shepherd, on condition that he shall have a Share in the Wool, Milk, and other Profits, must take part with him when the Partnership is ended: *Si in communis societate ----- artem operantem pollicitus est alter, veluti quom socius in commune pasendum, aut agrum polt est*. M. *Brakerhoveck* reads it, *Oditori. Observ. 3. 9.) domus in commune querendi fructibus, nimirum ubi etiam culpa præstantia est.* *Digest.* lib. 17. tit. 2. Pro socio, Leg. 52. § 2.

³ *Vid.* lib. 17. t. 2. l. 73. and l. 52. l. 3, 4. l. 60. l. 1. *D. pro Socio.* ⁴ In Partnership, the more a Man contributes, the more does he receive. *Arist. Nic. l. 8. c. 16.* In the same Sense ought that in the *Digests* to be explained, l. 20. D. h. t. *Id est be nec mentioned what Share each Party contributed, they must be presumed to be all equal.* ⁵ *Vid. Instit. l. 3. t. 26. De Societat. § 2.*

the Money is expos'd to, which if computed to be worth 100*l.* each Party shall gain equally.

The best way, in this Case, is to rate the Risque of the Principal and the Hopes of the Gain, according to the Interest that is generally given for Money. Supposing then this Interest to be 6*l. per Cent.* if one Party contributes Labour worth 60*l.* and the other 1000*l.* in Money, they shall share equally of the Gain.

But sometimes the Labour and Money are so interwoven together, as to give him that contributed only his Labour, a Share even in the Principal; the Labour of the one, and the Money of the other, being in a manner united into one Mass. As when one lays out his Money upon unwrought Commodities, and another spends his Labour in working them up, and managing them. Thus, if I give a Weaver 100*l.* to buy Wool, and he makes Cloth of it, computing his Labour at 100*l.* 'tis manifest, that here both of us have an equal Interest in the Cloth; and when it is sold, the Money must be equally divided: Nor ought I to subtract the Money that I contributed at first, and then divide the remainder with him.^a

III. Besides, 'tis not unjust to enter into such a Partnership, as that one Party may have a Share in the Gain^f, without being in danger of partaking of

the Loss^b. But this is irregular, and a mixt Contract of Partnership and Insuring; and here^c an Equality will be observ'd, if the insuring Party receives a greater Gain than the other, in proportion to the risque he runs in bearing the other harmless. But for one to partake^d of the Loss and not of the Gain, is repugnant to the very nature of Partnership; for no Body enters into such a Contract, but upon the prospect of some Advantage^e.

IV. Sometimes People enter into Partnership^f for all they are worth^d; in which Case each Party, according to his Condition and the Laws of good Husbandry, may take from the common Stock, as much as is necessary for the handsome Maintenance of him^g and his^e. But since few Mens Circumstances will induce them to^h continue long in such a Partnership as thisⁱ, it would be convenient to agree at first, what Share of the Gain each shall pretend to at breaking off. Where *Grotius* & observes, that no regard ought to be had to what has been actually gain'd by this or that Man's Contributions, but to what might probably have been expected from them: For therefore it is that many join their Stocks together, that each may be admitted into a Share of what is gain'd by the Goods of others.

Now tho' no Man ought to have his Liberty so far intrench'd upon, as to be confined to a Partnership

^a This takes place in other Things as well as Money, as when one allows Ground for a Building, on condition that he that builds on it, shall have a Moiety; or, as when one trusts a Flock to be fed, or a Servant to be fed or taught, on condition that if it be sold at the End of some Years, the Money shall be divided among the Partners. *Sed si puerum docendum, vel pecus pascendam tibi dederis, vel puerum nutriendum, ita ut, si post certos annos venisset, pretium inter nos communicaretur, abhorrens hoc: ab arca ----- ergo si quis arca dominum non transfulerit, sed passus sit te sic edificare, ut communicaretur vel ipsa, vel pretium, erit societas.* Digest. lib. 19. tit. 5.

Mr. BARB. NOTES on § III.

¹ The Words of the *Digests* are, *Contra Quinti Mucii sententiam obtinuit, ut illud quoque consisterit, posse convenire, ut quis lucri partem ferat, de damno non teneatur.* Yet it must be understood, that in several Matters of Partnership, if there be Gain on the one Side, and Loss on the other, nothing must be called Gain, but what remains when Losses are deducted: *Quod tamen ita intelligi oportet, ut si in alia re lucrum, in alia damnum illatum sit; compensatione facta, solum quod superest, intelligatur lucro esse.* Instit. ubi supra. § 2. See *Dig. lib. 17. tit. 2. Leg. 29. § 1.*

² So the *Digests* speak, *Quod ita demum valebit ----- si tanti sit opera, quanti damnum est. Plerumque enim tanta est industria socii, ut plus societati conferat, quam pecunia: Item si solus naviget, si solus peregrinetur, pericula sibeat solus.* Digest. ibid. But all that is said here of the Equality of the Portions of Gain, ought to be understood with this Restriction, If it be not otherwise agreed; for then the Consent of Parties supplies the Inequality of what each hath contributed of his own. *Et quidem si nihil de partibus lucri & damni nominatim convenerit, aequales scilicet partes & in lucro & in damno spectantur. Quod si expressae fuerint partes, hoc servari debent. Nec enim unquam dubiam fuit, quin valeat conventio, si duo inter se pacti sunt, ut ad unum duae partes pertineant, ad alium tertia.* Instit. ut supra, § 2.

³ The *Digests* so order, *Aristo refert Cassium respondisse, societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentire, & hanc societatem Leoninam solum appellare ----- Iniquissimum enim genus societatis est, ex qua quis damnum, non etiam lucrum spectet.* Digest. ut supra, § 2.

^a Compare *Grotius*, l. 2. c. 12. f. 24.

^b *Vid.* l. 29. f. 1. D. h. t.

^c *Vid.* l. 29. f. 2. D. h. t.

^d *Ibid.* f. 5.

^e *Ibid.* leg. 73.

^f *Vid.* l. 70. D. h. t.

^g D. L.

Mr. BARB. NOTES on § IV.

¹ So the *Digests* speak, *Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive castigalis, sive etiam rei unius.* Digest. ibid. Leg. 5.

² *Si societatem* (say the *Digests*) *universarum fortunarum ita coierint, ut quicquid erogaretur vel quaeretur, communis lucri atque impendii esset, ea quoque quae in honorem alterius liberorum erogata sint, utrinque imputanda.* Ibid. Leg. 73.

³ *Nulla societatis in aeternum coitio est.* ibid. Leg. 70. The Roman Lawyers say, that tho' a Partnership hath been contracted with this express Clause, Never to separate; yet the very Nature of Society, which is the Source of Divisions and Disorders, if it be entirely free, requires, that it be permitted to each of the Partners to renounce it, when it seems good to him, provided he do it not at an unreasonable Time, and to the Prejudice of others. *Si convenerit inter socios, ne intra certum tempus communis Res divideretur, non videtur convnisse, ne societate abeat. Quid tamen si hoc convenerit, ne abeat, an valeat? Eleganter Pomponius scripsit frustra hoc convenerit. Nam etsi non convenerit, si tamen intempestive renunciatur societati, esse pro socio actionem. Sed etsi convenerit, ne intra certum tempus societate abeat, & ante tempus renunciatur, potest rationem habere renunciatio, nec tenebitur pro socio, qui ideo renunciavit, quia conditio quaedam, qua societas erat coita, ei non praesentatur; aut quid si ita injuriosus & damnosus socius sit, ut non expediat eum pati? Digest. ibid. Leg. 14. See the last Note of this Section. *Quas discordias materiae communitatis solet excitare.* Lib. 31. De Legatis & fidei commissis, 2. Leg. 77. § 20.*

ship longer than he desires; yet since a great ⁴ Degree of Fidelity is required among Partners, he ought not to break off unseasonably and to the detriment of others ⁵. Upon this Point Cicero ^b discourges very seriously ⁶: *It is accounted, says he, a base thing to deceive a Partner in ever so small a matter, and with reason: For he who enters into Partnership does it in hopes of gaining to himself an Assistant: To whom therefore can he fly for Succour, that suffers from him*

on whom he depended? Those Crimes are of the blackest hue, against which there is the least guard: We may defend ourselves against the Malice of others, but to an intimate Friend we lie open. For how can we provide against a Partner, whom we cannot so much as suspect without violating our Duty? Well therefore did our Ancestors judge him who deceiv'd his Friend in this Point, fit to be reckon'd amongst the worst of Villains ⁶.

⁴ So the Digests order, *Venit autem in hoc iudicium pro socio bona fides.* Ibid. Leg. 52. § 1. *Cum in societatis contractibus fides exuberet, &c.* Cod. lib. 4. tit. 37. Pro Socio, Leg. 3. *Socius socio utrum eo nomine tantum teneatur pro socio actione, si quid dolo commiserit, an culpa, i. e. desidia, quaesitum est. Praevaluit culpa nomine teneri cum, sed culpa non ad exactissimam, sed talem diligentiam, qualem rebus suis adhibere solet.* Institut. ubi supra, § 9. Tribonian joins here two Laws of the Digests, *Pro Socio*, which do not agree together, viz. Leg. 52. § 2, & 58. See Mr. THOMASIVS's Discourse, *De Culparum Praestatione in contractibus*, c. 1. § 24. VINNIUS also owns, that the Reconciling of this Section with Leg. 33. of that Title of the Digests, *De positi vel contra*, is a Gordian Knot. As for me, I have laid down a general Rule about all Contracts, wherein we have the Affairs or Goods of another in our Hands after any manner, that we should act as we would do for ourselves, and our own Interest, in Things that most nearly concern us. And this Practice is the more just, because the Roman Lawyers say, that Partnership is a kind of Brotherhood. *Societas jus quoddam fraternitatis in se habet.* Digest. Pro Socio. Leg. 63. princ. But as for such Mischances as no human Foresight can prevent, neither of the Partners is responsible for them. *Damna, quae in prudentibus* (it should be read, as Mr. Bynkerhook observes, *Obs.* 10. 10. *imprudentibus*) *accidunt, hoc est, damna fatalia, socii non cogentur praestare,* Ib. Leg. 52. § 3.

⁵ TULLY's Words are, *In rebus minoribus socium fallere turpissimum est -- neque injuria; propterea quod auxilium sibi se putat adjunxisse, qui cum alteri rem communicavit. Ad cuius igitur fidem confugiet, cum per ejus fidem laeditur, cui se commiserit? Atque ea sunt animadvertenda peccata maxime, quae difficillime praevocentur. Testi esse ad alienos possumus, intimi multa apertiora videantur necesse est; socium vero cavere qui possumus? Quem etiam metuimus, jus officii laedimus. Recte igitur majores cum, qui socium sefellisset, in virorum bonorum numero non putarunt haberi oportere.* Orat. pro Roscio Amerino. Chap. 40.

⁶ The Digest thus speak, *Labeo ----- scribit, si renunciaverit societati unus ex sociis eo tempore, quo interfuit socii non dirimi societatem, committere eum in pro socio actione. Nam si enim mancipia, inita societate, deinde renuncias mibi eo tempore, quo vendere mancipia non expevit, hoc casu, quia deteriore causam meam facis, teneri te pro socio iudicio.* Digest. ubi supra. Leg. 65. § 5. of which see the rest.

^a *Fid.* l. 65. f. 5, &c. D. h. t.

^b *Pro Sext. Roscio*, c. 40. *Add.* Quintil. *Decl.* 320.

CHAP. IX.

Of Contracts depending on Chance.

- I. Bargains mixt with Chance.
- II. They are us'd, as well in Peace,
- III. As in War.
- IV. Contracts in laying Wagers.



- V. Contracts in Play.
- VI. Of Raffleings.
- VII. Of Lotteries.
- VIII. Of Insurance.

WE come now to such Contracts as depend upon Chance; where the Parties refer themselves to some ¹ uncertain Event, and give Security to stand to, and to be determin'd by it. Some of these indeed have no relation to Price, yet most of them have; and therefore we think fit to discourse of them all together in this Place.

II. These Contracts may be either publick or private. The publick are such as concern either War, or Peace. In Peace some Nations determine themselves by Lot ² in choosing Judges, in assigning Provinces, and in disposing of Offices, when the Competitors, both in respect of their Right and their Abilities, are equal; for otherwise should one have a better Right, his Right might be prejudic'd: Or should another have greater Abilities, the Common-

wealth might suffer by it. For as *Isocrates* in *Areopag.* says, pag. 248. Ed. min. *Paris.* *Fortune governs the Lot.* ² And *Callimachus* in *Hymn. Jovis*, v. 63, 64. *For a thing that each has an equal Title to, 'tis convenient to cast Lots.* And *Philstr.* in *vita Apol. Tyan.* l. 3. c. 9. *Fortune has no Prudence, so that the worst may be chosen by Lot.* In such Cases the Parties are suppos'd to enter into Compact to acquiesce without Complaint in the Determination of the Lot, as having voluntarily submitted to it. And when a Superior uses Lots about that which he might enjoyn of his own Authority, he is suppos'd to depart from his Right, and of his own accord to submit himself to their Determination.

The Design of these Lots is not to search into the hidden ³ Decrees of God, unless where he positively

com-

Mr. BARBEYRAC's NOTES on Chap. IX. § I.

¹ Because of the Uncertainty, he to whom the Event is not favourable, can't reasonably complain of the Loss that has befallen him, and to which he submitted before hand. 'Tis the general Law of these Sorts of Contracts, to which we may refer Bargains of uncertain Hopes, of which our Author treats *Chap.* 5. § 6. above. Mr. HERTIUS also places in the Number of Contracts which are hazardous, the Rents of Ground lost, and Partnership in all Goods, both in present Possession, and future. See the *Paræmie Jur. German.* of the same Author, lib. 1. c. 43.

Mr. BARB. NOTES on § II.

¹ Concerning all these Matters, see *Hadrian Junius's Animadvers.* lib. 2. c. 5. of the enlarged Edition in 1708. *The Gataker* speaks more exactly and fully in his *English Book, Of the Nature and Use of divers kinds of Lots*, c. 4 & 5. where he treats of this Matter, both historically, and as a judicious Moralist.

² *Callimachus's Greek* is, ἑστὶν ἰσοὺν γὰρ ἕκαστος Πότῳ. See also *Justin.* l. 1. c. 10. n. 2. & l. 18. c. 3. n. 9, 10.

³ They who believe that God is the Author of the Things effected by Lots, alledge the *Text* in the *Proverbs*, xvi. 33. *The Lot is cast in the Lap (i. e. in the hollow of some Vessel) but the whole Disposal is of the Lord.* But according to the Language of Scripture, no more is meant by it, than that Men are not Masters of the Effects wrought by Lots, as Mr. LE CLERE proves very well in his judicious Reflexions upon Mens good or bad Fortune in the Business of Lotteries, &c. c. 8. which the Reader would do well to peruse thoroughly. See also *Gataker*, of the Nature and Use of Lots, c. 8. § 3; &c. And Mr. LA PLANTIERE's *Treatise Of hazardous Games*, c. 2.

commands it ^a, but to put an end to Strifes and Differences ^b, or that a Person, who otherwise has Power to decide them by his own Authority, may avoid the *odium* of the Party against whom he decrees; and leave no room for a Complaint of the Injustice of the Sentence.

But in a Controversy where the Party cast is punishable by Law, 'tis absurd to apply any thing of Chance; for no Man ought to be punish'd, unless Matter of Fact be evidently prov'd against him: Whereas a Lot, let it fall out how it will, can never be able to undo what has been done, & *vice versa*; and therefore Lots are not capable of adjusting such Matters. But when a Multitude are in fault, and 'tis inconvenient for them all to suffer, then indeed the Criminals may be punish'd by Lot.

In private Affairs Lots are of great use, either in dividing ⁴ of Inheritances, or conferring upon one a Benefit, or a Burthen which cannot be divided, and yet which many have an equal Title to ^c.

III. Nor are such Pacts as these of less use in War, either when the Issue of the whole is thrown upon the Event of a Battle between both Armies ¹, or between two or more chosen out of each side ^d: Or when some dangerous and honourable Post is to be assigned, for which many are equally qualified ^e.

Indeed almost all solemn Wars, at least after all Terms of Peace have been rejected, seem to suppose an Agreement between both Parties, that which Side soever shall have the good Fortune to be Conqueror shall have Right to give Laws to the vanquish'd ²: and this is the Reason that no Party can ever urge as an Exception against any Treaty, that he was forced to it by Fear; for he who takes the Field, when the Controversy may be decided otherwise, is suppos'd to commit the Decision of it to the Sword, and therefore cannot complain whatever Condition the Chance of it imposes upon him. And this too is the Reason, that when they come to Articles, the Parties engaged are presumed to stand upon equal Grounds as to the Justice of their Cause, and whatever Mischief has been done on either side is forgiven, as suppos'd to have been done by Consent.

Such a Covenant as this do they enter into, who decide their Quarrel by a Duel, and therefore he that kills, is not oblig'd to make Satisfaction to the other's ³ Wife and Children for the Loss; for they join Battle by Agreement upon this Condition, to kill or to be kill'd. But since these Duels, when undertaken by private Men of their own Heads, directly thwart the End of civil Judicature, they are deservedly restrained by severe Penalties. Formerly indeed they were allowed of (but absurdly, and against the End of civil Government) either to clear a Man of a Crime objected, or to demonstrate his Right in Contest ^f. Thus heretofore in *Germany* a Point of Law, whether the Uncle, or the Son of the elder Brother deceas'd, should take place in the Father's Inheritance; was absurdly left to the Determination of a Duel ^g.

IV. Among these Contracts of Chance we may reckon ^h ¹ Wagers ⁱ, when two differ about some future or past Event, if not known to either Party, each laying down a certain Pledge, to be his, who shall happen to be in the Right. These Wagers seem to be reciprocal Promises, and conditional Bargains; which are so far mixt with Chance, as not having their Event depending on the Parties. The Riddle indeed propos'd by *Sampson* to his Friends, seems rather a Sport, than a Wager ^k, it being a contest of Wit, whether he could propose a Thing with greater Obscurity than they should answer with *Acumen*. But his Friends play'd foul, in solving his Riddle, not by their own Ingenuity, but by the Treachery of his Wife. Though perhaps it was not so very fair in him, to make a private Fact, and not some common matter the Subject of his Riddle. For 'tis almost impossible to find out such particular private Facts as those, by guessing ².

V. All Sorts of Plays ^l, where the Parties contend for something, carry with them a Covenant depending more or less upon Chance. And the more they admit of Ingenuity, Sleight, Cunning, or Strength, the less are they concern'd in Chance; and indeed are only so far dubious, as the degree of Strength or Dexterity is not as yet manifest, or, as some unforeseen Accident may interpose ¹, or as human Wit and

⁴ See *Pf.* xvi. 6. For the other two Passages quoted by the Author, relate only to such rare and extraordinary Occasions, as God over-rules the Lots in; ¹ every Tribe had his Portion of Land exactly in the Places where *Jacob* (*Gen.* xlix.) and *Moses* (*Deut.* xxxiii.) had foretold that they should be.

MR. BARB. NOTES on § III.

¹ See *lib.* 8. c. 8. § 5. following.

² See *lib.* 8. c. 8. § 1. following.

³ See *lib.* 3. c. 1. § 7. above.

MR. BARB. NOTES on § IV.

¹ They are allowed by the civil Law, provided they are not used about Things unlawful and dishonest: and he that wins them by fair Play, may recover them by Law. *Si quis sponsonis causa annulos acceperit, nec reddit victori, prescriptis verbis actio in eum competit.* --- *Plane si inhonesta causa sponsonis fuit, sui annuli duntaxat repetitio est.* Digest. lib. 19. tit. 5. De Praescriptis verbis, Leg. 17. § 5. See also *lib.* 11. tit. 5. De Aleatoribus, Leg. 3. Moreover, as Mr. *TITUS* on *Lauterbach* observes, *Obierv.* 294. when one lays a Wager about a Thing already done, the Wager is no less good, tho' one of the Contractors knows the Truth of it certainly. Indeed, whoever resolves willingly to lay a Wager with any one without knowing whether he is sure of what he maintains, or not, he must be thought to run the Hazard to engage a Person on the sure side, and consequently, if it so happens, must blame himself. And with great Reason he must do it, when one of the Wagers declares that he is perfectly well informed of the Matter in Debate, and tells the other so, that he may not engage in so rash a Wager. It is another Thing, when before the Wager is laid about an unknown Fact or Accident, one asks the other whether he knows any thing of it; for in this Case, if he seems to be ignorant of what he knows, merely to draw in the other to lay a Wager, he is guilty of Deceit, and so the Wager is void. See my Treatise of Gaming, *lib.* 2. c. 2. § 16. where this Question is fully handled.

² See Mr. *LE CLERC* on *Judg.* xiv. 12. &c.

^a See *Prov.* xvi. 33. ^b See *Prov.* xviii. 18. ^c Add. *Numb.* xxiv. 13. *Jos.* xiv. 2. *Psal.* xvi. 6. ^d Vid. *Grat.* L. 2. c. 23. f. 10. & l. 3. c. 20. f. 42. ^e Vid. *Hom.* II. n. v. 171. ^f Vid. *Jur. Canon.* tit. 10. De purgatione vulgaris, & pag. fm Cod. Legum antiquarum Lindenbrogii, c. 13; *Glossarium in Vocabulo Campio & Duellum.* ^g *Apud* Sigibertum Gemblacensem ad ann. 942. ^h *Sponsores.* ⁱ See Mr. *Barbeyrac's* first Note upon this Section. ^k *Judg.* xiv. 12. &c.

^l Vid. *Virg.* *Aen.* l. 5. v. 328.

MR. BARB. NOTES on § V.

¹ I have search'd this Matter to the Bottom in my Treatise of Gaming, Printed in 1709

and Industry does not exert it self so much at some times, as it does at others, Many are dependent both upon *Chance* and *Skill*, as *Gaming at Cards*, and the like; others are entirely at the Mercy of *Chance*, as *Dice*. None of which are naturally unlawful; for it is by Consent that we engage in them, and each Party ventures equally, and plays for Things that are in his own Disposal. But because the Publick is concern'd that no Man should mispend his Estate; and a Man may be easily undone by Gaming³, if he plays high⁴; at least⁵ much Time, which is a precious Thing, may be consumed in it⁶, and because it is frequently the Occasion of Quarrels⁷, and several other⁸ Inconveniences; it is therefore the Business of the Government to consider, how far *Gaming* should be permitted, and how high⁴; but generally speaking, those *Plays* seem most allowable, that admit least *Chance*, and most Ingenuity, and *vice versa*. Now in all sorts of *Gaming*'s is a standing Rule, that no foul Play be made use of, ⁶ *For they that run in a Race are suppos'd to contend by Swiftness, not by Tricks; to endeavour at the Victory by Speed, not by laying on of Hands, or tripping up the Heels of their Adversaries* ^c.

VI. Of the several sorts of *Gaming* that which we call¹ *Raffing* is, when many contribute towards the Purchase of a Thing, and then leave it to Chance which one shall have the whole. In this there are two sorts of Contracts; for in respect of him who exposes his Goods, it is Selling; in respect of them to whom they are expos'd, it is casting Lots for them. For, by Agreement, he whom Fortune favours is to have the whole; and the rest are to be at the Loss of what they contributed. The Rule here is, that the whole of the Money contributed should equal, and not exceed the Value of the Commodity: And that every one of the

Contributors should have an equal Chance for it, in Proportion to their Contributions.

VII. Another sort is, when a certain Number of Tickets, ¹ *Benefits* and *Blanks*, are cast into a Glass, and several, at certain Rates, buy the Liberty of drawing them with this Condition, that he who draws a *Benefit* shall receive the Value inscribed upon it.

This something resembles our *Lotteries*, and comes nearest to that Sort of Contract, which we call the *Purchase of Hope*, tho' there be Hazard enough with it. The Rule here is, That the Price of all the Tickets should not much exceed the Value of the *Benefits*; I say, *not much*, for Charges are to be consider'd, and the best *Benefits* may happen to be drawn first, and if so, People won't be so forward to venture upon the remaining Tickets.

Such *Lotteries* as these are sometimes set up to collect Money for publick Buildings, or for the Relief of the Poor; in which Case, the Price of all the Tickets together is generally much larger than the Value of the *Benefits*: which Overplus is in the Nature of Alms and Charity given after a free and cheerful manner^h.

But, in fine, for an Equality in Gaming, it is not only requisite that the Venture on each Side should be equal: but also that the Danger of losing, and the probability of winning should bear Proportion to the Thing contend'd for; *v. g.* in a Game that depends upon Skill or Ingenuity, if one Man is twice as skilful as the other, it is fit he should lay down a double Stake. So if ten lay down each of them a Guinea for him that throws highest, it may seem unreasonable that he who ventures but one Guinea should gain nine; but then we must consider, that it is nine times more probable that he loses, than he wins. Upon which Ground some¹ ² think it a foolish thing to be afraid of

² See Mr. PLACETTE'S Treatise of Hazardous Games, c. 6. who can't be supposed to be inclined to loose Opinions. A learned *English* Divine a long time ago confuted those of his own Profession, who absolutely condemn'd all hazardous Games, as in themselves contrary to Christianity, very fully. It was Mr. *Gataker*, in his forementioned Book of *Lots*, Chap. 6, 7, 8. and he has also, in Chap. 9. laid down such Conditions as he thinks Gaming may be allowed on. This Book I saw not till my Treatise of *Gaming* was printed, otherwise I should have had regard to so considerable an Authority. Was the vanity of hazardous Playing ever so great! for you compose yourselves to be content to hazard your Money in the Gamehouses. You carry your Pockets full of Pistoles to lose them at one cast of the Dice. See the following Verses:

³ JUVENAL'S Words are, ----- *Alca quando*
Hos animos! Neque enim loculis comitantibus itur.
Ad casum tabulæ, posita sed laetatur arcâ.

⁴ OVID'S Words are these: *Quique alii lesus (neque enim nunc persequar omnes)*
Perdere rem charam, tempora nostra solent.

⁵ Nothing is more fine or true than the following Verses of Mad. *Desboulivres*, which, tho' every where known, yet it may not be unpleasant to read them here:

Pleasures are bitter, when they are abus'd;
It is good to play a little to divert;
But we must let it only amuse us.
The Player, at the first sight,
Hath nothing human but his Appearance.
And further, nothing is so easy as to imagine

That he is an honest Man, and plays high.
The desire of Getting, which haunts us Night and Day,
Is a dangerous Spur.
Tho' our Thoughts and Intentions be often good,
We begin by being deluded,
And conclude by being cheated.

See also the Sixth *serious and comical Amusement*.

⁶ CICERO'S Words are, *Scitô Chrysiippus, ut multa: Qui stadium, inquit, currit, citi & contendere debet, quam maxime possit, ut vincat; supplantare eam quicum certet, aut manu depellere, nullo modo debet.*

Mr. BARB. NOTE on § VI.

¹ The Author says *Lotaria*, which I express'd in my first Edition by *Lottery*; but it may be better rendred *Raffing*.

Mr. BARB. NOTES on § VII.

¹ This I conceive is meant by *Olla Fortunæ* in our Author, tho' it can't be exactly rendred in every Language, most Countries having some Terms proper to them. See my Treatise of Gaming, lib. 2. c. 2. § 11. where I oppose the Author of the *Art of Thinking*, who condemn: Lotteries in general, as Arts of Cheating.

² This is all taken out of the *Art of Thinking*, Part 4. Chap. 16. tho' our Author quotes it not.

^a *Jur.* S. 1. v. 88, &c.

^b *Ovid.* Trist. l. 2. v. 483, 484.

^c The *Alcoran*, together with Wine, forbids those Plays which depend on Chance, because they administer frequent Occasions of Quarrelling, *Cap. de Merju.*

^d *Vid.* L. 11. t. 5.

D. de aleatoribus, & ibi: juris Romani interpretes, Phocius, Nomocan. *Tit. 13. c. 29.* Selden *de Jure. N. & G. jec.* Heb. l. 6. c. 11.

^e *Ambr.* Off. 3. c. 4. Which is taken from the Saying of *Chrysiippus* in *Cic.* Off. 3. c. 10.

^f *Lotaria.*

^g *Olla Fortunæ.*

^h *Add.* Martin Delrio *Disquisit. Magic.* l. 4. c. 4.

ⁱ This may be seen more at large in Mr. *Bouhour's Art of Thinking*, Part 4. Chap. 16. and the list, whence our Author has taken most of this Section.

Thunder, for of 2,000000 Men perhaps not one may perish by it; and therefore not only the greatness of the Evil, but the probability of its not happening ought to be considered.

VIII. To these Contracts that of Insuring bears some Affinity; when for a certain Sum a Man takes upon him the risque that Goods are to run in Transportation from Place to Place, chiefly by Sea; which, if they happen to be lost, the *Insurer* is bound to make good. This Contract is null, if either the *Insurer* knows for certain that the Goods be already safe, or the *Merchant* that they be lost. For the Master of this Contract is suppos'd to be a Loss considered as uncertain. Whereas, if the *Insurer* is certain that the Goods are arriv'd safe, he runs no Risque; and if the *Owner* knows that they are lost, he can't demand another to run the Risque of them; for what is not in Being can't be liable to Risque.

^a *De Legibus de Jure Maritimo*, l. 2. c. 5. ^b L. 23. c. 49. ^c L. 25. c. 3. ^d See Mr. LaPlacette's

As for the Price of such *Insuring*, it is to be stated by the common Rate, or by the Agreement of the Parties. Thus much is certain, that the more or greater the Dangers are, which the Commodity is expos'd to, the greater Rate may be demanded for *Insuring* it; as if the Seas be infested by Enemies and Pirates, more may be demanded, than if only the Uncertainty of Tempests were apprehended. And in respect of them too, more in Winter than in Summer ^a. This Contract I have mention'd here, because in respect of the *Insurer* it chiefly depends on Chance. There is mention made in *Livy* ^b of an *Insuring* which cost nothing, for they who bought up Cloth and Corn to be transported to *Spain*, demanded, *That what was on Board should be insur'd by the Publick from the Danger of the Enemy and the Seas*; but what cheats were committed by this means we may read in the same Author ^c ^d.

Treatise of *Rijndam*, B. 4. c. 15. where he treats of Insuring.

CHAP. X.

Of accessory Bargains.

- I. Accessory Contracts of two Sorts.
- II. Variety of additional Bargains.
- III. An additional Bargain, if it's lewd, is void.
- IV. Sometimes it disorders Business.
- V. Being presently added, is valid, if other Things agree.
- VI. Being added after some time, in the negative, is liable to an Exception.
- VII. Being affirmative, how far 'tis good.
- VIII. Of Trusting.

- IX. A Surety can't be engaged for more than the Debtor.
- X. But he may be more strictly bound.
- XI. What Advantages the Law allows a Surety.
- XII. Of Bails.
- XIII. The use of Pawns.
- XIV. A Pawn is either fruitful, or barren.
- XV. Whether a Pawn may be gained by Use.
- XVI. What is the difference between a Mortgage and a Pawn.

THAT being done with principal Contracts that subsist by themselves, I come now to those that are only accessory, and have no existence, but as they are added to others. These may be divided into two Sorts; for some are apply'd in order to add, or take away something from the principal Contract, and these the Civilians call *additional Pacts*: others are added only as a Confirmation and Security to Contracts already completed.

II. The *Roman* Lawyers ^a distinguish between such *additional Pacts* as are added before, or immediately upon the entire completion of the principal Contract, so as in a manner to be part of it; and such as are added sometime after: Then they examine whether the Contracts, to which they are

added, be such as admit of Equity, or such as are tied up to the rigour of the Law; and lastly, whether they affect the essentials of the Contracts, or such Things as naturally flow from them, or such only as are accidental to them. Whereof the first are so necessary, as that no Contract can be without them; the second generally proceed from the Contract, altho' they be not express; yet so as they may be varied by the Parties without affecting the essence of it: the last have no dependence at all upon the essence of the Contract, but owe their Being purely to the pleasure of the Parties. Moreover, they think it ought to be considered, whether these Pacts be added to increase, or to lessen the Obligation.

Mr. BARBEYRAC'S NOTES on Chap. X. §. II.

¹ See above, Chap. 2. §. 2. 8.

² Such is the Consent of Parties, without which no Contract can be made. The exposing of Goods, and setting the Price are particularly essential to a Bargain of Sale.

³ 'Tis a natural quality of all Contracts, that each of the Contractors is answerable for what he is faulty: Yet it may be agreed, that he shall not be responsible at all, or that he shall be answerable more or less for any thing elsewhere done, by virtue of the nature of a Contract. See § 5. following.

⁴ As when a Buyer engaged, that in case of Conviction, the Seller shall forfeit four times the Price of the Goods, or when they agree to give some Security, or to leave some Pledge in hand, &c. See § 5. following.

⁵ See § 6, 7. following, and *Cujacius's* Observations 14. 28. *Francisc. Hotoman's Quæst. illustres* 36, 37. This Matter is much perplexed by the Interpreters, by reason of the subtle Distinctions which the antient Lawyers have confounded the Law with, and the Obligation dispersed through the Fragments which we have of their Writings. See what Mr. THOMASius says in his Discourse *De juri practico accuratè distinct. inter empt. cum pacto de retrovend. & contractum pignori*. Chap. 11. § 10.

^a *Inst. D. lib. 2. t. 14. de Pactis*, l. 7. § 5

III. Concerning all which we may form these following Conclusions: I. A Pact so affecting the Essence of a Contract, as to make it unlawful, or against good Manners, is null. For we have proved above, that no such Covenant can stand good. Thus if a Bride should add a Clause to her Contract of Marriage, by which she might be allowed the Use of other Men; or, if a Steward should add it as a Condition, that he should be permitted to imbezil his Master's Goods, they would neither be valid. So it would be absurd for a Man to make a Bargain, and at the same time to protest that he is fore'd or frightened into it; or, for a Man in any Contract whatsoever to confess that he does not design to deal honestly^a.

IV. II. When the Pact so affects the Essence of the Contract, as utterly to change the Form of it, Regard must be had to the Intent of the Contractors. For if they designed the Contract, according to the Import of the words in which it is express'd, 'tis plain that the Pact which is repugnant to it must be null; for they cannot be suppos'd to will things, which are inconsistent and destructive of each other. Thus it would be ridiculous, if a Man should pretend to buy, and yet add such a Condition, as would make it impossible for him to receive the Commodity, and the other the Money; or, if he should sell a House, as to make over the Property of it to the Tenant; or to enter into Partnership, so as to have neither the Gain nor the Loss in common.

But if the Parties did really intend the Change, and mistook only in the wording of it, or for some certain Reasons chose to speak improperly, provided it be not against the Laws, it will stand good, and not be qualsh'd for the Impropriety of a Term^{a b}.

V. III. Pacts which are added immediately upon the completion of the Contract, whether they concern the Essentials of it, or those Things which naturally flow from it, or those which are purely accidental to it, are valid, if they be not repugnant to Law. For since both Parties are here suppos'd to have Power to dispose of these Things, they must be oblig'd to what they consent to; thus, although it be natural in buying and selling, that the Buyer be put in Possession of the Commodity, yet the Parties by an additional Pact may order it otherwise^c.

Thus the Obligation to make good a Defect may be augment'd or diminish'd, beside what the nature of the Contract would otherwise admit of; and the same obtains in consensual Contracts^d, if between the completion and the execution of them a Pact be added; for this is the same thing as if the Parties proceeded upon a new Contract.

The purchase of an Annuity seems to be such a sort of borrowing, as may be refer'd hither. For I receive Money upon Condition to pay such a certain Man so much Interest as long as he lives, provided, that after his Death the Principal be my own; whereas otherwise the Nature of a Loan requires, that the Principal be return'd to the Creditor, or his Heirs.

VI. IV. A Pact added to a Contract some time after its Completion, if it be negative and designed to take from the Obligation, and so made in Favour of the Debtor or Defendant, is valid. Thus some time after a Debt has been contracted, the Creditor and Debtor may enter into Covenant concerning the putting off the Payment, the Changing the Place of it, the Species of Money, the forgiving the Interest, &c.

Mr. BARB. NOTES on § III.

¹ See what I have said upon lib. 3. chap. 7. § 6. note 2.

² This is decided by the Roman Lawyers. *Illud non probabis, dolum non esse præsumam, si convenerit: Nam hæc Conventio contra bonam fidem, contraque bonos mores est: & ideo nec sequenda est.* Digest. lib. 16. tit. 3. Depositi, vel contra. Leg. 1. § 7. See also § 35. and lib. 50. tit. 17. De regulis Juris, Leg. 23.

Mr. BARB. NOTES on § IV.

¹ This must be supposed in a dubious Case, says Mr. HERTIUS here, who quotes this Maxim about it: *Contractus non tam nomine quam animo contrahentium æstimantur*, as it is found in the Digests, lib. 19. tit. 2. locati, conducti, Leg. 15. § 4. but there is nothing like it, neither in that Law, nor two others, which the same Author points at afterward, Digest. lib. 16. tit. 3. Depositi, &c. Leg. 24, 26. where we only find some Examples, which may have a Reference in some manner to this Subject.

Mr. BARB. NOTES on § V.

¹ So the Digests speak, *Contractus enim legem ex conventionem accipiunt.* Digest. Depositi, &c. Leg. 1. § 6. Vid. Leg. 24, 26. § 1. Lib. 2. tit. 14. De Pactis, Leg. 7. § 5. Lib. 18. tit. 1. De contrahendâ empt. &c. Leg. 7. § 1. Leg. 79. & Institut. lib. 3. tit. 26. De Societate, § 1, 2.

² We may here set down a Sale with a Clause of Commission. *Aldicio in diem*, and a Clause for leaving a Bargain, and one of taking Goods upon Trial, *i. e.* on Condition, if they don't agree, the Seller shall take them again. See above, Chap. 5. § 2. and 4. As also that Sort of Contract, by which one lends a certain Sum on a Lost Fund, *i. e.* that he who hath received it on that Condition, shall pay Interest, either to ourselves, during Life, or to another Person, as long as he lives; but after the Death of the Person nominated, then the Principal is his to whom it was lent: Whereas commonly, such is the Nature of a Loan, that the Sum borrowed may be called in by him that lent it, or his Heirs, which last the Author mentions.

³ See Chap. 2. § 6. above.

⁴ The Words of the Digests are, *Ut constat in emptione, ceterisque bonæ fidei judiciis, re nondum secutâ posse abiri ab emptione. Si igitur in totum potest, cur non & pars ejus pactione mutari potest? ----- ut quodammodo quasi renovatus contractus videatur.*

^a Vid. D. lib. 16. t. 3. *Depos. vel contra*, L. 1. § 7. & § 35. ^b Vid. D. lib. 18. t. 1. *de contrah. empt. &c.* L. 80. f. 3. lib. 19. t. 5. *De præscript. verb.* Sec. L. 4. & 6. & lib. 17. tit. 2. *pro Socio*, L. 5. l. 2. ^c Vid. D. lib. 19. t. 1. *De ali. empt. & vendit.* L. 11. f. 18.

Mr. BARB. NOTES on § VI.

¹ See above Chap. 2. f. 3. Vid. D. lib. 2. t. 14. *De pactis*, L. 7. f. 5. lib. 18. t. 1. *De contrah. empt.* L. 72.

VII. *V. By the Law of Nature, as far as bare Paſt is capable of Action, a Paſt added to a Contract ſome time after its Completion, although it increaſes the Obligation, and ſo turns in Favour of the Creditor or Plaintiff, may be valid.* For the Reason why the Roman Law denies it (*viz.* becauſe a bare affirmative Paſt does not bear an Action) is out of the Verge of the Law of Nature ¹. Thus ſuppoſe I had bought a Commodity, which by the Bargain is to be delivered by ſuch a Day, if afterwards we covenant to have it deliver'd ſooner, there is no Reason but that I ſhould receive the Benefit of it. Or, ſuppoſe I let you my Houſe for two Years, and we afterwards by Conſent limit the Time to one, at the End of the Year you ought to quit Poſſeſſion; but then I can't demand the Rent that would be due for the other Year. And thus in Loan of Money, I don't ſee why the time of Payment may not be anticipated as well as put off by an ² an additional Compact ^b; nay altho' no Allowance be made to the Debtor for this ³ Anticipation, yet he has no Injury done him, if he voluntarily ſubmits to it. But 'tis manifeſt, that his Obligation ought not to be increas'd againſt his Will, and therefore naturally as much as is added to him by this ſubſequent Paſt, ought to be taken off ſomewhere elſe. Thus, if the Creditor will have me pay him at another Place, than that which we agreed upon, I on the other Hand can fairly demand an Agreement of ſo much as it is my Intereſt to pay it in the former. But 'tis againſt the Nature of Chartering and chargeable Contracts, that any Paſt ſhould be added to increaſe the Obligation ſo much on one ſide, as to make an Inequality; as if the Buyer and Seller ſhould agree upon ſuch a Price, being the true Value of the Commodity; and yet afterwards ſhould covenant, that the Buyer ſhould

pay more than the Commodity is worth. Unleſs this be a mixt Contract of buying and giving, I can't ſee how the additional Price can be demanded ^c.

VIII. Hither I think may be referr'd what we call a ^d Truſt, ¹ when we make over to another the Property of a Thing upon Condition to have it reſtor'd again; which I mention among the Additional Paſts, rather than the principal Contracts, becauſe it is always added upon the Delivery of the Thing. And this ſeems to be call'd a ² Truſt; becauſe, whereas otherwiſe, when the Property of a Thing is made over to another, he may diſpoſe of it as he pleaſes, and either keep it himſelf for ever, or part with it to another; by this additional Paſt we ſeem to truſt to his Honour and Honesty, that he will not uſe his Property otherwiſe than according to Agreement, and will be willing to part with it again upon Demand. And therefore the ſolemn Form of this Contract among the Romans ran, ³ *As honeſt Men ought to deal together, without Deceit.* And becauſe the Truſt was ſo very extraordinary, the Breach of it was therefore branded with a particular Infamy by the Roman Laws. ⁴ There are Three private Concerns, upon the honeſt Diſcharge of which a Man's Reputation and almoſt his Life depends, A Truſt, Guardianſhip, and Partnership, *Cic. pro Roſcio, c. 6.* If a Guardian ought to be faithful, if a Partner, if one entrusted with a Commiſſion, if one that has received a Truſt, *Id. Topicis.*

⁵ He who by means of his Truſt has defrauded any one, is condemned immediately, *II. pro Cæcilia, c. 3.* But in what Matters the Romans interpoſ'd this Truſt, you may meet with every where amongſt their Lawyers. ⁶ *De Fiduciario Patre,*

MR. BARR. NOTES on § VII.

¹ This is call'd in one Word *Conſtitutio*, or *Pecunia conſtituta*.

² It has it in D. L. 1, as appears by theſe two Laws, of which our Author quotes the Firſt; and by this we may obſerve that there is a Connexion there is between the Principles and the Determination of the Roman Law. *Si is, qui & Jure Civili & Prætorio deſert, in diem ut obligatus, an cogitur ante tenetur? Et Labo ait teneri [conſtitutum] ----- adſcipt, vel propter has potiffimum ꝑcedunt, ut non ſunt ꝑ ꝑfect, conſtituta indicat: quæ ſententiam non invidus ꝑ harem, habet enim utilitatem, ut ex die obligatus, cogitur ſe eadem die ſoluturam, tenetur. Sed & ſi citiore die conſtituat ſe ſoluturam, ſimiliter tenetur.* Digest. ubi ſupra, Leg. 3. § 2. Leg. 4.

^a In the Laws before-cited.

^b *Fil. lib. 13. t. 5. l. 3. f. 2. D. de conſtit. pecun.*

^c Compare *Ann. Vinnii traſt. de*

paſtis, c. 9, &c. ^d *Eliaſta.*

MR. BARR. NOTES on § VIII.

¹ 'Tis the Definition that Bætius gives in his Commentary upon Cicero's *Topicis*, cap. 10. *Fiduciari accipere dicitur is, cui res aliqua mancipatur, ita ut ea ſolvendo mancipanti remaneret.* "As for Example, ſaith he, If in a Conjunction, when we ſay that we ſhall be ſtript of our Goods, we pray ſome potent Friend to buy of us ſome Land, making him promiſe that he'll ſell it to us again at the ſame Price, as ſoon as the Danger is over." *Veluti ſi quis tempus dubium timens, amico potentiori fundum mancipet, ut ei, cum tempus, &c.*

² See J. MELNARD upon *Tully's* Oration *pro Q. Roſcio Comædo*, Chap. 6. in *Tom. 1.* of *Grævius's* Edition, and *J. Vincent Grævii. Orig. J. r. Civili*, lib. 2. p. 448, 449.

³ *Ut inter bonos bene eger oportet, & ſine Fraudatione; vid. Cicero. de Offic. L. 3. c. 17. & in Topicis, c. 10. & ad Famil. L. 7. Ep. 12.*

⁴ Cicero's Words are, *Si quæ enim ſunt præcæta judicia ſummæ exilimationis, & pene dicam capitis, tria hæc ſunt, fiducia, tutela, ſocietas. Eꝑeculæ perſidioſum & nefarium eſt fidem frangere, quæ continet vitam: & pupillum fraudare, qui in tutelam pervenit: & ꝑctum fallere, qui ſe in negotio conjunxit.* *Cic. Orat. pro Roſcio Comædo*, Chap. 6. See alſo *pro Cæcilia*, cap. 3.

⁵ Moreover, This Head of Truſt hath Place in diverſe Sorts of Affairs, *viz.* making the Heir of a Family free, Poſſeſſion for a Time only, Guardianſhip, lending upon Pawns, and a firm Truſt. As to the firſt of theſe, among the Ancient Romans, if a Father would make his Son free, he muſt ſell him 3 times as a Slave, to a Perſon who promiſes him to ſell him to him again, who was therefore call'd *Pater fiduciarius*. After which the true Father having redeemed his Son, he enfranchiſeth him, and ſo his Freedom is effected. See *GAIUS's Inſtitut. l. 6.* and *ROſINUS's Antiq. Rom. lib. 9. cap. 10.* But at length theſe pretended Sales were aboliſhed, and it was ordain'd that the Fathers ſhould appear alone, and declare to the Judges, that they renounced their Paternal Power over that Child that they made free. See *Inſtitut. lib. 1. c. 12. § 6.* See Mr. THOMASII's Diſcourſe *De quaſi-emancipatione Germanorum*, printed at Hall 1703. This Freedom produced a particular Effect as to the Succeſſion of Fathers to the Goods of their Children. About which ſee the *Inſtitutes, lib. 3. tit. 2. De legitimâ Agnatorum ſucceſſione*, § 8. and *Code, lib. 8. tit. 49. De emancipationibus liberorum*, Leg. 6. Of Lending upon Pawns, ſee *SALMASIUS's* Treatiſe of *Uſury, cap. 4. & de modo Uſurarum, cap. 14.* and Mr. NOODP's *Obſervat. lib. 2. c. 7, 8.* as alſo Mr. THOMASII's Diſcourſe *De Uſu præctico accuratæ diſtinctionis inter emptionem cum ꝑcto de retrovendendo, & contraſtu. Pignoratitium*, Printed at Hall in 1707. c. 1. § 3. &c. 2. § 20. &c.

Patre, Vid. Caium, Instit. 1, 6. "A Trust was contracted in Childrens succeeding to their Father's Goods". *Vid. lib. iii. t. 2. f. ult. Inst. de legit. agnat. success. L. ult. lib. viii. 49. c. de emanc. liber. de fiduciaria possessione. Vid. Budæum ad l. 2. lib. i. t. 2. D. orig. juris. Greg. Tholosan. Syntag. juris l. xxiii. c. 5. f. 2. Vid. Inst. l. 1. t. 19. De tutela fiduciaria. Vid. Bachov. ad d. t. Instit. De fiducia circa pignus contracta. Vid. Ibid. Etymol. l. v. c. 25. Cujac. ad Pauli recept. sent. l. 2. t. 13. Sic & in fidei commissis instar fiducis intercedit. Vid. princ. l. 2. t. 23. Inst. de fidei commiss. & ibi Bachov. &c.* We have an Example of this sort of Trust in *Livy. L. xxxii. c. 38.* "So *Alboinus* delivered up *Pannonia* to his Friends the *Hænni*, upon Condition, that if the *Longobards* should ever have occasion to return, they should restore it back. *Vid. Paul. Warnetried. de gestis Longobard, L. ii. C. 7. Nabarzanes* (in *Curtius. l. v. c. 9.*) advises *Darius* to make over his Kingdom to *Bessus* for a time, so as to receive it back again when Things should be settled. *Hercules* having subdued *Sparta* placed *Tynlarus* the Father of the *Diocæri* in the Throne, which being his by Conquest, he enmeshed with him, upon Condition that he would restore it safe and sound to *Hercules's* Sons. *Diod. Sic. l. iv. t. 33. Boetius* (in *Topic. Cic. ubi supr.*) brings a Case with, "If a Man fearing the badness of the Times should make over in Trust a Farm to a powerful Friend, to return it, when Times should mend." *Philip, when he saw that he must fight, raises Forces in all Paris, and being solicitous for the City of Argos, thought it best to put it into the hands of Nabis King of Lacedæmon in Trust, to be restor'd again, if he return'd with Success: but if not, to be kept for himself.*

Among the *Turks*, if a Man swears to put away his Wife, altho' he immediately repents of it, he is

yet oblig'd to stand to his Oath; but in order to recover her again, he enters into a Trust with his Friend, and gets him to marry her, and immediately after to part with her. For, after a Divorce, unless the Woman be married again, she can't return to her first Husband ^a.

But such a Trust as evades the force of the Law, ought not to be contracted; as if I should give a Man, who is free from Taxes, my Estate in Trust, in order to cheat the Tax-gatherers.

IX. As for such Paçts as are added by way of Confirmation and Security to Contracts already completed, the most usual is that by which one Man gets another to be bound for him, so as to be responsible, in case he should fail. This personal Security is required in these three Cases:

First, Between Man and Man for the performance of something valuable, which is call'd *Suretyship*. Secondly, In criminal Affairs, which is commonly call'd *Bail*. Thirdly, In publick Concerns, where Security is given by ³ Hostages.

For the right understanding the nature of Suretyship, we must look back to the last Section of the second Chapter of this Book, to which we add, that being bound for another, we make our selves so far liable, as that if he does not pay the Debt, we must. But then recourse may be had to the principal Debtor ⁴, and the whole, with the Charges, may be recover'd of him. Now since Suretyship is only an additional Confirmation to a Contract ⁵, the Surety cannot naturally be oblig'd to more than the Principal ^b; so that if the Principal was obliged only Conditionally, the Surety cannot be obliged, unless the Conditions be made good, nor can he be confin'd to such a Time or Place which the other was not obliged to. And whatsoever ⁶ Exceptions the Debtor might make, the

⁶ See above in Chap. 2. f. 6. *Vid. D. lib. 2. t. 14. de pactis, L. 7. f. 6. Vid. Leg. 58. & lib. 18. t. 1. De contrab. empt. L. 72. t. 4. De rescindendâ vendit. L. 1, 2. & C. lib. 4. t. 45. Quando licet ab emptione Discedere, L. 1.*

Mr. BARB. NOTES on § ix.

¹ See above, *lib. 2. c. 4. § 18.* and § 12. of this Chapter.

² See *lib. 8. c. 9. § 12, 13.* following.

³ See *ibid. § 6.*

⁴ The *Digests* say, *Fidejussor in judicio sistendi causâ locuples videtur dari, non tantum ex facultatibus, sed etiam ex conveniendâ facilitate, Digest. lib. 2. tit. 8. Qui satis dare cogatur, &c. Lib. 2. princ.* But when once a Man is taken by us for a Surety, we ought to be satisfied, unless he become poor thro' some sudden Accident. *Qui ex causâ improbat ab arbitro probatos, alios improbatos probat: multoque magis si suâ voluntate accepit fidejussores, contentus his esse debet. Quod si medio tempore calamitas fidejussoribus insignis, vel magna iroribus accidit; causâ cognitâ ex integro satisfilandum erit. Ibid. Leg. 10. § 1.*

⁵ The Words of the Law are, *Fidejussores ita obligari non possunt, ut plus debeant, quam debet is, pro quo obligantur. Nam eorum obligatio, accessio est principalis obligationis: nec plus in accessorio potest esse, quam in principali re. At ex diverso, ut minus debeant, obligari possunt. Itaque si reus dæmon avocatus promiserit, fidejussor in quinque rellâ obligatur: contra vero obligari non potest. Item si ille purè promiserit, fidejussor sub condicione promittere potest: contra vero non potest. Non solum autem in quantitate, sed etiam in tempore plus vel minus intelligitur, plus est enim statim aliquid dare, minus est, post tempus dare. Inst. lib. 3. tit. 21.* This Maxim is carried so far, that if the Surety hath answer'd a bigger Sum than what the Debt amounts to, he is obliged to no more. *Illud enim non est in universis, qui pro aliis obligantur: quod si fuerint in duriores causam adhibiti, placuit eos omnino non obligari: in leviores planè causam accipi possunt. Propter quod in minorem summam rellâ fidejussor accipietur. Ibid. Leg. 8. § 7.*

⁶ The Words of the *Digests* are, *Ex persona rei, & quidem invito reo, exceptio & cætera rei commoda fidejussori, cæterisque accessionibus competere potest, Digest. ubi supra Leg. 32. Si is, qui fidejussorem dedit, ideo non fuerit, quod Republicæ causâ abfuit, iniquum est fidejussorem ob alium necessitate solum obligatum esse, cum ipsi liberum esset non sistere, lib. 2. tit. 11. Si quis cautionibus, &c. Leg. 6.* The Author quotes also *Lib. 2. tit. 14. De pactis, Leg. 32. lib. 3. tit. 3. De Procur. & Detentoribus, Leg. 51. lib. 14. tit. 6. De Senatuc. Maced. Leg. 9. § 3. lib. 16. tit. 2. De Compensationibus Leg. 4. 5. Inst. lib. 4. tit. 14.*

^a *Moncony's Itiner. Tom. 1. p. 465.* compared with *Olearius Itiner. Persic. l. 5. c. 23.* ^b *Fidejussores ita obligari non possunt, ut plus debeant, quam debet is, pro quo obligantur, &c. Instit. l. 3. t. 21. de Fidejussoribus.* ^c *Vid. lib. 2. t. 11. D. si quis cautionibus & lib. 2. t. 14. L. 32. D. de pactis, lib. 3. l. 3. L. 51. D. De procurat. lib. 14. t. 6. L. 9. 3. de Senat. Macedon. l. 16. t. 2. l. 4. l. 5. D. De excepç.*

the Surety can plead to his Advantage. ⁷ One that orders another to trust a third Person, does the same thing as if he made himself a Surety; for by such an Order he is presumed to interpose his Credit. But if he gives Order for 1000*l.* and the Person takes up but 500*l.* he will stand responsible for no more than was taken up; for the meaning of the Order was, that he should have Credit as far as 1000*l.* But tho' the Surety cannot be obliged to more than the Principal, yet he may sometimes ⁸ be obliged to less; as when he undertakes for only Part of the Debt, or for the whole, under certain Restrictions, or upon Condition that the time of Payment should be prolonged, or a more convenient Place assigned for it.

The End and Design of Suretyship makes it appear, that the Surety ought to be a Man of Substance and Credit, and able to answer the Creditor's Suite, which indeed is suppos'd by the Creditor's Acceptance of him. And therefore *Vulcan* (in *Homer. Odys. viii. v. 352, 353.*) when *Neptune* offer'd to be a Surety for *Mars*, replies, *That the Security was as bad as the Debt; for if Mars should run away, how should he be able to seize upon Neptune among the Gods?*

X. But yet it is not impossible but the Surety may lie under a greater and stricter Obligation than the Principal; for he interposes himself of his own Accord, the more to confirm the principal Contract, without whom the Creditor had not enter'd into it. And indeed Necessity forces some People to contract a Debt, but nothing but Generosity, and an Ostentation of Kindness, and a Confidence in his Riches engages the Surety in another's Concern. And

therefore the Creditor has sometimes more Reason to blame the Sureties, than the Principal; for it was upon their Account that he trusted at all, and they certainly are to be blam'd, who without the utmost Necessity derive a Burthen upon themselves, which they ought to have known they were not able to bear. And therefore wise ¹ Men every where dissuade us from Suretyship, unless we would involve our selves in unnecessary Evils ². The *Romans* kindly provided for the easiness of Women by the *Velleian Decree* ³; and by the *Roman Law* the Principal satisfied the whole Debt ⁴ by giving up all he was worth, though not sufficient to discharge the Debt ⁵; ⁶ which Favour was not indulg'd the Surety ⁷. For he was look'd upon as call'd in for the Relief of the Creditor, that in case ⁸ the Principal should prove insolvent, the Debt might be recovered of him. Tho' indeed this way of satisfying a Debt, by parting with all a Man is worth, is altogether unknown to the Law of Nature; unless common Humanity may plead, that if a Man be brought to want by some fatal Calamity, and not by Luxury or Idleness, it ought to suffice, if we strip him of his Patrimony, and not proceed any farther against his Person.

Besides, the ⁹ Surety may be more strictly oblig'd than the Principal, in Case he takes upon him by Oath, or under a Penalty, what the other barely promis'd. Thus it is the Custom in some Places, in default of Payment at the time appointed, to oblige the Sureties to appear at such a certain Place, and not to depart thence, 'till ¹⁰ the Debt be satisfied, and this they call a *Pledge*. Tho' by reason of some Abuses, which proceeded from it, it is now generally disus'd.

IX. But

⁷ So the *Digests* order, *Alibiteri autem fidejussor tam futuræ quam præcærenti obligationi potest, dummodo sit aliqua, vel naturalis, futura obligatio.* Digest. lib. 46. tit. 1. De fidejussor. &c. Leg. 6.

⁸ See Note 2. of this §.

MR. BARB. NOTES on § X.

¹ *CHILON'S Greek* is, 'Επίθε, παρὰ δὲ δῖα. *Diog. Laert. l. 1. p. 73. Prov. vi. 1. &c. xi. 15. xvii. 18. xxii. 26, 27. xxvii. 13. Excluf. xxix. 24, 27. Be a Surety, but at your peril,* was the Saying of *CHILON*.

² The *Velleian Law* is set down in the *Digests*, *Velleiano senatusconsulto plenissime comprehensum est, ne pro ullo sæmine intercederent. Nam sicut moribus civilia officia adempta sunt feminis, & pleraque ipso jure non valent: Ita multo magis admittendum eis fuit id officium, in quo non sola opera nudamque ministerium earum versaretur, sed etiam periculum rei familiaris.* Digest. lib. 16. tit. 1. Leg. 1. § 1, 2.

³ They were only discharged for the present. Such a Cession kept them indeed out of a Gaol, or released them from it; but it did not hinder, but if afterward they got any thing, Payment of what was remaining after the Sale of the first Goods, might be demanded. It is true, that in this last Case, it was not allowed to impoverish the Debtor quite a second time; he was only condemned to pay what he could, over and above a comfortable Subsistence. *Qui bonis cesserint, nisi solidam creditor receperit, non sunt liberati. In eo enim tantummodo non beneficium eis prodest, ne judici detrahantur in carcerem.* Cod. lib. 7. tit. 71. *Qui bonis cedere possunt,* Leg. 1. *Cum eo quoque qui creditoribus bonis suis cessit, si postea aliquid adquisierit, quod idoneum emolumentum habeat, ex integro in id quod facere potest, creditores experiuntur. Inhumanum enim erat, spoliatum fortunis suis in solidam damuari.* Inst. lib. 4. tit. 6.

⁴ The Words of the *Institutes* are, *Sane quædam exceptiones non solent his [fidejussoribus] accommodari. Ecce enim debitor, si bonis suis cesserit, & cum eo creditor experiatur: defenditur per exceptionem, si bonis cesserit. Sed hæc exceptio fidejussoribus non datur: ideo scilicet quia qui alios pro debitore obligat, hoc maxime prospicit, ut cum facultatibus lapsus fuerit debitor, possit ab iis, quos pro eo obligavit, suam consequi.* Inst. lib. 4. tit. 14. De Replicationibus, § 4. See more about the Cession of Goods, in *MR. DAUMAT'S* civil Laws in their Natural Order. Part. 1. lib. 3. tit. 5.

⁵ See lib. 3. c. 7. § 3. above.

⁶ By the *Roman Law*, when one has answered for a Pupil in an Engagement contracted without the Allowance of his Guardian, or for a Prodigal, who is debarred of the Management of his Estate, or a Mad Man: In these and the like Cases, where the Obligation of the Debtor was purely natural, and no Action lay against him, the Engagement of the Surety is nevertheless good and valid. *MARCELLUS* scribit: *Si quis pro pupillo sine tutoris auctoritate obligato, prodigove, vel furioso fidejussor sit: magis esse, ut ei non subveniat, quoniam his actio mandati non competit.* Digest. lib. 46. tit. 1. Leg. 25.

⁷ *Godartien.* This was antiently in use among the German Princes, as *MR. HERTIUS* observes, and gives some Examples of it. *MR. VIETRIARIUS*, in his *Univerſion jus Civile privatum*, lib. 3. tit. 21. § 9. teacheth us that the same Custom is still kept up in the Dutchy of *Holſtein*.

^a D. Lib. 16. t. 1. L. 1. f. 1, 2.

^b P. C. Lib. 7. t. 71. L. 1. & Inst. L. 4. t. 6. De actimib. f. 40.

^c P. Inst.

lib. 4. t. 14. De Replicationib. f. 4.

XI. But because *Suretiship* is only an *Addition* to another Man's Debt, it is most natural for the *Creditor* to make his Demands first to the *Principal*, and upon Failure there, to apply to the *Surety*. "This the *Roman Law* calls *Beneficium Excussionis & Ordinis*". The Condition of a *Surety* deserves Pity, for his Kindness ruins him, and his good Nature breaks him. "But the *Creditor* cannot with any Face apply to the *Surety*, but when he cannot recover his Debt of the *Principal*, *Quint. Decl.* 275." And if the *Surety* pays the Debt, the *Creditor* must make over to him all the Right that he had against the *Principal*; if that can be of more Service to him towards the Recovery of the Debt, than if he sued in his own Name, especially if any Pawn had been given for Security in Part, it must be given up to the *Surety*. But if several had bound themselves for Debt, all jointly, and not each for the whole, in Failure in the *Principal*, the Burthen ought to be divided amongst them, and each obliged to pay his ⁴ Proportion; unless one should prove insolvent, for then the Burthen must lie the heavier upon the rest. For a Number of *Sureties* were therefore provided, that if this or that should fail, the rest might be Security to the *Creditor* ⁵. Those who entirely take upon themselves in their own Name another's Obligation ⁶, so as to be esteem'd as *Principals* in the Eye of the *Creditor*, differ in some respect from *Sureties*. Whether such as these can recover of the Person for whom they engaged, what they laid out in his Service, and what Method they ought to take to do it, is to be determined according to the nature of the Kindness; for this Act in them may be a *Free Donation*, or a *Commission*, or a *Loan*, or a *Recompence*, or such like.

'Tis usual also for a *Surety* to provide for himself by ^c *Counter-Security*, whereby he may recover what he lays out for the *Principal*, if the *Principal* himself proves deficient ⁶. The Person that gives this *Security* owes the same Obligation to the first *Surety*, as the first *Surety* owes the *Creditor*; and has the same Action against the *Principal*, as the first *Surety* himself had.

XII. As for *Bail* ^d or the Obligations that those lie under, who engage for Criminals, 'tis observable that many of the Antients were of Opinion, that a Man was so far Master of his own Life, as to have Power by his bare Consent to engage it for another, so far as even to forfeit it for another's Crime. *Andocides* (*orat. de myster.*) relates, that *Munthitens* and *Apsephion* sat by the Altar humbly praying that they might not be put to the Rack, but that their *Bail* might be taken, which was no sooner granted, but they mounted their Horses, and fled to the Enemy; leaving their *Bail*, who were forced to undergo those Tortures which they themselves ought to have suffered. The Story of *Damon* and *Pythias* (whom *Diod. Sic.* in excerpt. *Pieresc.* calls *Phintias*) is well known as related by *Cicero* in *Offic.* l. iii. c. 10. Of whom *Manil. Aitr.* l. ii. v. 1. says,

*Et duo qui potuere sequi vadimonia sponsi:
Optavitque reum sponsor non posse reverti,
Sponsorumque reus timuit ne solveret ipsum.*

Once Death was strove for, 'twas a generous strife;
Not who should keep, but who should lose a Life
Was their Dispute, contending to deny
Each other the great Privilege to die.
The *Surety* fear'd the guilty *Friend's* Return;
The guilty *Friend* did his own Absence mourn.

Mr. CREECH.

Mr. BARR. NOTES on § XI.

¹ See JUSTINIAN'S Novels, 4. c. 1. *Ut creditores primo loco convenienti principalem. QUINCTILIAN'S* Words are, *Etiam cum istud periculum est sponsoris, miserabile est; bonitate labitur, humanitate conturbat* ----- *Non enim aliter salvo pudore ad sponsorem venit creditor, quam si recipere à debitore non possit.* *Declam.* 273. But we ought to observe by the antient *Roman Law*, the *Creditor* had his Choice to take either the *Principal* or *Surety*, as he pleased. *Jure nostro est potestas Creditori, relicto Reo, eligendi fidejussores, nisi inter contrahentes aliud placitum doceatur.* *Cod. lib. 8. tit. 41. De fidejussoribus & mandatoribus, Leg. 5.* See also *Leg. 3.* Mr. HERTIUS also says, that it was antiently a Custom in *Germany*. But as for what he adds, that it was used among the *Jews*, he ought to have brought good Proofs, for the Text he quotes is nothing to the Purpose, as the Reader will be convinced by seeing it: *Take the Garment of him who is a Surety for a Stranger, and take a Pledge of him for a strange Woman.* *Prov. xx. 16. xxvii. 13.*

² They are Terms used by the Interpreters, and not by the *Roman Law* itself. The Reason of the first is obvious: The other is taken from *Excutare*, which signifies in the *Roman Law* to seek whether any one be able to pay, and then to seize on him.

³ The Law is, *Potuisse sane, cum fisco solveres, desiderare, ut jus pignoris, quod fiscus habuit, in te transferretur; & si hoc ita factum est, cessis actionibus uti poteris: quod & in privatis debitis observandum est.* *Cod. lib. 8. tit. 41. De fidejussoribus & mandatoribus, Leg. 11.*

⁴ By the *Roman Law* the *Creditor* might apply himself to either of the *Sureties*, as he pleased, and make him alone to pay; for it supposes all the *Sureties* to be obliged to pay the whole, which yet is not true, unless all the rest prove insolvent. But the Emperor *Arrian* ordained, that if, at the time of the Process, the *Sureties* were solvent, the *Creditor* could demand of each no more than his Share. See *Institut. Lib. 3. tit. 21. § 4.* And this consisted in what the Lawyers call *Beneficium Divisionis*. See Mr. NODD, in his *Probabil. Juris*, lib. 2. c. 1.

⁵ This is what is called *Expromissor*; as for Example, *Digest. Lib. 12. tit. 4. De Corditi. causâ datâ, &c. Leg. 4. & lib. 50. tit. 17. De diversis regulis Juris, Leg. 110. § 1.* One single *Surety* is call'd *Adpromissor*. See *Digest. l. 45. tit. 1. De verborum obligation. Leg. 5. § 2. & lib. 46. tit. 3. De solutionibus & liberationibus, Leg. 43.* This last Law will be quoted in the next Chapter § 1. Note 5. Nevertheless these two Terms, as well as *Fidejussor*, are sometimes confounded by an Impropry of Speech, common to all Languages.

⁶ Our Author, as Mr. HERTIUS observes, confounds a subsidiary Security, call'd *Fidejussor succedaneus*, with a *Surety* to indemnify, call'd *Fidejussor indemnitatis*, a *Counter-Security*, as also divers others have done, as appears by Mr. THOMASIU'S Discourse *De fidejussore indemnitatis*, Printed at *Hall* in 1703. § 2. This subsidiary *Surety* is a second Security, which answers for the first, and in respect to whom this last is look'd upon as a principal Debtor. The *Roman Law* calls him *Fidejussor Fidejussoris*. *Digest. 46. tit. 1. Leg. 8. § 12. & Leg. 27. § 4.* And the first *Surety* is call'd *Fidejussor principalis*. *lib. 2. § 2, 4.* As for the *Surety* of Indemnity, the Lawyers mean by him a Person that is not obliged purely and barely for the whole Debt, but only for so much as the principal *Creditor* has not paid, i. e. if he can recover only one part of his Debt, the *Surety* shall indemnify him as to the other. See *Digest. ubi supra, Leg. 63. & lib. 45. tit. 1. De verb. obligat. Leg. 116.*

^a *Add. Phæd. l. 1. fab. 16.*

^b *Expromissores.*

^c *Fidejussor indemnitatis.*

^d *Vades.*

^e But

¹ But that a *Surety* ſhould by his bare Conſent make himſelf liable to a Punishment, which otherwiſe ought to be inflicted on a Criminal, does not ſeem agreeable to thoſe Rules of *vindictive* Juſtice, which ought to obtain in human Societies; indeed if a Man knaviſhly interpoſes himſelf, that the Criminal may have an Opportunity of eſcaping Juſtice, he ought to ſuffer as much, as it is the Concern of the Magiſtrate that the other had not eſcap'd his Hands; which may ſometimes be capital, eſpecially if he who thus eſcap'd be like to do more Miſchief ².

Farther than this, ſuch a ſubſtituted Death is not lawful in the civil Court: For no Man has ſo much Power over his own Life, as to expoſe it at Pleaſure for no publick Advantage, but only to hinder another from ſuffering what he deſerves. Beſides, the end of Punishments would be fruſtrated by this means, for the deſign of them is either to amend the *Delinquent*, or to deter *others*; but the *Surety* is not the *Delinquent*, as having net by any Act of his derived the Guilt upon himſelf: And as for *others*, they will not be deterr'd from offending by ſeeing an innocent Man ſuffer, but will either be moved with Compaſſion, or ſtruck with Admiration of ſuch Love and Conſtancy, as does not reſiſt even Death for the ſake of a Friend ^{b c}.

It appears therefore that *Bail* can be no farther admitted in criminal caſes, than as a Security to the Magiſtrate, whoſe Duty it is to proſecute, that the Damages of the *Delinquent* ſhall be made good, or his Fine paid, or if he be abſent, that he ſhall make his Appearance, ſo that nothing in the mean time may be decreed againſt him, as if he were convict; or if he be in Priſon, that he may not be forc'd to plead in Chains. And even in thoſe Caſes, the beſt way is for the Magiſtrate to let the *Surety* know beforehand, what Security he ex-

pects from him, that ſo he may conſider whether his Circumſtances will permit him to venture ſo much upon the Honesty of his Friend.

The Obligation that *Hoſtages* lie under, hardly ever taking place but in Leagues and civil Government, will be diſcuſs'd more conveniently hereafter. B. viii. c. 8. ſ. 6.

XIII. Another uſual way of *Security* is to give the *Creditor* ſome certain Thing in *Pawn*, till the Debt be paid; the deſign of which is not only, that the *Debtor* may be incited to a more ſpeedy Payment for want of his Goods ^d; but that the *Creditor* ^e in Caſe of Failure may have ſomething equivalent, and being in Poſſeſſion of the *Pawn*, need not to be at the Trouble and Expence of going to Law. And therefore the *Pawn* ought to be as much or more Worth than the Debt it ſelf. And ſince it is deſign'd for the *Security* of Debts, which bear either a *vulgar* or *eminent* Price, 'tis neceſſary that the *Pawn* ſhou'd have the ſame Faculty. So that we cannot approve of the *Egyptian* Cuſtom ^{f g} of *Pawning* the dead Bodies of their Parents, altho' whoever refus'd or neglected to redeem them, was proſecuted with the utmoſt Ignominy, and deny'd Burial after Death ². And for the ſame Reason it ſeems inhuman to ſeize upon the dead Body of a *Debtor*, that ſo his Relations might be ſhamed into a Payment of that which otherwiſe they were not oblig'd to.

By the way, 'tis worth obſerving, that in the Kingdom of *Pegu* a Man may *Pawn* his Wife and Children to his *Creditor*; but if the *Creditor* lies with either the Wife or the Daughter thus *Pawn'd* to him, he loſes his Debt, and is liable to no other Punishment ^h.

XIV. Things given in *Pawn* are either ſuch as yield Increate, or ſuch as do not; as for the *former*, 'tis uſual to allow the *Creditor* ⁱ the Profits, or a

Mr. BARP. NOTES on § XII.

¹ See *lib. 2. c. 4. § 17, 18.*

Mr. BARB. NOTES on § XIII.

¹ The Words of the *Inſtitutes* are, *Pignus utriuſq; gratia datur, & Debitoris, quo magis ei pecunia credatur, & Creditori, quo magis ei in tuto fit creditum.* L. 3. tit. 15. See alſo about this whole Matter Mr. THOMASIU'S Diſcourſe, *De diſtinctione emptioem cum pacto retrocedi & contract. pignor.* cap. 2.

² JUSTINIAN forbid it under a rigorous Punishment, *Novel. 60. cap. 1, & 115. cap. 5. § 1.* as Mr. HERTIUS obſerves.

Mr. BARP. NOTES on § XIV.

¹ Called *Pactum ἀντιπρωτε*, as the Author ſpeaks, and the *Digeſts* expreſs it thus, *Si ἀντιπρωτε, id eſt, mutui pignoris ulus pro credito, facta ſit, & in ſandum & in ædes aliquis inducatur: eouſque retinet poſſeſſionem pignoris loco, donec illi pecunia ſolvetur; cum in uſuras fruſtus percipiat, aut locatio, aut ipſe percipiendo, habitandove.* Dig. lib. 20. t. 1. De pignoribus & hypothecis, &c. Leg. 11. § 1. See Mr. NOODT'S Obſervations, *lib. 2. c. 9.* Mr. THOMASIU'S in his Diſcourſe *De Accurata diſtinct.* &c. c. 2. § 9, &c. maintains, that by the Natural Law, independant on the Civil, the Word *ἀντιπρωτε* is underſtood of itſelf, a containing the End of the Contract. It imports that the *Creditor* ſhall have the Benefit of the Fruits, be what they will, without giving any Account. We ſhall examine the Reaſons of that able Lawyer in the Place noted. The Uncertainty of the Produce of ſuch Things as are engaged, is a thing of great Weight; for, as *Cicero* ſpeaks in a Place quoted by Mr. HERTIUS, The Fruits of the Earth are always at the Mercy of the Winds and Tempeſts. *Totæ autem res ruſticæ ejuſmodi ſunt, ut earum ratio, neq; labor, ſed res incertiſſimæ, venti, tempeſtateſq; moderentur.* In Verrom, lib. 3. c. 98. & ult. See *Cod. lib. 4. tit. 42. De Uſuris, Leg. 17.*

^a V. 1 Kings 20. 39.

^b Add. Anth. Matth. de crimin. ad l. 48. D. d. tit. 14. c. 2. ſ. 13, &c.

^c V. Græc. L. 2.

c. 21. ſ. 11. n. 2.

^d Vid. Lib. 13. t. 7. l. 35. ſ. 1. De action. pignerat. &c.

^e V. Inſtit. L. 3. t. 15. Quibus modis

recontrahitur obligatio, ſ. 4.

^f V. Diodor. Sic. L. 1. C. 93.

^g V. Herodot. in Euterp. & Lucian. de Luctu. p. 306,

307. Ed. Anyſt.

^h Gaſpar. Balb. Itiner.

certain proportion of them in lieu of Interest. As for those which do not yield Increase, they generally bargain, that if they be not redeem'd by such a Time, the Creditor shall have the Property of them²: And this is not naturally unjust, especially if the Pawn does not exceed the value of the Debt, and the Interest of it; or if, provided it exceeds it, the overplus be return'd to the Owner. Tho' this the Roman Lawyers³ never allow of^a; for thus needy necessitous People might quickly be stript of all they were worth, through the Avarice of their Creditors, being often forc'd to leave in Pawn much more than the value of the Debt.

But it is reasonable, that⁴ if the Pawn be not redeem'd by such a Time, it should be look'd upon as sold at a fair Rate stated then, or some time before, by some honest Man^b.

In short, as the Creditor ought to restore the Pawn upon Payment; so while he has it in his Custody, he ought⁵ to look after it as carefully as his own, and if it may be the worse for using, he ought not to put it to any Use, unless Leave be expressly given him by the Bargain. And therefore if it receives any Damage, or happens to be lost through his Fraud, or want of, at least, common Diligence, he is obliged to make it good.

XV. It is a receiv'd¹ Opinion, that a Pawn deposited can never become one's own by Prescription^c; and the Reason is, because the Redemption of a Pawn is such an Action as cannot be exercised often, but once only. Besides Prescription was first introduc'd to put an End to Sutes, which could not otherwise be determined, and to settle Property which would

otherwise be uncertain. But in the Case before us there can be no Question in whom the Property of the Pawn is, when I possess it as another's, and it evidently appearing upon what account he lent it with me, I cannot presume that he had ever relinquish'd it.

But yet the Case may so happen, as that the Debtor may fairly be debarr'd the Power of Redemption; as^d if when he would have redeem'd it, he had been hindred, and has now pass'd it over in Silence so long, as to create a Presumption that he never designs it; or if it be very much to the Creditor's Disadvantage to have the Payment continually put off, it cannot be thought unjust in him to dispose of the Pawn as his own; especially if by length of Time the Value of the Money has been chang'd, so that the Creditor would receive less than he lent, should he admit of a Redemption. As suppose a Man had lent another 1000*l.* 100 Years ago, and had received in Mortgage a Farm, which was then worth the Money; in the mean time the Value of Money has sunk half in half, and therefore now, if the Creditor be forced to receive back his 1000*l.* he would receive only enough to purchase half the Farm; whereas, at the time of Contract it would have purchased the whole.

XVI. The Roman Lawyers distinguish between a Pawn properly so called, and a Mortgage^e; the former is the actual Delivery of some moveable, the latter is the bare Assignment of something immoveable, for Security of the Debt: For barely to assign over moveables as Security, without putting them into the Custody of the Creditor, would be ridiculous; for they might be removed away, and so not

² These Restrictions are no ways necessary, according to Mr. THOMASIVS, *ubi supra* § 13, 14. The Debtor, says he, is suppos'd, in this Case, to sell his Estate for the Sum lent; for which Reason he looked upon it himself as an Equivalent. And so after the Time is expired, the Creditor becomes full and irrevocable Proprietor of the Thing pawned, and 'tis the worse for him, if he finds it less worth than the Money lent; as it is also just, that if he sells it for more, he should have the Benefit, at least, if it be not otherwise agreed on, or the Laws of Charity do not oblige him to recede from his Right.

³ See *Cod. lib. 8. tit. 35. De pæctis pignorum, & de Lege Commissoriâ in pignoribus rescindendâ.*

⁴ The Words of the Digests are, *Poteſt ita fieri pignoris datio, hypothecæve, ut ſi intra certum tempus non ſit ſoluta pecunia, jure emptoris poſſideat rem juſto pretio tunc æſtimandam: hæc enim caſu videtur, quodammodo conditionalis eſſe venditio.* Digest. *ubi supra*, Leg. 16. § 9.

⁵ *En igitur, quæ diligens Paterfamilias in ſuis rebus præſtare ſolet, à creditore exiguntur.* Digest. lib. 13. tit. 7. De Pigneratitia actione, Leg. 14. See Mr. NOODT's *Probabilia Juris*, lib. 1. c. 4. lib. 4. c. 3. & Objere. 2. 13. But if without his Fault, the Pawn be lost, or destroyed by a Mischance, he still preserves his Right, who remov'd it only from the other Goods of the Debtor. *Quam [diligentiam exactam] ſi præſtiterit, & aliquo fortuito caſu rem amiſerit, ſecurum eſſe, nec impediri creditum petere.* Institut. lib. 3. tit. 15. § 4. Mr. THOMASIVS *ubi supra*, § 17, 18. expreſſes himſelf a little differently, and ſuppoſes, as I think, without Neceſſity, that in Things that yield a Profit, the Right of the Creditor to the Thing pawned, is a kind of Property, tho' revocable.

Mr. BARB. NOTES on § XV.

¹ The Interpreters of the Roman Law are not agreed about this; and the common Opinion, for the most part, is, that Prescription prevails in the Case of Pawns. See GROTIUS, *lib. 2. c. 4. § 15.* to which Place the Author alludes.

^a *V. C. L. 8. t. 35. De pæctis pignorum, & de lege Commissor. in pignorib. rescind.*

^b *V. D. L. 20. t. 1. De pignorib. & hypothecis, &c. l. 11. f. 1. & l. 16. f. 9. Añ. l. 10.*

^c Grot. *l. 3. c. 12. f. ult.* puts this Case.

^d *V. C. L. 4. t. 24. de Pigneratitia.*

^e *V. Instit. L. 4. t. 6. De*

actionib. f. 7.

answer the End for which they were assigned¹. This way of *Mortgage* is very useful among Subjects of the same State; for it being absolutely necessary that they should frequently borrow of one another, and as necessary that the Payment should sometimes be put off for a considerable Time, there would not be *moveables* enough for sufficient Security; and it would be too hard to oblige the Borrowers immediately to part with their *immoveables*, as their Houses, or Land². And therefore it suf-

fices to assign such an *immoveable* for Security, as can't be taken away, and of which the Law at any time can give Possession.

In the State of Nature such *Mortgages* are needless; for if the *Debtor* refuses Payment, the Possession of the *Mortgage* assigned in Security must be detained by Force of Arms. Whereas in that State, without such a particular Assignment, it is lawful to seize on any thing that belongs to the *Debtor*.

Mr. BARB. NOTES on § XVI.

¹ Their Words are, *Pignoris appellatione eam propriè rem contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit. At eam quæ sine traditione nuda conventionione tenetur, propriè hypothecæ appellatione contineri dicimus.* Institut. lib. 4. tit. 6. De Action. § 7. In fine, as to this whole Matter of Pawns and Mortgages, we may consult Mr. DAUMAT'S Civil Laws in their Natural Order, Part 1. lib. 3. tit. 1. See also Mr. NODD'S *Probab. Jur.* lib. 1. cap. 8. & lib. 4. cap. 10, 11. & *Obj.* 2. 8. where he corrects some Laws, and there we may see, among other things, that according to the *Preterian* Law, a Mortgage was made and concluded also by a single Agreement.

² Compare *Exod.* xxii. 26, 27. *Deut.* xxiv. 6. *Job* xxii. 6. xxiv. 3. *Prov.* xx. 16. & *D. L.* 20. t. 1. l. 6, 7. *D. de Pignor.* &c. *Diodor.* Sic. l. 1. c. 79. *C.* lib. 8. t. 17. *L.* 8. *Authent. Agricultores quæ res pignori oblig. poss.*

CHAP. XI.

By what means Obligations founded upon Compact may be dissolved.

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| <p>I. The most natural Way of dissolving an Agreement is to perform the Things agreed on.</p> <p>II. What if one pays a debt for one who knows not of it?</p> <p>III. To whom must we pay?</p> <p>IV. What must be paid?</p> <p>V. To whom and by whom may Compensation be made?</p> <p>VI. Where it may be used.</p> <p>VII. A Debt is paid by a Release.</p> <p>VIII. How an Obligation is made void by a disagreement.</p> | <p>IX. The Knavery of one Party frees the other from his Obligation.</p> <p>X. As also a Change of that Condition on which the Obligation was founded.</p> <p>XI. How an Obligation ceases by Time.</p> <p>XII. And how by Death.</p> <p>XIII. Of Delegation.</p> <p>XIV. Of Confusion.</p> <p>XV. Of Novation.</p> |
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WE come now to see by what means Obligations thus founded upon Compact may be dissolv'd. The most natural Way is¹ the Performance of the Covenants; for that being done, the Obligation ceases of course. And here we may observe, that some Obligations are² so inherent in a Person, that they cannot be perform'd by any other³; Whereas some may be done by *Proxy*, it being all alike to the Party concern'd, by whom they be perform'd. Of such a

Nature are all those Contracts which relate to common mercenary Work, such as may be done as well by one Man as by another; as also those which³ concern *consumable Commodities*, which if we do but get our selves possess'd of, it is indifferent by what Hand they come to us. In such Cases, altho' it be most natural for the *Debtor* himself, or some other by his Order, to pay and perform according to Agreement, yet the *Creditor* ought to acquiesce, if any other Man discharges

Mr. BARBEYRAC'S NOTES on Chap. XI. § I.

¹ *Tollitur omnis obligatio solutione ejus quod debetur, Instit. L. 3. t. 30. Quib. mod. tollitur oblig. princip. See Digest. Lib. 46. tit. 3. De Solut. & Liberat.*

² See what is said *Lib. 1. Chap. 1. § 19.* upon the distinction of a communicable and incommunicable Power.

³ As when one gives another a Garment, or a Chest, &c. to make, for it implies, that the Taylor or the Carpenter should do the Work themselves, or procure it to be done by some other of their Trade; unless it be agreed, That he that takes the Work should do it himself, or there be some great Inequality between his own Ability and the other Workman's, whose Assistance he use, *Si cui locaverim faciendum, quod ego conduxeram, constabit habere me ex locato actionem.* Digest. Lib. 19. tit. 2. *Locati conducti, &c. Leg. 48. Irene. Inter artifices longa differentia est, & ingenii & naturæ, & doctrinæ, & institutionis. Ideo si navem à se fabricandam quis promiserit, vel Insulam ædificandam, Fossamve faciendam, & hoc specialiter actum est, ut suis operis id perficiat; si fidejussor ipse ædificans, vel fossam fodiens, non consentiente stipulatore, non liberabit reum.* Lib. 46. tit. 3. De Solut. & Liberat. Leg. 3.

^a See above in B. 1. c. 1. f. 19.

⁴ for the *Debtor*; I say, for the *Debtor*, for whoever pays ⁵ upon his own Account, and not the *Debtor's*, does not release him ². But in case of *Suretiship*, if the *Principal* discharges the Obligation, ⁶ he releases both himself and the *Surety*. Whereas if the *Surety* pays the Debt, the *Principal* is indeed releas'd from the *Creditor*, but at the same Instant becomes indebted to the *Surety* ⁷, even altho' this Payment was made without his Knowledge.

II. But if a Man pays a Debt for another without either being his *Surety*, or having his Order for it, can he recover what he has thus paid of his own Head? In which Case we must distinguish whether he made this Payment against the other's Will, or only against his Knowledge. In the former Case 'tis plain ¹ he cannot recover it; For how can any one impose an Obligation upon me against my Will, which ought to be founded upon Consent? But because no Body is presum'd to throw his Money away, we ought to consider further, whether he design'd what he thus paid ² as a Gift to the *Creditor*, or not: If he did; the *Debtor* is not concern'd in it: But if he did not design it as a Gift; we ought to suppose, that he did it to transfer the *Creditor's* Right and Title against the *Debtor* upon himself. And altho' the

Creditor, at the Payment, knew not of his Design ³ but receiv'd the Money as paid in the Name of the *Debtor*; yet if he who paid it cannot recover it of the *Debtor*, the *Creditor* ought in Equity either to refund what he thus receiv'd, and still preserve his Action against the *Debtor*, or else to give up his Title to the other; especially if he may be presum'd to have made his Payment in hopes it would have been acceptable to the *Debtor*. Upon which account the *Roman* Law allows him ³ an *Action for Business done* ⁴: But since the *Debtor* may put in his Exceptions, that it was not acceptable to him, and that he is not willing to owe this other Person such a Kindness, his best way would be to ⁴ suppose that his *Creditor* has given up his Title to him, and to deal with him accordingly. But if a Man should lay out any Expence upon another's Goods, without his Knowledge, he ⁵ may keep the Goods as a Pledge till the Expences be repaid him, unless the Improvement is capable of being taken away from them.

III. No Payment or Satisfaction of any Obligation ought to be made but to the *Creditor* himself, or whom he has order'd to receive it in his Name ¹; and if I pay another by Mistake, the *Creditor's* Title nevertheless stands good; but

⁴ If the Debtor does not at all consent. *Nec interest quis solvat: utrum ipse qui debet, an alius pro eo, liberatur enim & alio solvete, sive sciente sive ignorante debitore, vel invito eo solutio fiat.* The Reason is, say the Lawyers, because he can do better for the Person who is ignorant of what is done for him, than the contrary. *Solvete pro ignorante & invito cuique licet: cum sit jure civili constitutum, licere etiam ignorantis invitoque meliorem conditionem facere.* Digest. Lib. 46. tit. 3. De solut. & liber. Leg. 53.

⁵ For as the *Roman* Lawyers speak in the Law, here quoted by our Author, What a Man pays in his own Name does not free the Debtor, *Dig. l. 5. tit. 3. leg. 31.* Moreover, we ought to observe, that according to the Style of the *Roman* Lawyers, which is very suitable, and followed by our Author in this Place; the Terms, Debt, Creditor, Debtor, and Payment, do not only respect the Obligation of those who owe a Sum of Money, or some other Thing capable of an Equivalent, but in general, those Engagements which we may be under upon any other Account, as in a Contract of Hiring, or Trusting, &c. *Creditorum appellatio non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes, quibus ex qualibet causa debetur.* Digest. Lib. 50. tit. 16. De verborum signif. Leg. 11. *Credendi generalis appellatio est: ideo sub hoc titulo Prætor, & de commodato & de pignore edixit: Nam cuiusque rei adsentiamur alienam fidem secuti, mox recepturi quid ex hoc contractu, credere dicimur, Lib. 12. tit. 1. De rebus creditis, &c. Leg. 1. Solutionis verbo satisfationem quoque omnem accipiendam placet, solvere dicimus eum, qui facit, quod facere promisit, Lib. 50. tit. 16. de verb. signif. Leg. 176. See also, Lib. 46. tit. 3. de solut. & liberat. Leg. 54.*

⁶ So the Law is, *Item si reus solverit, etiam ii, qui pro eo intervenierunt, liberantur. Idem ex contrario contingit, si fidejussor solverit; non enim ipse solus liberatur, sed etiam reus.* Institut. ubi supra. *In omnibus speciebus liberationum etiam accessiones liberantur; puta adpromissores, hypothecæ, pignora: præterquam quod inter creditorem & adpromissores confusione facta reus non liberatur.* Digest. Lib. 46. tit. 3. De Solut. & Liber. Leg. 43.

⁷ See Digest. Lib. 17. tit. 1. Mandati vel contra Leg. 29. & 40.

Mr. BARB. NOTES on § II.

¹ Especially if the Debt were not very lawful or clear. See Mr. DAUMAT'S Civil Laws in their Nat. Order. Part 1. Lib. 4. Tit. 1. Sect. 3. § 2. We may also consult the rest of that Title, where the whole Matter of Payments is handled.

² But that is not to pay for another, and so this Case is nothing to the purpose.

³ The Author refers us to this Law, *Cum pecuniam ejus nomine solveres, qui tibi nihil mandaverat, negotiorum gestorum actio tibi competit. Cum ea solutione debitor à creditore liberatus &: nisi si quid debitoris interfuit, eam pecuniam non solvi.* Digest. Lib. 3. tit. 5. De negotiis gestis, Leg. 43. But there he only is spoke of, who pays at the Request of the Debtor; whereas our Author is treating of the Case where payment is made against the Will of him whose Debt is acquitted; for it is certain, as Mr. HERTIUS observes, that by the *Roman* Law no Man could have an Action for Business done, against a Man for whom he has paid against his Will. See Digest. Lib. 3. tit. 5. De negotiis gestis, Leg. 8. § 3. as also, Lib. 17. tit. 1. Mand. vel contra, Leg. 6. § 2. Leg. 40. & Cod. Lib. 2. tit. 19. De negotiis gestis, Leg. 24. Here is some Confusion in the Sense, which makes one suspect that the Author, or Printers, have left out some Words, if not a whole Sentence. See the next Note

⁴ The Author should have said, *Against his Will, and his Prohibition*, and he hath written unawates, *pro ignorante*, for *pro invito*; and perhaps he put the one for the other, if there be not a greater Omission here, for the Word *ignorante* is met with again in the next Sentence, and we can't see why the Author should pass clearly from the first Member of the distinction to the last, and not particularly treat of this.

⁵ See Lib. 4. Chap. 13. § 13. I don't see well what this Period does here, having no relation almost to the Subject.

Mr. BARB. NOTES on § III.

¹ The Words of the Digests are, *Solutam pecuniam intelligimus utique naturaliter, si numerata sit creditori. Sed & si jussu ejus alii solvetur, vel creditori ejus, vel futuro debitori, vel etiam ei donaturus erat: absolvi debet.* Digest. Lib. 46. tit. 3. De Solutionibus, &c. Leg. 49.

² *Nam quod quis suo nomine solvit, non debitoris, debitorem non liberat.* D. L. 5. t. 3. l. 31. princ. De negotiis gestis, l. 43. & ult.

³ V. L. 3. t. 5.

then I may recover of the other what I thus paid him². The Creditor is here presum'd to be capable of managing his own Concerns³, and to have a perfect Understanding of the Affair in hand. For otherwise it would be to throw Money away, rather than to make Payment of it.

IV. Besides, the very Thing must be paid that was bargain'd for, and not another¹ in its stead²; it must be paid entire, not mangl'd; not partially, nor piecemeal; at the³ Time and⁴ Place appointed: especially if it be the Creditor's Interest to have it paid *here* rather than *there*, and at such a *Time* rather than at another; for the *Time* is part of the Price. Yet any of these Conditions may be superseded by a new Agreement, which the Creditor is sometimes forc'd to comply with, through the Poverty or Knavery of the Debtor: being willing to receive Part rather than nothing, at another Place rather than no where, and after the Time expired rather than never. Tho' sometimes Equity requires that the Payment be put off and accepted in Parcels, when it can't be perform'd immediately, or all at once. Thus the Athenians having made a Vow to sacrifice to Diana as many Goats as they should kill Enemies, when they could not procure so many in the whole Country, they decreed to sacrifice 500 every Year^b. Sometimes too there is no other

Way of ending the Sute, than by forcing the Debtor to pay an Equivalent.

'Tis manifest that the Creditor only can remit the Debt, and not his Servant or Steward, without his express Order. But if the Debtor's Steward transacts with the Creditor, and compounds for less than the whole, the Gain does not redound^c to the Steward, but to his Master; and it would be Theft and purloining in the Steward, if after having compounded with the Creditor, he should bring the whole Debt in his Accounts, and put what he got by Composition in his own Pocket.

The Creditor is suppos'd to be satisfied, if he accepts of a Pawn as Payment, or takes it in Trust till Payment be made, or if it be sold, and the Price receiv'd in lieu of the Debt. And if a Man owes Money by several different Bonds, and⁶ pays part, the Payment ought in Favour to be applied to the most burthensome^c. The Way which Vitellius^d took to pay his Debts was very scandalous; when he went to Germany he was so intangled, that his Creditors would scarce dismiss his Person upon any Security; who a little after, when he was made Emperor, and return'd to Rome, hid themselves. But he order'd them to be brought before him, and told them, *That he had restor'd them Safety for their Money*, and demanded back the Bonds and Instruments of Contract.

² The Words of the Digests are, *Indebitum est non tantum quod omnino non debetur, sed & quod alii debetur, si alii solvatur.* Digest. Lib. 12. tit. 6. *De conditione indebiti.* Leg. 65. § 9.

³ So we can't pay a Pupil without the Consent of the Guardian; *Pupillo solvi sine Tutoris Auctoritate non potest.* Digest. Lib. 46. tit. 3. *De Solut. & Liberat.* Leg. 6.

Mr. BARB. NOTES on § IV.

¹ See the Law quoted above, Chap. 7. § 1. Note 3. So that he who owes Money can't, unless the Creditor agree to it, make over any Debt to him in payment: *Enum, à quo mutuam sumpsisti pecuniam, in solutum nolentem suscipere nomen Debitoris tui, compelli juris ratio non permittit.* Cod. lib. 8. tit. 43. *De Solutio. & Liberation.* Leg. 16. See what hath been said Chap. 7. § 3. Note 1. and § 6, 7. upon the several Species in which a Payment of Money lent, may be made. See Mr. THOMASUS's Discourse, *De pretio affection. in res fungibiles non cadente*, Chap. 2. § 3, &c.

² At least, if (as the Roman Lawyers say) there be not any ground to contest the other part of the Debt, for in this Case the Judge may and ought to oblige the Creditor to receive what the Debtor offers him without prejudice to the rest: *Quidam nihil macerant, neque eum qui decem peteret, cogendum quinque accipere, & reliqua persiqui: neque eum, qui fundum suum diceret, partem duntaxat judicio persequi.* Sed in utraque causa humanius facturus videtur Prætor, si actorem compulerit ad accipiendum id, quod offeratur: cum ad officium ejus pertineat lites diminueret. Digest. Lib. 12. tit. 1. *De rebus creditis*, Leg. 21. Moreover, as it ordinarily behoves the Creditor to be entirely satisfied, he is not obliged to be contented with part of Payment, unless it be otherwise agreed on, *Quia sæpe & solutio & exactio partium, non minima incommoda habet.* Digest. Lib. 10. tit. 2. *Famil. cretiscandæ*, Leg. 3. See Lib. 22. tit. 1. *De usuris*, &c. Leg. 41. § 1. Lib. 20. tit. 1. *De pignor. & hypoth.* Leg. 19. *Vinnius* on the *Institutes*, Lib. 3. tit. 30. *princip.* Num. 5. & seq.

³ The Words of the Digests are, *Is qui certo loco dare promittit, nullo alio loco, quam in quo promissit, solvere, invito stipulatore, potest.* Digest. lib. 13. tit. 4. *De eo, quod certo loco dari oportet*, Leg. 9.

⁴ The Time was one part of the Bargain. See Chap. 1. § 10 above. Yet Payment may be made before the Time, a longer Time being granted ordinarily for the advantage of the Debtor, that he may discharge his Debt with less Inconvenience to him. *Quod certa die promissum est, vel statim dari potest: totum enim medium tempus ad solvendum promissori liberum relinquunt.* Digest. Lib. 46. tit. 3. *De solut. & liber.* Leg. 70. Yet sometimes the Term is fixed for the Creditor's Benefit, and in that Case he may refuse Payment. See Digests, Lib. 46. tit. 1. *De verb. oblig.* Leg. 122.

⁵ Mr. HERTIUS quotes, Digest. 17. Tit. 1. *Mandati vel contra*, Leg. 10. § 3. Leg. 20. and Lib. 26. Tit. 8. *De administratione & periculo Tutor. vel Curat.* Leg. 53. *princ.* But in the last he treats of Tutors and Curators, who trade with their Pupils Money, and in the two first of them who take upon them a Commission freely, so that they can't be applied, but by an Analogy or Accommodation, to what our Author says of them who are the Servants or Stewards of the Debtor, *Ministri aut Dispensatores*.

⁶ That is to say, If, for Example, of two Debts one be contended and the other clear, the Payment ought not to be made to the first, but the last. In like Manner Payment ought rather to be made of a Debt, which, if it be not discharged, will bring some Trouble on the Debtor, or a Condemnation to Damages and Loss, or concerns his Reputation, than of another from which the like Consequences are not to be feared, and so of a Debt with a Security rather than without one; of a Debt which is ow'd in his own Name, rather than where he is only a Security; rather of a Debt for which he has given a Pawn or a Mortgage, than upon his bare Promise: rather of a Debt for which the Time is come, than for that whose Time is not come; rather of an old, than new Debt; rather of a real and single Debt, than of a Conditional. *Quotiens quis debitor ex pluribus causis unum debitum solvit: est in arbitrio solventis dicere, quod potius debitum voluerit solutum: & quod dixerit, id erit solutum. Possumus enim certam legem dicere ei, quod solvimus. Quotiens vero non dicimus id quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat, dummodo in id constituit solutum, in quod ipse, si deberet, esset soluturus, i. e. in id debitum, quod non est in contraria aut in illud, quod pro alio quis fidejusserat, aut cujus dies nondum venerat. Et magis quod meo nomine, quam quod pro alio fidejussorio nomine debeo, & potius, quod cum pœna, quam quod sine pœna debetur ---- potior habebitur causa ejus pecuniæ, quæ sub infamia debetur ---- quæ sub hypotheca, vel pignore contracta est ---- vetustior contractus ante solvetur.* Digest. Lib. 46. Tit. 3. *De solut. & liberat.* Leg. 1. 4, 97.

^a Vid. Martial, L. 6. Ep. 30.

^b Xenophon *αἰὲ ἀναλ. τῶ Κλέπ.* p. 178. *Otherwise concerning the Time of Payment that of l. 105. of D. B. 46. tit. 3. De solutio. &c. us'd to be observ'd.*

^c V. D. ubi supra, l. 1, 4, 97.

^d V. Xiphilin.

ad ann. 69.

V. The Obligation is sometimes released by ¹ Compensation, which is by opposing Debt to Debt, or when a Man ceases to owe me, because I apparently owe him as much of the same Kind. For since as much (especially in consumable Commodities) is the same, and where the Debts are mutual, if I receive, I must immediately refund as much: Therefore to abridge such needless Payments, 'tis most convenient for each Party to pay himself by retaining his own ²; especially since there is no Paying and Receiving without some Trouble in it: And it would be very imprudent in me to pay first when I need not do it, and so to put it in the other's Power to be behind hand in his Payment to me ^b.

But this Compensation does not take place, but between those who are Creditors and Debtors to each other; for ³ if I have so much due to me from a third Person, I cannot obtrude that upon my Creditor for Payment, unless this Third and he be join'd in such a Partnership, as to have all their Obligations and Rights in common; for then their Goods may be look'd upon as one and the same Patrimony. Nay, if they be Partners in one Sort of Commodity only, ⁴ Compensation will take Place, if one be my Debtor and the other my Creditor for that Commodity; for so far they are to be esteem'd the same Person. So, if I owe Money to him who is my Debtor's Heir; or, if the Creditor of him whose Heir I am, is indebted to me, ⁵ Compensation may take Place. And thus I may oppose Debt to Debt, altho' my Creditor is against it; for with what Face can he demand me to pay him, when he declines paying me?

Since this Way of Compensation cannot be put in Practice, but between those who are mutually

in Debt to one another, it follows, that I cannot oppose to my Creditor what he owes another, ⁶ whose Agent I am, without his express Orders. For tho' a Man intrusts me with the entire Management of his Affairs, I am not therefore to reckon his Things as my own, and by that Means make Compensation for my Debts; for perhaps he had rather have another Man his Debtor than me. Nor if I trust my Affairs to another, do I thereby take his Debts and Obligations upon my self; thus *v. g.* should *Caius* enjoin me to exact his Dues of *Seius*, whose Debtor I my self am; neither can *Seius*, without *Caius's* Leave, compensate his Debt with mine, and under that Pretence refuse Payment (for what has *Caius* to do with my Debt?) Neither can I take the Debt upon me instead of *Seius*. So one that is indebted to a Minor cannot make Compensation of that which the ⁷ Guardian owes him: nor can the Guardian release his Debt by opposing it to that which his Creditor owes the Minor ^c.

On the other hand, if one that is bound for another, be call'd upon for the Debt, ⁸ he may oppose by Way of Compensation, not only what the Creditor owes to him, but also what he owes to the principal Debtor; and this even against the Knowledge and Will of the Principal: For since the Creditor cannot refuse such a Compensation from the Principal himself, why should not the Surety have the Advantage of it? And it would not be fair in the Principal to be against it, since he is oblig'd to repay what the Surety thus lays down for him.

VI. But in consumable Commodities Compensation does not regularly take place, but in those of the same Kind, and that too, not 'till the Time of Payment is come, or ² past ^d; and therefore

Mr. BARB. NOTES on § V.

¹ The Words of the Digests are, *Compensatio est debiti & crediti inter se contributio*, Digest. Lib. 16. Tit. 2. *De compensationibus*, Leg. 1. *Si causa, ex qua compensatur, liquida sit, & non multis ambagibus innodata, sed possit judici facilem exitum sui prestare*, Cod. lib. 4. Tit. 31. Leg. 14. § 1.

² The Digests so direct, *Unusquisque creditorem suum, eundemque debitorem, potentem summovet, si paratus est compensare. Ideo compensatio necessaria est, quia interest nostra potius non solvere, quam solutum repetere*, Digest. ubi supra, Leg. 2, 3. *Dolo facit, qui petit quod redditurus est*, lib. 44. tit. 4.

³ The Digests so order, *Creditor compensare non cogitur, quod alii quam debitori suo debet: quamvis creditor ejus pro eo, qui convenitur ob debitum proprium, velit compensare*, Digest. *de compensationibus*, Leg. 18. § 1. See also Leg. 16. *princip.* & Cod. Lib. 4. Tit. 31. *De compensationibus*, Leg. 9.

⁴ So the Digests speak, *Si duo rei promittendi socii non sint: Non proderit alteri, quod stipulator alteri reo pecuniam debet*, Digest. Lib. 45. tit. 2. *De duobus reis constituendis*, Leg. 2.

⁵ This hath Place by the civil Law, when the Heir will not enter upon the Inheritance, till an Inventory is made, because he will not represent the Dead in all Things, but will only be obliged to expend so much as may be the Value of the Inheritance. See *Cob. Lib. 6. Tit. 30. De jure deliberandi*, Leg. 31. § 4, 9. Upon the whole, a Compensation is made at all Times, when the Debtors or Creditors come into the Rights or Obligations of a Third.

⁶ For then is he *Procurator in rem suam*, as the Roman Lawyers speak. *In rem suam Procurator datus, post litis contestationem, si vice mutuâ conveniatur, æquitate compensationis utetur*, Digest. Lib. 16. Tit. 2. *De compensat.* Leg. 18.

⁷ So the Digests, *Id quod pupillorum nomine debetur, si Tutor petat, non posse compensationem objici ejus pecuniæ, quam ipse Tutor suo nomine adversario debet*, Digest. *ibid.* Leg. 23.

⁸ The Digests say, *Si quid a fidejussore petatur, æquissimum est eligere fidejussorem, quod ipsi, an quod reo debetur, compensare malis: sed & si utrumque compensare velit, audiendus est*. *Ibid.* Leg. 4. See the precedent Law.

Mr. BARB. NOTES on § VI.

¹ In Reality, the Compensation ought to answer the Debt, for the Debtor is obliged to render the Thing in that Manner. *Cum quid mutuum dederimus, etsi non cavimus, ut æquè bonum nobis redderetur, non licet debitori deteriore rem, quæ ex eodem genere sit, reddere: veluti vinum novum pro veteri. Nam in contrahendo, quod agitur pro cauto habendum est. Id autem agi intelligitur, ut ejusdem generis & eadem bonitate solvatur*, Digest. Lib. 12. tit. 1. *De rebus creditis*, &c. Leg. 3. As to the Quantity, altho' the Debt be on each side unequal, so that a Compensation can't be fully made, yet the Compensation may make the Debt less, and so acquit him of the greatness of it. *Si constat pecuniam invicem deberi, ipso jure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejusque solius, quod amplius apud alterum est, usuræ debentur, si modo petitio earum subsistit*, Cod. Lib. 4. tit. 31. *De compensationibus*, Leg. 4.

² So the Digests speak, *Quod in diem debetur, non compensabitur, antequam dies veniat, quanquam dari oporteat*, Dig. Lib. 16. tit. 12. *De compensat.* Leg. 7.

³ *V. Grot. l. 3. c. 19. f. 15. &c.*

^b *L. 2, 3. D. d. l. Dolo facit, qui petit quod redditurus est.*

^c *V. D. ibid. L. 23.*

^d *V. l. 7. D. h. t.*

Things of a different Sort or Quality can't be paid by Compensation, as a Bushel of Wheat for a Bushel of Oats, or a Hoghead of *Rbenish* for a Hoghead of *Port* Wine; nor Things of a different Species, as this Horse for that Ox; nor of a different Kind, as a Sheep for a Goose; nor a Species for a Thing indefinite of the same Kind, or for an indeterminate Quantity, as *Bucephalus* for a Horse, or a Vessel of Oyl. Yet the *Roman* Lawyers admit of Compensation, where the Particulars are not assign'd, but the same Sort and Quality is owing on each side, as if I had promis'd you a Horse in general, and you happen to be Executor to one that leaves a Horse to me in Legacy. But, yet even in the former Cases, each Party may rate their Debt, and then pay them by Compensation. And yet, where Debts are thus reciprocal, the Obligation is rather³ suspended, than taken away, by withholding what I owe another, till he pays what he owes me. But Work for Work, or Work for Goods, will not admit of Compensation at the very Instant that it ought to be perform'd; for that would frustrate the very⁴ End and Design of such Contracts.

But if each Party release the other, the Obligation ceases upon another Principle, *viz.* *Mutual Disagreement*; so also if I cease to be oblig'd, because another, who ought first to perform his Part, omitted it, it is not by reason of Compensation, but because the Condition, upon which the Obligation was founded, does not appear. But if my Work has been neglected by the Party that had undertaken it, I may rate it, and so bring it into Compensation. Nay, I can oppose to a Debt an equivalent Damage, or a Fine adjudg'd to me

for any Injury done by my Creditor. But if two Persons be at Law, and while the Cause is depending, strike up a Bargain, neither can oppose the Law-sute, or the Charges of it, to the other^a; *v. g.* suppose I am at Law with another for an Estate, and during the Sute sell him a House, he can't impute to me as Payment the Estate, or the Expences he has been at about it; for the Estate does not as yet appear to be his, and the Nature of the Thing shews, that the Bargain was made without any Regard to the Cause depending.

As for that Sort of Compensation, which cancels former Favours by subsequent Injuries, *Seneca* discourses largely of it^b. So also equal Injuries may, by Compensation^c, be put up on both sides, provided the Right of the Magistrate be not infringed.

VII. The Obligation ceases also when the Creditor, or he who has a Title to it, forgives it; for 'tis evident any Man may recede from his own Right, and when the Right has been made over to another, there too the Obligation ceases upon that other's forgiving it. And as at first I cannot stand oblig'd, if the other Party refuses to accept of it; so neither can I continue bound, if he thinks fit to cancel the Bond. But this only in Case no Third Person is injur'd by it; for otherwise he alone cannot release me, altho' I was immediately oblig'd to him only.

This Release is perform'd either expressly, or tacitly; to the former belongs what the *Roman* Law calls^d *Acceptilatio*, an Acquittance or Discharge, by which the Person acknowledged himself to have receiv'd what indeed he had not; as also the^e

³ This is a Term borrowed from the *Roman* Law, which allows Retention in several Cases, where the Things due on both sides are not of a sort. See *CUJACIUS*'s *Observat.* viii. 2. xv. 12. xviii. 10. *Vinnius* upon the *Institutes*, Lib. 4. tit. 6. *De actionibus*, § 13. and *Mr. NOODT*'s *Probabilia Juris*, Lib. 3. Chap. 9.

⁴ For Actions are not capable of being put in the place one of another, as Things are; they can't be reduc'd to an Estimation respectively, so that it be all one to a Person, whether he do what he hath promised or not, provided he be dispens'd with, to do or give what he hath promised in his Turn; and likewise it be indifferent either to receive the Thing it self which is due, or another of equal Value. So when any one engages to do any thing for us, we can depend upon nothing, because he'll endeavour always to evade his Engagements under a pretence of some Compensation due to him from us, and for which he will labour to get quit with us.

⁵ The *Digests* thus speak, *Si duo dolo malo fecerint, invicem de dolo non agent.* *Digest.* Lib. 4. tit. 3. *De dolo malo*, Leg. 36. *Vero atque uxore mores invicem accusantibus, causam repudii dedisse utrumque pronunciatum est. Id ita accipi debet, ut ea lege quam ambo contempserunt, neuter vindicetur. Paria enim debita mutua pensatione dissolvuntur,* Lib. 24. tit. 3. Leg. 39. It appears by the first Law, That if in an Exchange, for Example, I have given a blind Horse, and the other hath given me a lame one, we are quit. In like manner, If a Man hath stolen from another, and the other hath stolen from him again, there's nothing can be demanded from each other, provided that the Things stolen were of equal Value. *Quotiens ex maleficio oritur actio, ut puta ex causa furtiva cæterorumque maleficiorum, si de ea pecuniarie agitur, compensatio locum habet,* *Digest.* Lib. 16. *De compensationibus*, Lib. 10. § 2. The other Law imports, That if an Husband being desirous to be divorced from his Wife, for her scandalous Behaviour, is accused by her, and convicted of the same Faults, or such as are as contrary to conjugal Fidelity as those he blames her for, neither of them may pretend to any Advantage to dissolve their Marriage. This is just, but if Adultery be committed on both sides, the Woman's Crime affords a much stronger Reason for their Separation: See *Chap.* 1. of the following Book. But 'tis not the same with punishments inflicted by the Laws, which are only some pecuniary Fines laid on the Parties. When two Persons have committed a like Crime one towards the other, the Magistrate hath nevertheless a Right to punish them both. See *Digest.* lib. 48. tit. 5. *Ad legem Juliam de Adulteriis coercendis*, Leg. II, § 4. & XIII. § 5.

Mr. BARR. NOTES on § VII.

¹ The Law is, *Item per acceptilationem tollitur obligatio. Est autem acceptilatio, imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, si id velit Titius remittere, poterit sic fieri, ut patiatu debitorum hæc verba dicere: Quod ego tibi promisi habesne acceptum? Et Titius respondeat, Habeo. Quo genere, ut diximus, tantum eæ solvuntur obligationes, quæ ex verbis consistunt, non cæteræ,* *Instit.* Lib. 3. Tit. 30. § 1.

² The Words of the *Digests* are, *Est autem prodita stipulatio, quæ vulgo Aquiliana adpellatur, per quam contingit, ut omnium eorum obligatio in stipulatum deducatur, & ea per acceptilationem tollatur. Stipulatio enim Aquiliana renovat omnes obligationes.* *Ibid.* § 2.

^a *A. Grotius well observes, l. 3. c. 19. s. 19.*

^b *Epist.* 81. & *de Beneficiis*, l. 6. c. 4, &c.

Stipulatio Aquiliana, which by a Sort of Novation, brought the Debtor to Articles of Agreement, and then releas'd him by a Discharge; all which tedious Forms and Circumstances the Law of Nature knows nothing of, but makes the Obligation to cease upon the bare Consent of the Party signified³.

Besides, the Obligation is presum'd to be⁴ remitted, if I designedly deliver up (not in Trust, or such like) the Instruments or Deeds, without which the Debt cannot be made out^a; but if I have several Instruments, and each of them is capable of proving the Debt, then⁵ the Obligation is not suppos'd to be cancelled upon the Delivery of one only.

As for what the *Roman* Law observes, that by Delivery of the Deeds the Creditor is judg'd to enter tacitly into Compact not to demand the Debt; that Nicety is unknown to the Law of Nature, which supposes the Obligation cancell'd, not only by real Payment, but by the bare Remission of it.

The Obligation is suppos'd to be tacitly forgiven, if the Creditor, directly or indirectly, hinders the Discharge of it: Thus if I bargain with a Man to do any certain Work, and am my self to call upon him when I would have him perform it, my not calling upon him is presum'd to be a Release, as is also my substituting another to do it for him.

VIII. But as the former Methods take place, where one Party only is oblig'd; so where both are concern'd, if nothing be yet perform'd, the Obligation may cease upon each Party's dissenting and receding from the Bargain¹; for 'tis natural that the contrary to that which causes the Obligation should be capable of making it void, provided it be not of such a Nature, as, when once

contracted, never to be rescinded; for no doubt a positive Law may, in certain Cases, forbid that what has been once agreed upon should be² retracted, altho' nothing yet be perform'd in it. But if part has been perform'd, and one Party done something of his Duty, then 'tis plain³ bare Dissent is not sufficient to take away the Obligation; which in this Case cannot be cancell'd, unless he who perform'd releases the other, or has amends made him some other Way^b.

IX. Moreover, an Obligation is released, or rather broke off, by the Perfidy of either Party; so that if one does not perform his Part, neither is the other oblig'd to make good his^c: For when a Man takes upon him any Duty, not absolutely and *gratis*, but upon the Prospect of the other's doing something on his side, the Obligation to make good his Undertaking is only conditional, as if he had said, *I'll do this, in case you will first do that*. Now whatever is founded upon a Condition, fails of Course, if the Condition does not appear¹. And therefore the superstitious Exactness of the *Indian*, if it be true, was more than he was oblig'd to; who, when another had taken away his Wife against all Right and Reason, would not however break off with him, because he had taken a solemn Oath, that he would never, upon any Account, do any harm^d. But this² holds only where the Non-performance lies on his side, who ought to perform first. How far, or whether the Fear, left, after I have done my part, the other should not perform his, frees me from the Obligation, has been discours'd of before^e.

But if one Party has performed in part, and the Contract happens to be broke off before Completion, how shall he have Right done him? In this Case we must distinguish according to the va-

³ Whereas the *Roman* Lawyers affirm, That there is here a difference between real Contracts, Contracts of bare Consent, Contracts by Writing, and verbal Contracts, or Stipulations, (see *Chap. 3. § 6.* above) there are none but the last, according to them, to which Acceptation can be applied, as appears by this § of the *Institutes*, *Quo genere, ut diximus, tantum esse solentur obligationes, quæ in verbis consistunt, non etiam ceteræ.*

⁴ See the Law of the *Digests*, quoted above, *Lib. 3. Chap. 6. § 2. Note 7.*

⁵ Several able Lawyers are of another Opinion, and that with Reason, as Mr. *HERTIUS* saith; for they draw Consequences from what hath been done, rather than what hath not, and they presume, that every wise Person will not do any thing but will have some Effect, and they can't see what he can propose to himself, who gives up an obligatory Note (supposing that there be good Proof that the Bill was fairly given up) but that every Man should believe that the Creditor would forgive the Debt, unless the contrary can be made fully to appear.

Mr. BARB. NOTES on § VIII.

¹ So the *Institutes* direct, *Ex obligationes, quæ consensu contrahuntur, contraria voluntate dissolvuntur. Nam si Titius & Seius inter se convenerint, ut fundum Tusculanum emptum Seius haberet centum aureis; deinde re nondum secuta, id est, neque pretio soluto neque fundo tradito, placuerit inter eos ut discederetur ab ea emptione & venditione, invicem liberantur. Instit. ubi supra, § 4.*

² In Case of Marriage, for Example.

³ As it is in a Bargain of Sale, the Buyer hath already paid for the Goods, and hath not receiv'd them, or the Seller hath delivered his Goods, but hath not taken the Money. *Sed non poterimus eadem ratione uti post pretium solutum emptione repetita, cum post pretium solutum infectam emptionem facere non possumus. Digest. Lib. 18. tit. 5. De rescindenda venditione, &c. Leg. 2. Ab emptione, venditione, locatione, conductione, cæterisque similibus obligationibus, qui integris omnibus consensu eorum, qui inter se obligati sunt, recedi posse, dubium non est. Aristoni hoc amplius videbatur, si ea, quæ me ex empto tibi præstare oportet, præstitissem, &c. consentiremus ne quid tu mihi eo nomine præstares, Lib. 2. tit. 14. De Pactis, Leg. 58.*

Mr. BARB. NOTES on § IX.

¹ ἄλλοι δὲ σπονδὰς εἶναι ἀποσφραγίστας, ἀλλ' οἱ ἀσφραγίστας ἐστίν. Not those that defend themselves, but those who are the Aggressors break the Truce. *Thucyd. Lib. 1. Chap. 123. Edit. Oxon.*

² So the Law is, *Nec adversario tuo transactione uti concedendum est; nisi ea, quæ placita sunt, adimplere paratus sit.* Cod. Lib. 2. tit. 3. *De pactis* Leg. 22. *Frustra sibi fidem quis postulat ab eo servari, cui fidem à se præstitam servare recusat.* Decretal. Lib. 6. tit. ult. *De regulis Juris*, Leg. 75. We know the common Maxim, *Frangenti fidem fides frangatur eadem.*

^a *Lib. 2. t. 14. L. 2. D. de Pactis.* ^b *V. l. 58. D. de Pactis, ubi supra.* ^c *V. Grat. L. 3. c. 19. f. 14.* ^d *Id*
Philosof. L. 3. c. 9. de vita Apollon. Tyanæi. ^e *B. 3. c. 6. f. 9.* *riety*

riety of Circumstances. For if I have perform'd what I ought, and the other refuses to perform his part, I have a Right to force him to it by any lawful Means: But if after having perform'd part, I begin to be tired, and neglect to make an end of it, I cannot oblige that other to make any Allowance for my partial imperfect Performance, 'till I finish the whole according to the Agreement; nor can that trite Saying be objected here, that *no one ought to grow rich at the Loss of another*, for no Regard is to be had to the Loss which a Man by his own Fault brings upon himself³. And if he whom it concerns to have my part of the Covenant fulfilled, is the Occasion why it is not, it is the same thing to me as if it was fulfilled. Nor if he should afterwards repent of his Breach of Faith, and be willing to compleat his Contract, shall I be obliged to comply with it. For one Violation entirely breaks off the Contract, and frees the other from his Obligation; thus, should I hire a Servant for a Year, and pay him his Wages beforehand, and, for no Fault of his, should turn him off before the End of the Year, I should not be able to oblige him to return me part of the Wages proportionable to the Remainder of the Time. Nay, if each Party has perform'd equally, yet even then, neither can break off the Bargain before the Time appointed: and if one should give back, the other would have a Right to force him to compleat it; or to make as much Amends, as it was his Interest to have the Compact exactly perform'd.

X. Obligations also expire, when the¹ Person, in whom they are founded, changes². Thus the Magistrate, having promised Protection to the Subject, is no longer oblig'd to it, than he continues in his Office: and the Subject having sworn Allegiance to the Magistrate, is freed from the Obligation, if either *he ceases to be a*

Subject, or the other to be a Magistrate. But such an Alteration in the Subject Matter as would have prevented the Obligation, had it existed at the making of it, will not be sufficient to dissolve it afterwards, provided the Party be not thereby render'd incapable of performing it³. For unless Provision had been made at first for such Accidents, the Right, which was irrevocably given, shall continue firm, altho' perhaps *the other* be a little burthen'd by it. For he enter'd into Contract freely and of his own accord, and may thank himself for not having foreseen those Inconveniences, that might probably have been prevented. Thus when⁴ a People have given up their Liberties to an Arbitrary Power, altho' afterwards they change their Minds, and shew a greater Inclination for another Form of Government, yet they cannot therefore shake off their Allegiance. And thus many, if they had known the Inconveniences of a married State, would never have embrac'd it; who yet having enter'd into the Bond, whatever happens,⁵ must endure it.

XI. Time puts a¹ Period to those Obligations which were limited to a Day; and if the Parties desire to have them continued, they must covenant again *de novo*, which needs not always be done expressly, but may sometimes be tacitly perform'd². But such an Obligation as is void after such a Time, and yet has no room to exert it self in before the Time expired, is absurd: As if I should make my self indebted to you 100*l.* for three Years, yet so as that you shall have no Right to demand it before the Time be lapsed; for vain is the Obligation that has no Effect before it expires, nor leaves any behind it after.

But it is another Thing, if I covenant, That unless you demand it within the Compass of three Years, it shall not be due: For that will be a Condition annex'd to the Obligation, which not ap-

³ The Words of the Digests are, *Qui operas suas locavit, totius temporis mercedem accipere debet, si per eum non stetit, quo minus operas præstat.* Digest. Lib. 19. tit. 2. *Locati, conducti*, Leg. 38. *princip.* See also Leg. 19. § 9, 10.

Mr. BARB. NOTES on § X.

¹ See the next Chapter § 20. at the end. Mr. HERTIUS quotes a Law here, in which it is said, That if one make a Promise to any one to give so much, either to thee or to another, and that other comes to be adopted, or banished, or carried into Slavery, or changes his Condition in any other Manner, the Engagement is null, as to him, because it contains a tacit Agreement or Condition, that he remain in the same State. *Cum quis tibi aut Titio dari stipulatus sit, magis esse ait, ut ita demum recte Titio solvi dicendum sit, si in eodem statu maneat, quo fuit cum stipulatio interponeretur. Caterum sive in adoptionem, sive in exilium ierit, vel aqua & igni ei interdictum, vel servus factus sit: non recte ei solvi dicendum, tacite enim inesse hæc conventio stipulationi videtur.* &c. Digest. Lib. 46. tit. 3. Leg. 38. But such a Change of State hath no Connexion with such a Promise, but by Reason of the Niceties of the Civil Law.

² So a Person in Commission, after his Commission is expired, is not obliged any longer to him, whose Affairs he before was engaged to manage. It is the same with a Tutor or Guardian, in respect to his Pupil's Affairs. See Digests, Lib. 14. tit. 3. *De inlittoria Actione*, Leg. 20. *Cod. Lib. 5. tit. 37. De Administratione Tutorum vel Curatorum*, &c. Leg. 26. and tit. 39. *Quando ex factis Tutoris, vel Curatoris Minores agere, vel conveniri possunt*, Leg. 1. Mr. HERTIUS quotes these Laws.

³ See what Mr. BAYLE says, in his Answer to the *Questions of a Provincial*, Tom. 1. Chap. 60. upon this Question, Whether *Gebhard Truchbes* may justly take Possession of the Archbishoprick of *Cologne*, seeing he has been married?

⁴ This can't happen in the Life of the first Prince, unless he has excessively abused his Power, and in that Case he from whom he keeps it hath a Right to put him out: but if after some Generations, the Alteration of the State, or the Genius of the Nation requires another Form of Government, why may not the People introduce it? The Publick Good, for whose Safety it is, or ought to be established, makes here a tacit Condition or Exception, which obliges us not to judge of the Engagement of a People in a Body, with Relation to the Establishment of a Sovereign Power, after the same Manner as we regulate the Engagements of private Persons one to another. We shall speak of the Grounds of my Assertion in another place.

⁵ See the famous Mr. BAYLE's Answer to the *Quest. of a Prov.* Tom. 2. p. 40.

Mr. BARB. NOTE on § XI.

¹ See Lib. 7. Chap. 6. § 15. following. This Author, in his Abridgment of the *Duties of a Man and Citizen*, Lib. 1. Chap. 16. § 7. adds this Restriction, *Provided, that during the Time agreed on, he was in a Condition of requiring the Performace of the Engagements of the other Party.*

² Vide L. 14. t. 2. l. 13. f. ult. D. *Locati*, &c.

pearing, the Obligation will cease, Thus 'tis usual for a *Surety* to bind himself for such a Term only, to oblige the *Creditor* to demand his Money be- times, and while the *Debtor* is able to pay, lest o- therwise he should remain bound for ever.

XII. By *Death* those Obligations expire, which were founded in the Person of the deceased; for the *Subjeſt* being gone, the *Accident* must necessa- rily follow, and the Performance be render'd ¹ im- possible in Nature. But yet in *Japan* the *Bonzy* persuade Men, That *those who give them Money here shall receive ten-fold in the other World*: And upon this Account give their *Creditors* a Note under their Hand, which they keep carefully, in order to be buried with them ². But generally the Obligati- on that lay upon the deceased is communicated and continued to the Survivors; and this, either when the Survivor takes it upon him, of his own accord to preserve the Reputation of the deceased, or for other Reasons; or when the Goods of the deceased, being made over to the Heir ³ the In- cumbrances also go along with them.

But if a Man dies, and leaves not enough to satisfy his Debt, the *Creditor's* Action seems to die with him; for what can any one do to a dead Carcase ³? Tho' among the *Egyptians*, the *Credi- tors* used to bury the Bodies of their *Debtors* in their Houses, which afterwards the Heirs of the deceased, if they were able, redeemed and interred honourably. Among whom too it was usual for the Children to pawn their Parents dead Bodies; but if they did not redeem them again, they were

treated with the greatest Ignominy, and after Death were denied Burial ^o.

XIII. By *Delegation* a Man substitutes his *Debtor* to his *Creditor* to make Payment for him ¹; or I make over to my *Creditor* the Debt another owes me: And here the *Creditor's* Consent is necessary, but not the Consent of the ² third *Debtor*, whom, in this Case, I can make over unknown to him, and against his Will: For 'tis the same thing to whom a Man pays, but not the same from whom he is to demand a Debt.

XIV. There is no need to say much of *Confu- sion*; for since the same Man cannot be his own *Cre- ditor* and *Debtor*. it follows, if a Man becomes Heir to his *Debtor*, his Action ceases, ¹ not finding an Object to exert it self upon.

XV. ¹ *Novation* seems to belong peculiarly to the positive ² Civil Law, and not to the Law of Nature and Nations; for old Obligations may be alter'd by Consent of Parties, as suppose that the Loss of a Thing, thro' the Delay of the *Debtor*, should not be imputed to him, that no Penalty or Usury be demanded for Delay, that Pledges be re- stored, Sureties releas'd, the *Creditor*, for the fu- ture, declaring himself willing to depend entirely upon the Credit of the *Debtor*; but those that deal according to the Simplicity of the Law of Na- ture, need not here suppose a new Obligation su- per-indue'd upon the former; for indeed nothing is here transacted, but only the *Creditor* gives up part of his Right, or several Pretensions are blend- ed into one: But that one Action should enjoy

Mr. BARB. NOTES on § XII.

¹ Vide *Val. Max. Lib. 2. Chap. 6. f. 10.* and *Pomp. Mel. Lib. 3: Chap. 2.* says of the Old Gauls; *The Management of their Concerns, and the Demand of their Debts were put off to the other World.*

² See *Lib. 3. Chap. 1. § 11.* and *Lib. 4. Chap. 10. § 13.* above.

³ To which the Law of *Solon* has Regard, which forbids the Dead to be used contumeliously. Vid. *Plut. Solon. p. 139.* Vid. *Lib. 47. tit. 10. Lib. 1. f. 4, 6.* and *Lib. 27. D. de injuriis, &c.*

Mr. BARB. NOTES on § XIII.

¹ *Delegare est vice sua alium reum dare creditori, vel cui jufferit.* Digest. 46. tit. 2. *De novationibus, & delegationibus,* Leg. 11.

² It is by the Roman Law, *Delegatio debiti, nisi consentiente, & stipulante promittente debitore, jure perfici non potest.* Cod. Lib. 8. tit. 42. *De Novat. & Delegat.* Leg. 1. But our Author puts another Sense upon the Term *Delegation*, than the Law- yers do; for he understands by it, the Translation or Resignation of a Debt, which in the Roman Law is looked upon as a kind of Sale, which a Man may make without the Consent of the Debtor. *Nominis autem venditio, & ignorante, & invito eo, ad- versus quem actiones mandantur, contrahi solet.* Cod. ibid. See also what Mr. HERTIUS says here, and Mr. WEBER, Pro- fessor also at *Giesſen*, in his Notes upon the *Abridgment, De Offic. Hom. & Civ.* printed in 1710. *Lib. 1. Chap. 16. § 9.*

Mr. BARB. NOTES on § XIV.

¹ So the Digests affirm, *Aditio Hereditatis nonnunquam jure confundit Obligationem, veluti si creditor debitoris vel contra debitor creditoris adierit Hereditatem.* Digest. Lib. 46. tit. 3. *De solution. & liberat.* Leg. 95. § 2. "Confusion happens "there, where Right and Obligation meet, and joining in the same Person vanish by that means." The Examples produced by Mr. HERTIUS to shew that the Notion of Confusion is of a more large Extent, concern only the Decisions of the Roman Law, about which we may consult Mr. TITIUS's *Jus privatum Romano-Germanicum, Lib. 5. Chap. 16. § 9.*

Mr. BARB. NOTES on § XV.

¹ The Roman Laws mean by it, an Act by which the Creditor and Debtor, without any new Cause change the Nature of a Debt, by adding some new Obligation to the old. *Novatio est prioris debiti in aliam obligationem, vel civilem, vel naturalem, transmissio atque translatio: hoc est, cum ex precedenti causa ita nova constituitur, ut prior perimatur. Novatio enim à novo nomen accepit, & à nova obligatione.* Digest. Lib. 46. tit. 2. *De novationibus, & delegationibus,* Leg. 1.

² Mr. TITIUS, *Objerv. 415. on Pufendorf,* maintains the contrary; for he says, That *Novation*, as every other lawful Act, is made by the mutual Consent of Parties, and in Consequence of that Liberty which all Men naturally have, to determine and change, as they see fit, their Engagements one to another. See what Mr. HERTIUS says about it.

³ Vide *Bern. Varen. de relig. Japan. p. m. 35.*

^o Vide *Diod. Sic. L. 1. c. 92, 93.* *Lucian. de luctu, p. 306, 307.*

one Privilege more than another, is entirely owing to some positive Law; for in the *Law of Nature* those Things that are equally due, may be equally demanded. But, as for what the ³ *Roman Law* delivers concerning such a *Novation* as is got by a Contest at Law (and which they call *necessary*, as they call the other *voluntary*) may be apply'd in some Respects to the *Law of Nature*;

for he that ⁴ casts his Adversary, has an Action against him for what the Court adjudges, let the Merit of his former Cause be what it will: So when any Controversy is decided by War, let that be as it will, after the War is at an end, not only the first Pretensions may be demanded, but also that which was determined by the Peace ⁵.

³ In the *Digests*, *Aliam causam esse novationis voluntariæ, aliam judicii accepti, multa exempla ostendunt. Digest. ubi supra, Leg. 29.*

⁴ *Judicati actio.* See *Cod. Lib. 7. tit. 54. De usuris rei judicatæ, Leg. 3.*

⁵ To these several Ways of entering into an Obligation, our Author might have added another, *viz.* When a Thing which was due in Specie, as our Lawyers speak, so that it can't be discharged by an Equivalent, is destroyed, without any Fault of the Debtor, or by any Delay in returning it. The *Roman Law* gives an Example of a Slave who dies before he is put into the Hands of him to whom he was promised, or to whom he was bequeathed, by a Person to whom he was Heir. *Si ex Legati causâ, aut ex stipulatu hominem certum tibi debeas, non aliter post mortem ejus tenearis tibi, quam si per te steterit, quominus vivo eum tibi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum. Digest. Lib. 45. tit. 1. De verborum obligationibus, Leg. 23. see also 72. § 1. and 83. § 7. and Cod. Lib. 4. tit. 2. Si certum petatur, Leg. 9. and the Jus privatum Romano-Germanicum, by Mr. TITIVS, Lib. 5. Chap. 16.*

CHAP. XII.

Of the Interpretation of Compacts and Laws:

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| <p>I. The Reason of the Order.</p> <p>II. The Necessity of a right Interpretation.</p> <p>III. The Words are ordinarily to be understood according to the common Usage. And</p> <p>IV. Words of Art according to the Art.</p> <p>V. Conjecture is sufficient, when Words are dubious.</p> <p>VI. Or seem to contradict one another.</p> <p>VII. Conjectures must be taken from the Matter treated on.</p> <p>VIII. From the Effect, or</p> <p>IX. From the Coherence, Original, and Place.</p> <p>X. How the Sense may be gathered from the Reason of them.</p> <p>XI. Some Words have both a large and strict Signification.</p> <p>XII. Some Things are favourable, others odious.</p> | <p>XIII. Rules are to be made from these Distinctions.</p> <p>XIV. An Example of Two who came to the Goal together.</p> <p>XV. How this Order is to be interpreted. No Man must wage War without the Command of another.</p> <p>XVI. Of these Words, Carthage shall be free.</p> <p>XVII. A Conjecture when a Law must be enlarged.</p> <p>XVIII. Of Tricks to evade a Law.</p> <p>XIX. A Conjecture when the Law ought to be restrained upon the Account of some Defect in the Will of the Lawgiver.</p> <p>XX. An Observation upon this Conjecture.</p> <p>XXI. Or upon the Account of some Accident inconsistent with his Will, as where it is either unlawful.</p> <p>XXII. Or too grievous in Respect of the Performance.</p> <p>XXIII. What if two Laws are contrary one to another.</p> |
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SO much for Pacts in general, and partly in particular; let us now proceed to the Interpretation of them, for since in all Obligations certain *Signs* are made use of to express the Minds of the Parties, and the Laws and Heads of the Contract; and since these *Signs* may sometimes be taken in different Senses, 'tis highly necessary to have some Rule to find out that which is true and genuine. Now altho' we design to treat hereafter of those Pacts which presuppose civil Government; and

most of what we have to say upon this Head has Relation to such an Establishment; yet since it would not be so convenient either to divide the Matter, or to reject the whole to the end of the Book, it will not, I hope, be thought so much against Method to treat of all together in this place, as *Grotius* ² has done before me, who has handled this Subject with the utmost Nicety.

II. If then we consider for what End *Obligations* are made, we shall find that every Man is

Mr. BARBEYRAC'S NOTES on Chap. XII. §. I.

¹ The Original is here obscure, the Word *Pleraque* seeming to refer to *Pactorum*, and so it ought to be rendred, *The most of these Pacts*; but then his Words are not true, for Laws are not properly Pacts, as our Author proves, *Lib. 1. Chap. 6. § 2.* and the contrary appears in this Chapter, for the Rules here laid down may be applied as well to Pacts as Laws.

² *Lib. 2. Chap. 16.*

bound to that which he intended, when he enter'd into the *Obligation*. It is here suppos'd that he enter'd into it freely, and of his own accord, and that the Matter is such as he lay under no Constraint to perform it otherwise: And therefore I don't see how a Man can possibly be obliged farther than he himself intended; in this Sense is that of Cicero¹ to be taken; *In Obligations regard is to be had not so much to the Expression as to the intent of the Party.*

Farther, such is the Nature of Man, that his internal Actions are not in themselves visible to another, and may differ from his external Signs and Actions: And yet we lie under a Necessity to distinguish clearly what every Man is obliged to, or what may lawfully be demanded of him; for there would be no such Thing as *Obligation*, if any one might free himself, by affixing what Sense he pleas'd to his *Signs*, and by pretending that he meant different from what others went away with. And therefore right Reason dictates that he, to whom the *Obligation* is made, should have a Right to compel him, from whom 'tis due, to the Performance of it, in that Sense which the right *Interpretation* of the *Signs* made use of importeth. For tho' the Man himself is chiefly concerned in what he meant; yet others must act by *Signs*; for else the Matter would be to no End or Purpose, which in Morality is absurd. Consonant to this was the old Form us'd in making Leagues, *Sine dolo malo, utique ea hic hodie rectissime intellecta sunt; Without any fraudulent Design, according² to the Sense which the Words at present bear.*

The true End and Design of *Interpretation* is, to

gather the Intent of the Man from most probable Signs. These Signs are of two sorts, *Words*, and other *Conjectures*, which may be considered separately, or both together³.

III. As for Words¹, the Rule is, *Unless there be reasonable Objections against it, they are to be understood in their proper and most known Signification; not so much according to Grammar, as to the general Use of them*².

When *Tiberius* had us'd a Word which was not *Latin*, *Capito* said, that, in Honour of the Emperor, it ought to pass current for the future, altho' no body before him had made use of it: But one *Marcellus* reply'd, *That Cesar might, if he pleas'd, naturalize Men, but Words he could not.* *Procopius*^b having said, *That the Emperor had rais'd an Army partly among his own Subjects, and partly among the Allies*, subjoin'd, *That formerly by the Name of Allies were meant only the Barbarians, who were not Slaves; for they were never conquered but had obtain'd the Privilege of Citizens, with Arms in their Hand, and were so called from the Alliances which they made. But now there is none but may have a Title to this Name: The Way of the World is not to keep Words strictly to that Sense which they did originally bear; for Men change at Pleasure the Things themselves, little regarding by what Names they were first called.* The *Locrians*^d arriving at the extreme Part of *Calabria*, found that Country possess'd by the *Sicilians*, who alarm'd with their unexpected Arrival, receiv'd them, and struck up a League in these Words, *That the Locrians should preserve an Amity with the Sicilians, and permit them to enjoy the Country in common with them, as long as they should tread upon that*

Mr. BARR. NOTES on § II.

¹ CICERO'S Words are, *Semper autem in fide, quid senseris, non quid dixeris, est cogitandum. De Offic. Lib. 1. Chap. 13.* But these Words are a part of a large Passage, which are neither found in the most antient Editions, nor the most part of the Manuscripts.

² This is well expressed, saith the Author after GROTIUS, in the Form of the Treaties of the antient Romans, *Ut illa palam prima postrema, ex illis tabulis ceræe recitata sunt, sine dolo malo, utique ea hic hodie rectissime intellecta sunt, illi Legibus Populus Romanus prior non deficiet.* Tit. Liv. Lib. 1. Chap. 24.

³ That is to say, So that the Conjectures be drawn hither from the Words alone, or something contained in them.

Mr. BARR. NOTES on § III.

¹ The Author supposes that such as interpret Compacts and Laws, should understand the general Rules of Criticism, which are absolutely necessary to discover the Sense of all Sorts of Words, whether delivered by word of mouth, or written. Such as these Maxims, for Example, 1. To understand a Man, who speaks not distinctly, or has an Impediment in his Speech, we must be accustomed to hear him. As also to decypher a Deed, we must learn to read the Writing of him that made it. Whereupon the Roman Law determines, that if a Man at the Point of Death says, *I make my Servant Cratinus (for Cratistus) free*, and he is his only Servant, he ought to have his freedom according to the Will of the Testator. *Qui habebat servum Cratistum, testamento ita cavuit: Servus meus Cratinus liber esto. Quæro an servus Cratistus ad libertatem pervenire possit, cum testator servum Cratinum non habebat, sed hunc servum Cratistum? Respondit, nihil obesse, quod in syllaba crasset.* Digest. Lib. 40. tit. 4. *De manumissis testamentis*, Leg. 54. princip. Mr. THOMASIVS, *Instit. Jurispr. Divin. Lib. 2. Chap. 12. § 22.* shew'd me this Example. He also observes in § 25. following, That the Emperor *Justinian*, *Col. Lib. 1. tit. 17. De veteri Jure civil. &c.* forbids with Reason, *Leg. 1. § 13. Leg. 2. § 22. Leg. 3. § 22.* to use short Writing in copying out Laws. And it were to be wish'd that none had transgress'd his Prohibition. 2. We ought to be well acquainted with the Language of him that speaks or writes. 3. We should know his Style, and the Style of the Time in which he wrote. 4. We ought to be acquainted with the Opinions and Customs to which he alludes. 5. We should endeavour to discover his Sentiments and Disposition, his Character, his Capacity, End and Intention. 6. We should see if the Deed be not forged, nor any thing put to it or taken from it fraudulently; if there be no Fault crept into the Writing, either thro' the Mistake of the Author, or Negligence or Ignorance of the Copier. For, to bring an Example of the last Case taken out of the Roman Law, "if the Clerk of a Notary hath filly copied out the Heads of a Contract, it shall not tend to the Prejudice of him upon whose Account it is made." *Si Librarius in transferendis Stipulationis verbis errasset, nihil nocere, quinimus & reus, & fidejussor teneatur.* Digest. Lib. 1. tit. 17. *De diversis Reg. Jur. Leg. 92.* 7. We must understand the Matter which is treated of. 8. Lastly, There are a great Number of other Circumstances which ought to be minded, and some of which are set down a little lower by our Author, but which may be better discovered by Use, and by reflecting upon particular Cases, and upon every Passage, than by general Rules. See the Writers upon the Art of Criticizing, but chiefly the excellent Work of Mr. LE CLERC, entituled, *Ars Critica*, where we may find a compleat System of that useful and necessary Art. Mr. THOMASIVS, and others which he mentions in the forementioned Chapter of his *Jurispr. Divin.* furnishes us with several Examples, which relate to Compacts and Laws.

² Inasmuch that an antient Roman maintains, *That Tiberius*, as potent an Emperor as he was, could not make one foreign Word become a Denizen of Rome. DIO CASSIUS, *Lib. 59.* See above, *Lib. 4. Chap. 1. § 6.* and THEMISTIUS ORAT. 23. *sive Sophista*, p. 287. Edit. HARDUIN, upon the Word *Sophista*, as also PROCOPIUS Hist. *Vandal.* upon the Word *Allies*.

^a *Usus, quem pene arbitrium est & jus & norma loquendi.* Hor. Use is the true Standard of Speaking, Words are like Money, none will pass but what has the publick Stamp upon it. Quint. *Instit. Orat. l. 1. c. 6.* ^b *H. 9. Vandal. l. 1.* ^c *The Signification of the Word Sophister, in process of Time, changed like Money,* Themist. *Orat. 23.* ^d *Polyb. l. 12. c. 4.*

Earth, and wear these Heads upon their Shoulders. These Terms being agreed upon, the *Locrians* came to take the Oath, having first put *Earth* in their Shoes, and fastened the Heads of Garlick upon their Shoulders, so as not to be seen. But when they had taken the Oath, they threw the *Earth* out of their Shoes, and the Heads of the Garlick from their Shoulders, and watching their Opportunity, fell upon the *Sicilians*, and drove them out of the Country. The *Bœotians* ^a made a League with the *Spartans*, and one of the Articles was, That they should deliver up *Panaetum*; which they did indeed deliver up, but first demolish'd it.

Leucippus ^b having borrowed of the *Tarentines* the Use of a Place for a Day and a Night, and not being willing to restore it, when they demanded it by Day, he put them off to the next Night; and when by Night, to the next Day.

When *Alibomet* took *Eubœa*, he told a certain Person that *his Head should be safe*, but immediately cut him in two in the middle.

A petit Prince of the *Indies* fled to the King of *Persia* for Protection, and when his Sovereign demanded him by his Ambassador, the *Persian*, during the Audience, order'd him to be put in a Basket, and hung upon a Tree, and then deny'd that he was upon his Land ^c. Thus a certain Person deny'd positively that he had laid Hands on a Priest, for he had only cudgell'd and kick'd him. Thus *Tamerlan* having artick'd with the Garison of *Sebastia* that *no Blood should be shed*, nevertheless order'd all the Prisoners to be buried alive. But these Quibbles, as they are too gross and frivolous, so, as *Cicero* observes, instead of taking it off, they rather bind the Perjury upon the Conscience ^d.

IV. As for *Terms of Art*, which are ¹ above the Reach of the common People, the Rule is, That they be taken according to the Definition ² of the Learned in each Art. The *Logicians*, says *Cicero*, use not the same Words as other Men; they have Terms of their own, as indeed all other Arts have; *v. g.* the Word *Army*; suppose it had been stipulated between two Crowns, that one should not pass thro' the other's Territories with an *Army*, what Number of Soldiers would come under that Denomination? *Grotius* ^e defines an *Army* to be such a Number as dares invade a foreign Country, or face an Enemy in the Field; for we find in all Histories the open Actions of an *Army* oppos'd to what is done by Stealth in the Manner of Robbers; yet it cannot be so universally defined, how great a Multitude constitutes an *Army*, as to hold good

at all Times, and in all Places: For both the Enemy's Strength, and our own, must be considered. If we have to do with a poor State, a small Force may be esteem'd an *Army*, which yet against some flourishing Kingdoms would be deem'd little better than a handful of Foragers. And therefore when *Vegetius* ^f describes an *Army* ^g to consist of Legions and Auxiliaries, and a competent Number of Horse to carry on a War, he does not describe an *Army* in general, but as it was then amongst the *Romans*; for an *Army* may be compos'd of only natural born Subjects, or of Allies and Foreigners only; or it may consist of only Foot, or only Horse. *Cicero* ^h tells us, that *Craffus* deny'd any Man to be rich, who was not able to maintain an *Army* at his own Charge, which he ⁱ defines to consist of six Legions, and a great Number of Auxiliaries. *Polybius* ^j says, the *Roman Army* generally contain'd 16000 *Romans*, and 2000 Auxiliaries; tho' sometimes it did not amount to that Number. In the *Digests* ^k, he who has one Legion under his Command, is said to be General of an *Army*. Besides, another Question might be moved upon this Word; as, Whether the afore said Article be violated, if one marches a great Number of Soldiers thro' the other's Territories, not in a Body, but in separate Parties? Now since a Man may be said to have an *Army*, either if he has all his Forces united together in one place, or has them so dispersed as to be able to draw them together upon short Warning, it ought to be farther considered, for what End this Article was made; for if it was only for our own Security, 'tis plain the Article is not violated by the *Army's* marching in small Bodies; but if it was for the Security of a Neighbour, such a Passage as this breaks the Article. And the same may be applied to a *Fleet*, if in any Treaty it be provided, that no *Fleet* shall be suffer'd to pass in such a part of the Sea; for here not only the Number of Ships, but their Bigness and the maritime Strength of the People concern'd is to be consider'd ^l. And so in respect of a *Fort* prohibited to be rais'd within such a Distance; the Word may signify either a high and regular Fortification, or any fortified Place whatsoever, altho' consisting of low pitiful Buildings. And therefore, if the Design of the Article be to prevent any fortified Place from giving Umbrage to our Territories, 'tis plain that it is against the Treaty to throw up so much as a little Bulwark of Earth, with small Huts to lodge Soldiers in ^m.

But if ⁿ *Terms of Art* happen to be differently

MR. BARRÉ'S NOTES on § IV.

¹ This is what *CICERO* observes about *Logick*, in the Passage quoted by our Author after *GROTIUS*. *Qualitates igitur appellati, quas vocantur Græc. vocant: quod ipsum apud Græcos non est vulgi verbum, sed Philosophorum, atque id in multis. Dialecticorum verò verba nulla sunt publica: suis utantur: & id quidem commune omnium serè est Artium, Academic. Quest. Lib. 1. Chap. 7.*

² Unless he that speaks understands neither any Art, nor the Terms of it; for then we must judge by the Connexion of a Discourse, or some other Circumstances, what Sense he had in his Mind.

³ His Words are, *Exercitus dicitur tam Legionum, quam etiam auxiliorum, nec non etiam Equitum, ad gerendum bellum multitudo collecta. De re militari. Lib. 3. Chap. 1. Edit. Plantin. Scriver.*

⁴ This Reflection, as *Mr. TILLOTSON* observes, *Observat. 419.* is nothing to the Purpose, for he treats not of the Manner how one may express himself clearly to make his Mind known, but only gives some Rules to discover another's, when 'tis darkly expressed.

^a *Thucyd. l. 5. c. 42. Edit. Oxon.* ^b *Strabo, l. 6. p. 183. Edit. Genev.* ^c *Olearius, Itin. Pers. l. 4. c. 30.* ^d *Off. 3.*

^e *32. Fraus enim adstringit, non dissolvit perjurium.* ^f *Ubi supra.* ^g *De re militari, l. 3. c. 1.* ^h *Paradox. 6.* ⁱ *To the same place.* ^j *L. 6.* ^k *Lib. 3. t. 2. l. 2. f. 1. D. de his qui not. infam. &c.* ^l *To this belongs that of Florus, l. 1. c. 11. n. 10. Edit. Grav.* The Spoils of *Antium* are in being, which *Mænius* fix'd in the *Forum*, having taken the Enemy's *Fleet*, if it may be call'd a *Fleet*. For there were six Ships with Stems, and that Number then was enough to enter into an Engagement with. *Add. Alber. Gent. de jure belli, l. 3. c. 20.* ^m *Add. Alber. Gent. d. l. c. 21.*

defined by different Persons, to avoid Quarrels, it will be convenient to express in common Words in what Signification the Word under Debate shall be taken.

V. When a *single Word* or *Sentence* is capable of several Significations, Conjectures are necessary to find out the true. Both of these Cases the *Rhetoricians* call *ambiguous*. But the *Logicians* are more nice, who, if the Variety of Significations lies in a Word, call it *equivocal*, if in a Sentence, *ambiguous*. An Example of the former we meet with in *Tertullian* ^a, who tells us that the Word *Roman* in *1 Cor. xi. 5*, &c. ought to be extended to *Virgins* also. Altho' sometimes it is oppos'd to *Virgin*, as in *Cicero* ^b, *To Morrow she will be a Woman*. ^c *Cicero* gives this Example of the latter: A certain Man had bequeath'd a Legacy in these Words; *Heres meus uxorum argenteorum pondo centum novem, &c. quæ volent, dato*. Let my Heir give his Mother in Law 100 Weight of Plate at Pleasure. Upon this the Lady demanded the finest and best wrought Plate: But the Heir interpos'd that the Choice was left to his Pleasure. The Ambiguity had been avoided by the Addition of the Word *His* or *Her*. The Roman Law in such a Case ^d gives the Legatee the *Option*, and indeed there is Reason for it. For had the *Option* been design'd to be left at the Discretion of the Heir, there had been no need of the Clause at Pleasure. For if a Thing is enjoin'd me at large ^e, and I have several Ways of satisfying the Obligation, 'tis left to my self to choose which way to do it. But when a Clause is added concerning the Choice, 'tis designed in Favour of the Party which is to receive, that the other may not obtrude some pitiful, worthless Thing upon him ^f.

As for the famous Decision of the Duke of *Osuna*, Viceroy of *Naples*, who decreed the whole Inheritance to the Son against the Priests, who were left Heirs, with a Clause, *To give the Son what they would* strictness of Justice does not plead in Behalf of it, so much as the odious Covetousness

of that sort of People; which are always hankering after other Mens Estates.

Another Instance we have in the Answer *Charles V.* gave the *French Ambassador*, when he demanded the Dukedom of *Milan*; *That which pleases my Brother the French King, pleases me also*. Which the Ambassador in great haste gave his Master Advice of, as if he had gain'd his Point ^d.

VI. Besides, when we meet with a seeming Repugnancy in the Terms, Conjectures are necessary to work out the genuine Sense, by reconciling, if possible, those Terms that seem to be repugnant. But if there be a clear evident Repugnancy ^e, the latter Contract vacates the former: For no Man can will Contradictions, and it is the Nature of Acts, which depend upon the free Will of the Agent, or over which no Man has acquir'd a Right, to be disclaim'd by a contrary Motion of the Will. And this Change of the Will, in order to annul an Act, is sometimes required on one side only, as in making Laws, Wills, and Testaments, &c. and sometimes on both sides, as in Contracts, which, unless the Law interposes, can't be dissolv'd without the Consent of both Parties ^f. From hence, by the way, it appears how *Lycortas* might have excus'd his Neglect, in not mentioning, when he went to renew the League between the *Achæans* and the King of *Egypt*, which, of the many Leagues that were between them, he would have renew'd: for he might have said, that those which were never broken needed not to be renewed, and in the renewing of those which had been broken, he ought to be presum'd to mean the last ^f.

For an Instance of two Laws, that seem to thwart one another ^g, *One* enacts, *That a Statue be erected in the Gymnasium in Honour of the Person that kills the Tyrant*: *Another* says, *That no Woman's Statue shall be plac'd in the Gymnasium*: *Now a Woman kills the Tyrant*. In this Case I should judge in Favour of the Woman. For the Reason of the first Law was,

MR. BARB. NOTES on § V.

^a *CICERO'S* Words are, *Paterfamilias, cum Filium hæredem faceret, uxorum argenteorum centum pondo Uxori suæ sic legavit: Hæres meus uxori meæ uxorum argenteorum pondo centum, quæ volent, dato. Post mortem ejus causa vacans. Et pretiosè clarata petit à Filio Mater. Ille se, quæ ipse vellet, debere dicit. Cic. de inventione, Lib. 2. Chap. 40. See ad Herennium, Lib. 1. Chap. 12. and *Quintil.* Lib. 7. Cap. 9.*

^b The Words of the Law are, *Quotiens servi electio vel optio datur, Legatarius optabit, quem vellet. Sed & homine generaliter legato, arbitrium eligendi, quem acciperet, ad Legatarium pertinet. Digest. Lib. 33. tit. 5. De optione vel electione legata. Leg. 2. prim. § 1.*

^c 'Tis a Maxim of the Roman Law, *Cum illa aut illa res promittitur, rei Electio est, utram præset.* Digest. Lib. 23. tit. 3. *De jure dotium, Leg. 10. § 6.* See also *Leg. 18. tit. 1. De contrahenda emptione, Leg. 25. princ. and Lib. 17. tit. 1. De action. Empti & Venditi, Leg. 21. § 6.* Indeed it belongs to him only who lays the Obligation, to explain himself clearly and without Equivocation or Reserve, as to what he requires of another. *Quidquid adstringendæ obligacionis est, id nisi potest verbis exprimitur, omisso intelligendum est. Ac fere secundum promissorem interpretatur: quia stipulatore locum fuit verbis tantè concipere.* Digest. Lib. 45. tit. 1. *De verborum obligationum, Leg. 99.* And we may lay this down as a general Rule. That when there is in a Deed any Obscurity or Doubtfulness, which can't be cleared by the Intention of the Contractors, or any other Circumstance, the Interpretation ought to be against him, who ought to have explained himself, or made the other have delivered himself fully. Inasmuch that he who is obliged, might and ought to speak clearly, the other hath a Right to explain the Clause for his own Advantage. *Nec rursus promissor ferendus est, si ejus intererit, de certis potius casus forte, aut benevols actum.* Digest. *ibid.* So that all Obscurities and Ambiguities in a Bargain of Sale, or Living, must be interpreted against the Seller or Landlord. *Veteribus placet, passionem obscuram, vel ambiguam venditori, & qui locavit nocere: in quorum fuit potestas. Legem oportius considerari.* Digest. Lib. 2. tit. 14. *De pactis, Leg. 39.* See also *Lib. 18. tit. 1. Leg. 21, 33. Lib. 50. tit. 17. De diversis regulis Juris, Leg. 172.*

MR. BARB. NOTES on § VI.

^a *Ubi duæ contrariæ leges sunt, semper antiquæ obrogat Nova. Tit. Liv. Lib. 9. Chap. 34.* Where two Laws thwart one another the new one abrogates the old. *At πρῶτον πρὸς ἀρχαίας ἐκείνην ἢ πρὸς ἀρχαίῳ νόμῳ.* Digest. Lib. 1. tit. 4. *De constitutionibus Principum, Leg. 4.* See also the Canon Law in the *Decretals, Lib. 1. tit. 3. De Rescriptis, Chap. 3.* and a Passage in *Plutarch*, which will be quoted Note 6. on § 9.

^b See the foregoing Chapter, § 8.

^c *Tyrannicidæ imago in gymnasio ponatur: contra Mulieris imago in gymnasio ne ponatur. Mulier Tyrannum occidit. Quint. Inllit. Orat. Lib. 7. Chap. 7.*

^d *De velandis Virginibus, c. 4.* ^e *Apud Quintil. Inllit. Orat. l. 6. c. 3.*

^f *Ad. Auth. ad Horn. l. 1. c. 12. Quint.*

^g *File Polyb. excerpt. leg. 41.*

that

that the Youth which is train'd up to Valour in the *Gymnasium*, should by such sort of Honour be stir'd up to imitate brave Actions: The Reason of the latter is, because the Virtues proper to Women are not generally the Object of Mens Imitation. But, in this Case, since a Woman has outdone her Sex, she deserves the rather to have her Statue put up in the *Gymnasium*; for such Bravery in a Woman would be a greater Incitement to Emulation in the Men. There is another Example in ⁴ *Cicero de Invent. Lib. ii. Cap. 49.* One Law says, *Whosoever kills the Tyrant let him be rewarded as a Conqueror at the Olympick Games, and let him demand what he pleases of the Magistrate, and let the Magistrate grant his Request.* Another Law runs thus: *Upon the Death of the Tyrant, let his five nearest Relations be put to Death.* Alexander, who had exercised Tyranny over the Phereans in Thessaly, being kil'd by his Wife Thebe, She, for her Reward, demands her Son, whom she had by the Tyrant. Some were of Opinion, that by the Law the Son ought to be put to Death ⁵.

But sometimes the same Law seems to clash with itself; ⁶ as for Instance, the Law says, *That a Woman, who has been debauch'd, may choose either to marry the Man who has injur'd her, or to have him put to Death.* Here is a Man that has debauch'd Two, whereof one chooses his Death, the other demands him in Marriage: In this Case, the Reason of the Law will decide the Business: For here the Law, by permitting the Woman to choose the Death of the Man, did not suppose that many would desire it; but the Good of the poor Woman was herein consulted, lest she should for ever continue without a Husband; for the Man, after the Heat of his Love was over, might cast her off, as not likely to deny others those Favours which she had so unlawfully granted him: nor would it be easy to find one who would willingly marry her that had been deflowered by another. And therefore she that demanded the Man in Marriage ought to be preferr'd: For this answers best the Design of the Law, which had the Convenience of the

Woman, rather than the Death of the Man in its Eye; and after this rate, one of them, at least, will be provided with a Husband, whereas otherwise both will be forced to remain single. Besides, when there is as much to be said on the one Side as on the other, the more favourable Sentence ought to prevail.

But sometime the Words clash in some particular Case, as in this Instance; there is a Law, ⁷ *That a Man, who has behaved himself honourably in the War, shall have whatever he demands; here are Two such, who both demand the same Virgin; since both cannot be satisfied, which must be preferr'd?* I answer, He that made the Demand first. But if both demanded together, they must draw Lots; for tho' the Law gives an unlimited Liberty of demanding, yet it must be supposed to be restrain'd to those Things which can conveniently be granted. Another Example is propos'd by ⁸ *Philstratus* in the Life of *Secundus.* He that raises a Sedition, is to be hang'd; he that quells it, to be rewarded: The same Man both raises a Sedition, and quells it, and demands his Reward. In which Case *Secundus* with good Reason argues thus, *Provided you first suffer Punishment for raising the Sedition, you shall then, if you please, receive the Reward for quelling it.* In such Cases as these, where Words are ⁹ evidently obscure, we are forc'd to have recourse to *Conjectures.*

These *Conjectures* are sometimes built upon such good Grounds, as that the genuine Sense forces itself upon us, even against the receiv'd common Signification of the Word. To this purpose is that Distinction of the *Rhetoricians* between the *Letter* and the *Design.* As for Instance, ¹⁰ *The Law makes it capital for any Foreigner to presume to mount the Walls: 11 But in a Siege a Foreigner mounted the Wall, and beat down the Enemy that was ready to scale it.* Now the *Letter* is against the Foreigner, the *Design* for him; according to which no doubt Judgment ought to be given; for the *Design* of the Law was to prevent any Foreign-

⁴ TULLY'S Words are, *Ex contrariis autem Legibus controversia nascitur, cum inter se duæ videntur Leges, aut plures discrepare, hoc modo: Lex est, Qui Tyrannum occiderit, Olympicarum præmium capito, & quam volet sibi rem à Magistratu deposcito, & Magistratus ei concedit. Et altera Lex, Tyranno occiso, quinque ejus proximos cognatione Magistratus necato. Alexandrum, qui apud Phereas in Thessalia tyrannidem occuparat, Uxor sua, cui Thebe nomen fuit, noctu, cum simul cubaret, occidit. Hæc filium suum, quem ex Tyranno habebat, ubi præmii loco deposcit. Sunt qui ex Lege Puerum occidi dicant oportere. Res in judicio est. De Invent. Lib. 2. Cap. 49.*

⁵ They had done wrong, for besides that the first Law was manifestly barbarous and unjust, the End was, without doubt, to destroy all that had any Relation to the Tyrant, as Men to be feared, or whom he might have for his Associates; for there is all the appearance imaginable, that the Mother who had so much Courage and Zeal for the Publick Good, as to stain her Hands with the Blood of her Husband, would have had no regard to her Son's Life, if she thought him to be of the same Temper as his Father.

⁶ This is the Subject of SENECA'S Fifth Controversy: *Lex: Rapta raptoris, aut mortem, aut indotatas nuptias optet. Una nocte quidam duas rapuit: altera mortem optat, altera nuptias.* Most of the Declainers, whose Fragments SENECA relates, would condemn the Ravisher to Death.

⁷ I do not know from whence this Example is taken; the Law indeed is found in SENECA, *Controvers. 31.* and in the *Excerpt. Controversj. Lib. 10. Declam. 2.* As also in AULUS GELLIUS, *Noct. Attic. Lib. 9. Chap. 16.* but the rest of the Case is altogether different.

⁸ PHILOSTRATUS'S Words are, *Ὁ ἀρξίας γάλας, ἀποθνήσκω, ἢ ὁ πάσαις γάλας, ἢ ἰχθυὸν δωρεάν. ὁ αὐτὸς ἢ ἀρξίας ἢ πάσαις, δειπῶ τὸν δωρεάν. πῶν δὲ ὑπόθω, ἡδὲ ἰσραχολόγησον. ἀκύν, ἔρη, πὶ ἀρξίπρον; τὸ κινῆσαι γάλας. πὶ δειπῶν; τὸ πάσαις. ὅτις τὸν ἢ ὅτι ἡσίαι; πμωρίαι, τὸν ἰφ' αἰς τὸ πτωτικῶς δωρεάν, εἰ δύναιται, λάβε. Philostrat. de Vitis Sophistarum, in Secundo, Lib. 1. Cap. 26. Ed. Olear. 1709.*

⁹ In the Examples of apparent Contradictions brought by our Author, the Terms are not obscure; but, on the contrary, very clear. But the Intricacy proceeds from this, That they conclude not in themselves the Exceptions which the Lawgiver would have made to the Law, if he had foreseen certain Cases which are drawn from some other Thing, than the Words taken literally, and in their full extent.

¹⁰ *Περί ἡρώ, ἢ θανάτου;* which the *Latins* render, *Ex Scripto & sententia scripti:* or, as QUINTILIAN, *Lib. 7. Cap. 6.* and the Author of the *Rhetorick*, dedicated to *Herennius*, *Lib. 1. Chap. 11. Ex Scripto & voluntate statum.*

¹¹ QUINTILIAN'S Words are, *Peregrinus, si murum ascendit, capite puniatur. Cum hostes murum ascendissent, peregrinus eos depulit. Petitur ad supplicium. Quintil. Lib. 7. Cap. 6.*

ner from mounting the Walls as a Spy; which Reason in the present Case ceases ^a.

But we must take notice that sometimes a *Repugnancy* is suppos'd, when indeed there is none, viz. when Words are taken in a larger Signification than the Speaker design'd them. A notable Instance of this we meet with in *Josephus* ^b; where King *Zedechias* would believe neither *Jeremiah* nor *Ezekiel*, because he thought they contradicted one another: for the *one* asserted that he should be carried away into *Babylon*; the *other*, " that he should never see *Babylon* with his Eyes. The two Prophets were very consistent with each other; for he was carried away to *Babylon*, but his Eyes were first put out.

VII. *Grotius* has assign'd three *common places*, from whence we may trace out the Design, where the Words are obscure or ambiguous, viz. The *Subject matter*, the *Effects*, and the *Circumstances*.

As for the *former* ¹ 'tis in the Mouth of every *Civilian*, That *Words ought to be understood according to the Subject matter of them* ^c; as ² if a Man promises to defend you in the Possession of the Goods you buy of him, his promise is not suppos'd to extend to any extrajudicial Violence ^d. I fancy this Rule may be applied to the Vow of *Jephtha* in *Judges XI. 31.* and to that of *Agamemnon* in *Cicero* ^e who having vow'd to offer up to *Diana* the most beautiful Creature that should be born that Year, sacrific'd *Iphigenia*, who indeed was the most beautiful which that Year produc'd: But he who talks of sacrificing is presum'd to mean a *Subject* fit to be made a Sacrifice of ^f.

So if a Truce be made for Thirty Days, it must be understood of *natural* Days consisting of Twenty four Hours: not of *artificial*, or the space of the Sun above the Horizon. And therefore it was a frivolous Quibble of *Cleomenes*, who had made a Truce with the *Argives* for so many Days, but the third Night finding them sleeping and unprovided by reason of the Truce, set upon them, and slew some, and took others; and when he was upbraided for his Perjury, denied that the Nights were comprehended in the Treaty ^g. In vain also did *Mycerinus* King of *Egypt* endeavour to convict the Oracle of Falshood; for the Oracle foretold

that he should live no more than six Years: but he order'd Candles to be lighted up, and revell'd by Night as well as Day, as if by thus using the Night as Day he could make Twelve Years out of Six ^h.

Thus the Word *Arms* denotes sometimes the Weapons of War, sometimes the Warriors themselves, according as the *Subject matter* of the Discourse directs. For if it be an Article, that neither Party shall use *Arms* against a Third, 'tis plain Soldiers or an Army is meant by it: but if upon the Surrendry of a Garrison it be stipulated that they deliver up their *Arms*, not the Soldiers, but the Weapons are suppos'd by it ⁱ.

The *Platæenses* having promis'd to restore the *Theban* Captives, ought to have restor'd them alive, not dead ^k. For the Treaty was concerning ^l living Men, and not the Carcasses of them.

It was a wretched Fetch of *Labeo's*, who having by the League a Title to half of *Antiochus's* Fleet, cut every Ship in two, and so depriv'd the King of his whole Navy ¹. Thus the *m Campanians* struck up a League with their Enemies, and one Article was, that they should have half their Arms restor'd them; but they cut each Weapon in two, and so deliver'd them half.

Xiphilinus ⁿ tells us of two Soldiers, who having got a Hoghead of Wine amongst their Plunder, and being commanded to divide it, cut it in Two with their Swords. *Rhadamistus* swore to *Mitbridates*, that he would not either by Sword or Poison do him any Harm; but presently after he smother'd him in his Bed ^o.

VIII. *Secondly*, The *Effects* and the Consequence do very often point out the genuine meaning of the Words. For where Words, if they be taken literally, are like to bear none, or at least, a very absurd Signification; to avoid such an Inconvenience ¹ we must a little deviate from the receiv'd Sense of them ^p. And therefore it was absurd in the *Athenians* ^q, having promis'd to relinquish the Territories of the *Bœotians* to deny the Ground that they had encamp'd upon to be the *Bœotians*. With the same Cavil did *Alexander* elude the Conditions that *Darius* propos'd to him. *Darius* had offer'd him all the Land that

¹² See *Jeremiah xxxviii. 17.* &c. and *Ezekiel xii. 13.*

Mr. BARB. NOTES on § VII.

¹ The Words of the *Digests* are, *Quotiens in Stipulationibus ambigua Oratio est, commodissimum est, id accipi, quo res, qua se agitur, in tuto sit.* *Digest. Lib. 45. tit. 1. De verborum obligationibus, Leg. 80.* See also *Lib. 50. tit. 17. De diversis Reg. Jur. Leg. 67.*

² So the Code assures us, *Expulsos vos de fundo per violentiam à Nerone, quem habere jus in eo negatis, profitentes, nullam vobis adversus eum, ex cuius conditione fundum possidetis, actionem competere probatis,* *Cod. Lib. 4. tit. 49. De actionibus empti & venditi. Leg. 17.* See other Examples, *Lib. 19. tit. 2. Locati, conducti, Leg. 15. § 4. and Lib. 39. tit. 2. De damno infecto, &c. Leg. 49.*

³ So *Ovid* speaks in the Passage quoted by our Author, but not mentioned from whom; *Hæstor erat tunc cum bello certaret, at idem Tractus ab Æmonio non erat Hæstor equo, Ovid. de Trist. Lib. 3. El. 11. v. 27, 28. Sic Pericles cum quibusdam hostibus ita pactus legitur, ut ipsi ferrum deponerent; postea eisdem pacti violati insinulavit, argutatus eos non deposuisse fibulas terreas quas in laciniis vestimentorum gerebant. Lex est, qui nocte cum ferro deprehensus fuerit, alligetur: cum annulo ferreo inventum magistratus alligavit, Quint. Inst. Orat. Lib. 7. Cap. 6.*

Mr. BARB. NOTES on § VIII.

¹ Thus the Roman Lawyers say, *In ambigua voce Legis ea potius accipienda est significatio, quæ vitio caret: præsertim cum etiam voluntas Legis ex hoc colligi possit.* *Digest. Lib. 1. tit. 3. De Legibus, & Senatufconsultis, &c. Leg. 19.* *Cicero* says again very well, *Nullam esse Legem, quæ aliquam rem inutilem, aut iniquam fieri velit,* *De Invent. Lib. 2. Cap. 47.*

^a *Add. l. 39. t. 4. l. 15. D. de Publicanis, &c.*

^b *Archæol. Jud. l. 10. c. 10.*

^c *Vid. lib. 45. t. 1. l. 10. D.*

^d *L. 19. t. 2. l. 15. f. 4. D. locati, & l. 39. t. 2. l. 43. D. damni infecti, &c. L. 4. t. 49. c. l. 17. de act. empt. & vend.*

^e *Off. 3. c. 25.*

^f *Add. Everhard. loc. legal. 40. which is about the Subject-matter.*

^g *Plut. Apopht. Læon. p. 223.*

Such another Trick the *Thracians* used against the *Bœotians*, *Strab. l. 9. p. 277.*

^h *Herodotus, Euterpe.*

ⁱ *Id.*

^k *Thucyd. l. 2. init.*

^l *Val. Max. l. 7. c. 3. tho' Livy, l. 38. c. 38. says nothing of the cutting of the Ships.*

^m *Polyæn. l. 6. c. 15.*

ⁿ *Epist. Dion. in Caracalla, ad ann. 217.*

^o *Tac. Ann.*

^p There is an Example of this in the League whereby *Lewis XII. of France*, took the City *Bologna*, and its petty Prince *Bentivoglio*, into his Protection; which he afterwards cavilled at, in a manner very unbecoming a King. *Guiccard. Hist. l. 5. p. m. 134. & p. m. 146.*

^q *Thucyd. l. 4. c. 98.*

lay between the *Euphrates* and the *Hellespont*; to which *Alexander* reply'd, *He offers very liberally all on that side the Euphrates, where is it then that he speaks to me? I am already beyond the Euphrates; and therefore the whole of the Dowry he offers is less than what I am already Master of: drive me hence, that I may be assur'd that what you offer is your own* ^a. As if it was the same thing to possess a Place by Force of Arms, and to possess it peaceably, and with the Concession of the former Master.

Lewis XII. agreed with the *Pope's* Legat, that the Bishopricks void by the Death of the Bishops in *France* should be at the King's Disposal. But a *French* Bishop happening to die at *Rome*, the *Pope* immediately nominated a Successor, and the King as soon another; which occasioned great Differences. In this Case, were I Judge, I should not scruple to pronounce in favour of the King; for to render an Office vacant, 'tis no matter in what Place the Incumbent dies: and if such a Cavil had been admitted, the King's Right might have been invaded several ways ^b.

At *Bologna* it was enacted, that *Whoever drew Blood in the Streets should be severely punished* ^c. Upon which Law a Barber was indicted for opening a Vein in the Street, and it had like to have gone hard with him, because it was added in the Statute, that the *Words should be taken precisely, without any Interpretation*. ² In *Quintilian* we have this Case, *A poor Man and a rich Man were Friends: The rich Man in his Will made another Friend his Heir, but bequeath'd to the poor Man as much as he in his Will had bequeath'd to him. The poor Man's Will is produc'd;*

by which it appears, that he had made the rich Man Heir of all; and therefore he demands the whole Inheritance. He that was the written Heir was for giving only so much as the poor Man was worth ^d. And indeed, this is to be said for the written Heir, that if he did not obtain the Cause, his being made Heir would have had no Effect. Which was the chief Reason why the *Falcidian* ³ Law, and ⁴ *Pegasian* Decree assign'd the Heir a ⁵ *Dodrans* over and above; for so the Heir and Legatee were both provided for. As for the Interpretation of the Laws of the Land, that of *Cicero* ⁶ must every where take place: *All Laws, says he, ought to be referr'd to the Benefit of the Commonwealth, and ought to be interpreted according to the publick Advantage, not according to the Letter; for no one would have the Laws regarded for the sake of the Laws themselves, but for the sake of the Commonwealth.*

IX. Besides, *Thirdly*, it gives great Light to the Interpretation of obscure Passages to compare them with others that have some Affinity with them; as to consider what the same Author says ¹ in another Place, where he handles the same Matter; or to ² compare them with what goes before and follows in the Context. For in a doubtful Point the Author must be suppos'd to be consonant to himself: And therefore, if ³ in one Place he has express'd his Mind clearly, we ought to presume, that he is still of the same Mind in another Place, unless it expressly appears that he has chang'd it. Thus if two Men should bargain for Wheat, without mentioning the Quantity, it would be ⁴ an imperfect Bargain: But

² *QUINTILIAN'S* Words are, *Pauper, & dives, amici erant. Dives testamento aliam amicam omnium bonorum instituit heredem: pauperi iussit dari id quod ille sibi testamento daret. Aperta sunt tabule pauperis: omnium bonorum instituerat heredem. Petit totam divitis hereditatem. Ille, qui scriptus est heres, vult dare tantum, quantum in censum habet pauper.* Declam. 332.

³ See *Lib. 3. Chap. 4. § 5. Note 1. above.*

⁴ In the Time of *Nero*, in the Consulship of *Trebellius Maximus*, a Decree of the Senate was made, That an Heir in Trust, who was obliged to resign to the Lawful Heir, should be discharged of all the Debts and Disbursements, which, as well as the Rights, Names, and Actions, should pass with the Goods to him, for whose advantage the Trust was made. But since the Heirs thus put in Trust, had little or no Advantage by the Inheritance, which they were to make over; and so scarce any one cared to trouble themselves with a Trust, it was ordered by another Decree of the Senate, in the Time of *Vespasian*, in the Consulship of *Pegasus*, That he that was obliged to resign to the Heir, or another Party, should keep a fourth Part. The Emperor *Justinian* united these two Decrees afterward, and called them by the Name of their Author, the first, *The Trebellian Decree*, and the other, *The Pegasian*. The more ancient Name, which was the *Trebellian*, remained only, and from thence it was called, *The Trebellianick Quarter*, or singly, *The Trebellianick*, viz. the fourth Part of the Inheritance which was to remain to the Heir who was to resign. See the *Institut.* lib. 2. tit. 23. *De fidei commissariis hereditatibus*, &c. and the *Digests*, Lib. 36. tit. 1. *Ad Senat. consultum Trebellianum*; as also *Mr. DAUMAT'S* civil Law in their Nat. Order, Part 2. L. 5. tit. 4.

⁵ In all the Editions of the Original our Author has it, *quartam partem*. Yet we ought to observe, that in the *Roman* Law the *Trebellianick* fourth Part is called the *Falcidian*, because the *Trebellianick* is much the same as to the Heir who is to resign, as the *Falcidian* is, as to the true and real Heir. See *Digests*, Lib. 28. tit. 6. *De vulgari & pupillari substitutione*, Leg. 41. § 3.

⁶ *CICERO'S* Words are, *Omnes Leges, Judices, ad commodum Reipublicæ referre oportet, & eas ex utilitate communi, non ex scriptis, quæ in literis sunt, interpretari. ----- Neque enim ipsi [qui Leges scripserunt] quod obisset, scribere volebant, & si scripsissent, cum esset intellectum, repulsum iri legem intelligebant. Nemo enim Leges Legum causa jalvas esse vult, sed Reipublicæ, quod ex legibus omnes Reipublicam optimè putant administrari.* *De Invent.* Lib. 2. Cap. 38.

Mr. BARR. NOTES on § IX.

¹ It is a judicious Maxim in the *Roman* Law, That every part of a Law ought to be interpreted by the Tenor of the whole Law: *Indivisibile est, nisi tota Lex perpensa, una aliqua particula legis proposita, judicare, vel respondere.* *Digests*, Lib. 1. tit. 3. *De Legibus*, &c. Leg. 24. See also about *Compacts*, Lib. 45. tit. 1. *De verborum Obligat.* Leg. 134. § 1.

² The same Lawyers observe also, That we must explain one Law by another, the Ancient by the New; and on the other side, the New by the Old, unless the last have manifestly abrogated something preceeding. *Non est necum, ut priores Leges ad posteriores trabantur. ----- Sed & posteriores Leges ad priores pertinent, nisi contrariæ sint: ilque multis argumentis probatur.* *Digests*, Lib. 1. tit. 3. *De legibus*, &c. Leg. 26. and 28. Further, *Mr. HERTIUS* makes a pleasant Mistake. As the Author says, *Cum illis Locis ubi idem de simili agit materia*; he quotes thereupon with a *for*, a Law, which imports, that when the Intention of the Contractor fully appears not, they must follow the Custom of the Country where they treat: *Aut, si non appareat quid actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequentatur.* *Digests*, Lib. 51. ut. 17. *De Reg. Jur.* Leg. 34.

³ *CICERO* observes well, That to discover the sense of a Writing, we must examine the Works of the same Author, his Actions, Words, Opinions, and Conversation: *Qua in Sententia Scriptor fuerit, ex cæteris ejus scriptis, factis, dictis, animo atque vita ipsa fieri oportebit.* *De Invent.* Lib. 2. Cap. 40.

⁴ The Words of the *Digests* are, *Imperfecta erit stipulatio. ----- Si quod pondere, numero, mensura continetur, sine adjensione ponderis, numeri, mensuræ stipulatus effem.* *Digests*, Lib. 45. tit. 1. *De verborum obligat.* Leg. 115. princip.

^a *Q. Curtius*, l. 4. c. 11.

^b *F. Marsel*, Legat. l. 1. c. 38.

^c *Everhard*, loc. legal. 8. ab absurd.

^d *Declam.* 332.

i f by their former Dealings it appear'd, that such a Sort and such a Quantity was thought of and design'd, it is as good as if it had been actually express'd a. This may be illustrated from Homer b in the Duel between Menelaus and Paris. They had agreed, that the Conqueror should enjoy Helen; Paris being worsted, provided for himself by Flight, and Agamemnon proclaim'd Menelaus Conqueror, and that therefore Helen, according to Articles, ought to be his. And the Poet makes Jupiter of the same Opinion, who declares himself c,

Ἄλλ' ἤπει νίκη μὲν ἀξιοζήλας Μενελάε.

Brave Menelaus gains the Victory.

Besides, he that imposes the Conditions must be the best Interpreter of them; for he on whom they are imposed, has no Power of adding to them. But the Conditions (as Hector express'd them) had no relation to Slaughter or Death, but to Victory only; for Helen was not to be adjudged to him that prov'd the better Man, but the Conqueror, and not he that slays the other is such; for a Brave Man may fall by the Hands of a Coward. On the other side it might be argued, that in Decrees, Laws, Leagues, and Pacts, a latter Condition takes place 6 of a former: and that the last Condition that Agamemnon had added, was κατὰ πέρην, expressing the Death of the Conquer'd d, and so Priamus seems to have understood, in saying,

Jove and the Gods eternal only know, Which of the Two is doom'd to Shades below e.

Besides, the former Condition is included in the latter, for he that kills, conquers, but not vice versa. And therefore the Condition which Hector propos'd, Agamemnon did not annul, but explain'd f; did not change, but added to it that which was of the greatest Moment, that the Victory should consist in the Death of the Adversary; for that is undoubtedly Victory, whereas the other may bear a Dispute: As therefore where Laws are really repugnant, the Judges embrace that

which is evidently clear, in preference to that which is obscure; so we look upon that Pact to be better and more valid, which is decisive of the Controversy, and liable to no Exception 7 g.

X. But that which helps us most in the Discovery of the true meaning of the Law, is the Reason of it, or the Cause which moved the Legillator to enact it 1. This ought not to be confounded with the Mind of the Law; for that is nothing but the genuine Meaning of it; for the finding out of which, we call in the Reason of it to our Assistance. And this is of the greatest force, when it evidently appears that some one Reason was the only Motive that the Parties went upon, which is no less frequent in Laws than in Pacts. And here that common Saying takes place, that The Reason ceasing, the Law itself ceases. But if several Reasons concur together, and only one ceases, the others do not immediately expire, or become less able to support the Efficacy of the Law. Nay, sometimes the general Reason of the Thing seems to draw one way, and the absolute Will of the Legislator another; and in such a Case 2 the Will of the Legislator must be deem'd by the Subjects a Reason, which if it be but clearly signified, altho' not altogether so congruous to the Laws of Prudence, yet suffices to create an Obligation. From these Premises may be rightly infer'd, that a Present made 3 in Prospect of Marriage may be revoked and demanded back, if the Marriage does not succeed; especially if it sticks on that Side to whom the Present was made. Tho' generally in such Presents as pass among the Living, the Reason of them 4 has not the force of a Condition (unless it be expressly mention'd) so as to make the Fact null, where that does not appear. And therefore the Olynthii were not unjust in refusing to restore the Land which Amyntas King of Macedon had given them, when, being defeated by the Illyrians, he had had lost all Hopes of defending his Kingdom b.

Yet in some Cases, the Law itself may sustain the Place of a Condition i. And therefore Cicero k, to the 5 Interdict which l, amongst others, had these Words in it, 6 From whence you, or your Family, or your Agent, &c. rightly argues:

5 And again, Triticum dare oportere stipulatus est aliquis. Facti questio est, non juris. Igitur si de aliquo tritico cogitaveris, id est, certi generis, certæ quantitatis: id habebitur pro expresso. Ibid. Leg. 94.

6 PLUTARCH'S Words are, Ἐν τῷ δόγματι καὶ νόμῳ, ἐν τῷ συνθηκῆς καὶ ὁμολογίας, κατέστιται τὰ ὕστερα κηρύσσων, καὶ βιβαιοτέρῃ καὶ σιμύτῳ. Plut. p. 742. D. Ed. Wech.

7 PLUTARCH'S Words are, Ὡσαύτῃ δὲ ἐν τοῖς ἀλλοθινοῖς ἀντινομίαις εἰ διακασθῆ τῷ μὲν ἀμειστοτήσῃσι ἔχοντι παρσιδύλαι, τῷ ἀσπιστῶν ἐλάσει: εἰς τὴν ἐλάσει τὴν ἀσπιστῶν καὶ γινόμενον πᾶσι ἀγροῦν ὁμολογίας, βιβαιοτέρῃ καὶ κατέστιται κηρύσσων. Ibid. pag. 743. A.

MR. BARB. NOTES on § X.

1 See what will be said, § 19. Note 5. about the Cases where the Law ought to be restrained, because the Reason, which effectually determined the Lawgiver, or Contractors, takes not place.

2 See how the Author explains this in his Abridgment of the Duties of a Man and Citizen. Often, tho' we see not the Reason of a Law, the Will of the Lawgiver is sufficient to impose, on them that depend on him, an Obligation to conform to it. L. 1. Chap. 17. § 8. See also Mr. THOMASIU'S Jurisprud. Divin. Lib. 3. Chap. 12. § 151.

3 See above in Book IV. Chap. 9. § 4. Note 6.

4 So the Digests order, Et generaliter hoc in donationibus deserviendum est: multum interesse, causa donandi fuit, an conditio. Si causa fuit, cessare repetitionem. Si conditio, repetitioni locum fore. Digest. Lib. 39. tit. 5. De Donation. Leg. 3.

5 This is what is called Interdictum. See the Institutes, L. 4. c. 15. and FRANCIS HOTOMAN upon CICERO'S Oration for Cæcina, Chap. 4. There are several sorts of it, and this of which he treats is called, Interdictum unde vi.

6 CICERO'S Words are, UNDE TU, AUT FAMILIA, AUT PROCURATOR TUUS, Cicero pro Cæcina, Cap. 19.

a De verb. oblig. l. 94. D. conf. Ziegl. ad Grot. d. l. f. 7. b Iliad. Γ. ε. Δ. c Iliad. Δ. ε. 13. d Homer. Il. 3. v. 281. e Homer. Il. 3. v. 309. f Ibid. v. 91, 92. g Plut. Symp. l. 9. qu. 13. p. 743. A. h V. Diod. Sic. l. 15. c. 9. i Vid. Cod. l. 8. tit. 56. de revo. donat. k Orat. pro A. Cæcina 19. l V. Instit. l. 4. c. 15. § D. L. 43. t. 16. De vi & de vi armata, l. 1. princip.

altho' one Servant be not a Family, yet if that one Servant dispossession me, 'tis plain I ought to be restored from the Reason of the Edict^a. Nor is there any Difference whether my *Agent*, or any body else in my Name, dispossession another: He adds, the Reason is the same in this Case, whether your *Agent* (as the Word signifies one that manageth all your Concerns in your Absence with full Power, as your Attorney or Substitute) or your Neighbour, or Client, or Freed-man, or any other disturb me upon your Account and Intreaty^b.

Another Instance of a Case which may be decided from the Reason of the Law^c, *The Law is, that those, who in a Storm forsake the Ship, shall lose all; and the Ship and the Lading shall be theirs that stay in it. But in a very dismal Tempest all forsake the Ship, except one sick Man, who is not able to get out and escape; the Ship by chance comes safe to Port; the sick Man seizes it as his; the Owner puts in his Plea against him. Now the Reason of the Law was, that those who had expos'd their Lives to save the Ship, should have some Encouragement; but this the sick Man can't pretend to, who neither stay'd in the Ship upon that Account, neither contributed any thing to the saving of it.*

XI. Besides, the same Word admits of sometimes a more loose, sometimes a more strict Interpretation, which may happen upon several Accounts. Sometimes the Name of the *Genus* is peculiarly apply'd to one of the *Species*; as in the Words *Adoption*¹ and *Cognation*². In the Names of Animals, where the Word is not of the common Gender³, the *Masculine* includes the *Feminine*, and *vice versa*. Sometimes Art gives a Term a larger Signification than common Use: As *Death* in the Roman Law is extended even⁴ to Banishment, which in popular Use signifies only the Separation

of the Soul from the Body. Hither may be refer'd the Ambiguity in the Words, *mine, thine, yours, &c.* which *Martial*^d plays with;

*Carmina Paulus emit, recitat sua carmina Paulus:
Nam quod emit, possis dicere jure tuum.*

You Verses buy, your Verses you recite:
For what you buy, that justly is your Right.

XII. Moreover, in Promises and Pacts, as also in Privileges, some Things are *favourable*, some *odious*, and others of a middle or *mixt Nature*.

Those are *favourable* which carry an Equality along with them, or which equally oblige each Party, and which tend to promote the common Advantage; and the greater and the more extensive the Advantage is, the better Title have they to *Favour*. Those also are favourable which make for the Preservation of Societies, and without which some Act would be to no End or Purpose. Besides, to avoid an Inconvenience is more favourable than to gain a Convenience¹, and greater Favour is allow'd to that which makes for Peace, than that which makes for War; and a defensive War is still more *favourable* than an offensive.

On the other side, those are *odious*, which lay the Burden on one Party only, or on one more than the other; that also which carries a Punishment along with it; or makes any Act of no Effect; or changes any thing in former Constitutions; and such as tend to the Destruction of Friendship and Society.

Those that are of a *mixt Nature* (as suppose former Constitutions are changed, yet for the sake of Peace) according to the Greatness of the Good, or the Change, are sometimes *odious*, sometimes

⁷ CICERO'S Words are, *Si me Villicus tuus solus dejecisset, non familia dejecisset, ut opinor, sed aliquis de familia. Restituitur diceres te restituisse? ----- Non enim alia causa est æquitatis in uno servo, & in pluribus: non alia ratio juris in hoc genere dumtaxat, utram me tuus procurator dejecerit, is qui legitime procurator dicitur omnium rerum ejus, qui in Italia non sit, absente Reipublicæ causâ, quasi quidam pene dominus, hoc est, alieni juris vicarius.*

⁸ Indeed, as the Law to which the Author here refers us, imports, all Cases can't be expressed in Laws, they ought to be applied to Cases perfectly alike, and where the same Reason takes place evidently. *Non possunt omnes articuli singillatim aut Legibus aut Senatûs-consultis comprehendî: sed cum in aliqua causa sententia eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet.* Digest. Lib. 1. tit. 3.—*De Legibus*, Leg. 12, 13. See also Leg. 27.

⁹ So the Author ad Herennium speaks, *Sit Lex, quæ jubeat, eos, qui propter tempestatem navim reliquerint, omnia perdere; eorum navim, ceteraque esse, si navis consecrata sit, qui remanserint in navi. Magnitudine tempestatum omnes perterriti navim reliquerunt, scapham conscenderunt, præter unum ægrotum: is propter morbum exire & fugere non potuit. Casu & fortuito navis in portum incolomis delata est: illum ægrotus possidet; navim petit ille, cujus fuerat.* Cap. 11.

Mr. BARB. NOTES on § XI.

¹ Under the Term of *Adoption* is contained the Adoption properly so called, by which the natural Father releases his Son from under his paternal Authority, and transfers him to his Adoptive Father; and Abrogation is by which a Son, who has lost his natural Father, and was under his own Power, submits himself to him who is willing to become a Father to him. See the *Institut. Lib. 1. tit. 11. De adoptionibus.*

² *Cognati* in the Roman Law is spoken generally of all the collateral Kindred, but more particularly *Cognati* are the collateral Kindred on the Mother's Side, and *Agnati* of the Father's Side. See *Institut. Lib. 1. tit. 15. De Legitimâ Agnatorum tutela*, § 1.

³ The Words of the Digest are, *Verbum hoc, si quis, tam masculos quam feminas complectitur.* Digest. Lib. 50. tit. 16. *De verborum significatione*, Leg. 1.

⁴ So the Digest speaks, *Deportatio enim mortuorum loco habendus.* Digest. Lib. 37. tit. 4. *De bonorum possessione contra tabulas*, Leg. 1. § 8. See above Lib. 3. Chap. 6. § 3. Note 5.

Mr. BARB. NOTES on § XII.

¹ QUINCTILLIAN'S Words are, *Incommoda vitantis melior, quam comoda petentis est causa.* Institut. Orat. Lib. 7. cap. 4. pag. 539. Edit. Ludg. Bat. 421. Edit. Obrrecht.

^a Vide Cicer. ubi supra, c. 19, & 20. ^b Add. Lib. 1. t. 3. l. 12, 13. & Lib. 27. de legibus. ^c Which is put by the Aut. ad Heren. l. 1. c. 11. ^d L. 2. Ep. 20. Id. l. 6. Ep. 12. *Jurat cupillos esse, quos emit, juos Fabullus; nunquid, Paule, pejerat?*

favourable; yet, *cæteris paribus*, Favour ought to take place ².

XIII. Upon these Distinctions *Grotius* builds the following Rules.

1. In Cases that are ¹ not odious, Words are to be understood according to the full Propriety of popular Use; and if in popular Use there be several Significations of the same Word, the largest is to be taken. Thus sometimes the Masculine is to be taken for the Common Gender: as if Leave be given to kill any Game in such a Forest, except Bucks, under that Name ² Does also ought to be comprehended. In such Cases too an indefinite Word is to be taken ³ universally; as if it be stipulated in a Treaty, That the Captives shall be return'd on both sides, it must be understood of all and every one of them. So *Cicero* ⁴ argues in the aforesaid Interdict, that the Words, *From whence a Man has been ejected*, ought to be extended even to him who is hindred from coming to his own ⁴. For this Sense is not repugnant to the Nature of the Words; and in Favour a Man ought to be put in Possession of his own;

for to Dispossess is to hinder one from continuing in Possession ^b, but a Man continues in Possession, altho' he sometimes goes out upon necessary Occasions. And therefore it is the same thing whether a Man actually turns me out of my House, or, while I am out upon necessary Business ^c, hinders me from coming in ^e. From the Force of this Rule it is, that, in a doubtful Case, if it be a Matter of Favour, the Year begun is look'd upon as compleat, where another's Right is not injured by it ^d. And against this did *Caligula* ^e offend, in denying those, whose Ancestors had obtain'd the Freedom of Rome for themselves and their Posterity, a Title to it, unless they were their Sons, ⁶ affirming that Posterity ought not to be understood beyond that Degree ^f. Yet I am afraid *Dido* made use of too favourable an Interpretation, who when she had purchas'd so much Ground, as she could cover with an Ox's Hide, cut the Hide into thin pieces, and so seiz'd upon more Ground than she had really bargain'd for ^g. By the same Trick did *Ivavus* buy as much Land as he could en-

² This Distinction of Things favourable and odious is equally uncertain and useles. The Definitions given them by *Grotius* and our Author have no Foundation; for the Promises and Compacts, as well as Privileges, devolving upon Things allowable and innocent, as we may here suppose, are all indifferent in their Nature, and by Consequence ought not to be extended or restrain'd farther than the Intention of the Author requires. There are in these Definitions Things which do not well agree together: For we say, for Example, that what tends to the publick Advantage is favourable, and what contains any Trouble in it is odious; for we know, that the Infliction of Punishment makes for the publick Advantage. There are no Causes favourable or odious; for what they have of that Nature proceeds not from the Thing it self, but depends only upon the Intention either of the Legislator, or Contractors, or Testator. In the Roman Law, for Example, the Liberty of a Servant (see the *Instit. Lib. 1. tit. 6. Quibus ex causis manumittere non licet, § 2.*) is a Thing favourable, as also the Portion of a Woman (see the *Digests Lib. 23. tit. 3. De jure Dotium, Leg. 68, 70.*) On the contrary, Second Marriages pass for odious with most People (see *Novel. Justiniani 2. Chap. 2. § 1.*) I have also said that this Distinction is useles: Indeed in the Examples alledged by our Author, the Interpretation which he gives, may either be given independently upon what he believes odious or favourable, or is directly contrary to his Rule. Mr. *TITIVS*, *Objer. 428, 429.* See what shall be said in the following Notes. The Author whose Opinion I have related, follows Mr. *THOMASIVS* in this, none of whose Works I had seen when I put out my first Edition of this Book; see his *Jurispr. Divin. Lib. 2. Chap. 12. § 159, &c.* and the Appendix following it, where he defends himself against the Professor of *Hamburgh* named *Vincent Placcius*, who had criticized upon what he maintain'd, that he could not give a good Definition of favourable and odious.

Mr. BARB. NOTES on § XIII.

¹ That is to say, according to Mr. *THOMASIVS*, *ubi supra, § 173.* in Things of a mixt Nature, which are both favourable and odious. We must add, *Provided the favourable most prevail.*

² That's true, but that is not because a Thing favourable is treated of, but by reason of the usual Signification of the Word *Cervus*, i. e. a Buck. Mr. *TITIVS* observes very well, That when indeed we speak of a Buck, or any other Creature in the Masculine Gender, which is the more noble, it comprehends the Female as well as the Male, unless there be some Circumstance which shews plainly that we speak of the Male in Opposition to the Female. But I am not of the Opinion of that Author, who affirms, That according to the Opinion of *GROTIUS* and *PUFENDORF*, the Word *Buck* is only applied to the Males. *Because* (says he) *this Clause, Except the Bucks, imports a Change of what before it was wont to signify, and consequently includes something Odious.* This Change was made after the first Agreement, and not a Restriction added on a sudden and in the Agreement itself, as that is, which is treated of in this Example.

³ This is not because a Thing favourable is treated of, but because in ordinary Speech these indefinite Expressions are equivalent to universal, unless there be otherwise some Reason to restrain them, as there is not here. For why is it, that in a Treaty of Peace we would keep any Prisoner taken in War? According to the Principles of *GROTIUS* (as *THOMASIVS* observes) he that having the greater Number of Prisoners, would exchange them only Man for Man, for otherwise it would be a Thing odious, because he would give more than the other. This last on his part affirms, That, according to the Agreement for Peace, he treated for the most favourable Thing, and so the Terms are to be understood in the most extensive Sense that they are capable of. Thus thro' the Contrariety of Reasons, nothing is determined by these Terms *Favourable and Odious*. Moreover, it sometimes leads us to an Interpretation plainly contrary to the Sense of him that speaks: As Mr. *THOMASIVS* shews by this Example, "Suppose (says he) a Magistrate forbids the Carriage of Corn out of his Country, under severe Penalties, and one carries out Meal." In this Case, according to *GROTIUS*'s Rule, he that carries out Meal ought not to be punished; for besides that his former Liberty is abridged, the Prohibition is accompanied with a Punishment, and so a Thing absolutely odious is treated of.

⁴ This is determined in the *Digests: Si autem cum dominus veniret in possessionem, armati eum prohibuerant, qui incausant possessionem, videri cum armis dejectum*, Lib. 43. tit. 16. *De vi & vi armata, Leg. 3. § 8.*

⁵ The Words of the *Digests* are, *Sive autem corpore, sive animo possidens quis dejectus est: palam est, eum vi dejectum videri. Idcircoque si quis de agro suo vel de domo processisset, nemine suorum relicto, mox revertens, prohibitus sit ingredi vel ipsum prædium: vel si quis eum in medio itinere detinuerit, & ipse possiderit: vi dejectus videatur: admissi enim ei possessionem, quam antea retinebat, est non corpore.* Ibid. Leg. 1. § 24. Besides, what our Author says is sufficient to shew, that we need not examine whether the Thing treated of is favourable or not, for the Sense of the Words, *drive out*, may be proved by other Principles. Mr. *THOMASIVS* says here, that *all depends upon the Reason of the Law, for* (adds he) *the Roman Law would by it prevent all ways of private Persons thus acting one by another.* Francis Hotoman nevertheless affirms, That *Cicero* is a little cavilling in the Business of *Cæcina*, as appears by his Notes on that Orator's Harangue before quoted. See Mr. *SCHULTING*'s Discourse, *De Jurispr. M. Tall. Cicero.* pag. 283.

⁶ Nothing is more common, than to understand by the Word *Descendants*, all those who descend in the Right-line for several Degrees, without needing a favourable Construction, to extend it farther than the first Degree. And the Determination of the Roman Law is positive, as to the Privileges granted a Person and his Descendants, as appears by the Law quoted by our Author. *Immunitates generaliter tribuntur eo jure, ut ad posterum transmitterentur, in perpetuum succedentibus durat.* Lib. 50. tit. 6. leg. 4.

^a *Orat. pro Cæcina, c. 23.* ^b *Add. l. 3. f. 7. D. h. t.* ^c *Add. L. 19. t. 2. l. 29. D. locati, &c.* ^d *V. Bussier's Hist. Franc. l. 19. p. 39.* ^e *Suet. c. 38.* ^f *Add. L. 50. t. 6. l. 4. D. de jure inhumanitatis.* ^g *Juz. l. 18. c. 5. Virg. Æn. l. 1. v. 371. & Cæcia ad h. l.*

compass with the Hide of a Horse, which he afterwards cut into several small Thongs, and encompassed Land enough to build a City upon ^a.

2. In a Matter of Favour ⁷, if he that speaks be learned in the Law, or speaks by the Advice of those that are, his Words are to be taken in the most comprehensive Signification; so as not only to import as much as they do in common Use, but to include that Signification also which is used amongst the Lawyers, or which the Civil Law has impos'd upon them.

3. On the other hand; Words shall be taken in a stricter Sense than the Propriety requires, if otherwise Injustice or an Absurdity would follow ⁸.

4. Altho' it be not absolutely necessary for the avoiding Injustice, to take the Words in a stricter Sense than their Propriety demands; yet if there be a manifest ⁹ Advantage in such a Restriction, we ought to stop at the narrowest Limits of their proper Signification, unless Circumstances persuade otherwise.

5. In an odious Matter a figurative Speech may be admitted ¹⁰ to avoid a Grievance; thus in a Donation, or when a Man recedes from his Right, Words, altho' deliver'd at large, are usually confin'd to those Things only, which were suppos'd to be then thought of. And therefore Cicero argues right, that ¹¹ tho' a Man bequeaths to his Wife all the Money he has, yet his Debts are not therefore bequeath'd unto her; for there is a great deal of difference between ready Money, and such as is due upon Bonds. Thus Aurelian, when he set out on his Eastern Expedition, promis'd the People Crowns of two pounds Weight, if he return'd Conqueror: And when the People expected Crowns of Gold, which Aurelian ^b was neither able nor willing to bestow, he gave them only Crowns of Bread ^c. Nay, tho' a Man expresses himself universally, if afterwards a particular Enumeration follows, the ¹² Law won't allow any thing to be made over, but what was particularly express'd. And when one Nation has stipulated to send another ¹³ Auxiliary Forces, it is suppos'd that they are to be sent at the Expence of

him to whom they are promis'd, unless it was expressly otherwise agreed between them. And thus a League made for the Defence of a Dominion, when the Lord is in Possession of it, does not extend to the Recovery of it, when he is ejected ^d. Sometimes the Odium of the Person justifies a strict and almost quibbling Interpretation: Thus the Lady that betray'd the Capitol, and had bargain'd for her Pains to have what the Sabines carried upon their left Arms, meaning their Bracelets, was buried under their Shields ^e ¹⁴.

XIV. Grotius applies these Rules in a few Examples: As thus, It is demanded, if a Reward be propos'd to him that first gets to the Goal, and two come in together, whether it be due to both or to neither? Indeed the first, in this Case, may signify either him who out-runs all the rest, or him whom none out-runs: And therefore if the Reward was only a Wager between the Parties, and both come to the Goal together, they must draw Stakes. And the same holds, if two Spectators, as is usual, had laid a Wager on this or that Man's Head. But if the Reward was propos'd by a third Person to encourage their Industry, then those who come in together ought to divide it, if it be capable of Division; or else to enjoy it both together; or, if that cannot be, to draw Lots for it, or to run again; for 'tis hard that both should be deprived of the Reward, because neither was worse than the other: Besides, the Rewards of Virtue ought not to be confined to so strict an Interpretation; and therefore it would be generous in the Patron to give the whole Reward to each that performs equally ^f ¹. But what Augustus gave the Robber Coracota (who having heard that such a Sum of Money was laid upon his Head, surrender'd himself) proceeded rather from the Greatness of the Emperor's Soul, than that it was due from him ^g.

XV. In the Treaty which put an End to the second Punick War, there was a Clause, That the Carthaginians should not wage War, either in Africa, or

⁷ But why should not this have place in a Donation, for Example, which is a Thing odious, according to Grotius and our Author. The Donor knowing all the Force and Extent of the Terms which he uses, may be suppos'd to use them without Restriction, unless there be some probable Reason to make us think he had something less in his Mind, and in that Case 'tis not because a Thing odious or chargeable is treated of, that the Signification of the Terms are restrained, but upon the Account of what the Donor's Mind was most probably, as our Author himself speaks, a little lower, after Grotius.

⁸ This and the following Rules are not peculiar to Things favourable, as is easy to observe. They concern all Acts done with Deliberation.

⁹ Grotius says, *A manifest Equity, or Profit*; and the first Word is apparently omitted, either by the Carelessness of the Author, or Fault of the Printers. As for the Rule it self, if Equity requires that the Signification of a Word should be restrained, it is for that Reason, and not because a Thing favourable is treated of. But Profit has no Influence here, farther than 'tis evident that the Lawgiver or Contractors would procure it.

¹⁰ Provided, that there be Reason to believe, that he that speaks would not subject himself or others to this chargeable Consequence; for if he intends it, why should we oppose his Design?

¹¹ Cicero's Words are, *Non si Uxori Vir legavit omne argentum, quod suum esset; idcirco quæ in nominibus fuerunt, legata sunt; multum enim differt in arcine positum sit argentum, an in tabulis debeat.* Topic. cap. 3. When he speaks of his Money, he means not ordinarily his Debt, to the Sense of the Testator is taken from the Signification of the Terms, and not from the Nature of the Legacies or Gifts themselves.

¹² But then the Enumeration it self shews, that he that speaks did not take the universal Particle in its full Extent.

¹³ In this Example 'tis clear, that the Promise to send Succours, does not contain, according to the ordinary Use of the Words, and common Practice, an Engagement to furnish the Troops at his own Expence. So that, when a Thing favourable is treated of, it can't be extended to an Agreement, unless it be explained in other Terms. As for the Example following, I can't see why the Author alleges it here.

¹⁴ See Mr. Buddeus's Discourse, entitled, *Jurisprudentiæ Historiæ Specimen*, § 11, &c. among his *Selecta Juris Naturæ & Gentium*, where he examines this Case.

Mr. BARB. NOTES on § XIV.

¹ See Mr. THOMASIU's Discourse, *De Prioritate & Posterioritate temporis dubiâ atque incertâ*, which are amongst those at Leipzig, Chap. 3. where the Question propounded in this §, and several other curious ones are handled.

² *Apud Saxonem Gramm. l. 9. & Polyd. Virg. Hist. Angl. l. 5:*

^b See above in B. 3. c. 5 f. 10 and Mr. Barbeyrac's

¹⁰ Note upon it.

^c Which were called Siliginei. Panis Siligineus, White Bread. *V. Fl. Popinum in Aurel. c. 35.*

^d Vid. Guicciard. Hist. l. 15. p. m. 433.

^e *Tarpeia. V. Plat. Romulo, & Liv. l. 1. c. 11.*

^f *V. Liv. l. 26. c. 48.*

^g *Dio. Cass. l. 56.*

out of Africa, without Leave of the Roman People ^a. Ought this to be understood of an offensive War only, or of a defensive also? Certainly only of an offensive War; for otherwise that Clause would be odious, as inconsistent with the very Being of the State of Carthage. Besides, 'tis hard to retrench one's natural Liberty, so far as not to permit him to defend himself against an Injury ^b. Nor was it the Design of the Romans ^c by this Clause to expose the Carthaginians to the Insults of their Neighbours, or to render them entirely dependent upon their Arms for Protection; but only so to tie them up, as that they should not enlarge their Territories, or increase their Strength by War. Indeed when the Romans made such a League with Antiochus, they inserted this express Clause ^e, *That if any Nation, against whom Antiochus by these Articles is debarred from waging War, should set upon him first, he should then have Liberty of Warring against them* ^d.

XVI. The Romans promis'd the Carthaginians, that Carthage should be a free City: And a little after demanded of them that they would demolish it, and build another at a greater Distance from the Sea; pretending that the Spot of Ground, upon which the City stood, was not Carthage ^d. Here tho' the Freedom which the Romans promis'd can't be understood of a full and entire Liberty, that having already suffer'd no small Diminution; yet, at least, so much Liberty ought to be understood, as that they should not be oblig'd, at another's Command, to destroy their native Country, and betake themselves elsewhere. Indeed Liberty, or a Privilege of being govern'd by one's own Law ⁱ, is the Attribute of a People, not of a City, as it consists of Walls and Houses; yet since it was said that Carthage should be free (not the Carthaginians, by which way of speaking the Romans might have colour'd over their Cheat) the natural Meaning of the Words intimate, that the People should enjoy their Liberty in the City Carthage that then was, and also that the Buildings themselves should be secure. Polybius ^e relates, that the Senate had promis'd, that *They should have their Liberty, their Larvs, all their Lands, the full Possession of all their Goods, both publick and private*; and that the Carthaginians presently suspected why there was no Mention made of the City. But indeed 'tis evident,

that the Romans here were guilty of more than Punick Perfidiousness.

XVII. There are other Conjectures founded upon something else than the Signification of the Words in which the Thing is express'd, which make it necessary sometimes to enlarge, sometimes to restrain the Meaning. Yet it is observable, that we have oftner Reason to restrain than to enlarge it. For the Want of any one Cause is enough to hinder the Effect of a Thing, whereas all must necessarily concur to produce it: Thus, in such Acts as create an Obligation, the Meaning must be restrained, if it appears that any one of the Causes be absent; whereas to enlarge it, there must be a Concurrence of them all.

And this Enlargement is not so easily admitted here, as when I just now said, that in a Matter of Favour, the Words may bear another, tho' less receiv'd Signification than usual: For there (since the only use of Words is to express one's Mind) such a Sense of the Words, not being entirely dissonant to common Use, might probably have been in the Mind of the Speaker. But the Case before us supposes us to make Use of Conjectures, to prove that the Mind of the Speaker is such as his Words won't admit of, and therefore we ought to be very certain of it.

Nor can a Law extend to a Case, which proceeds upon a Reason only like that which the Law is founded upon, for the Reason ought to be exactly the same. Nay even that is not always enough, for sometimes the bare Will of the Legislator determines it self at Pleasure, even against or without Reason, and yet is sufficient to produce an Obligation.

To justify then such an Enlargement, we ought to be sure that the Reason, under which the Case in Debate comes, was the ¹ only Cause and Motive that induc'd the Legislator to enact the Law; and that this Reason has been consider'd by him so generally, as that he would have apply'd it to the present Case, had he foreseen it, because otherwise the Law would have been useless or unjust.

Hither may be refer'd what the Rhetoricians say about Reasoning, when a Thing, for which there is ² no Provision made by any particular Law ^f, is infer'd, by a Parity of Reason, from a like Case which is provided for: or, as Quintilian

Mr. BARB. NOTES on § XV.

¹ This Reason alone hath so great Force, that 'tis not necessary to alledge what the Clause contains hurtful or odious.

² *Si qui sociorum populi Romani ultro bellum inferent Antiocho, vim vi arcendi jus esto: dum ne quam urbem aut belli jure teneat, aut in amicitiam accipiat.* Tit. Liv. Lib. 38. cap. 38. "If any of the Allies of the Roman People set upon Antiochus, let him have Liberty to repel Force by Force, provided he takes no City, either by the Right of War, or by Treaty." See also Polyb. Excerpt. Legat. 35. cap. 4.

Mr. BARB. NOTES on § XVI.

¹ As Nicias and Themistocles say in Thucyd. Lib. 7. Chap. 77. "Men make up the State, and not Walls and Ships without Men in them." Ἄνθρωποι γὰρ πόλιν, ἢ πλοῖα. Add. Just. Lib. 2. cap. 12. n. 14.

Mr. BARB. NOTES on § XVII.

¹ There is no Necessity that the Reason of the Law should be single, to authorize the Extent of it; for there is often more than one thing which causes Laws to be made, and in one and the same Thing several Ends may be propos'd, either equally, or so as some may be principal, and others subordinate. In this Case, if he that speaks has equally propos'd to himself diverse Reasons, which he had in View, they must all be joined in extending it, in such a Manner, as the like Case, to which the Law may be extended by virtue of one of those Reasons, agrees with all the other. But when there is a principal one, there is no Necessity that the Case should also agree to the other subordinate ones, as Mr. THOMASIVS observes, *Instit. Jurispr. Divin. Lib. 2. Chap. 12. § 90.*

² See the Laws quoted above, § 10. Note 8.

^a Liv. l. 30. c. 37. Polyb. l. 15. c. 18. The like Article we find in the Peace which Flaminius gave to King Philip, Liv. l. 33. c. 30. ^b Add. Livy, l. 42. c. 41. ^c Add. Livy, l. 42. c. 23. ^d Vid. Appian. de Bello Punic. p. 45. Ed. Steph. ^e Ex. Legat. 142. ^f Vid. D. l. 1. f. 3. De legib. l. 12, 13, & 27.

has it, *When a Thing not written is gathered from a Thing written: which he illustrates by these Examples* ³. *To take a Plough in Paron is not lawful, he takes the Plough-share. The Exportation of Wool is prohibited, he exports Sheep. He that slays his Father must be sew'd up in a Leather Bag, he has slain his Mother. A Man ought not to be dragg'd out of his House to Justice; he drags him out of his Tent* ².

Hither too may be referr'd the Case defended by *Lucian* ^b; the Law is, *Whosoever kills the Tyrant shall be rewarded: A certain Man climbs into the Citadel to kill the Tyrant, but missing him, kills his Son, and leaves the Sword in the Body: The Tyrant coming in, and finding his Son slain, out of Grief falls upon the same Sword, and dies: He that slew the Tyrant's Son demands the Reward, as the slayer of the Tyrant.* *Erasmus* ^c takes the other side; yet certainly the Reason of the Law is for having the Reward given, not only to him who slays the Tyrant with his own Hand, but to ⁴ him also who is the immediate Occasion of it ^d. Since there is no doubt but the Legislator would have decreed the Reward to him also, had such a Thing come into his Mind.

The Law says, that whosoever kills his Wife shall be put to Death; but a certain Man, being willing to get rid of his Wife, and at the same time to escape the Law, kept his Mule three Days without Water, and the fourth Day pretending to ride out for his Diversion, put his Wife upon the Back of the Mule; who as soon as he came to the River, ran eagerly into it, and threw the Woman, who perish'd in the Waters.

Thus the Brethren of *Joseph* vainly thought, that

they should be guilty of a less Crime in throwing him into the Pit, where he must die of Hunger, than if they had actually cut his Throat ^e.

It was stipulated between two neighbouring Nations, when there was no other sort of Fortifications, That such a Place should not be Walled in; which therefore ought not to be enclos'd with so much as a Pile of Earth, if it evidently appear'd, that the Reason why Walls were prohibited, was to render it incapable of holding out against Force.

A Man leaves his Estate to *Titius*, after the Death of the Child his Wife was then big with: He thought his Wife had been with Child, but it proves otherwise; and therefore *Titius* has a fair Title to the Estate: For 'tis evident, that the Reason why the deceas'd did not absolutely make *Titius* his Heir, was, because he thought he might have a Child; and therefore had he known that no Child would have been born, he would have made him such without any Condition ^f ⁵.

It would have been too hard, says Lyfias ^g, *for a Lawgiver to have crowded into his Law all the Words of the same Signification, and therefore what he has express'd of one, he is suppos'd to have understood of all the rest.* Thus the Law, in *Exod. xxi. 33.* is rightly extended to every tame Animal, and the Word *Pit* to every Ditch ⁶.

XVIII. Besides, it is of great Use to enlarge the Meaning, so as to leave no Room for any sort of Cavils, and so to prevent ¹ the Quirks, that crafty designing Men have found out to evade the Law ^h. Of these Cheats the Roman Lawyers make four sorts; one by a Commutation of ² Things, another by a Commutation of ³ Persons;

³ QUINCTILIAN'S Words are, *Hic status [Syllogismi] ducit ex eo, quod scriptum est, id quod incertum est: quod quoniam ratiocinatione colligitur, ratiocinativus dicitur* ----- *Quod in toto, idem in parte: Aratrum accipere pignori non licet, vomerem accipit* ----- *Quod in parte, idem in toto. Lanæ vendere Taranto non licet, oves cecit* ----- *Majoris pugnae est ex scripto ducere quod scriptum non est.* Instit. Orat. l. 7. c. 8.

⁴ AS SENECA expresses it, *Herc. Octavo. v. 859, 860. Quicquid in mortem trahit Telum est abunde, i. e.* "Whatsoever kills, is Weapon sufficient." But we ought to observe, that to a moral Imputation, it is not sufficient, that what a Man has done, should be, by Accident, the Cause of what happens, as *Erasmus* very well proves, and it may have place here. See Mr. THOMAS'S *Instit. Jurisprud. Divin. Lib. 2. Chap. 12. § 98, 99.* and what I have said above at *Lib. 1. Chap. 5. § 3. Note 4.*

⁵ SENECA says, *Scriptum Legis angustum est, interpretatio diffusa est: quaedam vero tam manifesta sunt, ut nullam cautionem desiderent.* Senec. Controv. 27. See *Lyfias, Orat. 10. contra Theomnest. 2. cap. 2.* and *Libanias Declam. 31.*

⁶ QUINCTILIAN'S Words are, *Nulla tanta providentia potuit esse eorum, qui leges componebant, ut omnes species criminum complecterentur. Nam & semper caventes Nequitia vicissit; & Jus ita multiplex atque diffusum esset, ut pro incerto haberetur ignorantum. Egerunt ergo, ut rerum genera complecterentur, & spectarent ipsam Aequitatem. Multa ergo invenientur frequenter, quæ Legum verbis non tenentur, sed ipsa vi & potestate teneantur.* Quin. Declam. 331. "It was impossible for those that made Laws, to provide particularly against all sorts of Crimes: For, after all their Care, Knavery would find out Evasions; and the Law would be so voluminous and confused, that instead of Uncertainty we should lie in entire Ignorance. They therefore took care to have general Heads, and to have regard to Equity. And therefore we frequently find Things, which are not express'd in the Letter of the Law, but yet come under the Force of it." See also *Cicero De Invent. Lib. 2. Chap. 42. and Orat. pro Cæcina c. 18.*

MR. BARB. NOTES on § XVIII.

¹ The Digests say, *Contra Legem facit, qui id facit, quod Lex prohibet: in fraudem vero, qui, falsis verbis Legis, sententiam ejus circumvenit. Fraus enim Legi fit, ubi, quod fieri voluit, fieri autem non vetuit, id fit: & quod distat a verbo dicitur dicitur, i. e. dictum à sententia; hoc distat fraus ab eo, quod contra Legem fit.* Digest. Lib. 1. tit. 3. *De legibus, &c. Leg. 29, 30.*

² The Digests enact, *Sed si fraus sit Senatusconsulto [Macedoniano] adhibita, puta frumento, vel vino, vel oleo mutuo dato, ut his abstractis fructibus uteretur pecunia, subveniendum est Filiofamilias.* Digest. Lib. 14. tit. 6. *De Senatuscons. Macedon. Leg. 7. § 8.* See also *Leg. 3. § 3.*

³ See the Digests, *Lib. 24. tit. 1. De donationibus inter virum & uxorem, Leg. 5. and Lib. 35. cap. 7.*

^a Vide *D. l. 9. t. 2. ad Leg. Aquil. l. 7. f. 7.* ^b In *Declam. quæ inscribitur Tyrannicida, Tom. 1. p. 693, &c. Edit. Amst.* ^c In the Answer which he has made to *Lucian's* Declaration, *Tom. 1. pag. 914, &c.* ^d Is there any difference whether you kill him your self, or afford the Cause of his Death? *ibid.* ^e *Joseph. Archæol. Jud. l. 2. c. 3. Gen. xxxviii. 21, 22.* ^f *Add. L. 5. t. 2. l. 28. D. de inoff. test. In a Law many Things are excepted, though not express'd; the Letter is narrow, but the Meaning extensive; but some Things are so plain as to need no Exceptions, M. Senec. l. 4. contr. 27. What? was this provided for by the Letter? By no Means? Upon what therefore do we proceed? The Design. Which could it be apprehended without Speaking, there would be no need of Words, but because it cannot, Words were found out, not to binder, but to declare the Design, Cic. pro Cæcin. c. 18. Every thing is not express'd in Writing, but some are evidently supposed to be tacitly excepted, Id. de Invent. l. 2. c. 42. Lyfias, Orat. 10. c. 2. contr. Theomnest. ^g *Orat. 1. contr. Theom.* ^h As also to answer any Cavils whatsoever, Vide *l. 29. l. 30. D. de leg. ubi supr. & D. l. 10. t. 4. l. 19. ad exhibend. & Lib. 35. t. 1. l. 76. D. de condit. & demonstrat. & l. 48. t. 5. l. 33. f. 1. D. ad L. Jul. de adult.**

third by Commutation of the Contract; the last in the Way of Contracting ^a.

Licinius Stolo ^b having made a Law that no one should possess above 500 Acres, he himself, nevertheless, purchased a Thousand, and to palliate his Crime, made over half to his Son: For which Reason he was accus'd by *Popilius Læna*, and was the first that fell by his own Law; teaching us that no Man ought to prescribe to others but what himself is willing to perform. *By the Voconian Law no Man can bequeath above half his Goods to a Woman; and therefore when a certain Man had made two Women joint Heirs, his Relations impleaded the Will* ^c.

The *Rhodians* had a Right to Tribute from the Isle of *Pharos*, but when the Receivers came to demand it, the Queen of the Place detain'd them under some pretence of Ceremony, till she had cast Moles into the Sea, and join'd *Pharos* to the Continent; and then she drove them away, as having Commission to levy Taxes upon Islands, but not upon the Continent ^d.

The *Athenians*, when a certain Harlot, by Name *Læna*, i.e. *Lioness*, had slain the Tyrant, for fear of profaning the Temple with the Statue of a Harlot, they erected the Effigies of the Animal whose Name she bare ^e.

The *Rhodians*, because it was unlawful to pull down a Trophy, did therefore hide the Trophy, that *Artemisa* had erected to their Disgrace, by building a House over it ^f.

When the *Spartans* demanded to have the *Athenians* Decree, which hindred the *Megarenses* from trading with them, abolish'd, and *Pericles* objected that the Law forbid any Decree of the People to be pull'd down; one of the Commissioners reply'd, *We do not desire you to pull it down, but to turn it out of sight, and that none of your Laws forbid* ^g.

The King of *Portugal*, for certain Reasons, for-

bad the Clergy the Use of Mules, but they plead'd their Privileges; upon which the King commanded all the Smiths, upon pain of Death, not to shoe any Mule; and so the Clergy quitted them of their own Accord ^h.

Tiberius, because it was esteem'd unlawful to strangle Virgins, order'd them first to be defiled by the Executioner, and then to be strangled ⁱ. The *Corinthians* were forbidden by the Law to give away their Ships, and therefore they sold them to the *Athenians* for five Drachms a piece ^k.

By a Decree of the Senate, no Slave could be Evidence against his Master, and therefore *Tiberius*, a crafty Evader of the Law, gave each of the Slaves their Liberty, that he might make use of them against *Libo*, without breaking the Decree of the Senate ^l.

Tiridates refus'd to lay aside his Sword at *Nero's* Command, but put a Lock upon his Scabbard ^m.

Robert Carnarosse, a wealthy *Scotchman*, bought his Preferment of the King, who then wanted Money, and yet by a Trick eluded the Law against *Simony*; for he laid a great Wager with the King, that His Majesty would not give him such a Preferment ⁿ.

In the Reign of *Philip II.* of *France*, the Bishop of *Beauvais* appear'd in the Field against *Otho IV.*; but to avoid shedding Blood, he fought with a Club, not a Sword: But did such a Quibble excuse the Prelate, or rather aggravate his Guilt ^o?

XIX. But sometimes the meaning of the Words are to be restrained, and although general Terms be made use of, yet they ought to be taken with some Exception or Limitation ¹; either, 1st, Because of some Original Defect in the Will of the Speaker; or, 2^{dly}, ² Because of some Accident which happens inconsistent with his Design.

1. An Original Defect is in the Will; First, *When an Absurdity proceeds from it.* For no Man in

^a The Words of the *Digests* are, *Julianus, minoris factam venditionem nullius esse momenti ait.* Digest. ibid § 5. See Chap. 2. § 10. Note 1.

^b The Words of the *Digests* are, *Si, quum esset tibi contracturus, mulier interzeverit, ut cum ipsa potius contraham: videtur intercessisse.* Digest. Lib. 16. tit. 1. *De Senatuscons. Velleian.* Leg. 8. Mr. THOMASIVS, *Instit. Jurispr. Divin. Lib. 2. Chap. 12. §. 102.* says, There is no great Difference between the last sort of Fraud and the preceding. He observes also, that there are some sorts of Frauds, that can't be reduced to either of these Kinds.

Mr. BARB. NOTES on § XIX.

¹ CICERO'S Words are, *Non ergo omnia scriptis, sed quedam, que perspicua sunt, tacitis exceptionibus caveri.* Cicero de *Inventione*, Lib. 2. Cap. 47.

² Mr. THOMASIVS, *Instit. Jurispr. Divin. Lib. 2. Cap. 12. § 104, 105.* finds fault with this Division, as neither exact, nor just. "For, says he, every Interpretation ought to be made according to what the Person, who speaks the Words, willed and intended, at the Time when he spake or wrote them; and not before or after: And so it can never lawfully be founded upon the Inconsistence of a Case which has happened after the Will of the Legislator or Contractors, thro' any Opposition, or Original Defect in the Will. Moreover, Terms are ordinarily restrained, because we presume, that the Lawgiver or the Contractors have spoken no more than what was in their Mind, and never thought of the Case treated of. So that a Restriction supposes always a Case happened since, which is not agreeable with the Will of him, whose Words we examine. Consequently no Man can see how the Original Defect of a Will can be opposed to the Inconsistency of a Case, which happened afterwards by the Will of the Lawgiver or Contractors." See also Mr. TITIVS on *Pufendorf, Observe.* 438. where he observes several Defects in this Division of *Grotius*, which our Author has carefully followed.

^a L. 8. f. 14. *D. ad Sctum Vellei.* ^b *Val Max. l. 8. c. 6. f. 3. Idem refert Plin. 18. c. 3.* ^c *Quintil. Dec. 264.* *Fraudes circa eludendam legem Papiam Poppæam memorat. Suet. August. c. 34. & Tib. c. 35. in fin. & Tacit. An. XV. 19. The Trick that the Romans used to let fall the private Sacrifices, which otherwise would pass over to the Heir, as an Incumbrance, with the Estate, Salmasius gives an Account of, ad Plauti Bacchi, Act. 4. Scene. 9. voce coemptionalem senem.* ^d *Amm. Marcellinus, l. 22. c. 16.* ^e *Laëtan. de falsa rel. c. 20.* ^f *Vitruv. de Architect. l. 2. c. 8.* ^g *Plat. Partic. l. 2. c. 28.*

^h *Sulpitius, who had been against the Law to restore the Banish'd Citizens, having afterwards changed his Mind, was for it, but would not own it was the same Law he was before against; for he was not for the Return of the Banish'd, but of Those who were forced from their Country: As if the Controversy had been what Name they ought to have been called by, or as if all, who were forbidden the Use of Fire and Water, did not come under the Denomination of Banish'd. Auctor ad Herenn. l. 2. c. 28.* ⁱ *Vide Tacit. Ann. 5. c. 9. & Suet. Tiberio, c. 61.* ^k *Herod. Erato, p. 230. Edit. H. Steph. Add. L. 44. t. 7. l. 54. D. de obligat. & action.* ^l *Tacitus Ann. 2. cap. 30. Though Dio ascribes the Trick to Augustus, lib. 55. Critias used a more impudent Trick against Theramenes. Xen. Gr. rer. l. 2. p. 275. Edit. H. Steph. It was a poor Trick to avoid the Name of Aleutores, which was branded by the Law, to call themselves Tesserarii; between which there is much the same Difference, as between a Thief and a Robber; as Amm. Marcell. says, l. 28. c. 9.* ^m *Xiphilin. Epit. Dion.* ⁿ *Buckton. rer. Scot. l. 14.* ^o *B. Hist. France. l. 8.*

his Wits can be supposed to will Absurdities: And I am mistaken, if upon this Principle, that noted Dispute between *Protagoras* and *Euathles* ^a may not be decided; for altho' they agreed in general Terms, that the Master should have no Right to his Reward 'till the Scholar had gain'd a Cause, yet when the Master had sued for his Reward, and the Judges had given Sentence in Favour of him, the Scholar ought by no means to have defended himself by that Exception: For when they enter'd into Contract that was not thought of; and it is absurd for any one to make such a Pact as should cut him off from any Possibility of obtaining what might be due to him by it. Something akin to this is that which they tell of *Aristides*, who had promis'd a Penny to him that should tell him the Truth: To whom says a Sophist, *You will not give me the Penny*. What must *Aristides* do in this Case? if he gives it, he gives it to one that did not tell the Truth; but if he does not give it, he refuses it to one that did. In such Cases as these, that Rule of the *Civilians* ought to be apply'd; that *In a general Discourse the Person of the Speaker is always excepted*. And therefore *Epimenides the Cretan* cannot be prov'd a Liar from his own Saying, *Κρητες ἀει ψευδαι*, the Cretans are always Liars ^b. Nor can I approve of that of *Lucretius* ^c,

*Denique, nil sciri si quis putat, id quoque nescit
An sciri possit, cum se nil scire fatetur.*

He that says, Nothing can be known, o'erthrows
His own Opinion, for he nothing knows.
So knows not that -----

MR. CREECH.

For he that says, *Nothing can be known* ^d, professes himself to know this one Thing, *That nothing can be known* ^d. In the Schools we have this Example of an Inconsistency ^e, *A Man dream'd that there was no Credit to be given to Dreams*. Now whatever *Genius* had infus'd this Dream into him, design'd so much Credit should be given to this, as that none should be given to any other ^f.

Besides, *Secondly*, The Will is thought to be originally defective ^g, *When the Reason ceases, which*

alone fully and efficaciously moved the Will; for if the Reason of the Law be added, or if we be sufficiently satisfied of it, the Thing is no longer consider'd Simply, but as it comes under the Reason. An Example of this we have in the Law that forbids Patrons to lay an Oath upon their Bondmen not to marry, or to breed up Children, where it is added, that *although in the Law no Person ^h is excepted, yet it is to be understood of those only who are capable of having Children; and therefore if a Man should lay such an Obligation upon an Eunuch, he would not come under the Penalty of the Law*. For the Reason of the Law was, lest the ⁱ Patron out of Covetousness should put a stop to Propagation; which Reason in the Case of an Eunuch, ceases.

But, *Thirdly*, the Will is originally defective, *If there be a Defect in the Matter*: For the Matter which he is about, is always supposed to be in the Mind of the Speaker, although his Words seem to be of a larger Extent. Thus, if an Estate be given to a Man and his Heirs Male, his Grandsons by his Daughter are not supposed to be meant by it: for the Nature of such a Settlement interposes, which plainly excludes Women, and the Descendants of them.

XX. Yet as to the *Second Head* *Grotius* remarks ^g, *That under the Reason may be comprehended some Things which do not actually exist, but are consider'd in a moral Possibility only; and when this happens, no Restriction must be admitted*.

The Meaning is, that a Covenant where the Parties had a certain Reason in View, as suppose the avoiding Danger, or an Inconvenience, does not only hold good in those Cases where such Inconveniences would have follow'd, but in those also where they may probably be suspected: For Instance, should two Nations enter into a Treaty that no Army or Fleet should pass within such Limits, altho' the Reason of this Article be, that one should not actually do the other any Harm, yet it won't be lawful to send an Army or a Fleet thither, although there be no Design of injuring the other. And thus, if the Law forbids that any one should walk the Streets with Torches; tho' the Reason of the Law be to prevent any Mischief from them, yet it would be no Excuse for a

⁴ Very well. But if he has any good Reason why he believes that he knows nothing, he may make use of that very Reason to prove, that there are other Things which he may know, and consequently 'tis false, that he knows nothing.

⁵ Here again, according to Mr. THOMASIVS, we must distinguish, if there be one or more Reasons, how it might happen, that the Legislator or Contractors could have more Things in View, and if, supposing he had several Reasons, he that speaks, had regard to them on the same Account, or no. If divers Reasons had an equal Force upon his Mind, so that one alone is neglected, we may restrain the Terms in which the Law or Bargain is conceived. But if there be one principal Reason, so long as that is in force, 'tis of no Importance, that one or several subordinate Reasons may be offered to make it defective, a Restriction can have no place for that Reason only, but on the contrary, as soon as that Reason ceases, all the other lose their Force. There is another Exception also, which makes a second Head, from whence some infer a Necessity of restraining the Terms, which of themselves extend to one certain Case (besides what the Author, after GROTIUS, speaks of in the following §, and above, § 10.) which is this, That 'tis not sufficient that the Reason of the Law ceases in certain Cases, which happen very rarely, but it must be of that Nature as to happen often. For Example, the Reason why a Child, who is not yet of Age, can't be a good Witness, is because he is not in a Condition to dispose of his Goods with Discretion and sound Judgment. If therefore there be any Child, whose Judgment is above his Age of Minority, which is a Prodigy, the Will of such a Child is nevertheless null, according to the general Law. See Mr. THOMASIVS, *ubi supra*, § 153, 154. and what I have said in my *Treatise of Games*, Lib. 3. Chap. 9. § 3.

⁶ The Digests thus speak, *Quamvis nulla persona Lege excipiatur, tamen intelligendum est, de his Legem sentire, qui liberos tollere possunt. Itaque si castratum Libertum iurjurando quis adegerit, dicendum est, non puniri patronum hac lege*. Digest. Lib. 37. tit. 14. *De jure Patronatus*, Leg. 6. § 2.

⁷ Thus, if a Freeman dies without Children, all his Goods, or at least a part, return to his Patron, or him whose Slave he was, for so the Word *Patronus* signifies. See *Instit. Lib. 3. tit. 8. De successione Libertorum*.

^a *Apud Gellium*, l. 5. c. 10. *Diog. Laert.* l. 9. § 56. *Apul. Florid.* l. 3. *Sext. Emp. adversus Math.* l. 2. ^b See Titus i. 12.
^c *L. 4. v. 471, 472.* ^d *He acts absurdly, who says, He is silent; for by saying, He is silent, he is not silent; and so destroys his own Assertion*, *Apul. Apol.* p. 529. *Edit. in Usum Delph.* ^e *Laëtant.* l. 3. c. 6. ^f *So in the Example propos'd by Gellius*, l. 9. c. 16. *this Restriction ought to be made, That the Law may not deprive Brave Men of their Reward.* ^g *L. 2. c. 16. f. 25*

Man to say, that he would use them so carefully as to do no Harm with them ¹.

'Tis also a Question, whether Promises carry this tacit Condition along with them, *That Things continue in the same Posture that they are?* Which in general is denied; for since this Condition is *Odi-ous* ²; as being apt to render the Act null, it ought not easily to be presum'd, if it be not actually added; unless it appears plainly that the present posture of Affairs was included in that one only Reason which we have been talking of. For thus we frequently read in History, that Ambassadors have return'd home without opening their Commission, upon such Revolutions, amongst those to whom they were sent, as may be presum'd to make void the whole Reason of their Embassy ³.

XXI. 2. That an Accident is inconsistent with the Design of the Person, may be made to appear; either, *First*, From natural Reason; or, *Secondly*, From some Sign of the Will.

In order to make this Discovery from *natural Reason*, *Aristotle* ^b thinks that the *Understanding* ought to be endued with a true Sense of Equity, and the Will with an hearty Inclination to judge according to Equity ^c. And he rightly defines ¹ Equity to be a Correction of the Law, where it is deficient, by reason of its being too universal. Or, in other Words, A dextrous Interpretation of the Law, shewing that such a particular Case ² ought not to be brought under it, because an Absurdity would follow: Which may all be apply'd to Wills and Pacts, *mutatis mutandis*. And here *Grotius* ^d well observes, that Equity has no Place in the Law of Nature, since that Law does not speak more universally than the Nature of Things requires. But yet that the Law of Nature, not as it is in it self, but as it is ³ generally express'd by Men, may want the Assistance of an equitable Interpretation: for Instance, when that Law says, that *Every Man ought to have his own*; we must in Equity qualify it with this Condition, that *he be in his Senses*, and that *no superior Right interposes*. For since, in Laws especially, all Cases

cannot be foreseen, or by reason of their infinite Variety express'd ^e ^f; it is therefore necessary for them, whose Duty it is to apply particular Cases to the general Decrees of the Law, to have a Liberty of excepting such as are so peculiarly circumstantiated, that the Legislator himself would have excepted them, had he been present, or had he foreseen such Cases ^g.

There is an Example in *Cicero*; it was a Law among the *Rhodians*, that if any Ship of Strength should be found in the Haven it should be confiscated. A great Storm, notwithstanding all the Seamen could do, drives a certain Ship into the *Rhodians* Haven: the Questor seiz's upon it, and the Owner pleads, from the reason of the Thing, that it ought not to be confiscated. Again,

The Law ⁴ forbids the Gates to be opened at Night, in Time of War; nevertheless a Man opens them, and receives in some Allies, who, if they had been kept out, would have been cut in pieces by the Enemy, which was encamp'd hard by ⁵.

However this Liberty must not be indulged too far, lest any one should rashly make himself Judge of the Legislator's Design; for sometimes he wills and commands that the very Letter of the Law should be put in Execution. And therefore we ought to have Reason very evidently on our side; when we act counter to it; as we certainly have, when we find that the precise adhering to the Letter is unlawful, *i. e.* repugnant to the Law of God or Nature: For to such, no Man can be oblig'd; indeed no Man in his Senses can be presum'd willing to oblige another to it ^h.

Sometimes Equity is taken in another Sense, as when any Cause is said to have the Benefit of Equity, or the Rigour of the Law is allow'd to be softened in Favour of the Criminal; for even private Men are said to have Recourse to Equity, when they don't so rigidly insist upon their Right against their Adversaries, but remit something of it.

Lastly, Causes are sometimes said to be left to

MR. BARB. NOTES on § XX.

¹ See another Example of this Author's mentioning. *Lib. 7. Chap. 6. § 11.* following.
² 'Tis not because the Condition is odious, but because, if we suppose it included in every Engagement, there is still something which may be relied upon ordinarily with some Certainty.

MR. BARB. NOTES on § XXI.

¹ His Words are, *Και ἔστι νόμος ἡ εὐνομία ἢ τὸ ἔπιθετον, ἢ τὸ ἀποκρίνον, ἢ ἡ ἀρετὴ διὰ τὸ καθ' ἑαυτὸν. Ubi supra. Lib. 5. Cap. 14. See his Magn. Moral. Lib. 2. Cap. 1, 2.* And a little Treatise of *Grotius*, *De Equitate*, at the end of the last Editions of his Book *De Jure Belli & Pacis*.

² Equity, or an Interpretation according to Equity, hath a place in being extended, as well as restrained. And here we may apply in general, the Saying of an ancient Poet:

Ὅτι νόμος ἀσπίς ἐστίν, ἢ δὲ ἔσται τὰς νόμους
ἀπὸ δακτύλου, συκαράντος μὴ γαλιότατος

Laws are a fine Thing without Contradiction;
But he that will apply himself nicely to the Letter of the Laws,
Seems to me a Sycophant or Caviller.

Τὸ καλὸν ἕσσεν καὶ κατὰ τὴν ἔξω τὴν νόμον.

What is good, is better than the Law.

³ The Author, thro' Mistake, says here, *minus*, for, *nimis*, but it may be a Fault in the Printing, tho' it remains in the last Edition of 1706.

⁴ *In quo genere (sive Totius) non simplex voluntas scriptoris auctoritas, quæ in omne tempus, & in omni fortuna imperabit, sed ex quodam facto et eventu, ad tempus interpretanda dicitur. Ut in eam, qui, cum Lex aperiri portæ non esset, aperuit quodam in bello. & auxilia pro loco in oppidum recepit, ne ab hostibus opprimerentur, si foris essent, quod pro munere habere haberent.* De Invent. Lib. 2. Cap. 42. See also Cap. 32.

⁵ So the *Digest*, again, *Quædam personam durum est: sed ita Lex scripta est.* Lib. 40. Tit. 9. *Quæ & à primis maximi liberi non sunt.* Et. Leg. 12. § 1. which is very hard, but so it is Written. See *Lex M. in Lib. 2. Tit. 1. Chap. 12.* The Lawyer say also, that we can't always know the Reasons for which Laws are made, nor ought we always to enquire after them. *Non omnium, quæ à magistratibus constituta sunt, ratio reddi potest: & ideo rationes earum, quæ constituntur, inquiri non oportet; aliquam multa ex his, quæ constituta sunt, subvertuntur.* Digest. Lib. 1. Tit. 3. *D. Inqui. Et Leg. 20. 21.* See Mr. NooDR's Observations, *Lib. 1. Chap. 2.* and Mr. LE CLERC's Reflexions upon it, in his *Biograph. Critique. T. 11. p. 222.*

^a Vide *Tac. Hist. L. 2. c. 1.* Where *Titus* upon *Galba's* Death returns back. ^b *Nicom. l. 5. c. 10.* ^c Vide *D. L. 47. t. 2. De furtis L. 61. f. 5.* ^d *Al Campanella Pol. e Xen. Hæparch.* To commit to Writing every thing that ought to be done, is as difficult as to know all future Things. ^f See above, Section 17. towards the End. ^g Vide *L. 1. t. 3. L. 3. 4. 5. 6. 10. 11. 12. 13. D. de leg. h* *Grat. ad Hebr. c. 4. 15.* Circumstances are such as render the observing of the Law a Breach against the chief Laws of Nature. *Add. V. Max. l. 3. c. 7. n. 1. c. 8. n. 6.*

Equity, when the Civil Law takes no Cognizance of them, or when the Nicety of the Law is not regarded, but the Thing is left to the Arbitrage of honest Men.

XXII. Moreover, a general Law ought to be restrain'd; if, altho' it be not absolutely unlawful to stick to the Letter, yet upon weighing the Thing in Candour and Prudence, it appears to be too grievous and burthensome, either in respect of the Condition of human Nature absolutely consider'd, or in regard of the Person and Thing in Debate, compar'd with the End of it. For some Things seem intolerable to Mankind in general, others to some certain Persons; some Business is such, as to take much Pains about it would be folly. And an Exception against those is still the more reasonable, if the Law be not only positive, and the Matter of it such, as makes it probable, that the Legiflator would not, at the great Inconvenience of the Party, demand the Observance of it; but also if the Neglect of it does not tend to the Dishonour and Contempt of the Authority that enacted it^a.

And therefore, without doubt, 'tis a foolish piece of Superstition in the *Abyssines*, so to weaken themselves by Fasting in Lent, as, for want of Strength and Courage, not to be able to resist the Inroads of their Enemies; infomuch that their Country has sometimes been over-run at that Time without Resistance^b.

Thus a Man that lends a Thing for a certain Time may demand it back before the Time expired, if in the mean while he happens to be in great Want of it himself; for by the Nature of such a beneficial Act no Man can be presum'd willing to oblige himself to his great Inconvenience.

So if a Prince has promis'd to assist his Ally with Forces, he may be lawfully excused, as long as he is in Danger at home, and wants those Forces for his own Defence: For since every Prince is, in the first place, oblig'd to protect his own People, all the Promises, which he makes to Foreigners, are understood to extend no farther than the Safety of his own Kingdom admits.

And thus a Grant of Immunity from Taxes and Tribute ought to be understood of ordinary annual Taxes only, not of those extraordinary Subsidies, which the urgent Necessity of Affairs may

require, and which the Publick can't subsist without. From hence it appears, that *Cicero*^c is too free in saying, that *such Promises are not to be kept, as are usefess to the Persons to whom they are made; nor if they be less beneficial to him, than prejudicial to the Maker*. For whether a Thing be useful, or not, to the Person to whom it is promis'd^d, it is not always for the Person promising to judge; unless he has Authority over him, or has him placed under his Care. Nor is any Prejudice or Burthen redounding to the Person promising, sufficient to release him from his Promise (for the Performance of every free Promise has some Burthen going along with it) but such and to much as, according to the Nature of the Act, ought in reason to be presum'd, excepted. As in the Example brought by *Cicero*^d, *If you had promised to appear immediately as Advocate for another, and in the mean time your Son falls dangerously Ill, it would not be a Breach of Duty not to perform what you have promis'd*^e.

XXIII. But, *Secondly*, There are also some Signs of the Will, from whence it may be certainly collected, that a Case ought to be excepted from the general Expressions of the Law; as when the Words of the Legiflator in another place, though not directly opposite to the Law now supposed to be before us (for that would be a Contradiction) yet by some peculiar Incident and unexpected Event of Things, happen to oppose it in the present Case; or, which amounts to the same Thing, when there are two different Laws, which don't interfere, and which easily may and ought to be observed at different Times, but can't both of them be satisfied, when by some Chance they call for our Obedience at the same Instant^f. In this Case, we must observe some certain Rules to know which Law or Pact ought to give place to the other, where both cannot be fulfilled. *Grotius* lays down these:

1. *That which is only permitted gives place to that which is commanded*^g¹. For a Permission includes a Liberty, but a Command carries along with it a Necessity of acting.

2. *That which ought to be done at this present time, is preferable to that which may be done at any other time*: Or when, at the same time, I lie under two Obligations, whereof one can't be satisfied but at this Instant, the other at any time hereafter; the

Mr. BARR. NOTE on § XXII.

¹ But, as Mr. FRED. GRONOVIUS observes, in a Note upon *Grotius*, 'tis no more than what *CICERO* means, for he speaks of a Thing hurtful, in the Judgment of all Persons of Understanding, and not only in the Imagination of him that made the Promise. It is certain, that in all *TULLY*'s Discourse there is nothing that can hinder us from explaining his Notion in this Manner.

Mr. BARR. NOTES on § XXIII.

¹ That is to say, Commanded or forbidden. *Plus enim valet sanctio permissioe. Auctor ad Herenn. L. 2. C. 10.* See *Quint. Decl. 374*. The Law which forbids is more powerful than that which permits. This is reserved in the Power of the Magistrate: And one who forbids can do more than all who allow: For that which permits leaves us to our Liberty, whereas that which forbids binds us under a Penalty. *Nam id quod imperatur, necessarium: illud, quod permittitur, voluntarium est. Cic. de Invent. Lib. 2. Cap. 49.* These last Words are part of a long Sentence, from whence *GROTIUS* takes all his Rules, which he draws up into a better Order. I will recite *Cicero*'s Words upon every Rule, as our Author does, but not quite thro'. It is true that he gives us the entire Passage at the end of the Chapter, but besides he engages himself upon an usefess Repetition; as he has placed it, it seems to contain something new, whereas it is no more than the Result of what he has said. Moreover, as Mr. *TULLIUS* observes, *Objerv.* 441. this Rule is true only when the Permission is general, and the Commands or Prohibitions particular. For, says he, 'tis certain on the contrary, that a particular Permission refers to a general Command, the Permission in this last making an Exception to the Command, as in the first Case the Command restrains the Extent of the Permission. There are, nevertheless, Cases, where the Permission and Prohibition are in one Sense general, as the Terms alledged by *Ziegler* in his Notes upon *Grotius*, will shew, pag. 395. "It is permitted to every Citizen to have a Concubine, but forbidden every Soldier to have a Woman in the Camp". The Prohibition is general, as to Citizens in the War.

² *CICERO*'s Words are, *Deinde ex lege utrum statim fieri necesse sit: utrum habeat aliquam moram & sustentationem: Nam id, quod statim faciendum est, perfici prius oportet. Cicero, De Inventione, Lib. 2. Cap. 49.*

^a Add, *Grat. ad Mat. c. 12. c. 3.* ^b *Fr. Alvarez. Desc. Eth. c. 13.* ^c *Off. 1.* ^d *D. 1.* ^e *Add. Sen. de Benef. l. 4. c. 35.* ^f *Char. de la Sageffe, l. 1. c. 37. §. 5.* ^g *A Command is of greater Force than a Permission; for that which is commanded, is necessary; that which is permitted, voluntary. Auth. ad Heren. l. 2. c. 10.*

former

former shall be perform'd, the latter put off to some other Opportunity. From whence it follows, that no Man can be enjoin'd two Things, which cannot both be perform'd together, and which neither of them admit of Delay. From hence we may give an answer to the Enquiry of *Plutarch* ², Why it was not lawful for the *Flamines Diales* to bear any other Magistracy? For since the Duties of the Priests were certain and settled, and the Duties of other Magistrates uncertain and not settled, the same Man, being both Priest and Magistrate, would not have been able to provide for Business of so different a Nature, if they happened to interfere in the same nick of Time: So that one must necessarily have been neglected for the Performance of the other. It seems that those Priests had not found out the Secret of making an Honour and a Gain of the Priesthood, and yet of throwing the Duty and Burthen of it upon their Curates.

3. An affirmative Precept gives way to a ³ negative; or when an affirmative Precept can't be satisfied but at the Expence of a Negative one, then the Performance of the affirmative shall be deferred or put off, 'till it ceases to clash with the other which is negative. The Reason of this is taken from the Nature of the affirmative and negative Precepts: For the Obligation of these is perpetual, uniform, and equally binding; whereas those presuppose an Opportunity of being put in Execution; which is presum'd not to offer it self, if it can't be done without the Violation of some Law: And therefore Things, in such a Posture of Affairs, are esteem'd morally impossible. Hence it is, that no Man can injure another, or break his Word, to promote the Advantage of a Friend, or to get wherewithal to be grateful, or generous: For 'tis a strange sort of Piety to steal Leather, and then give the Shoes in Alms to the Poor. *Mahomet* in the *Alcoran* forbids any one to give Alms of ill-gotten Goods. However, I can't say, that *Schach Abas* King of *Persia* was in the right in disposing of no Money so freely to charitable Uses, as that which he had raised from the Stews; For this, said he, was paid willingly, whereas the other Taxes were extorted with Sighs and Groans from the Subject: Yet, methinks, it was not so decent to pitch

upon Money rais'd after that Manner for such Uses ^b. To this Head, in some Respect, belongs what *Leo of Modena* ^c tells us of the *Hebrews*, that whatsoever was forbidden the Men, was also forbidden the Women; but as for the affirmative Precepts, the *Rabbies* declar'd, that none of those which were confin'd to a certain Time, oblig'd the Women, by reason of the Weakness of their Sex, and their living under the Government of their Husbands.

4. In Covenants and Laws, which are in other respects equal ⁴, that which is particular and applicable to the present Case take place of that which is general. For generals must be reduc'd to particulars, before they can be apply'd. As for what *Grotius* subjoins ⁵, That a Prohibition, which has a Penalty annex'd, ought to take place of that which has none; and that which has a greater, of that which has a less, is not so clear; for a Prohibition that has no Penalty, either fix'd or arbitrary, annex'd to it, is of no Force at all. And that Rule, Of two Evils to choose the least, can't properly be apply'd to moral Evils or Sins: For when it happens, that one of two Prohibitions must needs be violated, then that whose Violation is of least Concern is suppos'd to be permitted; for Example, one Law is, That no Man shall appear abroad in Arms on a Holy-day; another, That no Man shall stay at home upon hearing the Signal of a Tumult. In this Case the latter is to be look'd upon as an Exception to the former; as if the Law had been, That no Man should appear abroad in Arms on a Holy-day, unless he be commanded by the Magistrate in Case of a Tumult.

5. When two Duties happen to interfere at the same Point of Time ⁶, that which is the more honest and profitable is to be preferr'd. For the other Obligation is only upon Condition, that it can consist with an Obligation of greater Moment

6. When two Covenants, one upon Oath ⁷, the other not, can't be performed both together, the former ought to take place of the latter; unless the latter was added as an Exception and Limitation to the other; for an Oath added to a Covenant excludes all such Restrictions and tacit Exceptions, as are not necessary from the Nature of the Thing, and which, if there be no Oath, may be more easily admitted ^d.

³ Deinde utra Lex jubeat, utra vetet. Nam saepe ea, quae vetat, quasi exceptione quadam corrigere videtur illam, quae jubet. That Law which forbids, seems, by some sort of Exception, to correct that which commands. *Cic. de Invent. Lib. 2. c. 49.* See above *Lib. 1. Cap. 3. § 8.* and *Lib. 2. Cap. 6. § 2.* and *Lib. 3. Cap. 7. § 5.* But we are to distinguish here, whether the Laws which forbid, or command, are general, or particular. See above, § 1.

⁴ And again *Cicero* says, Deinde utra Lex de genere omni, utra de parte quadam; utra communiter in plures, utra in aliquam certam rem scripta videatur. Nam quae in partem aliquam, & quae in certam quandam rem scripta est, promptius ad causam accedere videtur, & ad judicium magis pertinere. *Ibid.* The more particular a Law is, the more does it seem to make to the Case in hand.

⁵ In which he follows *Cicero*, as in the other Rules. Deinde in utra Lege, si non obtemperatum sit, poena adficiatur, aut in utra major poena statuatur. *Ibid.*

⁶ Primum igitur Leges oportet contendere, considerando, utra Lex ad majores, hoc est, ad utiliores, ad honestiores ac magis necessarias res pertinet. Ex quo conficitur, ut, si Leges duae, aut si plures, aut quotquot erunt, conservari non possint, quia discrepent inter se, ea maximè conservanda patetur, quae ad maximas res pertinere videatur. *Ibid.*

⁷ This Rule is true, if we suppose all things else equal; for if he treats of two Agreements directly opposite one to another, the last in Date ought to mention whether the first were upon Oath, or not; for if the Agreements were only different, a Particular is of greater Force than a General. Our Author following *Grotius*, blindly establishes a Maxim here which he has confuted elsewhere. I mean, that Opinion of *Grotius*, in which he affirms, That an Oath added to a Promise produces a new and particular Obligation, by virtue of which a much stricter Interpretation is to be made of such Engagements, than of those that are made without calling God to witness. *Titius Oshere. 445.* Mr. *Thomasius*, who also rejects our Author's Maxim. *17tit. Jurispr. Divin. Lib. 2. Cap. 12. § 141.* adds, That he knows not what these Words mean. Unless the Agreement without an Oath hath been annexed to another, by way of Exception or Limitation, and it were to be wished, that he had brought some Example. I observe also, that our Author omits this Restriction quite, in his *Abridgment of the Duties of a Man and Citizen*, *Lib. 1. Cap. 17. § 13.*

^a Quæst. Rom. in fin. p. 291. C.

^b *Olearius, Itin. Pers. l. 5. c. 31.* The Law which forbids is of greater Authority than that which commands; for every Law that forbids is therefore stronger, because it corrects that which permits or commands, *Mar. Victorin. in exp. in 2. Rhet. Cic.*

^c *De Rit. Hebr. p. 5. c. 5. f. 1.*

^d *Medea in Euripides, ver. 743.* having desired *Ægeus* to entertain her, and not to deliver her up, when her Enemies should demand her, would needs have it confirm'd by Oath: Which *Ægeus* approved of, For so, says he, it will be the safer for me, if I can make such an Excuse to your Enemies.

7. An Obligation imperfectly mutual⁸ gives place to one that is perfectly mutual, and binding on both sides⁹. Thus what I own upon Contract, ought to be paid before what is due from me upon free Promise, or upon Gratitude, or any such Respect, if both can't be perform'd together. And therefore Phocion, when he was ask'd a Largeſs for a certain Sacrifice, reply'd, *Ask the rich, for I ſhould be aſham'd to give to you, and not to pay this Man* (pointing to Callides the Uſurer) *what I owe him*^a.

8. The Law of Generoſity gives place to the Law of Gratitude, *cæteris paribus*: Altho' each implies an imperfect Obligation. For the Debt of Gratitude has more Favour to plead in its Behalf than that of Generoſity; for *that* requires that we ſhould give becauſe we have receiv'd; whereas *this* is built upon no ſuch Foundation. And therefore, in this Caſe, becauſe the Neceſſity of Gratitude interſeres, the Object of Generoſity is ſuppos'd to be wanting. And this holds ſo far, that even Generoſity towards our own Relations, unleſs it be due upon ſome cloſer Obligation, gives place to the Duty of Gratitude.

9. Where the Laws were made by ſubordinate Powers, that of the Inferior yields to that of the Superior, if both can't be obey'd. Thus we ought to obey GOD, rather than Man^b. And the Command of a King carries more Weight with it, than that of the Maſter of a Family.

10. The more noble, uſeful, or neceſſary the Matter of one Law is, than that of another, the greater Weight ought the Law to have with us.

11. The cloſer Tie there is between any Perſon and us, the more ought Obligations due to him, to outweigh thoſe due to others, *cæteris paribus*^c.

Cicero^d has a Paſſage very pertinent to the

Matter in hand: *Contrary Laws*, ſays he, *admit of Diſpute, when two or more ſeem to claſh. As thus, one Law ſays, That whoſoever kills the Tyrant, ſhall be rewarded as a Conqueror at the Olympick Games, and may demand what he pleaſes of the Magiſtrate, and the Magiſtrate ſhall grant his Requeſt. Another Law enact's, That upon the Death of the Tyrant his five neareſt Relations ſhall be put to Death. Alexander, who had exercis'd Tyranny over the Phæreans, was ſlain in the Night by his Wife Thebe, and ſhe, for her Reward, demanded her Son, whom ſhe had by the Tyrant. Some were of Opinion that the Son by the Law ought to be put to Death; the Thing may bear a Diſpute. Now, in ſuch Caſes it ought to be conſider'd, which of the Laws conduce to greater, i. e. to more honeſt, more profitable, and more uſeful Ends. And that ought to be obſerved which has the greater Ends to ſupport it. Then we ought to conſider which Law was made laſt, for the laſt is of greateſt Obligation. Then which of the Laws commands, which permits only; for that which is commanded is neceſſary, that which is permitted, voluntary. Then which Law is penal, and which is enforced with the greater Penalty; for that ought to be moſt obſerved, which can be violated with the leaſt Impunity. Then which commands, which forbids; for that which forbids is often an Exception to that which commands. Then which ſeems deſign'd to bind in general, which in part only: Which to conclude in common ſeveral Things, which ſome particular one only; for that which binds in part, or ſome certain particular Thing only, ſeems moſt capable of being applied and brought into Court. Then by the Law what ought to be done immediately, and what admits of Delay; for that which can't be put off, ought to be obey'd firſt.*

⁸ I wonder that our Author was not aware, that all theſe following Rules are contained in the fifth, of which they are only the Conſequences; and therefore he himſelf hath left out the three laſt, in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Cap. 17. § 13.

⁹ See the Explication of this Diſtinction, Lib. 3. Cap. 4. § 9. above.

¹⁰ See Mr. BUNDEU's Diſcourſe, entitled, *De comparatione obligationum, quæ ex diverſis hominum ſtatibus oriuntur*; in the *ſelecta Jur. Nat. & Gent.* pag. 680, & ſeqq.

^a *Plut. Phocione*, 745. C. D. ^b *Añ.* iv. 19. c. 14, 15. Where he talks of the Degrees of Society.

^c *Gal.* vi. 10. *1 Cor.* viii. 13. *1 Tim.* v. 7. *Clc. Off.* 1. ^d *L. 2. de Invent.*

C H A P. XIII.

Of the Way of deciding Controversies in the Liberty of Nature.

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| <p>I. What is due to others is willingly to be performed.</p> <p>II. In a State of Nature there is no Judge.</p> <p>III. Controversies, which can't be decided by Conference, are to be referred to Arbitrators.</p> <p>IV. There is a Covenant between an Arbitrator and the contending Parties.</p> | <p>V. Arbitrators, in a Doubt, are bound to judge by Law.</p> <p>VI. Arbitrators are not to judge of the Possession.</p> <p>VII. Of the Mediators of a Peace.</p> <p>VIII. What if Deeds be lost.</p> <p>IX. Of Witnesses.</p> <p>X. Of the Execution of the Sentence.</p> |
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BY the Law of Nature every Man is oblig'd to perform, and to pay, of his own Accord, what by any Title is due from him; and if any one has designedly damag'd or offended another, the same Law moreover obliges that the Delinquent should seriously repent, and give Security to live in Peace and Friendship for the future. And as this Repentance, where it is not extorted by Force, but proceeds from the Principle and Consideration of Justice, is a sufficient Indication of the Offender's Amendment: So on the other side, after such Satisfaction is made, and Security given, the Party injured ought to forgive him, and to live peaceably with him for the Time to come. And if a Man thro' Passion and a Desire of Revenge refuses it, he must be answerable for the Breach of the Peace, and the Consequences of it^a. For it is inhuman and brutish, not to be satisfied with any thing less than the Blood of the Offender: And when a Misunderstanding is once begun, to continue it on for ever. It was a cursed Speech of *Cato's*^b, who, when he met a young Man just slusht with the Ruin of his deceased Father's Enemy, took him by the Hand; and Thus, said he, *ought we^c to appease the Ghosts of our Parents; not with Kids, or Goats, but with the Tears and Destruction of their Enemies.*

II. But all Men are not of such a happy Temper, as to be willing, of their own Accord, to perform their Duty: And besides, several Controversies may arise, concerning the Certainty and the Quantity of a Debt, and the rating of a Damage, the Competency and Exercise of certain Rights, the fixing Boundaries, the Interpretation of Pacts, and other Pretensions; and yet in the Liberty of Nature^d no Man can take Authority up-

on him to determine and compose such Controversies. Indeed *Hobbes*^e makes every Man his own Judge in a State of Nature^d; by which he can mean nothing else, but that he who has no Superior to govern him, may manage his Business as he pleases, and appoint Means for his Preservation, according to his own Discretion. For if another Man should take upon him to judge of my Affairs, yet, since he has no Authority to determine me by his Opinion, it will depend intirely upon my Will and Pleasure, whether, or how far, I shall be concluded by him; and so ultimately the Management of my Actions will lie in my own Breast; which yet I ought to govern according to the Rules of Nature.

As to what remains; tho' every Man may, in that State, either neglect or defend his own Right, either put up, or return an Injury; yet he can't, in his own Cause, give Sentence so as to oblige him, with whom he has the Controversy, to stand to it. For tho' he designs never so justly, nay, tho' he protests upon Oath, that he decrees what seems to him to be right; yet since the other may have as great a Respect for his own Opinion, if they happen to disagree, nothing can be done by reason of that Equality, which is essential to the State of Nature. *Almost all wicked Men think fit to be² Judges in their own Case, Arist. Pol. iii. c. 9.*
³ No Mortal ever thinks an Injury against himself small, most think them greater than really they are, Salust. Catil. c. 51.

III. But yet the Law of Nature by no means allows, that every Man should immediately fly to Arms, and put the Controversy to the Decision of the Sword, before milder Methods have been attempted^f. And therefore the Parties ought first

Mr. BARBEYRAC'S NOTES on Chap. XIII. §. I.

^a See *Lib. 2. Chap. 5. § 19.* above.

^b See what Mr. HERTIUS says upon the Notions of the Pagans upon that sort of Revenge, in his Discourse, *De Herede Occisi Vindice*, Sect. 1. § 4. in *Tom. III.* of his *Opuscul. & Commentat.*

Mr. BARB. NOTES on § II.

¹ In which Sense that of *Thucydides*, *Lib. 1.* may be admitted; *βιάζεσθαι γὰρ, οἷς ἀν' ἑσέ, ἀναγκάσει ἐξείναι ἀποβῆσθαι.* They that may use Force have no need to go to Law.

² ARISTOTLE'S Greek is, *Σταθὲν εἴ οἱ πλείους ἐπιλαὶ κερταὶ ἀπὸ αἰτίας.*

³ SALUST'S Words are, *Neque cuiquam mortalium injuriæ suæ parvæ videntur. Multi eas gravius æquo habuere.* SENECA, as Mr. HERTIUS observes, says, That every one in that Respect has a Royal Spirit in him. We desire that all Things may be allowed us towards others, but are not willing others should be permitted any thing towards us. *Regis quisque intra se antrum habet, ut licentiam sibi dari velit in alterum, in se nolit.* De *Irâ*, *Lib. 2. Chap. 31.*

Mr. BARB. NOTES on § III.

¹ Nam cum sint duo genera decertandi, unum per disputationem, alterum per vim, cumq; illud proprium sit hominis, hoc belluarum, confugiendum est ad posterius, si uti non licet superiore. De *Offic. Lib. 1. Cap. 11.* "There being two Ways of Contending, one "by Argument, the other by Force, and that being proper to Men, this to Brutes, Recourse is to be had to the latter, when "the former is refused." See *Justin, Lib. 8. Cap. 1. n. 4. &c.* When, without trying to compose Matters amicably, Arms are taken up, then that of *Ovid* takes place, *Injustum rigido jus dicitur ense.* *Trist. l. 5. El. 10. v. 43.*

^a C. Pontius in *Livy, l. 9. c. 1.* argues excellently to this Purpose.

^b Vide *Plutarch in the Life of Cato the Elder,*

p. 344. E.

^c De *Cive, c. 1. f. 9.*

^d How far this is true, may be seen in *B. 2. c. 2. l. 3.*

to endeavour, by some friendly Debate between themselves or their Agents, to compose the Difference ^a. Indeed even after Arms have been taken up, and each Party, by the Calamity of War, has been induced to hearken to gentler Accommodations, we generally find that the Difference is at last adjusted by Treaties and Negotiations. If the Thing and the Temper of the Parties admit of it, the Dispute may easily be decided by Lot ^b. But if neither a Debate is able to put an End to the Controversy, nor either Party thinks fit to trust that to Chance, which each, in Reason, thinks to be on his side; the only Thing they can do, is to pitch upon an *Arbitrator*, and each bind himself to stand to his Award ^c. And here *Grotius* ^d well observes, that in a doubtful Case, altho' each Party ought to come to Terms, rather than go to War, yet the *Plaintiff* is more oblig'd to it than the *Defendant*; for the *Defendant's* Plea is the more favourable even in the Law of Nature.

IV. From the Design of appealing to an *Arbitrator*, it appears how he ought to be qualified. For therefore recourse is had to him, because a Man's Judgment, by reason of that natural Affection which every Man bears to himself, is suspected to be partial in his own Cause ^e. Upon which Account the *Arbitrator* must take care not to sacrifice Right to Affection, nor to be bias'd in Favour of one more than the other, any farther than the Merits of the Cause incline him. And if he behaves himself thus impartially, he ought not to regard the unjust Resentments of him that is cast. *Bias* ^f used to say, that *he had rather judge between those that were his Enemies, than his Friends; for, in the latter Case, let him judge how he would, one of his Friends would turn his Enemy; whereas, if both were his Enemies, one probably would become a Friend.* And therefore it is manifest, that a Man who has any Interest in the Success of either Party, ought not to be an *Arbitrator* between them; for fear he should not be able to observe so exactly that Indifference and Impartiality which he ought ^g.

From hence it follows, that there ought to be no Pact or Promise between the *Arbitrator* and the Parties, whereby he may be prejudiced in Favour

of either of them ^g. Nor ought he to expect ^h any other Reward for his Sentence, than the Satisfaction of having judg'd right. Absurd therefore was the *Arbitrage* which *Maximilian* and the *Venetians* submitted to *Leo X.* whilst each of them privately tamper'd with him to declare of his Side ^h.

Now altho' the contending Parties enter into Compact with the *Arbitrator*, about taking upon him his Office (for as no *Arbitrage* can be exercised without the Consent of the Parties, so no one can be forced to be *Arbitrator* against his own Consent) yet it is not from the Force of that Compact, that he becomes obliged to judge according to what he thinks is agreeable to the Laws of Conscience and Equity; or they to stand to his Award. For the Law of Nature, which can receive no Enforcement from any Compact, obliges him to judge according to Justice; and they are obliged to submit, without any Reserve, to his Determination, because otherwise the Design of going to an *Arbitrator* would be frustrated, and there would be no End of such Appeals.

For suppose they should agree to submit themselves to his *Arbitrage*, not absolutely, but upon Condition that he should decree according to Justice, how would they ever be able to decide the Matter? For the Parties, being supposed to be in a perfect Liberty of Nature, are as yet equal; and each has Power to enquire whether the *Arbitrator* has perform'd the Condition, in judging according to Justice. And therefore, if, after the Sentence be given, it should seem unjust to either Party, or should really be so, another Controversy would arise about it; which since neither this *Arbitrator*, nor the Parties could be able to determine, it would be render'd necessary to apply to another. And if with this other they enter into the same conditional Compact, and a Doubt should arise about the Justice of his Sentence also, they would be forced to apply to another for Relief, and so on *in infinitum*.

From hence it follows, that the Pact, which the Parties enter into, when they consent to stand to the Award of an *Arbitrator*, ought to be conceiv'd simply, and not upon Condition that he pronounces Sentence ⁱ according to Justice; for else, as was said before, there might be an Appeal from

Mr. BARB. NOTES on § IV.

¹ ΠΑΡΑΧΩΣ ΔΕ ΤΡΟΧΟΝΤΩ Ο ΔΙΑΜΟΝΙΟΣ, Ο ΔΙΑΜΟΝΙΟΣ ΔΕ Ο ΜΙΣΘΩ. *Arist. Pol. l. 4. c. 12.* "An *Arbitrator* is every where to have a "Trust reposed in him." Upon the same Principle depended the Answer that *Amasis* King of *Egypt* gave the *Aleans*, when they were to be *Arbitrators* in the *Olympick Games*, and had sent to him to advise them, how they might perform the Office with greatest Justice; *Let none of the Aleans*, said he, *be concern'd in the Games.* Hither may be refer'd that scandalous Decree of the *Roman* People, who in the Controversy between the *Aricinians* and the *Ardeates*, adjudged the Land to themselves. *Livy, Lib. 3. Cap. 72. Add. Just. l. 8. c. 3. n. 15.* where is a like Example of *Philip of Macedon*, See *Diodorus Siculus, Lib. 1. Chap. 95.*

² *PLINY* gives this Commendation to *Trajan*, as to the Causes on which he gave his Sentence, *Nec aliud tibi sententiæ tue pretium, quam bene judicavisse*, *Plin. Panegy. c. 80. n. 1.* You had no other Reward of your Determination than that you judg'd well.

³ The *Digests* speak to this Purpose, *Qualem autem sententiam dicat Arbitrator, ad Prætorum non pertinere, Labeo ait, dummodo dicat, quod ipsi videtur. Et ideo, si sic fuit in Arbitrum compromissum, ut certam sententiam dicat, nullum esse arbitrium, Lib. 4. tit. 8. De receptis, qui arbitrium receperunt, ut sententiam dicant, Leg. 19. princ.* Whence it comes, that according to those Lawyers, the Sentence of an *Arbitrator* ought to end the Matter entirely, and not to be remov'd to the Judgment of another *Arbitrator.* *Idem Pedius probat, ne propagentur arbitria, aut in alios interdum inimicos agentium transferantur, sua sententia finem controversiæ cum imponere oportet.* *Ibid. Leg. 32. § 16.* Further, as to what concerns the Agreement of Parties, and the Qualities or Duties of *Arbitrators*, as to the private Affairs of the Members of the same State, we may consult the whole Title which I have quoted, as also *Mr. DAUMART's Civil Laws in their Natural Order, Part 1. Lib. 1. tit. 14.* and the *Publick Law* of the same Author, *Lib. 2. tit. 7.*

^a Vide *Grot. l. 2. c. 23. f. 7.* ^b *V. eund. d. l. f. 9.* ^c *V. Grot. d. l. f. 8.* ^d *D. l. f. 11.* ^e Vide *L. 2. t. 1. l. 10. D. de jurisdic. Plut. de adulat. & amic. discernè* Every one is the greatest Flatterer of himself. ^f *Diog. Laert. l. 1. f. 87. Aut. Gell. l. 1. c. 3.* ^g Compare *Hobbes de Cive, c. 3. f. 14.* ^h *Gaucciard, Hist. l. 11. about the end; and l. 12. p. m. 245.*

one ⁴ *Arbitrator* to another, and from him to a third, and so on without End. Besides, that there can lie no Appeal from the *Arbitrator* is plain, because there is no superior Judge to receive it, which obtains even in civil States, where the Parties by Consent pitch upon an *Arbitrator*, provided the Cause be such as it does not concern the Government to intermeddle with: And if any Country admits of such an Appeal, it is by reason of some positive Law. Indeed, in some places, those extraordinary Judges who have Causes laid before them, to be examined and decided out of hand, without the tedious Forms of Law, come under the Name of *Arbitrators*. And from these nothing hinders but that an Appeal may lie to a Superior.

But when we say that the Parties ought, right or wrong ⁵, to stand to the Sentence of the *Arbitrator*, it must be understood with some Restrictions. For tho' I can't fly off, because he decrees otherwise than I expected; yet his Sentence shall not bind me, if it manifestly appears that he tamper'd with the other Party, and receiv'd Bribes of him, and concerted Matters to my Disadvantage. For he who evidently ⁶ takes part with either side, ceases to bear any longer the Person of an *Arbitrator* ³.

If it be thought fit to ⁷ refer a Cause to more than one, 'tis best to have an uneven Number; for else they may divide into equal Votes, and so leave the Business undecided.

V. Moreover, *Grotius* ^b would have it consider'd, whether the *Arbitrator* be chosen as a Judge, or as having Authority more at large of giving Sentence, not according to the ¹ Rigour of the Law, but according to Reason and Equity. For sometimes both Parties appeal to the Law; and there the *Arbitrator*, as if he were a Judge, ought to weigh the Merits of the Cause, and to determine according to Law. Sometimes one Party only insists upon the Rigour of the Law, and the other, in Favour and Compassion, desires a Mitigation of it; or, in other Words, appeals to Equity: Where by *Equity*

I don't mean that dextrous Interpretation of the Law, mentioned in the foregoing Chapter, which even a subordinate Judge ought to make use of: but an Abatement of the Rigour of the Law, upon the Dictates of Humanity, Charity, Compassion, &c. which none but the supreme Judge ², or an *Arbitrator* chosen on purpose, has Authority to apply.

If it be doubtful under which of these two Qualifications the *Arbitrator* is chosen, he ought to suppose himself tyed up to those Rules, which a Judge would be obliged to follow; for it is for want of a Judge and Judicature that he is called in: And, in a doubtful Case, we ought to take that side which is clearest ³. Besides, an *Arbitrator* can't so easily act unjustly, if he has a limited, as if he has an absolute Power delegated to him. Indeed to persuade a Mitigation of the Rigour of the Law is properly their Business, who voluntarily, without entering into any Engagements, interpose as common Friends between the contending Parties.

Now as he that judges between Fellow-subjects, judges according to the *municipal* Laws of the Place; so he who judges between those who acknowledge no common *municipal* Laws, ought to judge according to the Law of Nature; unless the Parties submit their Cause to the positive Laws of some particular State.

VI. The same *Grotius* ^c observes also, that an *Arbitrator*, chosen by the supreme Authority, ought to take Cognizance of the Merits of the Cause, and not of the Possession; for it belongs to the civil Law to determine that, whereas, by the Law of Nature, the Right of Possession follows the Property. Concerning which my Opinion is, that altho' by the Law of Nature and Nations it does not seem necessary, that if a Man be turned out of Possession he should immediately be put in again, before the Merits of the Cause be heard, especially if it can be immediately determined; yet, in many Cases, the *Arbitrator* ought to make Enquiry who was in Possession, that he may know whom it chiefly concerns to make out

⁴ *Ad eo summum quisque cause sue Judicem facit, quemcumque elegit.* Plin. Nat. Hist. Præf. f. 47. "Every one makes him, whom he has chosen, the chief Judge of his Cause." *Ἦν ὁ τις ἑαυτὸν ἀπὸ συνθέτου δικαστῆς, ὃ ἀρχαῖον ἐπιπέσειον δυνάμει, ἐκ τῆν δίκων ὁ ἰσχυρὸς ἐς ἑαυτὸν ἐπιπέσειον δικαστῆρον.* Lucian *Abdicat.* l. 1. p. 715, &c. Edit. *Angl.* "If any one pitches upon those to be Judges in his Case, whose Opinion he was not otherwise obliged to stand by, after having made the Choice, he ought to submit to their Determinations." From hence may be brought a Reason of that in QUINCTILIAN, *Declam.* 372. *Judicia tamen judicis rescindi non possunt.* "One Decree cannot make void another."

⁵ This is said formally in a Law, where the Arbitrators spoken of are opposed to another sort of Arbitrators, to whose Judgment we are not bound to submit, unless it be conformable to the Rules of Equity. *Arbitrorum enim genera sunt duo, unum ejusmodi, ut sive æquum sit, sive iniqum, parere debeamus; quod observatur, cum ex compromisso ad arbitrium itum est; alterum ejusmodi, ut ad boni viri arbitrium redigi debeat.* Digest. Lib. 7. tit. 2. *Pro Socio*, Leg. 76. See the following Laws.

⁶ The Law of the Romans grants in this Case an Exception of Fraud. *Arbitrorum ex compromisso sententiæ non obtemperant, si sordes, vel evileus gratia eorum, qui arbitrati sunt, intercessit; adversus filiam tuam agentem ex stipulata, exceptione doli mali uti poteris.* Cod. Lib. 2. tit. 56. *De receptis Arbitris*, Leg. 3.

⁷ So the Digests direct, *In impari enim numero idcirco compromissum admittitur, non quoniam consentire omnes facile est, sed quia, etsi dissentiant, invenitur pars major, cujus arbitrio stabitur.* Lib. 4. tit. 8. *De Receptis*, &c. Leg. 17. § 6.

MR. BARR. NOTES on § V.

¹ GROTIUS quotes here a Passage of *Seneca*, *De Benef.* Lib. 3. Cap. 7. where he does not treat of Arbitrators, but such subordinate Judges, as the Prætor or Governor ordered for the Parties, who were obliged to follow the Forms prescribed them strictly, or the Maxims of Equity, according to which the Cause respected an Affair of strict Justice, or of Honesty. See Mr. NODD'S Treatise, *De Jurisdict. & Imperio*, Lib. 1. Cap. 13.

² This is what the Emperor *Constantine* expressly speaks of, in this Law quoted by Mr. HERTIUS: *Inter acquitatem jusque interpositam interpretationem nobis solis, & oportet, & licet inspicere.* Cod. Lib. 1. tit. 14. *De Legibus*, &c. Leg. 1. See the preceding Chapter, § 21. Note 5.

³ So the Digests speak, *Semper in obscuris, quod minimum est, sequimur*, Lib. 1. tit. 17. *De Div. Reg. Jur.* Leg. 9.

^a Vide L. 7. t. 2. l. 76, &c. *D. pro Socio.*

^b Vide *Grot.* L. 3. c. 20. f. 46. n. 24

^c *D. l. f.* 48.

his Title. ¹ For the Plaintiff ought to have very clear Proofs to support his Pretensions, whereas it is enough for the Defendant to confute the Arguments of his Adversary; tho' sometimes it may be convenient, over and above, to shew his own Title also. However 'tis not sufficient for the Arbitrator to give Judgment concerning the Possession only, for that is generally out of dispute, and seldom brought before him; but his business is to examine into the Merits of the Cause, and by a final Determination to put an End to the Suit. But while the Cause is depending, no Innovations ought to be made; and, if the Plaintiff can't make out his Pretensions, Judgment ought to be given for the Party in Possession.

VII. But *Mediators*, who, interpose between contending Nations, either preparing, or actually engaged in War, and endeavour, by their Authority and their Arguments and Intreaties, to bring them to Terms of Accommodation, are not properly *Arbitrators*². These having so pious a Design in hand cannot be obstinately rejected, without the greatest Inhumanity, even altho' they should appear to be more intimately allied to either Party. For the other still has Liberty either to accept or refuse what they offer: And it is the chief Business of a Friend, where he cannot join in the Quarrel, to endeavour to bring it to an amicable Composition. Besides, it is frequently the Interest of a Prince, to prevent War from breaking out between Nations; for some Sparks of the Fire, kindled in his Neighbourhood, may possibly reach him; and, besides, it may be dangerous for him to have both, or either of the Parties entirely ruined; and therefore, as he values his own Safety, he ought to endeavour might and main to hinder the Flame from coming to a Head. And the more earnestly ought *Christians* thus to labour in composing Differences, because even the *Alcoran*^b (how senseless soever it be in other things) does wisely in commanding, that if two *Mahometan* Nations go to War, the rest shall interpose, and force the Aggressor to make Satisfaction, and after that oblige both to live in Friendship and Amity for the future.

'Tis certain, that if it be the Interest of several to have the Quarrel made up, they may enter into Compact jointly to labour for Peace; and if their Endeavours should prove unsuccessful, they may then mutually prescribe to one another, how far each shall make himself a Party in the War. But this only, in case none of them has any Pre-engagement upon him to assist either of the Parties, in case of War; for

such an Obligation can't be limited by a Treaty made afterwards with a third Person.

Moreover, two or more, whom it concerns to have an End put to the War, after having weighed the Pretensions of each side, may lawfully agree upon what Terms a Peace ought to be concluded, and then offer them to the Parties with a *Manifesto*, that they will join Forces against him that refuses them. For a Prince does not, by this Means, obtrude his *Arbitrage* upon another against his Will; nor decides another's Quarrel by his own Authority (both which are Enroachments upon the Liberty of Nature) nor are those Terms offer'd to the Parties so, as if they were oblig'd to comply with them. But since, by the Law of Nature, a Man may join Forces with him, who, he thinks, has receiv'd an Injury, especially if the Consequence of it is likely to redound to his Damage; by such a Method as this he openly declares for Equity and Peace, that he is desirous others would act fairly, and that he is not willing to enter into a War, before the adverse Party has rejected the Proposals of Peace^c.

And this sort of Mediation is the more commendable, if it puts an End to a War, that would prove destructive to one or both Parties; yet he, who makes himself a *Mediator*, should take care that he be able to compel by Force, that Party which refuses to stand to his Determination^d.

VIII. How the Form and Process of a Debate before an *Arbitrator* is to be manag'd, common Sense will best direct, according to the different Circumstances of the Thing; for it would be impertinent to give tedious Directions how each Party ought to open his Cause, how to state the Question, how, after the Arguments on both sides have been weighed, the Sentence ought to be pronounced: We need only observe, that if the Pretensions on one side cannot be made out but by Deeds, and they happen to be lost, the *Arbitrator* has nothing to do, but, with the Consent of the other Party, to give him his Oath^e: I say, *with the Consent of the other Party*; for else, in the Liberty of Nature, no Man is obliged to put the Issue of his Cause upon another Man's Conscience. It is also in the Power of the Parties to refer themselves to the Decision of a Lot, or a² Duel, as has formerly been practis'd among many Nations.

However, I do not see how the³ Loss of my Deeds can extinguish my Right; indeed I cannot have Justice done me in the civil Court, being

Mr. BARR. NOTES on § VI.

¹ See the *D. de* appoint. *Ex parte controversiæ Possessionis hic est, tantum, ut prius prononciat Judex, uter possideat: ita enim fiet, ut h. 7. dicitur eod. de possessione, Pettitoris partibus fungatur, & tunc de Domino queratur.* Lib. 41. tit. 2. *De acquirendâ, vel amittendâ possessione.* Leg. 35. Besides, as there are sometimes great Presumptions for one of the Parties, Equity requires, if he hath been, for Example, dispossessed by an unjust Force, he should be again put in Possession without a strict Examination of the Petitioner, which may be long and intricate, that the Detainer, during that Time, may not enjoy peaceably the Fruits of his Force, and the Advantage of the Possession. See Mr. TITIVS's *Observ.* on LAUTERBACH, *Obs.* 1071.

Mr. BARR. NOTES on § VII.

¹ The Words of VELLEIUS PATERCULUS are, *Festinationem itineris ejus [Cæsaris] aliquandiu morata Mussilia est, fide melior, quam consilio prudentioris interpositæ principum armorum arbitria captans, quibus illi debent interponere, qui non parentem coercere possunt.* Lib. 2. Cap. 50. See Mr. BOECLER's Discourse, entitled, *Quies in turris*, which is the 34 of *Tom.* 1. pag. 996, &c.

Mr. BARR. NOTES on § VIII.

¹ See *Lib.* 4. *Chap.* 2. § 21. foregoing.

² See *Lib.* 8. *Chap.* 8. § 5. following.

³ See *Lib.* 3. *Chap.* 6. § 16. foregoing.

⁴ Vide *Galerianum. Hist.* l. 4. where is debated whether *Hercules* Duke of Ferrara should perform the Part of an *Arbitrator* or *Mediator*, between the *Venetians* and the *Florentines*. ⁵ *Cap. de Clausuris.* ⁶ Vide *L.* 3. l. 4. c. 19. at the End. *Jur.* l. 6. c. 6. n. 1. ⁷ Vide *Vell. Patere.* l. 2. c. 50. *Leg.* l. 9. c. 14.

not able to produce sufficient Evidence; but, in the Liberty of Nature, 'tis enough to justify me in the Prosecution, if I be fully convinced of my Right, tho' I be not able to make out my Pretensions to another ^a.

IX. This Arbitrators have in common with Judges, that, in the Examination of Matters of Fact, they ought to shew themselves equal to the bare Asseveration of each Party, *i. e.* when they contradict one another, to believe neither. But when Deeds ^b, Arguments, and undeniable Instruments can't be produced, they must then give Judgment according to the Testimony of Witnesses ^c.

And these Witnesses ought to shew themselves indifferent towards either Party, and not to let Favour, or Hatred, or Revenge weigh more with them than their Conscience ^d. *Thuanus* ^e relates, that heretofore in *Great-Britain* an *English* Man could not be a Witness against a *Scot*, nor a *Scot* against an *English* Man, by reason of the Enmity between the two Nations: But *Cambden* ^f tells us, that this obtain'd only between the bordering *Scots* and *English*; so that if never so many *English* Men should, with their open Eyes, see a *Scot* commit Murder, their Testimony would signify nothing, unless some *Scot* or other testified the same Thing.

And therefore as my Adversary may refuse to admit of my near Relations as Witnesses ^g; so may I except against my profess'd Enemies. Indeed sometime Relations are excus'd upon a Principle of Humanity, for fear they should be forced to offer Violence, either to their Affections, or to their Conscience. And ^h therefore the *Roman* Law never oblig'd the Client to be Evidence against his Patron, nor the Patron against his Client ⁱ: But besides this, there was another very good Reason why Servants should not be allowed to give Evidence against their ^k Masters ^h; for, as *Cicero* says, *If that which is done in our own House, and among our selves, were permitted to be publicly*

exposed and brought against us, the Master would be the Slave, and the Slave Master. Indeed *Theodoric* ^l forbid the Abuse of this Law by an Edict; for some bought up other Peoples Servants, who were conscious of their Crimes, lest they should be brought as Evidence against them. Lastly, it is very reasonable, that ^m no Cause should stand or fall by the Credit of any one single Witness ^k, not only because one may more easily be deceived or corrupted than many, and there is no Falseness so impudent, but may get the Assistance of one Witness ^l; but also because an able understanding Judge may discover the Witnesses to be false, by opposing to one another the Examinations of several ^m, whereas one may easily be consistent with himself; and altho' by this Means some Crimes must remain unpunish'd in this World, and some must lose their just Right, who perhaps have but one Witness to support it; yet this Inconvenience is not so great, as if every one's Life and Fortune lay at the Mercy of any one Man's Impudence and Villany; for 'tis better that a few guilty Persons should escape Punishment, than that many innocent should suffer ⁿ.

Yet *Selden* ^o observes, that against a *Gentile* the *Jews* admitted of one Witness as sufficient. And *Gratius* ^p takes notice, that one Witness was enough, not to condemn, but to inform the Court, and, in pecuniary Matters, to put the Defendant to his Oath. At this Day, among the *Moors* the Evidence of two honest Men is sufficient, but if the Witnesses be suspected, then twelve Persons are required; for they think as much Credit may be given to twelve, let them be ever so profligate, as to two, be they ever so honest ^q ^r. The *Hebrews* admitted none to be Witnesses, but such as were of good Reputation; mad Men were excepted against, and Children, till they were thirteen Years of Age; and Thieves, even after they had made Restitution; those too who lived by Gaming, and *Publicans* who exact more than their due, and such as deal in those Things which deserve Stripes. Among the *Turks*, those who have made

MR. BARR. NOTES on § IX.

¹ For as *Iseus* says, *Orat.* 7. p. 504. 505. Ἄ κριμύτερον καὶ τὸ εἶναι μάρτυρας ἢ εἶναι. "Arguments are better than Witnesses." And, in *Orat.* 3, he shews, That in Matter of Inheritances particularly, *Deeds are preferable to Witnesses.* *Philos. Jud. de Deed.* p. 764. *Ed. Par.* "If Arguments and Writings be wanting, the Controversy must be decided by Witnesses." See *Lex Wisigoth.* l. 2. t. 4. c. 3.

² There were, nevertheless, certain Cases excepted, as well for the Criminal as for the Citizen. See Mr. NODD's *Probabilia Juris*, Lib. 3. Chap. 5, 6. as also the Interpreters on *CICERO'S Orat. pro Milone*, Chap. 22.

³ *Pro Rege Deputar.* Chap. 11. *Lucian in Astin.* Tom. 2. Page 80. *Edit. Anst.* "Servants must needs know both the Good and the ill Things of their Masters." There is such another Passage in *LYSIAS, Orat. de furo. Oloro. inano. Plant. Barch. At.* 4. Sc. 6. ver. 20, 21. I know I am a Slave, and therefore I am ignorant of even that which I know." See a Passage in *ISOCRATES TRAPEZ.* de fide quaestionum, pag. 634, &c. and *Aristot. Rhet. ad Alex.* Chap. 17. Hither may be refer'd the History, or rather the Fable, of *Arion*, in *Gabriel. Sionit.* de urbibus & moribus Oriental. c. 3. See *Lex Wisigoth.* Lib. 5. Tit. 4. Chap. 14. with which may be compared, *ibid.* lib. 3. tit. 4. chap. 10. and lib. 6. tit. 4. chap. 3. and *Capitulare Caroli*, lib. 7. chap. 280. *Edictum Regis Theodor.* chap. 48, 46, 101.

⁴ So the Code orders, *Et nunc manifestè juremus, ut unius omnino testis responsio non audiatur, etiam si præclaræ curiæ honor fulgeat.* Lib. 4. Tit. 20. *De testibus*, Leg. 9. § 1. See also the *Digests* Lib. 48. Tit. 18. *De quaestionibus*, Lib. 20.

^a Vide *Comestag. de Unione Lusitan.* l. 5. p. m. 222. To this Purpose is that of *Quintilian*, *Declam.* 312. *The Condition of Man is miserable, since it seems necessary to have a Witness for every thing we do: Truth has so little Power, and False so little Esteem, as that scarce seems sufficiently proved, which is attested by Two.* ^b Vide *Sact. Guid.* c. 7.

^c ----- cum sint præmia falsi
Nulla, ratam debet testis habere fidem. *Ovid Trist.* l. 3. *El.* 10. v. 35, 36.

Add. *Lex Wisigoth.* l. 2. t. 4. c. 12.

^d *Lib.* 50. ^e *Ad. ann.* 1585. ^f *V. Aristot. Pol.* L. 2. c. 6. ^g *Plut. Romul.* *Lex Wisigoth.* l. 5. t. 7.

^h *Unles for Incest, as Cicero says, Orat. pro Milone, c. 22.* ⁱ *Edict.* c. 101. And therein re *Abuse,*

d. l. does well call it a foolish Law, *If the Accuser brings a Multitude of his Relations as Witnesses, the Accus'd shall be found*

Guilt. ^k See *Numb.* xxxv. 30. *Deut.* xvii. 6. and xix. 15. ^l *Plin. Nat. Hist.* l. 8. c. 22. ^m Vide

Susan Hist. v. 51. ⁿ *Val. Max.* l. 4. c. 1. f. 10, 11. ^o *De Jure N. & G. Jo. Heib.* l. 7. c. 6. ^p *On*

Deut. xix. 16. ^q *What Qualifications are necessary for Witnesses, may be seen in.* L. 22. f. 5. l. 2, 3. f. 1, 2, 3, 4. 4.

^r See above, in B. 3. c. 6. f. 16.

a Pilgrimage to *Mecca* are equivalent to three Witnesses^a. ⁶ Add to this, that *one Eye-Witness is worth Ten that have the Fact by Hear-say only*. And therefore their Testimony is of no Weight which is built upon the Authority of others.

But tho' the Oath of a Witness creates a great Presumption of the Truth of what he asserts, yet, in the Law of Nature, nothing hinders but that a sworn Witness may be convicted of Perjury; and, if he be so convicted, the Sentence founded upon his Testimony comes to nothing^b: Yet it seems absurd, that the Party concern'd should be permitted to make void the Evidence, by swearing on the other side; for this would not only lay open a great Gap for Perjury, but by reason of contradictory Oaths, the Controversy would remain as uncertain as before. And therefore it is according to its usual Silliness and Impicy, that the *Alcoran*^c commands him who accuses his Wife of Adultery, and has no Witness to prove it, to swear four times, and the fifth time to imprecate the Curse of GOD upon himself, if what he affirms be not true. And on the other side, it allows the Woman to be clear, if she denies the Charge four times upon Oath, and the fifth time with an Invocation of the Curse of GOD.

X. As for putting the Sentence of the Judge in Execution, we need not say much; for in a State of Nature, if a Man does not of his own Accord perform what is due to me, I may, by all the Power that I myself have, or my Friends can

supply me with, force him to it. How far we may carry such violent Proceedings shall be shewed more fully hereafter, when we come to discourse of War. Only here we may observe, that in such an Execution I not only acquire the Property of the Thing adjudged to me, when by any Method whatsoever I have got Possession of it; but moreover, if I cannot get Possession of the Thing itself, I may seize upon any Thing of the same Value, the very Charges of the Execution being reckon'd in, so as to become the rightful Owner of it^d. Indeed the Goods of a Debtor, who becomes such either by his own Contract, or by the Thing it self, or by his Injustice, are look'd upon, in the Law of Nature, as tacitly mortgaged for the Debt; and, if it be not discharg'd, may be justly seized for it; nor is the bare Detention of the Thing enough for the Creditor, for that frequently, has more Trouble than Profit in it; but he must also have full Liberty to dispose of it as he pleases: For my Right is not satisfied, if instead of the Thing, with the Property of which I ought to be invested, I receive nothing but the Custody of another Man's Goods; yet, in such a Case, I ought to signify with what Design I make such Seizure, whether in order to extort from the Debtor my Dues the sooner, or to take the Goods thus seized upon in part of Payment; indeed it seems but reasonable to give the Debtor Liberty to receive his Goods, upon Payment of the Debt. But this Way of Execution is proper to the State of Nature, and has no place in a Civil Constitution^e.

⁶ *Pluris est oculus testis unus, quam auriti decem.* Plaut. *Trucul. Act. 2. Sc. 6. v. 8.* "The Ears are less faithful than the Eyes." Lucian *de Domo*.

⁷ Ὁ δὲ θεὸς ἢ παρὰ τοῦ ἀκούοντος πολιτῶν ἀναξίον ἐπιφέρει νόμον, ἀλλ' ἢ μὴ μαρτυρεῖν, ὅτι φέρεται τὸ δικασθῆναι αὐτὸς παρὰ τὸ δικασθῆναι παρὰ τοῦ. Philo *Jud. de Corrupt. Linguarum*, pag. 340. B. C. Edit. Paris. "In a well-regulated Commonwealth the Laws take Care, that what is given upon hear-say shall not go for Evidence. For such a Testimony is naturally liable to Corruption. The Eye is apprised of the Things themselves, and in a manner intermeddles with Business, and perceives all by Light, by which every Thing is illustrated and discovered: but the Ear has less Credit, as having to do not with the Things themselves, but with Rumours, which do not always mind the Truth, *Id. de Jndice. p. 719.*"

^a Vide Chr. Richer. *de moribus Turcarum*.

^b The Attick Laws allow, that, after the Sentence, an Action of Perjury may be brought against the Witness, as is plain from Demosth. *Orat. in Euergum, in the Beginning.* Add Plat. *de leg. l. 11. about the End.*

^c *Cap. de Lumine.*

^d For as Grotius observes, l. 2. c. 7. s. 2. *Expletive Justice, when it cannot get the Thing it self, demands an Equivalent, which morally speaking is the same.*

^e Vide L. 41. t. 2. l. 5. *D. de acquir. possess. l. 47. t. 8. l. 2. f. 18. D. de vi bonorum raptorum, § L. 4. t. 2. l. 13. D. quod metus causa, § L. 48. t. 7, & c. L. 7, 8. D. ad l. Juliam de vi privata.*

OF THE

LAW of NATURE

AND

NATIONS.

BOOK VI.

CHAP. I.
Of MATRIMONY.

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| <p>I. <i>The Coherence.</i></p> <p>II. <i>Matrimony the Propagation of Mankind.</i></p> <p>III. <i>Whether there be an Obligation to marry.</i></p> <p>IV. <i>A wandering Lust opposite to the Law of Nature.</i></p> <p>V. <i>Mankind not to be propagated but by Marriage.</i></p> <p>VI. <i>What Obligation may be laid on Men to marry by the Laws of Nations.</i></p> <p>VII. <i>What it is by the Law of Nature.</i></p> <p>VIII. <i>How far the Laws of Nations may order concerning Marriage.</i></p> <p>IX. <i>The disorderly Marriages of the Amazons.</i></p> <p>X. <i>The Laws and Rights of a regular Marriage.</i></p> <p>XI. <i>Whence arises the Man's Power over the Wife.</i></p> <p>XII. <i>Whether it be bestowed immediately by God.</i></p> <p>XIII. <i>Whether it necessarily implies a Power of Life and Death.</i></p> <p>XIV. <i>Whether Consent, not Bedding, makes the Marriage.</i></p> <p>XV. <i>No Woman may marry more than one Husband.</i></p> <p>XVI. <i>Polygamy in use among many People.</i></p> <p>XVII. XVIII. <i>Whether it be repugnant to the Law of Nature.</i></p> <p>XIX. <i>The true nature of Marriage is for one Man and one Woman to be joined together.</i></p> | <p>XX. <i>It is not lawful rashly to part Man and Wife.</i></p> <p>XXI. <i>Adultery and wilful Desertion make a Marriage void.</i></p> <p>XXII. <i>Whether an intolerable Ill-nature is a Reason for Divorce.</i></p> <p>XXIII. <i>The Opinion of some Men, about the Sense of the Law of God about Divorce.</i></p> <p>XXIV. <i>Particularly of Mr. Milton.</i></p> <p>XXV. <i>Marriage requires suitable Qualifications of Nature.</i></p> <p>XXVI. <i>An Error concerning Matrimony.</i></p> <p>XXVII. <i>A marry'd Woman can't rightly marry another.</i></p> <p>XXVIII. <i>Marriages with near Kindred, why forbidden?</i></p> <p>XXIX. <i>How it comes to pass that Men are ashamed of their Genitals.</i></p> <p>XXX. <i>Of Nakedness.</i></p> <p>XXXI. <i>The original of natural Shame.</i></p> <p>XXXII. <i>Marriages between Parents and Children wicked.</i></p> <p>XXXIII. <i>The Opinion of the Jews about it.</i></p> <p>XXXIV. <i>Of the Marriages of Brothers and Sisters.</i></p> <p>XXXV. <i>Of the other Degrees forbidden.</i></p> <p>XXXVI. <i>Of secondary Wives.</i></p> |
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IT follows in course that we examine the Original and Nature of human Government, and that we observe what Precepts of the Law of Nature and Nations do presuppose it. But in as much as Government can-

not otherwise be conceiv'd than between several Persons, and since the Holy Scriptures inform us, that in the Beginning GOD Almighty created one only human Pair, the Original Parents of our Race; it may seem ne-

Mr. BARBEYRAC'S NOTES on Chap. I. § I.

¹ The Connexion is something different, and perhaps better in his *Abridgment of the Duties of a Man and a Citizen*, lib. 2. chap. 2. where the Author follows the Notion, which he had before propounded: Lib. 1. Chap. 1. § 7. and says, That he passes to the Consideration of the Accessory States; *i. e.* to them which are consequent upon some human Act, which he reduces to four: *viz.* Marriage, the Relations of Father and Mother, Master and Servant, and the Members of a Kingdom.

necessary, ² before we proceed in our Enquiry about Civil Power, to consider the Relation of Matrimony; which being the Source of Private Families, does, by consequence, supply Matter for the composing of all Sovereignties and States. For as the Body of Man is made up of divers Members, each of which consider'd by it self, hath likewise in some sort the Appearance of a Body; so States are form'd out of lesser Societies, of which some are call'd Simple and Primary, others Compound, and as it were Collegiate. Of the first Sort are three, according to the threefold Power of a Husband, of a Father, and of a Master. And these bear the Name of Simple, not because they consist of no more than two Persons, as some maintain ^a, but because they are not compounded of inferior Societies. For why may not one Father have more Children, and one Master more Servants, and yet the Societies thus constituted be as truly simple, as if each Father had but a single Child, each Master but a single Servant ^b?

II. To go on then; so soon as Man was rendered obnoxious to Mortality, lest the Duration of so noble a Species should be confin'd to a single Age, or should require the constant Miracle of new Creations to preserve it in Succession, it pleas'd the most wise GOD to provide against these Inconveniences ^c; by enduing the two different Sexes with a natural Power of Propagating their Kind. And lest they should forbear so necessary a Work, either out of Negligence, or upon Apprehension of the great Pain of Bearing, and the great Trouble of Educating their Off-spring; he implanted in each Sex a

most passionate Love, a most ardent Propension towards the other, with a most deep and tender Affection for their Common Issue; that so they might not only willingly, but joyfully contribute their Service to the Preservation and the Continuance of Human Race ^e.

III. The first Point of Enquiry concerning Matrimony must be, Whether Men, in all respects fit for such a Condition, lie under any Obligation of entering upon it? For about this Action, as likewise about others, to which Men are inclined by a natural Appetite, as Self-preservation, and the Love and Education of Off-spring, many have rais'd a Scruple, as if they were not under the Care and Cognizance of the Law of Nature. For, say these Authors, what need was there of a farther Engagement to such Performances, as the Sensitive Appetite, and Instinct did with sufficient Strength incite and drive us to before? But indeed their Dependence on natural Instinct is so far from proving them to be uncommanded by the Law of Nature, that it rather argues a more peculiar and more earnest Care in Nature to have them observ'd with the utmost Strictness, as the immediate Causes of the Safety and Welfare of Mankind; whilst distrustful, as it were, the bare Force of Reason, she assists and seconds it with so violent an Instinct, that Men cannot, without great Difficulty, bend the contrary way ^d. Where should we find a Man ^f who would venture the common Vexation of Children, were he not led to desire them, as well by a Natural Inclination ^e, as by the sober Advice of Reason? especially since the means of obtaining them are such, as would

² PLATO says, That if we will make good Laws, we must begin to regulate Marriages well. *Γαμποὶ δὲ νόμοι πρότερον κινδυνώσκειν πειράσκει, καὶ οὐκ ἂν πείσεται πρὸς ἰσότητά παρὰ πύλας.* De Legib. lib. 4. p. 835. Edit. Wech. Ficin. See also *Dion. Halicarn. Antiq. Rom. Lib. 2. Cap. 24. p. 91.* There is a Fragment of *Hierocles's*, which deserves, to be recited here, where that Philosopher says, That nothing is more necessary to be treated on than Marriage, because Mankind is born for Society, and Marriage makes the first and most simple of all Societies; for, adds he, there can't be a City without Families, nor can any Family be complete, unless the Head of it be marry'd. *Ἀναγκαιωτάτος ὄντιν ὁ πρὸς τῷ Γάμῳ λόγος.* Ἄπαν γὰρ τὸ ἡμῶν τὸ γένος ἔσται πρὸς κοινωνίαν. Πρώτη δὲ τῆς κοινωνίας οὐκ ἔστιν ἡ κοινωνία, ἢ κατὰ τὴν γάμον. Οὐτε γὰρ πόλεις ἂν ἦσαν, μὴ ἔντων ἕκαστον. Οὐκ ἔστιν ἡμετέρας τῆς πόλεως ὁ πρὸς τῷ ἀγαθῷ. *Hierocles De Nuptiis apud Stob. Serm. 65. p. 300. Ed. Hier. Needham.*

Mr. BARB. NOTES on § II.

¹ Some Divines having quarrell'd with our Author for what he says here, he answers them thus in his *Specimen Controversiarum circa jus Naturale, &c.* Chap. 3. § 7. When God, who knows all things, foresaw that Man would inevitably become subject to Death, he dispos'd things by this infinite Wisdom from the Beginning after this manner: That diversity of Sexes should be of use both in the state of Integrity, and of Sin: In the state of Integrity, it was to raise up an holy Seed, to increase the number of the Worshipers of GOD; but after they had sinned, it was to propagate a corrupt Race, that Death which is the Consequence of Sin, might not quite destroy Mankind in the space of one Generation only; the Creator not judging it fit to form a new Root of Innocent Men, and choosing rather, that the Earth should be inhabited by a corrupt Generation, than remain a Desert.

Mr. BARB. NOTES on § III.

¹ And would not the Women also reject it on their Part for many Reasons? See Mr BAYLE in his News Letters upon Mr. P. MALMBOURG's Critical History of *Calvinism*, Let. 16. and Mr. LOCK's Essay upon the Human Understanding. Lib. 2. Chap. 21. § 34.

² *Vid.* Joh. Frid. Horn. *de Civitate*, l. 1. c. 1. f. 2. ^b In beginning thus with Matrimony, PLATO himself is our Guide and Director. Let us hear his Managers of the Question, LL. l. 4. Athen. *Come, tell me by all that's Good, what Point ought first to fall under the Legislator's Care? Will not Nature teach him to settle, before all things, by good Laws the Affair of Generation and the Origin of Mankind?* Clin. *Yes no doubt.* A. *But the Affair of Generation takes its Rise from the Union and Community of Wealth.* C. *It doth so.* A. *Why then, if Nuptial Laces be in the first place establish'd, they cannot but have a good Influence on all the future Regulations of the State.* ^c My Lord BACON, *De Augment. Scient.* l. 7. c. 2. observes, that amongst Animals the Pleasure of Generation is greater than that of Feeding.

*Procidit ille maximas mundi parens,
Cum tam rapaces cerneret fati minas,
Ut damna semper sibi reparare nova.*

The wise Creator knew the World was frail,
And order'd quick Succession to repair
Still with new Race the Breaches made by Fate.

----- *Calibem vitam prebet
Sterilis juvenentus; hoc erit, quicquid videt,
Unius ævi turba.*

----- Let our barren Youth
Experience their mistaken Chastity,
And all you see must prove a short liv'd Crowd,
A People of a single Age -----

Senec. *Hippol.* v. 465, &c.

⁴ *Ald.* Oppian, *Cyneget.* l. 3. v. 107, &c. *Halicut.* l. 1. v. 702, &c.

⁵ *Vid.* Euripid. *Medea* v. 1090, &c. *Hippol.*

appear both tedious and despicable to a wife Man, unless attended with some delightful Charm ^a? We acknowledge that there is a great Difference between *Instinct* and *Reason*, and that in most Cases those Powers take quite contrary Roads, and that therefore the Licentiousness of the former is to be bridl'd, and controll'd by the Authority of the latter; which to compass and effect is an Argument of a great and worthy Soul. But altho' *Instinct* hath not in it self the Force of an *Obligation*, yet it many times happens, that we may, by some superior Engagement, be obliged to undertake a Performance which bare *Instinct* before inclined us to.

And hence we may infer the falseness of that Position ^b, which asserts, that a Mother who kills her Child to avoid publick Infamy, and so stifles her *Instinct* of Natural Affection, by another *Instinct* of Aversion to Shame, is not guilty of a Sin against the Law of Nature. For the Infant's Life was guarded by that Law, as well as by the *Instinct* of the Mother; and it was her Duty to have known, that her Disgrace was an Evil which ought not to have been weigh'd against the Death of an Innocent, brought into the World by her free Consent. If the Care of her Reputation was dearer to her than the Pleasure of being a Mother, she ought to have consider'd this before she chang'd her pure and spotless Condition. But afterwards, it would be barbarous Injustice to conceal the Sin of the Parent by sacrificing the Child.

When Marriage is once contracted, in as much as the Gift of Fruitfulness is not confer'd by human Power ^c, a greater or a lesser Number of

Children equally answers the Obligation of *Nature*. Nor should the Wife's Barrenness raise any Scruple in the Husband, as if he had been wanting in his Duty to the World ^d.

IV. To carry on our Enquiries as clearly as may be, this in the first Place we take to be most evident, that all those impure Pleasures are repugnant to the Law of Nature, which aim at no other End than the Satisfaction of Brutal Lust. For the more warmly the Appetite of Love stirs in human Breasts, the more is Nature and Reason concern'd to provide, that the Irregularities of its Motions do not prejudice that *comely Order*, which is the very Life of Society; and that it be rather made to contribute to the Maintenance of Decency and Peace. Whence appears the most detestable Sinfulness of those Pollutions which we so justly call *Unnatural* ^e.

But the Sin of Uncleanliness is not confin'd to those gross Degrees; many grievous Violations of *Chastity* there may be in what we are wont to term the ordinary way of Nature; and these happen as often as we pursue our Pleasure, without regarding the only just End of it, the due Conservation of our Race. It hath indeed been asserted, that many Nations of old thought it a part of natural Liberty to prosecute an amorous Entertainment, without being ^e tied by the Rules of Matrimonial Strictness. But 'tis sufficiently manifest, that if all Men should make a constant use of this irregular Freedom, human Society could not long subsist, either in a graceful, or in a quiet Condition ^f. And therefore, according to Bishop *Cumberland's* most true Rule

Mr. BARB. NOTES on § IV.

¹ PLINY speaks of the two sorts of infamous Copulations, as well as of the Abortions which Women cause by Medicines, to hide their unchast Lives, as Crimes unnatural, and more than beastly. *In hominum genera caritatis gratia, etiam in excogitata, omnia scelere naturæ; fœminis vero abortus. Quantum in hac parte nulli nocentiores, quam sine lege.* Nat. Hist. Lib. 10. Chap. 63. see *Phœnyliæ*, *Æschines's Orat. in Timarch.* *Diogenes Chrysoſtom. Orat. de Palæſtrac.* *Salluſt. P. 7. 9. quæſt. Tho. Hyde, Martia. Lib. 1. Epig. xci.* In *Peru* (as *Garcilasso de la Vega* reports in his History of the *Incas*, Lib. 3. Chap. 13.) the Name of Sodomy was so abominable, that if any one in the heat of a Quarrel reproached another with that Vice, he liv'd in disgrace all his Days: Yet it was so common among the *Greeks*, that *Plato* (*de Legibus*, Lib. 7.) found it very hard to banish it out of his Commonwealth. The *Turks* also, who otherwise detest it, allow it with such fair Breasts as they have made their Prisoners, as if War licensed them to do what they list with them. *Scipio Annimat. Diss. Lib. 5. Chap. 5.*

² Mr. BARBEYRAC's Second Note upon this Section is chiefly contained in the Letter. ^d and ^e following.
³ The matter is clear in it self, and will not bear Enlargement. Mr. THOMASUS in his *Jurisp. Divin.* Lib. 3. Cap. 2. had granted, that by the Law of Nature only it could not be prov'd that Bestiality, Sodomy, wandering Lusts, &c. in a word, all Use of the natural Parts only for Pleasure, is unlawful absolutely; and that to prove it a Crime, recourse must be had to the Laws of God which are purely positive and general: but that able Lawyer afterwards rectify'd his Opinion by distinguishing what's just from what's honest, and so in the main agreed with our Author. See his *Fundamenta Jur. Nat. & Gent.* Lib. 3. Chap. 2. § 6, 7, 21, &c.

^a *Add. Val. Max. l. 7. c. 2. f. 1. Extern.* *Montaigne Essays*, l. 3. c. 5. p. m. 137. *Cartes de Passions. Art. XC.*
^b *Vid. Grawinkel ad Grot. l. 1. c. 1. f. 11.* ^c *Genes. xxx. 1, 2.* ^d *Senec. l. 2. Cont. 13.* *Franklin's* *debt not come at all Pleasure, nor at the time fix'd for it in our Account; Nature is absolutely at her own Disposal; and not tied up by human Laws: Sometimes she hastens and outruns our Wishes; sometimes she proceeds slowly, and disappoints them with her Delay. Nature doth not work by Form, nor is Chance confin'd to Rules and Prescriptions. The Law may appoint a set Day, but Nature takes no notice of the Expiration.* ^e Thus Mr. *Salluſt.* *De J. N. & G. sec. Heb. L. 5. c. 4.* shews from the *Jeruzalem Rabbies*, that before the *Mosaic* Law it was allowable for a Woman, not yet married nor betroth'd, to bestow herself, either *gratis*, or upon Consideration of a Reward, without the Confinement of Cohabitation. Whereas the succeeding Institution absolutely forbid circumcised Persons to use any Community of Bed, without entering on a married State: though if this were practis'd between a circumcised Person and a Heathen, it was, in some Cases, adjudg'd lawful. To which purpose they cite, *Deut. xxiii. 18.* *Levit. xix. 29.* *Genes. xxxviii. 14.* &c. *Add. Grot. ad Genes. xx. 9.* The Reason given by *Maimonides* for this Prohibition is, that the Contentions and other Evils usually occasion'd by these irregular Liberties, might be avoided, and that Good of certain Notes and Distinctions of Families procur'd. 'Tis not necessary to appeal to the Testimony of Heathen Writers, yet see *Epiet. Enchir. c. 47.* *Plaut. Cureul. Act. 1. Sc. 1. c. 33, Sc.*

P. H. *Quin leno hic habitat.* P. A. L. *Nemo hic: prohibet nec vetat, Quin quod palam est venale, si argentum est, emas. Nemo ire quenquam publica prohibet via, Dum ne per fundum septum facias semitam. Dum tece abſtineas nupta, vidua, virgine, Juventute, & pueris liberis; ama quod lubet.*

P. H. "As I take it, here lives my worthy Procurer. P. A. L. "We have a fair Market; if you bring Money in your "Pocket, you are free to buy any thing but prohibited "Goods. No Body hinders you from travelling in the "High-way, so long as you don't break Hedges and In- "closures: and in the same manner so long as you re- "frain from Wives, Widows, Virgins, Youth, and Free- "men's Sons, you may chuse love as you list.

That

^a *That in which it is impossible for all Men to agree cannot be according to right Reason.*

Nor was the Command of Natural Law, as to this Point, so quite worn out amongst those very Nations, which allow'd a publick Security to such Practices, as that they really approv'd of what they permitted, or absolv'd the Actors from all Marks of Disgrace. 'Tis a famous Aphorism of *Ulpian*, that a *Whore is Vile*, or Wicked, by her Profession; and the *Romans* thought it a sufficient Punishment to these loose Ladies, to make them shew their License in Publick before the Magistrates, and thus to stand infamous on Record ^b. The Principle then, on which those States and People proceeded, who conniv'd at such youthful Disorders, was, by the means of these publick Traders in Lewdness, to preserve and guard the private Chastity of Virgins and of honest Matrons. In warmer Climates, the Extravagance of wild Gallants ^c might have injur'd the most sacred Modesty, had it not been diverted by a Tribe of forward Nymphs, who were proud of their Addressees, and met them in their irregular Designs. This, however, is manifest, that the same Nations which extenuated rather than defended these Immoralities, as no more than harmless Failings, and pardonable Slips of Youth, did yet, at the same time, assert in the highest Degree the just Honour of the Marriage-Bed, and esteem'd Faithfulness to it, as a Mark of singular Sanctity and Goodness.

V. A diligent Observer of human Nature will easily discover how extravagantly Unreasonable it is, that Mankind should be propagated by Chance-Beds, without Confinement, and Rule ^d. Such a Life, they tell us, the People of *Attica* led before the time of *Cecrops*, cohabiting like a Herd of Beasts, under no regard to Decency or Distinction. Whoever was made a Mother by so wide a Provision, presented her Medley Off-spring to any one of the many Fathers who would be pleas'd to own and to accept it. When *Cecrops*, by the institution of Matrimonial Laws, had banish'd this barbarous Custom, he pass'd, in Fables with the common People, for a kind of an *Hermaphrodite*; either because he taught them to know their Fathers, as well as their Mothers; or because, by the conjugal Tie, he incorporated as it were two in one ^d.

Who is there that can pretend to be insensible how little Difference would be left between Beasts and Men, should the Ordinances of Marriage be universally cancell'd and repeal'd? Indeed the Beasts would then have the Advantage of the Comparison ^e. They are frequently observ'd to use some sort of *Constancy* in their way of Love, and some Semblance of Conjugal Fidelity. And if the fair Mistress raise a Quarrel in the Herd, 'tis only at certain Seasons of the Year, when they feel a Warmth beyond their ordinary Temper. But Men would be perpetual Rivals; and human Race would be confounded and destroy'd by so wild a Method of its Preservation. Again, How miserably weak and helpless would be the Condition of the breeding Mothers? Or, if they weather'd out that Danger, how great would be the Trouble, how high the Charges of Education, above their single Strength, or single Fortune? It is plain, the Men would not be over-forward to assist them under either of these Burthens; not in the First, unless they knew themselves to have been the Cause of their Pain; not in the Second, unless they could be assur'd, that the Child to be provided for was their own. And 'tis not likely, that they should be able to obtain any Certainty in these Points, without the regular Restraints of Marriage. For what *Aristotle* ^f reports of a Nation in *Africa* ^g, where the Wives are held in common, but the Children distinguish'd and appropriated, by the Likeness of Features, is at best a very deceitful Method. Tho' indeed *Theocritus* ^h makes the Tokens of an Adulteress *τένια ἔπος' ἐνόματα πατρὶ*, *Children unlike the Husband*; and *Horace's* Wish for the Roman Chastity is, *Laudentur simili prole puerpera*, "Let the Women deserve Commendation, for picturing the legal Father in the Child.

Lastly, Since without Matrimonial Prescriptions we cannot well suppose any such thing as Families, nor without Families any publick States; and since therefore the whole Order and Harmony of civil Life is founded on these Regulations, it is most clear that were Men entirely releas'd from such Bonds, they must live in an unsoeiable, separate Condition, little better than Brutal. And therefore *Horace* shew'd his true Judgment in deriving the Calamities of his Country:

Mr. BARB. NOTES on § V.

^a *Dialy.* Lib. 41. vers. 382.

^b Of the Law of Nature, c. 5. f. 46. ^c Tacitus of Vitellia, *Ann. L. 2. c. 85*. That Youth in *Quintilian* (Decl. 14.) was arriv'd at the highest Pitch of Impudence, who forms a publick Accusation against his Miss, for giving him a *Potion* that suppress'd his Love. Amongst other of his Rants, this is one, *I had just enough to furnish my self with a moderate and sparing Measure of unforbidden Joys, sufficient for the Necessities of Life. Therefore instead of a Wife, I was content with a Mistress, and with a single Mistress, which is a most certain Sign of Frugality and good Management in Pleasure.* ^e *V. Cicero pro Caelio. c. 17. &c. Epist. Enchir. c. 47. Add Mason. in Stobaeus, Serm. VI. Grot. in Math. v. 27.* The *Mahometans* allow Fornication with their Maids; which the more virtuous *Indians* do, in all Shapes, and on all Accounts, detest. *Plutarch (de Virtut. Mulier.)* reports, that among the People of *Cbios*, for the space of seven hundred Years together, there was no mention made of Adultery, or any other unchast Practice; though the Island was famous for Beauties. ^d *Athenaeus, l. 13. c. 1.* ^e *Quintil. Instit. Orat. l. 9. c. 2.* "Tho' *Dido* in *Virgil* complains of her late unhappy Match, "yet her real Thoughts could not but break out, and she declares in the midst of the Lamentation, that a Life absolutely without Marriage was the proper Condition of Beasts, not of Men.

*Non licuit thalami expertem sine crimine vitam.
Degerere more feræ?*

Æneid. 4. 550.

^f *P.L. B. 2. c. 2.*

^g Who perhaps are the same that *Nicol. Damascen. (de Mor. Gent.)* calls *Limyrii*.

^h *Ilyl. 17.*

*Fœcunda culpa secula nuptias
Primum inquinavere, & genus, & domos:
Hoc fonte derivata clades
In patriam populumque fluxit.* L. 3. Od. 6. V.
[17, &c.]

First those Flagitious Times
(Pregnant with unknown Crimes)
Conspired to violate the Nuptial Bed;
From which polluted Head
Infectious Streams of crowding Sins began,
And thro' the spurious Breed and guilty Nation ran.

My Ld Roscommon.

To all which Considerations we may add, that without a Successor, in way of Marriage, no Man could be born to an Estate or Inheritance; and should we take away these Advantages, human Life would be depriv'd of its chief Ornaments, if not of its necessary Supports. 'Tis remarkable what *Justin*^a relates of the *Parthenia* amongst the *Spartans*; they were born, as the Irony of their Name imports, from promiscuous and irregular Embraces, and being grown up to a Sense of their Shame and of their Poverty, fearing to starve at home thro' Defect of Paternal Fortunes, they were necessitated to leave their Country, and ramble abroad in a Body, to force a Maintenance and a Seat³.

VI. In as much then as it appears evident, beyond Dispute, that in order to the keeping up a comely and a regular Society amongst Men, it is necessary, that the Propagation of human Kind should be settled and limited by Matrimonial Constitutions; we are in the next place to enquire what Obligation particular Persons, of proper Years and Abilities, have, to engage in a married State. And here we may first take a View how the Matter before us hath been order'd by the Laws of People and Governments, and then how far it seems to be determin'd by the bare Law of Nature. It was the Doctrine of the ancient *Jews*, as *Mr. Selden*^b informs us, that by the Divine Precept of *Increase and Multiply*, all their Males were bound to Marry before they had completed twenty Years; unless upon account of some natural Defect, or because they had devoted themselves to a Life of Chastity, and constant Study of the Law. And this Com-

mand they said extended to all the Posterity of *Noah*. They added, that he who buried his Wife, without seeing a Son and a Daughter (and those as *Perfect by Nature* as their Parents) had not yet fulfill'd the Precept. But that in case a Man's Son and Daughter were dead, and had left Children of both Sexes, the Grandfather was then free. That otherwise, upon Defect of Issue of either Sex, Men were oblig'd to contract new Marriages, so long as their Age would give them leave. And therefore, that if a Man had either taken a barren Wife, or one that was not yet old enough to be a Mother, he did not answer the Law, unless he took another immediately capable of *Bearing*. *Leo Mutinensis*^c observes farther, that altho' the bringing of a Son and Daughter into the World, seem'd to be sufficient for the full Observance of that Divine Command, yet a Man of convenient Age and Strength was still bound to seek a married Life, for the avoiding Fornication^d. But whether this Injunction extended to Women, as well as to the Men, was a Point not very well settled and agreed amongst them. It is most probable, that their Judgment was to this purpose, that the Women were not indeed oblig'd to any determinate Time, because it is not in their Power to marry when they will; but that upon the first fair Offer made them, they stood engag'd to contribute their Assistance to the World. 'Tis a Saying amongst the same Doctors, that *He who neglects the Precept about the Multiplication of Mankind, ought to be looked upon as a Murderer*^e.

Many other Nations have, in their publick Institutions, declar'd themselves to the same Purpose^f. *Plutarch* recites a Law of *Lycurgus*, by which it was Enacted, that old Bachelors should be excluded from the solemn Sports and Dances of the Women; and that in the Winter Season they should go naked up and down the *Forum*, singing a Song in Dishonour of themselves, the Burthen of which was, that *They owned themselves to be thus justly punish'd, for disobeying the Ordinances of their Country*. And that, besides all this, they should have none of those honourable Marks of Respect and Duty paid them, which the younger *Spartans* were otherwise oblig'd to pay to the elder. Upon this last account *Dercyllidas*, a Famous, but unmarried General, desiring a younger Person, according to Custom,

³ *Servius* (*ad 3. Æn. v. 551.*) & *Lactantius* (*de fals. relig. c. 20.*) vary somewhat in the Relation of this Story. Hither may be refer'd most of the common Arguments urged against *PLATO's* Community of Wives. *Add. Stob. Serm. LXV.* "*Cyrus*, King of *Persia*, having by a Publick Ordinance commanded the promiscuous Use of Wives and Women, his Subjects "rose in Rebellion and expell'd him the Kingdom. *Procop. Hist. Pers. l. 1. c. 5. Agath. l. 4. Plato de LL. l. 4. p. 835.* Every Man, who arrives at the Age of thirty Years, ought to choose him out a Wife; considering with himself, that Mankind is by a kind of natural Desire prompted to a Pursuit of Immortality; there being no Person who is not Ambitious of keeping a perpetual Name and Memory with succeeding Ages. Now the Way by which human Race obtains an endless Duration, is by leaving an uninterrupted Course and Series of Posterity. It cannot but be highly criminal, for a Man to rob himself of Immortality through his own Default; yet whoever neglects the Affairs of Marriage and Issue, voluntarily throws away his Title to this invaluable Benefit. *CICERO* (*de Finib. &c. l. 3. c. 20.*) observes, that in order to a Man's living as his Nature directs and enjoins, it is convenient, that he apply his Mind to the Choice of a Partner, and the Desire of Posterity. *PHILIP BALDEUS* (*de Helat. Ind. Gent. p. 2. c. 5*) reports of the People of *Benjin*, "that they look on it as the basest Reproach to want Children: Such a Par-son (they say) is not worthy to see a Man first in a Morning.

^a L. 3. c. 4. ^b *De J. N. & G. lib. 5. c. 3.* ^c *De rit. Hebr. p. 4. c. 2.* ^d *Plato* (*de LL. l. 11.*) delivers the like Opinion, and adds, *One of each Sex is the least Number of Children that ought to pay for sufficient.* ^e Yet the Sect of the *Essenes* amongst them utterly forswore the use of Women. *Vid. Plin. N. H. l. 5. c. 17. Solin. c. 38.* ^f *Varro*, in *Leg. Mænia apud Nonium in Eunuchare*. He that destroys his Country, his greater Parent, is most inexorably guilty: And this every one does so far as in him lies, who either disables himself from being a Father, or defers to act as such. See the Sayings of *Musonius*, *Hierocles* and *Antipater* in *Stob. Serm. LXV. Add. Arrian in Epictet. l. 3. c. 7. J. Poilux l. 3. cap. μετ' ἀγαυοι*, mentions Suits at Law carried on at *Athens* and *Lacedemon*, against Celibacy and late Marriage.

to resign his Seat to him at a publick Solemnity, the Youth refus'd, with this smart Reason, *Because, says he, you have brought no Son into the World, who might hereafter give place to me* ^a. At Rome the Censors somtimes impos'd a Mule (for that Reason call'd *Uxorium*) upon such Men as had grown old in a single Life ^b. And good *Metellus* speaks home to the Business, in *Gellius*, *Could we, my Country-men, says he, do together without Wives, we need not give our selves these unnecessary Troubles. But since Nature hath so order'd Matters, that human Life can neither be very free and easy with them, nor possibly subsist without them, we ought rather to consult our perpetual Safety, than our present Conveniency* ^c.

It follows from the same Principles ², that it is sinful and unjust to emasculate Persons; at least, without their Consent. *Domitian* forbid the Performance of this Operation by an express Law ^d. After which, those who had so ridiculous a Design on themselves, or on others, were oblig'd to ask leave of the Emperor, or the President of the Province ^e. Upon what account the Eastern Monarchs were so fond of employing Eunuchs in their nearest Offices, may be seen in *Xenophon* ^e. To whose Reasons, we

may add this one farther, that the Prince could, without Envy or Offence, make himself Heir to these Childless Favourites, and so ingross all they had got in his Service ^f. Amongst the Jews, an Eunuch was not permitted to be a Judge in any Case; upon the Opinion of their excessive Spitefulness and Cruelty. And, in the Indies, 'tis a common Saying, that *To castrate Beasts makes them more tame and humble; but the same Experiment tried on Men makes them more Insolent and Intolerable* ^g ^h.

Some observe that Eunuchs were first made in those Countries, where Polygamy was permitted; the Number of Men being superior, or at least equal, to the Number of Women. Others maintain that they owe their Original to the Right of War; when a Conqueror sparing the Lives of those he overcame, thought fit to put them into this unmanly Condition, that having lost the Springs of private Interests and Affections, they might, with the more Security be trusted in his Service ⁱ.

VII. If we consider barely the force of natural Law, we shall conclude, that in as much as Matrimony is the great Source ^j, and the main Foundation of a Social Life ^k, Men are so far

Mr. BARP. NOTES on § VI.

² See *Cod. Lib. 8. tit. 58. De infirmis pœnis caribus, &c.* & *Sozomen. Hist. Eccles. Lib. 1. Chap. 9.*
³ *Vid. Casaubon. ad Sueton. Domit. cap. 7. & Justin. Mart. Apol. 2. Ad Deuteron xxiii. 1. Joseph. Antiq. Jud. Lib. 4. c. 8. Lib. 27. f. 28. D. ad L. Aquil. Novell. 142. & ib. Dion. Godofred. l. 4. f. 2. l. 5. D. ad Cornel. de Sicariis. Euseb. Evangel. Præp. l. 6. c. 8. In Syria and Osiroene many castrate themselves like the Priests of Cybele. But King Abgarus commanded the Hands of all those, who had abused themselves in this manner, to be cut off: after which Order, the Infamous Practice ceased in that Country. Quintil. Institut. Orat. l. 5. c. 12. For my own part, when I contemplate Nature, there is no Man who seems not more fair and comely to me than our Eunuchs; who are thus abused, purely to render them more beautiful. Providence can never be so negligent of its Work, as to let Infirmiti pass for Excellency: nor can that which would be monstrous, if produced by Nature, be harsher if produced by Art. Let this Cheat, this feign'd Alteration of Sex, delight the Votaries of Lust; yet Vice and Immorality will never be able to gain such an Empire, as to make that Good, which they make Costly and in Request. How Hermetius revenged himself on Panionius, who had thus dismembred him. See HERODOT. URAN.
⁴ See *BRISSON. Select. Antiq. Jur. Civil. Lib. 2. Chap. 21.* and *Mr. BYNKERSHOEK'S Observat. Jur. Rom. Lib. 4. Chap. 5. p. 355.**

Mr. BARB. NOTES on § VII.

¹ *CICERO* fully owns it, and would have every wise Man to marry and have Children, as well as concern himself with the Government of the State. *Cum autem ad tuendas, conservandasque homines, hominem natum esse videmus, consentaneum est huic nature, ut sapiens velit gerere, & administrare Rempublicam, atque ut à natura vivat, uxorem adjungere, & velle ex eâ Liberos. De fin. bon. & mal. Lib. 3. Chap. 20.* See also *PLATO DELEGIBUS, Lib. 4. p. 825.* *PYTHAGORAS* says, that we ought to bring Children into the World, that we may leave after us new Adorers of God. *Ὅτι δὲ τεκνοποιᾶν, δὲ γὰρ ἀναγκαῖον τῶν τῶν ἀγαθῶν ἕνεκα, & ὅτιον, Jambl. de Vit. Pythag. Chap. 18. Num. 83, see also PLATO, ibid. Lib. 6. p. 773. & also HIEROCLES in *Stobæus. Serm. 65. & 73.* to engage Men to marry; and *GATAKER* on *Marcus Antoninus, Lib. 8. § 31.**

^a *Μὴ μὲν ἀγαθῶν, &c.* Phocylides.

To live unmarried is to die unmourn'd.
 Add to your Race; see Nature's Gift return'd.

^o *Valer. Max. l. 2. c. 9. Festus in Uxorium, & ibid. Jos. Scal. Plutarch* reports the same in his Life of *Camillus*. ^c *Postdomus* called the *Myrians*, who admitted no Women amongst them, *Ælius, Men without Life, Strabo, l. 7. p. 205.* Of the *Lex Papia Pappæa*, see *Lips. ad Tacit. l. 3. Ann. c. 25. & Jacob. Godofred.* Which Law the Christian Emperors repealed probably by Advice of the Church-men. *Vid. L. 8. t. 58. C. De infirmis pœnis caribus, & Sozomen. l. 1. c. 9.* The Speech of *Augustus* in *Dion. Cassius, l. 56.* is remarkable on this Subject. *Ælian. (V. H. l. 6. c. 6.)* recites a Law of the *Spartans*, enacting, that "If a Man had increas'd the Commonwealth with three Children, he should be releas'd from keeping Watch; with five, from all publick Duties and Charges." See likewise a long Passage of *Hierocles* in *Stobæus*, in *Serm. 73.*
^d *Vid. Sueton. Domit. c. 7. Statius, IV. Sylv. ver. 187, 188.*

Qui fortem ætat interire Sexum.

Forbids the nobler Sex to feel Decay.

Add. Martil. l. 6. Ep. 2. ^e *Cyropæd. l. 7. p. 116 Ed. H. Steph.* ^f *Heliodor. Æthiop. l. 8. in fin. The Eunuchs are the Ears and Eyes of the Persian Courts; who having neither Children nor Kinsmen to engage their Minds, depend entirely on him that employs them. Claudian. in Eutrop. l. 1.*

----- Eunuchus nulla pietate movetur,
 Nec generi nativæ cavet.

----- An Eunuch feels no Tie
 Of Duty, Nature, or of Progeny.

^f *Heliodor. l. 9. Eunuchs have ever a great deal of Jealousy in their Tamper; and therefore they make the better Keepers of Women; being then employ'd to hinder others from Pleasures, which they are themselves incapable of enjoying.* ^h See *Grotius upon Deuteron. xvi. 18.* ⁱ *Plat. de Leg. Lib. 4. p. 835.*

bound to enter upon it, as they stand engaged to all Duties necessary for the attaining of that End: yet Nature lays this Injunction on us in the manner of an Affirmative, Indefinite, Unlimited Command; so as not to oblige necessarily all Men, and at all times; but requiring due *Occasion* before it exacts our Performance. Now in fixing the *Occasion* of Matrimony, we are not to rest in the fitness of Age and of Ability, but are likewise to suppose that the *Match* offer'd us, is answerable to our Birth and Condition, and that we have both competent Wealth to maintain, and competent Prudence to govern a Family ^a. The Laws of the *Islanders* prohibit Marriage to Persons of extreme Poverty ^b. Sometimes too it happens, that the Condition of the present Times, or the strict Care of a Function incumbent on us, will not give us leave to think of changing our State of Life ^c. And therefore it is not only unnecessary, but senseless and ridiculous, that those young Fools should run a Marriage-hunting, who have neither Means nor Wit to keep a Family from starving; and who, at the best, are only able to stock the Nation with a young Succession of Beggars. Those again deserve not only Excuse, but Commendation, who decline a married State, that they may with more Ease and Opportunity improve and cultivate their Minds, for the publick Service of the World. For since the two great Uses of Matrimony are the Preservation of Race, and the avoiding those fouler Lusts which would stain and disgrace human Society; so long as neither of these Ends is like to be prejudic'd, we ought not to blame a Resolution of single Life in such Persons as probably foresee, that they shall be able thus to do more good to their Country, and to Mankind, than in another Condition. If therefore a brave and generous Soul should either be insensible of the idle Stings of Love, or able easily to master and suppress them ^d, and at the same time, capable of benefiting the World otherwise than by advancing its *Stock* and *Breed*; we cannot in reason imagine, that Nature lays any Obligation upon him to let the Charms of the fair Sex hinder or divert his worthy Designs ^e: Especially since there are so very few, who can pretend to this Gift of Chastity; so that the World is in no Danger of coming to an untimely End by their Resolution. Much less ought those Persons to fear Reproach and Censure, who having serv'd Mankind by a former Marriage, decline a second Engagement for the sake of their Children. Tho', on the other side ^f, the Law of *Charondas*, in *Diodorus Siculus*, l. xii. c. xii. seems a little too hard, excluding all those Men from the publick Councils of the State, who had

brought a Mother-in-law into their Family. The Reason he gave for so severe a Decree was this, *He esteem'd it impossible, that a Man should be able to advise well for the Interest of his Country, who had been so far from consulting the good of his own Children. If his first Marriage prov'd successful, he ought to rest satisfied with that Happiness; if unfortunate, he could not be reckon'd in his Wits, for running on a second Danger.* But indeed, a second Marriage does not always prove injurious to the Children of a former Bed. And as to the other Part of the Objection, it may be easily retorted. We have something like it in the old Greek Epigram,

Ἔστις ἀπαξ γήμας, πάλι δούλεα λέκτρα δικάει,
Ναυηγὸς πλώει δις βυθὸν ἀργαλέον.

*He that escapes one Wife, and ventures on,
Courts a new Ship-wreck, when but half undone.*

To which *Harry Stephens* has given this ingenious Answer,

Ὅστις ἀπαξ γήμας, πάλι δούλεα λέκτρα δικάει,
Ὅχι βίος κομρῆς ἄξιον ἐδεμῆς.
Ἐὶ κακὴ ἡ προῶτη, πάρα δούλερον ἐκαυῆσαι,
Ἐὶ δ' ἀγαθὴ, ἀγαθὴν ἐλπίδα ἐν τίτ' ἔχει ^g.

*When a stout Widower tries the second Hit,
'Tis hard to blame his Memory or Wit.
This may be Good, if one was bad before;
If Good, kind Heav'n may have as good in store.*

On the other hand, it sometimes falls out; that besides the general Ordinance of Nature, a Man may be obliged by a particular Reason to enter on a married State. As for Instance, suppose a Royal Family should be reduc'd to one only Person, that Person is highly and peculiarly bound to seek an honest and lawful way of increasing his Race, to hinder the Confusion which must follow in the State, upon Default of Succession; and because, as *Euripides* ^h says, *Male Children are the Pillars of great Families.* And what we have thus settled, in regard to the Obligation of *Matrimony*, seems more agreeable to the Nature and Condition of Men, than the Rule which *Bishop Cumberland* ⁱ lays down, and so largely insists on, that *Since the Earth is now well stock'd, Men are left at their Liberty, to choose either a married, or a single Life.*

VIII. From these Considerations Judgment may be made, how far the Laws of particular States have Power to streighten, or to loose, the natural Necessity of Marriage. And this in the first Place, is evident beyond Dispute, that

³ We know that most of the Fathers of the Church have much out-run themselves on the Subject of second Marriages, of which I have given several Examples in my Preface. We may also consult Mr. *HERTIUS*.

^a *Plin. l. 1. ep. 14.* *When I reflect on the common Custom of the World, and the Laws of our State, which command us, in Marriage, to have a considerable regard to Wealth and Fortune, I think it is very proper to mention, that the young Lady's Father is Master of a very fair Possession. And besides this, the Hopes of a very fruitful Bed ought, in my judgment, to go a great way in determining our Choice, and to be reckoned amongst the chief Conditions of a Bride.* *Add. Orat. M. Hortali. Tacit. An. l. 2. c. 37.* ^b *Arngim. Jon. Descrip. Island. c. 8.* ^c *See 1 Corinth. vii. 26.* ^d *Ἐκαὶ τὸ μὴ ἱρᾶν, as Philostratus speaks, Apoll. T. l. 8. c. 3. A lover of Abstinence from Love.* ^e *Add. Arrian in Epictet. l. 3. c. 22. p. 311, 312. Ed. Wolfii. Corn Nep. Epamin. c. 10.* ^f *Add. Charron de la Sageffe, l. 1. c. 42, & 46. f. 2, 3. Bacon's Essay 8.* ^g *Iphigen. in Taur. v. 57.* ^h *De Leg. Nat. c. 6. f. 9.*

a civil Legislator may, by Virtue of his Sovereign Authority, constrain all his Subjects, who are capable by Nature, and have means of procuring a sufficient Maintenance, to engage in Matrimony by such a time. But to compel a Man to marry for the Propagation of a Race of Beggars, is equally Impolitic and Inhuman. Yet it looks more mild, in this Case, to enforce an Ordinance rather by Rewards to the Compliers, and Subtraction of Benefits from the Recusants, than by direct and positive Punishment. Of this sort was the famous *Jus trium liberorum*^a amongst the Romans; and that Spartan Law mentioned by Aristotle^b enacting, that *He who had increas'd the State with three Children, should be free from the Trouble of keeping Watch; and he that had one above that Number should stand farther exempted from all kinds of Burthens.* After the same manner Strabo^c informs us, that the Persian Kings propos'd a yearly Prize to those who had been Fathers of most Children.

It is no less evident, that a Prince or State would act most ridiculously, as well as most unjustly, should they in general forbid Matrimony to all their Subjects: Or should they allow this Privilege to the First-born only of every Family, and enjoy strict Celibacy to all the rest^d. For it is impossible, that in so great a number, all should be able to lead a Life of Severity and Continence. Nor would these Constitutions be a more merciful way of retrenching the exuberant Flood of Subjects, than the cruel practice of *exposing Infants* so common in antient Greece, or the other of *procuring Abortion*, which Aristotle^e himself adviseth.

But if it appear upon common Reason or Experience, that any particular Office in a State can be more conveniently discharg'd by an Unmarried, than a married Person, the civil Laws may fairly restrain such an Employment to Men that are content to live singly^f, and may oblige them to quit the Honour, when they change their Condition. Provided still, that the Number of Men, privileg'd to forbear Matrimony by the Gift of Continence, be sufficient to fill these Offices with a constant Supply. For it must not be suppos'd that the design of such an Ordinance is either to licence irregular Lusts, or to do Violence to any Man's natural Temper; in as much as no Man is compell'd to act in this Capacity, who judgeth himself unfit for the Service. And it must be a farther Proviso, that as to the great Business of Posterity, due Care hath been

taken of it another way, so that it may not suffer by these Restraints.

In the same manner, it is lawful to forbid an Ambassador, a General, or a Soldier, when sent on a Long or Dangerous Adventure, to carry his Wife with him, in the Expedition^g.

Farther, since the natural Obligation to Matrimony is undeterminate, and admits of some Latitude, the civil Legislator may fairly fix the Age of the Persons who shall be thus join'd together; or assign a Period taken from some other Consideration. Thus in the *Lex Papia Poppæa* amongst the Romans it was order'd,^h that *no Woman under Fifty, should marry a Man of Sixty; and no Man under Sixty, a Woman of Fifty.* Which we find afterwards repealed by Justinianⁱ. So Plato^h limits the time of a Man's being a Father, from Thirty to Fifty-five Years of Age, and of a Woman's being a Mother, from Twenty to Fortyⁱ. Amongst some People, it was unlawful for a Man to Marry, before he had given some signal Proof of his Valour upon the Enemy. As Strabo tells us of the *Carmanians*, no one of whom was permitted to have a Wife, till he had taken off the Head of an Enemy, and presented it to his Prince^k.

And, what is more, though Persons are naturally free to marry whom they please, yet a Government, if it seem for the Interest of the State, may in some Cases restrain and limit this Privilege; for instance, it may be order'd, that no Subject shall marry a Foreigner, none of the Nobility a Plebeian. Arrian in his History of the *Indians* reports, that the several Orders of the People were forbid Marrying one into the other. A Husbandman could not give his Daughter to an Artificer, nor an Artificer return the Compliment in the same manner^l.

Lastly, it may be enacted by civil Powers, that Marriages shall not be contracted but with the intervening Consent of publick Authority; especially between Persons of considerable Figure and Importance in the State. The force of which, and of the like Laws may amount to this Effect, that all Matches contrary to such Injunctions shall either be declar'd Void, or shall be divested of certain Privileges, with which they would be otherwise attended. Thus, in *Livy*^m we find the *Campanians* petitioning, "That they might have the Liberty of marrying Roman Dames, and that, if they had formerly been so happy, they might still keep them unmolested; and that the Children, already born

MR. BARB. NOTES on § VIII.

¹ See what Mr BAYLE says in his Answer to the Questions of a Provincial, Tom. 1. p. 542, &c. about Gebardb Truckes, Archbishop of Cologne; who, having married Agnes de Mansfeld, and embraced the Lutheran Doctrine; would have kept his Electorate and Archbishoprick.

² The Author doth not recite this Law exactly.

^a Vid. J. Lips. Excurs. in Tacit. Ann. III. 25. L. 15. p. 504. Ed. Cal. Herodot. L. 1. p. 36. Ed. H. Steph. Polit. 7. c. 16.

^b Polit. l. 2. c. 7. Ælian. Var. Hist. Lib. 6. c. 6. ^c Vid. Dig. Lib. 23. t. 2. De ritu nupt. Leg. 19. Pliny (l. 6. c. 22) reports of the People of Taprobane, "That, in their Choice of a King, they do not only require, that the Person be Good and Merciful, but likewise that he be advanced in Age, and without Children; and if after his Admission, he happens to obtain Issue, they depose him from the Government, lest the Kingdom should become Hereditary, Solin. c. 66. ^d Vid. Sueton. in Claud. c. 23. & Cod. Lib. 5. t. 4. De nuptiis, Leg. 27. ^e Plato de Rep. Lib. 5. p. 657. Ed. Wech. ^f Add. Aristot. Polit. 7. c. 16. & Michael Piccart, *ibid.* Tacit. Germ. c. 20. ^g Strab. l. 15. p. 500. ^h Add. Abrah. Roger. de Bramin. p. 1. c. 11. ⁱ We find the same account in Hieron. Ojor. de Reb. Gest. Emanuel. l. 2. & Montagne, L. 3. c. 5. p. 630. ^j Ed. Paris. 1657. Fol. ^k L. 38. c. 36.

“to them, might be acknowledged so, their just and lawful Heits: And, in *Dionysius Halicarnassens* ^a we meet with a Decree of the Senate, upon the Commencement of a War with the *Latines*, “Giving leave, on both sides, to the *Latin Women*, that had married *Romans*, and to the *Roman Women* that had married *Latines*, “either to tarry with their Husbands, if they thought fit; or else to return into their proper Country, leaving behind them their Male Issue, “and carrying with them their unmarried Daughters. The Effect of which was, that almost all the *Roman Dames* quitted their Husbands, and return’d to the City: whereas all the other Women, two only excepted, prefer’d their *Roman Husbands* to their *Latin Friends* ^b.

IX. We are, in the next Place, to enquire by what Heads of Conditions, with regard to the Law of Nature, the Matrimonial Covenant is compleated; and likewise what Right accrues to both the Persons from such an Union. And here we suppose before-hand, that all Human Persons, whether of one Sex, or of the other, are naturally equal in Right: and that no one can claim the Sovereignty over another, unless it be obtain’d by the free Act of one of the Parties. For though, in Strength of Body and of Mind, we are allow’d to have the Advantage of the *Fair Train*; yet this Superiority is not of it self sufficient to justify us in setting up for their Masters and Governors. Therefore whatever *Right* a Man holds over a Woman, in as much as she is by Nature his *Equal*, he must acquire, either by her Consent, or by the Sword, in a just War. Yet since it is most natural, that Marriages should be founded on mutual Good-will, the former way seems more proper for the winning of Wives, the other for the procuring of Slaves. And therefore, in those Countries where it is usual to marry their fair Captives, the Men lay aside the severe Authority of Masters, for a more gentle and more agreeable Sway ^c.

If then, we suppose all Mankind thus plac’d in a Condition of natural Equality and Liberty, it may happen that a Woman, as well as a Man, shall desire Issue peculiarly for herself, over which she may preside and command. Now to accomplish this End, it is necessary, that a Covenant

pass between a Man and a Woman, for their *mutual Assistance* in serving *Posterity*. If this Covenant be *Simple*, not join’d with any Agreement about constant Cohabitation, but respecting barely the Procreation of Children, it confers on neither Party any Sovereignty or Right over the other, except they may challenge on either side, the *promised Assistance*, with regard to *Posterity*. And, in this Case, if it was expressly intimated in the Covenant, that the Woman desir’d Issue properly for her self and her own Management, the Children shall be under the Government of the Mother. Such a kind of simple and irregular Marriage we may call *Amazonian*, if any Credit is to be given to the Stories of those warlike Dames ^d. In the same manner, when *Thalestris* courted *Alexander the Great* ^e, and, as some tell us, the Queen of *Sheba* King *Solomon*, the Off-spring could not fairly be reckon’d spurious, but, in their way, honest and legitimate. So Travellers report of the Inhabitants of the Kingdom of *Congo*, that their main Strength consists in Companies of Women, who live by themselves in certain Territories assign’d them by the Prince; and at set times choof some that they like best among the Men, for the sake of continuing their Breed: If the Child prove a Boy, they send him back to his proper Father, if a Girl, they keep her in their own Train, and educate her under the Severity of Martial Discipline ^f.

Now though it must be confess’d, that this kind of Coupling is Barbarous at least, if not Beastly; yet, amongst the most civiliz’d Nations, there are often to be found Instances of Marriages, in which either both Parties are declar’d *Equal*, or else the Husband is oblig’d to submit to the supreme civil Authority of the Wife. As when a Queen, who enjoys a Crown in her own Right, takes a Husband, and yet retains her Superiority in the Government ^g.

X. But we may take our leave of these irregular Matches, and proceed to examine those which appear more suitable to the Condition of human Nature ^h. This then we take for granted, that the matrimonial Covenant ought to begin at the Man, not at the Woman, that the Courtship should be us’d not on her side, but on his; this Method agreeing best with the Genius

MR. BARB. NOTES on § X.

¹ The Notion which the Antient Lawyers had of Marriage, was taken partly from their Idea of Friendship, and partly from the Relation, which they had conceived to be between a Father and his Daughter. See Mr. NODD’S curious Chapter in his *Probab. Juri.* Lib. 2. Chap. IX.

^a L. 6. init. ^b Senec. de Benef. l. 4. c. 35. *I promised you my Daughter in Marriage, afterwards you appeared to be a Foreigner; under that Character I may not enter into such a Relation with you: The same Law which lays this Prohibition on me, protects me from the Centure.* ^c Add Deuterom. xxi. c. 10, &c. ^d *Vid.* Arrian. de expell. Alexand. l. 7. c. 13. *Procop. H. G.* l. 4. *Palaphat. de Jab. narr.* l. 1. c. 33. *Jornand. de Reb. Getic.* c. 8. *Steph. Cleric. Quest. Acad.* 2. *Justin. l. 2. c. 4.* *Diadorus Siculus*, l. 2. c. 45. reports, “That the Sovereign Dames oblig’d their Husbands to perform all the servile Employments, even those which, in other Places, belong particularly to the Maids.” He tells us the same of a People in *Libya*, whom *Hercules* utterly destroyed, thinking it a Reproach to Mankind, *That a Nation should be oblig’d to continue where the Government was in the weaker Sex*, l. 3. c. 53. & 55. ^e *Vid.* Curtium, l. 6. c. 5. ^f *Vid.* Edward Lopez, de Regno Congo, l. 2. c. 9. *Add.* Alvarez Descript. Æthiop. c. 133. *Idem* *Vid.* de N. l. c. 19. *Michael Glycas*, Ann. part 2. tells of the *Agilæans*, “That amongst them the Women bear Rule over the Men, and are very communicative of themselves, without any Danger of their Husband’s Jealousy: that they till the Ground, build the House, “and perform all the nobler Labours of the other Sex. ^g See the Articles of Marriage between *Philip* and *Mary* in *Tuan.* l. 13. ad ann. 1553. & 1554. Those of *Mary Queen of Scots*, *ibid.* l. 20. ad ann. 1571. & l. 27. ad l. 1. *Ad. Marian. Hist. Hispan.* l. 24. c. 5. *Diador. Sic.* l. 1. c. 27. mentions a Decree that pass’d among the *Ægyptians* in Honour of *Isis*, importing, “That the Queen should enjoy a greater Degree of Power and Dignity than the King: and that, amongst private Persons, in the Nuptial Writings, the Wife should be invested with the Command, and the Husband be oblig’d to obey.” *Add.* Guicciardini, l. 6. p. 178. where he speaks of the Government of *Capite*. admitted with joint Authority by *Ferdinand* and *Isabella*.

and Character of both Sexes. For tho' it be, in many Places, usual for the Relations of the Woman to make the first Offer to the Man, yet this is only to direct his Aim in the Attack, and to fix a particular Mark for his Addressee.

This Principle being suppos'd, it is clear, that the Man, when he makes his Suit, is desirous of such Issue as shall be true and genuine, not spurious or adulterous. And therefore we ought to abhor, as contrary to Reason and Nature, the licentious Practice of many Nations in this Point. Travellers tell us, that the King of *Calecut* hath two Wives, each of whom is constantly waited upon, with all Familiarity, by ten of the Idolatrous Priests; and that the King esteems it an Honour to be thus abus'd; though he hath the Prudence, not to let his own Illegitimate Race succeed to the Crown, that Dignity being reserv'd for his Nephews^a. Indeed the Women are in that Country, for the most part, held in common^b; whence it comes to pass, that the Fathers neglect the Care of their Children, and all Inheritances descend by the Mother's side^c. *Buchanan*^d, to the Discredit of his own Country, reports a Law of *Evenus*, or *Ewen*, the Third King of *Scotland*, by which it was order'd, that the first Night of a Nobleman's Marriage should be the King's Fee; and that the Nobleman, besides taking the same Liberty with the Commoners Wives, should again command their Company whenever they pleas'd. Till *Milcolomb* the Third, at the intreaty of his Queen *Margarite*, chang'd this scandalous Indulgence into a Fine of half a Mark, to be paid by the Husband, in lieu of parting with his Bed the first Night^e. At this

time of Day, in the Kingdoms of *Pegu* and *Arraca*, at the Nuptial-feast, one of the Guests presents the Bridegroom in his Addressee to the Bride; yet it is Capital for him to be catch'd a second time, using the same Freedom^f.

We may conclude farther, that nothing is more repugnant to that Decency and good Order which ought to be kept up in the World, than to lead a wandering desultory Life, without any fix'd Abode, without any certain Seat of one's Fortunes and Concerns^g. The Education of the common Off-spring is then certainly carried on with most Convenience, when the Parents unite their Assurances to so good a Design; and their Minds are by these sweet Pledges knit together in a stronger Band of Affection^h. Besides, a constant Cohabitation cannot but afford vast Delight and Satisfaction to an agreeable Couple: and then the Husband is by this means much more secure of his Wife's Chastity, than if they dwelt at a distance. Such Matrimony then, as is regular and perfect, conformable to natural Reason and to the Ends of civil Life, besides the Covenant of Fidelity to the Bedⁱ, doth imply an Agreement on the Woman's side, that she will constantly dwell with the Man, and unite in the strict Society of a Family; as well for the Education of the Children, as for mutual Aid and Pleasure^j. The Custom amongst the *Chinese*, for the Women to bind their Feet so very streightly, that they cannot go without great pain, seems to have been first introduc'd on this politick Account, that being disabled from gadding abroad, they might be oblig'd to fix with the greater Application on the Care of Domestick Affairs^k.

^a See the Author's Abridgment of a *Man's and Citizen's Duty*. Lib. 2. Chap. 2. § 4.

^b Mr. MONTAGNE speaks well to this purpose: A good Marriage is a pleasant Condition of Life, full of Constancy, Fidelity, and an infinite number of profitable and solid Duties, and mutual Obligations. Every Woman who has a true sense of it, *Optato quam junxit lumine tæda*, Cat. would not be Mistress of her Husband: if she be entertained in his Affections as his Wife, she is much more honourably and surely received. When he shall be in a Passion, or Hurry, as he must needs be; to whom would he rather with some Disgrace to befall, his Wife, or his Mistress? If any Misfortune happen to him: to whom would he with the greatest? These Questions have no doubt in a good Marriage. That we see so few good Ones, is a sign of its great Price and Value. If it be well order'd and manag'd, there is no finer piece of Society. 'Tis to this Association, that this Saying is most fitly applied; *Homo Homini Deus, aut Lupus*. We must be endowed with the best Qualities to come into it. They that take this Affair in hand, and carry with them Hatred and Contempt, do unjustly and unprofitably. Marriage hath on her part, both Profit, Justice, Honour, Constancy, an equal and universal Pleasure. Love is grounded on Pleasure only; and is therefore more Dangerous, Lively, and Sharp. *Essays*, Lib. 111. Chap. 11. Pag. 630, &c.

^c *Vil. Aloyf. Cadamust. Navig. c. 75.* we meet with the like Account in *Ludov. Rom. Navig. l. 5. c. 7.* ^d *Vid Pet. de Valle, Itiner. P. 3. Ep. 7.* ^e The Practices of the *Colchians*, reported by *Busbequius*, in his third Epistle, are very filthy. ^f *Rev. Scotie. l. 4.* ^g *Li. L. 7. Polydor. Virg. Hist. Angl. l. 10. Comp. Sueton. Caligul. c. 40. & Boxhorn. Not.* ^h *Ludovic. di Barthema, Itiner. p. 2. c. 11.* Of the Inhabitants of *Canich*, see *Paul Venet. l. 2. c. 38.* ⁱ *Xenophon* had reason to call a Man's Home or his Fire-side, the sweetest and the most sacred Possession that he enjoys. *Cyropæd. l. 7. p. 116. Ed. H. Steph. Add. Aristot. Oecon. l. 1. c. 3.* ^j *Genes. xxix. 32. Lyfius, Orat. 1. c. 2.* "So soon as the fore me a Child, I admitted her into the full Trust and Care of all my Affairs; judging this the firmest Band that could unite and engage us to each other."

Conciliat animos conjugum partus fere.

Senec. Herc. Oet. ver. 407.

"Children are commonly the means of uniting and endearing a married Pair."

^k *Domesthen. in Neer.* "The Reason of our taking Wives is to obtain Issue, and to see our Family Affairs under a faithful Directress." *Add. Xenoph. Oeconom. & Columell. de R. R. l. 12. præfat.* ^l *Comp. Martin. Hist. Sim. l. 3. c. 28. Plutarch. Præcept. Conjugal.* "As Physical Humours and Qualities are said to diffuse themselves whole through the entire Mass, so ought the Bodies, the Wealth, the Friends and Acquaintance of a married Couple to be thoroughly mixt and blend-ed together. When the *Roman* Lawgiver forbid either of the Pair to give any thing to the other, the meaning was not to exclude them from a Participation of Benefits, but to shew that they ought to hold all things Common between them." *Quintil. Declam. 249.* "Ye know that Marriages are the things which hold a Commonwealth together, which preserve Race and Issue, and confirm and regulate the Decent of Patrimonies and Inheritances, and maintain Domestick Safety and Peace. Without this Security at Home, who would venture to travel into foreign Parts, or so much as take a Journey to a distant Estate; to go on publick Embassies, or to engage in military Expeditions?" See *Montaigne's Essays, lib. 3. c. 5. p. 630. 631, 632. Edit. Paris. Fl.*

From what hath been observ'd before, it appears why the Husband, and not the Wife, ought to have the Privilege of choosing their seat of Residence; for it is he that admits her into his Family, of which he himself is the Head and the Director. Though no Man, commonly speaking, will be so hard as not to ask his Wife's Consent in this point; especially if she brought him a considerable Fortune.

It is farther evident, that without a Breach of the Matrimonial Contract, the Wife cannot against the Husband's Consent ramble abroad, lodge apart, or deny him reasonable Favours, unless upon extraordinary Occasion.

Upon the same Principles is founded that Presumption in civil Law, that Children born in Lawful Wedlock are really the Husband's, unless there appear some very strong Argument to the contrary, sufficient to overthrow the favour of the Presumption ^a. The English Laws are particularly complaisant to the fair Sex, obliging the Husband to own a Child, born after he hath been absent many Years, provided he hath been all the while within the Bounds of the Island ^b. And they ground this Indulgence on two Reasons, first, because the Wife hath solemnly given her Faith, that she will be true, which she is presum'd not to have broken; and, secondly, because it is in the Husband's power to secure his Wife's Honesty; and what Right or Power any Person enjoys, he is always suppos'd duly to exercise ^c.

And hence, the Opinion of the Vulgar is not altogether unreasonable, when they fancy, that the Wife's dishonesty casts some kind of ignominious Blemish on the Husband ^d: As if, either out of Folly or Meanness of Spirit, he had neglected to use his Authority ^d. Domitian struck a Gentleman's Name out of the List of Judges, for receiving his Wife again, after he had put her away upon an Accusation of Adultery ^e. Some give another Reason why a Mark of Shame should be fix'd on this Misfortune; and that is, because it looks disgraceful in a Husband not to be Ma-

ster of those good Qualities which might engage his Wife's Affection, and secure her Fidelity. A Man that lies under this unhappy Censure, and cannot conveniently redress the wrong which he suffers, would do well to consider Euripides's wife Aphorism, that

----- Ἐν σοφίᾳ γὰρ
Τὰδ' ἔστι θηπιᾶν, λαιθόλειον τὴ μὴ καλᾷ.

It is a great Part of human Wisdom, to cover those things with Secrecy, which look ill if they come abroad ^f.

Charvon's ^g Remark will not, in all Cases, hold strictly good, that 'tis a vulgar Error and Folly to upbraid a Man with his Wife's Dishonesty; as if this were to make him suffer for the Crime of another, which 'tis not in his Power to prevent.

^h It may not be amiss, on this Subject, to throw in an occasional Observation, that those Marks of Reproach, which the common People fix on the Heads of such unfortunate Husbands, are no new Invention, nor confin'd to the Customs of our Western World: For we read that the Emperor Andronicus caus'd the largest of the Stag's Horns he met with, to be fastned on the Gate of the Market-place, on pretense to shew the Vastness of the Beasts he had kill'd in Hunting; but really as a silent Rebuke to the Immorality of the City, and the Lightness of the Dames ^h. But as She cannot properly be called an Adulteress who suffers in her Honour by Compulsion and Force ⁱ, so to keep a Wife who hath been thus injur'd, doth not, in it self, appear any way foul or reproachful ^k.

XI. We are farther to examine, whether by the meer Law of Nature, from the Principal Contract of true and perfect Matrimony, there ariseth any proper Sovereignty or Dominion of the Husband over the Wife. Indeed in holy Scripture it is expressly said, that the Will or Desire of the Wife shall be to her Husband, and that

^a It was one of P Y T H A G O R A S's Maxims, that care should be taken, that Women should not break their Nuptial Fidelity either through the negligence or ill-behaviour of their Husbands; "Αἰ τε γυναῖκες μὴ νεβόσωσι τὸ γένος ὑποβρίβη ἢ κακίᾳ ἢδ' αὐαῖ- κείνων. Jambl. de vita Pythag. Chap. 9 Numb. 48.

^b If any one desires to see more of this trivial Usage, of which the Gravity of our Author would not permit him to say more, let him consult S A L M A S I U S's Notes upon Tertullian de Pallio, p. 338, 339, &c.

Juvenilis ardor impetu primo furit;
Languescit idem facile, nec durat diu
In Venere turpi, seu levis flammæ vapor:
Amor perennis conjugis castæ manet.

Senec. Octav. v. 189, &c.

" The Fire of Youth in Love's dishonest Joys,
" At the first Blaze is Fury, Flash, and Noise;
" But spends in Smoak, and what it gave destroys.
" Whilst the chaste Passion of a lawful Dame
" Burns with a gentle, but an endless Flame.



^a See above, lib. 4. c. 11. f. 10. & *vid.* Gell. l. 3. c. 16. Plin. *Hist. Nat.* l. 7. c. 5. Where he treats of the time of going with Child, which must be examin'd, before the Child brought forth is delivered to the Husband. ^b See Chamberl. Present State of England, p. 1. c. 16.

^c 'Tis a saying of Gyges in Herodot. (*Clio* p. 3. Ed. H. Steph.) Every one ought to keep an Eye on his own Concerns. P L A T O observes (in *Alcibiad.* l. p. 441. Ed. *Wich.*) "That the Wives of the Spartan Kings are publickly watched and overseen by the Ephori, lest any Heir should be obrudged upon the Crown, who is not truly of the Race of Hercules. Whereas in Persia the King seems, in Excellency of Nature, so much above his Subjects, that there is no Danger of counterfeiting his Strain: And therefore his Wives are under no Guard, but that of their own Reputation.

^d Sueton. *Dom.* c. 8. So by the Attic Law, "A Man was reckon'd base and scandalous who kept his Wife, after he had discover'd her Dishonestly, Demosthen. in *Nær. Add. Dig. lib.* 48. t. 5. *ad Leg. Jul. de Adulter. leg.* 2. f. 6. & *leg.* 29. *prin.* In TACITUS (*Ann. lib.* 2. c. 85.) Labeo the Husband of *Vistilia* was cited to give an Account why he had forborn

" to see the Law executed upon his Wife, after she had been openly convicted: and he could not otherwise excuse himself than by pretending that the sixty Days, which the Law allow'd him for considering time, were not yet expired.

^e Eurip. Hippol. Coron. *Add.* Plutarch. *de Anim. Tranquil.* p. 467. E. F. ^f L. 1. c. 39. n. 11. ^g Nicet. *Acominat.*

de Imper. Andronic. l. 2. ^h *Vid.* Gratian, *Caus.* 32. *Qu.* 5. c. 2, &c. ⁱ Yet we are to commend the Proceeding of David in 2 Samuel xx. 3.

He shall rule over her ^a. But this being enjoin'd the Woman by way of Punishment, seems to bear the Face of a *Positive Institution*. To discover, then, how the Law purely natural directs in this Point, we may first observe, that to be bound to follow the Will of another in some certain Business, is not altogether the same thing as to be subjected to his Dominion; because the former may result from a *simple Pact*. For there are many Pacts, especially of this kind, *I give you this to do such, or such a thing; I do this, provided you will do so, or so for me*; in which it was at first in the Power of either Party to choose, whether he would enter into the Agreement, or not. Yet the Covenant being once consented to on both sides, one Party must follow the Will of the other (as to this particular Business) and not *vice versa*. Whence it appears, that how far soever the Wife may be obliged to submit to the Husband's Will in the Affairs proper to Matrimony, yet it doth not presently follow, that he must needs have the sovereign Command over her, in other Actions and Concerns.

Again, the End of Marriage is not like that of Commonwealths, the Defence and Security of Men (for how weak an Union, as to any mutual Safety, is that which consists only of two Persons?) but is directed wholly to the Propagation of Human Race. Therefore as a Commonwealth cannot be understood without a sovereign Ruler, so it should seem that Marriage, without any Superiority of Government, might subsist well enough under the common Force of Contracts, assisted with the Engagements of Friendship and the Charms of Love. It must be confess'd, that a separate Family hath somewhat in it much like a State or Community, which not regularly allowing of more than one Head, the Wife when she is admitted into it, ought, one would think, to yield a full Submission to the Lord and Director of the Society. But it may be urg'd, in Answer to this Objection, that a Family, if increas'd with a numerous Train of Servants, hath two Ends and Designs, one common, the other proper. The common End consists in mutual Defence and Security, arising from the united Strength of so many Persons. In this respect, tho' some supreme Sway be necessary, yet, in as much as the Wife is but little concern'd in that Affair, the Unity of the Family may be very well kept up, altho' she be join'd to her Husband by no severer Bands than those of Affection and the Matrimonial Covenant. Thus we find the Patriarch *Abraham* exercising a Sovereignty over his Domesticks, and yet treating *Sarah* with the kind Equality of a Sister ^b. Though, at the same time, her dutiful Behaviour towards him is highly commended in the holy Scriptures; and it is said particularly, that

she call'd him Lord ^c. The proper or peculiar End of Marriage seems likewise attainable, without any Inconvenience, although neither of the Parties should bear any such absolute Authority over the other, as must include the Power of Life and Death, and of the most rigorous Restraints; but the Ties of Friendship and the Obligation of the free Contract, may very well serve to hold Man and Woman together. Yet this Contract (the Husband having the better Part in the Terms and Conditions, and the additional Advantage of his Sex) seems to be form'd in the manner of those Leagues and Covenants which we call Unequal; so that the Wife is bound to Obedience, and the Husband rather to Protection. Not that it is repugnant to the Law of Nature, for a Wife to be subjected to her Husband in the way of strict Political Government. For the Fear of supreme Authority, and the Endearments of Conjugal Affection are really no more destructive of each other, than the Sovereignty of the Prince extinguisheth the Love of the Subject. And this full Political Authority, as it may be acquired by any Husband, by means of a new Covenant annex'd to the Matrimonial Agreement, so we find it in some Nations, allowed to all Husbands in general, by Virtue of a publick Custom or Constitution. *Cesar* ^d tells of the Antient *Gauls*, that they had the Power of Life and Death, as well over their Wives, as over their Children. Amongst the *Germans*, the Husbands were empower'd to execute the Punishment of Adultery; not as an Indulgence to their Rage and Resentment, but as an Effect of their just Power and Command ^e. How the Case stood at *Rome*, *Gellius* thus informs us from a Speech of old *Cato's* *A Husband (except after a Divorce) is a Judge, a Censor, and a kind of sovereign Prince over his Wife: if she acts any thing perversely, or scandalously, he sets a Mulct upon her; if she drink Wine to Excess, if she commit any dishonesty with another Man, he cendemns her to a suitable Punishment*. Again, says that grave Senator, *should you apprehend your Wife in the Act of Adultery, you might kill her without farther Process or Trial; on the contrary, should she find you guilty of the same Crime, she hath no Right to touch you with a Finger*. *Tacitus* hath recorded a later Instance of this antient Custom ^f. He reports that *Pomponia Gracina* (Wife to the famous *Plautius*, who triumph'd for his Victories in *Britain*) being accus'd as a Favourer of foreign Superstition, was remitted to the Judgment of her Husband: And he, according to the old Institution, calling an Assembly of her Relations, took supreme Cognizance of her Life and Honour. We must not omit the most remarkable Practice of the *Saccæ*, a People of *Scythia*, among whom, as *Ælian* tells us the Story ^g; "When a Young Man seeks him out a Wife, he is oblig'd, in the first

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^a *Martial*, L. 8. Ep. 12. v. 3, 4.
*Inferior matrona suo sit, Præce, marito,
Non aliter fuerint fãmina virque pare.*

Should Manly Empire not controul the Fair,
Husband and Wife were an unequal Pair.

Plin. Paneg. c. 73. *Many worthy Men have been hindred from being Chief in the State, by their not being Chief in their own Families.*

^a *Genes.* iii. 16. *Ephes.* v. 22, &c.

^b See *Genes.* xvi. 2, 5, 6. xxi. 10, 11, 12.

^c *1 Pet.* iii. 6.

^d *De B. G.* l. 6. c. 19.

^e *Tacit. Germ.* c. 19. What he says of their Power over their Servants see after-

wards, *cap.* 3. f. 4.

^f *Ann.* xiii. 32. *Add.* *Euripid.* *Medea*, v. 230, &c. *Varren, Descrip.* *Japon.* lib. 13. *Lex*

Wigibornum, L. 4. t. 4. c. 3.

^g *V. H.* l. 12. c. 38.

“ place, to engage her in single Combat ; and if
 “ he gets the better, he leads off his Captive in
 “ Triumph, and ever after acts the Sovereign o-
 “ ver her : if the Victory fall on her side, she is
 “ the Queen, and he the Slave. And this Con-
 “ tention is not design’d to endanger the Lives of
 “ the Combatants, but only to determine the Ma-
 “ stery between them.

What Power the Husband hath over the Goods of the Wife, is likewise to be adjusted, either by the Contract and Agreement of the Parties, or by the Decision of the Civil Laws. These Engagements are to be strictly obey’d in the several Points which they have settled ; as for Instance, whether the Woman shall bring a Portion at Marriage ; whether or no the Couple shall join Purfes, and mix their Effects in the Common Stock, whether the Husband shall have an absolute, or limited Disposofal of his Wife’s Fortune ; and the like Questions.

Amongst the *Japonesse* the Women marry without Portions : Indeed, the Maids Parents, if of the wealthy Sort, send a Sum of Mony as a formal Present to the Bridegroom on his Wedding-day, but he presently returns it in the same ceremonious manner ; the reason they alledge for their Custom is, that they may not give the Women an occasion of Insolence and Pride. And there they have this mortifying Proverb, *That a Woman, so long as she lives, hath not so much as a House that she can call her own* : Before Marriage she is a Dependent on her Father’s Family, in Marriage on her Husband’s, in Widowhood on that of her Children ^a. It was a Custom with the old *Thracians*, that the fairest of their Maids should be expos’d to publick Sale, and be given in Marriage to the highest Bidder : On the other side, that those whom Nature had been less kind to, should expend their Fortunes to buy themselves Husbands ^b. The *Affyrians* likewise dispos’d of their Virgins in the way of Sale ^c.

Where the Civil Laws have not defined these Matters, or where the Parties live in a State of Natural Liberty, the Husband and Wife may settle any such Point as they please, by particular Contract.

XII. For the further Illustration of this Subject, it will not be amiss to examine the Doctrine laid down by *Hornius* in his first Book *de Civitate* ^d. First of all, he rejects the Opinion of those who assert, that the Husband hath, by Nature, a Sovereignty over the Wife. And thus far we approve his Censure, if the Persons, against whom he disputes, did maintain the Husband’s Sovereignty to be the free Gift of bare Nature, without any intervening Contract, or without the Wife’s voluntary Submission. For this indeed would be repugnant to the Natural Equality of Mankind ; and a fitness or ability to govern, cannot, of it self, confer a Right of Government.

Hence he proceeds to affirm, That *there can be no Sovereignty, publick or private, of one Person over another, but that which ariseth from the express Appointment and the most solemn Intervention of Almighty GOD*. Now as to this Position, we cannot but observe, that when Enquiries are thus made into the Origin and Fountain of Dominion, what we search for is the nearest, the immediate, and the second Cause ; the first and universal Cause of all things being ever presuppos’d. And therefore, tho’ it appear most evidently, that God hath commanded such an Order to be introduc’d among Men, yet the main Question will be still behind, what Contracts are required to put Men in a way of conforming to the divine Precept. For he must have little Knowledge of Letters, who can imagine, that when we say God is the Author of such or such a moral Institution, we mean that he produceth it, as he did at first the Heavens and the Earth, without the Intervention of any thing formerly created. That God expressly order’d the making of the *Jewish* Tabernacle, is no manner of Reason why we should not say, that the Workmen were the next and immediate Cause of the Fabrick. Thus although it be enjoin’d by the Divine Oracle, that the Woman shall be in Subjection to the Man, yet to make him actually and immediately her Sovereign, it is necessary, that she promise Obedience to him by her own free Covenant. To say the contrary would not be less ridiculous, than to pretend, when God bids us *have Dominion over the Beasts of the Earth* ; that there is no need of our using any outward means to obtain it, as by Hunting, &c.

The Argument this Author afterwards makes use of is certainly most trifling and childish. *The Wife*, says he, *hath no such thing as Conjugal Sovereignty, and therefore she can confer no such thing on the Husband*. As if, by the Agreement of several Persons, a new moral Quality could not be produc’d, which did not actually exist before ^e. To constitute a Dominion, it is by no means necessary, that it must be first really possess’d by one Party, and then translated on another (as physical Substances cannot be given away, unless they had before a full and formal Being) but this Superiority then ariseth, when any Person divests himself of that Power of resisting another which his natural Liberty gives him, and engageth his Faith, that he will submit, in all things, to the Will of him whom he thus chooseth for his Governour.

Farther : Although in the Holy Scriptures the Subjection of *Eve* is said to have been enjoin’d her as a Punishment for seducing her Husband ; yet it doth not hence appear, that the Husband’s Sovereignty, after the Fall, hath not for its nearest and immediate second Cause the Agreement between Man and Woman. For, since a necessity of Obedience doth not always include an unhappiness of Condition (as the most blessed State of the holy Angels is not impair’d by their yielding the

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[†] See what the Author says, l. 7. c. 3. § 4. following.

^a *Bern. Varen. Descrip. Japon. c. 12.*

^b *Solin. c. 15.* Thus *Scythæ* in *Xenoph. Exp. Cyr. Lib. 7. f. 20.*

^c *Ælian. P. H. l. 4. c. 1.* *Herodot. Clio.* Add what the *Roman* Laws deliver concerning the Prohibition

of Donations between Husband and Wife. *Lib. 24. t. 1. D. De donat. inter Vir. & Uxor.*

^d *Cap. 1.*

the strictest Service to God) the Punishment attending the Woman's Inferiority seems to be this, that she bears the Yoak unwillingly, with inward Grudgings at her Station, and a Natural Desire of Command. And therefore it is no Contradiction to say, that the Superiority of the Husband naturally springs from the Consent of the Wife; and that GOD Almighty in way of Punishment to the Woman, hath made her Subjection troublesome and uneasy.

The following Distinction looks but like an impertinent Niceness, *Whatever Will, or whatever Voluntary Act we can now conceive in the Woman, belongs purely to the Act of contracting Marriage; and consequently is to be understood of that Consent and Approbation by which she acquiesceth in the future Government of such a particular Husband.* This is no more than to say, that the Husband's Sovereignty is not produc'd by the Consent of the Wife, but being before establish'd by GOD's Command, the Wife voluntary enters under it. As a Traveller doth not build his Inn, but freely makes use of it, when he findeth it built to his hands.

It is sufficient in the whole to observe, that the Dominion of one Person over another, consider'd as a Moral Entity, doth not exist without the Concurrence of some human Act, and cannot be understood without Subjection and Obedience: And that the Woman, for this reason, lies under no Obligation to obey, before she hath by her own Consent submitted to the Rule and Authority of an Husband. And though that she should thus submit herself, be indeed agreeable to the Divine Will, yet this doth not hinder, but that her own Covenant, and her Subjection consequent upon it, are the immediate and nearest Cause productive of the Husband's Power.

XIII. Nor can we grant what the same Author maintains, that the Husband, besides the Command of the Family, and of Conjugal Affairs, is invested with an absolute *Power of Life and Death, in which Right the Summ of his Authority consists.* For though this Power be meant as it is unrestrain'd by Civil Constitutions, and as it amounts not to a licentious Excuse of Murder and Parricide, but to a lawful Authority of inflicting condign Punishment on capital Crimes: yet that *every Sovereignty, as it is seated in a proper Person, not precariously obtain'd, nor circumscribed by a Superior, doth import the Power of Life and Death,* is an Assertion that we should not be inclin'd to assent to, without very good Proof. Certainly the End of Matrimony requires no such absolute Authority. And if it be objected, that all grie-

vous Enormities ought to be brought under Human Cognizance, we will only ask, who shall punish a sovereign Prince, or who the Father of a Family, living separate from all civil Government? We confess, that if the Wife prove guilty of Intolerable Wickedness, she may (in this Natural State) be expell'd the House as an Enemy, and may be kill'd by the Right of War. And we have already granted^a, that even this most strict political Power is not repugnant to the Nature of Marriage, though we are very far from allowing it to be essentially necessary.

XIV. We are oblig'd here to explain that common Maxim of the Lawyers, that *Consenting, and not Bedding, makes a Marriage.* Which will bear these two Senses, that a Couple, whatever Freedom or Familiarity they may use², cannot be Husband and Wife, unless they have pass'd their mutual Consent to live in Wedlock^b: Or, that so soon as both Parties are come to an Agreement, the Matrimonial Contract ought to be esteem'd perfect, even before the Ceremony of the Bed. Our Judgment on this Point is this, that as it is requisite to the full transferring of Propriety, that the Thing be plac'd under the Power of another, in such manner, that he may dispose of it at his Pleasure; so to make a Wife, it seems necessary, that the Woman deliver her self as it were into the Possession of the Man, for the common Ends of Matrimony: But it is by no means essential to this Agreement, that the Bed begin it. It is said *Rebecca became Isaac's Wife* after he had brought her into his Mother *Sarah's Tent*^c. And I question whether we ought to call it Adultery, when a Woman betroth'd to a Man in his Absence, but not *led home to his House, nor given into his Possession,* is bedded by another Person: although we suppose, that the former Engagement, as made by Proxy, had in the Eye of the Law the full Force of consummated Marriage. On the other side, it would be absurd to say, that *Tobias's Wife* had not a Title to that Name the *three first Nights*^d. Or that our Women are not Wives, when the Priest hath perform'd the solemn Office, 'till the Evening-Diversions of the Bride-Chamber.

According to the Opinion of the *Jews*^e, Consummation, as well as Consent, was, before the Law, required to the completing of Matrimony. Yet, by their Law, Consent alone render'd a Marriage valid^f. *Grotius* observes^g, that no Proceeding was made in the Nuptial Affairs, 'till

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¹ So the Digests affirm. *Nuptias enim non concubitus, sed consensus facit. l. 35. t. 1. De conditionibus & demonstrat. Leg. 15. & de Regul. Juris. Leg. 30.*

² Or, as *QUINCTILIAN*, *Decl. 247.* expresseth it, *Familiarities and Meetings without proper Rites can never make a Wife.* *Vid. Can. 5. caus. 27. quest. 2. & Cod. Lib. 5. t. 5. l. 8. de incest. & inutil. nupt. Leg. 8.*

³ *The three first Nights.* The History of *Tobias* mentions no such thing. Moreover, the thing appears certain in it self, if we suppose the Story true; for the Text says only, that after *Tobias* had driven away the Evil Spirit, they both of them slept that Night. *Chap. viii. 10.*

^a Sect. 11.

^b And therefore *Aeneas* pleads for himself in *Virgil*,

----- *Nec Conjugis unquam
Prætendi tædas, aut hæc in fœdera veni.*

I ne'er pretended to the lawful Claim
Of Sacred Nuptials, and a Husband's Name.

^c *Genes. xxiv. ver. ult.* ^d See *Tob. viii. 10.*
^{xxii. 23, 24.} *Add. l. 8. C. de incest. & inutil. Nuptiis.*

^e *Vid. Selden de J. N. & G. l. 5. c. 4.*
^f *Ad. Matrh. l. 18.* ^g *Æn. 4. v. 338, 339. & Deuter. 10.*

'till the Solemnity had been usher'd in by the hearing of *Divine Service* in a publick Assembly: Which most religious and most decent Institution, the *Jews* probably receiv'd from antient Tradition, and do still observe; and from them, it was admitted into the Christian Church. For this Reason, though at the settling of the Contract they oblig'd the Man to swear to preserve the Virgin's Honour, 'till the Day of Marriage; yet for the greater Security, they shut her up from him in the *Apartment of the Women*, till the time of that finishing Ceremony ^a.

XV. We are in the next place to enquire, whether by the Law of Nature the Matrimonial Bond be limited to a single Man, and a single Woman? Or, which is the same thing, whether Polygamy be naturally allow'd? Polygamy is of two Sorts; either when one Woman promiscuously admits of many Men, or when one Man is at the same time join'd in Marriage to many Women. To the former kind belongs the famous *Platonical* Communion of Wives: A Custom propos'd by *Plato* in *Idea* ^b; but really practis'd by ^c many Nations. *Diodorus Siculus* ^e reports of the *Taprobanians* in *India*, "That the Men did not confine themselves to strict Wedlock, but possess'd the fair Sex in common, and educated the Children (in whom they reckon'd themselves all concern'd) with Care and Love. Nay, the Nurfes oiten chang'd their little Infants, so as to hinder them from knowing their own Mothers." *Cesar* ^f tells us of the Antient *Britains*, *Ten or Twelve of them together have Wives in common amongst them; especially Brothers with Brothers, Fathers with their Sons. But every Woman's Children are attributed to him, who first married her, when a Virgin.* Where it is plain, that great Author cannot mean, that one Woman had, at the same time, ten or twelve Husbands, as *Mr. Selden*, amongst others, imagines; but that so many Men having each of them married his proper Wife, afterwards agreed upon that friendly Way of possessing them. *Lycurgus*, as *Plutarch* ^{*} delivers, "Endeavouring to prevent the vain womanish Passion of Jealousy, thought this the best Expedient, to allow honest Men the Freedom of each other's Bed: Laughing at those who resented, in so high a manner, these petty Injuries, as to pursue their Revenge by Mur-

thers and War. He look'd on it as no indecent Custom for a Man, step'd into Years before his Wife, to recommend her to the Arms of a young and virtuous Friend; and, when there appear'd Hopes of having a Child by so good a Father, to challenge the Blessing to himself. On the other side, a good and upright Man, who esteem'd a married Woman for her own Virtue, and for the Comeliness of her Children, was encouraged to beg of her Husband, without Ceremony, the Favour of a Night's Lodging; *That he might transplant into his own Garden some Slip of so goodly a Tree.* Indeed *Lycurgus* was of Persuasion, that Children were not so much the Propriety of the Parents, as of the whole Commonwealth; and therefore he would not have them begotten by the first Comers, but by the best Men that could be found. He censur'd the Lawgivers of other States, who whilst they spared no Pains or Charge in promoting and improving the Breed of their Dogs, and of their Horses; yet, being themselves Old and Infirm, shut up their Wives from other Men. Whereas a little Reflexion would have taught them, that the Virtues and Vices of Children, their Success or Miscarriage, do chiefly redound to those who have the Care of their Education." And this Institution of the *Spartan* Founder, the Historian judgeth to have been set on foot, *φυσικῶς ἢ πολιτικῶς, Agreeably to Nature and to Polity* ^d.

The *Stoicks* ^e too were of Opinion, that wife Men ought to communicate their Beds, as well as their other Possessions: Because by this means all esteeming their Children their own, would love them with equal Tenderness; and there would be left no room for jealous Fears, no Suspicion of Adultery or Dishonesty ^f. The borrowing and lending of Wives, amongst the *Romans*, is a Practice much talk'd of by Authors ^g. *Solon*, in his Laws, permitted an Heirefs, whose Husband prov'd impotent, to call in the Assistance of his nearest Kinsman ^h.

Yet we are not to make the least Doubt but that all these licentious Indulgences are repugnant to the Law of Nature ⁱ. For the natural and regular End of Marriage is, the obtaining of Children, whom we may with Certainty call our own. But what room can there be

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^a Add. *Diod. Sic.* l. 2. c. 58. Of the *Ischyophagi*, l. 3. c. 15. Of the *Hyllophagi*, l. 3. c. 24. Of the *Nomades*, c. 32. which are likewise mention'd by *STRABO*, l. 7. Of the *Garamantes*, vid. *Plin.* l. 5. c. 8. *Solin.* c. 43. Of the *Troglodyte Agatharcid.* c. 30. *Pompon. Mel.* l. 1. c. 8. Of the *Agathyrsi*, *Herodot. Melpom.* p. 161. Ed. *H. Steph.* Of the *Gindani* and *Nomades*, *ibid.* Of the Inhabitants of *Thule*, *SOLINUS* reports (I know not with what Credit) that *They hold their Women in common, and are Strangers to fixt Matrimony*, c. 35.

^{*} *De B. G.* l. 5. c. 14.

[†] *Lib.* 5. cap. 11. The same Custom is mention'd, tho' not so distinctly, by *XIPHILIN.* *Epit. Dion. in Ner. in Boudicca's* Speech; and again in *Sever.* *STRABO* reports somewhat like this of the *Sabæans*: "Their Possessions (says he) lie in common to all of the same Blood and Family, but the eldest bears the chief Sway. One Wife serves them All: He that comes first hath Admission to her Bed, placing his Staff before the Chamber-door; But the Nights she passeth with the Eldest. They punish Adulterers with Death, and such they esteem every Intruder into another Family, *lib.* 16. p. 538. *Vid.* l. 11. p. 353, 354. *de Massaget. & Tapyr.* Of some Inhabitants of the Kingdom of *Calecut*, *Ludovicus Romanus (Navig.* l. 5. c. 8.) informs us, "That every Woman is at the same time married to Seven Husbands, who lodge with her by turns. When she is brought to Bed, she presents the Child to which of the seven Fathers she pleaseth, and no Appeal lies from her Determination, *Vid. & Pet. de Valle Itiner.* p. 3. Ep. 7. *Juan. Buen. de Mir. Gent.* l. 3. c. 7. reports of the *Lithuanians*, from *Æneas Silvius*, "That the Women, by Consent of their Husbands, have their Sparks, whom they call Assistants of their Bed; whereas on the other side, for the Husbands to use the like Liberty, would be accounted highly infamous.

^a *Comp. Genes.* xxiv. 67. *Deuteron.* xxi. 13. ^b *Vid.* l. 5. *de Repub. & Marcil. Ficin. in Præfat.* ^c *L. 2. c. 58.* ^d The same Law is mention'd by *Xenophon, de Reb. & Leg. Lacedæmon.* ^e In *Diog. Laert. Zen.* ^f *Aid. Thom. Campanell. de Civit. Solis.* ^g *Vid.* *Plutarch, Num. & Cat. Min.* So *Cato* is commonly said to have lent his Wife *Marcia* to *Q. Hortensius.* *Vid. & Lucan.* l. 2. v. 328. ^h *Plutarch, Solon.* ⁱ *Comp. Mat.* xxii. 25, &c. for

for Distinction in this wild and confus'd Mixture? Again, The business of Nature not requiring so numerous a Concurrence, all these additional Helps and Services proceeded not from Necessity, but from Lust. Besides, a most material Objection against these Irregularities is, that the kind and endearing Titles of Relation are sunk and extinguish'd in them. *Plato* ^a proposeth by way of Remedy to this grand Inconvenience, that the civil Laws shall supply the Defect of natural Kindred; that all Persons shall esteem their Seniors in Age, as their Parents; their Juniors, as their Children; their Equals, as their Brothers and Sisters. But this is a most idle and vain Expedient; for to have *no certain* Father, *no certain* Child, &c. is, with regard to mutual Affection, the same thing as to have none at all. 'Tis well urg'd by *Laſtantius* ^b: *If all, says he, are concern'd in every Child, who can love a Child as his own, when he must needs be ignorant, or at least doubtful, whether it be his own, or no?* On the other side, *Who would reverence a Man as his Father, when indeed he is uncertain to whom he owes his Being? Whence it comes to pass, that he must take a Stranger for his Father, and his Father for a Stranger.* And it was a good Answer to one, admiring there should be no such thing as *Adultery* heard of in *Sparta*, That *their very Matrimony was Adultery.* Farther still; the main Difference betwixt the conjugal Union of Mankind, and the wild Freedom of coupling amongst the Beasts is, that the Wife engageth her Faith to be true to the Husband's Bed. Which Engagement, if he voluntarily release, and madly betray his own Honour to new Rivals, he is unworthy the Name, not only of a Husband, but of a Man; and is to be look'd upon as a most vile Disturber of human Decency and Society. As for the Excuse of *Ly-*

cungus, and others of those antient Lawgivers, that so fair a Soil as a young Wife ought not to lie fallow, under the Neglect of an unactive Husband, their most ready and most honest Way of preventing such Mishaps, had been to prohibit Marriage between Persons of improper Years. And then for the Point of *Jealousy*, by it they must mean, either that senseless Passion, which torments a Man's Head without good Suspicion or Reason; or else a due and proper Vigilance and Caution, in order to the preserving a spotless Bed: The former kind of Jealousy, the most foolish, and the most miserable Disease of human Minds ^c; their Community of Wives could not cure; and the other being the just Effect of Reason and Prudence, it ought by no means to have taken away ^a ^d. Nor shall I ever be persuaded, that to lay all Possessions in common, and to give each Man the Privilege of calling every Thing *his own*, is the surest Method of preserving Peace and Friendship in the World. Every one must indeed acknowledge, that it is much more for the publick Benefit to have a *State* fill'd with healthy and vigorous, than with diseas'd and weakly Subjects; and at the same time, that the Parents Constitution hath a considerable Influence on the Child's. Yet, did this Rule hold true more generally than it doth, it were by no means worthy of so high Regard, as that in consideration of it we should dissolve the sacred Ties of Marriage, and shake the main Foundation of all good Order amongst Men ^e.

XVI. The other kind of *Polygamy* ^f, and that which more properly claims the Name, being the joint Relation of many Wives to one Husband, hath been the Practice of many Nations in antient and in modern Time. The *Mosaical* Law was so far from forbidding this

^a Mr. BAYLE, in his News-Letters against *Maimbourg*, Lett. xvii. § 5. maintains strongly, "That if we follow Reason, as distinct from Grace, and the Light of Faith, a Man need not more to scruple to lend his Wife than his Book, and that without the ridiculous Fear of Cuckolding. Reason would rather advise a Community than Propriety of Wives." I own, that here, as well as in many other Things, Men, for the Good of Society, might, by a certain Instinct, which prevents the Use of Reason, be led to it. If Hunger and Thirst did not often put us in mind of our Nourishment, we should often forget, or neglect to satisfy that natural Necessity; and so the World might be unpeopled. In like manner, were it not for that unquiet, and raging Passion, called *Jealousy*, which always attends the Love of a Woman, the Community of Women would be easily introduced, or at least Husbands for the most part would be very careless of the Honour of their Wives, and easy to permit them to communicate their Favours to others besides themselves. Not that Reason would incline them to it, but the contrary; because, as Men are ordinarily made, there are few that consult, or hearken to Reason, so that they must be led to their Duty by Sense. With *Aristippus's* good leave, as a Philosopher (cited by Mr. BAYLE, § 4.) he had very superficial and popular Ideas. If he us'd his Reason but a little, he might have discover'd without Revelation, that Man is a Creature made for Society, and that no Society can subsist without Order, and that Community of Women (as Mr. BAYLE owns) would breed Confusion in civil Society; so that Men must not be judg'd of as Beasts, by looking upon their Propagation, as a Thing absolutely indifferent, and as to which every one may regulate himself only according to his own Fancy. In his Case 'tis certain, that a Woman ought to be a Common Good, as the Water of a River; and so it would be a sordid Passion to be displeas'd, that another should quench his Thirst at the same Spring. But since, by God's Appointment, Man ought to propagate his Kind in a Manner suitable to a reasonable and sociable Creature, Jealousy in it self, and reduced to its just Bounds, is neither more unjust nor unreasonable, than the Inclination, which leads both Sexes to join together; and we may say, that Nature hath wisely put into Men that nice Humour, as a faithful Guardian of the Chastity of Women, which several Husbands would little trouble themselves for, and would have them loosed without it. All that is meant, is this, when a Woman is unfaithful to her Husband, without any just Cause from him, Reason requires, that he comfort himself, and say with the Comedian,

*If my Wife deceive me, she shall lament it;
I've done no Wrong, and can't repent it.*

*They'll call me Fool not to revenge it.
But I should be hardy to hasten my End.*

^a L. 5. *de Repub.* p. 658. A. Ed. *Wsch.*

^b *Div. Instit.* l. 3. c. 20.

^c *Vid.* *Oppian. Cyneget.* l. 3.

^d *Vid.* *Senec. Herc. Oct.* v. 233, &c.

^e The Argument which some are not ashamed to bring from our Ways of promoting the Breed in Horses, is too filthy and scandalous to deserve a Refutation. Add *Aristotle's* Discourse against *Plato*, on this Subject, *Polit.* 2. c. 2. It is a worthy Saying of his in the same Work, l. 7. c. 16. *For Persons who are truly and properly Man and Wife, to seek another Partner, and another Bed, ought to be reckon'd amongst the vilest and most infamous of Offenders.*

^f *Vid.* *Grot.* l. 2. c. 5. § 9.

Custom, that it seems in several places to support it ^a. And GOD, by the Prophet *Nathan*, reckons amongst the peculiar Favours and Blessings he had bestow'd on *David*, that *He had given him his Master's Wives into his Bosom* ^b. Mr. *Selden* ^c assures us, that the *Jews* esteem'd it lawful for a Man to marry as many Wives as he pleas'd, provided he could maintain them, and yield a Supply in all things answerable to their Relation. Yet it was the Advice of their sagest *Rabbies*, that for the avoiding the Inconveniences of *Number*, no Person should exceed *Four*, except the King. He that acted contrary to this Rule, was adjudg'd guilty of notorious Impudence, and of Disobedience to the Institutions of his Ancestors. The *High Priest* was allow'd one Wife at a time, tho' he was not hindered from marrying another, in case of the Death, or Divorce of his first. By the Prohibition of *Deuteron. xvii. 17.* they were persuaded, that their King ought not to go beyond Eighteen. If the Men of their Nation liv'd in a Country, where *Polygamy* was not tolerated, they thought them oblig'd to conform; as particularly in the *Roman Empire*, the Laws of which expressly restrain'd them from the Use of such a Liberty ^d. As for the modern *Jews*, we are inform'd by *Leo Mutinensis* ^e, That those of them who live in the East, still keep up their antient Practice of *Polygamy*; whereas in Germany they are not allow'd this Privilege, and in Italy very rarely; and only in case a Man hath liv'd with his present Wife many Years without Issue ^f.

Tacitus ^g observes of the antient *Germans*; They are almost the only People amongst the *Barbarians*, who are contented with single Marriages. Indeed some few Persons of extraordinary Merit are advanced to the Favour of more Ladies than one; but then they are courted to this Liberty, not out of Lust, but upon account of their singular Virtues and Worth. Thus *Cesar* ^h tells us of *Ariovistus's* two Wives, chosen out of different Nations.

The *Grecians*, according to their regular Frame and Constitution, admitted but of one Wife; yet we find in one of the *Athenian Decrees* an Exception to this purpose, That to increase the Number of Men, at present deficient, it shall be lawful for any Person to have Children by another Woman, besides her that is in a more strict sense, his Wife ⁱ. And hence *Atheneus* ^j urging the Improbability of the common Story, that *Socrates* had two Wives, inasmuch as this was contrary to the primitive Ordinance of *Cecrops*, and was not objected to him by the *Comedians*, who handled him so reproachfully on other Occasions; at last concludes, that if the matter of Fact were really true,

it must proceed from a particular Order of State, dispensing with the antient Strictness, by reason of the present Scarcity of Subjects. In *Gellius* ^k, among the several Causes alledg'd, why *Euripides* should get the Title of the *Woman-Hater*, this is brought as one, that he had two Wives together (the *Athenian Government* at that time allowing it) who made him quite weary of Matrimony, and quite out of love with the Sex. Amongst the *Spartans*, we find in *Herodotus* ^l, that when their King *Anaxandrides* refus'd to put away his Wife, on the account of Barrenness, he was compell'd by the Authority of the *Ephori*, to admit another to his Bed, who did not lie under the same Imperfection. Every Body knows, that the *Romans* were content, each Man with his single Wife ^m. Yet *Suetonius* ⁿ reports, that it was once in *Julius Cesar's* Head, to introduce a Law, to give Men Licence to marry what Sort, and what Number of Wives they thought fit, for the better stocking the Commonwealth. *Socrates*, the Ecclesiastical Historian ^o, reports of the Emperor *Valentinian*, that whilst his Wife *Severa* was living, he admitted to the same Honour the most beautiful Lady *Justina*; and publish'd an Order through his whole Dominions, permitting every Man to follow his Example; To have Two lawful Wives. *Paulus Diaconus* ^p gives the same Relation; and *Zonaras* mentions the Emperor's Two Wives, though he says nothing of the Law enacted on that Occasion. But in as much as the other Historians, *Ammianus*, *Zozimus*, and *Orosius*, together with the Christian Fathers, who so often discuss the Questions concerning Matrimony, are absolutely silent in this Point; *Baronius* ^q concludes the double Marriage of *Valentinian*, and the Law in Justification of it, to be perfect Forgeries.

Mahomet in his new Institution allow'd of *Polygamy*; craftily accommodating his Doctrines to the Temper of the People, whom he intend'd to deceive. For as the Force of Love is stronger in the Men of those Eastern Parts, so the Women, either by their natural Genius, or by the Power of Education, live in such perfect Subjection to their Husbands, that their Jealousies and Quarrels are seldom considerable enough to disturb the Peace and Union of the Family. Yet the wealthier Men shut up their Wives in separate Houses, or confine them to distinct Towns, to prevent Dissention ^r. *Boccaline* ^s will have this Indulgence to have been a Device, to dispose Men the better for a Life of Slavery; whilst dividing their Riches amongst so large a Progeny, they must continually

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^g Tacit. de Mor. German. c. 18.

^a See Deuteron. xxi. 15. xvii. 16, 17, & loc. Ambrosii, apud Gratian. Caus. 32. quæst. 4. c. 3, 7. ^b 2 Sam. xii. 8. ^c De Rit. De Uxore Hebraic. l. 1. c. 9. ^d L. 8. C. de Jud. &c. Add. Selden. de J. N. & G. 5. c. 6. ^e De Rit. Hebra. p. 4. c. 2. f. 2. ^f Here Mr. Selden observes, that in the first Edition was added, *Indulta tamen Romani Pontificis impetrato*, "Yet not without procuring the Indulgence or Dispensation of the Pope"; which Words are omitted in the Paris Edit. 1637. ^g De B. G. l. 1. c. 53. n. 4. ^h Ding. Laert. Socrat. l. 2. § 26. ⁱ L. 13. c. 1. ^k L. 15. c. 20. ^l Terpsichore, p. 190. Ed. H. Steph. Vid. Potter Archaeol. Græ. l. 4. c. 11. p. 599. ^m Vid. Cod. lib. 5. t. 5. l. 2. de Incest. Nupt. & lib. 9. t. 9. l. 18. C. ad L. Jul. de Adult. ⁿ C. 52. ^o L. 4. c. 26. ^p L. 11. ^q Tom. 4. ad. A. Chr. 370. §. 125. ^r Richer. de Morib. Turc. ^s Ragg. di Parnass.

grow weaker, and more absolutely at the Command of the Government. A Thought very ingenious indeed, and of refin'd Policy; and such as probably never enter'd into *Mahomet's* Head, who died so long a time before the Establishment of the *Turkish* Tyranny and Empire. As for the *Indians*, Travellers inform us, that the chief Reason why several of their Princes have refus'd to imbrace the *Christian* Faith, hath been because, amongst other Conditions, it was required of them, to admit no more than one Woman to their Bed ^a.

XVII. Whether or no this Practice be repugnant to the Law of Nature, is a Point not fully settled amongst the Learned. It shall be our Business to propose fairly the Arguments on both sides, leaving the decisive Judgment to be pass'd by the Reader. Those then, who maintain *Polygamy*, as we now understand it, to be in it self agreeable to natural Law, argue in this manner: The regular End of Matrimony, that is, the Certainty of Off-spring, and the Benefit of mutual Assistance, is as well answer'd under these Allowances, as under the strictest Confinement. It is an idle Objection, which some make, That at this rate the conjugal Faith will not be reciprocal, a Condition which Reason it self requires as essentially necessary to every Covenant. For mutual Faith doth by no means suppose, that the Performances on each side must needs be equal. Nor doth the true Intent of Matrimony demand, that the Man should confine his Desires so streightly as the Woman. The Reason why one Woman ought to take up with one Man, being the great Danger of the Uncertainty of Issue; which Hindrance doth not lie in the way of the other Sex. Yet is not the Husband less oblig'd to make good his Faith to every Wife; which Performance consists in the yielding her all due conjugal Help, Kindness, and Support. As for the main End of Marriage, the obtaining of Children, one Man is, in this respect, equal to many Women; at least to such as are Moderate and Virtuous ^a. And therefore it is chiefly Lust and Intemperance which makes Women so averse to *Polygamy*. Indeed, if a Wife, at her first Contract with her Husband, bind him under an Engagement to admit no Partners with her of his Bed (as *Laban* ^b bound *Jacob* in Behalf of his Daughters) such a Covenant is faithfully to be perform'd ^c. Where no such Condition

is made, there the Wife ought to rest satisfied with a competent Share in the Husband ^d. Nor doth she in this Case suffer any Injury; for she can have no more Right over her Husband's Body, than what she obtain'd by the Matrimonial Compact: But in that Compact she receiv'd a Right only to a Part of the Man, and voluntarily agreed to this imperfect Possession. And therefore she hath only Reason to complain of her Husband, when, as *Plautus* ^e says, *He lets his own Field lie fallow to plough another Man's*. Nor doth this Allowance of *Polygamy*, as some object, reduce the Women into the Condition of Slaves. Nor is it any Crime, to place the weaker Sex in an inferior Degree to the stronger, to whom they owe their Defence and Support ^f. The Reasons alledg'd on the other side, taken from the fatal Effects of Jealousy, the Danger of Domestic Quarrels, the Hatred of the rival Mothers transmitted to their various Race, do not amount to a Proof, that *Polygamy* is naturally unlawful; but then the same Inconveniences appear, as in all, so especially in *second Marriages*, which no one will upon this account term unlawful. Nor are the Troubles and Misfortunes of this kind equal in all Places; but they are chiefly to be discover'd in those Countries, where either the Women have too high and commanding Spirits, or the Men too low and servile. In many Nations the Wives, either by their natural Disposition, or by Custom and Education, pay a more strict and quiet Obedience ^g. And besides, it is no difficult Task, for a Man of tolerable Prudence and Discretion, to keep the Family-peace amongst several Women ^h.

XVIII. Those, who deny *Polygamy* to be agreeable to the Law of Nature, chiefly insist on the Seventh Commandment in the *Decalogue*, *Thou shalt not commit Adultery*; which must be acknowledg'd to affect the Man, as well as the Woman, And therefore, say they, if the Prohibition lies on both Parties, the Husband must be guilty of Adultery, whenever he receives into the Covenant of Marriage, or into the Possession of his Bed, another Woman, against the Consent of *Her* to whom he first plighted his Faith, and gave the Power over his Body ⁱ.

In return to this Argument, *Antonius Mattheus* ^k, the *Civilian*, affirms, that Adultery cannot be committed, either by *Polygamy*, or be-

^a *Add. Abrah. R. de Bravin. p. 1. c. 13. & Alex. de Rhodis Itinerar. p. 2. c. 11. Add. Nouv. Memoires de la Chine. Tom. 2. l. 4. & WILL. BOSSMAN'S Voyage to Guinea, Lett. 19. & Mr. BAYLE'S Nouvelles de Avril, 1685. as also LYSTER'S Book, entituled, Polygamia Triumphatrix.*

^b Especially, if they imitate *Zenobia*, Queen of the *Palmyrenes*, who would not admit the Embraces of her Husband upon any other Account, than the obtaining of Children. *Trebell. Poll. in xxx. Tyran. cap. 30.*

^c *Add. Lib. 45. t. 1. l. 121. f. 1. D. de Verb. Obligat.*

^d *See Genes. xxx. 15, 16. Herodot. Thalia, pag. 120. Ed. H. Steph.*

^e *The Persian Wives take their turns and Courses with their Husbands. Asinar. Act. 5. Sc. 2. Add.*

^f *lib. 48. t. 5. l. 13. f. 5. D. ad l. Jul. de Adult. & ad eam Grot. in Flor. Spars. ad Jus Justinian.*

^g *Women are seldom so very ambitious of Honour, as to be satisfied with the Excuse which Ælius Verus (in Spartian) gave his Lady, when she complain'd of his Mistresses: Give me leave, says he, to satisfy my Inclinations by some other means: A Wife is a Name of Dignity, not of Pleasure. Add. Plaut. Mercat. Act. 4. Sc. ult. Gratian, Cauf. 32. Qu. 6. c. 2, &c.*

^h 'Tis a Saying of *Euripides* in *Sappho*, ver. 40. *That Women who are wise, will transact every Thing by Men.*

ⁱ *Vid. Benzo, Hist. Nov. Orb. p. 1. c. 37.*

^j *The Reasons urg'd by Dionys. Golofred. (ad Lib. 1. t. 9. l. 7. C. de Judicis, &c.) will be found upon Examination, very slight and trivial.*

^k *Gratian. Cauf. 32. Quæst. 5. cap. 15, 16, 23. Vid. Bæcker. ad Grot. l. 2. c. 5. f. 9. Hobbes*

hath made some kind of Reply to this, in his Sixth Chapter de Gibe. f. 16. and in his 14th Chapter, f. 9. which we shall elsewhere take occasion to examine in lib. 7. c. 1.

^l *De Crimin. ad L. Jul. de Adulter. c. 1. l. 13.*

tween a married Man and an unmarried Woman ^a, but only with another Man's Wife ^b. Nor will he allow every Violation of the Marriage-Covenant to be the Sin of Adultery: For we never call him an Adulterer, who maliciously forsakes his Wife, who refuseth to give her Maintenance, and the like; yet such a Man, without doubt, breaks his matrimonial Faith. He ^c adds, " altho' it be unjust in the Husband, to require a stricter Chastity of his Wife, than he practiseth himself; yet this by no means proves the Sin on both sides to be equal. For every one knows, that the Wife is, upon many Accounts, oblig'd to a much severer Degree of Moderation and Purity; in regard, as well to the Modesty of the Sex, as to the Danger of confus'd Amours, and of a supposititious Breed; as likewise to prevent the Scandal her Lightness would bring, not only on her own Family, but on the Government under which she lives. For if it be reckon'd so very disgraceful to be born of Parents, one of whom is a Native, the other a Foreigner, in so much that in most Countries a Name of Reproach is fix'd on Persons of this motly Race; how much fouler an Infamy would it prove, as well to the whole State, as to particular Men, should it be left uncertain, whether the Subjects are born in Adultery, or in lawful Marriage? In *Leviticus* ^d Adultery is defin'd, *The coming to another Man's Wife, the polluting another Man's Bed*. Nor can it on any account appear probable, that a Law against Adultery, directed to a People who actually used *Polygamy*, should forbid this Practice, without declaring as much in express Words. Those Expressions of holy Scripture ^e, and of the primitive Fathers ^f, which seem to make the coveting, or desiring another Man's Wife, to be Adultery, are to be understood in the same Sense, as when he that *bates his Brother* ^g, is stil'd a Murderer."

Others choose to answer thus, " The Commandment alledg'd doth indeed bind Men, as well as Women: And therefore for one Husband to dishonour another's Bed, is no less sinful, than for a Wife to defile the Bed of her proper Husband. But then *Polygamy* doth not make the Husband guilty of this Trespass against his Neighbour. It is true, if in the Original Contract between the Parties it was expressly provided, that the Man should transfer the whole Power over his Body to the Woman, then in case he brings an Usurper to her Bed, whether under the Name of an Harlot, or of a Wife, he certainly violates his Faith given in the former Matrimony. But we have no such Charge of Perjury to lay against him, if at the first Marriage he reserv'd to himself the Liberty of adding a second Consort, as a Partner to her whom he then receiv'd. Nor can he be said to defraud her, in as much as he bargain'd to

" allow her only a Share in himself." To this it is reply'd, That *we must not suppose the Woman would thus consent to her own Loss and Injury, unless either compell'd by Force, or Fear, or mov'd by Weakness and Defect of Judgment; neither of which Causes are able to found a Right in the Man*. But the Assertors of the other Opinion will not grant, that there is any Injury in the present Case. " All the Right and Title, say they, that one Person can have to the Body of another, must arise from Covenant, and from the Consent of that other Party. And consequently, if so much be perform'd, as was fairly covenanted for, there ought to be no Complaint of Injurious dealing. It is no good Consequence to say, that because, in just and true Matrimony, the Husband receives the full and perfect Possession of the Wife; therefore the Wife obtains the same absolute Title to the Husband. Nor will such an unequal Covenant prejudice the natural equality of Mankind. For to save this, it is not necessary, that the mutual Performances amongst all Persons should be exactly alike: If so, it would be repugnant to the Law of Nature, that one Man should be born a Prince, another a Subject, and both by virtue of an antecedent human Covenant, not made by themselves, but by others. Will any one be so extravagant as to maintain, that 'tis a Breach of natural Equality, unless the Wife be allow'd her Turn of Governing, as well as the Husband? And there is the same Difference observable in the Care of the common Off-spring: How little Trouble doth this bring to the Father, in comparison to the grievous Pains undergone by the Mother? Would it not be a most ridiculous Proposal, for the Women of State to desire a Part in the supreme Administration? And yet we must not say, that the Men are guilty of Injury and Tyranny for excluding the fair Sex from this honourable Privilege. Should any People be of such a Temper, as to desire the Establishment of a stricter Government (which the bolder Patrons of Liberty are wont to call, the Treatment of Slaves) if they too freely indulge the Reins to the new Power, they act foolishly, and transgress that *ruling Prudence*, which is the best-lov'd Sister of *natural Law*. So that to commiserate the Condition of the Wives in *Turky, &c.* is as absurd and impertinent, as to bestow our Pity on Husbandmen and Artificers, and condoling with them, that they should be so unfortunate, as to live in more uneasy Circumstances, than the Nobility. The Reason why a Husband cannot honestly admit another Man to partake of his Bed, is built upon a different Bottom. On the whole it may be concluded, that a Woman lies under no restraint of Conscience, from agreeing to this Kind of Matrimony, in a Country where the Practice is publickly receiv'd. Especially, since

Mr. BARB. NOTE on § XVIII.

¹ So the *Digests* speak, *Periniquam videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat*. Lib. 48. tit. 5. *Ad Leg. Jul. de adulteris coercendis*, Leg. 13. § 5.

^a S. 12. ^b L. 6. f. 2. *D. h. t.* ^c *Levit.* xviii. 20. xx. 10. ^d *Matt.* v. 28. ^e Produced by *Gratium*, cap. 3, 4, & 1. quæst. 4. caus. 32. & c. 5. quæst. 6. caus. *ealem.* C. 4. 10. *De eo qui cognov. Conjugam. Uxor. fæc.* ^f *1 John* iii. 15.

“ if it were in any degree Vicious, yet the bare Force of the weaker Sex could never prevail to the beating down a publick Custom; nor would all of them join in the Attempt: Some being ever more kind and friendly than others, and more unwilling to engage against the Men ^a. The Example of the Heathens, and of the *Mahometans* (who are allow'd four Wives, and as many Concubines as they can maintain) may indeed be of no great Force in the Argument; because it appears, that those People are guilty of many Violations of the Law of Nature; but the Polygamy of the Fathers, under the old Covenant, is a Reason, that ingenuous Men must confess to be unanswerable. As to the Saying of the Apostle, 1 Cor. vii. 4. it doth not seem to teach the primary Design and Use of Matrimony, but only the secondary and indirect End, *the avoiding Fornication*: which End belonging in the same degree to the Man and to the Woman, Humanity and Equity enjoin, that the same Provision should in this respect be made for both Parties; and then it follows, that the Husband ought not to deny his Wife conjugal Favours. But the communi-

“ cating his Favours to others besides her, doth not here seem to be forbidden.

XIX. However it be, this is very clear and certain, that the most decent, the most proper, and the most peaceable Way of Wedding is, for *one to live contented with one*. This then is, without all doubt, to be esteem'd the highest, and the most perfect Kind of Matrimony; and the Laws and Conditions of it are most religiously to be observ'd, as well by the Husband, as the Wife ^{1 2 3}. It is worth remarking, that where several Wives are allow'd to one Man, he seldom fails to single out a Beloved, whom in all respects he prefers to the rest ^b. Thus Nature it self seems, out of Multitude, to lead us into Unity. 'Tis a wife Observation that of *Salust* ⁴, *The Relation*, says he, *of a Son-in-law, is but slightly esteem'd amongst the Numidians, and the Moors* ⁵: *And the reason is, because they marry each as many Wives, as they think agreeable to their Fortune and Grandeur; some Ten, some more, and their Princes with a far wider Liberty. Thus the Mind is divided and distracted with Number, and all are despis'd, because all cannot be lov'd* ^c.

⁶ *Grotius* ^d assigns these Reasons for the

Mr. BARB. NOTES on § XIX.

¹ *Euripid. Andromach. v. 464, &c.*

Οὐδέ ποτ' εἴδιδουσα
 Αἰχίρ' ἰταμίωσεν ἑσπέρην,
 Οὐδέ' ἀμυμμάτερον κορπεῖ,
 Ἴδεν ἢ κίμων,
 Δοσμητίς τε λύπαις.
 Τὴν μὲν μοι σιγήτω πόσις γάμοις
 Ἀκατάβητον δὴν ἀνδρός.

-----Ne'er will I commend
 More Beds, more Wives than one; nor Children curs'd
 With double Mothers, Banes and Plagues of Life.
 Let each good Man possess his single Bride,
 And check the Intrusion of a Rival Dame.

Isoocrates Nicol. p. 59, 60. Edit. Paris. “ I cannot but greatly condemn those, who having entred upon a Married State for their whole Life, neglect afterwards to stand to the Agreement; but giving a Loose to their Pleasures, injure those dear Partners; from whom they expect nothing but Kindness and Comfort. In other Bargains, they are wont to practise Justice and Honesty, and yet make no scruple to violate the nuptial Contract, which ought to be so much more strictly observ'd than all others, as it is of more sacred Obligation, and of nearer and more important Concern.”

² *Plaut. Mercat. Act. 5. Sc. 1. v. 8.*

*Nam uxor contenta est, quæ bona est, uno viro;
 Quæ minus vir unâ uxore contentus fiet?*

A good Wife is contented with one Husband,
 And why should not an Husband with one Wife?

Plutarch. de Præcept. Conjugal. “ They say, that a Cat, upon smelling certain Essences or Perfumes, is driven to Madness. Did the same Effect hold in Women, ought not Men to abstain from using such Perfumes, rather than cause so great Misfortune for the sake of a worthless Pleasure? Why, the Dishonesty of a Husband is as likely a Means to throw his Wife into Distraction, as the most offensive Smell could be: And consequently, it is most unjust, on the account of an idle Satisfaction, to bring so grievous Affliction on an innocent Person; and not rather to preserve the Nuptial-Bed uncommunicated and unstain'd.”

³ *Clytemnestra in Eurip. Electra, v. 1035, &c.*

Μᾶλλον ἢ εἴν ζωστικῆς, ἢε ἄλλας λίγας
 Ὅταν δ' ἰσπρίθω ἴσθδ', ἄμαρ πάλιν πόσις,
 Τῆσδιν παρσόντις λίγας μιμνήσκω δίλει
 Γυνὴν ἢ ἀνδρα, καὶ ἀπὸν κλέσται αἰλον.
 Καπεταί, ἐν ἡμῖν ὁ φόβος, λαμπρωσίται,
 Οἰδ' αἶπις πῶν δ', εἰ κλύσο' ἀνδρες κακῶν.

Women are Fools: 'tis own'd; and by a Woman:
 But when Men take Advantage of the Folly,
 Slight home, and scout abroad for lawless Love;
 No wonder if the Dames return the Wrong,
 Seek out new Mates, and practise as they're taught.

⁴ *Salust's Words are, Etiam antea Jugurthæ filia Boccho nupserrat. Verum ea necessitudo apud Numidas, Maurosque levis ducitur, quia singuli pro opibus, quisque quam plurimas uxores, denas alii, plures alii habent, sed Reges eo amplius. Ita animus multitudinè distractitur, nullam pro fœcia obtinet, pariter omnes viles sunt. In Bell. Jugurth. c. 82.*

⁵ *Claudian de Bello Gildon, ver. 442. makes this Reflection on the same People of Africa:*

-----Connubia mille:
 Non illis generis nexus, non pignora curæ;
 Sed numero languet Pietas.

-----A Thousand nuptial Bands they wear,
 Blood is no Union, nor their Race their Care;
 But Love expires in Number.-----

⁶ We may here add the Reflexions of the famous Mr. BAYLE, in his News-Letters upon the Occasion of *F. Maimbourg's* critical History of *Calvinism*. It is certain from the Experience of all Countries, where Polygamy is allow'd, that the Peace of Families is not so great in them, as among Christians. And as for those Banterers, that would have Women to be taken upon tryal, and if Men did not like them, leave them: I answer them, That if this Liberty were permitted Husbands only, 'twould be unjust; and if it were granted to both Sides, the Husbands would be catch'd; for when they would keep to their first Market, their Wife would not agree to it, and so they'd see themselves obliged to leave Things as they were, to avoid greater Trouble.-----As a Servant never does his best but for two or three of the first Weeks, so it would be in the Service of new Husbands, who take Wives upon tryal. Women would not pass all their youthful Days in such Tryals. This being so, our Banterers would get so little by it, that they'd find it the shortest and best way to keep to the Christian Institution, tho' there were no Command from God to authorise it. *lett. xxii.*

^a *Ijiah iv. 1.* ^b *Genes. xxix. 29. Deuter. xxi. 15. Esther ii. 17. Cant. vi. 7, 8.* ^c To the same purpose *Amm. Marcellinus* (l. 23. c. 12.) speaks of the *Parthians*, *Their Affection grows cool and languid, by the unbounded Variety they make use of in their Pleasures.* ^d *De Verit. Rel. Christ. Procop. Hist. Vandal. l. 2. Be Ye concern'd for your Children, say the Barbarians, who are chain'd to the Necessity of a single Bed: As for Us, who, if we please, can have Fifty Brides together, we are in no fear of wanting Posterity.* *Eurip. Androm. v. 177, &c.*

Reception of *single Marriage* amongst *Christians*; *That the Wife, bestowing herself entirely on the Husband, may receive the equal return of his whole Heart and Affection: That the Family-Affairs may be carried on with more regularity under a single Mistress; and that many Mothers may not create Feuds and Quarrels amongst the Children.* To which we may add, that after the sufficient Multiplication of Mankind, *Polygamy* ought, amongst all Nations of tolerable Civility, to be restrain'd on this politic Account, that by too great a Number of Children the nobler Family must in time be reduced to Poverty, the meaner to Beggary, and the *State* oppressed with an idle Swarm of baser Populacy: which if not prevented and thrown off (as it cannot always be) will at length overturn all Order and Government, and sink the Commonwealth under its own Weight ^a. We are told that the *Turks* themselves, in the Point of Marriage, do not now take the same Liberty as they formerly us'd, and as their Law allows: The Cause of which alteration is, not perhaps so much the Increase of *bestial Lust* amongst them, as their Experiences of the Inconveniences and Mischiefs attending *Polygamy*.

XX. Another Controversy, no less warmly manag'd, is, Whether Matrimony, by the Law of Nature be a *Society*, or Partnership, capable of being dissolv'd; and consequently, Whether *Divorces* be by the same Law allowable? And here we shall take the same Course as before, to lay down the Strefs of what both Parties urge upon the Point, leaving the considerate Reader to pass Judgment for himself. First of all, it is taken for granted, that according to the common nature of *Covenants*, one Party cannot recede, unless the other hath either broken the Agreement, or else yielded his Consent to this Release.

It will therefore be repugnant to the Law of Nature for either of the married Couple to depart from the other unconsenting, only for the Improvement of Condition, or Satisfaction of Humour, without being able to alledge any Breach of the matrimonial Pact on the other's side. Nor, can the ¹ Indulgence of the *Roman Law* ^b, in some Cases of Partnership, be brought to justify a Desertion of this kind. For, besides that the relinquish'd Party is most certainly *endamaged* ²; an Union enter'd into upon account of Gain, may much more easily admit of Separation, than this most strict and sacred Tie between Man and Wife. For in Marriage the Parties acquire a *Right* over the Bodies of each other, which ought not, on either side, to be taken from them against their Will. And indeed, tho' there should be a mutual Consent of the Parties, yet it would be both indecent and unsafe to allow the dissolving of Marriage, without ³ very weighty Cause: In as much as this Liberty of frequent Divorces must exceedingly shock the Strength, and Credit of Families; and the Grace and good Order ⁴ of the whole Commonwealth ^c. And the same Reason will hold in *Esposals*, which although no farther Progress hath been made in order to their Consummation, yet ought not to be broken off by the Act and Motion of the Parties contracted, unless some extraordinary Occasion fall out; or some of those Conditions are found defective, on the supposal of which the Validity of the Covenant dependeth ^d. *Dionysius Halicarnassensis* exceedingly commends the Institution of *Romulus*, by which he order'd one sort of Marriage ^e, solemniz'd with the greatest Ceremony, to be incapable of Divorces. *This Law* (says the Historian) *engag'd the Wives* ^f (who had no Re-

MR. BARR. NOTES on § XX.

¹ The Words are, *Sed etsi convenit, nō intra certum tempus societate abeat, & ante tempus renunciatur, potest rationem habere renunciatio.*

² They suppose on the contrary, that he that withdraws, doth it either because the other Party hath broken some Condition, to which he was obliged by the Contract; or because he hath suffered some Wrong, *Nec tenebitur pro jocio, qui ideo renunciavit, quia conditio quedam, quā societas erat coita, ei non profuitur; aut quid, si ita injuriosus & damnosus socius sit, ut non expediat eum pati?* Digest. ibid.

³ The very Nature and End of that Society proves, that it ought to continue a long time; for we marry not only to have Children, but to bring 'em up. Now a Woman is capable of Conception, and usually finds her self big a considerable time before a Child which is born, is able to provide for its Needs; so that the Husband ought to remain with her till her Children are grown up, and of Age to subsist, either of themselves, or with such Goods as he gives them. We see, that by the admirable Wisdom of the Creator, this Rule is constantly observ'd by the Creatures destitute of Reason. Amongst the Beasts, which feed on Grasse and Herbs, the Society of the Male and Female remains no longer than the time of Copulation; because the Milk of the Dam is sufficient to nourish the Young, till they can feed upon the same Herbs. But as to Lion, and other Beasts of a Prey, seeing the Dam is not able to provide for her young Ones, the Male also hunts for them. We may observe the same thing in all Birds, unless it be tame Fowl, who live in such Places as afford them plenty of Food. But tho' the Conjugal Union of the Husband and Wife continues longer than that of other Creatures, yet there is nothing in that Union (as I think) that can require them to remain together all their Lives, after they have brought up their Children, and put them into a way of Living: That depends, as all other voluntary Engagements do, upon the Contract of Marriage, unless they live in such a State where the positive Laws command, that that Contract should be for Life. *This is taken out of Mr. Lock's Treatise of Government, Part. II. Cap. 7. § 2. &c. See also ALGERNOON SIDNEY'S Discourse of Government, Chap. 2. § 4. in fin.*

⁴ This would produce many Adulteries; for a Man, who in his Anger, or some other Passion, hath put away his Wife for a small Cause, may be reconcil'd to her, when she is married to another, and the Familiarity he has had with her, may easily afford him a means to maintain the antient Conversation in private. Besides, were the Women left thus to the Humour and Inconstancy of Men, what must Children suppose, when they see their Mother expell'd for no Cause, or for Trifles? And how can they have any Respect afterward for them from whom they have receiv'd their Beings?

⁵ The Ceremony was called, *Confarreatio*, because the married Couple, after a solemn Sacrifice had been offer'd by the Pontiff, who had join'd them with a set Form of Words, eat of the same Barley-Cake which had been used in the Sacrifice. See LIPSIVS on Tacit. Annal. Lib. 4. Chap. 16.

⁶ DION. HALICARNASSEUS'S Greek is; *ὅστις ὁ νόμος τὰς τιγαυήρας ἐντάλας τὰς γυναῖκας, ἢ ἀνδράσιν ἰστέον ἐπέθετο, ὡς ἐκ τῆς τῆς γυναικῶν τῆς ἀρετῆς, ἢ τῆς ἀνδρῶν, ἢ ἀναγκῆς τῆς ἀναγκαίης χροναίῃ, ἢ γυναικῶν κατὰ τὴν* Lib. 2. p. 95. Ed. Sylb.

^a It is a most barbarous Way which the People of *Angola* in *Africk* use, to get rid of their vast Stock of Men, occasion'd by Polygamy, when they sell their superfluous Numbers to the *Americans* for Slaves.

^b Vid. *Nal. Max.* l. 2. c. 9. f. 2.

^c Add. *Gell.* l. 4. c. 4.

^d Digest. Lib. 17. t. 2. l. 14. § 70

fuge,

fuge; nothing to trust to in Case of a Rupture) to yield a ready Compliance to the Temper of their Husbands: And it obliges the Husbands, on the other side, to use their Wives as a necessary Possession, which they could not, on any account, throw up, or desert. And one may reckon among the chief Causes of the Decay and Corruption of the Roman State, their too frequent Practise of Divorces, either upon so slight Pretences, or upon none at all ^a. *Amnianus Marcellinus* reports of the *Saracens* what seems very agreeable to their barbarous Customs. They hire Wives, says he ^b, to serve a present Turn: And to make some shew and semblance of Matrimony, the Woman presents her Mock-Husband with a Spear and a Tent; at the fix'd Day, she may, if she pleaseth, break up and seek a new Mate. *Vivenius* ^c informs us, that the Dutch, now and then, contract this kind of Marriage in Japan; having liberty to release themselves at their leaving the Island. The like is practis'd in many other Parts of the Indies, and the Kingdom of *Persia* ^d. How vile doth the Roman Liberty appear in *Juvenal* ^e?

*Cur desiderio Bibula Sertorius ardet?
Si verum excutias; facies, non uxor, amatur.
Tres rugæ subeant, & se cutis arida laxet,
Fiant celsuri dentes, oculique minores;
Collige sarcinulas, dicet libertus: & exi;
Fam gravis es nobis, & sæpe emungeris; exi
Ocyus, & propera; sicco venit altera naso.*

These Truths with his Example you disprove,
Who with his Wife is monstrously in love:
But know him better: For I heard him swear.
'Tis not that she's his Wife, but that she's fair.
Let her but have three Wrinkles in her Face.
Let her Eyes lessen, and her Skin unbrace;
Soon you will hear the saucy Steward say,
Pack up, with all your Trinkets, and away;
You grow offensive both at Bed and Board;
Your Betters must be had to please my Lord.

Mr. DRYDEN.

For really, as *Claudian* ^f observes,

*Fœmina cum senuit, retinet connubia partu;
Uxorisque decus matris reverentia pensat.*

A Matron for her fruitful Bed we praise:
And the Wife's Charms the Mother's Awe repays.

And how scandalous was that Law of *Charondas*,
mention'd by *Diodorus Siculus* ^g, giving Liberty

^g PUBLIUS SYRUS'S Latin is, v. 252, 425.

*Habent locum maledicti crebræ nuptiæ,
Mulier, quæ multis nubit, multis non placet.*

Many Marriages are next to many Curses. A Woman that marries often, displeaseth often. *Tacit. Ann. 2. c. 86.*

Mr. BARR. NOTES on § XXI.

¹ *St. Paul* allows a Dissolution of Marriage, upon this account, *1 Cor. vii. 15.* If an Unbeliever (either a Man or Wife of a Christian) departs, let him depart; a Brother, or a Sister, is not under an Obligation in such a Case; i. e. he is not so bound to him, as either to recall him, or live without marrying.

² *Senec. de Benef. l. 3. c. 16.* Who is now ashamed of breaking the Nuptial Union, when so many Ladies of Eminence and Quality reckon their Years, not by the Number of Consuls, but of Husbands; and are divorc'd in hopes of marrying, and marry in hopes of being divorc'd?
^b *L. 19. c. 3.* ^c *Japon. c. 13.* ^d *Olear. Itin. Pers. l. 5. c. 22.* *Petrus de Valle Itin. P. 2. Ep. 17.* ^e *Sat. 6 v. 141, &c.* ^f *In Eutrop. l. 1. v. 72, 73.* *Add. Martial. L. 10. Ep. 41.*
^g *L. 12. c. 18. p. 83. Ed. Rhodom.* ^h *Hist. Gotb. l. 4.* ⁱ *Vid. Plutarch. Amator. p. 769. & in Solon. p. 89.*
Aristot. Oecon. Lib. 1. c. 4. *Diog. Laert. in Pythag. Laſtant. l. 5. c. 23.* *Gratian. Caus. 3. Quæst. 5. c. 1, &c.* ^k *Vid. Selden. de Uxore Hebraica, l. 3. c. 6, 7.* *Montaigne's Essays, L. 3. c. 50.*

to Husband, or Wife, after a Divorcé, to choose a new Partner, provided they did not pitch on a younger than the former?

Besides all this, to put away a Wife looks heinous in the Eyes of all the World, and loads the Woman with so much Reproach, that it would appear most Base and Unworthy to proceed in so severe a manner, unless upon some extraordinary Grounds and Provocation. And this may extend it self as well to the Business of Contracts, as of the more solemn and perfect Marriage. Thus when *Radigis*, in *Procopius* ^h, having espoused the celebrated *Brittia*, broke off the Match without being able to allege any Crime on her side; the Historian tells us, She, unable to bear the Scandal, bent all her Thoughts and Resolutions on Revenge. For Modesty and Chastity are so highly priz'd, and so nicely regarded by these Barbarians, that a Woman turn'd off and deserted most infallibly lesseth her Reputation, though her Virtue be really safe and unshain'd. It was a wise and rational Choice, when the Daughters of *Pollio* and *Agrippa*, "standing for the Place of Governess over the *Vestal Virgins*, the former Lady was prefer'd on this account; because her Father and Mother had liv'd "in a long and peaceable Marriage, without Separation; whereas *Agrippa*, on the other side, "had filled his Family with Jealousies and Dissensions ⁹.

XXI. We are farther to examine, whether we may apply that to Matrimony, which holds good in all other Covenants, that in case the Heads and Conditions, especially the chief of them, are broken on either side, the injur'd Party hath the Power of receding from the Agreement. And here we may venture to take the Affirmative Part, if the Question be put concerning the necessary and essential Terms of the Contract. Thus the principal Design of Marriage is the procuring of Children, in order to the effecting which, it is requisite, that there be the nearest and most familiar Communication between Husband and Wife. And therefore if we regard barely the Law of Nature, either Person may quit and renounce the Relation, in case the other prove guilty of base ¹ Desertion, or of voluntary and obstinate ⁱ Unkindness, as to the Affair of the Bed. This last Omission would bear an Action of Law amongst the Antient *Jews* ^k; and the conjugal Debt as well as others might be recover'd by Process in open Court.

Again, the Intent of Marriage is not only that we may obtain Children, but that we may obtain such as shall indeed be our own. "On this account,

" says

“ says *Josephus*, *Moses* absolutely forbid Adultery; “ thinking it would be every way more happy, “ that the Husband should keep the Possession of “ his Bed secure and undisturb’d, and that the “ Production of genuine *Illæ* would be alike ad- “ vantageous to private Families, and to the pub- “ lick State. (*Antiqu.* III. 10.)

Nay, and after this End hath been provided for, every honest Man is willing to keep his Bed to himself, and doth not think it either decent or safe, to take Passengers a-board, though the Vessel be first laden to his Desire. Very few Hus- bands have so high Notions of Courtliness and Complaisance, as to be concern’d at *Ovid’s* Cen- sure, that,

*Rusticus est nimium, quem ludit adultera Conjux,
Et notos mores non satis urbis habet* ^a.

He that won’t lend his Bed’s a stinky Clown,
Unpractis’d in the Freedom of the Town.

It is therefore to be esteem’d a just Cause of Divorce, if a Wife voluntarily expose her Honour to another Man. As on the other side, if she be overcome by the Usurper, in the way of Force and Violence, we can on no Pretence call her Vir- tue in Question ^b. And though it be commonly reckon’d a more heinous Crime, to assault her Chastity thus, by main Strength and Power, than to ensnare or betray it by Flattery and Charms ^c; yet the Truth is, the former indeed offers the more grievous Injury to the Wife, but the latter to the Husband ^c.

It appears then, that the reason why Adultery and wilful Desertion are accounted sufficient Causes of Divorce, doth not arise from any particular positive Law of God (as if these two Excep- tions were added to that O. dinance which makes the Bond of Marriage perpetual) but from the common Nature of Covenants, which is such, that when one Party hath broken the Agreement, the other is no longer oblig’d to keep it. And the Force of these Causes is so extensive, as to justify the injur’d Person, not only in refusing to coha- bit with the perfidious Wretch, but likewise in passing to a second Marriage; whatever the Ca-

nonists urge to the contrary. Indeed those grave Prohibitors, when they are to gratify a Friend in this Point, do not scruple to find out a way of eluding their own Decrees, by declaring the former Marriage to have been originally null and void; an Evasion which they can ground on many plausible Scruples.

But altho’ Marriage be chiefly enter’d into up- on the Design and Hopes of Children, yet the bare Inability of either Party (otherwise fit for a Con- jugal Seat) towards promoting this End, doth not seem a sufficient Ground of Separation; in as much as it is a thing surpassing all human Power to bestow the Blessing of Increase. Yet *Cicero* *Ruga*, the first Man of the *Romans* that put away his Wife (523 Years after the building of the City) is reported to have taken his principal Motive from the Oath, which the Censors required of every mar- ried Man, in this Form, *Se habere Uxorem libero- rum querendorum causa*; That he engaged in that Condition on the account of Issue ^d.

XXII. But the chief Point of the Controver- sy on this Head is still behind, and may be thus frated: According to the true regular way of contracting Marriage, the Wife consents to a constant Cohabitation with the Husband, prom- ising, according to her best Strength, to assist and comfort him, as well with Sweetness of Con- verse, as with the Participation of Business and Cares, and engaging farther to be guided and directed by him, as the Lord and Governour of the Family. In requital for which, the Hus- band, on the other side, is oblig’d ^e to pro- tect and defend his Wife, to treat her with Honesty and Civility, and to pay her many o- ther friendly Regards of the same kind. Now the Question is, whether the signal and enor- mous Violation of these inferior Duties gives a full and fair Reason for a Divorce? And here, if we regard barely the Law of Nature, ma- ny venture to hold the Affirmative. For since a Father hath the Power of discarding an un- dutiful Son, who, at least in natural Considera- tion, seems more nearly related to him than a Wife; why may not he banish his Wife, as a rebellious Member of the Family, when her Manners are intolerable ^f, and her Amendment despe-

^a ‘Tis in this sense the Law of the *Digests* is to be expounded: *Persuadere autem est plus quam compelli, atque cogi sibi parere.* As at ^c.

^a *Amor.* l. 3. & l. 4. v. 37, 38. *Martial*, L. 6. Ep. 90.

*Mæchum Gellia non habet nisi unum,
Turpe est hoc magis, uxor est duorum.*

One Spark serves honest *Gellia* at a Time.
But her two Husbands are a fouler Crime.

Add. *Abr. Roger de Bramin.* p. 1. c. 13. ^b Add. *Valer. Max.* l. 6. c. 1. s. 2. *extern. Lic.* l. 38. c. 24. *Xenophon* in *Hieron.* p. 578. L. 48. t. 5. l. 13. s. 7. & 39. *princ. D. ad L. Juliam de Adult.* *Ælian.* V. H. l. 12. c. 47. ^c L. 11. t. 3. l. 1. s. 3. *D. de Servo Corrupto.* To inveigle and persuade is more than to force and compel. ^d *Vid. Gell.* l. 4. c. 3. *Valer Maxim.* l. 2. c. 1. s. 4.

Mr. BARB. NOTES on § XXII.

¹ Thus *Achilles*, in *Homer.* Il. 9. v. 340, &c. speaks;

“*Η μῆτις εὐχέσθ’ ἀλόχως μέεσπον ἀνδρώπων
Ἀρσῆσαι; ἐπειθ’ ὅτε τις ἀγάσας, ἢ ἐχέεσπον,
Τὼ αὐτῶ φιλίαι ἢ κίσεται.*”

The Wife and Good will cherish and defend
The Partner of their Bed, their nearest Friend;
Their second Self,-----

² The Law of *THEODOSIUS* and *VALENTINIAN* deserves to be recited here. They alledge first, that the Marriage Bonds ought not to be broken without good Reason, in consideration of Children. The Reasons which they mention, and for which they allow the Use of that sharp Remedy, but some times necessary, are these; If a Husband or Wife are convict- ed of Adultery, Assassinating, Poisoning, or Treason; if they are Forgers of Wills, Sacrilegious, Thieves of any Sort, Harbourers of Robbers; if an Husband has to do with a Whore in his Wife’s sight; if a Woman goes to a Feast with unknown Persons, without the Knowledge and Consent of her Husband, and if she lies abroad without very good Reason

desperate? Especially if we reflect on the Remark of *Fulgentius*, that a *Wife*, the nearer she is join'd to *Man* by the Law, the more certainly she proves to him, either *Honey*, by the Sweetness of her Temper, or *Poyson*, by her froward and malicious Disposition; being really, either a continual Comfort and Refuge, or a perpetual Plague and Torment. An honest Man, says old *Simonides*, can have nothing in this World better than a good *Wife*, nothing worse than a bad One ^a. On the other hand, in case the Husband treats the Wife with unreasonable Severity, and denies her the Respect due to her Sex and her Relation, so as to shew himself, not so much a kind Partner, as a troublesome and vexatious Enemy, it should seem very equitable, that she might be relieved by a Divorce ^b.

Another Scruple immediately ariseth upon this, Whether it be allowable, by the Law of Nature, on the account of intolerable Manners, or of barbarous Treatment, entirely to dissolve the matrimonial Bond? or, Whether the other conjugal Duties, as the Propagation of Race, &c. may not still be continu'd, though the cohabiting in the same Family be broken off? In as much as the former Covenant, bearing a regard to Children, seems to be Essential to Matrimony, the latter only Additional. Thus much then is certain, that several Pacts may be made between the said Parties, under this Condition, That in case one of them should be violated, the others shall nevertheless stand Good. Nay, one and the same Pact may be divided into many Heads, and Provision may be made, that although one of the Heads be transgress'd, yet the Parties shall proceed in performing the rest. If the Marriage was contracted under such a Form, it seems reasonable, that the Wife, although she hath by her unpeaceable Carriage forfeited her Title to a continual Cohabitation, yet may still lie under the Force of that Part of the Covenant, which obligeth her to consult Succession. But, because it is by no means probable, that she, who is unfit for the first of these Privileges and Duties,

should with any Convenience be admitted to the other; that a Man should desire Issue by the same Woman, whom he is constrain'd to hate: and not rather entertain an absolute Aversion to the Body, which lodgeth so froward a Guest: It is the common and regular Practice for the Parties to contract, by one and the same Agreement, for their living together, and for their mutual Care of Posterity: And thus the two Conditions are in so close a manner united and interwoven one with the other, that in case either be broke, both naturally fall asunder. It is therefore contrary to the Law of Nature, that the Reason before alledg'd should cause a Separation from Bed and Board, and yet continue some part of the Marriage Obligation, so as to hinder the Parties from disposing of themselves another way. Unless such a Separation be enjoin'd only for a time as a Punishment to obstinate Perverseness, and to try, whether there is any probability of Reforming. For it is absurd to say, that the Tie of a Covenant remains in force, whilst no part of the Debt arising from that Covenant can, or ought to be discharg'd. And tho' we should acknowledge, that the Party, who gave Occasion to this Mischief, is justly enough punish'd, yet the innocent Party is in the mean while injured, suffering thus for the Fault of another, and being oblig'd to live in a State of Celibacy, probably inconvenient, perhaps intolerable.

Thus far then, in the Consideration of natural Law, the Man and the Woman are upon the same Ground. And for this Reason *Plutarch* ^c calls that Order of *Romulus*, *σφοδρὸν*, very hard and severe, which forbid a Woman to desert and turn off her Husband, yet gave the Husband leave to discard his Wife, either upon her poisoning the Children, counterfeiting the Keys, or committing Adultery ^d. Amongst the *Athenians* we find either Party might upon sufficient Cause, separate ^e from the other: Though they distinguish'd these two kind of Divorces by different Names. For a Man to put away his Wife was term'd *ἀπὸ πέρμειν*;

four, or is present at Plays at her pleasure; if an Husband lays Snares for his Wife's Life, or she for his; if an Husband beats his Wife. The Words of the Law are: *Solutionem Matrimonii difficiliorē debere esse favor imperat liberorum. Causas autem Repudii hūc saluberrimā Lege apertius signamus. Sicut enim sine justa causa dissolvi matrimonia justo limite prohibemus, ita ad eorū necessitate p̄gion, vel p̄gion, quamvis infans, attamen necessario auxilio cupimus liberari. Si qua igitur maritum suum adulterum, aut homicidam, aut veneficam, aut certē contra nostram imperiam aliquid molientem, vel falsitatis crimine condemnatum invenerit, si sepulchrorum dissolutorem, si sacris adibus aliquid subtrahentem, si latronem, vel latronum susceptorem, vel abscōrem, vel plagiarium, vel ad contemptum sui, domūque suae, ipsā inspiciente, cum impudicis mulieribus (quod maxime etiam casus exasperat) certum inuentum, si suae vitae censum, aut gladio, aut alio simili modo insidiantem, si se verberibus (quae indignis aliena sunt) adflicentem probaverit; tunc repudii auxilio uti necessarid permittimus libertatem, & causas infidii Legibus comprobare. Vir quoque pari sine claudetur ----- nec ullo modo expellat fugalem, nisi adulteram, &c. ----- aut extraneorum virorum, se ignorante et nō lente, concivicia adpetentem, aut ipso invito, sine justa, & probabili causa foris scilicet permittentem, vel Circusibus, vel theatralibus ludis, vel arenarum spectaculis in ipsis locis, in quibus haec adjuvent celebrari, se prohibentes, gaudentes, &c. Cod. Lib. 5. tit. 17. De Repudiis & Judicio de moribus sublato, Leg. 8.*

^a V. *Fulgent. Myth. l. lib. 1. Si vult den inter Poet. Lyric. Edit. H. Steph. p. 227. Euripid. Orest. v. 602, &c.*

Blest is the Man, and sweetly runs his Life
Where smiling Fortune ties the nuptial Band;
But he whom inauspicious Hymen joins,
Wretched abroad must prove, and curs'd at home.

^b Add. *L. Theod. lib. 5. t. 17. l. 8. C. de Repud.*
^c *Euripid. Andromache. v. 672, &c.*

^e In the Life of *Rom.* p. 89. See Mr. *Davies's* Note upon

Whether the Man from a Disloyal Dame,
Or the Chast Dame from an Injurious Man
Suffers Reproach; each finds a just Relief.
Him his own Strength can vindicate; and Her
Parents and Friends combin'd protect from Wrong.

^d *Potter. Ant. l. 4. c. 12.*

for a Woman to quit her Husband, was ἀπολείπει. The reason of this variation in Terms is manifest; the Woman was receiv'd into the Man's Family, and therefore she could not properly ἀποπέμπει, send him away, or move him out of the House, tho' she might, ἀπολείπει, forsake him, and retire to a place of Ease and Security.

We have only this to observe farther, that upon whatever Reasons Divorces are tolerated in a Commonwealth, it is highly expedient, that the Cause be heard and approv'd by the proper Magistrate; and that a Point of so very great weight and moment be not left to be decided by the private Conscience and Discretion of the married Pair. For, the Reason which Bodinus^a offers to the contrary, *Because this publick way of proceeding must necessarily impair the Credit and Character of one of the Persons*, doth not seem to conclude with any Force to the purpose^b.

XXIII. With regard to the divine Law, either as originally declar'd, or as renew'd by our Saviour, the Difficulty is much greater. This is evident, the Jews thought Divorces not only permitted, but commanded (in case the Wife displeas'd her Husband) by the 24th Chapter of Deuteronomy. And farther, there is a place in Philo Judæus^c which seems to imply, that Barrenness was judg'd a sufficient Cause for the like Separation. Nor are we to doubt but that the thing was frequently practis'd in that Nation, although their sacred and profane History, for more than 700 Years, have recorded none, or very few Instances of this kind. For it is not indeed the Custom to register, in publick Annals, Matters which are done according to general Use, but such only as appear singular and extraordinary. In *Isaiab*^d, and *Jeremiah*^e, amongst the many Ways of representing and reproving the People's Sins, we find Similitudes taken from a Divorce, as an Action very well understood by the Vulgar. *Josephus*^f takes Notice of it, as a thing very unusual, and differing from the ordinary Law and Practise, that *Salome*, Wife to *Costobar*, Prefect of *Idumea* and *Gaza*, should send a Bill of Divorce to her Husband; whereas, regularly, it was not allowable for the Woman to leave the Man, unless he put her away: Excepting only one Case, when the Husband falsely reported, that his Wife did not prove a Virgin at their first Familiarity; here the Woman had her Choice, whether she would stay, or depart; and the Husband, if she chose the former, was oblig'd to keep her^g. *Josephus*^h reports the same of *Herodias*, *Aristobulus's* Daughter, the Lady who was the Subject of *St. John Baptist's* Reproofⁱ.

But, that our Saviour absolutely took away this ancient Liberty of Divorce, is the Judgment of most Divines; grounded on *Matth. v. 32. xix. 8, 9, &c. Mark x. 4, 6, 12.* *Grotius*^k is of Opinion, that it was, from the Beginning, most pleasing to GOD, that the Bond of Marriage should be perpetual; but, whereas the Old-Covenant-Men were not oblig'd to this Strictness, our Saviour, under the new Covenant, ratified by an express Law what was before most agreeable to the divine Will. Mr. *Selden's* Explication^l of the same Places of Scripture is to this purpose: "There were amongst the Jews two Sects, the *Sammeans* and the *Hillelians*, who maintain'd contrary Notions on the Point before us. The former asserted, That a Man ought not to quit his Wife, unless upon some Discovery of Baseness and Dishonesty: The latter, That any Dislike taken of the Woman, was enough to justify a Divorce. Our Saviour then, as an Arbitrator between the two disputing Parties, declares in Favour of the *Sammeans*; That it was not Lawful upon slight Pretences, to dissolve an Union instituted by GOD himself; but only upon the commission of foul and scandalous Crimes, comprehended, according to the Genius of the Hebrew Language, under the general Term of Fornication^m. He adds, that amongst the most ancient Christians, Adultery was not esteem'd the only lawful Cause of Divorce: As appears from *L. 8. C. de Repudiis*, enacted by the most Religious of all the Emperours. Till by the Superstition and the Corruption of the *Papal* See, the Bond of Matrimony was declar'd indissoluble during the Life of the Parties. *Buxtorf*ⁿ hath endeavour'd to make out, contrary to the current of the Jewish Writers, that in the Words of *Moses*, *Deuteron. xxiv. 1. 2, 3, 4.* this one Prohibition only is contain'd, "That a Man shall not receive again to his Bed a Wife which he hath once put away: But that the Custom itself, of putting away Wives, is in that place, neither approv'd by *Moses*, nor plainly condemn'd; but left as it were indifferent. And, says he, the Observation of our Saviour, that this Permission was given by *Moses*, because of the Hardness of their Hearts, sufficiently makes it appear, that the *Mosaical* Indulgence doth not amount to an Approbation, but signifies only a bare Toleration, or Connivance, exempting from civil Punishment^o.

XXIV. Mr. *John Milton*^p, provoked, as it should seem, by the Misfortune of his own Family, hath with great Pains endeavour'd to make out, that, even by the Principles of the Christian Religion, an intolerable Disposition, a Dis-

Mr. BARB. NOTE on § XXIII.

^a See 1 Sam. xxv. 44. and Mr. LE CLERC's Note upon it.

^a De Repub. l. 1. c. 2.

^b Add. Plat. de LL. l. 11. p. 974. Ed. Wech. Charron de la Sageff, l. 1. c. 46. n. 12.

^c Selden de J. N. & G. l. 5. c. 7.

^c De Leg. Special. p. 782. B. Ed. Paris. Herodot. lib. 5. p. 190. Ed. H. Steph.

the whole Passage runs thus; "Men who take Wives, being uncertain of their Fruitfulness, in finding them afterwards to be barren, they do not dismiss them and force them to lead a separate Life, are very excusable; in as much as being won by a long Familiarity and a Course of mutual Love, they cannot easily do Violence to those Affections which are so deeply rooted in their Minds. But they who choose Women of known Barrenness, seeking only, like Beasts, to satisfy their lustful Inclinations, are to be reckon'd amongst the most impious Offenders, as contradicting and opposing GOD himself, who hath established the Laws of human Succession.

^d Ch. L. 1.

^e III. 1. 6.

^f Antiq. L. 15. c. 9.

^g Vid.

^h Phil. Jud. de Special. Leg. p. 789. D. Ed. Paris.

^h Ant. Jud. L. 18. c. 7.

ⁱ Matth. xiv. Mar. vi.

^k L. 2. c. 5.

^l De Uxore Ebraea, l. 3. c. 22.

^m Vid. Val. Max. l. 9. c. 2.

ⁿ De Sponsal. & Divort.

^o Add the excellent Dissertation of *Grotius* on this Point, on *Matth. v. 31, 32.*

^p In his Book of the Doctrine and Discipline of Divorces.

parity, or Contrariety of Mind, is a sufficient Reason for Divorce; nay, that Persons, so unhappily pair'd are indeed under an Obligation to separate. We hope we shall not seem tedious, if we venture to run over his chief Arguments. In the first place, then, he lays down this Assertion to build upon; *God, in the first Ordaining of Marriage taught for what End he did it, in Words expressly implying the apt and chearful Conversation of Man with Woman, to comfort and refresh him against the Evils of solitary Life: not mentioning the Purpose of Generation 'till afterwards; as being but a secondary End in Dignity, though not in Necessity.* Now this Bottom we take to be false. When God was pleas'd to give Man a Helpmeet for him ^a, and afterwards commanded the primitive Couple to *increase and multiply* ^b, he did not hereby ordain two different Ends of Marriage; but the latter Words seem design'd to describe the chief Fruit arising (through the divine Benediction) from the mutual Assistance first mention'd. And indeed, if the bare Delight of Conversation had been the principal Intent of the Creator, what need was there of a Difference in Sex? For take away the Procreation of Off-spring, together with the Pleasures which by the Appointment of Nature sweeten and recommend it, and Men alone would have been more agreeable Companions, and more able Assistants to each other. And thus we see, that Boys and old Men, those who have not felt the Passion of Love, and those who are past it, agree in preferring the converse of their own Sex to all the Charms and all the Entertainments of the Fair. But Mr. Milton seems to dream of some more delicate and more refin'd Pleasures; and frames the Idea of a Wife suitable only to the Genius of a wife and learned Husband: He would have her able to be the Companion of his Studies, or to refresh him with her Wit, when he comes from severer Meditations, to compose his Cares with sweet Discourse, and charm away a melancholy Fit. Whereas although there is no considering Man, who would not infinitely prefer the Pleasure of the Mind, to the short and empty Gratifications of Sense: Yet, it is so very difficult to find a Woman of this philosophical and elevated Temper, that there is scarce any Man eminent for Wisdom and Learning, who might not sue for a Divorce, on this Pretence. And therefore, if there be any Person of so mortified a Spirit, as to think the continuing of his Name and Race so mean and worthless a Design, and who feels no Pains, that the Fair only can cure, he should on all Accounts be advis'd to lead a single Life: For, 'tis no wonder, if Coldness and Gravity prove so ill Companions for Charms and Beauty. Lastly, whatever the Assertors of these Opinions pretend, 'tis impossible they should give any other Reason, why the Conversation of Women was rather instituted as a Help for us, than that

of Men like our selves; except, that Nature hath wisely fix'd in the difference of Sex sweeter Engagements, and more peculiar Propensions. It may then, on the whole Matter, be the safer way not to endeavour the bringing this high and Platonical Strain of Notions into practice (but, considering the ordinary Temper and Capacity of the female Sex) to judge her a very convenient and proper Partner, who is able to sustain a Share in the Concern of Children, both as to their Birth and Education, and in the Care of directing the Family; altho' she be able to afford little Assistance in deep Speculations and in studious Enquiries. *Juvenal's* Advice hath something in it besides Satyr,

*Non habeat matrona, tibi quæ juncta recumbit,
Dicens genus, aut curtum sermone rotato
Torqueat enthymema, nec historiam sciat omnes,
Sed quædam ex libris, & non intelligat: Odi
Hanc ego, quæ repetit voluitque Palæmonis artem,
Serenata semper lege & ratione loquendi,
Ignotæque mihi tenet antiquaria versus,
Nec curanda viris Opicæ castigat amica
Verba: Solacisimum liceat jecisse marito.*

Sat. 6. v. 447, &c.

O! what a Midnight Curse has he, whose side
Is pester'd with a Mood and Figure Bride!
Let mine, ye Gods! (if such must be my Fate)
No Logick learn, nor History translate;
But rather be a quiet, humble Fool:
I hate a Wife, to whom I go to School.
Who climbs the Grammar-tree, distinctly knows
Where Noun, and Verb, and Participle grows;
Corrects her country Neighbour, and abed,
For breaking *Priscian's*, breaks her Husband's head.
Mr. DRYDEN.

Strabo ^c reports of the *Brachmans*, that they never communicate their Philosophy to their Wives: lest, if they prove wicked, they should divulge some Secrets which ought to have been conceal'd from the Profane; or, if they happen to be good, they should desert their Husbands. For the equal Contempt of Pleasure and Pain, of Life and Death, is no good Principle to fit a Person for a State of Subjection ^d.

This Remark will hold good in general of Mr. Milton's Arguments, that they prove just nothing at all, in case it be apparent, that our Saviour declar'd Adultery to be the only sufficient Cause of Divorce ^e. To seem hard in some particular Instance, is no Objection against the express Words of a Law. We are not presently for repealing those human Constitutions, which appearing useful and beneficial to the Commonwealth in general, do yet turn to the Prejudice of one or two private Persons: Because these are look'd upon as Inconveniences which 'tis impossible to avoid.

Mr. BARR. NOTES on § XXIV.

^a *JUVENAL* there pleasantly Laughs at the learned Women of his time, who fallily pretended to Arts and Sciences, or the Defects of that small Number of Women, who are, or might be truly knowing.

^a *Genes.* ii. 18.
v. 640, 641.

^b *Ibid.* i. 28.

^c L. 15. p. 490. Ed *Gen. Casaub.*

^d *Euripid. Hippol. Coron.*

-----From a Woman wife above her Measure
Protect me, Heaven.-----

^e *Vid.* lib. 5. c. 12. f. 21.

The only Point he gains is this, that if the Saying of *Christ* will bear another Interpretation, it should seem more agreeable to the Gospel Clemency and Goodness, to follow a milder Sense, than that which is at present receiv'd. The whole Strength of his Reasons may be thus represented in short. "Incorrigible Disparity of Mind, or Stubbornness of Temper, rendering a Woman unfit to live in Society with such a particular Man, and hindering the chief Benefit of Matrimony, mutual Help and Refreshment, is a much weightier Cause of Divorce, than any natural Defect, any Distemper, any uncleanness of Body; which yet were allow'd as lawful Pleas by the *Jewish* Dispensation^a. No Partnership can oblige Persons concern'd, in Contradiction either to the chief End of its Institution, or to the Intentions and Hopes of both, or of either Member. Now it was the Design of the wise Creator, not to give Man a domestick Torment, but a kind Help to join with him, not only in the bringing of Children into the World, but in the Education of them, and in the whole Business of Life; which End intolerable Sowness of Temper doth plainly pervert and destroy. It looks absurd and unreasonable, that the *Canon Law* should without Scruple declare *Impotency* a sufficient Cause of dissolving Matrimony, and yet allow no Regard to the Manners and Dispositions of the Parties: especially since the former may immediately be discover'd; whereas 'tis usual craftily to disguise and conceal the latter, 'till the poor Man runs ignorantly into the Snare, whence he can never be releas'd. It is against the Law of Charity: nay, it is most barbarous and inhuman, to confine and chain down a Man to such Miseries as are not to end 'till his Death; and which would admit of an easy Cure, did not the Severity of this positive Ordinance stand in the way: in as much as God Almighty, in his Laws and Commands, seems to have mercifully accommodated himself to the Infirmity of human Nature. The Holy Scriptures prescribe Matrimony, among other Reasons, for the avoiding of Temptations to Incontinence. But now the Man who can find in Marriage no Rest or Comfort to his Mind, who is perpetually reiz'd and disturb'd by an untoward Partner, must needs be assaulted with stronger Temptations, than if he liv'd in Celibacy. For his Heart will be ever full of Discontent; and because his Wife is so unpleasing an Object, he will seek to bestow his Love and himself elsewhere. *Maimonides*, amongst the Reasons of the Law about Divorce, assigns this for one, That the Peace and Tranquillity of particular Families might by this means be the more surely preserv'd^b. Which Reason affecting *Christians* as much as *Jews*, it cannot seem pro-

bable that GOD design'd to lay a heavier Yoak on the former, than on the latter^c. We are commanded in Holy Scripture to remove from us all Obstacles of Piety: Amongst the chief of which we may fairly reckon the Frowardness of an incorrigible and inseparable Companion. It is repugnant to Nature, that two Minds directly opposite, and admitting of no Possibility of Union, should be tied together in a Bond never to be broken. The Christian Emperours^d have declar'd it as their Judgment, that the Plotting of either Party against the Life of the other, is a good Reason of Divorce: and how many Mens Lives have been unhappily shortned by these continual Grievs and Discomforts? Marriage is a Society: But human Societies, inasmuch as they are held together in a Moral Bond, consist rather in the Union of Souls, than of Bodies. Should we say otherwise of Marriage, we should degrade it below the coupling of Beasts, in which we frequently observe some sort of Affection and Good-will in the Mates to each other. When therefore the Soul doth not find in Matrimony that sweet Agreement which it sought, so ill-match'd a Pair live rather in the Misery and Hardship of a Prison, than in the Comfort of Society. Solemn Oaths, if either in themselves improper, or tending to the Prejudice of a Third Party, are capable of a Dispensation; and hath not the Marriage-Covenant a good Right to the same Favour? Nor will it signify any thing to answer here, that unhappy Matches are laid on Men by Divine Providence, for the Tryal and Exercise of their Patience: For Diseases and other Calamities are most certainly sent from Heaven; and yet the Application of human Remedies was never forbidden in such Cases.

After this, he holds a long Dispute concerning the *Permission* of Divorce among the *Jews*. "For," says he, if it be in the Nature of the Fact *Adultery* for either Party, after a Divorce, to marry again, it follows that *Moses* establish'd *Adultery* by a solemn Law. But to inagin this of Institutions which had God for their Author, would not only be absurd, but most profane and impious.

He likewise reprehends these Authors who affirm, that the *Jews* had not a Law of Divorce, but rather a *Dispensation*. "A *Dispensation*, he observes, is of two Kinds, either *properly* so called, or *improperly*. The latter is rather a particular and exceptive Law, absolving and disengaging from a more general Command, for some just and reasonable Cause: as that mention'd *Numb. ix. 6*, &c. and *Deut. xxv. v. 5*. and that in *Leviticus*, of marrying the Brother's Wife, upon his Decease without Issue. A *Dispensation*, properly so called, obtains only in particular Cases rarely happening, and therefore not specified in

^a *Deuteron. xxiv. 1.* ^b So *Bodinus, De Repub. l. 1. c. 3.* affirms, *Never was any Law more just and holy than the Divine Ordinance of Divorces, either to curb the Pride of Women, or to restrain the Anger and Violence of Men.* ^c *Varenius Descript. Japon. cap. 12.* reports of the *Japonesse*, *Divorces are very frequent in this Nation, though the nobler Persons still keep the rejected Wife in their Family, and take care of her Maintenance and Support. On this account, the Women apply their Endeavours to discover their Husbands Temper and Humour, by which means they may in all things gratify and please them, and be ever laying new Engagements on their Minds. And being once thrown off, they dissemble the Injury, and make not the least Complaint, that by the Sweetness of their Conversation, and Readiness of performing all kind Services, they may recover themselves in their Affections.* ^d See the Law already quoted in Sect. 22.

“ the Law, but left to the *Decision of Charity*, and
 “ to the Prudence of the Judges: As upon ex-
 “ treme Hunger, it was lawful for *David* and his
 “ Followers to eat the *Shew-Bread* ^a: So that this
 “ sort of Dispensation is nothing else but the inter-
 “ preting a Law according to Equity.

Here 'tis worth our Notice that he confounds Dispensation and Equity with each other; whereas there is really a wide Difference between 'em. But, as to the Argument, this is certain, whoever will maintain the *Jewish* Divorces to have proceeded in the way of Dispensations, it lies on him to prove, that there was then extant some general Law, declaring Matrimony not to be reversible upon account of Manners and Temper; which Law must either have been a Branch of *Nature's* Ordinances, or a *Divine Positive* Institution. As for those Words in *Genesis* ii. 24. ^b, and *those two shall be one Flesh*, some are of Persuasion, that they express indeed a most strict Partnership, and such as, to break off on a slight account, could neither be decorous nor advantageous to Mankind. But it doth not hence follow, that the Knot cannot be untied upon Reasons which subvert the very End and Design of Matrimony: As it would be ridiculous thus to argue, *GOD joins Man and Wife together, therefore it is not in the Power of Man to join himself to whom he pleaseth*: or, *therefore no human Covenant ought to intervene*. But what ought to be infer'd is rather this: God joins the Parties by the Mediation of their Deed and Covenant; therefore it is his Will they should not be separated, unless that Covenant be on one side or the other transferr'd.

Mr. *Milton* proceeds to enquire into the Opinion of those who assert, that Divorces were by the Divine Law permitted only, and not approved. This he takes to be an irreverent Reflection on Almighty God; in as much as it betokens Infirmary in a Governour, to allow his Subjects in any Practice, to which he does not really give his Approbation. And why must the *Jews* alone have been so notorious for *Hardness of Heart*, as not to be able to comply with the suppos'd primitive and general Ordinance, when so many *Christian* Nations and Ages have yielded a ready Obedience to it?

On those Words of our Saviour, *from the Beginning it was not so*, some thus descant: “ In the
 “ State of Innocence ^a human Manners were
 “ more perfect and excellent, than to give occa-
 “ sion to any signal Trouble and Disagreement:
 “ And therefore the Necessity of applying Di-

“ vorce as a Remedy to unhappy Marriages, is a
 “ remarkable Evidence of the impair'd Condition
 “ of our Nature.

To conclude; Mr. *Milton* farther censures those who alledge, that this Liberty of Divorce was therefore granted to the *Jews* by *Moses*, because they had been accusom'd to it in *Egypt*. For now, when the Weight of the *Egyptian* Yoak was still upon their Shoulders, must needs have been the most proper time of teaching them to forget the Customs of that Country. As we see so many strict and excellent Laws given them against *Idolatry*, which they had seen practis'd every Day, during their Servitude and Confinement.

But these Matters we leave undetermin'd, as not tending directly to our main purpose.

XXV. The necessary Qualifications required by the Law of Nature, in Persons rightly contracting Matrimony, are a Fitness or Ability, both *Physical* and *Moral*. By the former we understand such a Constitution of Body as is capable of attaining the chief End of Marriage, the Procreation of Issue ¹. Therefore such Persons as labour under a perpetual and incurable Impotency, such as *Eunuchs*, and the like, ought not to aspire to the conjugal Honour. It was certainly an unnatural Custom in *Egypt*, to allow the *Eunuchs* Wives, because they laid claim to some inferior Degree of useless Pleasure ^c. And here a Doubt may arise, whether we can properly call it *Matrimony*, when an antient Couple are link'd together without any Prospect of a Blessing from the Bed. *Dionysius*, in *Plutarch* ^d, when his aged Mother desired him to bestow a Husband upon her, replied, *It was in his Power to do Violence to the Laws of his Country, but not to the Laws of Nature* ^e. Yet in most Commonwealths these sort of Matches are tolerated; in as much as the other End of Matrimony, mutual Assistance and Comfort, will hold as strongly here as in any other Case ^f. Perhaps we shall not speak improperly if we call these ² *Honorary Marriages*, as we term those Offices *Honorary*, in which a Title only is conferr'd, without Action or Business. *Nero*, when he deserted his Wife *Oetavia's* Bed, excused himself with saying, *sufficere sibi Uxoriam Ornamenta* ^g, *He was contented with the bare Ornaments and Badges of Marriage*; in Allusion to the *Triumphalia Ornamenta* ^h, sometimes bestow'd on Persons without the real Solemnity of a Triumph. The Case of *David* and *Abisbag* ⁱ seems to fall under this imperfect Matrimony. Tho' *Solomon*, in all Ap-

^a A fine Explication! As if Men had remain'd so long in a State of Innocence, as to make use of Divorce. Our Lord explains these Words very fully, when he says, *Mat. x. 6. God created Male and Female, that they twain might become One Flesh, and be no longer twain, but One Flesh*, i. e. the Creator intended, that Marriage should be so ilreight and fast an Union, as never to be dissolv'd but by Death, or by something extremely contrary to the Nature of that Society, such as Adulteries.

Mr. BARR. NOTES on § XXV.

¹ *SOSIMUS*, l. 5. c. 28. speaking of the Empress *Mary*, Wife of *Honorius*, says, *Και το παρ' ημετων εις μεζην ευδωρα, εβραυς εδωκεν, ης εδωκ' ημεσιν ημω. To put a Virgin in the Marriage-Bed before the proper Age, is no less than to do an Injury and Violation to Nature.*

² See the *Paræmia Juris Germanici* of Mr. *HERTIUS*, Lib. I. Chap. 67.

^a 1 *Sam.* xxi. 6. *Matt.* xii. 3, &c.

c. xxiii. v. 1. *Genes.* c. xxxix. v. 1.

^b See Mr. *Le Clerc's* Comment upon the Place.

^d In *Apophthegm.* p. 175. E. Ed. Wech.

^c *Grot. ad Deuter.*

Quintil. Declam. 306. p. 464. Ed. *Ludg. Bat.* There may be some kind of Unchastity even in Marrying. Idem *Declam.* 2. p. 23. in fin. An old Husband is (often) the most humble Instance of Slavery; and is the more charm'd and overcome with the Magick of the Fair Sex, the colder his own Powers are in the Reception of it. *Comp. Val. Max. l. 7. c. 7. f. 4.*

^e *V. Lib. 5. t. 4. l. 27. C. de Nuptiis.*

^f *Sueton. Ner. c. 35.*

^h *Sueton. August. c. 38.*

ⁱ 1 *Kings.* 1.

pearance, esteem'd the Marriage good and valid; in as much as he gave capital Judgment on *Adenijah*, for begging her for his Wife; because this Attempt of marrying the King's Widow (which in the *Jewish* Constitution was accounted unlawful) shew'd he was driving on some Design against the publick Peace and Establishment ^a.

XXVI. It is farther supposed in *Matrimony*, as in all other Covenants, that the Parties contracting it have sufficient Use of Reason; that there is no Error, no Flaw ^b in the Essentials, and that no unjust Fear is on either side occasion'd. In this last Point, the *Jewish* civil Laws were very particular; by them, if the Woman was compell'd by Force or Fear, the Espousals were revers'd; but not on the other side, if the Man alledg'd Compulsion, because there could not be the same Presumption of any Violence or Fright offer'd him: And if the Conditions had displeas'd him, he might afterwards have reject'd her ^c. In like manner, if there were a Mistake, either as to the Person, the Object of Consent, or in any Quality, either relating to Matrimony it self, or ^d serving as a Condition on which the Consent was built (especially in case of Guile or Deceit used on either side) the Contract was manifestly void. Thus a Wife pretending Virginity, and afterwards discover'd defective, was by the Divine Law, not only turn'd away from her Husband, but made liable to severe Punishments. Tho' the barbarous Nations appear not to have been over curious in this Point of Purity ^d. Thus, again, if a Man in the Covenant of Marriage expressly inserted a Clause, importing that he took such a Woman for his Wife only in case she were of Noble Blood, of such a Fortune, or the like; he shall not be obliged to consummate the Match till the suppos'd Condition be made appear. But if, neglecting to enquire into the Truth, he shall have proceeded to Consummation, he shall by this Act be judged to have tacitly renounced the conditional Clause; and therefore if things do not afterwards come up to his Hopes, he hath no good Reason for *Divorce*. For the Contract did not run in these Terms, *If you do not bring me such a Fortune I'll divorce you; but, if you do not bring me such a Fortune, I'll not marry you;* which are manifestly different. He then, who in the Affair of Matrimony thus feels the Charms of the Portion more than of the Lady, is very ridiculously Senseless, if he let the Business be finish'd before he hath good Security for that

which was his chief Aim ^e. Much less shall it be lawful to break off a Match, or to forbear consummating it, when a Man hath catch'd at the Bait of a supposed Fortune, without bargaining for any particular Summ. And therefore the *Ephori* in *Sparta* did very justly in fining the Gentleman, who having been contracted to *Lysander's* Daughter in her Father's Life-time, refused her, when that Great General was found to die in so poor a Condition ^f.

What we have been offering holds good only, in *natural Law*. For it is in the power of civil States to enact, that no such Clause, belonging indirectly to Matrimony, shall hinder or deter the due Consummation of it.

XXVII. A *moral Ability* of contracting Matrimony is wanting in Women already dispos'd of to other Men. For the Right of the Husband over the Wife continues so long as he doth not actually renounce it. Therefore to marry another Man's Wife, not duly loos'd and separated from him, is not only unlawful, but void, and ineffectual: Because it was not in the Woman's power to make this second Engagement, whilst the first continu'd in force; and to cohabit with this new Husband, is to live in constant Adultery. For the same reason, in Countries where *Polygamy* is prohibited, a Man cannot without Sin proceed to another Marriage, whilst he is held by the Bonds of a former.

By the *Jewish* Law it was criminal for a Man to take his Wife again, whom he had put away ^g. The reason of which Institution no doubt was to prevent the frequency of Divorces on slight and petty Occasions, by cutting off all Hopes of Re-union, when Passion should grow cold ^h. Yet some, from *Jerem. iii. 12.* collect, that it was lawful to receive again the dismiss'd Woman, provided she had not contracted a new Marriage.

It is remarkable in the *Turkish Alcoran*, that a Man is allow'd to take home his Wife, even after he hath three times dismiss'd her; but not unless she has been in the mean time married to another, and been discarded by him likewise. The *Mahometans* esteem this as the highest Infamy and Reproach, and therefore the famous *Bajazet* thought he could not bestow a heavier Curse upon *Tamerlain*, who sent to defy him to War, than by replying, *If he does not come as he threatens, may he fetch his Wife back, after he hath three times sent her off* ⁱ. It is another Precept of the *Alcoran*, that a Man who puts away his Wife, shall fix a certain Time, during which, it shall be un-

Mr. BARR. NOTE on § XXVI.

^a See what Mr. BAYEE says in his Answer to the *Provincial's Questions*, Tom. II. p. 40, &c. on the account of *Madam de Mazarin*.

^a Grot. *ad Reg. d. l. c.* 11. 17. ^b See above in L. 3. c. 6. f. 11. ^c Selden *de Uxore Ebrae.* l. 2. c. 4.
^d See the Customs of the *Barbarians*, *Diad. Sic.* l. 5. c. 18. of the *Armenians* and *Lydians*, *Strab.* l. 11. of the *Babylonians*, *Herodotus* in *Clio*; of the *Thracians*, *Idem Terptich.* of the *Adriamachidae* and the *Nisomones*, *Id. Mel. mor.* See also *Joseph's* soul fancy in *Diog. Laert.* l. 2. Add *Bohori's* Notes on *Sueton. Calig.* c. 40. towards the End. *J. l.* l. 13. c. 5. n. 4. *Paul. Venet.* l. 2. c. 37. of the Inhabitants of *Tebeth* and *Cathay*. *Constantine the Great* abolish'd the like Immodesty amongst the *Phoenicians*; as we are told by *Saxomon*, *Hist. Eccles. lib.* 1. cap. 8. *lib.* 5. cap. 9. ^e Especially since the Managers of Matches usually answer the Character which we find in *Libanius* (*Progymn.* p. 6.) *They come armed with a great many shafts & Flourishes and fine Sayings, and by lessening what's present, and magnifying what's absent, easily prevail on the kind and credulous*
^f *Vid. Aelian. V. H. lib.* 6. c. 4. ^g *Deuteron.* xxiv. 4. ^h Grotius (*ad. d. l.*) gives this Reason, *Beccae pub. Practice looks like lending one's Wife to another Man, and might yield Shelter and Countenance to the most scandalous Debaucheries.*
ⁱ *V. Laonic. Chalcondil.* l. 3.

lawful for her to choofe a new Husband: That he may thus use Deliberation in determining whether or no to take her again into Favour.

^a *Josephus* ^a mentions a *Jewish* Ordinance forbidding a Man to marry *Her* whom he hath persuaded to leave her former Husband; since this Irregularity could not but breed high Difcontentments and Troubles. On the same good Reason are these *Christian* Canons founded, which deny an Adulterer the liberty of marrying the Woman whom he thus defiled ^b. In this Point *Euripides's* ^c Observation seldom fails,

-----*The Wretch that stains another's Bed,
And takes the vile Adulteress to his own,
Condemn'd to wed her for his Punishment,
Is wildly vain, if he expects she'll prove
In her new Vows more chaste than in her old.*

XXVIII. Persons allied within such a Degree of *Blood*, or *Affinity*, are likewise under a Moral Incapacity of contracting Marriage ^d: in so much that it is not only from the Beginning unlawful to strike such a Match; but this Engagement, tho' actually concluded, is ever esteemed Vicious and Defective. This is an Opinion generally receiv'd by all Nations of Manners and Civility; yet to assign a solid Reason for it, such as shall flow, like other Precepts, from the social Nature of Man, seems at first sight a Point of no ordinary Difficulty. Some Enquirers are content to fly to the Abhorrence of human Affections in this Case. "All Persons, say they, who are not corrupted by ill Education, or Wicked Habits, do find in their very Senses, a Repugnancy and Aversion to such Impurities; which is a plain Argument that those Things are prohibited by the Law of Nature." But indeed this repugnancy of Affections is not equally to be discover'd amongst all People, nor always, even amongst those who pretend to the Art of Culture and Refinement; And when Authors urge it for a Reason, it would not be altogether absurd to answer them, that the Abhorrence may perhaps arise not so much from any in-bred Principle, as from long Use and Custom, which often counterfeit Nature. Nor in our Searches after *natural Law*, is it very safe to rely upon the bare Judgment of our Senses and Affections; since at this rate we might conclude, that those Things are by the same Law commanded, towards which our Senses and Affections are carried on with a vigorous Inclination; whereas, on the contrary, it is manifest that those Acts to which we are so violently prone, Reason and Nature do really disallow.

Plutarch ^e enquiring why the *Romans* did

not take Wives from amongst their near Relations, thus proposeth his Reasons after his doubting manner. *Was it that they might spread their Kindred more widely, and increase the Number of their Alliances; giving Wives to some, and taking them from others? Or did they it, to avoid conjugal Discords? which, should they arise between Persons allied by Blood, would destroy not only the Love between Husband and Wife, but the very Principles of natural Affections?* Or, because they knew the weaker Sex to stand in need of many Defenders, were they therefore unwilling to marry their Kinswomen, that they might be ready to Assist and Protect them, if injur'd by their Husbands? The first of these Reasons, *The spreading and improving of Alliances*, is confirm'd by the Approbation of *St. Augustin*, and of *Bishop Cumberland* ^h. But on this way of arguing we may observe, that as an Act less useful, or profitable, is not always unlawful, so the Profit here alledg'd is not attainable by this only Method: In as much as a far greater Advantage may result from the quite contrary Practice; that is, if the nearest Relations would still match themselves to each other, their Estate and Wealth would be hindred from passing out of the Family. And on this account in the *Divine Law*, *Numb. xxxvi. 3.* Women possess'd of an Inheritance in *immoveable Goods*, are commanded to take Husbands only from amongst their Kindred; lest the Land should run out of one Tribe into another. Yet in case they would quit their Title to the Inheritance, they were allow'd to marry any Persons of their own Nation.

The Women of the Tribe of *Levi* were not concern'd in this Injunction, as being incapable of holding Land ⁱ. In *Peru*, during the Command of the *Yucas*, it was provided by Law, that every Man should choofe his Wife out of his own City, and his own Family: After the Marriage was concluded, a House was built for the new Couple at the common Charge, and the nearest Relations presented them with Furniture ^k. It was one of the *Attic Laws* ^l, that *Heiresses* should be taken in Marriage by their nearest Kinsmen, to preserve the Riches of their Ancestors in the same Line ^m. But the seeming Hardship of this Ordinance was sufficiently made amends for by another, which commanded, that if the Circumstances of such a young Woman were but very mean and inconsiderable, the next of her Kindred should nevertheless be obliged to wed her, or else to give her a Fortune suitable to her Birth and Quality ⁿ.

XXIX. In order to the settling of these Questions, it is in the first place necessary, we examine how it comes to pass, that altho' the Propagation of so noble a Creature as *Man*, be in it self a Work of Honour and Credit; yet amongst

Mr. BARB. NOTE on § XXVII.

^a This Law of *Josephus* is not conformable to Scripture, and the Translation which our Author follows, doth not agree with the *Greek*.

^a *Jud. Antiq. l. 4. c. 8.*

^b *Gratian. Cauf. 31. qu. 1. c. 1, 2, &c.*

^c *Electra. v. 921, &c.*

^d *Vid.*

l. 38. t. 10. l. 4. f. 3, 4, 5. D. de gradibus & affinitibus.

^e *Quæst. Roman. 108. p. 289. D.*

^f For In-

stance, because there often happen Quarrels between the Husband's Mother and his Wife, therefore a Man (according to this Argument) ought not to marry one that ow'd a natural Reverence to his Mother; that is, his Sister.

^g *V. Augustin De Civitate Dei, l. 15. c. 16. cited by Gratian. Cauf. 35. qu. 1. c. 1.*

^h *De Leg. Nat. c. 8. f. 9.*

ⁱ *Vid. Grot. ad Matth. i. 16.*

^k *Garcilasso de la Vega Comment. Reg. l. 4. c. 8.*

^l *V. Sim.*

Petit. in Leg. Attic. l. 6. t. 1.

^m Many Suits of Law filling out amongst the Pretenders to these Heiresses,

the young Women got the Title of *Emidrus*.

ⁿ We find a Law of *Charondas* much to the same Purpose, in

Dial. Sic. l. 12. c. 8.

all civiliz'd Nations, as well the *Instruments*, as the *Act* of this good Service, should be guarded with so tender a Sense of Modesty, as nothing but a Face harden'd by habitual Wickedness can conquer, or suppress? To which purpose we have a most remarkable Story, recorded by *Plutarch*^a and *Polyanus*^b, of the *Milician Virgins*, who being, ' by some strange and unknown Cause, driven to a mad Desire of hanging themselves, and their Distemper admitting of no Stop nor Remedy; it was at length decreed by a solemn Law, that the Bodies of those who dispatch'd themselves, in this desperate way, should be carried naked through the common Market. And by this means, whilst the Fear of Death could make no Impression on the Frenzy, the Sense of Shame restor'd them to their Wits. It is farther remarkable, that whatever Nations, in ancient, or modern Times, have entertain'd a Custom of going naked, or of performing in open view the secret Affairs of Marriage, have been censur'd and condemn'd by the rest of the World, as wild and barbarous^c. Now the reason of all this is not so easy to come at. For as to the immediate Instruments of this Work of Nature, they lie under no Scandal of Deformity, and they serve to a great and worthy Design: And therefore, the *Egyptians* and *Athenians* paid religious Regards to them, in their mysterious Worship^d. The Act it self, as it is agreeable to Nature, so is it of absolute Necessity, and every way proper for the producing of so brave and generous an Effect. And therefore, why should the Exercise of it before others create more *Shame* in a Man, than *Eating* and *Drinking*; since the human *Species* can no more be preserv'd without the former Means, than the *Individuals* without the latter? Nor will *Plutarch's* Distinction satisfy the Doubt. *There is no Pleasure* (says he^e) *which we can more innocently enjoy, than that which we receive from Food and Nourishment. All Men are agreed on this Truth, as they shew by their daily Practice. For they eat in full Company, and in open View; whereas in their Love-Affairs they seek the Shelter of the Night: Because in these latter Ceremonies, to be publick and communicative is esteem'd as brutish and unnatural, as to be private and secret in the former.* As to this Point of Openness and Secrecy, it was a severe Return which a *Scotch Lady*, in the Emperor *Severus's* Time, gave *Julia Augusta*, when reproach'd by her for the Custom of holding Wives in Com-

mon amongst the *Britains*; *We* (says she) *obey the Necessities of Nature much better than you Roman Dames: for we do that openly with the best of our Men, which you do privately with the Worst of yours*^f.

Neither do they thoroughly clear up the Matter, who have recourse to the Holy Scriptures, where the natural Shame is recorded to have been the immediate Consequence of the *Fall*. For the chief Question still returns, Why the Passion of Shame should fix on these Parts for its peculiar Residence, when our Hands, and our Tongues are as readily dispos'd to aid our sinful Lust, and disorderly Desires? Nay in as much as the primitive Transgression came by the Act of *Eating*, one might imagine that this *Opinion of Impurity* should rather fasten upon the Mouth as its original and proper Seat.

XXX. The Author of the *Treatise de Principiis justis & decoris*, touching on this Subject now before us, in the first Place lays down this for a Principle; *Every thing which causeth Shame is not a Sin, nor forbidden by the dictates of natural Law*^g. He instanceth in Poverty, mean Cloaths, innocent Mistakes, Deformity, and the like; which frequently put us to the Blush, tho' we can by no means lay any *moral Turpitude* to their Charge. "He proceeds to observe, that the reason why "we would avoid such things, is because they are "the Tokens of some Infirmity or Imperfection; "from which Censures every Man desires to keep "himself at as great a distance as possible. In the "same manner, altho' to discover the *Secrets* of "the Body be not in it self sinful, yet a Man "ought not certainly to use such a freedom in "open view, whensoever it would prove an Of- "fence and Blemish to natural Honesty; which "is very often the Case. A Man hath then on- "ly good reason to be ashamed, when he possesseth or discloseth such Imperfections, as may "make others justly despise him, whilst appear- "ing thus below the Character which he sustains: "To be ignorant of a Point of Learning is no "Blemish in him who hath wanted the Benefit of "Education; but one who hath made a long Pre- "tence to Study, and yet can shew no Fruits of "his Proficiency, may well be ashamed of the "Neglect. Plain Behaviour fits decently enough "on a Countryman, but would be a faulty Stiff- "ness in a Person of Breeding. Thus then, he "who uncovers in publick Sight those Parts of "the Body which the Custom of the Nation bids

Mr. BARB. NOTE on § XXIX.

¹ See several Examples of the like Nature, in Mr. BAYLE's Answer to the Questions of the Provinc. Tom. 2. p. 92, 93 in the Margin.

^a *De Virtute Mulier.* p. 249. C. ^b *Strategem.* l. 8. c. 63. ^c Thus *Pompon. Mela* reports of the *Messynians*; that their Love-Affairs are *promiscuous and open.* And *Apollonius Rhodius* in *Argonaut.* l. 2. has left this Character of the same People;

The Manners and the Notions they pursue,
Are the reverse of ours; in publick View
What we perform, or at the crowded Bar,
They act by Stealth, and make a silent Care;
But what our Modesty at Home conceals,
Their Tribes proclaim, and every Street reveals.
Like Beasts, beyond the Power of Shame to move,
Stretch'd on the Ground they ply their common Love.

Vid. *Diod. Sic.* l. 14. c. 31. & *Xenophon. Exped. Cyr.* l. V. Of the *Massagetans* *Herodot.* in *Clio*, towards the End; of the *Nasamonies* in *Melpomen.* ^d *Vid.* *Diodor. Sic.* l. 1. c. 88. ^e *Conviv. Sapiens.* p. 153. F. ^f *Xiphilin.*

Epit. Dion. in Sever. *Add.* *Montaign's Essays*, l. 2. c. 12. & *Charron de la Sageffe*, l. 1. c. 22.

^g P. 59, &c.

“ him conceal, is an Offender against natural
 “ Honesty and *Decorum* ^a. But he may take
 “ the same Liberty in a Country where the Men
 “ go naked; as suppose in the *Caribbies*, without
 “ the Imputation of Obscenity, or of Sin ^b.
 “ Thus it is accounted Impudence to do some
 “ things in the Presence of Strangers, without
 “ desiring particular Leave, which we make no
 “ Scruple of practising before our Equals and our
 “ Acquaintance ^c. Thus a Teacher of Ana-
 “ tomy lays open such Objects to our View, as it
 “ would not be decent for him so much as to name,
 “ were he not engag'd in his proper Business and
 “ Exercise. The same Judgment we are to make
 “ of the Point before us: “ For altho' a Nation,
 “ which doth not censure these unseemly Free-
 “ doms, must needs have cast off all modesty ^d,
 “ and this is not without a grievous Sin in their
 “ Fore-fathers, from whom the loose Opinion is
 “ deriv'd; yet the Custom being once firmly es-
 “ tablish'd, and such a Way of living exempted,
 “ by universal Consent, from all Marks of Dis-
 “ grace, the whole People may then openly ap-
 “ pear in the same Manner, and yet contract not
 “ the least Guilt. In as much as they do not ap-
 “ prehend, or acknowledge in this Practice, any
 “ Imperfection, or Infirmity deserving Shame;
 “ more than we do in the Custom of our Women
 “ to go with their Faces unveil'd, which in some
 “ Countries would be reckon'd a scandalous
 “ Breach of Modesty ^e. We may farther observe,
 “ that even in those Nations where the appearing
 “ Naked is prohibited, the most secret Parts are
 “ sometimes disclosed without Sin, as when they
 “ are recommended to the Care of Physicians, or
 “ when Surprise, or Necessity, in regard of Time,
 “ or of Want, hinders their Concealment; or
 “ when Children are wrapt in their Swadling-
 “ Cloaths. Because, in these Cases, the Mark
 “ of Impudence ceaseth; the Discovery being
 “ made without any lascivious Design ^f.

In another part of his Work he repeats the same
 Argument; “ The uncovering the secret Parts
 “ (says he) is not in itself foul, or indecent, but
 “ is only render'd such by means of the Cir-
 “ cumstances; which Circumstances are taken,
 “ either from the Lust of others, or from their

“ Honour or Worth, or from our own Reputati-
 “ on, which we are oblig'd to support and pre-
 “ serve. But in as much as the external Tokens
 “ of Reverence and Respect are capable of great
 “ Variation, many Actions are (by the same
 “ People) construed as an Affront to our Neigh-
 “ bour, or a discredit to our selves, which, upon
 “ the change of Circumstances, would appear
 “ harmless and inoffensive. Upon the Approach
 “ of our Saviour, we find St. Peter ^g hastning to
 “ gird on his Fisher's Coat; whereas he was not
 “ ashamed to work naked with the Companions
 “ of his Business. Because the Dignity of *Christ*,
 “ and the Honour St. Peter ow'd him, requir'd a
 “ grave and modest Appearance and Carriage;
 “ which, in the Opinion of civiliz'd Nations, are
 “ inconsistent with Nakedness ^h. We transact
 “ many things in secret with Decency and Con-
 “ venience, which if perform'd openly, would
 “ be reproach'd as Infamous; neither do we
 “ reckon it dishonourable, to let the Company
 “ know on what account we retire. Lastly, many
 “ Actions pass unblam'd in *Men*, which would
 “ look inexcusably impudent in the other Sex.

From St. Paul's manner of Speech, *2 Cor. xi. 17.*
 he infers, “ That when upon the Formality of
 “ begging Pardon, or desiring Leave of others,
 “ we say, or do a thing fairly, or civilly, which
 “ would otherwise be rude and indecent; the Im-
 “ propriety here doth not affect the Thing abso-
 “ lutely consider'd in it self, but depends wholly on
 “ the Circumstances, which if taken away, leave
 “ no Ground for Censure: For all that is here
 “ done, is that the other Party waves and remits
 “ the Reverence, which was owing to him. He
 “ judiciously inserts this Caution, *provided, that by*
the general Custom of the Nation, all Men are allow'd
to indulge each other in these petit Liberties. For o-
 “ therwise particular Persons do by no means wipe
 “ off the Blemish, when they give themselves a mu-
 “ tual Dispensation in such Points: As a Company
 “ of wild Sparks could not avoid Shame and Re-
 “ proof, should they, by joint Consent, go naked
 “ in a Place of Manners and Civility. Lastly, He
 “ makes no doubt but that our first Parents, before
 “ they sinn'd, had, in respect of Shame ⁱ, the in-
 “ nocent Insensibility of Children: But that im-

Mr. BARB. NOTE on § XXX.

^a This is a false Supposition, for what should *Adam* and *Eve* be ashamed of, when they alone were in the World, and made one: or the other by the Creator? When then the sacred Historian says, They knew that they were naked, it signifies only in the Style of the Eastern People, Their Conscience accus'd them for the Sin they had committed, in eating of the forbidden Fruit. See Mr. LE CLERC upon *Gen. iii. 7.* The Example of Infants, alledg'd by Mr. VERTHUYSEN, shews, that Shame is only the Effect of Education and Custom, wisely establish'd to prevent divers Inconveniences.

^b *All women's* Case, as *Herodotus* expresseth it, *L. 1. p. 3. Ed. II.* Steph. when she throws off her Garments, lays aside her Modesty.

^c In some Parts of *Abyssinia*, the Women go quite naked, without having any irregular Influence on the Men. *Franc. Alvarez* Descript. *Æthiop. c. 32.* *Al. J. Len. Hist. Amer. c. 8.* & *Rocheport Descript. Ind. Antill. pt. 2. c. 9.* If I mistake not, amongst some of the *Indians*, to go with the Walle cover'd, fell under the same Penalty as Adultery.

^d And since *Cladius* did not put out the wife *Edict*, which was so long under his grave Deliberation (*Claud. Suet. c. 32.*) we will make a Scruple of offending the Company with some kind of Sounds, which we reckon not quite so improper Musick when we are alone. *Al. Drogen. Laert. in vitam Metrol. l. 6.*

^e Since amongst all civiliz'd People, it hath been, even in Death, a *Caro deponitur nuda, to fall in a decent and modest Posture.* ^f Plato (*in Diag. Laert. 3.*) speaking of unwritten Law, proceeding from Custom, instanceth in *Ἐπισημοῦς ποδῶν ἐν τοῖς δημοῖς, not to appear naked in publick Places.*

^g A *Pagan* might well be ashamed of his Size amongst a People of larger Dimensions; yet in his own Quarters, he is not affected with the Disgrace.

--- Ubi tota Cobors pede nuda est amplior uno;

Where the whole Troop make but a Foot in height.

Sir Th. Herbert (Travels, p. 21.) reports of Women amongst the *Casars*, that if you give them any thing, they uncover all, in violation of Civility.

^h Hence amongst the *Romans*, Sons, grown up to the Condition of Men, never talk'd with their Parents, nor Sons-in-Law with their Father-in-Law, *Val. Max. l. 2. c. 1. f. 7.* So in *Uzey*, *L. 3. c. 26.* The *Deputies* command *L. Quintus*, whom they found stripp'd at his Country-Work, to hear the Orders of the Senate in his *Clam.* In the same manner, within our own Houses, and in private, we are not ashamed of the meanest Apparel, which yet we could not appear in at a Wedding, or solemn Meeting, without great Indecency and Offence. See *Matt. xxii. 12.*

mediately

mediately after their Offence, this guilty Passion seiz'd upon their Mind, by which they apprehended their Nakedness to be indecent, as we, when we grow up to Years of Reason, make the same Judgment. His Inference from the whole is this, "That no Degrees of Marriage are forbidden by the Law of Nature; tho' to abstain from some is most agreeable to natural Honesty."

XXXI. For our part, tho' we do not think this way of arguing ought altogether to be condemn'd, yet we choose to fix the Shame, now under our Examination, principally on these two Reasons: First, because Man is a Creature of high and proud Conceits, fondly desirous of Honour and Grace, and abhorring any thing that seems to lessen him in these respects. Now through those Out-lets of our Body Nature casts off the useless Relicks of what we eat or drink: and these Relicks we have a great Aversion to, not only upon account of that *Uncomeliness*, but in as much as they seem to upbraid us with our mean Condition, whilst the greatest Delicacies of Taste, by being once receiv'd within us, are so vilely chang'd and corrupted. And hence our lofty Imagination engageth us to be very industrious in concealing so manifest Tokens of our Infirmary^b. *Nature* (says *Tully*^c) seems to have had a most kind regard to the Dignity of our Body, by exposing only those Parts to sight, which appear beautiful, comely, and agreeable; and by covering and concealing those which would be foul and offensive, if laid open to view, and serve us only for the meer Necessities of our Being. This exquisite Diligence, which Nature hath shown in the human Fabrick, Men have imitated in their modest Customs and Manners^d.

Our second Reason is, since our Affections being deprav'd and corrupted by the Fall, our irregular Lusts endeavour violently to make a Sally through those Passages; and since the due Restraints, and the legal Methods of Propagation, are the very Hinges on which human Order and Society seem to turn; Nature, to preserve her own Dignity, and to cut off, as much as possible, all Occasion of loose Desires, hath invented this Pas-

sion of Shame, engaging Men carefully to cover and to guard those weak Places, left lying continually open, they should tempt and invite the Enemy; and restraining the Pursuit of unlawful Pleasures, whilst Modesty confines the Exercise of those which are lawful, to the Privacy of Darkness and Retirement. Hence our first Parents, after the perfect Harmony of their Affections was disorder'd and impair'd, when they found the unreasonable Inclination of Sense, vigorously striving to force a way through those defenceless Parts of the Body, could not but conceive the deepest Shame at this wretched Discovery of their own Imperfection; which, in some measure, to disguise and conceal, they had recourse to the² Shelter of Apparel. That this Original Shame of Nakedness should, amongst many Nations, seem to have been quite subdu'd and effaced, was probably the Effect of Necessity: when Men being driven on uninhabited Coasts, and having worn out their present Garments, found no Supply of new ones, nor yet wanted them, by reason of the kind Temper of the Climate. Thus their Shame dropt off by degrees with their Cloaths; or perhaps they express'd, for a little time, some Marks of it in wearing a thin Covering round their Middle, which soon left them quite naked.

It's farther observable, that our Shame is ever increas'd to a high degree, by the Presence of those Persons to whom we naturally owe a Reverence, or towards whom we ought to carry our selves with Gravity and Caution; such as are especially our Parents, and our Children. So that he who cannot be hereby deterr'd from daring to offer, under these awful Restraints, the open Freedom and Familiarity of the conjugal State, is fairly judg'd to have an invincible Forehead, and to be well prepar'd for the Commission of the greatest Villanies, being possess'd with harden'd Impudence, *The most violent Distemper of human Minds*, as it is term'd by the wise Tragedian^e.

Mr. BARB. NOTES on § XXXI.

^a TULLY'S Words are, *Principio, corporis nostri magnam Natura ipsa videtur habuisse rationem, quæ formam nostram, reliquamque figuram, in quâ esset species honesta, posuit in promptu; quæ partes autem corporis, ad Naturæ necessitatem datæ, ad speciem essent deformem habituræ ac turpem, eas contexit, atque abdidit. Hanc naturæ tam diligentem fabricam imitata est hominum verecundia. Quæ enim Natura occultavit, eadem omnes, qui sanè mente sunt, remouent ab oculis, ipsique necessitati dant operam, ut quam occultissimè parcant: quarumque partium corporis usus sunt necessarij, eas neque partes, neque earum usus suis nominibus appellant: quodque facere turpe non est, vobis occultè, id dicere obscenam est. Itaque nec aperta actio rerum ullarum petulantia vacat, nec orationis obscenitas.*

^b The Original Hebrew may be explain'd as if the sacred Historian had said, That Adam and Eve made themselves a kind of Cabin, to hide themselves in, after they were sensible of the Fault they had committed. See Mr. LE CLERC upon Gen. iii. 7. For these irregular Desires, of which our Author speaks, could not yet be thought to have place in them, unless we will say, that the Love, which Adam and Eve had one for another, was unlawful after they had sinned. See the Note upon the foregoing §.

^c The Greek is, Ἄνθρωπος ἡ φύσις αὐτῶν ἐν ἀνθρώποις νόσσην ἡσυχίαν ἀναδέεται.-----

^a Compare Montaign's *Essays*, l. 1. c. 35. & Charron de la Sageffe, l. 1. c. 6. & 14. ^b See 1 Cor. xii. 23, 24. ^c *Offic. l. 1. c. 35.* ^d This seems to be taken out of *Xenophon*. Apomnem. l. 1. where Socrates is speaking of Providence. Add. *Ambros. Offic. l. 1. c. 18.* Herodotus (*Euterp.* p. 64, towards the End) reports of the Egyptian, that They eat their Food in the publick Streets; but retire Home when they have Occasion to get rid of it; upon this Principle, That whatever was foul and indecent, yet necessary, was to be perform'd at Home in secret, and every thing which was not foul, abroad. Yet we may remark (by the bye) that the same People were jested upon, for tempering their Clay with their Hands, and their Bread with their Feet. In *Salus's Persick Rofary* (c. 8.) this Reason is given why the Ring should be worn on the Left-Hand, tho' less Honourable than the Right; Because the Right-Hand is a sufficient Ornament to it's self. Aloys Cadamuri (*Navig. c. 10.*) tells us of the *Azenagians*, the Inhabitants of *Senega*, that They are as much ashamed of their Mouth, as of any other Part of the Body; and therefore they ordinarily go with a Cover upon it, which they only take off on the account of Eating. They take it for a kind of Sink always sending out Stench and Nastiness. Leo Africanus (*l. 1.*) gives much the same Relation, and by him the People are call'd *Senegates*. ^e Eurip. *Medea*, v. 471, 472. Huart (*Trial of Wit*, C 1) gives another Reason for this Modesty, which we have not leisure now to examine.

XXXII. This Shame or Modesty may be assign'd as one of the principal Causes, why we esteem Marriages between Kindred, in a direct Line, to be forbidden by the *Law of Nature*: especially since there never did, and probably never will any such Case happen, as shall render these Matches necessary for the Preservation of human Race ^a. And with regard to this Restraint, we are to expound the Reason urg'd against those Marriages by *Grotius*: ^b *The Son* (says he) *being superior by the Law of Matrimony, could not pay to his Mother, if at the same time his Wife, that Reverence which Nature requires; no more could the Daughter, in the like Case, to her Father; because, altho' the conjugal Pact would keep her still his inferior, yet so near a Familiarity must needs prejudice her natural Duty* ^c. For take away the Force of this Original Modesty, and it will not appear so very absurd, for a Mother to marry her own Son; since it is agreeable enough, that a Husband should pay Respect and Honour to his Wife on account of her extraordinary Virtue, Wisdom, or Birth. *Tacitus* observes of his Father and Mother in law (*Agricola* and his Lady) *vixerunt mirâ concordia per mutua charitatem & invicem se anteponendo*: They liv'd in wonderful Agreement, thro' the Engagements of mutual Affection, and by their kind Care of giving each the Preference to the other. Much less inconsistent would it be, for a Woman to pay to the same Man the Duty of a Daughter, and of a Wife, did she not find a Restraint from the above-mentioned Principle.

The Reason alledg'd by *Socrates* in *Xenophon* ^e, appears very poor and insipid, as if nothing deserv'd Blame in these Matches, but the great difference of Age, the effect of which must either be Barrenness, or suspicious and unrefembling Issue: For are there not many Marriages in which the Years of the Couple stand at as wide a distance as those of Parents and their Children?

We cannot on this Head, but recommend the chaste and pious Regard of the *Roman* Laws, which out of Reverence to the bare Name of a Father, allow'd no Man to marry ³ his Adopted Daughter, tho' all the Right of Adoption had been formally taken off and revers'd ^d. And the Emperour *Claudius* acted much beyond his ordinary Capacity, when a Woman refusing to acknowledge her Son, and the Arguments appearing dubious on both Sides of the Cause, he oblig'd her to a Confession of the Truth, by ordering the young Man to demand her in Marriage ^e.

Some have attempted to shew the high Indecency of such a Practice, from the strange Confusion it would cause in the quite contrary Names and Titles of Relation. Thus *Myrrha* argues with herself in *Ovid*,

*Nec, quot confundas & jura & nomina sentis?
Tunc eris & matris pellex & adultera patris?
Tunc soror nati, genetrixq; vocabere fratris?*

Mr. BARR. NOTES on § XXXII.

^a Mr. LE CLERC supposes, that the common use of *Sodomy*, which they had been brought up to, might contribute much to this. for he proves very well that they could not be carried to it by this Motive, that Mankind should not perish. See his Note on *Gen. xix. 31*.

^b GROTIUS does not mean so: He only speaks of a Respect which is inconsistent with Inferiority, or at least with the Equality which Marriage introduces. It seems, as if God by *Moses*, the *Jerush* Lawgiver, had given us that Reason, when he commanded, *Levit. xviii. 7. Thou shalt not uncover the Nakedness of thy Father, or of thy Mother, she is thy Mother, thou shalt not uncover her Nakedness*. Beside, Marriage being instituted for the Propagation of Mankind, it is not convenient that any one should be married to a Person to whom he gave a Being, either mediately or immediately, and so the Blood return again, as we may say, to the Fountain from whence it came. Lastly, besides that no good Reason can be given to justify Marriages in the ascending and descending Line: If these sort of Marriages were not abhorred, every Family almost would become, as I may say, a *Stew*, and there would be but little Union in Families, from whence would arise infinite Disorders, and very troublesome Inconveniences. This I think is all that can be said to prove that this sort of Incest is contrary to the Law of Nature as well as the civil Law. See the *Institut. Lib. 1. tit. 10. § 1*. So far is the Reason which our Author so much depends on, from having that Weight which he imagines, that it has no Foundation, since, as I have already observed, the Shame of which he speaks is the only Effect of Education and Custom. Besides, he is not aware that this Reason is not good but with respect to them who use Cloathing; for those People who go Naked, not being sensible of any Impressions of Shame, as he himself owns; according to his Principle, Incest would not be unlawful in those Countries, because it would be no Obstacle to that Respect which Children are ought to have to them that gave and preserved their Lives.

^c The Words of the *Digests* are, *Quintianus nefas existimatur, cum quoq; uxorem ducere, que per adoptionem filia neptisq; esse coepit, in tantum, ut, esse per emancipationem adoptio dissoluta sit, idem juris maneat*.

^a And therefore the Daughter of *Lot* (*Genes. xix. 31*) were too forward in their Conclusion. Though *Grotius* is of Opinion, that they thought their Practice absolutely blamable, having heard that it was usual with their Neighbours the *Arabians*, as it was likewise with the *Perhians*.

^b *B. 2. c. 5. l. 12. n. 2.* ^c *Aponnem. l. 1.* ^d *Fid. L. 23. t. 2. l. 55. princ. D. de ritu nuptiarum.*

^e *Sueton Claud. c. 15.* ^f *Metam. 10. v. 346, &c. So Oedipus in Seneca (Phœniss.) v. 134, &c.*

*Avis gener patrisque rivalis sui,
Frater sororum liberorum, & fratrum parens.*

Son-in-Law to his Grandfather, Rival to his Father,
Brother to his Children, and Father to his Brothers.

Thyestes in the *Agamemnon* of the same Poet, v. 34, &c.

----- *Verba est natura retro
Avis parentem --- patri virum,
Natis nepotes miscui.*

----- I've turn'd the Course of Nature back,
Confounded all Relations, wildly mixt
The Names of Father, Grandfather, and Son,
Husband, and Grandson.

Ibid. *Per scelera natus, nomen ambiguum suis,
Idem sororis natus & patris nepos.*

Conceiv'd in sinful Love, and born a Riddle;
Puzzling his Friends to fix his doubtful Name,
Son to his Sister, Grandson to his Father.

We meet with what follows amongst the ancient Epitaphs;

*Herfilius hic jaceo, necum Marulla quiescit,
Quæ soror & genetrix, quæ mihi sponsa fuit.
Vera negas, frontem trabis, hæc ænigmata Sphingis
Credis? Sant Pythio vera magis Tripode.
Mater pater è nata genuit, mihi jungitur illa,
Sic soror & conjux, sic fuit illa parens.*

Here *Herfilius*, and next in deep repose
Marulla lies, his Mother, Sister, Spouse.
Start not, or frown to see the *Sphinx* renew;
The *Pythian Tripod* never told to true.
Shamed by her Sire, she weds their common Son,
And blends the three Relations into one.

Canst thou be call'd (to save thy wretched Life)
 Thy Mother's Rival, and thy Father's Wife?
 Confound so many sacred Names in one;
 Thy Brother's Mother, Sister to thy Son?

MR. DRYDEN.

And *Philo Judæus*^a inveighing against the *Persians*, who allow'd the Marriages between Mother and Son, thus expresseth himself: *Nothing could have been invented more grossly Impious; to abuse the Bed of the deceased Father, which claim'd a most religious Respect; to pay no Reverence to the Mother; to have the same Man become her Husband and her Son; on the other hand, to see the Mother assume the Name of a Wife; to bear their common Children call'd the Brothers of their Father, and the Grandsons of their Mother.*

No less unnatural and detestable is the Custom of the *Ile of Ceylon*, where a Father, when he hath provided a Match for his Daughter, forestalls the Husband in the Office of the Bed; giving this ridiculous Reason, that 'tis but just he should gather the Fruits from a Tree of his own Planting^b.

XXXIII. The *Jews*, in this Point, had recourse, not so much to Natural Reason, as to the Original Prohibition of GOD. They taught, that from the Beginning of the World, six Kinds of Conjunctions were Divinely forbidden; with a Mother, or Mother-in-Law, with another Man's Wife, with a Sister by the same Venter, with a Male, and with a Beast. And all this (except the Case of a Sister) they deduce from those Words in *Gen. ii. 24. Therefore shall a Man leave his Father* (that is, say they, the Bed of his Father, and consequently shall abstain from his Mother-in-Law) *and his Mother* (that is, he shall observe Decency and Distance towards his proper Mother) *and shall cleave to his Wife* (thus both Males are excluded, and Women Married to other Men) *and they two shall be one Flesh*; therefore unnatural Desires towards Beasts are here likewise forbidden, in as much as 'tis impossible for Man and Beast to make one Flesh. This is *Mr. Schlen's* Account of their Doctrine^c. It was a very strange and singular Fancie of theirs, which the same Author reports^d, that a *Gentile* becoming a Profelyte of Justice, immediately lost all Relation to his *Gentile* Friends, of what Nearness and Degree soever. Thus, if several Persons of the same Family, as suppose a Mother with a Daughter, were admitted together into the *Jewish* Communion,

they imagined that their Right of Kindred straight expired, and that they ought to live as Persons entirely disengag'd from each other, For by this Act of embracing and acknowledging their Religion, they conceiv'd Persons to be absolutely regenerated, and put into the Condition of Infants^e. Thus their new Man having extinguish'd all the Ties that were upon him from his first Nativity, lay, in that respect, under no restraint or Limitation as to Marriage. And this Notion they pretended to found on the divine Law. Yet, by the Traditions of their Wife-men, a Profelyte was forbidden to marry his Mother, his Daughter, or his Sister, tho' a Profelyte as well as himself. And if any Person, during his Continuance in *Paganism*, had wedded into such Degree, at his Conversion he was oblig'd to release himself by Divorce. The Case was not the same with a Slave, when receiv'd into their Worship under that Condition. For as they imagin'd him likewise to have no remaining Alliance of Kindred, or Blood; so further, they judg'd it no Sin for him to pass beyond the above-mentioned Bounds of Marriage, which confin'd all Freemen, as well *Gentiles*, as *Jews*. The Reason of this difference was, because they esteem'd a Servant as No-Body, in civil Consideration: And thus the State was not concern'd in regulating such inferior Marriages, but they were confirm'd or dissolv'd, at the Master's Pleasure. Yet the *Roman* Laws enjoin the same decent Regard to Kindred^f in the Marriages of Slaves, as of free Subjects.

'Tis remarkable what Travellers report of the *Chinese*, that they decline marrying Women of the same Name with themselves, tho' not allied to them by Blood. And that, on the other hand, provided their Names be different, they never regard any nearness of Birth between Husband and Wife; so that a Niece and an Uncle is a very allowable Match^g.

XXXIV. We are now to examine the other Degrees of Consanguinity, those in a transverse Line; and afterwards to pass on to the Case of Affinity. To begin with Brothers and Sisters; there is commonly so very remarkable a Modesty between them, that they are unwilling to be, at the same time present in a Place, where the Endearments of Love and Courtship are carrying on: Nay, it may be observ'd, that Brothers themselves are usually averse to talking with each other on these Points of Pleasure, tho' only in Sport and Jest^h. Yet the Reason why we cannot positively affirm that Marriages, in

^a *Philo Jud. de Leg. Special. p. 778. C. Ed. Par.*
seem to have obscurely hinted at this Opinion, when, in his Character of the *Jews*, he says, *Those who pass over to their Profession, use the same Customs; and one of the first Lessons which they are taught, is to despise the Gods, to lay aside all Duty and Regard to their Country, utterly to neglect and undervalue their Parents, Children, and Brothers.* *Hist. l. V. c. 11. p. 1. D. unde cognati. l. 8. / 14. l. 2. 3. D. de ritu nuptiar. l. 22. de reg. juris. Selden l. V. c. 16.*

^b And the same vile Excuse is alledged for his Incest by *Charbon* in *Berrier's* Description of the Empire of the *Mogul*.
^c *L. P. c. 1, 2.* ^d *C. 16.* ^e *Tacitus*

^f *Charbon* seems to have obscurely hinted at this Opinion, when, in his Character of the *Jews*, he says, *Those who pass over to their Profession, use the same Customs; and one of the first Lessons which they are taught, is to despise the Gods, to lay aside all Duty and Regard to their Country, utterly to neglect and undervalue their Parents, Children, and Brothers.* *Hist. l. V. c. 11. p. 1. D. unde cognati. l. 8. / 14. l. 2. 3. D. de ritu nuptiar. l. 22. de reg. juris. Selden l. V. c. 16.* ^g *Phil. Martin Hist. Sinic. l. 1. p. 116.*

^h For which *Plato* assigns this Reason (*de LL. l. 8. p. 912. A. Ed. Wech.*) *That all the Talk of the World lies that way; Persons, in their very early Age, bearing these Doctrines ever insinuated, sometimes in Jest, sometimes in more serious Application; and particularly in the Tragedies on the Stage, where Narrations are commonly made, that sick-wild Wretches, as *Thyestes*, *Oedipus* or *Macareus*, who have committed Incest with their Sisters, were seen in a terrible Manner to be their own Executioners. *Simplificus* on *Epictet. c. 47.* speaks to the same Purpose. Since Law and Custom have forbidden the Familiarity of Brothers and Sisters, the Inclinations are no less powerfully suppressed, than if the Command of Nature it self had laid this Restraint upon them; except when Persons are transported with Frenzy, and tortured by the Furies of a wicked Conscience. *Group. Charon de la Sageité, l. 2. c. 8. p. 6.**

the first Degree, are of themselves repugnant to the Law of Nature, is this; because as the Origin of Mankind is recorded in the holy Scriptures, such Matches must necessarily have been made between the first Children of our first Parents. For it is by no means to be suppos'd, that GOD would appoint such a Case in which the Law of Nature could not but be violat'd; and yet we see him commanding the Propagation of Kind, and at the same time providing no other way of performing that Duty, besides these Contracts between Brothers and Sisters. Nor can we say that the Creator lay under any Obligation of forming one only human Pair. Some have express'd great Contempt of this Argument, as rash and impertinent, but their Censure will be of little Force, 'till their Reasons are more considerable. They tell us, *GOD was pleas'd Mankind should draw their Descent from one Head, that He might establish a firm Alliance amongst them on the score of their Kindred.* But would not the Alliance have been sufficient, should several Pairs have been at first produced, all having the same Nature, and the same immediate Author of it? And would not they have been able, by Intermarriages, to keep up the near Relation amongst their Posterity? They urge farther, that if the Beginning of human Race had been otherwise settled, *Wars must have immediately followed, and the World have perish'd in its Infancy.* But of what Consequence is this Objection, when, even according to the establish'd Method, we see one of the first Brothers falling by the Hands of the other? Therefore the Prohibition of these Marriages seems to have taken its rise from some positive Ordinance^a: The Ground and Occasion of which might be, First, the great Modesty discoverable between Parties thus related; and, Secondly, this Consideration, that in as much as their Circumstances engage them to live together in a free and unobserv'd manner, were they farther allow'd to unite in a wedded State, too frequent Opportunities would be offer'd of Adultery, and other shameful Disorders^b.

It may contribute to the Illustration of this Point, to reflect again on the Opinion of the antient *Jews*, as collected by Mr. *Selden*^c. They therefore, amongst these six Kinds of Conjunctions originally forbidden by GOD, reckon the Marriage of a Brother with his Sister by the Mother's Side. But they add, that this Command did not exercise its Force till Mankind being sufficiently multiplied, Plenty of other Women might be had, and there was no need of breaking in upon this Degree. 'Tis an old Tradition with the Eastern People, that all *Adam's* Children, except *Seth*, were Twins, and that it being necessary amongst them for a Brother still to marry his Sister; yet they carefully abstain'd from Sisters of the same Birth. Farther, the *Jews* believ'd a Sister, by the Mother's Side, to be more closely allied to her

Brother, than if by the Father's only. (And thus *Deuteronomy* xiii. 6. *Thy Brother the Son of thy Mother*, is emphatically spoken, as a nearer Degree of Relation.) They thought the primitive Command affect'd only Sisters in the former Sense, not in the latter; for these they judg'd might be taken for Wives by the purest of the *Gentiles*, those who observ'd the Precepts of *Noah*, and govern'd themselves by the Law of Nature and of Nations. And hence, they say, it came to pass that *Abraham* married his Sister *Sarah*; no Restraint being yet laid, in that Particular, from the positive Law. For lest any should imagine, that the Term of Sister is there put for any Kinf-woman, the Patriarch himself explains his own meaning, *Truly*, says he, *she is my Sister, for she is the Daughter of my Father, but not the Daughter of my Mother*^d. Yet that such Matches were not usual in those Countries, is evident from this, that *Abraham* imagin'd he should avoid being taken for *Sarah's* Husband, if she pretended to be his Sister. Unless we are rather inclin'd to say, that he hoped they would take the Word in the fullest and most vulgar Sense, for the Sister by both Sides.

A Difficulty ariseth on this Subject, from *2 Sam.* xiii. 13. where *Tamar* answers her Half-Brother *Amnon*, soliciting her to his Bed, *Speak to the King, for he will not withhold me from thee.* Here on the one Side, it is not probable that *Tamar* was ignorant of the divine Law, which expressly forbids the Marriage of a Brother and Sister by the same Father, as well as by the same Mother. And on the other Side, it would have been in vain for her to think of finally escaping the Violence of her Brother's Passion, by depending on this Reserve, that whatever she might seem to promise him, he could not at last wed her, without a manifest Violation of the divine Command; which yet is *Josephus's* Opinion^e. The *Jewish* Doctors therefore give this Answer to the Case before us. They suppose *Maacah*, the Mother of *Tamar* and *Absalom*, to have been taken Captive by *David*, in the War against the King of *Gesur*, and to have born him *Tamar*, whilst she continued a *Gentile*, and *Absalom*, after she was made a Profelyte. Since then they were persuaded that Persons, by embracing their Religion, were releas'd from all former Kindreds; and because the Child of an *Israelite*, by a *Gentile* Wife, follow'd the Mother, not the Father, and was likewise reckon'd a *Gentile*; they concluded that *Tamar*, when she became a Profelyte, lost all the Relation she had to *Amnon*, during her *Gentile* Condition; and that accordingly she believ'd she might be given in Marriage to him, without transgressing the divine Ordinance; her Nearness of Blood being extinguish'd in her Regeneration.

To touch on the Customs of other Nations in this Affair, we find *Byblis* in *Ovid*, complaining that the Laws of Marriage should be stricter amongst Men than amongst the Gods;

^a See Mr. *Barlecyne's* 1st, 2d and 3d Notes upon § xxxii. of this Chapter.

^b *Add Cumberland de L. N. c. 8. f. 9. Selden de J. N. & G. l. 5. c. 1. & 3.*

^c 438, 535, 558, &c.

^d *L. V. c. 11.*

^e *Genes. xx. 12. Vid. Grot. ad loc. dist*

^b *Vid. Ovid Metamorph. IX.*

^c *Antiq. Jud. VII. 7.*

----- *Dii nempe suas habuere sorores.*
Sic Saturnus Opim junctam sibi sanguine duxit ;
Oceanus Tethyn, Junonem rector Olympi.
Metam. IX. v. 496, &c.

In *Homer* ^a the Daughters of *Æolus* are represented as married to his Sons. *Theocritus* ^b commends King *Ptolemy* and his Queen, for resembling the Matches of the Gods, in being Brother and Sister. *Lucian* ^c reports the same of *Mausolus* and *Artemisia* ; in *Arrian* ^d, *Indicus*, the *Carian*, is said to have married *Ada* his Sister. Amongst the old *Peruvians* the *Thians* alone were permitted to marry their Sisters, and all other Men forbidden to take the same Liberty ^e. On the other hand, the *Romans* abhor'd this Practice as most odious and unnatural. *Plutarch* ^f, giving the reason why the Women, in that Nation, saluted their Relations with a Kiss, hath left this Remark, *When the Laws had prohibited the Marriage of near Relations, they yet allow'd them to proceed to this innocent Expression of Love ; and this became a mutual Pledge and Mark of their Alliance. For in ancient Times the Romans abstain'd from wedding their Kinswomen, in any Degree of Blood ; as they at present forbear their Aunts and their Sisters. It was late before the Marriage of Cousin-Germans was dispens'd with* ^g.

The *Athenians*, by the Constitution of *Solon*, might marry their Sisters by the Father's side, not by the Mother's. Thus *Plutarch* ^h relates a Match between *Themistocles*'s Son and his Daughter by another Wife. *Demosthenes* ⁱ reports the same of his Grandfather. *Cornelius Nepos*, in his Life of *Cimon* ^k, observes that General to have made the like Marriage, which, he says, *Was agreeable to the Athenian Customs* ^l. Yet there is a Passage, in the Oration of *Andocides* against *Alcibiades*, which seems to overthrow all this: *Reflect*, says he, *upon the Examples of our Ancestors ; with what Bravery and what Wisdom they proceeded, when they sent so great a Man as Cimon into Banishment, for violating the Laws, in taking his own Sister to his Bed* ^m. *Plutarch*, in *Cimon*'s Story, delivers himself with no Certainty on this Point ; he tells us, *Some censur'd him for using too much Liberty with his Sister, tho' only in Sport : Others affirm'd, that the matrimonial Contract had really pass'd between them, and that the reason was, because the young Lady, on account of the Poverty of the Family, could not find a Husband abroad*.

The *Lacedemonians*, on the contrary, married their Sisters by the Mother's side, not by the Father's ; as *Philo Judæus* ⁿ informs us.

It appears from *Pluto* ^o, that he esteem'd Matrimony between Brothers and Sisters lawful ; in as much as he forbids it only in the ascending or descending Line of Kindred.

Amongst the *Egyptians*, *Diodorus Siculus* ^p observes, this kind of Marriage was establish'd by an express Law, and was grounded on a superstitious Conceit, that the same Practice had succeeded fortunately with *Isis*. *Achilles Tattius* ^q reports the same Custom of the *Phanicians*.

Others of the Antients declar'd an absolute Dislike of this Freedom. It is one of *Phocylides*'s Precepts ^r,

Μὴδὲ κασιγέτρης ἐς ἀπόγαγον ἐδιδίμαι ἐπιθεῖν,
 Nor climb thy Sister's interdicted Bed.

And indeed that these Matches were very unusual through all *Greece*, may be gather'd from *Hermionæ*'s Speech in *Euripides*, where she thus upbraids *Andromache*,

Τοῖσπερ πῶρ τὸ βεβήκατον γῆναι, &c. v. 103, &c.

Thus the *Barbarians* with incestuous Love, Fathers their Daughters, Sons their Mothers wed, Brothers their Sisters ; and no Law restrains Their sinful Passion.-----

Or if they were once permitted in *Greece*, it is certain they grew entirely out of use with Posterity ; as that Passage of *Senatus Empiricus* ^s sufficiently proves ; *The Egyptians contracted Marriage with their Sisters ; which, amongst us, is disallowed by Law*. The same Author says in another place ^t ; *In our Country we esteem it contrary to all Right and Decency, to make a Wife of a Mother or of a Sister* ^u. Yet he chargeth both those Practices on the *Persians* ; as do likewise *Strabo* ^x, *Lactantius* ^y, *Curtius* ^z, and *Lucian* ^a. Tho' the Answer given by the Judges to *Cambyses*, in *Herodotus* ^b, plainly shews, that the wiser Men, even in the *Persian* Nation, were of a very different Opinion.

It may not be improper to conclude our Search into the present Controversy, by returning to the *Jews*. They then, in their Prohibition of Marriage between Brothers and Sisters, thought it made no difference whether the Sister, in such a Case, came by Adultery, or by a lawful Bed : nay, if she was born of a Mother-in-Law, in a dishonest way, the Rule held against her in this respect ^c : Though, otherwise, as to the Crime of Incest, they held it could only be committed by *Matrimony*, not by Adultery, nor by unmarried Pollution. Thus, amongst them, he did not pass for an Incestuous Person, who had defil'd a Mother and her Daughter, but he only who had actually wedded both. Thus too a Man might marry her whom his Father, Brother, or Uncle, had been too familiar with, tho' he could not wed his Mother-in-Law, nor his Uncle's Widow, nor so much as his Brother's Relict, unless in the extra-

^a *Odyss.* 10. ^b *Ibid.* 17. towards the End. ^c *Dial.* Diogen. & Mausol. ^d *D. Euseb.* Alexand. l. 1.
^e *Garcilasso de la Vega.* l. 4. c. 9. ^f *In Qu.* Rom. p. 265. C. ^g See the Rest in *Ibid.*
^h *In Themistocle.* in fin. ⁱ *Contra Eubulid.* ^k C. 1. ^l See *Bardet's* Notes on this Place.
^m To this agrees *Athenæus*, l. XIII. c. 21. ⁿ *De leg. Special.* p. 779. E. Ed. Paris. ^o *De LI.* l. 5.
^p L. 1. c. 27. ^q l. 1. ^r V. 170. ^s *Pyrrhon.* Hypotyp. l. 1. c. 14. p. 31.
^t L. 3. c. 24. ^u *Ad Selden.* de J. N. & G. l. 5. c. 11. ^x l. 15. c. 505. E. Gen. Consul.
^y *In Proæm.* ^z L. 8. c. 2. l. 10. ^a *De Sacrific.* p. 364. Edit. Amst. ^b *Tham.* *Ibid.* What is relat-
ted of the *Thracians*, the Inhabitants of Mount *Libanus*, I know not with what Credit, by *Levi Broderick* *Im. Oriental.* l. 2.
c. 15. in fin. ^c *Ad l.* 54. *D. de Rota Nupt.*

ordinary Cafe of his dying without Issue ^a. And so on the other hand, a Man might take her to Wife, whose Mother, Sister, Grandmother, Aunt, Daughter, or Niece he had corrupted. It is true, by the Traditions of their Rabbins, these Marriages were judg'd unlawful; yet the contracting Party was only corporally punish'd, and the Contract still allow'd to stand good. From all which we may infer, that the Jews, in stating the Notion of Affinity, held it to proceed not from a bare Nearness of Blood, unless caus'd in a regular and matrimonial way ^b.

Nicetas Acominatus reports, that the Emperour Andronicus Comnenus having a Design of joining in Marriage Alexius and Irene, both incestuously begotten on Theodora, and consulting his Judges on this Point, one of them gave his Opinion that *The Parties being illegitimately born, were not to be esteem'd of Kin to each other, but had lost all Right and Alliance of Blood; and were in the Condition and Distance of Strangers.* But the Historian censures these Judges, as Men of greedy and fordid Tempers, who made a Gain of dispensing with GOD's Commands, and would sell their Voices for the Feasts and Favour of great Persons.

XXXV. As for the other Degrees, forbidden ^c in Leviticus xviii. it will be still more difficult to find a Reason why they should hinder Marriage, on the bare Consideration of the Law of Nature. Though it must be own'd, that such Matches have been condemn'd and detested by many Heathens. St. Paul ^d calls it *Such Fornication as is not so much as named amongst the Gentiles, that a Man should have his Father's Wife.* Phocylides ^e sets it down as one of his Moral Lessons,

Μητρικῆς μὴ ψαδὲ γε δεύτερον λέλειπα γονῆθι,
Μητέρα δὲ ὡς πῖμα πλὴ μπητέρως ἴχνηα ἔῶσαι.

Make not thy Father's injur'd Bed disgrace
Thy Step-dames Vows; but with Respect confesse
A Mother her, that fills thy Mother's Place.

The Story of Stratonice is well known, whom Seleucus her Husband gave away to his Son Antiochus, when the young Prince was fallen in Love with her beyond Cure. It was a remarkable Saying of Seleucus on this Occasion, that *if his Wife express'd an Abhorrence of so unusual a Practice, be begg'd his Friends to inform her, that whatever Action was pleasing to the King, and beneficial to the Publick, she ought to esteem right and just* ^f. Yet Appian ^g doth not stick to call this Love of Antiochus, ἀδελφικὴ πάθος, *A sinful extravagant Passion.* It ^h is said to be the ordinary

Custom amongst the Tartars, for a Son to marry his Mother-in-Law, when left a Widow by his Father ^h.

The antient Jews, as Grotius observes ⁱ, founded the Prohibition of these Degrees chiefly on two Reasons: First, on *that natural Modesty which hinders Parents from holding Familiarity with their Issue, either by themselves, or by such Persons as are in Blood, or Affinity, nearest to them.* Which Argument, as it is of good Force in the ascending and descending Line, so, in as much as the Shame there alledg'd is exceedingly weakened, and almost brought to nothing in the collateral Kindred, especially beyond the second Degree, it can here by no means amount to a Precept of the Law of Nature. Yet are we to esteem those civil Constitutions most just and well grounded, which extend the Prohibition to a wider Compass; on purpose, as it were, to fence in and secure those Degrees which the Dictate of Nature, or the positive Ordinance of GOD had before forbidden. Their second Reason was, *Left too great occasion should be offer'd to Fornications and Adulteries between Persons thus related, and constantly conversing with Freedom together, if such Pieces of Wantonness might be made good by the Remedy of Marriage.* This Argument, like the former, is sufficient to give Occasion to a positive Law, not to evince any Precept of Nature. The Jews apply it well, to account for that seeming Difficulty in the xviiith of Levit. where the marrying an Aunt is forbidden, and not the marrying a Brother's Daughter, though both seem equally distant in Degree. For they observe, that young Men frequenting the Houses of their Grandfather and Grandmother, and sometimes dwelling with them, are very much in the Company of their Aunts; whereas they come not so often to their Brother's Houses, nor have there the same Privileges and Freedoms. Yet the latter of these Degrees was esteem'd unlawful by the Romans, as appears from the Case of Claudius, when designing to marry Agrippina ^k.

Many there are notwithstanding who assert, that in the Place of Scripture but now mention'd, not such particular Persons are forbidden, but in general all such nearness of Degrees: whose Arguments, were there occasion, might perhaps find an Answer.

Those who maintain that all the Degrees, mention'd in the xviiith Chapter of Leviticus, are likewise repugnant to the Law of Nature, urge the Words of the 24th Verse, *For all these Abominations have the Men of the Land done which were before you, and the Land is defiled.* "For, say they,

MR. BARB. NOTE on § XXXV.

^a The Pythagorians mightily approved the old Laws of the States of Greece, by which it was forbidden to have any Amorous Conversation with a Mother, Daughter, or Sister, and to satisfy his Desires with any Woman whatsoever in a Temple, or in the sight of the World; for, say they, it is good and profitable to put as great an Oblacle to it, as possible. Ἐπιανθίου δὲ ἀπίης ἱστορίαι, ἢ τὰ τελευτὰ τῆς αἰωνοπαράστατον νομίμων ἐν ταῖς ἑλληνικαῖς πόλεσι, τὸ οὐτε μητέρας ἀφίενθαι, μητε θυγατέρας, μητε ἀδελφῆς, μητε ἐν ἑσέ, μητε ἐν τῆς φανερῆς, καλῶν τε γὰρ τῆς, ἢ σύμφορον, το ὅς πλείοντα γυναικῶν καλῶματα τ' ἀφίενθαις ταύταις. Jamblich. in Vit. Pythag. § 210.

^a Comp. l. 1. f. 3. D. de Concubin. l. 4. f. 8. D. de Gradib. § Affin. ^b Selden. *ibid.* ^c V. Grot. L. 2. c. 5. f. 13, 14. ^d 1 Corinth. v. 1. ^e V. 168, 169. ^f Plutarch in Demetr p. 907. Ed. Wech. ^g In Syriacis, p. 127 Ed. H. Steph. Add. Senec. *Controvers.* l. 6. Decl. 7. Valer. Max. l. 5. c. 7. f. 1. Ext. Cicero, pro Cluent. c. 6. expresseth a grievous Abhorrence of Marriage between a young Man and his Wife's Mother, *O incredible Villany of a Woman, says he, and never heard of till this time in the World!* Add. D. L. 23. t. 2. l. 12, 15, §c. De ritu Nupt. Haythou. de Tartar. c. 48. Paul. Venet. l. 1. c. 15. ^h In the Places abovesited. ⁱ V. Tacit. Ann. XII.

* in as much as every Transgression presupposeth a Law, those *Gentiles* in contracting such Marriages must needs have violated, either some natural Law, or some divine positive Ordinance universally binding Mankind: The latter is hardly to be made out, and the former must therefore be admitted. To this Mr. *Selden*^a answers, that the Word^b *these* is to be restrain'd to those Sins which the Heathens were capable of committing. And as an Argument that it doth not extend to every Particular there mention'd, he observes, that one Case there prohibited^c is the marrying of two Sisters together, which could not be before vicious, having been practis'd by so righteous a Man as *Jacob*. (Though to this Remark of Mr. *Selden* it might well be added, that the Quarrels and Emulations between those Sisters, *Jacob's* Wives, was probably the Reason of this positive Prohibition.) In the same manner *Anram*, *Moses's* Father, married *Jochabad* his Aunt; another of the Degrees here forbidden^c.

By the *Turkish Alcoran*^d, a *Mussulman* is restrain'd from wedding his Mother, his Step-dame, his Daughter, his Sister, his Aunt, his Niece, his Nurse, his Foster-Sister, his Wife's Mother, his Wife's Daughter by a former Husband, his Son's Wife, two Sisters, a Daughter to a Woman whom he hath abused, and, lastly, another Man's Wife, unless taken for a Slave in War^e.

^f It may not be from the purpose to observe, that many have imagin'd the Force of Affinity to cease, on the Death of the Person in whom it was founded. It is a saying of *Euripides*^f.

----- *New Affinities efface the old.*

Isocrates^g, speaking of a Gentleman who had married his Aunt, says, *He took so much Delight and Satisfaction in my Father's Friendship, that losing my Aunt without Issue by her, he took my Father's Cousin-German for his second Wife, to keep up the Affinity between our Families*^h. *Florus*ⁱ tracing out the Cause of the Quarrel between *Caesar* and *Pompey*, observes, that upon the Death of *Julia*, Daughter to the former, and Wife to the latter, the Band being broken asunder which had so long held them together, they soon discover'd their mutual Jealousy, and appear'd the most violent of Rivals. *Marriages*, says *Philo* the *Jew*^k, *are the Ties and Engagements which unite the Families of Strangers; and when they are dissolv'd, the Affinity breaks off with them.*

lies of Strangers; and when they are dissolv'd, the Affinity breaks off with them.

XXXVI. It will be convenient to add a Word or two about those inferior, or secondary Wives in use amongst some Nations: Such as do truly plight their Faith to their Husband, and are united to him in the strictest manner of Society; yet so as that upon account of their unequal Condition, or Birth, or for other Reasons, they are not admitted to the full Honours of their Character, nor acquire the same Rights for their Children, as other lawful Mothers^l. Of these Mr. *Selden*^m hath treated at large; and from him it appears, that their Difference from just and proper Wives is introduc'd purely by positive Law, or by the particular Covenant of the Parties, who to the principal matrimonial Pact may add any thing at their Pleasure, which doth not contradict and overthrow it. The chief Reasons on which this Practice seems to have been founded are these, the Preservation of noble Families, the Fear of injuring former Childrenⁿ, and lastly, the avoiding of those great Expences, which a Wife, in the higher or more perfect Degree, might challenge by the Custom of the State. In order to the keeping up of great Families, it is convenient that they marry into equal Fortunes and Honours: For the better procuring of which it hath been enacted, in many Commonwealths, that in case a Man take a Wife beneath himself, the Marriage shall not have all those Effects and Privileges, which it would otherwise, in course, enjoy. And then again, nothing more weakens a Family, than the dismembring of an Estate into too many Parts; wherefore to prevent this Misfortune, some have thought it proper to take up with these secondary Wives, whose Children, if their Portions are not over large, have yet no Reason to complain. And as to the third Point, he is a notorious Fool, who makes himself a Beggar to maintain the Pride and Grandeur of a Wife.

On the whole, it is clear how injuriously we deal with these inferior Wives, if we allow them no better a Title than the vile Name of Concubines^o. For Concubines are properly such, as exercise conjugal Freedom without conjugal Faith, and differ only in Degree from common Strumpets: Nor do they exempt themselves from the Scandal by entering into a private Engage-

³ This critical Remark, alledg'd by *Grotius* before § 14. destroys the whole System of them who ground your Divine positive general Laws upon it; though they can't shew, how they have been publish'd to all People.

⁴ Yet among the *Tartars*, on the contrary, Fathers marry their deceased Sons with the deceased Daughters of some other, and imagin, that by that Posthumous, or rather Imaginary Contract, the Parents of that Son, or Daughter, contract a true Alliance or Affinity. *Marc. Paul. Venet.* Lib. 1. Chap. 58.

Mr. BARB. NOTE on § XXXVI.

⁵ See *Cujacius Observ.* Lib. V. Cap. VI. where he treats of the Notion that the *Romans* had about them, and shews us, how they were look'd on as Concubines.

^a L. 5. c. 11.

some remarkable Things concerning the Degrees of Consanguinity amongst the *Indians*, in *Abr. Roger. de Bramin.* p. 1. c. 12.

^d Chapt. of Wives.

^c *Add. Selden. de J. N. & G. &c.* l. 6. c. 11.

^f *Med. ec.* 76. & in *Orest.* 1083.

^g In *Aeginetic.*

^h *Cicero pro Quint.* c. 6. *The Affinity could by no means be broke off, whilst the Children were alive.* Idem *Philipp.* XI. c. 4. concerning *Dolabella*, who had formerly married his Daughters; *And this Gentleman, O ye heavenly Powers, was once my Friend!*

we are told of the *Tartars*, that amongst them 'tis an usual thing for different Parents to make Matches between their deceased Sons and Daughters; fancying that by this posthumous way of Marriage, a Relation is no less contracted between their surviving Friends, than if they had actually celebrated their Nuptials in their Life-time.

ⁱ L. 4. c. 2. n. 13.

^k *De Legat. ad Caium.* On the other side

^l *Vid. Selden. de J. N. & G.* l. 5. c. 7.

^m *V. Grot.* l. 2. c. 5. § 15.

ⁿ So in *Julius Capitolinus* towards the end, the Emperor

Marcus, upon the Death of his Lady *Faustina*, took the Wife of his Procurator for a Concubine, *Ne tibi liberis superinduceret novercam, That he might not bring so numerous a Family of Children under the Power of a Mother-in-Law*

ment, and confining their dishonest Service to a single Person ^a. But the Faith of the Marriage-Bed is infinitely more sacred and solemn, than to be brought into Comparison with the strictest of these illegal Compacts, founded on the base Prospects of Lucre or of Lust ^b.

Busbequius ^c remarks somewhat very particular of the *Turkish* Emperours, that after *Bajazet*, none of them enter'd into just and proper Matrimony. For he, after his Defeat by Tamerlain, falling together with his Wife into the hands of the Victor, took no part of the Barbarous Treatment more to heart, than the Affronts and Dishonours put upon the Sultanes before his Eyes. In regard to this Accident, his Successors abstain from conjugal Engagements; and as to the Affair of Issue, make use of Women in the Condition of Slaves, who are not capable of suffering so much Injury and Dishonour. But indeed the Turks in general pay no less Affection and Kindness to their Sons by Concubines or Harlots, than to those who are born of their legal Wives; nor have the former any less Degree of Right to the Goods and Estate of their Father.

Abbas, King of Persia, took another way of preventing these Indignities: For, carrying with him into the Field all his Female Train, he commanded the Eunuchs, that had the Custody of them, to

cut off the Heads of all his Wives, in case he lost the Battle ^d.

The *Chinese*, when they despair of obtaining Issue in just Marriage, have recourse to the Remedy of Concubines; esteeming it the most miserable thing that can befall a Man, to be at a loss for Children, who might mourn at his Decease, and perform the decent Honours of his Burial ^e.

We have only this Observation to add, that as the publick Laws of Commonwealths are wont to invest other Contracts with certain Rites and Solemnities, upon want of which they pass for invalid in civil Cognizance; so in some States there are such Ceremonies annex'd to Matrimony, as if omitted make it illegal, or at least deprive it of some Effects which would otherwise have sprung from it, according to the local Customs and Constitutions ^f. Now although the Law of Nature be a Stranger to these Formalities, yet inasmuch as it commands all Subjects to obey the Ordinances of the Government under which they live, it would be idle and ridiculous for such Persons, as have not the Power of making or of reversing civil Laws, to plead the Indifference of natural Law in the present Case.

^a *Vid. Ælian. V. H. l. 10. c. 18.*
Vid. L. 32. t. 3. l. 49. l. 4. D. de Legat. and L. 5. t. 27. l. 3. C. de natural. liberis, Concubinage is call'd unequal Marriage.
Ad. Godofred. ad l. 1. d. 17.

^b Yet sometimes we meet with the Word *Concubina* in no disgraceful Sense.
^c *Epist. 1.*
^d *Petrus della Valle Itin. P. 2. Epist. 5.*
^e *Martin. Hist. Sin.*

l. 6. c. 1. p. 201.

^f *V. Constitat. Sicul. l. 3. t. 20.*

CHAP. II.

Of paternal Power.

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| <p>I. The common Opinion of the Original of paternal Authority.</p> <p>II. According to Hobbes, the original Power over Children is in the Mother.</p> <p>III. And from her is derived to others.</p> <p>IV. On what Reason paternal Authority is grounded.</p> <p>V. How far the Father has more Right than the Mother.</p> <p>VI. How great the Power of the Father is, as such, over his Children;</p> | <p>VII. Both in their Infancy and Childhood.</p> <p>VIII. How far Children are capable of being govern'd at this time.</p> <p>IX. Whether a Father may sell his Son.</p> <p>X. Of the Obligation of Children made free.</p> <p>XI. What Power Fathers have over their Children, out of civil Societies;</p> <p>XII. What Power in civil Societies.</p> <p>XIII. How this Power is lost.</p> <p>XIV. Whether Children ought to have their Parents Consent to their Marriages.</p> |
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Children are the proper Fruit of Matrimony; as they are likewise the proper Subjects of paternal Dominion, that most antient, and, at the same time, most sacred Kind of Government; by Virtue of which the Children are engaged to acknowledge the Superiority, and to reverence and obey the Commands of their Parents. The Origin of this Power, *Grotius* ^a, and most Writers refer to the Act of Generation, by which the Parents do, in some measure, resemble the divine Creator, whilst they make a

Person really exist, who before had no Being. But in as much as both the Parents equally contribute to this signal Benefit, they say that both originally acquire a Right over their Issue; but that, in case they contend for the Sovereignty, and by reason of their contrary Commands cannot both be obey'd together, the Father's Authority is to carry the Precedence; not only on the account of the Advantage he hath in Sex, but likewise because the Mother herself is placed under his Direction and Sway.

Mr. BARBEYRAC'S NOTES on Chap. II. § I.

¹ *QUINCTILIAN* expresses this very well in this Passage of his, *Declam. VI.* quoted in part by *GRONOVIVS: Duo [Pater & Mater] unum creabamus, videamus, quod ire debuerit. Pateram quidem fortiter dicere, Pater iusti. Hoc nomen omni Legge majus est-----Necesse habuit parere-----Sint jam jura paria, jedeat melius inter duos Jdex: Non comparabo Personas, quomais apud omnes Gentes plus juris habeat Pater: Sit jam Natura communis, non impatib, quod nomen dedi, quod familiam, quod impensar, &c.*

^a *L. 2. c. 5. f. 1.*

II. Mr. *Hobbes* ^a takes another Road in tracing out this *paternal Rule*: “Tho’, says he, this be a true Consequence, *A Man is the Father of another, and therefore hath the Dominion over him*; yet it is not so clear and manifest as to shew its own Necessity, as those do where one of the Terms is included in the Definition of the other; but must be made out by other Arguments and Proofs. Besides, since all sovereign Power, if regularly establish’d, is indivisible, so that no one can, at the same time, serve two Masters, unless in Subordination; and since two Persons concur to the Act of begetting, that Act should seem an improper Foundation for Sovereignty; which may therefore be more conveniently deduc’d from a State of Nature, in the following Method. During such a State every Man hath a Liberty of practising against every Man, what he thinks may conduce to his own Preservation: ¹ and consequently the Conqueror is the Lord and Master of the conquered. Whence we may infer, that by the Law of Nature the Right of governing an Infant is first in the Power of the Mother; who, if she resolve to nourish and breed him up, ² as she is in Duty obliged to do, is suppos’d to do it upon this Condition, that he shall not prove her Enemy when grown up, *i. e.* that he shall pay Subjection and Obedience to her. (According to his Hypothesis, those are mutual *Enemies*, who are neither subject one to the other, nor own a common Master.) For it is by no means to be presum’d that I would give a Person Life, on purpose to put him in a Capacity of growing up to my Prejudice, and of gaining strength in time to repay my Kindness with Hostility. Thus therefore a Woman becomes, at the same Minute, a Mother and a sovereign Mistress. Nor is the Excellency of Sex a sufficient Argument why we

“ should attribute this Right of Governing to the Husband, rather than to the Wife: For the Inequality is not so great between them, as that the Man can immediately establish his Rule over the Woman without Opposition; but, in a State of Nature, he must fairly win her by a Course of War. Farther, ³ the Woman, by carrying the Child so long about her, and nourishing it with her Substance, ⁴ doth certainly contribute, if not the most noble, yet the most laborious and troublesome Share to the Production of Issue ^b. Lastly, in as much as in a State of meer Nature, where no Commonwealths and no Families are supposed, ’tis impossible to know who is the Father of the Child, but by the Mother’s Attkveration; it follows that the Child belongs to whom she pleaseth, and therefore primarily to her self. On which account it was enacted by the *Roman* Constitution, that Issue brought forth without Matrimony ^c should follow the *Venter*, or the Mother ^d.

III. From the Mother this Dominion, according to Mr. *Hobbes*, may pass to other Persons several ways: “First, if the Mother renounce her Right by *exposing* the Child; the Person who finds, and breeds him up, shall enjoy the same Right which the Mother had over him before. For the Life which the Mother at the first gave him, she, as far as she is able, takes away again by this Act of exposing him: And consequently the Obligation he had to her, for her former Kindness, is entirely cancell’d by this Injury. On the other side, to the Person who sav’d and educated him, he owes all possible Returns, and ought to acknowledge him, both for his Parent and his Master ^e. Here, though we should grant that such a Child ought still to preserve an Inclination of paying Duty ^f to his Mother, and, upon her Sorrow and Repentance, to return

Mr. BARB. NOTES on § II.

¹ Our Author elsew here has confuted this Principle of Mr. HOBBS. See B. 1. c. 6. f. 10. and B. 2. c. 2. f. 5, &c.
² Mr. BUDDIUS sets down this (*as is certainly her Duty to do*) as Mr. HOBBS’s Opinion, but it is plainly contrary to Mr. HOBBS’s Notion, as the Course of his Reasoning makes it evident; and Mr. HOBBS explains himself without Reserve, *De Civ.* Chap. 9. § 2. where he says, that a Mother may either bring up or nourish her Child, *SUO ARBITRIO ET JURE*, at her own pleasure. See also his *Leviathan*. In general, our Author mixes his own Notions and Arguments too much with Mr. HOBBS’s, without Distinction, which ought to be carefully observed.
³ This is our Author’s Reason, tho’ Mr. BUDDIUS attributes it to Mr. HOBBS in the Place before quoted.
⁴ This our Doctors and modern Physicians will not allow, as most Men know.

Mr. BARB. NOTE on § III.

¹ These are our Author’s Words to the end of this Section, and agree with his Principles, only we must add, that what he says of the Mother, must equally be applied to the Father.

^a *De Civ.* c. 9. ^b *Quintil. Declam.* 338. *It is otherwise in the Case of the Men, who are made Parents by a slow and transient Pleasure, and are enac’d to their Children only by that outward Satisfaction. But the Mothers love with a much stronger Passion, remembering their ten Months Trouble, their Long Course of Cares and Dangers.* It is a saying of *Medea*, in *Ennius* (or rather in *Euripides*, v. 250, 251. from whence it was borrowed) *I had rather be Three times under the Sword, than once under the Hawks of the Midwife.* Yet they tell us of the Women of *Paria* in *America*, that they bring forth without any Pain or Weakness, and immediately after their Delivery return to their ordinary Work and Employment. Much the same is reported of the Women of *Chili*; and ’tis added, that the *Spanish* Dames, if they live there any considerable time, contract the same Hardiness. *Orestes* in *Eurip.* v. 552, &c. when it makes for his Cause, gives his Father much the Advantage of his Mother.

My Father planted me, and his fair Dame
 Was but the Soil that bred and brought me forth,
 More tied I judg’d my self to succour Him
 That gave me Life, than Her that gave me Food

^d By the Law of the *Lycians*, if a Free-Woman married a Slave, the Children were adjudg’d Free: but if the greatest Man in the State wedded a Foreigner or a Strumpet, the Issue was accounted base and servile. The same People took their Names from the Mother, not from the Father, *Herodot. Cho.* p. 44 Ed. H. Steph.

So far I died as Death was in Your Power:
 And if a kind Deliverer hath restor’d me
 To Light and Life, I own him for my Father;
 And boast to be the Comfort of his Age.

Liban. Orat. 13. *A Man who takes another out of the Water, where he was ready to perish, may well be esteem’d a Father to the Person he hath preserv’d.*

which naturally accrue to Men; before we can render them unequal to us, or subject them to our Dominion, it seems necessary for us to seek out some other Title: Especially since in the Method of bringing a Child into the World, the Parents have no little Regard to their own Pleasure and Satisfaction; and therefore cannot rate the Kindness at so vast a Price, and set it so highly on the Child's Score, as to demand back, in Consideration, a full Subjection and Obedience, whether the Child be willing, or no. It is a Saying of *Laërtius* ^a, *He that begets a Son, hath no Power to make him be conceiv'd, to make him be born, to make him live: Hence it appears, that he is not so properly the Author of his Son's Being, as the Instrument.*

The Right then of Parents over their Children seems to be founded on these two Titles or Claims: First, it ariseth from that Duty which Nature (in enjoining Man to be a sociable Creature) lays on them to take care of their Offspring; she having at the same time, to stir up their Diligence, wisely implanted in them a most tender Affection towards these little Pictures of themselves. For take away from the Parents all Care and Concern for their Childrens Education, and you make a social Life an impossible and unintelligible Notion. But this Care cannot duly be exercis'd, unless the Parents have Power to direct and govern the Actions of the Child, in order to the procuring his Benefit and Safety, which he himself, through Defect of Years and Judgment, is incapable of apprehending and of providing for ^b; and consequently Nature doth hereby enjoin Parents actually to make use of such a Power and Dominion, so far as it is necessary to the Accomplishment of so important a Work. For whoever obligeth a Person to the Prosecution of an End, is, at the same time, suppos'd to have given him Authority to apply all Means that shall appear requisite for its Attainment. And this Power of the Parents, resulting from the Duty lying on them to provide for their Issue, doth necessarily create in the Children an Obligation to submit themselves to their Parents Direction, without which Act of Submission the former Benefit cannot be obtain'd, and the Authority is to no Purpose.

Secondly, The Sovereignty of the Parents seems likewise to be built on the presumed Consent of the Children, and consequently on a tacit Pact. For, as the Parent, by the very Act of breeding up the Infant, doth declare himself ready to fulfil the Obligation of Nature, and to consult, so far as in him lies, the well educating of his Charge; so the Infant, on the other side, tho' on account of the imperfect Force of Reason, he cannot expressly promise those reciprocal Duties, which answer to the Parent's Obligation, yet by virtue

of this Care, employ'd by the Parents about him, he contracts as firm an Engagement towards them, as if he gave his full and express Consent ^c. And this Engagement begins to exert its Power so soon as he arrives at the Knowledge and Apprehension of any thing that his Parents have done for him. It being fairly presumed, that had he, at his coming into the World, been furnish'd with the Use of Reason, and made capable of understanding that his Life could not be preserv'd, without the kind Provision of his Parents, join'd with their Command over him, he would gladly have yielded Obedience on so commodious Terms. Which Consent of his, ² being rationally suppos'd, hath the same Validity as if it had been openly declar'd ^d. In the same manner, as a Person, who hath had any Business perform'd for him by another, in his Absence and without his Knowledge, is suppos'd by a kind of silent Covenant to contract an Obligation of refunding the Charges. It is clear therefore, that the Power which Parents have over a Child, is then actually constituted, when they apply themselves to nourishing and educating him, and rendering him, so far as they are able, a useful Member of human Society.

³ Some indeed have maintain'd, that the Obligation between Parents and Children can by no means be deriv'd from their tacit Consent and Covenant, upon this Argument: *Consent, whatever the Subject or Occasion of it be, doth not take place, except in Actions that were free before the Consent pass'd; but now it is not a matter of Freedom in the present Case, for the Parties to perform the mutual Duties of Education on the one side, and of Obedience on the other.* But this way of Reasoning cannot weaken what we here assert. For it doth not imply the least Contradiction, for a Duty to arise at the same time from a Precept of the Law of Nature, and from tacit Consent and Pact. It is not certainly free for a Man not to obey GOD; yet GOD hath been pleas'd to enter into Covenant with his faithful Servants. A Subject is no doubt oblig'd to perform all due Offices in the State under which he lives; and yet, when he is to be lifted in the Military Order, not only his Consent is required, but his Oath. And thus, why may we not as well affirm, that whilst the Parent actually undertakes the Education of the Child, the Child's tacit Consent is to be understood? the Effect of which Consent amounts to this, that he shall not afterwards have Reason to complain, that the Parents Authority was obtruded upon him against his Will, and without sufficient Grounds and Title.

V. When the Question is carried farther, and it is demanded to which of the Parents this Right over their Issue doth most properly belong, a Distinction or two will decide the Point. For

² This Supposition is equally ill grounded, and superfluous. We can't presume a Consent of a Child who is not in a Condition, either to give it, or refuse it. The Author also here, as well as elsewhere, confounds a presumed Consent with a tacit one. See what I have said above in my Note upon *Lib. 3. Chap. 6. § 2.* In that alone, that Nature puts Infants into such an Estate, wherein they have an absolute need to be help'd and directed by others, and charges Fathers and Mothers with that Care; it sufficiently imposes upon the First an Obligation to submit to the Power of the Latter.

³ It is JAMES THOMASIVS, the Father of the present Mr. THOMASIVS, in his Discourse, *De Patriâ Potestate*, § 49.

^a *Divin. Instit.* l. 5. c. 18.

^b See *Sirac.* VII. 23. XXX. 1, &c.

^c *Act.* L. 3. c. 5 l. 2. *D de negot. gestis.*

^d *Com. Senec. Consol. ad Marciam.* C. 18. *in fin.*

the Persons concern'd, either live under some Commonwealth, or not; and again, the Parents either are, or are not, engaged to each other by Covenant. Without the Bounds of a Commonwealth, or in a State of natural Liberty, if the Parents were not united by any lasting Contract, the Child is under the Care and Command of the Mother. Because, in such a Condition of Life, it being as probable that one Man should be the Father as another, the Mother can only determine the Controversy; at least, the thing cannot be otherwise known, with so much Truth and Certainty, as Matters of Fact demand^a. On this Principle, the *Roman* Laws award to the Mother Issue begotten^c in common^b. But if a Covenant hath pass'd between the Parents, by which they settled these Affairs, it will appear thence, which of the two is to bear Rule over the Children; for that two Persons should both hold the supreme Authority over a third, without Subordination or Division, is no regular Practice. This Covenant then between the Parties, either terminates in the bare Procurement of Issue, or it includes farther the Sovereignty of the Man over the Woman, and so falls in with just Matrimony; where no doubt the Command over the Children is lodg'd in the hands of the Father. But in Covenants of the former kind, though they usually take their Beginning from the Man, who seeks Children for himself, not for her, and consequently bargains to have the Rule and Disposal of them; yet it may so happen, that quite contrary to this Order, the Woman calls in the Man for an Assistant to her design of Issue; not the Man the Woman. This was the Case with the antient *Amazons*; and is still with any sovereign Princess, that marries without quitting her Rights; the Man being here not so properly a King, as the Husband of a Queen. Nor ought we to think that Pacts of this Sort are therefore repugnant to the Law of Nature, because in them, one of the Couple seems to renounce that Care of the Children, which Nature hath equally laid on both the Parents: For the Precept of Nature, in this Point, doth not precisely require that both Father and Mother shall apply themselves, in the same strict Degree, to the Work of Education; but is satisfied if by Compact the main Charge be committed to either. In the same manner, as the Mo-

ther is not so necessarily oblig'd to give her Infant Suck, but that she may make use of a Nurse^c; and as the Father acts upon good Prudence, when he delivers his Children into the Hands of able Instructors, for the forming of their Mind and Manners.

But in civil States, which for the most part have been erected by the stronger Sex, as the Men in common Course are the Heads of the respective Families, so the private Dominion over the Children belongs to the Father²; so that here, the Mother's Commands are in themselves little better than Counsels, and borrow their full Force of obliging, from that Share of Power imparted by the Husband to his Wife. For as it is generally found convenient to admit the Woman to a Part in the Government and Direction of the Family; so the Father's Power over the Children doth by no means exclude the Mother's inferior Authority and Care. Not but that the Constitutions of particular Commonwealths may settle this Matter otherwise, as shall be judg'd expedient. *Peter della Valle*, in his Travels^d informs us, that amongst the Inhabitants of *Babylon* or *Bagdet*, the supreme Power over the Sons is held by the Father, and over the Daughters by the Mother.

If, upon the Father's Decease, the Government of the Family remain with the Mother, it is but just that she exercise the same Authority over the Children which the Father formerly enjoy'd^e. And in Case she marry a second Time, and the new Husband be intrusted with the Care of his Predecessor's Children, they are to pay him the like Reverence and Duty as was challeng'd by their proper Father. Yet we are told a very odd Custom of the *Chinese* in this Particular, that if a Wife, after she hath buried one Husband, proceed to a second Match, her Children send her off, covered only with a single Garment, as an ignominious Mark of her light Disposition; and the Reason of the Custom is, that according to the Inclination of that People, the Children cannot bear a *Father-in-Law*, much less respect and obey him^f.

VI. The next Step we take, must be to enquire how far this Power of Parents over their Children extends; or what are the proper Bounds and Measures of it. And here it is necessary to distinguish, first between those Fathers of Families, who live under no publick Government, and those, who are the Subjects of a Common-

MR. BARB. NOTES on § V.

^a *Valgæ nupti* (say the *D. zēst*) dicuntur, qui patrem demonstrare non possunt, vel qui possunt quidem, sed eum habent, quem habere non licet, quæ & spurii appellantur. *Lex Naturæ hæc est, ut qui nascitur sine legitimo Matrimonio, matrem sequatur, nisi Lex specialis aliud inducit.* Lib. I. Tit. I. De Statu Hominum. Leg. XXIII, XXIV.

^b By the *Roman* Law Wives had no Authority over their Children, although *ULPIAN* seems to attribute some to them, *Dignif. Lib. XXVII. Tit. X. De Curatoribus furioso, &c.* Leg. 4. *Pietas enim Parentibus, etsi inæqualis est eorum potestas, a patre debetur.* See about this *MR. NOBLET*'s Observations, *Lib. 2. Chap. 15.*

^c *Comp. L. 3. t. 1. f. 31, 32. Instit. de rerum divis. & L. 41. t. 1. l. 7. f. 13. D. de acqui. rer. dom.* ^b The *Egyptians* followed a contrary Opinion. They accounted none of their Sons spurious, although born of a Slave; imagining that the Father alone was the Author of the Generation, and that the Mother contributed no more than Place and Nourishment. *Diodor. Sic. l. 1. c. 80. p. 72. Ed. Rhodom.* To the same purpose speaks *Theages*, the *Pythagorean*, in his Treatise of *Virtues*, *The Father produceth the Form, and the Mother only supplies the Matter.* *Opuscula Mythol. Eth. & Phys.* Printed at *Amsterdam* in 1688. p. 683, 684.

^e The contrary Opinion is maintain'd by *Plutarch*, de *Educat. &c.* and by *Phavorinus* in *Gill. l. 12. c. 1.* Add *Ferdinand Pinto*'s Travels, chap. 54. where he tells us how Strict and Religious a Point the *Japanese* esteem it, for a Mother to give her Infant Suck, In the *Alcoran*, the Women are commanded to perform this Office to their Children for the two first Years, ^d *P. 1. Epist. 17* ^e *Comp. Gen. xxi. 21. with xxiv. 4.*

^f *Neuhof. in Legat. p. 281*

wealth: And again, between that Power, which the Father holds, as he is a Father, and that which he bears, as he is the Head of a separate Family. The Power which a Father enjoys, on the bare Score of his being a Father, inasmuch as it accrues to him as a necessary means of discharging the Obligation towards his Issue, which Nature lays upon him, must consequently be so great, as sufficiently to answer and effect that Design. Now the Obligation, or Duty of a Father, as such, chiefly turns on this general Performance, that he duly educate his Children; that is, nourish, protect, inform, and govern them, in order to the rendering them useful to themselves and others, till they are able to consult their proper Benefit, and are grown Masters of their own Wills and Actions. (For, as to the Act of begetting, that is not so properly a Part of the paternal Duty, as the Occasion of it.) Parents ought to apply more Diligence and Caution in fulfilling this Obligation, the more Truth there is in that ¹ saying of *Plutarch* ², *Good Institution is the Fountain and Root of all Honesty and Virtue*. Especially if they take this Observation of *Plato* ³ along with it, which commonly holds true; *Persons, says he, who are naturally endued with the most excellent Wits, if they happen to be spoilt in the Breeding up, commonly prove the very worst of Mankind. Can you think that all those barbarous Villanies, all that horrid Wickedness, which we see in the World, proceed from mean and lazy Dispositions, and not rather from brave and generous Spirits perverted by ill Education? Or do you suppose, that a natural Weakness and Feebleness of temper does ever prove the Cause of any very great Good, or very great Mischiefs?*

It is plain then, that the Power of the Father

doth by no means reach to so extravagant a Degree, as that he may destroy the Child whilst in the Mother's Belly ⁴, unless the Mother must otherwise infallibly perish ⁵, or after the Birth ⁶ expose or make away with it, much less after the increase of Growth and Years. For altho' it be very true, that the Infant hath his Rise and Original from the very Substance of the Parents, yet he is immediately plac'd by Nature, ⁷ in a Condition of Equality with them ⁸; at least so far as to be capable of receiving *Hurt* and *Injury* &c. Therefore the Opinion deliver'd by *Aristotle* in his *Pellicicks* ⁹ is to be exploded as unjust and inhuman. *As to the exposing and the preserving of Children, says he, let it be order'd by Law that nothing lame or defective be suffer'd to grow up. If any Nation think it not allowable to expose their Infants, there certain Bounds are to be set to the Number of Births; and if the Business of Generation happen to exceed the due Limits, it will be convenient to procure Abortion, before the Fœtus is arriv'd at Life and Sense; for such a Period of its Growth is to determine, whether the Act of destroying it be harmless, or sinful.* *Lycurgus* did not expect more Mercy in his *Spartan* Discipline. We learn from *Plutarch*, that, when a Child was born, it was not left to the Parents Choice to preserve and nourish him. But he was carried immediately before an Assembly of the Seniors, who considered and surveyed him. If they found his Limbs strong and well set together, they order'd he should be bred up: But the weakly and misshapen Infants they adjudg'd to be carried away and thrown into a kind of Whirl-pool near the Mountain *Taygetus*; as if to live, when Nature had provided them so infirm or so unsightly a Body, could neither be for their own Good and Credit, nor for the Advantage of the Commonwealth ¹⁰. Indeed this unnatural Practice

MR. BARP. NOTES on § VI.

¹ PLUTARCH'S Greek is, Πῶς γὰρ ἐν βίῳ καλοκαγαθίας, τὸ νόμιμον τυχὴν τοσούτου. PLATO'S Greek is, καὶ τὰς ψυχὰς ἐπιμαρτυροῦντας τὰς ἀποφασίσεις, κακῆς παιδαγωγίας τυχούσας, διαστρέφουσιν κακῶς γιγνέσθαι, ἢ εἴτε τὰ μέγιστα ἀδελφώματα, ἢ τὸν ἀκέραιον ποσειδά, ἐν σαύκῳ, ἀπὸ δὲ ἐκ τῶν μακίστων πόσεισι περὶ διακομιχῆς γιγνέσθαι, ἀδελφὸν δὲ εὐνοῦ, μέγιστον ἐπὶ ἀγαθῶν ἐπὶ κακῶν αὐτῶν ποτὶ ἴσασθαι. Further, we may find several excellent Precepts about the Education of Children in *Plutarch's* Treatise before quoted, as also in *MONTAIGN'S* Essays, *Lib. 2. Cap. 8.* of the Affection of Fathers to their Children. In *CHARRON*, of *Wisdom, Lib. 3. Cap. 14.* but especially in that excellent Treatise of *Mr. LOCK*, which has been several times printed, but the best Edition is in 1708. because the Author has made several Additions to it, to which *Mr. COSTE*, who has translated it into *French*, has added several excellent Notes in diverse Places.

² This detestable and inhuman Custom was very common heretofore among the *Greeks* and *Romans*. See *Mr. NOODT'S Julius Paulus*, where he sits this Matter to the bottom. The Law of the *Digests*, quoted by our Author, where the Lawyer *Paul* condemns this abominable Custom, as contrary to the Rules of Humanity, Civility, and natural Justice, tho' 'twas not punish'd by the civil Laws; deserves to be set down here at length. *Necare videtur, non tantum is, qui partum persequat, sed & is qui abijcit, & qui alimenta denegat, & is qui publicis bonis misericordiae causâ exponit, quam ipse non habet.* He kills a Child, not only, who strangles it, but he that casts off all Care of it, and denies it Food, and he that lays it in a publick Road; that it may find that Mercy from others, that he is wholly devoid of. *Digest. Lib. 25. tit. 3. De agnoscendis, & utendis Libereis, &c. Leg. 4.* See about this, *Chap. 8, &c.* of *Mr. NOODT'S* Treatise before quoted.

³ See above, *Lib. 1. Cap. 1. § 7.*

⁴ *De Liberor. Educat.* p. 4. B Ed. *Wech.* ⁵ *De Republ.* l. 6. p. 6-6. Ed. *Wech.* ⁶ *Law de LL.* l. 7. calls a Child, *A Creature more intractable than a Beast.* *Liban. Declam. 20.* Education is one of the highest Goods of human Life. *Horat. L. 4. Ode 4. v. 33.*

*Doctrina sed vim promovet insitam,
Residue cultus peccora robant:
Utique desecere mores,
Dedecorant bene nata culpa.*

But Learning feeds the in-born Flame,
And Culture gives great Souls a firmer Frame:
If Generous Morals once decline,
Baseness and Vice attain the noblest Line.

⁴ *Vid. L. 47. t. 11. l. 4. D. de extraordin. crim. & L. 48. t. 8. l. 8. D. ad L. Cornel. de Siciariis, & tit. 19. l. 33. f. 5. D. de pœnis.* ⁵ *Vid. Ant. Matth. de crimin. ad l. 47. D. t. 5. f. 5. Grot. in Flor. Sparf. ad l. 30. D. de pœnis, and the Father of a Man. Vid. Philo. Jud. de Special. Leg. p. 794, 795. Ed. Paris. Laëtant. Dis. Instit. l. 6. c. 20. Diad. Sic. l. 1. c. 77. Add. Grot. ad Exod. xxi. 22. Leg. Wisigoth. l. 6. t. 3. c. 7. Selden. de J. N. & G. l. 4. c. 1.* It is a most absurd and most barbarous Custom which they practise in *Formosa*, where it is reckon'd scandalous for the Women to conceive before their Thirty fifth or Thirty sixth Year. And if they breed sooner than that time, by miserable Pains and Beatings they procure Abortion. ⁶ *L. 7. c. 16. (21.)* ⁷ I know not whether we may venture to credit the Account given by *Diodor. Sic. l. 1. c. 80.* of the Method taken by the *Taprobanians*, to make Experiment of the Temper of their Children.

of exposing Infants was so frequent and almost so universal a Custom with the Antients, that *Strabo*^a mentions it as something very particular in the *Egyptians*, that they breed up all their Children^b. So *Dionysius Halicarnassens*^c sets it down as a remarkable Opinion of the *Aborigines*, They refuse to make away with any of their Infants, thinking this one of the highest and most execrable Villanies. And *Tacitus*, in his Account of the *Jews*^d, makes their Abhorrence of this Cruelty one part of their Character^e.

Nor doth it appear reasonable to extend the paternal Authority, as such, to the *Power of Life and Death*, even in the Case of Faults committed; but rather to fix its Bounds within the Exercise of moderate Correction: Because its whole Care and Business is taken up about so tender an Age, as can scarce be imagin'd capable of such grievous and incurable Offences, as demand capital Punishment^f. It seems the more proper way of proceeding, when a Child of obstinate and incorrigible Perverseness rejects and despiseth his Father's kind Labours on his account, to cast him off, as unworthy of all Care and Notice. And thus to abdicate, or disinherit a Son, may pass for the severest Penalty that a Father, by virtue of his being a Father, can inflict^g.

VII. Of this paternal Power strictly taken, we must understand that Place of *Grotius*^h, where he divides the Age of Children into three Periods: First, "Of imperfect Judgment and Choice; Secondly, When they have attain'd to Maturity of Judgment, but still remain as Members of their Father's Family, and have not undertaken the separate Management of their own Affairs; Thirdly, When they have left their Father's Family, either to join themselves to some other, or to erect one of their own. Which Distinction *Ziegler* seems to have condemn'd on no very good Reason. For though, as he observes, the Holy Scripturesⁱ press the Duty of Obedience on Children, without making any such Difference, yet they do by no means forbid that grown Persons should be treated in another way of Management than Infants; nor do they require that a Son, when arriv'd at a State of Discretion and Maturity, should ever remove out of his Father's House. "During the first Period of Age, then" (says *Grotius*) all the Actions of the Children ought to be regulated and directed by their Parents; for he who cannot govern himself, falls of course under the Government of another; and the Parent, according to Nature, is the most proper Person to exercise this Authority over the Child.

VIII. It is here made a Question, whether a Child, under this imperfect Period of Reason, be by the Law of Nature capable of *Propriety*, or of being the Master of any Goods or Possessions, in such manner as to exclude the Claim of his Parents? On which Point it may be proper to distinguish between Goods gotten by private Industry, and those which are left or made over by the Liberality of others, as in Legacies, Donations, &c. In that tender Age, what can a Child be suppos'd to get by his own Industry? Certainly not so much as his Parents have laid out on his Education. This therefore the Father may fairly challenge, in requital of his Pains and Charges. For tho' he were oblig'd indeed, by the Law of Nature, to support and maintain his Offspring, yet he was not, in the least, prohibited to make what Fruit and Advantage he could of his Labour. One might as well say, that Parents are forbidden to take any Delight or Comfort in their Children; a Satisfaction so very great, that most, who are so happy as to enjoy it, esteem it invaluable, and beyond all Compensation or Equivalent^j. For the same Reason, it would be a high Degree of Impudence, for a Son, in his State of Minority, to require a Reward for the Service he does his Father. 'Tis a wise Saying of *Sophocles*^k,

*Good Children should forget the Toils they bear
To help their Parents*^l.

In *Peru* the Children were obliged to assist their Parents with their Labour, till the Age of five and twenty^m.

In the other Case, when any thing is to be transferr'd on the Child, in way of Gift or Legacy, at first view such a Donation may seem invalid, because Acceptance is a necessary Condition required in the Receiver, which cannot be perform'd without deliberate Consent, and therefore not without the full use of Reason. But because it would be an intolerable Hardship to make Children incapable of these Advantages, on account of their Immaturity, when for that very Reason they have more need of the Assistance of others, it is most agreeable to Equity, that another Person should accept this Bounty in their Name, and should likewise have the Goods in Charge, till the Children are capable of being their own Managers. And for this Trust no Man is so fit as the Father. Whence it appears, that it is by no means natural for the Father to acquire a Property over a Possession of this kind, tho' it be very equitable, that he take not only the Care,

^a See what we have said, *L. 4. Cap. 11. § 7, 11.*

Mr. BARB. NOTES on § VIII.

¹ The Greek of *Sophocles*,

-----Τὰς μάταια τῶν
ὀφθ' ἐπὶ σωτῆ τῆς, δὲ τῶν ματαίων ἔχου.

^a L. 15.

^b Add *Dionys. Sic. l. 1. c. 80.*

^c L. 1. p. 13.

^d *Hist. l. 5.*

^e Yet *Curtius*,

l. 6. c. 1 reports that the *Spartan* Custom was practis'd by some of the *Indians*. They bring up their Infants, says he, not at the Pleasure of the Parents, but according to the Order and Direction of Officers appointed to superintend this Affair: who command all such Children to be kill'd, as they find either extremely slow and heavy, or uselefs and defective in any Part of the Body. *Strabo*, *l. 15* gives the like Account of the *Catheans*. It is common, amongst the *Chinese*, for the Parents to kill their Children, especially the Female, without falling under Censure or Punishment. And, holding the Transmigration of Souls, as most other People of the East do, they think they do them a Kindness, by preparing their way to a happier Birth and a more advantageous Condition.

^f Thus the *Roman* Youths, whilst they wore the *Prætexta*, were not liable to Fines and Amercements, but receiv'd corporal Correction. *Plin. N. H. l. 9. c. 23.*

^g L. 2. c. 5. f. 2.

^h *Ephes. vi. 1.*

Col. iii. 20.

ⁱ *Vid. Senec. Consol. ad Marciam c. 17.*

^k In *Oedip. Col. p. 289. Ed. H. Steph.*

^j *Garcilasso de la Vega, l. 4. c. 19.*

but the Profits of them, as Helps towards maintaining the Child, till arriv'd at proper Years of Inheritance. And hence too we may discover the just and solid Grounds of those Distinctions, in the Roman Law, between the ² *Peculium Profectitium*, *Adventitium*, and *Castrense* of Children; the Stock or Wealth they get by labouring under their Parent, by the Bounty of others, and by the Military Pay.

IX. Another Enquiry that may be rais'd on this Subject is, Whether the paternal Power and Duty can be made over by the Father to a Substitute? On which Point we are to know, that altho' the Father's Authority and Obligation took their Occasion and Rise from a ¹ Personal Act, which is incapable of being transferr'd ², yet this doth not hinder him from recommending his Office to a Deputy, the Advantage or Necessity of the Child so requiring. But then he would do well to keep *Plutarch's* Advice always in mind: *Those Parents*, says that wise Author, *do justly deserve Censure, who having committed their Sons to the Care of Masters and Instructors, never trouble themselves to make Trial of their Proficiency. This is a very scandalous Mistake in Education. They ought, at proper Distances of Time, to enquire into the Boy's Parts and Improvement, and not to pl. ce all their Hopes in the Faith of a mercenary Teacher. Besides, the Master himself will by this means be engaged to use more Diligence and Application, when he finds that so frequent a Judgment will be pass'd on his Pains.*

Farther, it is not, in the least, repugnant to the Law of Nature, for a Father to resign his Child to be adopted by some other honest Person, when 'tis likely to prove to the Child's Advantage ^b. But that he should pawn, or ³ sell his Child, Nature seems not to allow in any Case; except when he cannot otherwise feed and support him. For then he ought rather to sell him into some easy Servitude, whence there is Hope of being releas'd, than to let him

perish with Hunger. *Ælian* ^c hath recorded a memorable Constitution of the *Thebans* to this purpose: *No Man, under Pain of Death, shall expose an Infant, or cast him out into an uninhabited Place. But if the Father be reduced to extreme Poverty, the Law directs him to carry the Child, immediately after the Birth, to the Magistrate, who upon receiving an easy Price shall deliver it, whether Male or Female, to another Person, taking Security of the Buyer that he shall honestly breed up the Infant, and for his Pains shall take its Service when grown to Man or Woman's Estate.* The Defence of which Law is grounded on this Rule, that Nature is suppos'd to give us a Right to every thing, which appears absolutely necessary to our fulfilling her Commands. ² In the same manner the Emperour *Constantine* ^d permits a Father, in the Case of extreme Want ^e, to sell his Son or Daughter, so soon as they come into the World, lest they should otherwise starve; yet ordering, at the same time, that whoever would repay their Price to the first Buyer, should have the Power of redeeming them into Freedom ^f. And when, in an Edict of *Theodorick*, and a Law of the *Wiso-Goths*, we find a Prohibition against *Selling Children for the sake of Food* ^g: it is meant of Food for the Occasions of the Parents, not for the necessary Sustainance of the Children. Yet *Romulus* granted Parents a very unreasonable Privilege, when, as *Dionysius Halicarnassens* ^h informs us, *He allow'd a Father to make Money, by selling his Son Three times; thus giving him more Authority over his Son, than over his Slave. For a Slave once sold, and then obtaining Liberty, is ever after at his own Command and Disposal. But a Son, tho' twice sold, and twice recovering his Freedom, return'd under his Father's Dominion, and was not exempted from it till he had pass'd the third Sale.* *Numa* in some measure softened the Rigour of this Law, by excepting from Sale those Sons who had contracted Marriage, provided they had done it by their Father's Orders, or with his Consent. The *De-*

² We call a *Peculium*, the Goods, that a Slave, or Son hath gotten of his own; what a Son hath gotten by War, or his Father, Mother, and other Relations have given him, while he follow'd that Business, belong absolutely to him; so that he can dispose them, as his own Goods, as he sees fit, and his Father hath nothing to do with them. This is call'd *Peculium Castrense*. See *Digest. Lib. 49. tit. 17.* 'Tis the same with that which a Son has gotten in any other Employment, where he has a Salary from the Publick, and this is called *Peculium quasi Castrense*. See *Code. Lib. 3. tit. 28. De inofficioso Testam. Leg. 37.* This is *Peculium Militare*. *Peculium Civile*, or as the *Code* expresses it *Paganum*, consists in the Goods, which a Son gets, who is not in publick Business, either by his Industry, or by some Gift, or Will, or by his Attendance upon the Laws, or by managing a Thing, of which his Father has only the Profits. This the Interpreters call *Peculium Adventitium*. Or in the Advantage that a Son makes of the Goods of his Father, or by their means, and this was absolutely in the Disposal of the Father, and is call'd *Peculium Profectitium*. See the *Instit. Lib. 2. tit. 9. Per quas personas cuique acquiritur, § 1. an* Mr. DAUMART'S civil Laws in their natural Order, Part. 2. *Lib. 2. tit. 2. § 2.*

Mr. BARB. NOTES on § IX.

¹ *LIBANIUS'S* Greek is, *Ὅτι γὰρ πρὸ πατρὸς ἐστὶν ἡ ἐξουσία καὶ τὸ νόμιμον νόμιμον.*

² These Quotations might have been put into a Note.

³ This Law of *Constantine* is the second, and last in the Title of the *Code* before quoted. The Words are, *Si quis propter nimiam paupertatem, egeat utique, victus causa (i. e. for the Life of the Child, not of the Parent) filium, filiamve sanguinolento vendiderit, venditione in hoc tantummodo casu valente, emptor obtinendi ejus servitii habeat facultatem: Liceat autem ipsi qui vendidit, vel qui alienatus est, aut exilibet alii ad ingenuitatem eum propriam repetere, modò si aut pretium offerat, quod potest valere, aut mancipium prosequimodi præstet.*

^a *Liban. Declam. 20. p. 523. Edit. Morell. No Law can recall the Act of a Father, and cause him not to have begotten.*
^b *Add. Gell. lib. 5. cap. 19. Euripides, Ion. v. 1535, 1536.*

If that Friend want a Fortune, 'tis but fair
 He give his Son to this who wants an Heir.

^c *V. H. l. 2. c. 7.* ^d *V. C. l. 4. t. 2.* ^e *V. Grot. l. 2. c. 5. f. 5.* ^f *Cap. 94, 95. in Edict. Theodorici.*
^g *leg. Wisigoth. l. 5. t. 4. c. 12.* ^h *V. C. l. 4. t. 2.* ⁱ *L. 2. c. 27.*

cemviri durst not quite take it away, but left it to wear off by gradual Difuse ^a, till it was at length exprefly revers'd in the *Code*. Yet the old Custom was still kept up of felling a Son three times, tho' only in way of Fiction and Formality, at the Ceremony of giving him his Freedom. Tho' this too was afterwards taken off by *Justinian* ^a. It appears from *Plutarch* ^b, that amongst the *Athenians*, at least before *Solon's* Time, a Father was allow'd to sell his Son for the Payment of his own Debts ^c. And we are lately rold of the *Muscovites*, that a Father makes this advantage four times, after which the Son is releas'd from his Authority ^c. The *Chinese* make a frequent Practice of felling those Children, whom they think they shall not be able to maintain; but with this good Condition, that any of them shall have the Privilege of buying themselves into Free-

dom, at the same Rate at which they were first fold.

X. ^a In order to our understanding what Power the Father hath over the Son, during the second Period, in our Division of Age, we must remind our selves of what was before slightly hinted, that Fathers are invested with another kind of Sovereignty, as they are the Heads of their respective Families. Now this Authority is different, according as the Persons live either within, or without the Limits of a Commonwealth. Separate Families, as they very much resemble States and Kingdoms, so they are govern'd by their Heads, in a Way bearing some Proportion to regal Power. For we are not willing to give them absolutely the Name of *Civitates*, as ² Mr. *Hobbes* hath done ^d; because Families and publick States are instituted on

^a We find a Law in the *Code* made by *Dioclesian* and *Maximian*, where it is said, That Fathers shall not have any Power to put their Children under the Authority of any other, either by selling them, or Gift, or Pawn, or any other manner, nor under a Pretence of Ignorance of him, who has either of those ways got him into his Power. *Liberos à Parentibus, neque venditionis, neque donationis titulo, neque pignoris jure, neque alio quolibet modo, neque sub prætextu ignorantie accipientis in alium transferri posse, manifestissimi juris est*, Lib. 4. tit. 43. *De Patribus, qui filios suos distraxerunt*. Leg. 1.

^b Comp. *Matth.* xviii. 25. ² *Kings* iv. 1. *Philostratus*, in vit. *Apoll. Thyran.* l. 8. c. 3. p. 401. Ed. *Mrell*. reports of the *Phrygians*, That 'twas an ordinary thing with them to sell their own Sons; and not to regard them, if they happen'd to be led Captives into Slavery. Add. *Plutar.* *Lucull*.

From these Places it appears, that among the *Jews* a Debtor, who found himself unable to pay, might become a Slave to his Creditor with his Children; or might sell himself and Children. See Mr. *Le Clerc* upon *Lev.* xxv. 39. and *Deut.* xv. 12. Lastly, there was printed in 1708. a Book intitled *Dissertatio Juridica, De Jure patrio, Auctore Abrab. à Kerckraad*, where we may find a Collection of all that this Author has put into his Lectures, about the paternal Power, principally in relation to the Customs and Notions of the *Romans*. It may serve as an Historical Dictionary upon this Subject.

^a L. 8. t. 48. l. ult. C. de Adoption. *Perfic.* l. 3. c. 6.

^b In vit. *Solon*.

^c *Sigisfr. Baro* in *Herberstein*. Add. *Olear. Itin*.

^d *De Cive*, c. 5. f. 12.

Mr. BARB. NOTES on § X.

^a The Three following Paragraphs are otherwise plac'd in the Original, This is the Eleventh, the next the Twelfth, and the Third the Tenth. Our Author, without any Reason, as appears from his Abridgment, *De Officio Hom. & Civ.* speaks of the Third Age of Children before he treats of the Second.

² Since Mr. *Hobbes*, an *English* Knight of the same Nation, named *ROBERT FILMER*, hath published a Book, entitled, *Patriarcha*, to prove, that all Government ought to be Absolute and Monarchical, and for a Foundation of his Opinion asserts, That the paternal Power is the same as royal Authority, and is entirely Despotick. *ALGERNOON SIDNEY* in his Treatise of Government, and Mr. *Lock*, in the first Part of his Work upon the same Subject, have quite overthrow the Consequences, which *FILMER* has drawn from his false Principles. Mr. *SIDNEY* has not dwelt long upon it; but Mr. *Lock* having taken pains in his Second Part to overthrow the Principle itself, we have thought it convenient to give an Abridgment of the Reasons he there gives. First then, this able Writer observes, that all the Obligations that Infants have, being founded on Generation, to which the Mother concurs, and contributes as much at least, if not more, than the Father, it follows, that both of 'em have an equal Right and Power over those who spring from their Union. So that to speak exactly, we ought to call that Authority the Power of the Parents, and not of the Father, as we do ordinarily, since the Impropriety of the Expression might be an Occasion for Men to imagin, that all the Authority over the Children resides only in the Father. The Laws, which God hath given both to the *Jews* and *Christians*, do plainly contradict this Mistake. *Honour thy Father and thy Mother*, *Exod.* xx. 12. *Children, obey your Fathers and your Mothers*, *Eph.* vi. 1, 2. This is the uniform Language of the old and new Covenant. From whence it follows, that the Power which they have over their Children can't be a Foundation for monarchical Government. But, suppose we grant that, it will not thence follow, that Kings have an absolute and despotick Power, because the paternal Power is not so, as will appear from the Consideration of its Nature and Extent. All the Rights of the Father and Mother consist in governing their Children, till they are able to govern themselves by the Laws, which are the Rule of the Parents Conduct, and in a certain Honour, which they owe their Parents, till they are of Age to understand and practise the Law. Altho' all Men are naturally equal, and every one is born free, *i. e.* has a Right to dispose of his Person, Actions, and Goods, as he sees fit, according to the Laws under which he lives. None of *Adam's* Posterity found himself in this State, when he came into the World. The Defect in the Use of their Reason, and the Impossibility that Children are in to preserve themselves, and provide for their Wants, obliges them necessarily to submit to the Direction and Power of their Father and Mother, who by the Law of Nature are tied to maintain and bring them up, not as their own Work, because they contributed to their Production only as bare Instruments, but as the Work of the Creator, to whom they must give an Account. If a Child never attains to such a competent degree of Reason, as to be able to order himself aright, as it happens to such as are born Innocents and Lunaticks, he depends always upon the absolute Will of the Father and Mother; but this is rare, and out of the common Course of Nature. So that the Bonds of Subjection of Infants are like their Swaddling-Cloath, and their first Garments, which are only necessary upon the account of their tender Years. When they come to the use of Reason, their Age removes them from their Father's Jurisdiction, and makes them Masters of themselves; so that then they are equal to their Father and Mother, in respect to that State of Liberty, when a Pupil becomes equal to his Guardian, after the Time of his Minority, appointed by the Law. The Liberty of Children, become Men, and the Obedience of their Father and Mother before that, are not more inconsistent, than is, according to the most zealous Defenders of Monarchy, the Subjection that a Prince is under, during his Minority, in respect to the Queen-Regent, his Nurse, his Tutors, or Governours, with the Right he hath to the Crown, which he inherits from his Father, and the Authority of a Sovereign, with which he shall one Day be invested, when his Age will render him capable to manage it himself, and govern others. It is otherwise so true, that the paternal Power doth not appertain to the Father by any particular Privilege of Nature exclusive of the Mother; and that he is but in the quality of a Governour or Tutor of his Children; that if he abandons them, and renounces all paternal Kindness to them, he deprives himself of the Power he hath over them, which is so inseparably annex'd to the Care that he

ought.

on different Ends and Designs, and consequently many Parts of civil Sovereignty are excluded from this private Dominion. And indeed Mr. *Hobbes* himself elsewhere confesseth ^a, that *A Family is not properly a Commonwealth, unless it be of that Power, by its own Number or other Opportunities, as not to be subdued without the Hazard of War.* Yet Family Rule, in this separate Condition, so nearly approacheth to the Legislative Authority, as to have the Power of Life and Death in Criminal Cases, as likewise the Management of Arms, and the Care of Leagues and Alliances. This Dominion of the Father over the Children, now grown up, is establish'd by tacit Compact; the Father extending his Commands beyond the Affair of Education, and the Children freely putting themselves into a State of farther Obedience. For the Laws of Equity and Gratitude direct, that a Son should yield his Strength and Service chiefly to him, to whom he owes all that he now is or enjoys; till such time as with his Father's Consent he be releas'd from the Subjection.

XI. But after the erecting of Commonwealths of these Rights which before belong'd to Fathers of Families, some were contracted, others quite taken away. Yet so much Authority was almost in all places allow'd, as appear'd sufficient for Educating the Children: Except that even this was much retrench'd under *Plato's* National Government; and in the *Persian* Conflitation, if we admit *Xenophon* for a true Historian ^b. In many Nations the Privileges of Family Rule were little impair'd. Thus at *Rome* the Fathers had the Power of Life and Death over their Children, which they exercis'd in a kind of Judiciary manner, calling a Council of their Relations and Friends, and causing Sentence to be executed according to their Determination ^c. *Justinion* ^d calls this Right *Proprium Civium Romanorum, Particular to the Roman Citizens*, and not pretended to by other Men; for which Position *Bodinus* ^e hath fallen heavily upon him; alledging that the *Persians* and ancient *Gauls* ^f made use of the same: And that the Abrogation of it in the *Roman* State was the Cause of

ought to take of them to nourish and bring them up, that it passeth from him to the Person who brings up an expos'd Child; for the single Act of Generation is a small thing, if we go no farther. In certain Places of *America*, when a Man and Wife part, which happens there often, the Children go along with the Mother; and are not these Children indispensibly obliged to obey the Mother, as much as those who among us lose their Father in their Non-Age? And can we say, that a Mother can prescribe such Laws to her Children, as shall be perpetually obliging, and by which she may dispose of all that belongs to them, and constrain them under some corporal Punishment, to conform themselves implicitly to her Will? Certainly a Father and Mother can dispose of their Goods as they see fit, when they put their Children into a Condition of subsisting of themselves; but the Power they have, as the Authors of their Being, doth not extend so far, as to be Masters of their Lives, Liberties, and Goods, whether they have gotten them by their own Industry, or are bestow'd on them by others. God himself allows Children to withdraw themselves from the Parents Jurisdiction, when he says, *Gen. ii. 24. Matth. xix. 5. Eph. v. 31. That a Man shall leave his Father and Mother, and be joined to his Wife.* But tho' Children as soon as they come of Age to see what the Laws of Nature and Civil Society, of which they are Members, demand of them, are not obliged to violate those Laws to please their Parents, yet they are bound to honour their Father and Mother, as the Instruments which God made use of to give them Life, and acknowledge the Care they have taken in their Education. They ought to have for them a particular Esteem, Affection, and Respect, and shew them in all their Discourse and Behaviour; do or say nothing that may offend them, or trouble them in the least, defend them, assist them, and comfort them by all possible and lawful Means, and conform themselves to their Will, when it may be done without any great Inconvenience to them. There is no Person of any Age, Rank, or Dignity, that can exempt a Child from these Duties towards them, from whom he hath receiv'd his Life, and to whom he has such great Obligations; but he is not for all that bound to pay them an absolute Obedience and Submission. The most powerful Monarch ought to obey his Mother, tho' he is not to follow her Will in the Government of his State, or royal Family. We ought therefore to distinguish well between these two sorts of paternal Right, *viz.* of directing a Child till he comes to the use of his Reason, and that which requires only Respect and Acknowledgment. The first is really only a Duty to Fathers, rather than a Power; the Authority which it gives ends with the Wants of the Child, and when it is most in force, it may be alienated in some sort; as when a Father trusts the Care of his Son's Education to another; for by putting him into that Person's Hands, he discharges him of a great part of the Obedience due to himself and his Mother. But as to Respect and Acknowledgment, nothing can release a Child from it; and the Mother has as good a Right to require it as the Father; so that if the Father orders his Son, not to honour his Mother, the Son ought to disobey his Father. This Duty may be more or less enlarg'd, according as the Father or Mother has taken more or less Care, and shew'd more or less Kindness to the Child. But it can never be entirely abolish'd; and in civil Societies themselves, Fathers and Mothers preserve their Right to require it, as well as to order them in their Education, inasmuch that every Subject has not only as much paternal Power over his Children, as a Prince has over his; but also the Sovereign himself ought to have as much Respect to his Father and Mother, as the meanest of his Subjects has to his. Hence it appears that Sovereignty and paternal Power are two different things, which have neither the same Foundations, End, nor Extent. 'Tis true, that as several Persons cannot live together without some Order, and some sort of Government, so we may easily conceive, that in the first Ages of the World, when any Family was about to withdraw itself, and settle in a Place uninhabited, the Father became, as it were, the Prince over his Children, tho' at the Age of Discretion; and it seems as tho' that Authority were conferr'd by the express or tacit Consent of the Children, who could find nothing more advantageous to them, than to put themselves under the Government of their Father only, and give him the Right, which every one naturally has, to execute the Laws of Nature. They were accustomed from their Infancy to be guided by their Father, and leave their little Quarrels to him; and 'twas natural for them to continue their Subjection to his Direction and Authority, when they were become Men. Who could they better choose for their Governour than He, who after he had given them Life, had carefully nourished and brought them up, and shew'd them so much Kindness? If then Fathers became Kings of their Families by this means, 'twas not by virtue of their paternal Power. And tho' royal Authority actually began by the Fathers of Families, it does not follow, that the Right of Sovereignty is founded on the paternal Power, and consequently belongs to the Prince, and the Prince only, since it is evident from the highest Antiquity, that Fathers were the only Persons in Families that offer'd Sacrifices. *This is an Extract of Mr. Locke's Part 2. of his Treatise of Government; and we ought to remember this, when our Author treats of the Original of sovereign Power.*

^a *Leviath. c. 20.* ^b *De Educat. Cyri, l. 1.* ^c *Vid. Val. Max. l. 5. c. 8. f. 2. 3. 5. Senec. de Clement. l. 1. c. 15.* 'Tis a Saying of *Turmus* in *Livy, l. 1. c. 50.* *That there can be no shorter way of deciding a Point, than between the Father and the Son; because, if the latter oppose or disobey the former, he is to expect the Plagues of Divine Vengeance.* ^d *Instit. L. 1. t. 9. f. 2. De Patria Potestate.* ^e *De Repub. l. 1. c. 4.* ^f *So Cæsar Comm. de B. G. l. 6. c. 19.* And some Footsteps of that antient Custom remain'd till the Year of *Christ 1301.* amongst the People of *Bordeaux*, by whose Laws, Fathers and Husbands had supreme Power of Life and Death over their Children and over their Wives: And if a Husband happened to kill his Wife in any Violence of Anger or Grief, upon declaring his Repentance by a solemn Oath, he was discharg'd without Punishment.

the same People the Son ever makes use of a lower Seat than his Father, and placeth himself at his side, not over against him. And indeed, that Children can never requite the Kindness of their Parents is a Truth in every Body's Mouth ^a. Though *Seneca* ^a hath for Opposition's sake, endeavour'd, in a long Dispute, to prove that a Son may sometimes even outdo a Father in Benefits: And *Alexander*, provoked once with some Complaints against his Mother, could not forbear saying, that *She made him pay very dear for his nine Months Lodgings* ^b. But how vast soever the Merits of our Parents be acknowledg'd, this is certain, that it will not bear them out in imposing an unlawful Command; and therefore it was a brave Reply of the same Prince to the same Mother, urging him to put an innocent Person to Death, and reminding him of the Pains she had undergone for his Sake: *My good Mother, says he, demand some other Reward for your Trouble; the Life of a Man is too precious to admit of any Equivalent* ^c. Mr. *Hobbes* ^d is of Opinion, that this filial Reverence ariseth not only from the Law of Gratitude, but likewise from the Force of a tacit Compact; it not being presumed that he who releaseth another from his Rule and Dominion, intends so far to make him his Equal, as not to reckon it to him as a Favour: But a Person, thus dismiss'd from Subjection, is ever supposed to promise, that he will constantly pay his Benefactor all those external Marks, at least of Honour and Esteem, which Superiors are wont to receive from their Inferiors.

Yet it was, no doubt, a Strain of Superstition in the *Jews*, when they would not allow a Son to let his Father Blood, to open a Sore for him, or to draw a Thorn out of his Flesh ^e.

Amongst those who live in a Commonwealth, it may happen, that upon account of some Office or Dignity born by the Son, the Father shall be oblig'd to do him Reverence, yet not so as to quit his Prerogative of private Respect ^f. Thus *Fabius Maximus* commended the Action of his Son the Consul, who, as *Fabius* came riding towards him at a publick Meeting, ordered him to alight and make his Approaches to him on Foot ^g.

Whether this perpetual Duty and Obligation of Children, remaining after their Father's Power is expired, arise from the Act of Generation, or from the faithful Care and Labour of Breeding them up, is a Controversy that hath divided learned Men. Those who contend for the former, are wont to tell us, that the Kindness of giving Life is not only, in its self, the greatest good that can be bestow'd, but is likewise the Occasion of all others; and

that, by this Action of conferring a Being, the Parents do, in some measure, resemble the Almighty Creator. Some, again, give their Judgment in favour of Education; as that which properly makes a Man deserve his Name, and which is not perform'd without a long and difficult Course of Application and Expence. They illustrate their Opinion by this Observation in Nature, that amongst Brute Creatures the Male is not discover'd to have the least Regard for the Young which he begets, and the Dam's Tenderness ceaseth with her Care, when they are able to provide for themselves; whereas the Affection between human Parents and Children is perpetual: which must needs be a Token that the great Dearness on the one side, and the Obligation to Duty on the other, do not chiefly result from that Act of the Parents which they exercise in common with Beasts, but from their peculiar Diligence in forming and managing their Off-spring, in order to a Life of Decency and Society. *Aristotle* is cited in Defence of the former Notion, *A Father, says he g, is the Cause of the Son's Existence (which seems the greatest of Benefits) and of his Nature and Institution.* And again ^h, *Men stand engaged in the highest Degrees of Friendship and Piety towards the Gods, and towards their Parents. For, from these they receiv'd the noblest of all imaginable Goods, their Being and Education.* On the latter of which Passages we may remark, that although the conferring of Life be first named, yet it is not expressly compared with the other Benefit. *Philo Judæus* ⁱ is produced on the same side; it is a Saying of his, *We can never return our Parents equal Favours; since we can't repay, in the same manner, their Kindness of first bringing us into the World.* And thus too, the Father in the Declamation ^k; *We first produced you out of our own Life and Substance, and opened to your Prospect this vast Scene of divine and human things. We made you capable of seeing and of enjoying the Sea, the Earth, the unwearied Course of the Stars, the Heavens with all their sacred and shining Glories.*

Yet we cannot but deliver it as our Persuasion, that the Benefit of Educating is a much stronger Ground and Spring of filial Obligation, than the other of Begetting. *Plato* ^l seems to countenance this Opinion, *Parents, says he, ought either not to have brought their Children into the World, or not to refuse any Pains in training and instructing them.* In another place ^m he introduceth *Demodocus* thus speaking of his Son; *The Act (of planting shall I call it? or) of begetting my Son, was the easiest imaginable; but the breeding him up was a Task of Difficulty and*

^a *Aristot. Ethic. ad Nicom. 8. 16. Οὐδὲν ἰσοπλάγιον τῷ πατρὶ κατὰ τὴν φύσιν ἔστιν ἄλλο τι πλεονέκτημα ἢ τὸ εὖ αἰετὶ βίοναι.* No Person can fully requite the Benefits of his Parents; but he who serves and respects them to his utmost Ability, may be pronounced Honest and Just. *Vid. Xenoph. Apomn. l. 2. p. 431, 432. Ed. Steph. Stobæ Sermon. 77.*

^b *Nam, quod ad jus publicam attinet, non sequitur [Pater] jus potestatis.* V. D. L. 36. t. 1. *Ad Senatus Consultum Trebell. l. 6. princip.*

^a *De Beneficiis, l. 3. c. 29, 30, &c.*

^b *Arrian. de reb. gest. Alex. 7.*

^c *Amen. Marcellin. l. 14. c. 10. Add.*

Gell. l. 2. c. 7.

^d *De Cicero, c. 9. f. 8.*

^e *Constant. L'Empereur in Babakama, c. 8. f. 3. Add. Selden. de*

J. N. & G. l. 7. c. 2.

^f *Plutarch. Fab. & in Apophthegm. Valer. Max. l. 2. c. 2. f. 4. Add. Bæcler in Grot. l. 2.*

c. 5. f. 6.

^g *Ethic. VIII. 13.*

^h *Ibid. c. 14.*

ⁱ *Allegor. l. 1. p. 58. in fin. & l. 2. p. 62. D. Ed. Paris.*

^k *Quintil. V.*

^l *In Criso p. 34. B.*

^m *Theag. init.*

Trouble ever filling me with Fears on his account. And Socrates, in the same Dialogue, declares it as his Judgment, *I know not any Business in which a prudent Man ought to shew more Caution and Diligence, than in forming his Son's Mind to Goodness and Virtue* ^a. So the Father pleads in *Quintilian* ^b, *I do not now, says he to his Son, set to your Score these vulgar Favours of lending you Life, and Light, and Liberty; but whatever Bravery you have shew'd, whatever gallant Action you have perform'd, this I charge upon you as my Merit; 'tis my Strength with which you have conquer'd. That Soul of yours, so unshaken, so undaunted under the greatest Dangers, had its Rise and Original from mine. It hath been my long employment to render you a Man of Abilities and Courage; in your early Years by my Precepts, and since, by my Example* ^c. It is not indeed easy to imagine or allow, that a Parent hath conferr'd any considerable Benefit on his Child, should he cast him away when he first comes into the World ^d; or afterwards entirely neglecting his Culture and Education, should let him grow up like a Beast, to lead a Life useless to others, and shameful to himself ^d. *Juvenal's* ^e Reasoning is very just and true,

*Gratum est quod patriæ civem, populoque dedisti,
Si facis, ut patriæ sit idoneus, utilis agris,
Utilis & bellorum & pacis rebus agentis.
Plurimum enim intererit, quibus artibus, & quibus
Moribus instituas.-----* (hanc tu

The State and People will your Zeal commend,
In giving that a Man, and these a Friend;
If fit to aid the publick Good; if skill'd
In rural Labours, or the martial Field,
Or grave Debates of Peace. Th' important Stake
Now waits your Care, what early steps you take;
What Scheme of Arts or Manners is design'd,
To fix his Pains, or cultivate his Mind.

⁶ *Aristotle* himself (who was cited to countenance the other side of the Question) hath left this Saying on Record ^e, that *Parents, who take Care to see their Children duly inform'd and instructed, deserve much higher Honours, than those who barely lend them a Being: the latter make them capable of living, the former of living benevolently and happily.*

Nor doth that Consequence, on which the other Opinion is built, seem to hold; *Life is the greatest Good; therefore the Act of the Parent in giving that, is the most fit and proper to raise an Obligation in the Child.* For before I can charge any Action of mine on another, as a considerable piece of Merit, it is necessary that I know to what Person I do the Kindness, and whether it will certainly reach him. Again, it will be convenient for me to reflect and consider, whether I really intended the thing as a Favour; how much it stood me in; whether I undertook it more for the sake of doing Good to the other Party, than for my own Pleasure, or Use; whether I was engaged in the Performance upon Reason and Deliberation, or was drawn to it by the Force of Passion, or Allurements of Sense. Lastly, whether the Action be capable of benefiting the other Person, without the Addition of some farther Services. Whoever diligently weighs these several Points of Enquiry, will be easily inclin'd to acknowledge, that the Kindness of Educating is much more proper to found an Obligation, than the vulgar Office of Begetting.

Yet we do by no means approve of all that *Seneca* hath urged on this Head, in his Discourse of Benefits ^f. For he is not to be born with, when he calls the Life of a Man, whom GOD hath endued with an immortal Soul, a *Thing common to us with the wild Beasts, with the smallest, and with some of the foulest of Creatures; and, the Happiness of Flies and of Worms.* But some Parts of his Argument may be admitted without Cen-

⁴ *Senec. de Benef. l. 3. c. 31. Vis scire, quam non sit magnum beneficium, vitam sic dare? Exposuisses; nescire injuria erat genuisse. Quo quidem colligo, minimum esse beneficium. Patris Matrisque concubition, nisi accessisset alia, quæ profecerentis hoc initium muneris, & aliis officiis ratum facerent. Non est bonum vivere, sed bene vivere.-----Tu me mihi rudem & imperitum dedisti: ego tibi filium, qualem genuisse gauderes.*

⁵ *Sat. 14. v. 70. &c.* He also speaks well to this purpose. *Sat. 7. v. 184, &c.*

*Quantumque domus, veniet, qui ferula domum
Componat; veniet, qui pulmentaria condit.
Hos inter suntus sestetia Quintiliano
Ut multam, duo sufficient: res nulla minoris
Constabit Patri, quam Filius.-----*

⁶ *Solon* hath left us this wise Law, *Plutarch* in *vita Solon.* *Ὁ γὰρ ὁ γὰρ ἄριστος παρρησιῶν το καλόν, ἢ τίμιον ἕνα δόλιος ὄντι, ἀπὸ ἡδονῆς, ἐξ ἡδονῆς γυνώσκου, τὸν τε μηδὲν ἀπέρχεται, οὐ παρρησιῶν ἀπὸ πρῶτος ἐπὶ γυνώσκου, ἢ ἀποκρίσσει, ὡς ἀπὸ το γυνώσκου πεποιμένον ὄντι.*

That he that contemns the Honesty and Sanctity of Marriage, and desires Women only to satisfy his Desire, and not to have Children, has this Reward, that he has no Right over the Children that proceed from such a Conjunction, whose Life he has made an Eternal Disgrace.

^a *Euripid* *Hecub.* *Good Institution is the Spring of Virtue.* *Phædr. Fab. l. 3. fab. 15.*

^b *Declam. 258.*

^c *Add. Declam. 278. &c.*

^d *Si res nulla minoris constet patri, quam filius; If his Son stands him in the least Charge of any thing he possesseth.* By the Law of *Solon*, in *Plutarch*, Children basely born were not oblig'd to maintain their Parents. The Reason of which Exception was grounded on this Consideration, that he who forsakes the honest way of Marriage, plainly shews that he seeks a new Partner, not on the account of Issue, but of Pleasure; and therefore his Vice is his Reward; and he can by no means complain of any Ingratitude in such Children, because he hath injured and disgraced them by making their very Nativity a Reproach. *Add. Vitruv. l. 6. Præfat.*

^e *In Deg. Lucret.*

It is worth observing in *Martinus Hist. Sin. l. 4. c. 2.* what mighty Respect and Veneration the *Chinese* pay to their Masters; who, as *Juvenal* says, ought to be *Parentis loco*, to be honour'd and obey'd as second Parents. The same *Historian*, *l. 6. c. 1.* reports, That the Son, in *China*, never riseth to a higher Degree of Honour than what had been formerly born by the Father; and if, for his signal Services to the State, he be advanced farther, the Dignity, with which he is to be invest'd, is first to be preferr'd, by a kind of posthumous Promotion, on his deceas'd Father: That People esteeming Duty with Reverence to Parents, the first and chiefest of Virtues.

^f *L. 3. c. 30, &c.*

sure. ⁷ Look, says he, upon my Nativity, as it appears barely in it self, and you will find it to be a short and uncertain Favour, a Subject lying equally open to Good and Evil. No doubt it was my first Step to all the Benefits I enjoy, but it was not therefore the greatest, because the first; nor, because the greatest, without it could never have been. And again, barely to live is the least Degree toward living well. I would thus talk with my Father: Suppose, as you first gave me my Life, so I had served yours: in this I should certainly exceed your Kindness, for I conferr'd my Favour when you was sensible from whom you received it, and I to whom I did it; and then, I did not consult my own Pleasure, at least not my Pleasure alone, in the Performance. Would you conceive how small a Boon you bestow'd on me in my Birth? Fausy your self to have immediately cast me out to perish naked and helpless; in this Case your Act of Begetting me had been a manifest Injury. From all which I infer, that the Acquaintance of my Father and Mother had proved but a slender Kindness to me, had it not been follow'd with other good Offices which ratified and confirm'd it ^a.

XIII. Lastly, As the Father ought not, without weighty Reasons, to expel the Children his House; so they on the other hand shall not, according to the regular Course, pass into another Family without his good Leave. Yet in case they have just Grounds for their Departure, and yet cannot prevail on their Father's Perverseness to give Consent, I should be of Opinion, that their Duty doth not hinder them from removing, so as to concert their own Affairs, contrary to his Humour; especially when they freely resign all future Dependence on him, for their Fortune and Inheritance. For as civil Constitutions do wisely countenance and strengthen the Authority of Parents, so they are not wont to encourage impertinent Obstinacy and Moroseness. Nor doth it seem to be in the Power of those who are Heads of separate Families, to retain their Children, when they have reasonable Occasion to remove; inasmuch as, in regular Common-

wealths, it is not usual to deny a Free-Subject the Liberty of transplanting himself, when tied to Residence by no particular Obligation.

XIV. To the same Head belongs that common Question, Whether Children may dispose of themselves in Marriage against the Consent of their Parents ^b? For the Solution of which we ought carefully and distinctly to consider what is incumbent on Children by Virtue of their natural Duty; and what on account of the Obedience which attends their State of Subjection: and again, what Rights belong to Fathers strictly, as such; what as they are the Heads of Families. Paternal Power, as such, we have already observ'd to be just so great as is sufficient to the Government of the Children, till able to be their own Managers. This therefore does not seem to extend it self so far as to the reversing of a Matrimonial Contract: An Affair supposed to be carried on by Persons of mature Age and Reason. Indeed the Duty of filial Piety and Reverence requires, not only that the Children apply themselves to their Parents for Advice in these Proceedings, but likewise that they may make a Conscience of opposing so awful Directions ^c. Yet if they happen to break their Duty in this Point, it doth not follow that the Act must be null and void. For an Obligation to hear and to respect Another's Advice, doth not presently divest a Man of the Power to govern his own Concerns. *The Liberty of a Son, as Quintilian observes, if it be at all allowable, is so in the matrimonial Affair: For who can love by the Eyes, or by the Rules of another?*

But what shall we say of that other Power, which the Fathers hold as they are the Heads of Families? Its true, in many Commonwealths, the Laws have variously restrain'd the Liberty of Marriage. Thus, in some Places, no Person of the Royal Family can contract, without the King's Approbation; such Matches often proving of very considerable Consequence to the Publick. In Japan the Prince chooseth Wives for his Nobles ^d. In several Countties Marriage Con-

⁷ Senec. de Benefic. Lib. 3. c. 30, 31, 34. Sed vide, ne illud verius sit estimari, an id quod potui, & id quod feci, meum sit, mearum virium, mea voluntatis. Illud quod natus sum, per se intueri quale sit: animadvertes exiguum & incertum, & boni malique communem materiam: sine dubio primum ad omnia gradum, sed non idem majorem omnibus; quia primum.-----Putam vitam pro vita reddidisse. Sic quoque munus tuum vici, cum ego dederim sentienti, cum sentiens me dare: cum vitam tibi non voluptatis meae causa, aut certe per voluptatem dederim.-----Ego vitam dedi statim illi usuro: tu nescituro an viveret.-----Paternum munus & simplex est & facile.-----In quo consortem habet, in quo spectavit Legem patriam, premia Patrum, domus ac familiae perpetuitatem, omnia potius, quam cura cui dabit.

Mr. BARB. NOTE on § XIV.

¹ Quintil. Declam. 270, 376. *Nasquam tamen libertas tam necessaria, quam in matrimonio.-----Quis enim amare alieno animo potest?*

^a A little after he styles Generation a *Vulgar Benefit*: the Office of a Father, *Easy, slight, and of little Value*; regarding any thing else, rather than the future Person to be produced.

^b V. Grot 1. 2. c. 5. l. 10.

^c *Non æquum est pugnare, pater cui tradidit ipse, Ipse pater cum matre, quibus parere necesse est: Virginitas non tota tua est: ex parte parentum est. Tertia pars patri data, pars data tertia matri: Tertia sola tua est: noli pugnare duobus, Qui genero sua jura simul cum dote dederunt.* Catullus, 60.

^d 'Twould be Rebellion to resist those Arms
On which your Parents have bestow'd your Charms.
Your Virgin Jewel is not all your own,
A third each Parent claims, a third alone
Remains to you; forbear with Two to Fight,
Who, in their Portion, give the Son the Right

Thus *Hermione* most dutifully speaks in *Euripides, Andromach. v. 987, 988.*

----- My Marriage is my Father's Care,
His Judgment guides my Choice.-----

And *Xenophon Cyrop. L. 8.* tells us that *Cyrus* would by no means engage in Nuptial Affairs without the Consent of his Parents.

^d *Varen. Descript Japon. c. 12. Add. Conflit. Sicul. l. 3. t. 21.*

tracted between a Subject and a Foreigner, between a Noble Person and a Commoner, are declared void. But as in all States and Governments, a Liberty of marrying and of removing is ever suppos'd, except where there is either an express Law to the contrary, or a Custom equivalent to a Law; so in separate Families, where most of the Reasons fail, on which the civil Constitutions, about this Affair, are built; the Father of the Family doth not seem to have a Right of prohibiting or of reversing his Childrens Marriage, when not defective in any thing but his Consent: provided still, that they are willing immediately to leave his House; for it would be unreasonable to bring a Person to live under his Eye whom he professeth to dislike ^a. Yet if a Father see his Authority slighted by his Children, without very sufficient Grounds for their Non-compliance ^b, he may, as a Punishment of that Neglect, exclude them from all present Benefits and all future Expectations ^c.

What Rights those Fathers of Families, who live not in a separate Condition, but under some Commonwealth, do in this respect enjoy, must be discover'd by the Customs and Constitutions of different Nations. Amongst the *Ja-*

ponese, Marriages are intirely directed by the Parents, or, if they are dead, by the next Relations ^d. And in *Peru*, under the antient Government of the *Yucas*, all Matrimony engaged in, without the Parents Approbation, was declared null, and the Children illegitimate ^e. This in general is certain, that as the Laws of a particular Country may pronounce a Contract invalid, either because defective in Form, or because transacted between Persons to whom such particular Agreements are prohibited; they may, in like manner, suspend the Validity of Marriage without the Consent of the Parents; so that if destitute of this necessary Condition, it shall pass in civil Estimation for null and insignificant ^f. For the Agreement of the Parties to cohabit like Man and Wife, can no more render Matrimony good, when contrary to Law, than the Bargain of a Minor and the Delivery consequent upon it, both undertaken without his Guardian's Influence, can effectually and irrevocably pass away his Estate. Though Parents are to be admonish'd, that when the Government allows them so high a Prerogative, they should be very cautious, and very merciful in putting it in Execution ^g.

^a *Genes.* xxvi. 34, 35.

^b *Vid. L. 23. t. 1. l. 12. f. 1. D. De Sponsal.*

^c *Vid. Leg. Wisogoth. l. 3. t. 2.*

^e 8. *Leg. Burgundion. t. 13. c. 5.*

^d *Varen. Descrip. Japon. c. 12.*

^e *Garcilasso De la Vega, l. 6. c. 36.*

^f *Vid. L. 23. t. 2. l. 2. D. De Ritu Nuptiarum, § L. 48. t. 5. l. 7. D. ad L. Jul. De Adulter.*

^g *Ad. Bacler. §*

Ziegler. ad Grot. l. 2. c. 5. f. 10.

C H A P. III.

Of a Master's Power.

- I. *What is the Relation of Master and Servant.*
 II. *Servitude was not ordained by Nature.*
 III. *Nor by God immediately.*
 IV. *The Original of Servitude seems to have been from Contract.*
 V. *War made the number of Servants greater.*
 VI. *What is the Duty of Captives to their Masters.*
 VII. *They are almost of the same Nature with other Goods.*
 VIII. *Yet an Injury may be done them.*
 IX. *Of the Children of Servants.*
 X. *The Inconveniences of Servitude.*
 XI. *How many ways a Servant may become free.*

AS the Husband and Wife (whence proceeds the common Off-spring) make the principal Parts of a Family; so Servants come in for inferior, secondary Members, to bear the Burthen of common Labour and Business. Now these being usually treated in a way of severer Discipline, give Occasion to the forming of a new Species of Government on their account; different from that which is exercis'd over Children, who demand a milder and more indulgent Sway. Yet we are persuaded, that neither this Society, between Master and Servant, can claim the Name of a Commonwealth or civil State, as Mr. *Hobbes*^a is inclined to call it; not only because it generally consists of fewer Persons than are necessary for mutual Preservation, in a Condition of natural Liberty; but likewise because a Master furnisheth himself with Servants, not so much for the sake of reciprocal Defence, as that by means of their Labour, he may, in a more ample and more convenient manner, discharge his Domestick Affairs.

II. As to the Original of this kind of Society, we must, in the first Place, discard that old Opinion which makes Nature her self to have actually establish'd the Relation of Master and Servant amongst Men. It is true, we discover a strange Variety of Parts and Capacities. To give one Instance for all; we observe some Persons of so quick and piercing Sagacity, as to be able always to apprehend their own Interest and Benefit, and, at the same time, of such Vigilancy, as to prosecute their Affairs by their own free Motion, without the Admonition or Compulsion of others. Some again are of so heavy Dispositions, as not to see their own Advantage, any farther than they are guided; being much fitter for the Labours of the Body, than the Employments of the Brain; and farther, so given over to Supineness and Sloth, as

unless they are forced and drag'd to Application; they can manage no Concern with tolerable Care; nor so much as save or spend by the Direction of their own Judgment. The latter Kind are those whom *Aristotle* calls Slaves by Nature; not that Nature by her own immediate Act sets them in such a Condition of Bondage, without any human Deed or Covenant intervening: but because by forming them with so much Disadvantage in their Frame, she hath rendred it more convenient for them to live under absolute Subjection and Controul, than to undertake the Government of their own Proceedings^b. It was a Saying of *Agefilaus*, that *the Asiaticks were the worst of Free-men, and the best of Slaves*: which *Passienus* turn'd upon the Emperor *Domitian*, when he observ'd, that *there was never a better Servant, and never a worse Master*^c.

III. *Hornius*, in his first Book *De Civitate*^d, jars upon the old String, in contradicting the general Opinion of the^e Lawyers, who derive the Origin of Servitude from the Law of Nations. He says, *The Manner only of this Institution is to be refer'd to the Practice of Mankind; a Custom having prevail'd amongst most People, to impose such a Condition upon their Captives in War. But we should always distinguish the Cause of the Society, from the Cause of the Sovereignty; the latter not being deducible from Custom, nor from the Law of Nations, but being establish'd by GOD himself. For since all Victory is from GOD, and by his Providence the Conqueror gets into his Hands the Person of the Enemy, it follows, that the Life of the Captive might immediately be taken away: But since Humanity would scarce have suffer'd, that the Victor should always exercise this Rigour on an unarm'd and suppliant Person, it was thought convenient to forbear Execution, and to retain his Power over the Prisoner, who might thus be of good Use in the Affairs of Life. But*

Mr. BARBEYRAC's NOTES on Chap. III. §. II.

^a This Opinion is contuted at Large, *Lib. 3. Chap. 2. § 8.* What our Author adds here, is an Abridgment of what he has there said, to which it is better to refer the Reader.

^b Their Words are, *Servitus autem est constitutio Juris Gentium, quâ quis domino alieno contra naturam subicitur. Servi autem ex eo appellati sunt, quod Imperatores captivos vendere, ac per hoc servare, nec occidere solent: qui etiam mancipia dicti sunt, eo quod ab hostibus manu capiuntur. Servi autem aut nascuntur, aut fiunt: nascuntur ex ancillis nostris: fiunt autem Jure Gentium, id est, ex captivitate; aut Jure Civili, cum liber homo major viginti annis ad patrimonium partem paulam seu censuali passus est. Instit. Lib. 1. Tit. 3. De Jure personarum, § 2, 3, 4.* We see that our Author makes two things, the Causes of Servitude, *viz.* Poverty and Force.

^c *De Civitate, l. 3. f. 12.*

^d *V. supra L. 3. c. 2. f. 8.*

^e *Tacit. Ann. 6. c. 20.*

^f *I. l. c. 2.*

indeed, as the Occasion of Mens engaging in War was ever partly their own Defence, and partly the Vindication of their Rights; so upon their obtaining the Victory, when they thought good to spare the Lives of the conquer'd, it was at their Pleasure, either to put them in a State of Slavery, or only to keep them in Hold till such time as by Ransom or Compact they should be deliver'd. All which Privileges and Proceedings, together with the Authority over Persons thus brought into Subjection, were not immediately appointed by GOD himself, but were approv'd by him upon human Institution. Nor is that Assertion true, "The Victor still retains that Power of Life and Death over the Captive, which he once procur'd; and consequently, his Right is the same, before he receives him into Fealty and Service, and after he governs him as a Part of his Family. For these are quite different things. The conquering Party may, by the Right of War, dispose how he pleaseth of his Prisoner, either kill him or save him: but this was never before term'd the Power of Life and Death, which denotes a lawful Authority of inflicting capital Punishment, in case of an antecedent Crime. Lastly, what the same Author lays down, "That all Sovereignty, of what kind soever, imports a Power over the Life of the Subject, and therefore we must not seek for Distinctions in the Power it self, but in the Exercise of the Power; and by consequence, the Authority of the Husband over the Wife, of the Father over the Children, of the Prince over the People, is one and the same with that of the Master over the Servant; except that the ways of Treatment are more kind and gentle in the former Instances, than in the last; is an Argument, that

"we can by no means prevail with our selves to allow.

IV. In our Judgment, the Origin of *Servitude* ought thus to be traced out: In the early Ages of the World, when Men began to quit their primitive Plainness and Simplicity, to cultivate the Method of Living, and to enlarge their Fortunes and Possessions, it is very likely the wiser and richer Sort invited those of less Parts, and less Wealth, to assist them in their Business, for Hire. Afterwards, when both Parties found their Benefit in this way of proceeding, the meaner Tribe were by degrees persuaded to join themselves perpetual Members to the Families of the greater; under these Conditions, that the latter should engage to supply Food and all Conveniences of Living, and the former should bind themselves to undertake all proper Labours and Employments, as their Patrons should direct. So that the first rise of *Servitude* is owing to the voluntary Consent of the poorer and more helpless Persons, and is founded upon that common Form of Contract, *Do, ut facias; I promise to give you constant Sustenance, upon Condition you assist me with your constant Work.* What Power Nature allows a Master over Servants of this kind, may be easily discover'd from the Ends of forming such a Society. He may enjoin them what Task he pleaseth, in Proportion to their Strength and Skill. He may likewise correct their Sluggishness, by such Methods of Severity as are most likely to prevail on their particular Dispositions; tho' he cannot, on this score, proceed to capital Punishments: so that the highest Degree of Penalty he can inflict on their Idleness is to expel the lazy Drones from his Family, and leave them to their own beggarly Condition. Nay

Mr. BARE. NOTES on § IV.

¹ GROTIUS, *Lib. 2. Chap. 5. § 30.* distinguishes *Servitude* into 1. Perfect, and 2. Imperfect. The first he there treats on, the other is only for a certain Time, or on Condition, or for certain Things, according to certain Rules, or by the Laws of the Country, or by the Agreement of the Persons concerned: See the Examples alledged by him. I shall content my self in reciting only what our Author speaks in his Abridgment of the Duties of a Man and Citizen, *Lib. 2. Chap. 4. § 2.* about hir'd or domestick Servants. The Master, says he, owes his Servant the Wages agreed on, and the Servant is oblig'd to do the Work faithfully for which he is hired by his Master. Farther, as in this Contract, the Condition of the Master is more advantageous than that of the Servant, the Servant ought to respect his Master according to his Station in the World, and when thro' Malice or Negligence, he discharges his Business ill, his Master may correct him with Moderation, but not inflict any corporal Punishment on him, unless it be inconsiderable, much less put him to Death by his own Authority. Mr. TITIUS, *Onerat. DXXIX.* affirms nevertheless, that this Chastisement, as moderate as our Author supposes it, is not a direct Consequence of the Rights of a Master over his Servant; for besides, says he, that such a Permission seems what ought not to be allowed to Masters in any well-govern'd State, the End of the Relation does not naturally require, that a Master should have so great a Power over his Servant; 'tis sufficient that the Servant be oblig'd, some way or other, to make good the Damage he has caused thro' his own Fault. But if he has deserv'd Blows for doing some Wrong, or Injury to his Master, his Master shall not inflict them by way of Punishment, for that belongs only to the Magistrate, but by a Right of War, which allows us to revenge the Injury done us with Moderation. But yet our Author, in all this Matter, without doubt supposeth, that no Servant or Slave is bound to obey his Master, if he command any thing contrary to the Law of Nature, or the Nation he lives in. See GROTIUS, *Lib. 2. Chap. 26. § 3.*

² We ought to observe, that one of the principal Reasons for the Institution of the Sabbath, was to procure Ease to Servants and Slaves: See GROTIUS, *Lib. 3. Chap. 14. § 1.* and Mr. LE CLERC's Notes on *Exod. xx. 10.* and *Deut. v. 14.*

³ See GROTIUS, *Lib. 3. Chap. 14. § 4.* where to speak by the bye, there is a false Quotation about Slaves, *Thou shalt not oppress thy Servant, nor rule over him with Rigour,* Lev. xxv. 17. 43, 53. and not out of *Deut. xv. 17, 45, 53.* and likewise the first words, which are at *ver. 17.* are not spoken of Slaves, for there it is said, *Thou shalt not oppress one another,* and 'tis spoken upon the account of selling of Lands, which the Lawgiver forbids, upon any Pretence whatsoever, longer than the Year of Jubile. The same Fault is found § 2. Num. 2. where *Deut. 18.* is quoted for *Lev. 25.* But to return to our Subject. We ought to observe these two Laws chiefly, *viz. Exod. xxi. 20, 21, and 26, 27.* The first imports, That if a Master beats his Servant that he die, he shall be punished as a Murderer, but if he lives only a day or two, the Master shall be exempted from that Punishment: And the Reason is because if the Slave dies not presently, 'tis to be supposed, that the Master had no Design to slay him, and so 'twas thought a sufficient Punishment to lose what his Slave had cost him, and his Service, which he might have had of him, which is meant, as Mr. LE CLERC expounds them, by these words, *For the Slave was his Money.* The other Law requires, That if a Master has smitten the Eye of his Servant, that it perishes, or his Tooth, he shall let him go free as a Satisfaction for that Loss; which without doubt hath place, when the Damage is more considerable, with greater Reason: See the same Commentator.

doth it appear, that he can transmit them to another Master, without their Consent; they being really in the Capacity of ^a perpetual Mercenaries, or Hirelings, working for the Advantage of him that employs them, whilst continuing in that State, but not at his disposal, when obliged to leave it. Lastly, if Persons, in this limited Order of Servitude, commit any grievous Offence against the Members of another Family, their Master cannot, even on this account, proceed to take away their Life. Yet lest he should engage himself in Quarrels, by defending their Injuries and Crimes, he is allow'd, or rather he is oblig'd to expel them his House; which is a kind of delivering them up to Punishment. But if they prove guilty of any heinous Practice against the Master himself, and his Family, he may then justly kill them; yet not by Virtue of his Sovereignty, but as *Enemies*, by the Right of War ^a.

And according to these Measures, the Condition of Servants, and the Power of Masters are, for the most part, ^b described in the Old Testament.

V. The Convenience of discharging inferior Offices and Labours, by the Hands of others ^b, being thus found out; in succeeding times, when Wars grew frequent in the World, it pass'd by degrees into a Custom, to indulge Captives with Life and corporal Liberty, upon Condition that they should yield perpetual Service to the Conqueror ^c. Thus *Diodorus Siculus* ^c reports of the ancient Egyptian King *Sesoftris*, that he perform'd all his publick Works by the Help of Captives; fixing this Inscription on the Temples which he built, *None of the Natives have here employ'd their Labour*. Now these Slaves of War were of course treated with severer Discipline, being supposed still to retain some Sparks of hostile hatred. Besides, an Act of Cruelty was judg'd somewhat excusable, when practis'd upon those who had formerly made an open Attempt on the Life and Fortune of their present Master; and the License in this Point improv'd so far, that it was esteem'd a harmless matter to kill them, either in Violence of Passion, or upon committing any Offence ^d. This Privilege being once introduc'd, was extended, tho' upon less Pretence, to the Children of the Vassals;

and to their Slaves, if they happen'd themselves to be *inferior Masters*. Yet in some Commonwealths, it was quite taken off by publick Decrees, and in others very much abridg'd and restrain'd. The primitive Institution therefore of Servitude was not founded on War, but on voluntary Consent; tho' the Chance of War supplied Occasion, not only to the increasing the Number of Slaves, but to the rendering their Condition more hard and grievous ^e.

VI. Let us see how Mr. *Hobbes* ^f derives the Sovereignty of Masters, and the Subjection of Servants, from his *State of War*. And, first, we must discard that fundamental Error of his, that from the Condition of Nature, which he calls a War of every Man upon every Man, there can result to any Person a Right of invading another, and of reducing him into Servitude upon gaining the Victory. Yet thus much is Sense; that as, by the Right of War, an Enemy may fairly be kill'd; so the Conqueror may, if he pleaseth, give him his Life, upon his Promise of perpetual Service. In which Contract and Compulsion, the Good which the vanquish'd receives, is the Security of his Life, which, by the Right of War, might have been taken away; and the Good which he engages to bring to the Victor, is his Service and Obedience, and those, as far as possible, *absolute*. For he that obligeth himself to perform the Commands of another, before he knows the Particulars, is bound, without any Limitation or Exception, to do all that the other Party shall enjoin. Tho' the Law of *Humanity* affords some Relief and Temper to this rigorous Justice ^g.

Farther, Mr. *Hobbes* ^h rightly observes, that not every Captive in War is thus supposed to covenant with the Conqueror. For some do not obtain an absolute Grant of Life, but a temporary Reprieve to cease at the Conqueror's Pleasure; which was the Case of those whom the *Romans* preserv'd to adorn their Triumphs, and to entertain their Amphitheatres. Nor is so much Trust and Credit given to every Captive, as that his Master should venture to leave him such a Degree of *natural Liberty*, as might enable him, were he so inclined, either to run away, or to refuse working, or to attempt any Mischief or Damage against the Family. Such a One therefore per-

^a If thy Brother be waxen poor, and sells himself to thee, thou shalt not constrain him to serve, as a Slave, but he shall be with thee, as an hired Servant, or a sojourner to the Year of Jubile, Lev. xxv. 39, 40. CHRYSIPPUS, as SENECA tells us, did say, That a Slave is a perpetual Servant. *Servus, ut placet Chrysisippo, perpetuus mercenarius est.* De Benef. Lib. 3. Chap. 22.

^b Exod. xxi. 21, &c. Deuteron. xv. 17, 43, 53, &c. Sirac. xxiii. 25, &c.

MR. BARB. NOTE on § V.

¹ See BUSBEQUIUS. *Et. 2. 3.* & CHRISTOP. RICHERIUS, *de Meritis Orientalium*. As to the Original of this Custom, 'tis an Assertion of PLINY, that *The Lacedaemonians invented Servitude* (l. 7. c. 56.) which cannot be admitted, except in one of these two Senses, either that they were the first in Greece who introduced this Practice, or that they made Slaves of their Countrymen the *Greeks*, as well as of the *Barbarians*, when taken in War. The former Sense is favour'd by that Place of HERODOTUS (*Erato*, towards the End) where speaking of the Island *Lennos*, its being seiz'd by the *Pelagi-gians*, he adds, *Neither they nor any other of the Grecians had then Slaves*.

^a Yet after another Manner than the Old Germans, who kill'd their Slaves, as Tacitus says, *Not out of Discipline and Severity, but pure Heat of Passion*.

^c 36 p. 52. Ed. Rhetor.

^b Hence Aristotle (Polit. 3.) calls a Servant, ὀργανον ἢ ἑταῖρον.

^d AId. Grot. l. 3. c. 7. §. 3.

^e AId. Beecler ad Grot. l. 2. c. 5. §. 27.

^f De Civib. c. 8. §. 1.

^g Vid. Grot. l. 3. c. 14.

^h Ubi supra, l. 2. §. 4.

forms Service, not upon account of mutual Faith and Contract, or by virtue of a moral Tye, but upon meer Force, like brute Creatures; being kept in Fetters, or under close Confinement. The Obligation therefore of a Slave of War towards his Master, doth not spring from the bare saving his Life, nor deferring his Death; but is built on his Exemption from Chains and Imprisonment. By this Act the Master expresseth so much Confidence in him, as to leave him possess'd of corporal Liberty; by which means, if no moral Bonds and Engagements had pass'd between them, the State of War would still continue; and the Slave might not only make his Escape, but might fairly slay his Preserver.^a From all which it is clear, that there is a great Difference between those Slaves who are secur'd in Prisons, Work-houses, and the like, and those who are tied by Covenant to their Master: the former serving not out of Duty, but to avoid Punishment; and consequently, not acting against the Law of Nature, should they either run off, or assault their Master's Life. For to hold a Person in Chains, or Durance, is a Sign, that we do not think him sufficiently ensured to us by any Obligation, or moral Restraint.

Yet that Assertion of Mr. *Hobbes* cannot pass for Truth, that *the Master hath altogether the same Right over the Slave, whom he thus keeps in Bonds, and him whom he holds only by Articles; in as much as his Right over both is supreme.* For that kind of hostile Privilege, which the¹ Victor reserves to himself over his Prisoner, is a different thing from his proper Sovereignty: Since by means of the former the Captive may, at any time, be deprived of his Life, under Pretence of the State of War, from which he seems to be not yet perfectly exempted; whereas the highest Degree of sovereign Rule or Dominion doth not directly include a Right over the Life of the Subject, except on a criminal Account.

VII. But altho' *Dominion*, which is properly the Right of governing another's Person, when establish'd with the free Consent of the Subject, cannot regularly be transferr'd without his good-liking; Men having usually peculiar Reasons why they chosse to submit to this Person rather than any besides: yet in those kinds of Dominion which are grounded upon Force, it hath been ever judg'd allowable for the Sovereign to alienate them by his own sole Will and Act. Yet so long as the Subjects enjoy any Remains of Liberty, we cannot in Strictness say, that the Men themselves are thus alienated or made over, but only the Right of governing them, as being

join'd with some Use or Advantage. Every Sovereign may indeed, as Mr. *Hobbes*^b remarks, say of his Subject, *Hic meus est; This Man is my Property* yet 'tis in a quite different Sense that we call a Thing our own. For by the former Expression I mean no more, than that I, and none else, have the Right of governing such a Person; yet so as to be my self under some kind of Obligation to him, and not empower'd to exercise that Right upon him, in an unlimited absolute manner. But, on the other side, the Property I claim over a Thing, implies a Right of using, spoiling, and consuming it, to procure my Advantage, or to satisfy my Pleasure; so that what way soever I dispose of it, to say it was my own, shall be a sufficient Excuse. It must be confess'd, that although the Law of Humanity doth by no means allow us to extinguish all Marks of primitive Equality in a Slave, who, whatever he may have formerly design'd, is now in a Condition of Peace and Kindness with us, so as to use him in the same manner as a Beast or inanimate Creatures, towards which we cannot stand under any Engagement; yet the barbarous Cruelty of many Nations hath proceeded so far, as to reckon their Slaves in the Number of their Goods and Possessions, and to treat them not in a way of Sovereignty, but of arbitrary Violence,^c calling them their own in the same Sense, as their Cattle. Amongst these People, if a Master perform'd the least Good towards his Vassal he did it purely for his own sake, lest he should suffer by losing him; and the poor Wretch was pitied only upon account of his Price.^c But all this is not enough to prove what Mr. *Hobbes* affirms, that *whatsoever the Slave possess'd before his entering on that Condition, doth then fall to his Master: which can be admitted only in this qualified Sense, that as much as the Slave was, before his Captivity, able to get by his Work, so much his Master may now claim, and oblige him to make good.* When a Man voluntarily engageth in Servitude, he may indeed deliver up his little Possessions, as well as himself, into his Master's Power. But there is no constant necessity of thus proceeding. And as for these Persons, who in ancient Times sold themselves into Slavery, it is probable, that they retain'd not only the Price given, but likewise their former Goods, at least, in the manner of their *Pecul um*; so as to have themselves the Property and Management of them, though their Masters had the chief Advantage; or else, that they surrendred them up to their Children, or aged Parents, whom before they were obliged to maintain. Tho' indeed the² *Jewish*

Mr. BARB. NOTE on § VI.

¹ The Captive having deserv'd to lose his Life, as we suppose, 'tis no Injury to him to make him a Slave; and if he find his Slavery more unsupportable than Life is sweet, he may procure his Death at any time, by disobeying his Master; as Mr. LOCK says in his second Treatise of Government, Chap. IV. § 23, in the Original.

Mr. BARB. NOTES on § VII.

¹ In the Roman Law, a Runagate Slave is said to rob himself. *Ancilla fugitiva quemadmodum sui factorem facere intelligitur, ita partum quoque contrahendo, furtivum facit.* Digell. Lib. 47. Tit. 2. *De Furtis*, Leg. 60. See also C. L. Lib. 6. Tit. 1. *De Serv. fugit.* Leg. 1. and *Quintilian.* Declam. VI. The poor Man, that by the Chance of War had been made a Captive and Slave, had reason to say, *Meipsum perdidit; I have lost my self.*

² Vid. Selden. *De J. N. & G. sec. Hebr.* l. 6. c. 7.

^a See Lock's Treatise of civil Government, c. 3. s. 2. *De Servitude*, p. 241. Ed. Morcell.

^b Ubi supra, l. 4.

^c A. L. Dio. Chrysost. Orat. 15.

Doctors held it unlawful for a Man to sell himself, except under danger of Starving. Amongst the *Romans* it was a known Trick with Sharpers, to suffer themselves to be sold, for the sake of going Sharers in the Price: And for their Punishment they were condemn'd to real Servitude. The Sham was this; *Caius*, suppose, pretended *Seius* to be his Slave, and accordingly offer'd him to Sale, tho' indeed a Freeman: *Seius* being, upon Bargain, to receive a good part of the Gain, consented to the Proceeding. But the Man being once pass'd off to the Customer, and the Price deliver'd; a third Person was suborn'd to claim *Seius* in the Court as a Freeman, by preferring an *Action* against the Purchaser; who (*Caius* being, in the mean time, slipt out of the way) was thus doubly gull'd of his Money, and of his Man ^a.

If a Man be compell'd to Servitude by the Right and Course of War, the Goods which are taken with him shall be the Victor's. But those which are not taken with him shall be as if he were naturally dead: At least till such time as he recovers his Liberty. Thus much is most certain, that what the Slave gets during his Servitude, he gets for his Master. For to whom any Person fully belongs, to him shall belong whatever that Person can procure or produce. And in this Sense Mr. *Hobbes* says truly enough, that *the Slave hath nothing which he can retain as his own, in Prejudice to his Master's Title*. Yet what his Master peculiarly assigns or allows him for Management or Use, he may keep and defend, against his Fellow Servants; as Victuals, Cloaths, Lodgings, Vails, and the like ^b.

VIII. When the same Author ^c adds, that *a Slave cannot be injur'd*, the Words are not fit to be receiv'd without much favourable allowances, large abatements, and Limitations. The Argument which he makes use of, *the Slave having subjeck'd his Will to the Will of his Master, whatever the latter does, is done with the Will of the*

former, and therefore can be no Injury to him; only proves thus much, that the Slave ought not to complain, whatever Work is enjoin'd him by his Master, provided it lie within the Compaſs of his Strength, tho' never so contrary to his Inclination: No more than a Subject can pretend he is unjustly dealt with, when an absolute Prince doth not manage things to his good liking. That this *Subjection of Will* amounts to nothing more, we will elsewhere fully evince. In other Matters, who will deny but that it is an Injury to a Slave, to set him a Labour above his Ability; ^d to beat him for not performing such an impossible Task; or to deny him necessary Food ^e? The *Jews* were so inhuman, as to think themselves not obliged to furnish a *Gentile Slave* with Cloaths, or Victuals, tho', at the same time, they exacted from him the hardest Services, with all imaginable Cruelty ^e. The reason of this barbarous Rigour might probably be, because they had themselves suffer'd the like Treatment in *Egypt* ^f. And as for that Command in *Leviticus* xxv. 43. prohibiting Severity, they confined it to Persons of their own Nation. The *Romans* in their Customs and Laws, as to the Point of Food, express'd more Kindness ^g. It was a noted Saying of *Cato's*, that *to quarrel with Servants about their Bellies, looks scandalously mean* ^h. Yet, in other Respects, the *Roman Masters* were remarkably unmerciful: As in selling their Slaves, when grown aged and unfit to Work; a Practice which *Plutarch* ⁱ justly censures, upon this Argument, that *it is natural for Men to express some kind of Clemency and Beneficence, even to brute Creatures*, which have undergone Labours for our Advantage ^k. On the whole, *Aristotle's* reasoning will ever hold good; *We owe, says he, some Friendship even to a Slave; not as he stands in that Relation, but on the account of his being a Man: Since there is a common Right, which each Person may claim in regard to every other Person, with whom he is capable of partaking in Laws, or Covenant* ^l.

Mr. BARB. NOTES on § VIII.

^a We ought always to remember, that they are Humane Creatures: *Theano's* Greek is, ἵνα μὴ διὰ τὸ κτῆνος ἐξέμεται, μὴ ἀδυνατούντων διὰ τὴν ἐξουσίαν, εἰς τὸ πρὸς ἀποδοῦναι τῆς φύσεως. To the Quotations of the Author may be added what *Petronius* makes *Trimalchion* say, *Amici, & servi homines sunt, & æquè unum lactem biberunt, etiam si illos malus sætus oppresserit*, Chap. 71. upon which the Commentators have heaped up many Authorities. But the *Jews* believed, that they were not oblig'd to use any Kindness to Slaves, except of their own Nation: See *Selden de Jure Nat. & Gent. sc. Lib. 6. Chap. 8*. Further, Our Author in his Abridgement of the Duties of a Man and Citizen. *Lib. II. Chap. 4. § 5.* says, That if we sell or alienate a Slave in any other manner, we ought not designedly, and without his desert, to put him into the Hands of such as will use him inhumanly. I will also add here, that there was a Law among the *Greeks*, which allowed Slaves, when they were used hardly by their Masters, to require that they might be sold to such as would use them better: See *Plutarch de Superflit. & Pollux. Lib. 7. § 13*. The Emperor *Antoninus Pius* commanded much the same thing in a Law above quoted, *Digest. Lib. 1. Tit. 6. Leg. 2*.

^a We have an Instance of this Trick in *Plautus*, *Perf. Act. 4. Sc. 4. & 9.* ^b *V. Plin. L. 5. Epist. 16.*
^c *Ubi supr. f. 7.* ^d *Theano (Epist. 3. in Opusc. Mythol. &c. p. 746.)* makes it necessary to the just use of Servants, that *They be neither broken by Labour, nor by Want.* ^e *Vid. Selden. de J. N. & G. sec. Hebr. l. 6. c. 8.*

^f *Exod. v. 13, 14.* ^g *Vid. L. 1. t. 6. l. 1. f. 2. D. De his qui sui vel alien. jur. sunt. & L. 7. t. 6. l. 1. f. 3.*
^{C.} *De Latin. Lib. Toll.* ^h *Plat. in Cat. M.* ⁱ *Ibid.*
^k *Plaut. (Menæchm.)* *If you are desirous of keeping a Slave securely, you must tie him to you with large Commons. You may easily pin down a Fellow's Nose to a full Table.* *Juvenal (Sat. 14. v. 125.)* censures the Miser, that

Servorum ventres medio castigat intquo,

With scanty Measure shrinks his Servants Guts.

It was a commendable Decree of *Claudius*, which *Suetonius* mentions (c. 25.) *When certain Persons had exposed their sickly and crazy Slaves, in the Island of Æsculapius, being weary of providing for their Cure; he ordered all those who had been thus exposed, to be declared free, and not to return to their old Masters, if they happened to recover: at the same time Enacting, that such Persons as chose rather to kill their Slaves, than thus to dispose of them, should be held guilty of Murder.* We meet with the same Account in *Dion. Cassius*, l. 60. ^l *Ethick. ad Nicom. 8. 13. Add. Oeconom. l. 1. c. 5. Senec. De Ira, l. 3. c. 4. De Clement. l. 1. c. 18. & Epist. 47. Arrian. Epictet. l. 1. c. 13.*

As

As the other Rights of Fathers of Families hath been moderated and restrain'd by national Constitutions; so it hath happened to this Authority over the Slaves, which, in different Countries, we find more or less restrain'd. But where it remains absolute and unlimited, we must suppose it not to have been thus appointed by *civil* Ordinances, but to have been pass'd by, and left as it formerly stood, before the Erection of Commonwealths. Yet it is observable, that the Laws of some States do encourage the Cruelty of Masters, and impose greater Hardships on the Slaves, than the Law of Nature permits, under the most absolute Command. We have a famous instance of this in the *Roman* Custom, of dragging the whole Family to Punishment, when the Master happened to be kill'd: Which *Cassius* in *Tacitus* ^a endeavours to defend, by Arguments drawn from Use and Convenience. The Emperor *Adrian*, in some Measure, lessen'd this Severity, by decreeing, That upon such a Misfortune, not all the Slaves should be arraign'd for Murder, but those only who were so near in the House, as to be able to hear and apprehend the Mischief ^b.

IX. About the *Off-spring of Slaves* there are two Points of Enquiry, Whether it necessarily follows the Mother? And whether it assumes the same Condition of Servitude? As to the former Question, it is a Rule in the *Roman* Laws, which holds of Slaves as well as of Beasts, that *Partus sequitur ventrem* ^c, *the Birth goes along with the Bearer*. This *Grotius* ^e judgeth not to be altogether consonant to the Law of Nature, in case the Father can by sufficient Tokens be discovered. "For, says he, since we may observe, "even in some brute Creatures, that the Sire, "as well as the Dam, expresseth a Care for the "young; we may hence infer, that both have

"an equal Interest in their common Issue: and "therefore if the municipal Laws are silent in "this Point, the Father's Claim is as good as the "Mother's ^d. But we do not think this Argument of any Force; having before made out, that the original Right over the Child is in the Mother; and only transferr'd to the Father, according to the Tenour of the matrimonial Covenant.

As for the other Difficulty; since in a Condition of perfect Slavery, not only the Works, but the Persons belong to the Master, their Children will likewise fall under his Dominion, as every thing else which they produce ^e. Now why the *Maid's* Master should have a better Title in the Case, than the *Mum's*, there are several Reasons to be given. As first, considering the Life and Familiarity of Slaves, to point out the true Father, might prove a Matter of Difficulty ^f. Again, the Mother is, on account of her *Burthen*, rendred for some time, unfit to perform her usual Work; and consequently brings a Loss and Prejudice to her Master, which ought thus to be repair'd. To which we may add the common Maxim, that *Things planted belong to the Proprietor of the Soil* ^g. If the Master himself have Issue by his Female Slave, the Condition of it shall be such, as either his Pleasure, or the Laws of the Country shall determine. And by them likewise Judgment is to be pass'd on a Child, which was conceiv'd by the Mother, whilst in a State of Servility, but born after she had obtain'd her Freedom; or *vice versa*. Tho' Humanity ever inclines to the favourable side, and declares ^h for the Child's Liberty ^g.

It is easy to shew, that the Master doth no *Injury* to his Slave's Off-spring, ⁱ by dooming it to the same Subjection. For since the Mother

MR. BARB. NOTES on § IX.

^a *Partum Ancille Matris sequi conditionem, nec statum Patris in hac specie considerari, expresse videtur, Cod. Lib. 3. tit. 5. De Rei venditione, Leg. 7. See also Lib. 7. tit. 16. De liberali causa, Leg. 42. And about Beasts, what is said above, Lib. 4. Chap. 7. § 4.*

^b See above in B. 4. c. 7. f. 5.

^c The *Roman* Law agrees here with the Laws of Humanity; for it requires, that the Child be Free, if the Mother be so when it is born, tho' she conceived it, when she was a Slave; and, on the contrary, if she were Free, when she conceived it, the Child was Free, tho' the Mother was a Slave, when it was born; it being unreasonable, that the Child (as *JESUITUS* says) should suffer the Misfortune which happened to the Mother, while it was in her Womb. *Sufficit enim, si in ventre Matris eo tempore, quo nascitur, licet ancilla conceperit. Et à contrario, si libera conceperit, deinde ancilla facta peperit, parit, eam, qui nascitur, liberum nasci: quia non debet calamitas Matris ei nocere, qui in ventre est.* Much more, when the Mother was a Slave at the time of Conception, if she was made free while she was big, and again became a Slave, the Child must be account ed Free. *Ex his illud quaeritur et, si ancilla prægnavit manumissa sit, deinde ancilla postea facta peperit, liberum, an servum pariat? Et Martianus probat, liberum nasci: sufficit enim ei, qui in utero est, liberam Matrem esse, in hoc tempore parturisse, ut liber nascatur. Quod & eorum est. Instit. Lib. 1. tit. 4. De Ingeniis.*

^d Mr. *BUDDEUS* (in his *Philos. Pract.* Part. 2. Chap. 4. Sect. 12. § 5. and Chap. 5. Sect. 6. § 12.) affirms, That this is unjust, and that the Children that are so born, are obliged only to acknowledge him their Mother's Master. I shall leave it to the Reader to examine whether the Reasons of that able Professor are strong enough to overthrow *GROTIUS's* and our Author's; especially as this last has laid them down with a Temper in his Abridgment of the Duties of a Man and Citizen, Lib. 2. Chap. 4. § 6. where he says, *It is evident, that these Children of a Slave being reduced to Servitude by their mothers, the Master can have no reason to use them worse, than perpetual Mercenary Servants.*

^a *Ann.* 14. c. 45.

^b In *Spartian.* *Add. L.* 29. t. 5. *D. de Senatusconsulto Silaniano.* Cod. 1. 8. 1. xxvi. 16. (The *Scythians* put out the Eyes of their Slaves, as we are told by *Herodotus*, *Melpom.* in the Beginning. *L.* 2. c. 5. f. 29.)

^c *Vid. Edit. Reg. Theodorici.* c. 67.

^e *Add. Grot. ad Exod.* xxi. 4. where he shews, that the Marriage of Slaves were disannull'd at the Pleasure of their Masters. *Xenophon* (*Oeconom.*) laying it down for one Rule, that Servants should not wed without their Master's Consent, gives this Reason for it; because *As those who are Good, will be so, so those who are Living and*

Faithful, so those who are Bad, improve in Knavery. ^f *Vid. Plaut. Catin.* § Part. the same sort of Servile Issue (*LL.* l. vi. p. 975. A.) *If a Female Slave bear a Child to another Slave, or to a proper Freeman, and that Child be set at Liberty, the Child shall belong to her Master. If a Master, or a Mistress, be convicted of having a Child by their proper Slave, the Father and the Child shall, in the former Case, be driven to another Country by the Magistrates, in the latter Case, the Mother and the Child shall be banish'd by the Magistrates.*

hath nothing of her own, 'tis impossible she should maintain the Child, but with her Master's Goods. And in as much as the Master is obliged to furnish such an Infant with Food, and other Necessaries, long before he is capable of making any Requital for his Labour; and since, when he first begins to Work, his Pains are scarce equivalent to his daily Maintenance, he cannot escape *Servitude*, unless by the Master's particular Dispensation. And this Reason will hold, not only whilst he is supposed to continue, as it were, in the Master's Debt, but ever after; because the Condition, on which the Master first undertook to keep him, was, that he should perform perpetual Service: and, to this Condition he is presumed to have yielded a tacit Consent; especially if it be consider'd, that his very Birth is owing to his Master's Favour; who, by the Right of War, might have put his Parents to Death. And as for that *natural Freedom*, with which all Men are in common invested, it then only takes place, when no Act or Agreement of our selves or others, hath rendred us obnoxious to a State of Inferiority.

And thus we seem to have clearly stated the Case of Children born to *perfect Slaves*, such as were Captives in War, and thence reduced to this Condition. As for those of the other Kind, who engage themselves in *Servitude* by their own free Motion, if there be no express Law or Covenant to the contrary, Equity and common Favour incline to this Resolution concerning them; that the Food of their future Issue is contained, or implied, in their own Maintenance, which their Master owes them as a just Debt: and consequently their Children are not involv'd in a necessity of Slavery ^a.

X. Let us, in the next place, examine what Inconveniences do really attend a State of *Servitude*, which, in the Opinion of most People, passeth for the greatest Misery incident to Mankind, and such, as one ought rather to die than endure ^b. The full Sum and Notion then of *personal Servitude* amounts to this; that a Man, for the sake of Food, and the other Necessaries of Life, shall lie under an Obligation to perpetual Labour; which if taken in its true natural Extent, extract'd from the barbarous Cruelty of some Masters, and the unreasonable Rigour of some Laws, doth not imply any extravagant Degree of Hardship and Severity. For that perpetual Obligation is well requited by a perpetual certainty

of Maintenance, for which those who work by the Hire, are often at a Loss, either through want of Business, or wilful Idleness ^c. Some have thought, and not altogether without reason, that the Prohibition of Slavery among *Christians* hath chiefly occasion'd that Flood of thieving Vagrants, and sturdy Beggars, which is usually complain'd of. Tho' there are *States* which have, in a great measure, put a stop to this Nuisance, by erecting publick Workhouses, and compelling lazy Rascals to a Life of Honesty and Industry ^d.

Mr. *Hobbes*, in his Book *De Cive* ^e, stating the Difference between Liberty and *Servitude*, expresseth himself to this purpose: "Liberty is nothing else but the absence of all Impediments of Motion. Those Impediments may be either *natural* and external, or *moral* and arbitrary. With regard to the former kind, Things are said to be more or less free, as they have more or less space to move in; as a Man in a wide Prison is more at liberty, than another under close Confinement. And thus a Person may be free to proceed one way, and not free to proceed another: as when a Traveller is hindered, by Hedges and Mounds, from diverting out of the Road into the Corn-fields or Vineyards. This Species of Liberty may be term'd *physical* or *corporal*; in which Sense all Servants and Subjects are free, who do not suffer Bonds or Imprisonment. Moral Impediments do not absolutely hinder Motion, but by *Accident*: that is, by our intervening Choice, whilst we judge it better for us to abstain from such a Motion, than to perform it. Thus a Passenger in a Ship is not restrain'd from throwing himself headlong into the Sea; yet, if he be in his Senses, he'll think a safe Cabin preferable to a Leap amongst the Waves. In like manner, whatever Penalties are denounc'd against any Action, a Man that fears not the Danger, sticks not to break the Command. And this is that intrinsic Liberty of the *Will*, inseparable from it, which Slaves no less than all other kind of Subjects enjoy. We must search therefore elsewhere to discover a Difference. And first, altho' scarce any Master is so severe, as to hinder his Servant from doing those things which are necessary for the Preservation of his Life and Health, which are the chief Objects and Pursuits of human Care; yet Free-

Mr. BARB. NOTES on § X.

^a There are some that affirm, that Slavery is not quite abolish'd among Christians. Mr. THOMASius says, he has proved it in his publick Lectures on the Institutes (*Not. in Huber. de Jure Civitatis*, p. 396.) and he publish'd in 1701. a Discourse, *De Hominibus propriis Germanorum*, which proves it in respect to Germany, where he affirms nevertheless, that the manner of *Servitude* hath been different from the Customs of the Romans. Mr. HERTIUS has a Discourse also upon these *Hominis proprii* in Tom. 2. of his *Comment. and Opuscula*.

^a Comp. Boetler. *ad Grot. l. 2. c. 5. f. 29.*
Bread, than to stand waiting at another's Table in a golden Girdle.
Pharf. l. 3. c. 152.

^b Rosar. *Perfic. Sadi. Cap. 1. It is better to sit down feeding on one's own*

^c Vid. Arrian. *Epicet. l. 3. c. 26. p. 257.* Lucan

Non tibi, sed domino gravis est, quæ servit egestas

Want in a Slave turns to the Master's Loss.

Add. Grot. l. 2. c. 5. f. 27.

^d *Add. Bodin. De Repub. l. 1. c. 4.* Busbeq; *Epist. 3. p. 118.*

^e C. 9. f. 9.

“men are, for the most part, allow'd to provide for themselves in these respects, with more Plenty and more Ease, than Persons of that low precarious Condition, whose Constitution often suffers by their hard Fare, and unreasonable Labour². Again, Freemen do in this shew their eminent Advantage above Slaves, that they are admitted to the more honourable Offices in Families and Commonwealths; and that they possess Superfluities in a far larger Measure. Both which Privileges are wonderfully pleasing to Men of lofty Spirits and Designs. For the Trouble of Business is soften'd and sweeten'd by the Honour and Credit of an Employment; and to swim in Affluence, is ever esteem'd a most valuable Happiness; as well, because we seem by this means to be well provided for, against all future Accidents and Occasions; as because our Life will thus pass the more smoothly, and we shall have larger Ability of doing Kindnesses, and gaining a numerous Party by our Benefactions. But the main Distinction of all is this, that free Subjects are only engaged to obey the supreme Power, and the general Laws of the State, and fearing no Punishment, but what is by them particularly denounced, in all other things they follow their own Fancy with full Delight and Satisfaction. But Slaves are obnoxious to the private Commands, and to the coercive Power of their fellow Subject, and are compell'd to bear his Humour, though the most froward or imperious; which is the greatest Hardship, by reason of their near Abode, and frequent Intercourse with their Master. And to render their Bondage still more grievous, the publick Laws do seldom afford them Relief against their Master, unless in Cases of most barbarous Severity and Cruelty. The more soft and gentle a Man's Nature is, the more must he be afflicted under these uneasy Circumstances³. We may add, that the Yoak of Servitude is much the more galling on account of human Pride; which encourages every Man to think himself worthy of Command; and thus when the Slave esteems himself altogether as fit, if not fitter, to bear Rule than his Master, he fancies that Fortune hath done him a mighty Injury, and desires on any Terms to change his Condition^b.

XI. A Slave may obtain Freedom several ways: As first, if his Master formally release

him; for what Right the Slave before transferr'd on his Master, the Master may restore to him again. Though it be customary, in many States, that the Slave, thus releas'd, shall still yield some kind of Duty and Reverence to his Master^c. In case the Master own'd a Superior, he cannot otherwise bestow Liberty, than in a way consistent with the Rights of that Superior, and with the publick Laws. Secondly, if his Master renounce and discard him: which, in Commonwealths, is reckon'd a kind of Punishment; and differs not from Manumission or formal conferring of Liberty, in the Effect, but only in the Manner and Design. In both Cases the Master resigns his Right; but in the former, by way of Reward; in the latter, by way of Punishment: for that it is a real Grievance and Affliction to lose a wealthy and convenient Master, even free Servants are often sensible. Thirdly, in case a Slave be made a Captive, whether alone, or together with his Master, his new Servitude extinguisheth his old. But if the Master be only made a Captive, the Slave falls into the same State and Condition as he would do, were his Master naturally dead, at least till such time as the Master be restored to Liberty. Fourthly, a Slave may be releas'd upon uncertainty of a succeeding Possessor^d; as suppose his Master dies without making over his Right to any other; because then he is under no Engagement of performing Service. For no Man is supposed to stand oblig'd, unless he can know the Person to whom the Debt is to be paid. But whether a Man, thus releas'd, can claim the Privilege of a free Subject in a Commonwealth, is a Question that the particular Laws and Customs must determine. Some tell us, that amongst the *Turks*, the Act of setting a Slave at Liberty will hold good only against his old Master, but that any other Person may again compel him into Service. Another Case when a Slave may be releas'd, upon the uncertainty of a succeeding Possessor, is, if his Master dye, either in a natural or civil Sense, without an Heir. For the Goods of such a Man are adjudg'd derelict, and pass to the first Seizer; yet his Slave cannot be forced into a new Service by the same Claim. Things may be laid hold on by any Man, if no other hath already a Right over them; but Persons cannot be challeng'd by any other Title, than what ariseth from their own Consent, or

² It is a Saying of TULLY (De Orator. l. 2. c. 6.) *Mibi liber esse non videtur, qui non aliquando nihil agit.* I don't look upon him as properly Free, who hath not sometimes the Privilege of doing nothing.

³ Yet there is a great Difference in Masters. In *Terence* (*Eunuch*. Act. 3. Scen. 2. v. 33.) a guess is made from the Slave, that his Master is poor and miserable. But on the other side, as *Juvenal* observes (Sat. 5. v. 66.)

Maxima quæque domus servis est plena superbis;

Great Families are plagued with haughty Slaves.

^b In *Xenophon* (*Cyropæd.* l. 8.) *Chrystantas* seems to establish some such kind of Difference. In the same manner, says he, as we think it reasonable to be obey'd by those under our Command; let us yield a ready Obedience where it is our Duty. Yet there should be this Difference between Subjects (as we are) and Slaves, that whereas those are compelled to their Labour and Service, we ought to perform our Devoirs with Readiness and willing Compliance. Add *Dion. Chrysost.* Orat. 14. De Servitute.

^c *Lex Wisigoth.* l. 5. t. 6. c. 17, & 21.

^d *Vid. Grot.* l. 2. c. 9. f. 1.

from some antecedent Deed, in which they are concern'd. And therefore, that Right being now extinct, which the Victor by War obtain'd over his Slave, natural Liberty returns: And this, although the Disposition of the Person should make it more proper for him to continue in Servitude; for the Fitness of a Man's Temper, or Inclination can by no means give another a Right of dragging him into Bondage, nor is it always lawful for me to force a Person upon that which is really for his Interest and Advantage. Fifthly, When a Slave, not by way of Punishment

¹ or on account of any preceeding Offence, is thrown into Irons, or otherwise deprived of corporal Liberty, he is by this Act releas'd from his former Obligation by Compact; for his Master is supposed to take off his moral Bonds, by thus imposing natural. It is inconsistent with Covenant, not to believe the Party covenanting, and that Faith cannot be violated, which was not given. And hence a Slave under this Treatment may, if Opportunity favour him, without incurring the least Guilt, make his Escape.

Mr. BARR. NOTE on § XI.

² We must take great notice of this Restriction, for it may serve to rectify Mr. HOBBS's Notions, especially if he were of that Opinion, which another Author of that Nation charges him with, *Richard Cumberland, De Legibus Naturæ* Chap. 9. § 14. See what has been said above, *Lib. 3. Cap. 6. § 9.* and *Chap. 7. § 5.* Our Author has borrow'd all this Paragraph of *Hobbes*.



THE

LAW of NATURE

AND

NATIONS.

BOOK VII.

CHAP. I.

*Of the Causes and Motives inducing Men to establish
civil Societies.*

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| <p>I. <i>Introduction.</i></p> <p>II. <i>Man naturally loves himself more than Company.</i></p> <p>III. <i>Yet the love of Company does not immediately infer the love of civil Society.</i></p> <p>IV. <i>Many Vices in Man prejudicial to civil Union.</i></p> <p>V. <i>Whether civil States arose in the World by natural Consequence.</i></p> <p>VI. <i>Whether Indulgence was the Cause of civil Establishments.</i></p> | <p>VII. <i>The true Origin of civil Government.</i></p> <p>VIII. <i>The bare reverence of the Law of Nature not sufficient to secure the Peace of Mankind:</i></p> <p>IX. <i>Nor the sole force of Arbitrators; or of Co-venants.</i></p> <p>X. <i>Difference in Opinion greatly prejudicial to the Peace of the World.</i></p> <p>XI. <i>Men need a much more severe Restraint, than the Law of Nature only.</i></p> |
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AFTER those which are term'd Primary Societies ¹, we come now to treat of a Commonwealth ², which is the last and most perfect Form of Society, and that whereby the best Provision is made for the Safety of Mankind, since their Increase. What induced Men to quit their primitive way of living, in separate Families, will be evident, upon our Enquiry into the Nature of civil Society, and the Disposition of those who compose it. For the better Illustration of which, it will be of great Use to examine the Accounts that are commonly given of this Matter.

II. And here the Generality have recourse to the peculiar Frame of human Nature, by which Man is supposed to be so strongly inclined to a civil State, that he would neither be willing nor able to live without it. This they confirm by Arguments drawn chiefly from the Miseries of a separate Life; the wearisome Condition of Solitude; the Ends of Speech, which would be lost without Company; the natural desire of Conversation; the Advantage of uniting together; and the like: which we have before ^b alludg'd, to prove Man a sociable Creature, from the relation that there is between Society ¹ and

Mr. BARBEYRAC'S NOTE on Chap. I. § I.

¹ See above in B. 6. c. 1. f. 1.

§ II. ¹ This is not the immediate Cause of the forming of civil Societies, as it appears by what our Author says at the third Section, and in the long Note on the seventh; yet it is certain, that Mankind naturally love Society: and he himself proves it in his second Book. But if any one has a mind to see a larger and more exact account of this Matter, at all some Thoughts quite new, and express'd in the most lively and justest Manner in the World; he need only read a Book translated from *English*, and printed at the *Hague* in 1710. entitled, *Essai sur l'usage de la Raillerie & de l'Enjoûment dans les Conversations qui roulent sur les matieres les plus importantes*, p. 94, &c.

^a *Civitas.*

^b B. 2. c. 3. f. 15.

the nature of Man. Mr. *Hobbes* ² on the contrary represents Man as a selfish Animal, whose Kindness chiefly terminates in his own Person and Interest ³, and whose Love for Society and other Men is Secondary, being entertain'd with a View of serving his own Pleasure or Profit by their Assistance ³. For no one (as he argues) was ever determin'd in the Choice he made of another's Company, by the bare Consideration of his being a Man, but by some Prospect of Honour or Advantage from his Acquaintance, preferable to what he could expect from the Acquaintance of any besides. This he endeavours to illustrate, by deduction from particular Societies. "They who unite in a Body for the promoting of Traffick, are led to it purely by the Hopes of advancing their Goods more in Conjunction with others, than they could by their private Industry: and what ever disappoints, or puts an end to these Hopes, prevails with all, but Fools or Madmen, to put an end likewise to the Society. So where any are joint Commissioners in a publick Office, they contract a sort of Law Friendship, implying in it more of mutual Fear than Love; and consisting rather in Forms and Ceremonies, than in any sincere Union of Minds, and Combination of Affections. So that such Men may sometimes bandy together in a Party or Faction, for the sake of carrying on some private Ends; but to a generous and dis-interested Friendship they are commonly utter Strangers. Nor will any one of these, if he dare rely on his own single Strength for accomplishing his Aims, ever trouble himself about Associates. Again, when Persons meet upon the common Design of passing the Time away pleasantly, 'tis a mighty Satisfaction that each takes in making himself and the Company merry: in which he cannot succeed without exposing the Faults or Follies of other Men, in Cases suppos'd not to reach himself. (For prudence would never allow him to censure that in another, of which he was not himself acquitted in his own Conscience: according to *Juvenal's* Rule;

" *Loripedem rectus derideat, Æthiopem albus* ⁴.

" Let him cry filthy Black whose Skin is white;
" And Bandy-legs, who treads himself upright.)

Mr. T A T E.

Mr. BARB. NOTES on § II.

² *De Cive*, c. 1. § 2.

³ Here we may observe, as well as in other Places, that our Author agrees with the Sentiments of Mr. *Hobbes*.

⁴ *Sat.* 2. v. 23.

^a *Jæus*, *Orat.* 2. No Man values others more than himself. *Euripid.*, *Mædia* v. 85, 86.

-----All agree
In this first Maxim of Philosophy:
That Love begins at Home.-----

Isocrates, *de Pace*, p. 285. *Ed. Paris.* In my Opinion, 'tis the common Desire of Mankind to advance their own Profit; and their common Labour to possess more than these about them. ^b *Arrian*, *Epictet.* l. 2. c. 22. "Suppose in a Dispute who was the chief Philosopher, One should tell you, he heard a judicious Friend say, that you were certainly the Man: Would not your Heart swell with the ample Testimony, and enlarge its Dimensions at the blast of Fame? But what if another ill-natur'd Critick should give such Instructions as these; *Why do you lose your time in hearing this Pretender to Wisdom? What does he know? Perhaps he has learn'd his first Principles, but I will venture him for getting a Step farther: Why, you'd be Thunder-struck with this mortifying Sound; you'd be put to't to keep your Colour; and would have only Spirit enough to say, I'll shew him what a Man he has affronted, and what a Philosopher he has under-rated.* Add. *Charron de la Sageſſe*, l. 1. c. 36. § 6.

" Therefore, for any one to deride others, is, in effect, to declare his Contempt of them in respect of himself, and a certain malicious Design of setting off his own Lustre by their Blemishes. Even with them who keep within the Bounds of innocent Mirth and inoffensive Raillery, there is none but aims more at his own Satisfaction, than that of other Men: nay, such as make a Profession of diverting those about them, mean nothing more than, by shewing their Wit, to recommend themselves to the Company. Besides, most Men have naturally an itching Desire to be examining, censuring, and exposing the Words and Actions of others; which, if they have frequent Occasion of gratifying, they look upon it as a notable Ingredient in the Pleasure and Happiness of Life. And this Humour 'tis a difficult thing to suppress, or keep within Compass, by the Provision made against it by Laws and Penalties ^b. Lastly, suppose some, that pretend to more Knowledge and Wisdom than ordinary, met together to confer about Matters of Learning; each Man is for prescribing his own Opinion to the rest, and finding his Abilities or Authority disputed,resents it as the most heinous Affront. Whence it plainly appears, that all Society, or Intercourse, between such Men, is founded on the Design either of supplying their Wants, or of gratifying their Vanity, or of finding Diversion and Entertainment. The same is asserted upon another Argument, taken from the Definition of the Will, and of what is good, honourable, and profitable. Societies are introduced among Men by their voluntary Consent. Now where there is an Act of the Will, there is of necessity an Object of that Act; which Object is always some supposed good to the Agent. For be a thing never so good in it self, yet if it be not so likewise with respect to us, it loses all its Influence on our Powers of acting. Thus, for Instance, did Matters go never so well with the King of *Persia*, I should not look upon my self as having any Share in his good Fortune, All good is attended with some Pleasure, either of the Mind alone, or of the Body in Conjunction with it. That of the Mind is either the Passion of Glory, or what may ultimately be resolv'd into such a Principle. That which affects the Body is Profit: which proves all Society to have first commenced upon the

Score either of Profit or Glory; that is, upon account of Love to our selves, exclusive of all others. However 'tis certain, that Glory cannot be a lasting Foundation of Society for any number of Men; because, in Glory, as in Honour, where the Title to it is general, there is in effect no Title at all: the very Nature of Glory consisting in the Opinion of some Advantage⁵, which, upon Comparison, we appear to have above the rest of the World. Neither does our joining in Society with others give us any farther occasion of Glory, than our Alliance with Men of great and extraordinary Virtues, may seem to argue a Parity of Worth in our selves. For otherwise a Man is valued in Proportion to that Ability he has of supplying his own Wants, without depending on the Aid of his Fellows⁶. It must be confessed, that by mutual Assistance the good of human Life is highly promoted. Yet to have the Service of other Men at our Command, would seem much more easy and agreeable: As amongst the other Conveniences and Helps of Living, that is still prized above the rest, which serves to more Purposes, and is purchas'd, or preserv'd with less Cost and Trouble. Whence we may conclude, for certain, that Man would be more inclin'd to Empire than to Society; that is, would much rather command absolutely, being himself exempted from all Obedience, than be oblig'd to any such exchange of good Offices, as seems to be required in a sociable Life: were it not that he is restrain'd from acting after such an arbitrary manner, by the Danger which he apprehends from so violent Resolutions⁷.

III. But altho' it cannot from hence be concluded (as we have before observ'd¹) that Man is not by Nature a sociable Creature; yet allowing him a natural Desire of Society, since this may be gratified by the primary Societies already described, this infers not his Desire of civil Society, any more than his general Love of Employment bespeaks his Affection for that of a Scholar, in particular. ^b Aristotle says, *That Man may be rather term'd a conjugal Animal than a civil; as a Family, in Necessity as well as in Time, is antecedent to a Commonwealth; and as the Propagation of Race is the most common Labour of*

Animate Beings. This is what Mr. Hobbes proves in the following manner. Civil Society consists not in a bare Assembly of Men; but in an Assembly combined together by mutual Leagues and Covenants. The Force of these Covenants ignorant People and Infants do not at all apprehend; nor is their Use discover'd by those who never felt the Mischief of living without them. So that the former are utterly incapable of instituting a civil State, as being ignorant of its Nature; the latter are wholly regardless of it, as not being any way sensible of its Benefit, or at best they live under it in a manner, that testifies no Esteem of its Excellence and Worth. And therefore all Men being born Infants, are by Birth unqualified for civil Society, and so a great Number of them remain to their dying Day: And the rest are formed and adapted to it by the Force of Discipline, not of Nature. Neither is the Credit of this Doctrine shaken by that known Maxim of Aristotle, that *Man is born, or is by Nature, a political Creature.* For, sometimes, affirming a thing to be such or such by Nature, we denote it to be actually endow'd with some Quality, without any antecedent Act of his own, or of any one else, by which the Quality might be introduced. In which Sense a Fish is endued with the Faculty of Swimming, a Bird of Flying, and an Oak of bearing Acorns. Sometimes the same Expression signifies a fitness in the Thing to receive some Perfection by Culture and Discipline; the Reception of which Nature seems to intend, or at least to approve, as agreeable, or, however, no ways repugnant to its Temper and Frame. Thus, a Horse has the natural Faculty of prancing, which an Ass has not; a Parrot of prating; a Field of bearing Corn, and a Hill Vines; a Man of discoursing, and of learning divers Arts and Sciences: In which Sense, also, we shall hereafter demonstrate him to be a political Creature, notwithstanding his being born an Infant: since we are wont to take our Measure of what does, ^c or does not, agree to Man by Nature, from what he appears to be in his grown Estate, and under his full Use of Reason². Aristotle³

⁵ See B. 8. c. 4. l. 11.

⁶ See the History of CALVISIUS SABINUS in SENECA'S Epist. 27.

MR. BARR. NOTES on § III.

¹ B. 2. c. 2. l. 7. &c. and C. 3. l. 16. &c.

² This is according to our Author's own Observation; that the Words *by Nature* do not here import the actual Existence of some Quality in a thing, with which it is endow'd by Nature, independent of any antecedent Act or Operation of his own, or of any other else; but only an aptness or Disposition to receive certain Perfections, by Improvement and Education, with which Nature designs to adorn it, or which at least she seems to approve of, as being agreeable, or however not contrary to it: Make and Constitution. Besides, we must observe, that ARISTOTLE sometimes uses the Words ζῷον πολιτικόν in a large and general Sense, to denote simply a *social Creature, or one made for Society*, and not strictly for *such a one as has a natural Inclination for Society*, and is exactly by Nature framed and fitted for it. The word *sometimes* is an Addition of mine: I know not whether I have in this closely followed my Author, but thus he ought to have express'd himself at least: For in the Passage which himself has quoted in the beginning of this Paragraph, it evidently appears that ζῷον πολιτικόν is a *Creature made for civil Society*, since 'tis oppos'd to ζῷον συνδραστηρικόν, or a *Creature made for the Society of Marriage*.

³ Arrian. Epist. l. 3. c. 24. "No Creature is engaged with so deep an Affection to another's Person, as to his own Profit. whatever stands in the way of this, whether Father, or Brother, or Son, or Lover, or Beloved, he hates and rejects with Curies and Scorn. For so has Nature appointed, that the strongest Charm should be our own Interest. This is our Father, our Brother, our Kinman, our GOD. Wherefore if we refer to one and the same End, our Profit, our Piety, our Honesty, our Country, our Parents, and our Friends; all are secured. But if we measure our Profit by one Standard, and our Friends, our Country, our Relations, our Justice it self by another; in this Case, Profit turns the Scale, and all other Considerations sink and are out-weighed. For I and Mine, are words which never fail to draw the animal Nature after their Charm. Did you never observe (says he a little before) *Wheels playing and faconing upon each other as the very Patterns of Love and Affection? But would you know how long-lived this Endearment is? The Experiment will cost you no more than a Bane.* Tully, Off. 3. *That every Man should procure the Necessities of Life, for himself rather than any besides, is an allow'd Privilege, and such as natural Inclination does by no means oppose.* ^b Ad Nicom. l. 8. c. 14. Vid. Digby & Origine Mandi, c. 9. l. 8. l. 85. ^c Vid. Cumberland de LL. Nat. c. 2. l. 2.

says in the same Work ^a, that a *Man is by Nature a political Creature, and therefore would desire the Company of others, though he did not stand in need of their Assistance.* But now his Affection for *civil Government* can never be infer'd from the bare desire of *Company*; since this, as was observ'd, may be equally gratified by *primary Societies*, such as may well be suppos'd without admitting a *Commonwealth*. So again, the Philosopher ^b proves Man to be a *political Creature* from the Reasons of Speech, which else had been assign'd him to no Purpose: whereas, the use of Speech is not confin'd to a *Commonwealth*; Men having lived and conversed together, long before the Institution of Government. In like manner, is to be understood that Passage in his first Book of *Ethics to Nicomachus* ^c: *That God may deserve the Name of perfect, which appears to be sufficient; and that we call sufficient, which answers not only to the Wants of a single Man in a solitary Life, but those of our Parents, our Wife, our Children, our Friends, and fellow Subjects: Ἐπειδὴ οὐτεὶ πλιπὸς ἀνθρώπου, Because Man is by Nature a political Creature.* And yet, there is room for the several Relations of Parents, Children, Wife, and Friends, without supposing a *Commonwealth*.

IV. For the clearing up of this whole Matter, we ought to consider, what that Condition is which Men enter into, upon their erecting a civil State; what Qualities they are which may entitle them to the Name of *political Creatures*; and lastly, what there is in their Frame and Constitution which seems (if we may so speak) to indispose them for a *Civil Life*. First then, whoever enters into a *Community*, divests himself of his natural Freedom, and puts himself under Government, which, amongst other things, comprehends the Power of Life and Death over him, together with Authority to enjoin him some things to which he has an utter Aversion, and to prohibit others, for which he may have as strong an Inclination; so that 'tis possible he may often, in obedience to this Authority, be oblig'd to sacrifice his private Good to that of the publick. Whereas, were Man to follow his natural Inclinations, he would be subject to no Body, but live wholly at his own Discretion, and

make his private Satisfaction and Interest the scope of all his Actions. Some weighty Motives there must needs have been, and such as amounted almost to Necessity, that could persuade him to overcome these so very soothing Desires. Man, therefore, first embraced civil Society, not as led to it by the Bias of Nature, but as driven by the Fear of greater Evils. The name of *political Creatures*, or good Members of a State, may be truly applied to those who promote the common Welfare to the utmost of their Power, and freely prefer it to any private Consideration; nay, and even measure their private ^d Good by the Relation it bears to that of the publick; and, lastly, at all times, demean themselves with Kindness and Courtesy to their Fellow-subjects ^e. But no one, now, is so little acquainted with human Nature, as not to know how ill-qualified the Generality are for discharging such a Part, it being evident, that very few do acquit themselves in all Points of their Duty; that Nothing, besides the Fear of Punishment, could keep the greater Number in any tolerable Order; and that very many continue all their Life long, *impolittick Animals*, or, which is the same thing, evil Subjects. Nay, it may be affirm'd, that no Creature is more fierce and unruly than Man, or exposed to more Failings, which tend to the Disturbance of Society. Beasts sometimes contend about their Food, and then 'tis only in the Case of Scarcity; sometimes again they enter the Lists, at the Instigation of their Lust, which yet has only its Seasons of returning. But be they of never so savage a Disposition, they seldom express it against their own Kind. Whereas Men quarrel with Men, not only as excited by the Stings of Hunger, and by a Lust so vigorous as never to be out of Season, but by other Vices and Passions, unknown to Beasts, and often repugnant in Nature one to the other. Of these, the chief are an endless Thirst after Things superfluous ^f, and Ambition, the most pernicious of all Evils; of which, as no Creature seems to have any Sense, excepting Man, so he has the most lively and tender Sense imaginable: while, in the mean time, 'tis the Pri-

MR. BARB. NOTE on § IV.

^a That it is to be understood in a *negative Sense*, and not always in a *Positive*; I mean, that if a thing is but in the least prejudicial to the Welfare of the State, a Subject ought to forbear doing it, what private Advantage soever he might make of it to himself. But for all that, there may be some things that a particular Member may make an Advantage of, which are neither prejudicial nor serviceable to the State; and in that Case, why should he not mind his private Interest? 'Tis in this Sense, that we must take the following Passage of CICERO *de Offic.* Lib. 3. Chap. 27. *Pote! autem quod inutile Republice sit, et cuiquam civi utile esse?* Can a good Citizen think that advantageous to himself, that is prejudicial to the State?

^b L. 3. c. 8. p. 345. ^c Polit. I. 1. c. 2. ^d C. 5. ^e Arrian. Epistol. A. 2. c. 10. *What then is the Duty of a good Citizen? That he measure nothing with respect to his own private Advantage; that he consult about nothing, as if he were a Land disfranchis'd from the rest of his Kind. But, that he so behave himself, as the Hand or Foot, if they were endued with Reason, and understood the Order of Nature, would never entertain any other Motion or Desire, than what was directed to the good of the whole Body.* Herodotus observes of the Persians in *Clio*, that those who sacrificed amongst them, did not put up Prayers for themselves and their own private Happiness; but in behalf of the whole Nation, and of the King in chief. ^f *Ennius* in *Catullus*. "The Love of Money, and afterwards, that of Empire were the source of all our Mischiefs. Covetousness, subverted Fidelity, Probity, and other worthy Endowments of Soul; introducing in their stead, Pride, Cruelty, "Providence" together with a common Sale and Market of all things. Ambition engaged its numerous Votaries to "set up false Colours; to have one thing in their Mouth, and another in their Mind; to measure Friendships and "Enamours, not by Reality, but by Advantage; and to endeavour more the keeping a good Face, than an honest Heart."

vilege of Brutes to be moved at nothing, but boldly Sufferings. Add to this, that quick Resentment of Injuries, and eager Desire of Revenge; an Evil less common and less active in Brutes. And, what is worst of all, Men pursue the Ruin of each other with so much Industry, that of all the Mischiefs to which human Condition lies open, the most Part are owing to their own Malice. Nor may it unreasonably be ascribed to the peculiar Care of divine Providence, that Men advance to Maturity so much slower than Beasts; to the End that they may, by length of time, be in some measure broken of their fierceness and haughtiness of Temper, and brought to an Accommodation with different Dispositions. Otherwise, supposing Man to be put immediately in Possession of his full Strength, the Forest could shew nothing so untractable ^a. What Mr. *Hobbes* ^b observes, concerning the Genius of Mankind, is not impertinent to our present Argument: that all have a restless desire after Power; not because they really wish to be advancing still to higher Degrees of Command, or that they may not, in their own Temper, be satisfied with a moderate Portion of it; but because they have no way of being secured in the Possession of what they already enjoy, but by farther Acquisitions: the old Stock being ever spending, and therefore ever requiring new Supplies. And this End being accomplish'd, there again succeeds a fresh Desire, either of Fame by new Conquests, or of ease and sensual Pleasure. Moreover, Competition for Riches, Honour, Command, or any Prerogative and Power above others, inclines to Contention, Enmity, and War: the way, by which any one Competitor may arrive at his Hopes, lying through the Death, or Defeat of his Rival. It may farther be urged, that whereas in Brutes of all Kinds, there appears visibly a great Affinity of Desires and Propensions; with us, there is not more Diversity of Men, than there is of Opinions and ways of living; each of which is cry'd up, with a wonderful Perverseness, by the several Patrons of them, in Preference to all besides: a Thing sufficient, of it self, to make Disturbances in

any Multitude; who are to unite in a Society ^c. So far it is therefore from true, that Man is by Nature a *political Creature*, or by Birth is fitted for the Discharge of *civil Duties*; that 'tis as much as can be done, to train up some few, by long Discipline, to a tolerable Behaviour in this Respect ^d. Not to mention the Vices of the vulgar Sort (who are the greater Part of Mankind) so often enlarged upon by other Authors ^e. So that a thorough Knowledge of human Malice and Fraud, in order to the avoiding and disappointing them, makes up a very considerable Part of civil Prudence ^f. From what has been said may be sufficiently gather'd the Sense and Import of this Expression, that Man is by Nature a *political Creature*: by which is meant, not that all and each of us are fitted by Nature for sustaining the Part of good Citizens; but that some, at least, by the Force of Instruction and Discipline, may be so formed as to acquit themselves well, under that Character; and that since Men have increas'd and multiplied, civil Societies are absolutely necessary to their Safety; for which as they are by a natural Principle engaged to provide, so they have the same natural Obligation to enter into regular States and Governments, the chief Benefit of which Institutions is, the habitual Exercise of an orderly, decent, and friendly Life.

V. *Hornius* ^g calls a Commonwealth *the Work of Nature*, and accounts for its Rise in a natural way: As, that the first Pair, from whom descended the whole Race of Mankind, were united by the Bonds of conjugal Love, and their Children by those of natural Affection, to them and to each other; that these Engagements founded a Family, which by constant Increase from new Births, with that Love of Society implanted in Men by Nature, and improved by Neighbourhood and Alliance, at length furnish'd out a civil State; it being absurd and senseless to imagine, that Men were once dispers'd in Woods and Deserts, and there led a Vagabond Life like the Brutes about them. But admitting the Origin of Commonwealths, according to this natural Account; yet to exclude all Com-

^a See Proverbs xiii. 24. xxxiii. 13, 14. Ecclesi. xxx. 1, &c. 12.

^b *Leviath. C. XI*

^c *Euripid. Phœnij. v. 502, &c.*

If what is Good, or Beauteous, always fore
The same conspicuous Marks to mortal Eyes,
Men would be Friends, the World a peaceful Scene,
But Name and Species only join us now:
Differing in thing, and clashing in Desire.

^d Plato de LL. l. 6. p. 864. Ed. Weck. *We affirm Man to be a mild and tractable Creature. And indeed, if, besides the Frugeness of Nature and Birth, he obtain the Benefit of good Institution, he becomes most gentle, lively and civil. But upon an insufficient Education, he grows the fiercest Animal of all that the Earth breeds.* Arist. Pol. l. 1. c. 2. *As Man, if properly perfected, is the best and noblest of living Creatures, so, if estranged from Law, and Justice, and Virtue, he is the worst and most contemptible.* Idem. ad Nicom. l. 2. c. 1. *in fin.* *'Tis not an indifferent Matter whether a Person has been thus or that he be torn'd from his Youth: but rather 'tis a Point of the greatest Consequence, and upon which all depends.* *Idem. l. 7. c. 1. in fin.* *Of Men, left to himself, would do a thousand times more Mischiefs to a Beast.* Add. Sen. Epist. 103. *Pol. l. 1. c. 13.* *A Man exceed other Creatures in Craft and Cunning, so they may many ways render themselves the worst of all that breathe. Other Animals being govern'd wholly by bodily Pleasure, are by that alone led into Fallings and Disorders: but Mankind, who are distracted with Variety of Opinions, offend as often through Perverseness of Judgment, or a heat of Thought, as through Frailty and Imperfection of Nature.* Laërtius de Vita Dei, c. 12. *What could be more fierce and cruel than Man, if living under no Restraint of a Superior, he might evade or despise the Authority of Law.* Plotin. in Clem. p. 884. D. Ed. Weck. *Were Power added to Passion and Inclination, Man would be the wildest thing in Nature.* ^e *And Mornay de Ver. Relig. Christianæ, c. 16.*

^f See Bacon's Adv. of Learning, b. 2. c. 2.

^g *De Civitate, l. 1. c. 4. t. 6.*

parts, and all other Motives from a Share in their Institution, is no less irrational than to say, that because a Seed grows up to a Tree, and because a Tree is cut out into Planks and Beams, and these, rightly framed and compacted together, compose a Ship, therefore a Ship is the Work and Product of Nature; without allowing the Labour of the Artificer, or any other particular Cause, to conspire in erecting that sort of Fabrick. We therefore readily acknowledge it for false and fabulous, whatever is fancied of a great Number of Men first assembled together, when dispers'd into Woods and Deserts, and after that reunited into one Commonwealth. But then their Opinion is better grounded, who suppose Mankind, from the primitive Couple, or from four Families after the Deluge, to have fallen immediately into the Order of civil State. For, however a Father might keep his Children under his Care, and the same common Roof, till such time as they came to Years of Maturity: yet since, in those first Ages of the World, they lived altogether on Tillage and Pasturage, when Children were married, the Father had no Reason to detain them longer. On the contrary, we are inform'd by Scripture, that it was usual for them, when arrived at an Age proper for taking the Care of a Family upon them, to separate and choose out new Habitations; especially while the World was yet unstock'd, and while the Pleasantness of the Scene invited them to distant Quarters ^a. Nor was it peculiar to Sicily of old, to have such Inhabitants as *Homer* ^b describes;

Τοῖσιν δ' ἔτ' ἀγοραὶ, &c. —

*No Councils they, nor Courts of Justice hold,
But on some Mountain's Top in Caves grow old.
Each o'er his Wife and Children Empire bears,
And none beyond his Cave extends his Cares.*

There is, it is granted, a natural Affection between Brethren; yet not such as excludes their Desire of living rather upon the Level, than with any Distinctions of Superiority amongst them; neither such as does convince us, that their Friendship could not be long-lived enough, supposing their Effects to be distinct and separate. So that, according to this Account, the Propagation of Mankind must rather tend to the increasing their Division, than to the uniting them in Society. But when the wiser Part began to consider, that, by their assembling into

one Body, the Inconveniences attending separate Families might be removed, they hereupon thought it not sufficient to agree together upon entering upon the same Covenant, and submitting to the same common Power, unless, for their better Convenience and Security, they likewise agreed to contract their Dwellings, and, for the future, confine them to the same Place. And, in this Sense are we to interpret those Authors, who suppose Men, from being dispers'd about in the Woods, to have been afterwards assembled and united together by the first Founders of civil Government.

VI. Some make the Wants and Necessities of Men to be the principal Cause of their framing political Societies; upon a Prospect of living in better Fashion and greater Plenty, when united together, than they could possibly do in a Condition of Solitude. In which Account thus much is certain, that were Men left alone, each to shift for himself destitute of all Help from others, no Creatures could be more exquisitely miserable. On the other side, 'tis undeniable, upon the Institution of Commonwealths, human Life grew refined to a Degree of Luxury and Delicacy ^c. But notwithstanding this, it seems evident to us, that Necessity was not the sole, or the principal Cause of Commonwealths, howsoever *Plato* ^d may favour that Opinion: Since the Arts of making Wine, of providing Cloaths, and of turning Ground to Pasture and Tillage, being even then known, while Men lived as yet in separate independent Families; there seems already to have been a sufficient Provision made for all the Necessaries of Life ^e. For let us suppose a Father of a Family possess'd of a large Portion of Land, and well stock'd with Servants and Cattle, what could such an one want for his Support? What, at least, that might not be supplied by the means of Commerce ^f? In like manner, as it is now usual, for different Nations to import from each other any sort of Commodities, for Use and Pleasure; without thinking it necessary for that Purpose, to unite together under the same Government and Constitution. And Instances may be given of People living for many Ages, under civil Establishments, in a Condition no way superior, for Plenty and Abundance, to that of the Fathers of Families in antient Time ^g. So that all that mighty Plenty and Luxury, which now reigns in some Parts of the World, seems to derive its Origin from great Cities, rather than from Commonwealths.

^a See *Genes.* xiii. 5, 6, 9.

^b *Odyss.* L. 9. v. 113, &c.

^c *Lactantius, de Opif. Dei, c. 4. n. 20, 21.*

If each Man alone had sufficient Strength to ward off all Dangers, and stood in need of no Assistant: what Society would there be in the World? What mutual Reverence or Respect? What Order? What Reason? What Humanity? What would be more vile than Man? What more extravagant? What more fierce and cruel? But now wwhile each single Person is poor and indigent, and cannot subsist without the help of his Fellows, all desire Society for Ornament and Defence of common Life.

^d *De Repub.* l. 2. p. 598, &c. Ed. *Wech.*

^e See *Genes.* xiii. 2. xxiv. 35.

^f *Vid. Cornel. Nep. Attic. c. 13.*

^g Who therefore might make the same Boast with him in *Valerius Flaccus*, l. 6. ver. 330.

----- *Nec mœnia nobis
Vestra placent, seror Arctoïis nam liber in arvis,
Cuncta tenens mecum: omnis amor iacturaq; plaustris
Sola; nec hac longum victor potiere rapina:
At epulæ quodcumque pecus, quæcumque ferarum.*

I your Imprisonment of Walls disdain,
Who live a Freeman on our northern Plain.
Of little Wealth I boast, but what I wear;
And if the Plough goes well, shall never die with Care.
No other Prize can tempt a Victor's Toil:
Nor shall this long remain an envied Spoil.
Nature purveys for me; the fiercest Beast
True Venison yields, and every Flock a Feast.

Because,

Because, in the Cities, the meaner People, having no Income from Cattel or Land, are forced (for a Livelihood) upon improving divers Arts and Inventions. Which, likewise, are not a little promoted by a Sort of Vanity, common to great Towns, of vying one with the other in Drefs and Finery, and thereby of running out into Extravagance; for the Support of which more Trades are intended, than for the Relief of Man's real Necessi-

ties: which yet civil Life could very contentedly be without¹.

VII. Therefore the true and leading Cause, why the Fathers of Families would consent to resign up their natural Liberty, and to form a Commonwealth, was thereby to guard themselves against those Injuries, which one Man was in Danger of sustaining from another¹. For as nothing, next to Almighty God, can be

¹ See our Author's Dissertation *De Statu Hominum Naturali*, f. 6.

MR. BAYLE'S NOTES on § VII.

¹ This is the Opinion of Mr. DE LA BRUYERE (in his *Caractères* at Chap. *du Souverain & de la République*, p. 319.) "Twas the Injustice, says he, of the first Men, that was the Original and only Source of War; and that put them under the Necessity of submitting to some Power that might settle and establish their Rights and Pretensions: For if they would have been contented with their own, and not have invaded the Rights of their Neighbours, the World would have enjoy'd an undisturb'd Peace and Liberty." Mr. BAYLE (in his *Nouvelles Lettres à l'occasion de la Critique generale du Calvinisme de Mainbourg*, Lett. XVII. Sect. 2.) adds to these some closer Reasons. 'Tis worth the while to regard either to the good or evil to come. They had no other Thoughts than to remedy the Mischiefs they had experienc'd, or which they look'd upon to be near at Hand.-----I cannot persuade my self, that Communities were form'd, because Men forelaw, by consulting the Ideas of Reason, that a solitary Life would be no Honour either to their own Species, or to their Creator, or to the World in general. 'Twas the *present Satisfaction*, and the *approaching Hope of living securely*, or else *Force*, that produced the first Commonwealths; without Mens having had in view Laws, Trade, Arts, Sciences, the enlarging of States, and all the other things in which the Beauty of History consists. They did not foresee these Consequences at the Beginning, and tho' they had foreseen them by the Light of an Understanding free from Passions, it would not have touch'd 'em in the least.-----Mankind are too cold and remiss, when they are spurrd on by nothing but Reason; and the Affairs of *human Societies* would have been but in a very sad Condition, had Men been tempted to have liv'd together only upon this Consideration; *that it is not reasonable for a Creature proper for Society, to live in Solitude*. As the nature and frame of our Constitution is, 'tis only by the means of *Senle* that we must be wrought on and determin'd". We cannot, in my Opinion, but approve of these judicious Reflections: And that the original of States and Empires is partly to be attributed to *Force*, is what we may with great Probability conclude, from the manner in which the Holy Scripture speaks of *Nimrod* the most antient King, and the first Conqueror we have any account of. *This Nimrod*, says *Moses*, *began to be a mighty one in the Earth: He was a mighty Hunter before the Lord; wherefore it is said*, Even as *Nimrod* the mighty Hunter before the Lord. *And the beginning of his Kingdom was Babel, and Erech, and Accad, and Calneh, in the Land of Shinar*, Gen. x. 8, 9, 10. The very Name of *Nimrod* may give us to understand so much, since it is deriv'd from a Word which in Hebrew signifies *to rebel*, and in Arabic to be *obstinate, fierce, insolent*, as Mr. LE CLERC has observ'd. 'Tis probable, that before this Off-spring of *Cah*, there was no Family but what liv'd in an entire independent State; so that the Members, of which it was compos'd, were subject to no Body but to their *Chief* or *Father of a Family*. But when *Nimrod*, contemning paternal Authority, set himself up as a *Sovereign* over People, who either wanted Strength or Courage enough to oppose him, or else who chose rather to submit to his Power than expose themselves to worse Inconveniences, by going to settle in some distant place; then a sort of *Kingdom* was form'd. And therefore our Author is too indeterminate, and too imperfect in his Notions, in maintaining that it was only the fear of being injur'd and insulted that gave Birth to all *civil Societies*. The very Causes of this fear, as Mr. TITIVS observes (*Observation* DXLVII. Numb. 3, 4.) were not in those Days so great, as necessarily to induce Men to form *Political Governments*. For why could they not then have been able to have sufficiently provided for their Quiet and Safety, by several of 'em joining together in Treaties and Confederacies, for the defence of each other against such as should pretend to molest them in the Enjoyment of what they had purchased by their Labour and Industry? These Treaties and Alliances being founded on the mutual Advantages of the Parties concern'd, each would have been induc'd to have observ'd 'em by his own proper Interest; as our Author says himself a little farther in the ninth Section. This is so very true, that a long time after Mankind began to increase and multiply, there were Nations, that for several Age liv'd without Laws, without Magistrates, or without any form of Government. See GRONOVIVS's 2 Note upon GROTIUS, Lib. I. Cap. I. Sect. 1. Nay, even to this Day there are several Examples of it to be found among the People of *Africa* and *America*. See *la Continuation des pensées diverses* of Mr. BAYLE, Artic. cxviii. Besides, those who refer the Rise and Settlement of all States to one general and uniform Principle, such as some suppose *Fear* to be, others the Necessities and *Occasions of Life*, others some other Motives (See *Lactantius Inst. Divin.* Lib. 6. Cap. 10. Numb. 13, &c. *Edit. Cellar.* and *Tacitus Annal.* Lib. 3. Cap. 26.) seem to suppose that in the first Ages of the World, several *Fathers of Families* met together, to consult in what manner they might most commodiously provide for their Security, or for their Necessities; and that upon mature Deliberation, they agreed that it was absolutely necessary for 'em to form among themselves a *civil Society*. Now this Notion is not agreeable either to History, or to common Experience, which demonstrate that all human Institutions of Government had but small Beginnings; that they are at first very rude and defective, and that it is by degrees, and in a long Series of time, that they arrive to any tolerable Perfection. But tho' one could find out, in the Monuments of Antiquity, some Footsteps of such an Assembly, it would be mighty difficult to suppose, that these *Fathers of Families* did immediately form an Idea of *civil Societies*, and did foresee and nicely weigh the Advantages and Inconveniences of it. This is a thing that requires a long Experience, and it is very unlikely that the Plan of so beautiful a Building was design'd and finish'd all at one time; since even now that it has been form'd so many Ages ago, the generality of Mankind know nothing of its Use, its Structure, or its Beauties: it being a Knowledge that even Persons, who have had some Education, do not attain to but by Study and Experience. Our Author himself (in his *Introduction to the History of the States of Europe*, Chap. 1. Sect. 3.) acknowledges that the first Governments were very small and very defective, and that the different parts of *Sovereignty* were not establish'd but by little and little, and one after another. In my Opinion, there is not Reflexion enough made here upon the *Simplicity* of those Times in which *civil Societies* began; and it seems to me, that it is the posture of Affairs at present that our Author has his Mind fix'd upon too much. The World not being as yet very full of People; and Sensuality or Luxury not having as yet infinitely increas'd the Wants, or rather the Desires of Mankind; every one could easily get enough to satisfy himself, and nothing but the most excessive and unruly Malice in the World, could induce a Man to take away his Neighbour's Goods by force. Besides, tho' Ignorance and Rusticity are not, without Dispute, the Parent of Virtue and Regularity, nor were those of the *golden Age*, certainly, better than the People of the succeeding Ages (as Mr. LE CLERC has shewn us in his Comment upon *Hesiod's Theogony*, v. 211.) yet since they were not in those times Masters of any great *Cunning*; and the Rules and Stratagems of War, together with those destructive Instruments that make up what is wanting in the strength of the Body, and render the Wickedness of Mankind more bold and enterprising, were not yet found out, 'twas no difficult matter to secure themselves against Insults, especially by several joining together in a defensive Al-

be more beneficial to Man, than Man himself; so nothing is able to work him greater Mischief; as *Cicero* shews at large in his second Book of *Offices*, cap. 5, &c. Now Man being infested with various Evils, has found out for each a proper Remedy. Sickness and Disease he prevents or removes by the Succours of Physick; Hunger, by tilling and manuring the Ground; against the Severities of Weather he is defended by Houses, Cloaths, and Fire; and by Weapons or Stratagems, against the Fury of wild Beasts. But for redress of those Evils, which Men, at the Suggestion of depraved Nature, delight to bring upon each other, they had recourse to themselves, as the surest Defence, by joining together in one Body, and erecting a civil Society ^a. And when they were once reduced to such Order, as to be secure from mutual Injury, they must of course enjoy a greater Share of those Benefits, which it was in their Power to confer upon each other ^a. And this Account is seconded by those who deduce the Original of Commonwealths from *Fear*. By which we are not to understand the violent Disorder of one in a Fright and Consternation; but only a wary

Provision against future Evils. Of which *Aristophanes* ^b rightly observes, Ἡ ἐπιδόξου σώζει πάντα, *Caution preserves all things*. And by this Exposition of the word *Fear* we avoid all the Force of what is objected, that, had Men been really afraid of each other, they would have been so far from uniting together in a civil State, that they would not have endured each other's Sight, but one flying this way, and another that, would thereby have remain'd in a perpetual Separation. As if *Fear* implied in it nothing but *Flight*, and not also *Diffidence*, *Suspicion*, and *Caution*. Nay, this is one Property of being afraid, the providing against the probable Grounds of Fear. Thus, going to sleep we shut the Doors, for fear of Thieves; when they are shut, our Apprehension is over. We go armed in a Journey for fear of Robbers; and being well armed, fear no more. To which Purpose *Thucydides* ^c observes, that the Custom of wearing Swords, which was generally receiv'd in the barbarous Nations, continued likewise among some People of *Greece*, by the Necessity of antient Times; when as yet they had no Walls to defend them from Enemies abroad, and could not

liance. It will, perhaps, be objected, that if People had not in those Days a great deal of Cunning in carrying on an Attack, neither had they more in making a Defence; and that therefore things were so far upon an equal Foot. But to me it seems, that generally speaking, to find out new Ways and Methods of attacking, requires infinitely more Art and Ingenuity than to defend ones self. There is such an Instrument, or such a Stratagem, against which it is easy enough to be provided; and which a Person that is but moderately prudent, will with the least Difficulty render the Design useless and ineffectual, and tho' the Contrivance of it cost a great deal of Labour; and tho' abundance of Care and a particular Dexterity be requir'd to manage it. In the first Ages, a Ditch, a strong Wall, some large Mastiff-Dogs were a Rampart and a Guard sufficient for a Man's Security. If we do but consider how long they were formerly in taking a Place, even after Battering-Rams and other Warlike Engines, often pretty well contriv'd, that the Antients made use of, were found out, tho the Fortifications were but very indifferent: If we do but observe, that even now-a-days, since the Invention of Artillery, the Besieg'd have much the Advantage of the Besiegers; I am certain we shall be oblig'd to conclude, that in the Simplicity of the first Ages, an Attack must be, without Comparison, more difficult than a Defence; and that therefore a Government had no such pressing Occasions to unite the Forces of several for their common Security. What we have to offer in this Matter is, That in proportion as Mankind increas'd, *civil Societies* were form'd by degrees for different Reasons, more or less imperfect according to the Times, and according to the Abilities of the Founders. Mr. TITIVS (as above, Numb. 6.) conjectures, and 'tis probable enough, that it was the Craftiness of some ambitious Mind, supported by Force, that gave Mankind the first Plan of Governments; and what I have observ'd with respect to *Nimrod*, seems to favour this Thought. Such a *Body Politick* being once form'd, several afterwards join'd themselves to it upon different Motives, others form'd new ones upon the same Model: When there were several of 'em instituted, those who had hitherto liv'd in a natural Independency, fearing to be insulted and oppress'd by these rising States, resolv'd also to form the like, and to choose themselves a Chief. At first these petty Kings were little more than for the determining of Disputes, and for the commanding of Armies. This appears by the History of the Judges, and of the first Kings of the *Israelites*, and by what *HERODOTUS* relates of *Dejoces* King of the *Medes*, Lib. 1. p. 26, 27. *Ed. H. Steph.* see also *HESIOD THEOGON.* vers. 85, &c. & *Oper. & Dier.* vers. 38, 39. And therefore it is that there were sometimes several Kings among one and the same People, as Mr. LE CLERC has not fail'd to remark and to prove from the Testimony of *HOMER*, who mentions several Kings of the *Pheacians*, *Odyss.* Lib. 8. vers. 40, 41. He also quotes a fine Passage of *DIONYSIUS HALICARNASSEUS*, from whence it appears, that the Abuse which Kings made of their Power, oblig'd People to establish *Aristocratical* or *Democratical* Government. Κατ' ἀρχὰς μὲν γὰρ ἅπαντα πόλεις Ἑλλάδος Ἰσπανίας, &c. "At first all the Cities of *Greece* were govern'd by Kings, but not arbitrarily as barbarous Nations were, but according "to the Laws and Customs of the Country; so that he was esteem'd as the best King, who was the most just and the strictest "Observer of the Laws, and who never departed from the Customs of the Country. This is what *HOMER* means, when "he styles Kings, *Men that do Justice*. The little Monarchies thus limited, subsisted a long time upon that Foot, as among "the *Lacedemonians*; but some Kings beginning to abuse their Power, and to govern by their Folly, rather than according to "the Laws; the generality of the *Greeks* would not endure it, and therefore abolish'd this form of Government." *Antiq. Rom.* Lib. 5. Cap. 74. *Ed. Oxon.* I will here add a Passage out of *Isocrates*, where this Orator having a design to compliment the *Athenians*, says, that he will go back to the time, ὅτ' ἐκ τῶν ἑστὶ δημοκρατίας, ἔτ' ἀριστοκρατίας ἔτι καὶ πολιτείας. Ἀλλὰ μὲν πολιτεία καὶ τὰ γὰρ τῶν βαρβάρων καὶ τοῖς πόλιν Ἑλληνίδας ἀπ᾽ αὐτῶν διέκρινε. "When the Name of neither *Democracy* nor *Aristocracy* "was in Being; but *Anarchy* was the only Government both among barbarous Nations, and among all the States of *Greece*." *Panathenaic*, p. 443, 444. *Ed. Paris. min.* See also the Commentators on the beginning of *JUSTIN'S* Universal History; and what is farther said, in *Chap. 5. Sect. 4.* of this Book; Mr. LOCKE has likewise treated of the Origin of *civil Societies* in his second Treatise of *civil Government*, Chap. 7, &c.

^a The Remainder of this Section is taken from our Author's *Abridg. de Offic. Hom. & Civ.* l. 2. c. 5. f. 7.

^a The *Persians* took the true way of demonstrating this; who had a Custom, upon the Death of their King, to live the five ensuing Days without any Law; to the end, *That finding, by Experience, the miserable Effects of Anarchy, the Slaughter, the Rapine, and if there be any thing worse, that accompanied such a Condition, they might be engaged in a firmer Allegiance to their Sovereign for the future.* *Sext. Empir. adv. Mathem.* l. 2. p. 70. *Ed. Genev.* To the same purpose may be applied some of the Reasons, which according to the Account of *Herodotus*, B. 1. induc'd the *Medes*, living before in independent Villages, to invest *Dejoces* with the regal Authority over them.

^c L. 1.

^b In *Acibus*, p. 532. *Ed. Lug. Bat.*

met together without some Fears and Jealousies at home. Remarkable likewise is that Speech of *Pyrrhus* to the *Athenians*, recorded by *Plutarch* in his Life; when being permitted to enter the City, and offer Sacrifice to *Minerva*, upon his returning thence, he said, "That for his part, he retain'd a grateful Sense of their Kindness, and the Confidence they reposed in him; but advis'd them, *not to open their Gates, if they were wise, to any King for the future.* Civil Communities, even in the times of profoundest Peace, do yet fortify their Towns, guard their Frontiers with Troops, and fill their Granaries with warlike Stores; all which would be an unnecessary Expence, did not they apprehend some Danger from their Neighbours: of whom, after these Precautions, they are no longer afraid. So that 'tis the natural effect of Fear, to find out Remedies against it self. And, in like manner, because Men were afraid of each other, they supplied each other with Relief, by joining in a civil State. Of the Force and Efficacy of which those Authors seem to have a deep Sense, who affirm, that, *In Case there were no Courts of Justice in the World, Men would destroy and devour each other*^a. And indeed, that Men have abundant reason to apprehend and fence against mutual Danger, we have in another place^{b c} fully made out: Which is no less true for what *Hornius* objects, *That the Fathers of Families for many Ages lived together on Terms of Equality, without the fear of any such pretended Invasion on their Rights: and that Ambition was but of late growth amongst Men; coming in after the Institution of Commonwealths, and then giving occasion to the Distinctions of Honour and Dignity.* As if it were not Ambition, which occasioned the first Murther in the World; when *Cain* was enraged, that his Brother's Offering should find more Acceptance with God, than his own^d! Besides, Ambition is but one Root of those Evils, which spring in like manner from Perverseness of Temper, and Competition of Desires. Of which, even in those plain and primitive Ages, the former produced that savage and brutish Fierceness in the Race of the Giants; the latter occasioned Strife and Dissension betwixt the nearest Relations^e. In the Breasts of Kings, Ambition, 'tis true, reigns with greater Violence, and transports them to Actions more bloody and cruel; yet we may trace some Footsteps of the same Passion in Shepherds and Rusticks^f. *Hornius* proceeds to observe, That, in those early times, *to provoke others with Words or Blows, would have proclaim'd a Man's Folly as well as his Malice: because this would have given a Right to the Party thus provoked, to take the first Opportunity of killing him. Again, there could be no hopes of Booty amongst People as yet unacquainted with Wealth, and possessing no other Stores but those of Fruits, plenty of which was to be had in other places, with little Pains, and no Danger.* As if the Prospect but of

moderate Gains were not, with bad Men, Temptation enough to do wickedly! Or as if Thefts and Robberies were not as common of Old, as they are at this Day, amongst People living wholly on Grasing and Tillage! Not to say, that the Occasion of founding Commonwealths was not only to protect Men from Robberies, but also from any Injuries, which they might be capable of offering or receiving. What he afterwards affirms is very true, that, *Let the Suspicions of another's mischievous Design be never so well grounded, this will not justify an Attempt upon him, by way of Prevention.* And that Right and Power of all over all, with which Mr. *Hobbes* invests Mankind in his State of Nature, ought to be extended no farther than right Reason allows of; amounting only to this Sense, that Man, in a State of natural Liberty, has a Right to imploy against all Persons, all such means for his Preservation, as Reason judges necessary for him to use, and dangerous to let alone. Wherefore to carry our Caution farther than right Reason shall prescribe, is doubtless a Breach of the Law of Nature. So that he, who on any uncertain Fears kills the Person he is afraid of, when he might as conveniently have escaped from him, must be adjudged guilty by the said Law. Whence they appear to be certainly in the wrong, who imagine that this Principle justifies Rapines and Robberies, upon such as are not open and profess'd Enemies. For Robbery and Rapine plainly denote such Means, as sound Reason can never judge necessary to a Man's Preservation, but such as are rather made use of to serve the Ends of Avarice and Cruelty: it being never alledg'd in Plea for Robbers, that they spoil Men of their Goods in their own Defence. That other Expression seems very ridiculous; *Supposing Hatred and Diffidence to have reign'd never so much amongst Men, yet this could never be said to have happen'd purely for the sake of Commonwealths:* for Men did not therefore hate or distrust one another, purposely that they might constitute a civil State; but they therefore constituted a civil State, because they distrusted or hated one another. And tho' we should allow, as fully as can be desired, that while the Hatred of one Person extended only to some few, who were disagreeable to him, he might at the same time love and favour all others, or at least not be enraged against them; yet if each Man had but his single Foe, this alone were enough to fill the World with Hatred and Dissension. 'Tis therefore a vain Attempt to ascribe the Original of Communities to *the Accidents of Neighbourhood, and the natural Increase of Mankind by Generation.* This last indeed affords a constant Supply, whence civil Bodies are stock'd and maintain'd: in like manner, the former might perhaps give Occasion for Neighbours to join themselves to the same Community, rather than to divide. But the Cause which first moved Men to esta-

^a Comp. *Hobbes de Corp.* l. 1. f. 2.

^b B. 2. c. 2. f. 6, 12.

^c V. *Græc.* l. 1. c. 4. f. 4. n. 2.

^d *Gen.* iv. 4, &c.

^e See *Gen.* xiii. 7. xxvi. 15, 20, 21.

^f *Jud.* viii. 12. 3. 25, &c.

^f *Jos.* 7. Theoric. *Idell.* 5. &c.

bliss Societies, is by no means deducible from these Grounds.

VIII. Nor has any One reason to imagine, that a bare Reverence of the Law of Nature, which prohibits indifferently all sorts of Injuries, could ever have been able to secure the whole Body of Mankind (as consider'd in a State of natural Independency) from mutual Prejudice. Some there are (it must be confess'd) with whom Honour, Justice, Faith, and Innocence are so much in esteem, that they would not violate these Rules, tho' sure of Impunity. Many also may be well represented by that Character which we find in *Aristotle*^a: *Who refrain from Injury upon a Principle of Fear (it being difficult to wrong others, without being likewise wrong'd by others) and who are therefore unwilling either to do wrong, or to receive it*¹. Now, were all Men of this Temper, the Establishment of civil Communities might not appear so very necessary a Work. But, on the contrary, what Numbers are there, who make light of breaking through the most sacred Ties of Duty, whenever invited to injure others by the Prospect of some Gain to themselves, and the Hopes of escaping, by Force or Fraud, from the Hands of the injured Parties? Not to distrust such Men as these, would be voluntarily to expose our selves to their Wickedness and Insolence. *Parum tata per se ipsa prohibita est, says Sallust*^b, *Unguarded Honesty is but an undefensible Hold*. But as it is the part of Prudence to keep a watchful Eye on bad Men, and to make an early Provision against their Attempts; so is that Assertion of *Mr. Hobbes*^c unreasonably harsh, wherein he affirms, *That the Hope of any Man's Security and Preservation consists in his being able, by his own Strength and Cunning, either openly or secretly to be beforehand with his Neighbour in Mischief*. Indeed the generality of Men are so far corrupted, that wheresoever there is appearance of greater Advantage from the Transgression of Laws, than from the Observation of them, they make no Scruple to transgress them: According to that of *Plato*^d; *Whoever conceives it in his Power to do unjustly, readily does so: each Person concluding Injustice to make much more for his private Interest, than Justice could do*. Yet to reproach all Mankind with this perverse Disposition, is carrying the Point and the Censure too far. Nay, by the Confession of *Mr. Hobbes* himself^e, some modest Natures there are in the World, that do not assume to themselves more than they leave to others; always having their Eye on that Rule, *To do as they would be done by*. How any one, upon Pretence of providing for his own Security, could rush upon the Oppression and Ruine of such innocent and excellent Persons, I must, for my part, own my self at a loss to understand. Nor can it ever be, that right Reason should warrant my going to kill or oppress another, of whose Designs to do me hurt I have not had very particular Indications: there be-

ing, till then, many better ways left open of composing Matters amicably. For, as to that Pravity of Nature and Disposition, which is common to the whole Race of Men, and which therefore admits of various Degrees, we cannot, on the account of it alone, conclude a Man an open and profess'd Enemy. 'Tis own'd therefore, that as to the Discharge of natural Duties from others to me, I cannot have it, in a State of Nature, so well secured, as under civil Government: yet neither is it left in so miserable an Uncertainty, as that hereby I must be obliged, or may be permitted, to treat all Men in a hostile Manner. For, while I find my own Strength to be equal or superior to another Man's, and while that Man, by Word or Deed, testifies a Desire of living peaceably with me, and by real Proofs confirms the Truth and Sincerity of that Desire; what reason have I to account him my Enemy? or how can the bare Suspicion, that all this Friendship is but Counterfeit; or that in time he may come to alter his Mind, give me Authority to assault him by way of Prevention? And the Truth of this will appear more evidently, if we look upon the Practice of entire and independent States and Governments, which are, with regard to each other, in a State of Nature. Here all Men agree in judging it a Crime for one Nation, by secret Stratagem or open Force, to attack another (as yet not known by any Exchange of good or bad Offices, nor engaged in Friendship and Alliance by Covenant or overt Act) only because there is no common Power presiding over both, by which the other State, if attempting any injurious Designs, might be restrain'd and punish'd. Which clearly proves against *Mr. Hobbes*^f, that the *Law of Nature is not altogether dumb even in a State of Nature*: tho' indeed there is much greater Security of having this Law obey'd, under civil Government; where the Power of the Magistrate is at hand, to compel those who are wanting in returns of Kindness and Peace. But, notwithstanding all this, thus much Prudence suggests to us, that we should not only provide, by a timely Defence, against the open and profess'd Malice of wicked Men; but that we should likewise esteem the Goodness of others, not infallible and immutable. And to answer all these Ends, no such universal Safeguard, as *civil Society*, could be invented or conceiv'd.

IX. Moreover, altho' the Law of Nature direct us, in case any Difference arise, to adjust it amicably amongst our selves, or refer it to the Arbitration of others; yet neither thus would the common Peace be sufficiently secured. For with the same Ease, that we dispensed with our selves in breaking the other natural Rules, we might also slight this of appealing to Arbitrators, and so have immediate recourse to Arms. Besides, supposing two Men had by Consent refer'd their Differences to a third

MR. BARB. NOTES on § VIII.

^a This Passage is not to the purpose, respecting only Covenantness: Our Author has express'd himself more to the point, in his Argument *De Officio Hom. & Civ. l. 2. c. 5. f. 8.*

^b *At. Nicomach. l. 3. c. 3. p. 46. C. Et. Pass.*

^c *Alberhal in Bell. Jugurth. c. 14.*

^d *De Civ. c. 5. f. 1.*

^e *De R. p. l. 2. p. 593. Lib. II. c.*

^f *De Civ. c. 3. f. 27.*

^g *De Civ. c. 5. f. 2.*

Person; yet were either of the Parties dissatisfied with the Decision, it were no hard Matter for him to renounce and reject it; in case he found his own Strength sufficient to shelter him from human Punishment: especially since the Arbitrator is not endued with any Authority and Command, by Virtue of which he might oblige the Parties to stand to his Sentence. Therefore, in a State of natural Liberty, Prudence will advise us, that we rely not too much on the bare Faith of others; but that we believe the Observation of all Compacts to be then best ascertain'd, when either they are grounded on the mutual Advantage of the Parties, or when 'tis in our Power to force those with whom we treat, to be just and honest. But where Perfidiousness is encouraged by Hopes of Profit, and not restrain'd by Fear or Punishment, there it were Madnes to think, that bare Covenants should be able to warrant our Safety. This appears from the Practice of all Nations; who when they break off their Alliance with one State, strengthen themselves with the Friendship of another: by which Act they do not presently condemn themselves of Treachery, in thus seeking for Protection to the Faith of others; but, in as much as Communities are chiefly guided by Interest, in fixing their Alliances, they do but substitute an advantageous League in the room of one which was either unprofitable, or dangerous. And 'tis under these Restrictions and Mitigations only, that we can any ways admit of Mr. *Hobbes's* Position, that *Covenants are made upon mutual Faith, in a State of Nature, and are not binding.* For tho' it be plausibly enough said by *Locke*, that *all Men are ambitious of being credited; and that, to repose Faith in them, is with us to put a Tye upon their Fidelity;* yet 'tis the first Course, in a State of Nature, to think upon that vulgar Saying;

Πῆρρα χρέματ' ἔλασσα, ἀπιστή δ' ἐσάωσα,
Theogn. ver. 830.

Undone by Trust; and by Distrust preserv'd.

X. Again, there is another reason why the Law of Nature cannot be able, of it self, to ensure the Peace of Mankind. For this is the Case of natural Liberty, that each Man, as he places his Defence and Safety in his own proper Strength; so as to the means of obtaining that End, and the whole Management of his Actions, he purely consults and follows his own private Judgment. And what a wide Difference there is between Men in this respect, no one can be so ignorant, as not to have made part of his Observation. Few there are of so happy and

noble a Temper, as to have, at the same time, that piercing Sagacity, which may discern what is for the lasting Advantage of all Men in general, and of each in particular; and that Strength and Firmness of Soul, which may constantly pursue what has been prudently foreseen. The greater Number are, on account of their natural Dulness, imposed upon by gross Error, in the likeness of Reason. Others are hurried by the Violence of their Passions, wheresoever the Gratifications of Lust, or the false Appearance of Advantage shall draw them. Now in so endless a Diversity of Opinions and Desires, what Hopes can there be of Peace and Agreement: whilst every Fool is as strongly conceited of his own way, as the wisest Man is convinced of his; and the former will no more submit to the latter, than the latter will condescend to be instructed by the former? Since therefore Reason alone, according to the Tenor which we find it to hold in particular Persons, is insufficient to compose these Differences in Judgment; other Means are to be used, by which an agreeable Union and Harmony of Mind may, in some Degree, be obtain'd.

XI. In fine: altho' it be evident to all Men that by breaking the Law of Nature they exceedingly obstruct their own Happiness (the Promotion of which depends on the Assistance of others) and bring many grievous Evils and Dangers on themselves; tho' Nature has wisely imprinted it on the Minds and Consciences of Men, that such as act contrary to the Laws of Nature, by lightly invading and harming their Neighbours, shall not, in the last Event, be unpunish'd: lastly, tho' the Benefits that would redound to them from their observing natural Precepts, and the Evils which they incur by transgressing them, are a manifest Argument, that it is better for Men to live kindly and sociably, than otherwise: yet would not all this be enough to procure the settled Peace of Mankind. And that, because the Multitude act not by rational Motives, but by wild Impulse, mistaking Passion for Reason; chiefly thro' the Fault of Custom or Education, which stifles and suppresses the Force of inward Reflection. As also, because the greatest Part of Mankind are wholly intent upon the present, without any Care or Thought of the future; and are commonly moved by those Objects which thrust themselves upon their Senses, while those of a higher and nobler Nature are too refined for their Affections, and too remote for their Desires. Whence it comes to pass, that the dread of human Punishment is with too many more prevalent, than that of

MR. BARR'S NOTES on § X.

¹ Mr. BRUYERE in his Character of Man, has this, "If a Man ask why the whole World does not make one single Nation, nor speak the same Language, nor live under the same Laws, nor agree in the same Usages and Worship? I answer, that, considering the variety of Mens Humours, the difference of their Talents, and the contrariety of their Judgments, 'tis strange that even seven or eight Persons can live amicably under the same Roof, within the same Compass, and compute one single Family."

² The latter part of this Period is taken out of our Author's Abridgment, *De Officio Hom. & Civ. B. 2. c. 5. l. 8.*

^a *De Civ. c. 2. l. 11.* ^b *L. XXII. 22.* ^c *Claudian. D. IV. Consulat. Honor. 7. 104.*

*Exstruite immanes jaspales, attollite turres,
Cingite vos fluviiis, castris opponite sylva:
Non debitis muram fieri.....*

Heap Rocks and Towers the vast Alient to win;
Let Floods surround, or Forests hem you in;
All Nature is too weak a Fence for Sin.

divine

divine Vengeance; which yet ought to hold the sovereign Place in our Fears. Because, the Justice of Providence is for the most part slow, and the Methods of it secret and retired ^a: Which, with bad Men, is an Argument, that the Calamities, which sometimes attend Impiety, arise from other Causes ^b; especially, when they find, that the worst amongst them often abound in those things, which the vulgar take for the Measure and Standard of Happiness, while the good are oppress'd with many Afflictions, sufficient to persuade the Wicked and Foolish, that Virtue has little Power, unless in making Men miserable. Thus *Plutarch* ^c observes: *When Judgment is immediately executed on a Crime, it stops those Men in the Course of their Wickedness, whom Success would have encouraged to proceed. For nothing does so much enfeeble the Hopes, and deject the Mind of the oppressed, as the Respite and Delay of divine Vengeance; and nothing more increases the Cruelty and Insolence of their Oppressors. And with this very Prospect it is, that the Wicked encourage and hearten themselves in Villany; that the Fruit of their Crimes they shall receive in Hand, but the Punishment in Reversion, and at a great Distance from Enjoyment.* It may farther be added, that the Stings of Conscience, preceding a villainous Act, are not so fierce and raging as those which follow after, when what is once done, we find past our Skill to undo ^d; and that the Voice of Reason, which could not be heard in the hurry and tumult of our Passions, when these once begin to cool and settle, will sound most forcibly in our Breast ^e. In like manner, says the wise Author but now cited ^f, as Malefactors, when led to Execution, carry each their Cross; so does Sin, out of every Offence, frame its own Torments: that most ingenious Artist of a miserable Life! such as is not only confounded with Shame, but distracted with Horrors, Convulsions, Remorse, and all the Tumults of a troubled Mind. But because these inward Torments make no Impression on Sense, they have so much the less Efficacy towards restraining the growth of Wickedness in others. Mr. *Hobbes* ^g is in the right, when he tells us, that *Scarce any human Action can be*

assign'd, which is not the beginning of so long a Chain of Consequences, as our foresight seldom reaches to the end of. The pleasant and painful Accidents of Life are so firmly link'd together, that he who receives the Pleasure, is at the same time oblig'd (whether he apprehends it, or not) to accept of the attending Pain. Thus the abuse of Power is punish'd by the Power and Violence of others; Intemperance, by Diseases, &c. and these are what I call natural Punishments. Yet the generality of Men, either through defect of Judgment, or vehemence of Passion, are commonly hindred from giving these Considerations due weight. Wherefore there remain'd no way of laying so powerful a Restraint on human Corruption, as what is now afford'd, since the Institution of civil States. *Plutarch* ^h seems to have forgotten himself, when he censures *Colotes* for the following Assertion: *They who first regulated Life, compos'd Laws, set up Governments, and Magistrates over Cities, and enforced Obedience to their Directions, were certainly the Persons who deliver'd us from Trouble and Tumult, and establish'd Peace and Safety in the World. Take away these Engagements; and we should live like wild Beasts, and hardly forbear to devour the next we meet.* For that grave Writer, who reprehends this way of speaking, could have no very deep Insight into human Nature and Disposition, if he imagin'd, that, upon reversing the Laws of all civil Communities, the Honour and Safety of Mankind could be preserv'd by the wise Rules of *Parmenides*, *Socrates*, *Plato*, or *Heraclitus*. And, tho' we should never so freely subscribe to *Aristippus's* Boast ⁱ, who, when ask'd, What Advantage Philosophers had above other Men? replied, *Were there a general Repeal of all Laws, we should continue to live as regularly and peaceably as we do at present; yet, what would become of the far greater Number; who, if left to themselves would satisfy Lust and Passion the best Reason and Philosophy? Rather therefore, let this be the final Decision of the Case; Qui ratione traduci ad meliora non possunt, metu contineamur* ^k: 'Tis fit, that they whom Reason cannot persuade to do better, Fear should restrain from doing worse.

^a 'Tis an Observation of *Cæsar*, that Divine Providence, to strike Men with a deeper Sense of Affliction, by a sudden Change from prosperous Affairs, sometimes grants to those, whom it intends exemplarily to punish for their Wickedness, the more fortunate Success, and the longer Enjoyment of Impunity, De B. G. l. 1. c. 14. n. 5.

^c De Sera Numinis Vindicta, p. 548. D. E. ^d Curtius VIII. 2. Nature seems unkind in leaving Men under this great Weakness and Disadvantage, that generally they consider things less before they do them, than after they have done them.

^e *Plutarch* De Ser. Num. Vindict. p. 555. E. When a Man, out of Avarice, Envy, Ambition, or sensual Delight, has committed some heinous Wickedness, and after the violent Thirst of his Desire is cool'd and appeas'd, takes time to reflect, that what he propos'd of Profit, Convenience, or Satisfaction in any kind, has left him utterly disappointed, while the base Impressions and horrid Tyranny of Sin remain in full Force; must necessarily be brought to this Persuasion, that when for the sake of empty Glory, or unworthy Pleasure, he broke through the most sacred, most beautiful and excellent Rules of Mankind, he at the same time, fill'd his miserable Life with Shame and Disquiet.

^h Against *Colotes*, p. 1124. D.

ⁱ In *Helych. De Vir. Illust.*

^k *Quintil. Inst. Orat. l. 12. c. 7.*

C H A P. II.

Of the inward Structure and Constitution of civil States.

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| <p>I. <i>Men only are a sufficient Defence against the Wickedness of Men.</i></p> <p>II. <i>To this End it is necessary that many should join together.</i></p> <p>III. <i>Those who join in this manner ought to agree in their Resolutions.</i></p> <p>IV. <i>The Difference between the Politics of Bees and Men.</i></p> <p>V. <i>An Union of Wills and of Strength necessary to a civil State.</i></p> <p>VI. <i>This Union produced by intervening Covenants.</i></p> <p>VII. <i>The first Covenant, with the Decree following upon it.</i></p> <p>VIII. <i>The second Covenant, giving the final Perfection to a civil Establishment.</i></p> <p>IX. <i>The Reason for which Hobbes will acknowledge but one Covenant.</i></p> <p>X. <i>This Reason insufficient.</i></p> | <p>XI. XII. <i>Hobbes's Arguments answer'd.</i></p> <p>XIII. <i>A civil State, how defined.</i></p> <p>XIV. <i>In a Monarch, the Will of the Prince is the Will of the State.</i></p> <p>XV. <i>Under other Forms of Government, according to the regular Course, the Community is concluded by the Votes of the major Part.</i></p> <p>XVI. <i>This Rule admits of a Limitation.</i></p> <p>XVII. <i>Of Equality of Votes.</i></p> <p>XVIII. <i>Of joining or dividing Suffrages.</i></p> <p>XIX. <i>How many Persons at least are requisite to a ruling Council.</i></p> <p>XX. <i>Civis, or a Member of the civil State, who may properly be so term'd.</i></p> <p>XXI. <i>Subordinate Bodies, of how many kinds,</i></p> <p>XXII. <i>Invested with what Rights and Privileges.</i></p> <p>XXIII. <i>Of unlawful Bodies, and Factions.</i></p> <p>XXIV. <i>The peculiar Duties incumbent on the Members of civil States.</i></p> |
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IT follows now, that we enquire more exactly into the inward Structure and Constitution of civil States. That Men therefore might render themselves secure against the Wickedness of others, so far as the Condition of their Nature will admit, no other Expedient could have been invented but this, that each Person should provide a sufficient Guard about him; by means of which the Designs of others might appear so dangerous in the Execution, that they would think it their safest Course, rather to refrain than to engage, rather to keep the Peace, than to be the Challengers and Aggressors in a War. For the malicious Inclinations of Men, and their ready Disposition to their Neighbour's Hurt, cannot any way be more effectually kept under, than by setting before their Eyes some present Danger, which must certainly fall on him that shall dare to assault another; and by taking away all Hope and Prospect of Impunity. Now such a Defence or Assistance as this, can by no means be afforded by any fortified Place, whether it derives its Strength from Nature, or from Art: For to lie thus continually in Hold, is to be a perpetual Prisoner; nor would it be easy for a single Man to defend his Post. But if he let in others to help him, there will be a Danger from them likewise, and he will stand in need of a new Protection. Some kind of Aid might indeed be expected from Arms; but not to such a Degree, as that one Person alone should be able to promise himself any long Security from hence, against numerous Oppressors. So too, the Defence which might be made by brute Creatures, is very slender and uncertain, and by no means capable of shielding us from Dangers of

this Nature. For tho' we meet with a Story of two Dogs, that perform'd military Service against the *Americans*^a; and tho' the Emperor of *Ceylon*, in his royal City of *Candy*, is reported to have a Life-Guard, as it were, of an hundred Elephants, which go their rounds upon the nightly Watch, and are the publick Executioners of Criminals: Yet many Men must join in teaching and training them, e'er they can be made fit for these Employments. It remains therefore, that against the Dangers which might be apprehended from Men, Men alone could afford an agreeable Remedy, by joining their Forces together, by interweaving their Interests and Safety, and by forming a general Confederacy for their mutual Succour^b.

II. But it is manifest, that the joining together of two or three, or a few Persons, must necessarily prove insufficient for this Defence; because, then, the least Addition, on the side of the Invaders would turn the Scales, and carry them on to certain Victory; and therefore would encourage and embolden them to begin the Assault, by promising not only Impunity, but Success. So that to obtain the Security of which we are now in search, it is requisite, that the Number of the Confederates be so great, as that the Advantage of a small odds, on the Enemy's side, shall not visibly determine the Issue of the War; and consequently, that this League and Union be made by a considerable Multitude. Hence *Plato*^c demands such a Number of Subjects in his Commonwealth, as shall be able to repel their Neighbours, when they prove Injurious, and to succour them, when they are oppress'd. From what has been offer'd this

Mr. BARBEYRAC'S NOTES on Chap. II. § I.

^a See MONTAIGN'S Essays, B. 2. c. 12. p. 336. See also an account of the *Island of Ceylon*, by Robert Knox. Book II. Chap. I. to which may be added, that according to STRABO, the ancient *Gauls*, in their Wars, made use of *Engl'ish Dogs*, as well as those of their own Country. *Geogr. Lib. 4. p. 305.* Ed. *Amst.* see other Examples in *Pliny*, *Hist. Nat. lib. 8. cap. 40.* *Poliæn. Stratag. Lib. 4. cap. 2. sect. 16.* *Lib. 7. cap. 2. sect. 1.* *Ælian. Hist. Animal. Lib. 7. cap. 38.* *Pollux Lib. 5. c. 47.* Ed. *Amst. Spartan. in vit. Caracall. cap. 6.*

^a Gomara, *Hist. Gener. Ind. Occid.* 44, & 65.

^b *Comp. Hobbes De Cive, c. 6.*

^c *De Leg. l. 5. p. 845.*

this farther Remark may be drawn, that the just Measure of any State ought to be taken from the Proportion it bears to the Strength of those about it. And therefore those Communities, which were heretofore look'd on as sufficiently large, when Mankind was divided into a prodigious variety of distinct Governments, are too little since the forming of mighty Empires. For, as *Pliny* observes^a, *Bodies, however high and towering, sensibly diminish, when set in Comparison with those that overtop them.*

III. To proceed: 'Tis no less necessary, that the Multitude united on this account, do agree about applying the means for the Attainment of the desired End. For otherwise, how numerous soever they may be, yet if they consent not in using the best Methods for effecting the common Security, but resolve to manage each his own Strength according to his own Fancy, the Design will come to nothing: Because, being divided in Opinions, and moving contrary ways, they will not help, but hinder one another. Or, to suppose the best, if they should once happen to agree well enough about the Undertaking of a single Action, either upon sudden Impulse, or upon Counsel and Deliberation, led on by the Hope of Victory, of Booty, or of Revenge (as may sometimes be observed, in the mad Disorders of popular Tumults^b) yet afterwards, either by the Difference of their Tempers and Judgments, or by that Envy and Emulation, which is natural to most Men, or through Lightness and Inconstancy, they will be so torn asunder, as that, for the future, they will have no manner of Inclination, either to afford their mutual Succour, or so much as to keep the Peace amongst themselves^c. And consequently these united Bodies, which are form'd of a great Number of Persons, are of all the most unlikely to hold for any long time; unless they are kept together by some general Fear, restraining them from quitting a Resolution at their Pleasure, which they have once by Agreement taken up. Whence it follows, that the bare Consent of a Multitude, tho' confirm'd by Covenant, cannot give us that Security, which we now seek after; or, that 'tis not enough, for many Persons to enter into a Confederacy of mutual Assistance, and to promise on both sides, that they will direct their Strength, and all their Actions towards this End, and towards the common Good. But 'tis still necessary, that some farther Tye be laid upon them, that they who have once consented, for their general Benefit, to be peaceful and helpful to each other, may be hindred, by some Fear, from drawing back and disagreeing, when they find their private Advantage clashing with the publick.

IV. For the Illustration of this Point, *Hobbes* examines strictly the Nature of some inferior Animals, which after a sort do appear likewise to maintain Society among themselves; of which kind, the most remarkable are the Ants and the Bees². For these Creatures, tho' void of Reason, by which they might en-

gage in Compact, and submit to Government; yet by joining Consent, that is, by desiring and declining all the very same things, do so direct their Actions towards the common Good, as that their petit Confederacies are liable to no Differences or Dissentions. Why it should happen otherwise with Mankind, and why a considerable Multitude should not be able to live amicably together for any time, without the Restraint of civil Authority, is a Question not unworthy our Debate. The Reason then, for which the wise Appointment of Nature hath join'd these little Creatures, rather than others, in publick Bodies, seems to be this; that they continue all the Winter, and are still nourish'd after their ordinary manner, whereas most other Insects, during that Season, either perish, or are preserv'd without any external supply of Food. Now these Winter-Stores may be much more conveniently brought together and laid up, if many join their Service, than if each labours apart from all the rest. Whence 'tis evident, that the Communities form'd by these Creatures have a quite different End from that of human and political Societies; tho' we may discover in them some resemblance of a Communion of Goods, whilst they labour all for the same general Stock, and afterwards do all receive their Maintenance from it. *Hobbes* offers this farther reason of the difference, that all the Government of these Animals is nothing but an universal Consent, or, many Wills directed to the same Object, not one arbitrary Will, as in civil States: he means, that each of them, in particular, conspires with the rest to work together, and to treasure up their Provision in the same Heap; and that all their Wills are not reduced into one sovereign Will, as in politick Bodies; so that what a single Ruler, or a governing Council determine, should pass for the Will of all in general. The main Causes why, in these Creatures, which live by the guidance of no superior Faculty than Appetite and Sense, the bare agreement of Inclinations should be so lasting, and so effectual, as to stand in need of no other Assistance, seems to be these that follow: 1. Men are continually in competition for Honour and Dignity, whereas these Creatures are not: And consequently, that Envy, Hatred, and Emulation, which flows from this Spring amongst the former, is not to be discover'd amongst the latter. 2. The natural Appetite of the Bees, and that Faculty, which we may call the Judgment of their Senses, are exactly uniform, and are carried on toward the publick Good, which in them differs not from the private. *Whatever is not good for the Hive (as Antoninus^d observes) is not good for the Bee.* To see their Hives full and flourishing, is their whole Wish and Desire. But amongst Men, *So many Heads, so many Wits:* and scarce any thing is look'd on as truly Good, which doth not afford the Possessor somewhat singular and extraordinary above his Neighbours. 3. Creatures, which have not the use of Reason, neither see nor fancy that they see any

^a *Peregrin.* c. 61. n. 2.

^b *Vid. Tacit. Annal.* I. c. 32.

Vices of the *Athenian* Commonwealth, l. 6. c. 45.

^c *L. 6. f. 54.*

^d Compare the Discourse of *Polybius*, on the

¹ *De Cives*, c. 5. f. 5.

² *V. Virgil. Georg.* 4.

any Defect in the Administration of their common Societies^a; in as much as they erected them not with the Guidance of Judgment, but by the bare Instinct of Nature, and have not the Art of comparing them with others. Again, not one of the Bees ever entertains a Design of forming her Comb in any other, than the common hexangular Figure; whereas, in human Politicks, there are very many, who, thinking themselves wiser than their Fellows, are disgusted with the present Condition, and are for introducing a Change in the Government. And according to the Difference of Judgments, several of those Projectors are for setting up several Models, or for reforming things each in his own way, the Consequence of which must be the Distraction of the State, and, in the Issue, a civil War. 4. These Creatures, tho' they have some Use of Voice, in making known to one another their Desires, at least, when their Affections are more warmly rais'd; yet they want that Art of disguising things in the false Colours of Speech, which is necessarily required to the disturbing the Minds and Passions of Society: This being the Instrument, by which what is Good is represented, either under a greater or a less Degree of Goodness, than it really hath; and what is Evil is in the same manner, either aggravated, or extenuated; or, perhaps both are painted with a quite different Face from what they truly bear. But now, the Tongue of Man is often us'd for a kind of Trumpet of War and Sedition; which is able, not only to propose false Rules of living and of acting, but also, with fair Glosses and much insinuating Language, to recommend them to Others, and thereby to render their Minds utterly averse to the Genius of a peaceful and social Life. On which account it was not without Justice said by the Comedian^b, of the eloquent *Pericles*, that *he thunder'd and lighten'd, and confounded all Greece*. 5. Irrational Creatures cannot distinguish between Contumely, or Contempt, and real Damage; or rather, they have no Sense at all of Contempt. Therefore, whilst they find the Necessities of their own Bodies supplied, they commence no Quarrel with their Fellows. But of Men, those are the greatest Disturbers of the Commonwealth, who enjoy the greatest Opportunity of being easy. Nor do they engage in Contentions about their Honour or their Reputation, till after they have gain'd an absolute Victory over the Force of Hunger, or the Injuries of Weather. Lastly, the Agreement of these Creatures is *natural*; but that of Men only *federal*; that is, artificial, or rather moral; held together by no other than moral Ties, which do not in the least extinguish the natural Difference of Mens Inclinations, the Roughness of their Tempers, and the Power which they have of taking quite contrary Measures. To all which we may add this further Consideration, that in the Kingdom of the

Bees there is no sovereign Authority properly so call'd (tho' this be the very Life and Soul of a Community) for which reason their Monarch is not arm'd with a Sting. And therefore 'tis the greater Miracle of Nature, that

—*Rege incolumi, mens omnibus una;*
Amisso, rupe're fidem.—

Their Prince secure, one common Mind they bear;
But, him once lost, with wild Distraction jar^c.

Yet here it ought to be well observ'd, that the Comparison, thus pursued, between the two Multitudes, one of Men, the other of Bees, hath been alledg'd to no other End, but to shew why, in a great Body of Men, destitute of the Advantages of civil Government, no long Agreement or good Understanding can reasonably be expected. But we would by no means be thought to insinuate, as if these Inclinations, in which the Seeds of Discord are contain'd, were found to be of equal Force and Efficacy in each particular Man; or, as if sound Reason did not, from the bare Consideration of human Nature, suggest such Arguments, as must engage and command Men, rather than any other Animals, to follow Concord and mutual Kindness. And therefore our Design in this Matter is not in the least thwarted by a learned Author^d, who hath undertaken to retort these six Reasons of Mr. *Hobbes*, by shewing, that as Man naturally loves Honour, so Honour is the natural Result of good Actions; that he more perfectly understands the Force of the publick Good, in securing his own private Interest; that he enjoys the Gift of Reason, which equally disposeth him, as his Lot shall fall, to govern or to obey; that he hath the Art of enlivening and adorning his rational Faculty, by setting an Edge and a Grace upon it, with the most proper Expressions; that he apprehends himself to be under the Guidance of a Law, by the Power of which he distinguisheth a down-right Injury, from a Damage offer'd without Injury; lastly, that Agreements made amongst Men are not only strengthen'd and confirm'd by Nature for a long Continuance, but do likewise receive from Art, as the Assistance of Nature, many Defences against less uncertain Dangers, and, by means of Writing, a Duration beyond the Age of Man. The Argument doth not at all affect us, unless it could make out, that a numerous Body of Men, united under no common Government, might not be disturb'd by a very few: As likewise, that all Men are judicious and wise, and do, after the clearest manner, apprehend the Dictates of sober Reason, and have utterly disabled all their evil Affections and Desires. He certainly erects a civil State upon no better than a ruinous Bottom, who makes too large Allowances to the Modesty and Ingenuity of Man-

^a The Government among such Creatures is but pretended and Chimerical. See *Alzernoon Sidney's* Discourse of Government, c. 2. f. 8.

^b *Arjtoph.* Achain. ver. 350. *Plin.* L. 1. Ep. 20. n. 17, &c. Ed. *Cellar.*

^c Tho'

by a kind of Miracle in Nature, the whole Hive disperse themselves, as soon as their King leaves them. V. *S. nec.* De *Clementia*, L. 1. c. 4, & 19.

^d V. *Virgil.* Georg. L. 4. v. 212, &c. Add. *Xenophon.* *Cropad.* l. V. c. 11.

^e Bp. *Cumberland* de L. N. c. 2. f. 22.

kind; and measures the Integrity of others, especially of the lowest Rabble, by his own.

V. But what that is which we may depend upon, as sufficient for the long keeping together the Consents and Inclinations of an united Multitude, will easily appear to one that throughly examines the common Bent and Genius of Mankind. Now in this there are two Vices to be discover'd, which especially hinder any Number of Persons from long continuing in the same general Design. One is, the great Variety of Inclinations and Judgments, about discerning what is most expedient for the common End: To which there is join'd, in many Men, a Dullness of apprehending which, of several Means propos'd, is more advantageous than the rest; as likewise, the obstinate Stubbornness in defending what they have once, right or wrong, happened to embrace. The other general Vice is a sluggish Coldness in Business, and an Aversion to doing willingly what we know to be for our Interest; when we are under no necessary Force, which might drive us on, if we hung back, and oblige us, whether we will or no, to the Performance of our Duty. The former of these Evils may be remedied, by uniting in a perpetual Bond the Wills of all the Parties, or by so ordering things, that in all Affairs relating to the common Good of the Society, there should be but one Will to govern their Proceedings. The latter, by constituting some Power, which shall be able to inflict a present and sensible Punishment, on those who oppose or hinder the publick Benefit. *Tully* hath a remarkable Saying to this Purpose: *They observe* (speaking of the *Aristotelians*; *that even the Passion of Grief was not constituted by Nature, without our great Use and Advantage; that Men taken in Offences might be heartily troubled at the Correction, the Reproof, the Ignominy, which they undergo. For they, who can bear Infamy and Reproach without Concern, seem to have obtain'd the Privilege of sinning with Impunity.*

Now the Union of Wills could not possibly be compass'd in any of the following ways: Either that by a natural Conjunction the Wills of all the Parties should be amass'd into one; or that one Person only should exert his Will, and all the rest suppress theirs; or that the natural Disagreement of Inclinations and Contrariety of Desires should by any means whatsoever be absolutely taken away, and combined in perpetual Harmony and Concord. The only Method then, by which many Wills may be conceiv'd as join'd together, is at least this; that each Member of the Society submit his Will to the Will of one Person, or of one Council; so that whatever this Person or this Council shall resolve, in Matters which necessarily concern the common Safety, shall be deem'd the Will of all in general, and of each in particular. For when I have made over my Power to another, his Act and Choice is interpreted as mine ^b.

So again, as to the other Remedy propos'd, 'tis impossible to constitute such a Power as shall be formidable to the whole Multitude, by natural Means; that is, by transfusing the real Strength of all and each of them into one Person, so as to leave all the rest utterly weak and impotent. But one Man can thus only be supposed to possess the Strength of all, when the whole Body, and every particular Member, have obliged themselves to use and apply their Strength, as he shall judge expedient. When this Union of Will and of Forces is once completed, thence at last ariseth what we call a Commonwealth, or civil State, the strongest of all *moral Persons*, or *Societies*.

What hath been offer'd may perhaps be more distinctly understood, if we consider, that by the Submission of their Wills, made on the part of the Subjects, their *natural Liberty* of Choice is not extinguish'd; by virtue of which they are still able, *de facto*, to resume what they once gave, and to deny and withdraw their Obedience which they promis'd: As likewise, that the Strength and Power of the Subjects are not by any natural Conveyance transferr'd really on the Sovereign, as if, for Instance, the Strength, which lay in the Shoulders of all the Subjects, should be removed to the Prince's Shoulders; and consequently that both the Wills and the Strength of those who are govern'd, are, as we may say, turn'd into the Scales, and render'd conformable to the Governour's Pleasure, only by these two *moral Weights*, which we come now to examine. The first is taken from their own Act and Covenant, by which they engage their Allegiance: And this receives all possible Force from the Command of GOD, and from the sacred Authority of an Oath; both which are so much the more effectual in over-ruling Mens Minds, the more carefully the Parties have from their Childhood been educated with good Discipline and Instruction, and the more Knowledge they have obtain'd of the Necessity and Usefulness of civil Government. But they, who, through the extreme Pravity of their Mind, resist the Force of this Weight, whilst they either foolishly imagine Government to be a Stratagem found out for the vexing and oppressing of all others, to satisfy the tyrannical Pleasure of a few; or else are overcome with a heavy Listlessness, rendering them averse to the voluntary Performance of what their Duty requires; these, we say, are drawn to obey their Superiors, by that other Weight which we have still in reserve; that is, by the Fear of Punishment, and by external Compulsion. Farther, since he who compels Another, ought to surpass him in Strength, and since that Strength, by which Governours exceed the Force of private Persons, ariseth from hence, that the Subjects are ever ready to apply their united Power, as they shall be commanded; hence 'tis evident, that the Ability, which Rulers have to compel and restrain evil and diso-

^a Tusc. Quest. l. IV. c. 20.

^b A good Man submits his own Judgment and Choice to the Governour of the Universe, as good Subjects do to the Laws of the State. *Arrian*. *Epietet. l. I. c. 12. p. 118.*

bedient Subjects, is owing to the Obedience of the Good. Now, that the greater Part of a Nation's Strength shall always be in the Hands of the Sovereign, 'tis easy for him to effect¹; provided that he first obtain'd his Crown by lawful Means, and that he expresseth any tolerable Care and Endeavour towards the Discharge of his Trust. For as he may ever reasonably hope, that the Majority of the Subjects will be mindful of the divine Command, and of their Oath of Allegiance and Fealty; so 'tis indeed ever the Interest of the larger and better Part of the People, that the State should remain secure and undisturb'd, that the lawful Government should be maintain'd in its due Privileges and Authority. But besides all this, Governours have ready at Hand certain useful Engines, which afford a vast Addition to their Power; such as are good Fortresses and a standing Force, engaged to the Prince by more than ordinary Ties; by means of which Assistances, a Multitude, how numerous soever, may be reduced to Obedience, especially if they want Arms, and are scatter'd at a wide Distance, through the several Parts of the Country; and in case the Sovereign useth due Caution, to hinder his People from bandying into Factions.

VI. That the Union, which we have been thus explaining, may be more thoroughly apprehended, we are to know, that many natural Persons, before they close into one moral Person, whatever they do, and whatever Obligations they take upon themselves, they act and undertake in their single Capacities, so that the Number of the Actions and Obligations is equal to the Number of the natural Persons. And tho' often, when we would denote many independent Men, we use the Word *Multitude*, which seems to imply some kind of Unity; yet if we consider more exactly, this Term is not one of those which we call *collective* Words, or such as signify an united Body, composed of many Individuals, as those other Names of an *Army*, a *Navy*, an *Assembly*, a *Senate*, and the like; but really imports no more than a bare Number of things in general, without specifying whether they be of the same or different kinds, whether they be united or dispers'd. And therefore, properly speaking, a *Multitude* of Men is not one compound Body, but many separate Persons, each of which hath his own Judgment, and his own Will to determine him in all Matters that shall be propos'd. For which reason, if we thus consider a *Multitude*, and then abstract it from the particular Man, of whom it consists, we cannot ascribe to it, in this general Notion, any one Action distinct from those of the private Persons, or any peculiar Privilege or Right. Hence suppose a Man to be in a *Multitude*, or to have many other Men about him, not join'd in a common Society; should most, or should all the rest of these perform any Act, or engage in any Compact, while he alone enters his Dissent to the Business, or, negatively, doth not any

way approve or partake of it, the said Act or Compact shall on no account affect his Person. So that, on the whole, to join a Multitude, or many Men, into one *compound Person*, to which one general Act may be ascribed, and to which certain Rights belong, as 'tis oppos'd to particular Members, and such Rights as no particular Member can claim separately from the rest; 'tis necessary, that they shall have first united their Wills and Powers by the Intervention of Covenants; without which, how a Number of Men, who are all naturally equal, should be link'd together, is impossible to be understood.

VII. The Nature and the Number of those Covenants, by the Mediation of which a civil State is compacted, may be discover'd by the following Method of Enquiry. Let us conceive in our Mind a Multitude of Men, all naturally free, and naturally equal, going about voluntarily to erect themselves into a new Commonwealth: Here it will be necessary, first of all, that they covenant each with each in particular, to join into one lasting Society, and to concert the Measures of their Welfare and Safety, by the publick Vote (tho', in a Compact of this Nature, 'tis the most usual way, for particular Persons, to reserve to themselves the Liberty of departing, if they shall see fit.) This Covenant may be made either absolutely or conditionally. The first is done, when a Man engageth himself to stick to this Society, whatever Form of Government shall afterwards be approved of by the major Part: The latter, when the Person engaging adds this Clause, provided such a Form shall be introduced, as is agreeable to his private Judgment. Farther, when this Covenant is to be transacted, 'tis requisite that all and each of them give their Consent. He that shall disagree, tho' he may happen, for some time, to continue in the same Place with the rest, yet stands without the Bounds of the rising State, nor is obliged by the Vote of his Fellows, tho' the greater Number, so as to be under any Necessity of joining himself to the new Establishment; but he remains under his natural Liberty, in which it shall be lawful for him to provide for his private Security, according to his own Measures. But after such a Society, representing the first Rudiments and Beginnings of a State, hath been united in the manner described, it is then farther necessary, that a Decree be made, specifying what Form of Government shall be settled amongst them. For before this Point is adjusted, 'tis impossible they should take any regular Step towards maintaining the Safety of the Publick. Now when Matters are come to this Issue, they who join'd themselves in the Society upon absolute Terms, shall, if they design to continue longer in the Place where the Society is fixed, be bound by the Agreement of the Majority, to acquiesce in the Form establish'd, tho' their own Opinion more incline to some other Model. For, by adding no Exceptions to the Covenant,

¹ Mr. *Le Clerc* (in his Additions to *Morer's* Dictionary, at the bottom of the Article of *Calvin*) says, That Princes who have but a moderate share of Integrity, may be almost ador'd by their Subjects.

² See hereafter in B. 8. c. 11. f. 2.

they are presum'd to have, in this respect at least, submitted to the Will of the greater Number; from whom it can with no manner of reason be expected, that they should quit their own Judgment, to comply with a few that obstinately stand out. But on the other hand, they who entered themselves in the Society upon Conditions, unless they expressly consent to the Government resolv'd upon, shall not become Members of the new State, nor be concluded by the Vote of the Majority.

VIII. After the Decree hath pass'd, to settle the particular Form of Government, there will again be Occasion for a new Covenant, when the Person or Persons, on whom the Sovereignty is conferr'd, shall be actually constituted; by which the Rulers, on the one hand engage themselves to take care of the common Peace and Security, and the Subjects on the other hand to yield them faithful Obedience; in which likewise is included that Submission and Union of Wills, by which we conceive a State to be but *one Person*. And from this Covenant the State receives its final Completion and Perfection. But now, if the Form establish'd should happen to be a Democracy, this latter Covenant doth not so manifestly appear; because the same Persons are in different respects Sovereigns and Subjects: Whereas every Covenant requires two distinct Parties. Nor doth the different Respect seem a sufficient Distinction; as, for Instance, when the same *Titius* is said to be a Father, a Son, a Husband, a Son in Law, a Father in Law, a Merchant, &c. for here if this *Titius*, as a Merchant, shall promise any thing to the same *Titius*, as a Father, there is no Covenant in the Case. We are therefore to understand, that, in a popular Government, the particular Members and the Sovereign Assembly are not only distinguish'd by different respects, but are really different Persons (tho' not of the same kind) who have distinct Wills, distinct Acts, and distinct Rights from each other. For the Will of particular Men is not immediately the Will of the People; nor can what particular Men shall happen to do, be construed as the People's Acts, or *vice versa*. Again, particular Men neither enjoy the Sovereignty, nor any Part of it, but 'tis lodg'd in the Body of the People. For to have a Part of the Sovereignty, and to have a Vote in that Assembly in which the Sovereignty resides, are two different things. So that hitherto there seems to be no reason why we may not suppose a Covenant to pass between the general Assembly, and the private Members of the State. One thing indeed there is, which may be urged, with some Colour, to the contrary: 'Tis, that such a Covenant would be of no manner of Use; because each Man by giving his Consent to the setting up of a Democracy, is, at the same time, presum'd to have submitted his Will to the Will of the major Part; and besides, the Love that he hath for his own Person and Fortunes, seems to lay a sufficient Necessity on any Man to labour with his utmost Ability for the

publick Good, with which his own private Welfare is inseparably united. However, altho' it may not perhaps be altogether so necessary in Democracies, as in other Governments, that this Covenant, or mutual Engagement for performing the respective Duties of Sovereign and Subject, should be openly and expressly made; yet 'tis absolutely requisite, that we suppose it to have pass'd by tacit Agreement. For whether we look on the first Decree, for the Establishment of the Democracy, as the bare Act of many Wills conspiring in one Desire, or as the Covenant of each Man with each, to this Purpose, *I will submit my Will to a general Assembly for us all, upon Condition you will do the like*: Yet from all this, thus strictly consider'd, there can no other Obligation arise, but what follows, that every Person shall be bound to acquiesce in this particular Form of Government, so long as 'tis not alter'd by universal Consent. But now the Subjects in a popular State are certainly under a farther Obligation. For first, each Member is bound to stand to such Decrees and Commands as shall proceed from the general Assembly; and then again, they are engaged, every one in particular, to contribute each his utmost Service to the State, and to prefer the publick Good to his own private advantage^a. Otherwise, on what Pretence should any Man be punish'd, for not giving Attendance at the publick Councils? Since then such an Obligation is evidently discover'd, there must of Necessity be some Principle whence its Origin is derived; and this can be nothing else but the Covenant of which we have been now discoursing.

But, if the Society agree to erect an Aristocracy, or a Monarchy, then this latter Covenant is far more visible. For upon creating the Senate, or the Prince, both Parties interchange their mutual Faith, and mutual Performances thence arise, as their necessary Duty. In as much, as after the Sovereignty hath been once conferr'd and receiv'd, the Prince or the Senate, no less than the Subjects, stand bound to discharge certain Offices, with which they were not before concern'd: The People, before the passing of this Covenant, being no more engaged to obey one Man, or one Council of Men, than that Man, or that Council of Men were engaged to undertake the Care of the Publick. But now, from what Principle could this mutual Faith and Obligation to Duties, which were not required before, take their Rise, but from Covenant?

What we have hitherto deliver'd, concerning the two Covenants, and the one Ordinance or Decree, may be illustrated by that Account, which *Dionysius Halicarnassæus*¹ gives us of the first Settlement of the Monarchy in *Rome*. For here, first of all, a Number of Men flock together, with Design to fix themselves in a new Seat; in order to which Resolution a tacit Covenant, at least, must be supposed to have pass'd amongst them. After this, they deliberate about the Form of Government, and that by Kings

^a In *Thucydides*, a Member of a Democratical State, unacquainted with publick Affairs, is styl'd an *useless Citizen*, l. 2. c. 40. *E. l. Oxon. Socrates's Dispute with Charmides* in *Xenophon*, Memorab. l. 3. p. 485. ¹ B. II. in the Beginning.

being preferr'd, they agree to invest *Romulus* with the sovereign Authority. And this holds too in the Case of an *Interregnum*, during which, the Society being held together only by the prime Compact, it is frequent to enter the Debate about the Frame and Model of the Common-wealth.

We ought carefully to observe, that this Method of producing and constituting a civil State, by the means of two Covenants and one Decree, is the most natural, and what agrees in general to every kind of Government. Yet a Monarchy may sometimes happen to be constituted by one Covenant alone; as suppose many Persons, without any antecedent Agreement amongst themselves, should at the same or a different time, each Man for his own Person only, subject themselves to a single Master, almost in the same manner as an Army, which is form'd out of Strangers and Mercenaries, who come from all Parts to offer their Service. So again, they who join themselves to a Community already establish'd, have need of one Agreement only, by which they, on their own part, petition to be admitted into the State; and on the other part they who represent the State, upon Security given for their Obedience, admit and receive them.

It would be an unjust Suspicion, in any Person, to imagine that what we have offer'd about these Covenants, in making them the Cause and Foundation of a civil State, is purely our own

arbitrary Fiction; because the first Rise of most Governments is unknown, or at least we do not certainly apprehend them to have been compos'd and cemented after the manner here described. For 'tis certain every State once had its Beginning. But now, before the fixing of any State, the Persons, of whom it was to consist, could not be united to each other, by the same Ties as they are after the State is actually set up; nor could they yet be subject to those, to whom afterwards they owe Subjection. And since we cannot understand, how either this Union, or this Succession could be made, without the Covenants or Agreements before mentioned, it is necessary that the said Agreements must tacitly at least have pass'd in the Institution of Common-wealths. Nor is there any thing to hinder, but that the Original of some things, not committed to the Monuments of Time and History, may be traced out by the Disquisitions of Reason.

IX. It may be worth our while, on this Occasion, to examine with particular Strictness the Opinion of Mr. *Hobbes*, who, in the Generation of States, acknowledgeth no more than one Covenant of each Man to each Man; frequently representing and declaring, that there passeth no Covenant between the Prince, or the Senate, and the Subjects. Indeed, we may easily gather from the Design of his Books of Policy, which is clearly discover'd in the *Leviathan*, the Reason that put him upon this Assertion.

^a See the Debate of the *Persian Nobles* in *Herodotus*. *Thalia*, p. 121, &c. and of *Brutus* and his Associates, in *Dionysius Halicarn.* l. 4.

¹ Mr. *Buddeus* (in his *Practical Philosophy*, Part 2. c. 4. §. 4.) says, that *Philosophy teaches us the same concerning the Origin of States; but, if we consult History, we shall scarce find one Example of any State that has been form'd by such express Compacts.* And indeed (as Mr. *Titius* remarks, *Observ.* DLV) the first Covenant and the general Decree relating to the Form of Government, had nothing to do with the Establishment of all Civil Societies, not even of those that appear'd the earliest in the World, which (as I have observ'd in the first Note on the seventh Section of the preceding Chapter) plainly owe their Rise to the Cunning and Management of some ambitious Mind, supported by Force. In that Case, Subjects did not make any Covenant amongst themselves, but only treated every one for himself, with him to whose Government they submitted: And much less, had the new *Comes*, who afterwards join'd themselves to such Society, when there was already an acknowledg'd *Sovereign*, any Business to treat with any other else but him, as our Author himself owns. As for those, who afterwards join'd themselves several of 'em together with an Intention to leave the Independency of a State of Nature, and to form a new *Civil Society*; we must acknowledge, that they were oblig'd to engage themselves, the one towards the other, for ever to unite their Forces together for their mutual Preservation and Security. But besides, that this Covenant was rather *tacit* than *express*; it was only made but for a Time, and in view of a second, with respect to which it was what *Scissolis* are with respect to the Structure they serve for the bulding of. So that we may say, that the reciprocal Covenant between Sovereign and Subjects is what properly constitutes a State: A Covenant which is the Foundation of all Government, tho' it is often only *tacit*.

² It is not at all to be wonder'd at, says Mr. *Locke* excellently well, in his second Treatise of Civil Government, Chap. vii. Sect. 101, &c. that History gives us but a very little account of Men that liv'd together in the state of Nature; the Inconveniency of that Condition, and the want of Society no sooner brought any number of them together, but they presently united and incorporated, if they design'd to continue together. And if we may not suppose Men ever to have been in the State of Nature, because we hear not much of them in such a State, we may as well suppose the Armies of *Salmanasser* and *Xerxes* were never Children, because we hear nothing of them till they were imbody'd in Armies. Government is ever antecedent to Records, and Letters seldom come in among People, till a long Continuation of Civil Society has, by other necessary Arts, provided for their Safety, Ease, and Plenty. And then they begin to look after the History of their Founders, and to search into their Original, when they have out-liv'd the Memory of it. For 'tis with Commonwealths as with particular Persons; they are commonly ignorant of their own Births and Infancies: And if they know any thing of their Original, they are beholden for it to the accidental Records that others have kept of it. And those that we have of the beginning of any *Politics* in the World, excepting that of the *Jews*, where God himself immediately interpos'd, are all either plain Instances of such a Beginning as I have mention'd, or at least are manifest Footsteps. He must shew an Inclination to deny matter of Fact, who will not allow that the Beginnings of *Rome* and *Venice* were by the uniting together of several Men free and independent of one another, among whom there was no Superiority or Subjection: And if *Joseph Acosta's* Word may be taken, he tells us (*Lib. 1. Cap. 25.*) that in many parts of *America* there is no Government at all: There are great and apparent conjectures, says he, that these Men, speaking of those of *Peru*, for a long time had neither Kings nor Commonwealths, but liv'd in Troops, as do this Day in *Florida*, the *Cheriquians*, those of *Brazil*, and many other Nations, which have no certain King, but as occasion requires either in Peace or War, they choose their Captains as they please. And I hope those who went away from *Sparta* with *Palantus* mention'd by *Justin*, *Lib. III. Cap. IV.* will be allow'd to have been free Men independent of one another, and to have set up a Government over themselves, by their own Consent. See *Algernon Sidney upon Civil Government*, Chap. III. Sect. XXV, XXXIII.

His principal Aim was to oppose those seditious and turbulent Spirits, who in his time labour'd to bring down the regal Power to their own Model, and either utterly to extinguish, or to render it inferior to the Subjects. To cut off from these Men their ordinary Plea for Rebellion, which was, that there is a reciprocal Faith between the Prince and the People, and that when the former departs from what he engaged by Promise, the latter are releas'd from their Obedience; as also to hinder restless and factious Persons from interpreting every Action of their Prince, which suited not with their own Humour, as a Breach of his Faith; he resolves to deny that there is any such thing as a Covenant between Subjects and their Sovereign. And having undertaken to maintain, that every Monarch, properly and truly such, hath an absolute and unlimited Power; it follow'd of course, that he should exclude all Covenants or Compacts from this Affair, because these seem to be the chief Instruments of reducing Authority to Bounds and Rules. But now, although it highly concerns the Interest of Mankind, that the regal Power should be kept sacred and inviolable, and be secured from the impertinent Cavils of those busy Designers, who are always plucking at it; yet this Consideration doth by no means make it necessary for us to deny what is as clear as the Light, and to acknowledge no Covenant, in a Case where there is certainly a mutual Promise for the Performance of Duties not before required. Whilst I voluntarily subject my self to a Prince, I promise Obedience, and engage his Protection: On the other hand, the Prince, when he receives me as his Subject, promiseth his Protection, and engageth my Obedience. Before this reciprocal Promise, neither was he bound to protect me, nor I to obey him, at least by any perfect Obligation. And who will pretend to say, that an Act of this kind doth not fall under the Head of Covenants? Nor is this Covenant useless, because they, who by their own free Choice appoint a King over themselves, seem before-hand to have entred into an Agreement for the advancing such a particular Person to the Throne. For as the bare Election, without the Acceptance of the Party elected, confers on him no Power over the rest; so 'tis plain enough, from the Nature of the Business, that they who freely put themselves under the Power of another, desire he should, in the Exercise of that Power, pursue the End for which it was given him: And that he receiv'd the Power on this Condition, that those who conferr'd it on him should not, by his means, miss of their Aim. They who create a Sovereign therefore, as they at the same time promise whatever the Nature of Subjection requires; so, on the other part, engage him to endeavour the procuring of all those Benefits, for the sake of which civil Governments are introduced. And what can we call this but the entering into Covenant?

X. Nor, upon admitting this Covenant between Prince and People, do those Inconveniences, to which Mr. *Hobbes* seems to have had an Eye, necessarily follow. This indeed is common to all Covenants, that they lay upon Men an Obligation to some certain Performance. But then, there is the greatest Difference imaginable between those Covenants, in which one of the Parties doth, at the same time, put himself under Subjection to the other, and those, in which neither Party requires, with respect to the other, any Superiority or Command. Thus the Right of a Master over his Servant, at least over such an one as freely enters into that Condition, depends upon Covenant; and in the same manner the Authority of a Father over him that offers himself to be adopted, and the Command of a General over his mercenary Troops. And yet this doth not hinder, in the least, but that in all these Cases there is a Right of governing on the one side, and an Obligation to Obedience on the other: Nor may the Party in Subjection throw off the Yoak, when his Superior's Command proves disagreeable to his own Humour. For, in all these Covenants, which do not include a Submission of Will and of Strength, some certain Duties are specified, to be mutually perform'd on the inward Principle of Conscience; and when either Party refuseth voluntarily to fulfil his Engagement, there remains no Redress, but either from War and Violence, or from the Compulsion of their common Lord. But in Covenants, where one of the Parties is made subject to the other, the latter may, as he thinks fit, prescribe what shall be done by the former; and hath likewise a Power of forcing his Compliance, in case of Refusal; whereas the former Party cannot, on any account, be said to hold the like reciprocal Power over him. Wherefore a Governour cannot be tax'd with Breach of Covenant, unless he either utterly abandon all Care of the Publick, or take up the Mind and Carriage of an Enemy towards his own People, or manifestly, and with evil Design, recede from those Rules of Government, the Observation of which was, by the Subjects, made the necessary Condition of their Obedience. And 'tis very easy for one in Authority to avoid and escape all those Imputations, provided he will but consider, that the highest of mortal Men are not exempt from the common Laws which attend their Fortune and Condition, and that as *Pliny* ^b observes, *No Prince was ever himself deceiv'd, who had not before deceiv'd others.* Lastly, that Prince must either be extremely vicious, or extremely weak and impolitick, who cannot so order Matters, as that it shall be always the Interest of the greater, or the stronger Part of the People to see him preserv'd in his Person and Government. And it may be a strong Motive to him, to apply his best Endeavours towards the compassing this good End, if he barely reflect on that Saying in *Livy* ^c;

^a Xiphilin. *Epit. Dion in Neron.* All Sovereign Force and Authority, when conferr'd by a private Person, passeth immediately from the Giver, and holds good against him in the Hands of the Receiver.

^b *Paneg. c. 66. in fin.*

^c L. 8. c. 21.

Is it to be imagin'd, that any People, or so much as any single Man, will continue longer than they needs must, in a Condition which is grievous and uneasy to their Mind? If then the Majority of the People find it their Interest to stand by their Prince, and to defend the publick Administration as lodg'd in his Hands; as they cannot but do, if he guide his Councils with Justice and Wisdom, then his Fortune rests upon a Bottom. He that cannot compass thus much is fitter for any other Employment, than for Sovereignty and Command.

XI. Let us proceed to weigh more particularly the Reasons urg'd by Mr. *Hobbes* in favour of his Opinion. And here, first of all, we think it very inconvenient, that he should go about to derive the Obligation of Subjects towards their Sovereign, from such a Covenant by which each Man obligeth himself to each of his Fellows, that he will not resist the Will of that Person, to whom he hath yielded himself to be govern'd^a. Indeed, they who have agreed amongst themselves, to confer the Sovereignty on a certain Man, are presumed to have agreed likewise, that they should all submit their own Will to his Will; or, that, in the Management of the Commonwealth, his Will should represent the Will of them all. Nor is it unusual to ratify such a Consent about conferring the Sovereignty, as also the Terms under which it is conferr'd, by the mutual Covenants and Oaths of the People. Yet to agree about investing such a Person with the Government, and to confirm their Investiture by interchanging their Faith one with another, are two different things. But to go farther, there's no Absurdity in supposing, that Subjects should mutually engage their Faith to yield Obedience to their common Prince; as we know, there are such Covenants in which all engage for each, and each for all. Yet there is no Necessity, but that this may entirely be omitted, and in Fact 'tis seldom practis'd. When a Stranger is incorporated into a State, he swears Allegiance to the Sovereign: But he is now here required, so far as we can discover, to contract with the other Subjects about paying this Allegiance. Lastly, it would be a thing of very dangerous Consequence, to build our Obligation to our Prince on a Covenant with each of our Fellow-subjects, which would import as follows, *I transfer my Right upon the King for your sake, that you for my sake may transfer your Right upon him also.* For at this rate every Subject will seem to make the Obedience of every other Fellow-subject the necessary Condition of his own: And consequently, if any one happens to violate his Engagement, all the rest stand releas'd from theirs. And this Reason alone shews what Necessity there is that each Subject should

be bound to his Sovereign in his own Person, without any Dependence on the Obedience of others; to the end, that how uneasy soever one or two perhaps appear under their Confinement, the Sovereign may make use of the united Strength of all the rest, in reducing the Rebellious to their Duty.

No less incongruous is that Assertion of Mr. *Hobbes* to this Purpose; *That the Obligation to obey the supreme civil Power doth not arise immediately from the Covenant, by which particular Persons give up all their Right to the State; but only mediately from hence, that without Obedience the Right of Sovereignty would have been vain and insignificant, and, by Consequence, no Commonwealth would have been form'd*^b. What need of this winding and turning, when he might have gone on in the straight Road? The Reason, which moved him to this Position, is certainly idle and frivolous. He proceeds upon a tacit Supposal, that things agreed to by Covenant cannot lawfully be refused; whereas a Prince may lawfully command his Subject, what the Subject may as lawfully disobey; as if the King should order me to kill myself, or himself, or my Father, though judicially condemn'd: Wherefore, in his Opinion, the Obedience of Subjects is to be drawn from some other Principle, than from any Compact with the Sovereign. But now, we maintain, that the lawful Power of the Prince, and the Duty of the Subjects do exactly and compleatly answer one to the other: And therefore we deny, that, in any Case, the Subject can lawfully refuse what the Prince lawfully enjoins. For he can lawfully enjoin no more, than what really is, or, at least, is judg'd to be agreeable to the End for which civil Communities were first established. If either, through evil Design, or through unwise Counsels, he attempts any thing contrary to this End, the Act shall on no account be esteem'd lawful. But whether the Subjects may resist all such unreasonable Injunctions, is properly another Question, and shall be discuss'd in another place. Mr. *Hobbes's* Instances are of no weight in this Point. For, if the Prince might lawfully command any of those Actions, which he mentions; that is, if the Performance of such a thing, by a Subject, should seem conducive to the Good of the Commonwealth, the Subject could not lawfully refuse to comply^c. And, on the other side, if the Commands were void of all Justice and Reason, and the Subject slain for not performing them; no Man in his Wits will say, that such an one was lawfully put to Death.

As to what he affirms in the same Chapter d. That the Right of a Sovereign is conferr'd on him by the People, in the way of *Donation*;

^a De Cive c. 5. f. 7.

^b *Ibid.* c. 6. f. 13.

^c See *Falges* IX. 54. 1 *Sam.* XXXI. 4. *Zenaras*, Part III. reports, that when *Theophilus* the Emperor upon the Loss of a Battle, stood almost benum'd with Fear, and drawn, accosted him to this Purpose, *Unless you follow me, I am resolv'd to kill you on the spot; for 'tis better you should lose your Life, than that you should fix a Mark of the highest Disgrace on the Roman State, by falling into the Hands of the Enemy.* At which Threats the Emperor, with some Unwillingness, awaken'd from this Lethargy, and following his Guide, got off safe. The Poet *Quint. Calp.* l. 13. observes,

A Prince should rather fall amongst the Brave,
Than wear the Badges of a Royal Slave.

^d *See* ult. in fin.

this is not so much as consistent with his own Notions. *Donation* he himself allows ^a to be the transferring of Right from one Party to another, without the like Return. But now when a Prince is invested with the Sovereignty, there is a mutual transferring of Right, or a reciprocal Promise. The Subjects engage to be obedient, the Prince to take care of the Commonwealth, to which Duties neither of them stood bound, before this Act passed between them. For, as before the Government was conferr'd on such a Person, the rest of the Society might have oppos'd or resist'd his Command, though they afterwards appoint him for their Sovereign; so he on his part, if they had demanded his Care or Protection, might likewise have resist'd them; that is, might have denied those Performances, as things which they had no Right to require of him ^b.

XII. The other Set of Reasons, which he makes use of ^c to overthrow all Compacts between Prince and People, will appear to be no less weak than the former. In the first place, he undertakes to prove that democratical States are constituted, not by Covenants between each Man and the whole People, but between each Man and each Man. His Argument is: ^d Because, in every Covenant, the Parties covenanting must exist antecedently to the Covenant it self. Whereas before the Settlement of the State, the *People* cannot be said to exist, as being not one compound moral Person, but only a Multitude of Individuals. And then again, after the State is settled, to enter into such a Covenant would be to no Purpose; because the Will of the People includes in it the Will of any private Subject, to whom the People must be supposed, in this Case, to engage their Faith; so that they may release themselves when they please, and, by Consequence, are actually free. But now 'tis manifest, that there's a Medium between these Suppositions. Before the Settlement of the State, many Men are not indeed a *People*, that is, a democratical Community: Therefore no Covenant can be made with them as such. And so too, after the State is settled, a Covenant of this Nature would in one sense be in vain; that is, 'twould be in vain, for one or two particular Subjects, to make a private Compact with the People about the publick Administration: For he that hath once given his Consent to the introducing a Democracy, is presumed to have thereby oblig'd himself to obey such Decrees, as shall proceed from the Majority of the People; which Obligation must needs suffer Prejudice from any particular Covenant. But, still in the very Act of constituting a popular State, a mutual Covenant may, and really doth, pass between the People and the private Members; the Nature of which we have already explain'd. A Man might argue, with just as much Reason and Consequence, that a Husband cannot possibly have entered into any Covenant with his Wife: Because before Marriage she was not his *Wife*; and after Marriage, 'twould be in vain to come to a

Covenant; the Woman's Will being then put under Subjection to the Man's. Whereas in the very Act of taking or choosing such a Woman for a Wife, a Covenant might pass between the Parties. *Epicurus's* Fallacy about Death was a piece of Sophistry much of the same Strain, as 'tis recited and confuted by *Lactantius* ^e *When we are in Being, Death is not; and when Death is in Being, we are not: Therefore Death signifies nothing to us; or, Death and we have nothing to do with each other. What a nice Cheat was this upon our Understandings? As if we fear'd Death when 'twas once over, and had taken away our Senses with it; and not rather fear'd to die, by which Act our Senses are thus taken from us! For there is a certain Point of time, when we seem to be gone, and yet Death is not quite arriv'd. And here's the miserable Moment, when Death begins its Being, and we conclude ours.*

But farther, should a Man contend with never so much Earnestness, that he cannot in democratical Governments, conceive such a Compact in his Mind, or that he judgeth it utterly useles; yet he cannot fairly take Occasion thence to exclude it from other Forms, where those who command, and those who obey, are really and naturally different Persons. For here certainly a mutual Covenant is required, by which the former engage to undertake the Care of the Publick, and to make the Safety and Welfare of the People the chief Law of their Actions; and the latter, again engage to yield Obedience. Hence 'tis evident, what Judgment we ought to make of that other Assertion laid down by Mr. *Hobbes* ^e that, *because the particular Members of the Society, not by any Compact with the People, but by private Covenants between themselves, are bound to acquiesce in every Act of the People; they are, by the same Covenants, bound to acquiesce in that Act of the People, which transfers the Sovereign Right of the State upon a Senate, or upon a Monarch.* For 'tis no good Consequence to say; if the general Assembly of the People agree to transfer the supreme Command on a Senate, or on a King, particular Persons are bound to stand to their Resolution; therefore there passeth no Covenant between the People, who transfer the Right, and the Nobles, or King, on whom it is transferr'd.

He has still an Argument behind, of as much Strength and Weight as the rest. He tells us, that a King, though elected by the *People*, cannot by the same *People* be oblig'd to any Performance; because immediately upon his Election the *People* are dissolv'd, and lose the Existence they had as *one Person*; for which Reason the Obligation directed towards them as *one Person*, doth likewise perish and is dissolv'd. Now, what he fixeth here for the Basis of his Opinion, that the Obligation towards any *Person* ceaseth, the Person himself being taken away; is to be understood of those Cases only, in which, either the Person is extinct by a natural Death, or that Quality expires in which alone the Obligation was found'd. But when a free People transfer the Government on a King, neither do themselves die in a natural Sense, nor is the King's Obligation founded in

^a *Señ. ult. in fin.* ^b *Comp. Luke XII. 13, 14.* ^c *C. 7. f. 7, &c.* ^d *Institut. Divin. l. 3, c. 17.* ^e *De Civ. c. 7. f. 9.* that

that *Quality* of the People, which denominated them a free State; but in that by which they resolve to be, for the future, a Society of Men under a single Governour. As a Suitor who is engaged by Covenant to a young Woman, cannot after the Marriage hath been consummated, except against the Contract, on pretence that his Obligation is expired, because she is not a Virgin now, as she was when the Covenant was made. For the Obligation of a Suitor was not founded in the Quality of Virginity; but he contracted with a Virgin in order to her changing her Condition to that of a Wife. Upon the constituting a Monarch, the *People* are dissolved in this respect only, that the supreme Authority doth no longer reside in a general Assembly; but they are by no means dissolved into a loose Multitude, not united by any mutual Bands: For they still continue one Society, held together by one Government, and by their original Covenant amongst themselves. The whole of the Matter therefore is this; Mr. *Hobbes* imposes upon less intelligent Readers, by the ambiguous Signification of the word *People*. In Democracies, the *People* denotes the whole Body of Men, who, in different respects, govern and are govern'd ^a. But who will venture to affirm, that an Obligation towards a People in this latter Sense, or as they are subject to a Monarch, or to a Senate, may not continue and subsist, tho' contracted whilst they were yet free, but in order to their future Subjection, and in certain prospect of it? To conclude, Mr. *Hobbes* himself elsewhere ^b expressly asserts, that God was made the King of the *Jewish* People by virtue of a Covenant between him and them ^c. And how then can he pretend, that there is no Covenant between a mortal King and his Subjects? A little before he delivers the direct contrary: *When a Man, says he, submits himself to his Conqueror, he is bound by as necessary an Obligation as the truest Subject; for a Contract, lawfully entered into, can't fairly be broken or transgress'd* ^d.

XIII. By the means of these Covenants then a Multitude of Men are so united and incorporated, as to form a civil State; which is conceiv'd to exist like *one Person* ^e, endued with Understanding and Will, and performing other parti-

cular Acts, distinct from those of the private Members. Again, as 'tis distinguish'd and known from the same Members by one general Name ^d, so it hath peculiar Rights and separate Properties, which neither particular Men, nor many in Conjunction, nor all together, without him in whom the supreme Authority resides, can make any Claim or Pretences to: And lastly, it hath peculiar Actions proceeding from it, which private Persons can, on no account, assume or challenge to themselves. So that the most proper Definition of a civil State seems to be this, 'It is a compound moral Person, whose Will, united and tied together by those Covenants which before pass'd among the Multitude, is deem'd the Will of all; to the End, that it may use and apply the Strength and Riches of private Persons towards maintaining the common Peace and Security ^e. Mr. *Hobbes* hath given us a very ingenious Draught of a civil State, conceiv'd as an *artificial Man*: 'In which the Sovereign is the Soul, as giving Life and Motion to the whole Body; the *Magistrates* and the other *Officers*, artificial *Joints*; *Rewards* and *Punishments*, fastened to the Seat of Sovereignty, and by which every Member is moved to the Performance of its particular Duty, the *Nerves* which do the same in the Body natural; the *Wealth* and *Riches* of particular Members are the *Strength*; *Salus Populi* (the *People's Safety*) its *Business*; *Counsellors*, by whom all things needful for it to know are suggested to it, are the *Memory*; *Equity* and *Laws* an artificial *Reason*; *Concord* is *Health*, *Sedition* *Sickness*, and *civil War*, *Death*. Lastly, the *Pacts* or *Covenants*, by which the Parts of this Body politick are cemented together, resemble the divine *Fiat*, or the *Let us make Man*, pronounced by GOD in the Creation ^f. Whence we may gather, by the way, that *Isocrates* ^g was in the wrong, when he affirm'd the Form of Government to be the *Soul of the State*, having the same Force and Power as the *Mind* hath in the Body. Whereas the Form of Government is rather the same in the State, as in a human Body, the Structure and Disposition of the several Parts and Members.

^a Vid. *Hobbes de Cive*, c. 13. f. 3. ^b *Leviath. de Interregnis*, f. 7. *Conclus.* ^c *Statius Achil.* l. 1. v. 457, 458.

————— *Sparsa ac diffusa moles*
In Corpus unumque coit, & rege sub uno
Diffusa est. —————

————— A wild and shapeless Mass
Assumes a Figure and a comely Grace,
Under a Monarch's Reign. —————

^d Vid. L. 1. t. 8. l. 6. f. 1. D. *De Divis. Rerum*, & L. 2. t. 4. l. 10. f. 4. D. *De in Jus vocando*, & L. 3. t. 4. l. 7. f. 16 D. *Quot cujusunque Univers.* Nom. & L. 48. t. 18. l. 1. f. 7. D. *De Question. Act. Senec. de Beneficiis*, l. 6. c. 19, 20.

^e For that Definition of *Dion. Prusæus* (in *Borysthenic.*) *A State is a Multitude of Men living together, in the same Place, under the same Laws*, we may perhaps hereafter find Occasion to examine; it being founded on the Maxims of Grecian Policy. Nor hath *Apuleius* much better Success when he defines the *Platonic Commonwealth*, as the most perfect Model of Government, in the following manner; from the Authority of *Plato* himself; *A State is a Union or Conjunction of many Men, amongst whom some govern and some are govern'd, but all agree and mutually assist each other, guide themselves in their Duty by the same Laws (such as are good and just) and have accustom'd themselves to live within the same Walls, and to have the same Inclinations and Aversions in all things.* ^f *Leviath. Proæm.*

Mr. BARBEYRAC'S NOTES on § XII, XIII.

¹ Vid. *Hobbes de Cive*, c. 35. 40.

² Vid. *Hobbes ibid.* c. 20.

¹ This Definition is a little intricate, and as Mr. *Titius* observes (*Observ. DLVII.*) confounds the *Sovereign* with the *State*. The *State* indeed is a *Body* of which the *Sovereign* is the *Head*, and the *Subjects* the *Members*. Our Author has here too blindly follow'd *Hobbes's* Definition of *Cive*, Cap. V. §. 9.

² *Areopagit.* p. 245, & *Panathænic.* p. 450. But it seems to me, that *Isocrates* is not speaking there of the form of Government, and that *Πολιτεία* signifies here only *Civil Government* in general, which as our Author himself allows in the following Chapter, Sect. 1. is the *Soul of the State*. Mr. *Hertius* has lately observ'd the same thing in his Remarks on *Wolffius's* Translation, which led our Author into this Mistake.

XIV. The State in exerting and exercising its Will, makes use either of a single Person, or of a Council, according as the supreme Command hath been conferr'd, either on the former, or on the latter. Where the Sovereignty is lodg'd in one Man, there the State is supposed to choose and desire whatever that one Man (who is presumed to be Master of perfect Reason) shall judge convenient; in every Business or Affair, which regards the End of civil Government, but not in others. For Instance, if a Prince declare War, if he make Peace, or enter into an Alliance, this is interpreted as the Will and Act of the State^a: But not if he eat, or drink, or sleep, if he marry a Wife, or if he be guilty of any Vice or Disorder. So that we may form a Distinction between the publick Will of the Monarch, representing the Will of the State, and the private Will of the same Monarch, which he useth like any other Man, in the Prosecution of his personal Affairs. Hence there naturally ariseth this Question, Whether if he, in whom the publick Will resides, wills otherwise than he ought to do, and consequently sins in the Exercise of this publick Will, the Action, which proceeds from a Will thus depraved, is to be look'd on as the Action of the State? For every Person, who submitted his own private Will to that of the Prince, is supposed to have done it with this Intention, that the Prince should will nothing, but what should be just in it self, and advantageous to the Publick. Here it seems reasonable to pronounce, that an Action, proceeding from the Abuse and Corruption of the publick Will, is in it self a publick Action, or the Action of the State; because perform'd by the Sovereign, as consider'd in that Capacity. Thus if a King or a Senate ordain evil Laws, execute wrong Judgment, appoint unfit Magistrates, or undertake unjust Wars, that Act in all these Instances is certainly publick. As when a Coachman overturns, the Action is his as a Coachman, tho' as one unskilful or negligent in his Art. But then in the Court of Conscience no Man is accountable for such an Act, unless he contributed positively and effectually towards its Production. Therefore Subjects are not charged with the Faults of the Government, nor they in a Senate or ruling Council, who dissent from any such Proposal, and are outvoted by the rest. But the Inconveniences, which innocent Subjects suffer on account of these publick Crimes, are to be rank'd amongst those general Evils to which human Nature, in this Condition of Mortality, lies necessarily expos'd; and which we must therefore endure with the same Patience as we do extreme Drought, or immoderate Rain, and those other Misfortunes which we style *naturally Evil*. Though there are several things, which Expe-

rience shews to have a very great Virtue and Efficacy towards the preventing of these Inconveniences; as fundamental Laws, good Education and Discipline, and above all, the Precepts of Religion.

It follows on the other hand, that whatever any particular Person, or many together, or all, without the King, shall will or do, beside or contrary to his Authority or Command, not only in Business of the latter, but also of the former kind, shall not in the least be look'd on as the Will or the Action of the State, but as a private Will, or a private Action: Nay, there shall be so many distinct Wills, and so many distinct Actions, as there are particular Men concern'd in the willing, or the doing thus or thus. And the same Judgment is to be pass'd on that which single Men, or a Number of Men shall attempt by their own private Motion, without Authority or Order from that governing Council, in which the sovereign Power resides. Therefore amongst the Opinions which encourage Sedition, and which tend to the dissolving the inward Frame and Structure of any State, especially of a Monarchy, Mr. *Hobbes* reckons this for one, that the Vulgar are not able rightly to distinguish between a State, or *People*, and a *Multitude*. A *People* or a State makes but one Person, having one Will, and performing only one and the same Action. Neither of which can be said of the *Multitude* of Subjects opposed to the Prince or sovereign Council. But what he affirms afterwards, that *The People rule in every State*, comes to nothing through his idle Affectation of overmuch Nicety. For the Word *People* must import one of these two things; either the whole State, or the Body of the Subjects. In the former Sense 'tis ridiculous Tautology, *the People, that is the State, rules in every State*: in the latter Sense 'tis absolutely false, *the People, as distinct from the Prince, rules in every State*. As for that which follows, *In Monarchies the People govern; because the People, by the Will of one Man, exert their own*; he ought rather to have said more plainly thus: In a monarchical Government the Will of the Prince is supposed to be the Will of the State. Nor can that Paradox, *Rex est Populus, The King is the People*, be explain'd in any other Sense than this. His other Remarks are true enough; as, that the Vulgar always speak of a great Number of Men, as of the People, or the State, and are wont upon Occasion to say, the State hath rebell'd against the King, which is impossible; and that the People or the State, desire and refuse what is desired or refused by some troublesome discontented Mutineers; under the Name and Colour of *the People*, animating the Members of the State against the State, the Subjects against the Sovereign.

Mr. BARBEYRAC'S NOTE on §. XIV.

^a Provided first, that he act with Knowledge, and not thro' Error, nor thro' any rash Motion, which for a time deprives him of the Use of his Reason; and, secondly, that he don't violate the Fundamental Laws of the State. *Titius* Observ. 559.

² *Euripid.* Supplic. v. 1188, &c.

—————'Tis fit *Adrastus* swear;
The King and Lord of *Greece* shall swear for all.

^b *De Civ.* c. xii. f. 8.

XV. But

XV. But where the supreme Authority is conferr'd on a *Council* made up of many Persons, each of whom retains his own Will; the Question first to be determin'd is, What Number of these Persons, agreeing in the same Resolution, shall represent the Will of the *Council*, and by Consequence of the State? For otherwise, as no Man is bound to follow another's Judgment rather than his own, unless he hath subjected his Will to the Will of the other Party; so tho' a Man enter into Society with others, in order to the directing their Business by the common Vote, yet if by express Condition he reserve to himself the Privilege, that he will not be oblig'd to any thing to which he doth not give his Consent, the Decrees of the Majority shall not in the least affect him, or force his Compliance. Thus there are *Bodies incorporate*, in which each Member hath a Negative, and by it can render the Consent of all the rest void and ineffectual¹. Yet, if a Person absolutely refuseth to hearken to Reason, and out of mere Stubbornness opposeth those who are in the right Opinion, he may be expell'd the Society, as a Nuisance; or, in some Cases, may be brought to farther Punishment. For tho' here he is not bound to follow the Act of the greater Part by his own precedent Covenant; yet he is under the Obligation of a general Law, which commands him to shew himself friendly and easy to others, and, as a Part, to conform himself to the good of the whole^a. It must be confess'd, that in Meetings of this kind, especially when consisting of a great Number of Persons, Business is never dispatch'd without much Difficulty, and many times falls and comes to nothing, by reason of the Difference of Mens Judgments, and the impregnable Obstinacy of some Tempers. And, according to the ordinary Course, if any Person hath once absolutely, and without Terms of Exceptions, united himself to any Society or Assembly, in as much as

he cannot require, that all the rest should be govern'd by his Vote, or that they shall omit what seems necessary or profitable for them, in Deference to one dissenting Member; he is, at the same time, presum'd to have oblig'd himself to the acknowledging and ratifying all Resolutions, which the major Part shall have settled. For if he looks on this as any Hardship, he should have put in his Exception to it, when he first treated about his Admission into the Society. But it would now betray a Spirit unreasonably proud and troublesome, to think himself wiser than all his Fellows. If a Man so far persist in his Opinion, as to be uneasy, because he cannot force it upon the whole Company, he is at his liberty to quit the Union in which he was before engaged. But 'twould be high Injustice for a Person, when he had been out-voted, to follow the Example of those we find described in the Historian^b. *Every one of them*, says he, *taking it beinously that his own Opinion was not followed, applied himself more negligently and heavily to the common Business; nay, rejoiced upon any ill Success or Miscarriage, that he might have Occasion thence to boast amongst those of his own Party, and demonstrate that there could be no other Cause of the Disappointment, but the slighting his particular Advice.* Hence, according to the regular Course, the Votes of the Majority in Assemblies have the Force and Virtue of a general Decree; not because there is any Necessity of this, by the Appointment of Nature, but because there is hardly any other possible means of transacting Business amongst Numbers^c: Tho' it sometimes happens, that a Proposal more for the Benefit, or the Honour of the State, may be rejected, when the Authors cannot form a Party strong enough to carry it. For in these general Establishments, for the ordering of human Affairs, which often admit of so great Variety, since 'twas not possible for Men to invent such a Method, as should be free from all manner of

Mr. BARBEYRAC'S NOTES on § XV.

¹ Every one knows, that in *Poland* the Opposition of a single Member breaks up the *Diet*. See *Hartknock de Polon.* Lib. II. Cap. I. Sect. 15. The *States of Holland* likewise observe this Maxim, when they have any Affair of great Importance to be debated. See *Mr. Hortius's Note*.

² See also *Grotius Lib. ii. Cap. 5. Sect. 17.* & *La continuation des pensées diverses de Mr. Bayle, Pag. 14. Gronovius*, in a Note upon the Place I have just quoted of *Grotius*, adds the following Restrictions to this Maxim of the *Plurality of Voices*. *First*, That the Point in Debate be determin'd by fair Voices, that is, that there be no Combination among the Members, and that the Majority of 'em, before they enter the Assembly, have not agreed to carry such a particular Opinion. *Secondly*, That the Majority of the Assembly be not suspected Persons, who, according to the establish'd Laws and Customs, ought not to be in the Business that is debating, that they may not be Judges in their own Cause. *Thirdly*, That the Matter in Debate be not contrary either to Divine Laws, or to Reason. *Fourthly*, That it does not destroy the Fundamental Laws of the State, and that it does not tend to the changing, without Necessity, the Form of the Government. *Fifthly*, and lastly, That it be not in the least prejudicial to the Rights of particular Persons, nor to the Privileges and Antient Customs establish'd for the good of the Publick.

^a On which Subject, we may add the Argument in *Father Paul's History of the Council of Trent*, (l. 4. p. 788.) that the *French* were not bound by the Decrees of the Council, having protested against it. Where the Judgment of the Parliament of *Paris* is also produced, and runs to this effect: 'That the Authority of the whole Body is then, indeed, transferr'd on the major Part, when the Cause affects all in common, but toucheth none in particular: But when the whole Cause so belongs to all, as that each are to be allow'd their respective Shares; in this Case, the Consent of every one in particular is necessary, and the Negative is the more favourable side: Nor are the Absent in the least oblig'd: Unless they confirm the Resolutions by their own Vote.' That Ecclesiastical Assemblies are of this kind; in which, how frequently soever Councils may be held, the absent Churches are not at all bound by their Decrees, except they please to receive them. ^b *Agathias, l. iv. c. 5.* ^c *Vid. L. 50 t. 1. l. 19. D. Ad Municipalem. Plin. Lib. ii. Epist. 13. n. 5. The Votes pass by Number, not by Weight; nor is it possible, that in a publick Assembly it should be otherwise, where nothing is so unequal as the very Equality it self; whilst all have not the same Wisdom, and yet all have the same Right.* *Idem Lib. 6. Epist. 13. n. 4. Whilst the Point is unresolv'd, every Man hath the Privilege of dissenting; but when 'tis once determin'd, all are bound to maintain what the Majority have decreed.* And of this regular Course of proceeding we are to understand that of *Aristotle, Polit. IV. c. 8. That which most agree in, is receiv'd under all manner of Governments. For in Oligarchy, in Aristocracy, and in Popular States, the Resolution of the greater part of those concern'd in the Supreme Management, is confirm'd and ratified as a publick Decree.*

Inconvenience, that must be follow'd which holds good for the most part ^a. And therefore, 'tis idle to pretend, that since it seems agreeable to Nature, that what proceeds from more Wisdom should take place, against what proceeds from less; it is therefore repugnant to Nature, that the weaker Opinion of many should outweigh the wiser Opinion of a few, and consequently that the former should compel the latter to an imprudent Undertaking. Indeed, in determining speculative Truths, Opinions are not pass'd by *Number*, but by *Weight*: And the Multitude of Patrons is it self look'd on as a Mark of Error ^b. But this Rule can by no means be applied to the Management of Business in an Assembly, the Members of which have all an equal Right to influence the Proceedings. For who shall be the Judge here which Opinion is the wiser? Certainly not the Parties themselves, which are thus divided. For neither side will allow the other thus to over-rule a Point, in which their Credit, as well as their Interest, is so nearly concern'd. And where's the Man, who doth not think his own Parts and Wisdom more considerable than his Neighbour's? Nay, How many are there who take a Delight in disparaging an Opinion or a Project, tho' the best that could have been advanced, only because they were not themselves the Authors and Contrivers of it? Nor would it be easy, for the two dissenting Parties to refer such a Controversy as this, to the Decision of a common Arbitrator; for again, the Arbitrator's Wisdom or Integrity might be call'd into Dispute, and might require a new Judge to determine the new Question: Not to say, that most of the Points, debated in these Assemblies, relate to such Matters as cannot conveniently be committed to the Judgment of those who do not belong to the Society. It

hath been therefore thought most proper, to enter upon such a Method as should be the least expos'd, either to Difficulty or Uncertainty; and none can be invented which should answer this Character better, than the counting of Voices ^c. Besides, whoever is allow'd the Privilege to vote in a Council, is presumed of sufficient Ability to penetrate and comprehend all Affairs, that shall fall under their Deliberation. Which must be allow'd to be true of those Councils at least, into which Persons are not admitted, without some kind of Choice and Approbation of others. Neither would it be always expedient, to give any one Man in the Council, as suppose the President or chief Director, the Power of controlling the whole Matter by his Vote, and declaring which of the Opinions is the better. For, if the Privilege should be granted to him, he might prefer the Judgment of the smaller Party to that of the greater; nay, he might reject both Proposals, on Pretence that neither was good; and thus he would, to all Intents and Purposes, be the sole and arbitrary Governour of the State. As absolute Princes may follow that Advice which is offer'd by the fewest of their Counsellors; or may take such Measures as are contrary to the Opinion of them all.

XVI. But as to this Point of the Plurality of Votes, it is needful to observe, that in some Councils 'tis not enough for an Opinion propos'd to have the Advantage of one Vote, or of some few more than the contrary; but e'er it can be carried, it must have a Majority to such a certain Number ^d. Thus the Law about the Election of the Pope ^e requires two Thirds ¹ of the Cardinals to agree in their Nomination. And the same Rule appears to have been follow'd in ² the Election, and in the Orders

^a Bodin. *De Republ.* l. III. c. 4. p. 456.

^b Senec. *De Beat. Vit.* c. 2. *Whilst I am treating of a Happy Life, You are not to answer me, as upon a Division in the Senate-House, The greater Number is on this side; for the greater part is, for that very reason, the worst; Mankind are not so happy, as that the best things shall have the most Patrons and Defenders. And therefore a Multitude is generally an Argument of the Wrong.* Phocion, when a certain Proposal of his was receiv'd with general Applause, turn'd to his Friends, and ask'd them, Whether he had unadvisedly let drop somewhat that was amiss. *Plutarch* in Apophthegm. p. 188. *A. Idem De Educat.* p. 6. *A. Ed. Wech. To please the Vulgar is to displease the Wise, Euripides will bear Testimony to this Observation, whom we find speaking to the same Purpose:*

I've not the Art of tickling vulgar Ears,
But yet my Vote weighs somewhat with my Peers.
When *Aff's* judge, 'tis *Musick* to be loud;
And that which shocks the Thinking, charms the Crowd.

Hence, as *Quintilian* observes, (*Institut. Orat.* l. X. c. 7.) *They who are ambitious of appearing Wise to the Fools, appear Fools to the Wise. Plato Conviv.* p. 1188. *C. Ed. Wech. A few Men of Understanding are more to be feared, than a whole Multitude compos'd of Ignorance and Weakness. Add. Valer. Max. l. 3. c. 7. §. 1. Ext. Dio. Chrysost. De Illo non capto, p. 190. D. Ed. Paris. Morel. For a thing to have been believed along time by Fools, is no Authority or Argument for its Truth.*

^c *Plin. Panegy.* c. 62. in fin. *'Tis better to trust the whole Company, than any private Member: Particular Persons may deceive, and may be deceived; no Man ever cheated all, no Man was ever cheated by all.*

^d *V. Groc. L. 2. c. 5. §. 17. ibid. Becker.*

^e *Jus. Canon. C. 6. De Elect. & Electi Potestate.*

MR. BARBEYRAC'S NOTES on §. XVI.

¹ *V. Gratian. Can. 36. Distinct 63.*

² Our Author is very much mistaken in this Point, in reference to the Election of the *Decuriones* among the Ancient Romans; and to prove the Truth of this Assertion, we need only cast our Eyes upon the very Laws here cited by him: For they evidently prove, that there must be two thirds of the Members of the Council present in the Assembly; and not that two thirds of the Votes of those that are present are required, to determine absolutely in an Affair. See also *Digest. Lib. L. Tit. IX. Leg. II. III.* The Passage of *Prudentius*, which our Author quotes to prove it, is no better applied; for it signifies likewise, that to make a Decree of the Senate valid, it was antiently requisite, that there should be three hundred Senators present in the Assembly, and not that three hundred Senators should vote for the same Thing. For it was sufficient, that among those three hundred Senators, the Majority of Voice was for one particular Opinion. This appears among others, from this Passage of *Livy, Plebs sic jussit; quod Senatus juratus: MAXIMA PARS CENSEAT, QUI ASSIDETIS, id volumus jubemusque.* Lib. XXVI. Cap. XXXIII. towards the end. Upon which see *Gronovius's* Note. Our Author himself, Sect. 19. cites, in the same Sense I have done, the very Laws which he here applies wrong.

of the *Decuriones* under the *Roman* Emperours ^a. In the *Venetian* Historian ^b we find this Clause, added to the Decree of the Senate for Banishing the *Jesuites*, That nothing should be determin'd in Prejudice of the said Decree, unless eighteen Senators were present, and unless five Parts out of six consented to the Resolution. Yet, where there is no such particular Appointment, that side which exceeds the other, tho' by a single Vote, shall be accounted a true Majority, and equivalent to the Consent of the whole Body ^c. 'Tis to no Purpose, that some urge against this Judgment, the Maxim of the Civil Law ^d, *Quod omnes tangit, id ab omnibus approbari æquum est, Equity requires, that what affects or concerns all, should have the approbation of all*: For we cannot hence conclude, therefore 'tis Injustice, that for the more convenient Dispatch of Affairs, a few dissenting Members should yield to the stronger side. But farther, the Maxim produced doth not relate to those Assemblies or Councils, which are constituted for the Regulation of publick Affairs; but to private Partnerships and Confederacies, form'd by bare Compact, or by the Agreement of several Men, to be Joint-possessors of some one thing. Now such an Agreement, or Confederacy as this, doth not give the Persons concern'd, a Right to determine any thing about the common Affair, if so much as one of the Partners disagrees to the Proposal, thinking it prejudicial to his own Interest ^e. As for that Clause, which is added by the Law before mention'd, about the Papal Election, that 'What is there particularly order'd about the two Thirds, shall not abridge the Liberty of their Churches, in which the Opinion of the greater and sounder Part ought always to prevail; the reason of it seems to be this; because, according to their Hypothesis, the supreme Judge, the Pope, may declare which Opinion is the *sounder*, in case a Dispute should arise on that Point. Wherefore the *sounder* side, unless it be the stronger likewise, shall not be consider'd, except in Cases where there lies an Appeal to some Superior ^f.

XVII. If the Parties divided are equal, no Resolution shall pass; but Matters shall continue as they stood before: Because there is not ground enough for any Alteration either way; but, the Weight on both sides being the same,

the Balance hangs even, and the Business naturally stops. Hence, even in criminal Cases, upon an Equality of Votes the Party is acquitted: Tho' the Penalties enacted against false Accusation, on litigious Suits, seem not to take place on these Occasions ^g. Amongst the *Jews*, the Criminal was not condemn'd; tho' there happen'd to be one more Vote against him than for him. Which Custom was, no doubt, founded on this Principle, that since there is no less Religion and Conscience to be observ'd in what is pronounced by a Judge, than in what is deposed by a Witness; as a single Witness is not sufficient to convict; so a single Judge is not sufficient to condemn. For the rest of the Judges, by declaring directly contrary to each other, seem'd mutually to evacuate the Force of their own Authority. We ought to add one more Remark on this Subject; and it is, that where Suffrages are given by Companies or Tribes, the particular dissenting Members in one Tribe, who were outvoted by the Majority of their Fellows, shall not be allow'd to increase the Number of dissenting Suffragans in any other Tribe.

XVIII. Lastly, when more than two Opinions are started, the Question is, Whether they are all to be reckon'd separately from each other, so as to give the Preference to that, which taken apart hath more Favourers than one besides; or whether two or more Sentences, tho' different between themselves, may be first join'd together to cast out a third, and then play'd against each other, so that the Motion, which upon the last Result hath most Voices, shall prevail? Here, if we consider things barely according to their natural Equity, without any special Compacts or Constitutions to the contrary, it seems proper to distinguish between those Opinions which really and totally differ one from the other, and those of which one is included in the other as a Part, or which differ only in Quantity; so that the latter may be allow'd to unite in that common Point where they agree, but the former may not be join'd, being absolutely inconsistent. Thus they who adjudge a Delinquent to pay twenty Pounds, and they who adjudge him to pay ten Pounds, may unite in the ten Pounds, against those who would entirely acquit him; and he shall stand guilty to the Value of the said Sum, as that in which the

^a L. 3. t. 4. l. 3. 4. D. Quod cujuscunque univ. Nom. & C. L. 10. t. 31. l. 45. De Decurion. Prudent. l. 1. Contra Symmach. v. 604. &c.

*Sic consultæ patrum subsistere conscriptorum,
Non aliter licitum prisco sub tempore, quam si
Tercerum sensissi senes legerentur in unum.
Servemus leges patrias; infirmæ minoris
Vox cedat numeri, parvique in parte sileat.*

Whilst ancient Honesty possess'd the Throne,
To Acts of Senate just Respect was shown,
Because three hundred Heads had join'd in one.
Still let the Laws prevail; the Weaker Few
Yield up their False Belief, a Captive to the True.

^b Maurocen. l. 17. ^c Vid. L. 4. t. 8. l. 17. f. 6. D. De Receptis. Vid. Grot. d. l. ^d Cap. Quod omnes de Reg. Jur. in Decretal. Lib. VI. ^e By which we are to explain l. 11. of B. 8. t. 3. D. De Serv. Præd. ^f Ald. Gratian. c. 36. Distinct. 63. ^g Quintilian. Declam. 254. Equal Votes favour the Person in Danger. Antiphon. Grat. XIV. When things are equal, they make for the Prisoner, not for the Accuser; as an Equality of Votes assists the former, not the latter. Ad Aristot. Probl. f. 29. c. 13. Vid. L. 42. t. 1. l. 39. D. De Re Judicat. M. Senec. l. 1. Controv. V. One Judge condemns, the other acquits; of two different Sentences, the Milder ought to take place. The Greeks called this favourable Case, *Minerva's Vote*: On which Subject the Reader may consult a whole Dissertation of Bacler's. ¹ See Grot. B. 2. c. 5. f. 18. Note the last. ² See above in B. 5. c. 13. f. 19.

Majority of those that are to try him agree : The Fine of ten Pounds being contain'd under that of twenty ^a. Hence arose that Custom in the Roman Senate, of ordering a Member *Sententiam dividere*^b, to divide his Opinion, when he had not deliver'd himself distinctly, but had advanced two Motions at once, one of which was approved by the Company, the other not. But if some vote a Criminal to Death, others to Banishment, and a third Part are for clearing him ; neither can they who propos'd Banishment join with those who declared for his Death, against the acquitting Party, nor the Acquitters and the Banishers against those who condemn'd him to capital Punishment. For these Sentences are altogether incompatible ; Death being neither a Part of Banishment, nor Banishment of Death. And tho' the acquitting and the banishing Parties thus far agree, that both are for saving the Man's Life ; yet their Opinions do not directly produce this Agreement, but only by way of Consequence ; the Opinions being in themselves really different. For they who would absolve the Criminal, do thereby release him from all manner of Suffering ; whereas they who sentence him to Banishment insist positively upon having him punish'd, tho' in such a particular Manner and Degree ^c. *Polybius* ^d reports a remarkable Cause of this Nature. Certain *Grecians* were held Captives at *Rome*, and a Motion made in the Senate after what manner they should be dispos'd of. Upon the Debate three Opinions were propos'd, one that they should be releas'd, another that they should be condemn'd, and a third that they should be detain'd Prisoners some time longer ; the first in the Number of Votes exceeding both the other, if separately taken. Here *Posthumius* the Pretor, who then presid'd in the Senate, having a Grudge against the Captives, made use of the following Stratagem to the great Prejudice of their Cause. When the Members were to divide, he omitted one of the Opinions, and propos'd two only, ordering those who were for releasing the Men, to go to one part of the House, and those who were for disposing of them any other way, to go to the other part. By which means, they who would have confin'd them for a time, united themselves with those who whold have condemn'd them ; and so both together outvoted those who would have granted them their Liberty. In *Gellius* ^e we find the following Controversy propos'd : *Seven Judges were to sit upon a Criminal, and that Opinion*

was to stand, in which the greatest Part of that Number should agree : Upon hearing the Case, two of the Judges declared for the Prisoner's Banishment, two more would have him fin'd, and the other three voted him to suffer Death ; being demand'd, in order to his Execution, he demurs to the Sentence. This Case was then offer'd for such an one as they term'd *ἀρογος*, or unexplicable. *Cnemon* in *Heliodorus's* History ^f is condemn'd by seventeen Hundred Voices to Death, and by a Thousand to Banishment : Yet, in as much as the former Party was divided, some requiring that he should be stoned, others that he should be thrown alive into a vast Cavern of the Earth : The Thousand who decreed to banish him, made the greater Number ^g.

It is farther observ'd by *Grotius* ^h, that when several Persons join'd together do not form a Society, or general Body, properly so call'd, but are only tied to each other with regard to some certain thing which they all partake of, yet by unequal Shares ; then not only the Order and Precedency shall be fix'd according to their different manners of partaking, but the Votes, in stead of being numbered, shall be measured by that Proportion which each Suffragan holds in the common Possession ⁱ. On which Rule we may add this Remark ; that since a Society or Combination of this Nature is founded only upon somewhat, which all have a common Title to enjoy, and not upon such a Covenant as is requisite to the Establishment of a just and regular Community, and by which each Member submits his private Will to the Will of the Majority ; therefore when 'tis affirm'd, that the Vote of him, who holds a larger Share in the Possession, shall have the Advantage of another's Vote, who holds a smaller Share, we are to understand it with this Limitation ; that the former shall not be allow'd, by Virtue of his superior Vote, to divest the latter of his Right, or any way to procure his Prejudice. And thus we may apprehend what is to be look'd on as the *Will of the State*, where the Sovereignty is lodg'd in many Hands.

XIX. As to the Number of Men who may compose a Council or Assembly, in which publick Affairs are to be debated and determin'd, 'tis manifest that *three* at least, are absolutely required ^k. For should there be but *two*, if they happen to be divided in Judgment, there is none else to turn the Scale on either side, and so no Business can be concluded ^l. Nor is it any Objection against this Rule, that sometimes

^a To this Purpose see *l. 38. f. 1. d. l. D. de Re Judicat. & l. 27. D. de Receptis, d. l. & cap. 1. Jur. Can. de Arbitris in VI.* 'Tis but lost Labour in *Grotius* (*Flor. Sparf.*) when, as to the Case propos'd in one of these Laws (*l. 27.*) he opposeth the Determination there made, and says, the Criminal ought to be condemn'd in *ten*, because the greater Part agreed to this Sum, and that what they disagreed in, ought to be rejected. For in *five* they all agreed, but the Majority only then prevails, when the whole Body do not unite in any single Resolution.

^b *Vid. Cicer. Epist. Fam. l. 1. Ep. 2. Senec. XXI. What is customary in the Senate, ought likewise, I think, to be the Practice in Philosophy : When any Man delivers an Opinion, which I like in part, I bid him divide, and I follow accordingly.*

^c *Vid. Plin l. VIII. Epist. 14.*

^d *Excerpt. Legat. 129.*

^e *L. IX. c. 15.* The same Case is the Subject of *Quintilian's* 365th Declamation, where among other things, there is this good Remark : *Non idem sentientes non potes jungere, idem sentientes compara.* You can't join those that disagree ; therefore compare those that agree. See likewise the Argument of the 30th Declamation in *Liban.*

^f *L. 1.*

^g *Add. Cujac. Observ. XII. Cap. 16. & Ziegler ad Grot. l. 2. c. 5. f. 17.*

^h *Ibid. f. 22.*

ⁱ On this Subject, *Vid. L. 2. t. 14. l. 8. D. De Pactis, & L. 16. t. 3. l. 14. D. depositi, & L. 42. t. 5. l. 16. D. De Reb. author. judic. possid.*

^k *Vid. L. 50. t. 16. l. 85. D. De Verb. signif.*

^l *Ibid. Cap. 1. Jur. Can. de Arbitris.*

two Persons only are term'd *Colleagues*, as for Instance, the *Roman* Consuls. For that Word often imports no more than the Equality of Office and Dignity ^a. In Latin we meet with *Collegium Tribunorum*, the *College of the Tribunes*; and yet any one of those Magistrates, by entering his particular Dissent, could evacuate any Resolution agreed on by the rest. So that they who are united to each other by such a Relation, and bear such a common Title of Honour, do not always form a regular Assembly, in which the Wills of all the Members are, by Virtue of some Covenant, compacted into one Will. But Men may happen to compose a Body or Society, and yet retain each his particular Will, distinct from the Will of his Fellows. Therefore to urge, that a *Contract of Fellowship* may be made between two Persons only ^b, is of no Consequence in the Point before us. As for what may be alledg'd to the contrary out of the *Digests*; the meaning of the Law in that place is, not that a *College* or *Company* may be originally constituted by a single Person; but that upon Failure of the other Members, by any extraordinary Accident, one Man shall be sufficient to preserve and represent the Body already establish'd, till such time as new Members may be substituted in the room of the former.

According to regular Course, the absent Members are not consider'd in these Assemblies, provided they have receiv'd lawful Notice ^c, but their Right devolves (as it were) upon those that are present. *When two*, says ^d *Seneca*, *act by a common Commission, he that is present hath the Power of both*. Yet in our Judgment, this Maxim ought to be restrain'd to Business of daily Occurrence, and such as will admit of no Delay. It is likewise an Exception to the same Rule, if the Laws require such a precise Number of the Members to concur in every Business ^e. In some places the absent Members are allow'd to exercise their Power by delegating some others, who appear in Person, and thus to give their Suffrage amongst the rest, either in Writing, or by the Mouth of their Proxy ^f.

XX. The Civil State being thus framed and settled, the Person or Persons on whom the supreme Authority is conferr'd, whether one Man or a Council, either particular or general, obtain the Name of a *Monarch*, or *Senate*, or a *People*; and private Men, as oppos'd to these, are styl'd Subjects. Here we must observe, that a Man may become Member of a State two ways, by *express*, or by *tacit Covenant*. For they who were the original Founders of Commonwealths, are not supposed to have acted with this Design, that the State should fall and be dissolv'd upon the Decease of all those particular Men, who at first compos'd it; but they rather proceeded upon the Hope and Prospect of lasting and perpetual Advantages, to be derived from the present Establishment, upon their Children and

their whole Posterity. We must therefore presume them to have had this in their Aim, that their Children and their future Race should, as soon as they come into the World, enjoy the Benefits and Blessings of the publick Constitution. Which since it is impossible to obtain without Government, the very Life and Soul of a State, therefore all who are born within such Dominions, are hereby suppos'd to have submitted themselves to the standing Government. Hence there is no Necessity, that they who have been once invested with the supreme Command, should require the express Homage and Allegiance of their new Race of Subjects, tho' all the Persons, who first conferr'd their Authority upon them, may possibly be extinct. Farther, since every civil Community is fix'd in such a particular Scene, where the Members have placed themselves and their Fortunes in Security, which could not but be endanger'd, were all Men allow'd promiscuously the Privilege of coming thither without acknowledging the Government; therefore 'tis to be look'd on as a general Law in all States, that he who comes within the proper Limits of a State, and much more, if he desire to reap the Benefit of it, shall be presumed to have abandon'd his natural Liberty, and to have subjected himself to the Government there establish'd; at least for so long as he thinks fit to reside in those parts. If he deny to make this Acknowledgement, he is to be reputed as an Enemy; so far however, as that he may lawfully be expell'd the Borders. So it is manifest, that they are no less subjected to the civil Authority, who join themselves to a State already settled, than they, who by assembling and uniting themselves together, form'd it at the Beginning.

It may not be improper to remark on this Occasion, that there is some Disagreement amongst learned Men about the true Notion of *Civis*, a Member of a civil State. Mr. *Hobbes* ^g seems to make *Civis* an equivalent Term with *Subditus*, a Subject. According to which way of speaking, Women, Children, and Servants will be made proper Denizens. Our Judgment on the Point is, that since every State is constituted by Mens submitting their Wills to a single Person, or to an Assembly, they principally have a Title to the Name of *Members*, by whose Covenants the Society was first incorporated, and they who regularly succeed into the place of these primitive Founders. And since these Acts belong to the Masters of Families, they should seem to merit this Name by an especial Right; but Women, Children, and Servants, whose Wills were before included in the Wills of their domestical Governour and Director, can challenge it only by way of Consequence, and by Virtue of their Dependence upon him; in as much as they likewise enjoy the common Protection of the State, and hold several Rights and Privileges on the Score of that

^a *Vid. l. 173. D. d. l. De Verb. signif. & l. 26. t. 7. l. 14. D. De Admin. tut. & l. 46. t. 3. l. 101. D. De Solutione, &c.* ^b *l. 3. t. 4. l. 7. f. 2. D. Quod cujusunque Universit. Nomine, &c.* ^c *Vid. C. 36. Jur. Can. de Electione & Electi Potestate.*

^d *Controv. vii. 4. De Decurion.* ^e *Vid. l. 3. D. d. l. Quod cujusunque Universit. Nomine, &c. & l. 45. D. d. l.* ^f *Vid. Cap. 46. De Electione & Electi Potestate, in Ultimo.*

^g *De Civ. c. v. f. 11.*

Relation. But Inmates, Strangers, and other temporary Inhabitants, are not Members of the Commonwealth, because they propose only to tarry for a certain Space, but not to settle their Persons and Fortunes on the publick Bottom. *Aristotle's* Definition, fram'd to express a Member of State, and taken from his *holding a Share in the Magistracy, and in the judicial Proceedings*, agrees only to a democratical Government, as he himself observes ^a.

XXI. To proceed; in most Commonwealths the Members are found especially dispos'd to two subordinate Bonds or Engagements, by one of which they unite in certain Numbers, to form a particular Body, yet still under the Direction of the Publick; and by the other, the ruling Power calls them to some inferior Share in the Administration. These Bodies of Men, form'd in Subordination to the State, or general Body, whether they are term'd Companies, Corporations, Colleges, or pass under any other Title, may first be divided into those which were fram'd before the Settlement of civil States, and those which have been erected since. The Bodies or Systems, preceding civil States in point of Antiquity, are *Families*; in which the Authority and the Right, held by the Father and the Master, have been already explain'd. Of which Right, so much remains in their Possession, as hath not been cut off, either by the Nature and Frame of the publick Society, or by civil Ordinances, or lastly, by general Custom. Such *Bodies* as have been form'd since the Establishment of the civil Society to which they belong, may be distinguish'd by the Names of *publick* and *private*. The *publick* are those, which have been set up by Authority from the Sovereign Power in the Commonwealth. The *private* are, either those which have been compos'd by the sole Act of the Subjects amongst themselves, or such as depend upon some foreign Power, which, within the Dominions of another, is to be look'd upon only as a private Right and a private Act. *Private* Bodies may again be divided into *lawful* and *unlawful*; of which the former are, or ought to be, approv'd of and allow'd by the State, the latter not. We say, *ought to be allow'd*: For suppose under a State where the Divine Worship is corrupted, some endued with Sense and Knowledge of the true Religion, should hold private Assemblies, without either open Tumults, or secret Conspiracies against the Government establish'd; how much soever the Persons in Authority may dislike what differs from their own Persuasion, yet no one will presume to term these Assemblies *unlawful*, since the supreme Governours themselves lie under an Obligation to acknowledge, approve, and maintain the same Truths that are there profess'd.

So likewise, if in a barbarous State, where all Improvements of Learning are publicly discouraged, some Persons should meet together, to join in the Pursuit and Enquiry of Wisdom; such a Body of Men cannot be pronounced an unlawful Society. Both are again divided into *regular* and *irregular*. The former are those, in which, by Virtue of certain Covenants, there is an Union of Wills amongst all the Members: The latter those, in which we do not so much apprehend any Union of Wills, as a Consent and Conspiracy, without any mutual Bond or Engagement, such as may proceed from some common Affections, as suppose, from Hope, from Desire of Gain, or of Revenge; from Ambition, Anger, and the like.

XXII. With Regard to all *lawful* Bodies, 'tis to be observ'd, that whatever Right they possess, and whatever Power they hold over their Members, is all under the Determination of the supreme Authority, which it ought on no account to oppose or to overbalance. For otherwise, if there could be a Body of Men not subject to the Regulations of the civil Government, there would be a State within a State. Therefore, if any Commonwealth was at first fram'd by the Union of several absolute and independent Bodies, 'twas altogether requisite, that the respective Bodies should give up so much of their former Power and Right, as was necessary for the forming a civil Community: Because else they could not but fall short of the End which they propos'd. But, if we look on these Bodies or Systems in a State already settled, we are then to consider, what was the Intention of the supreme Governour, in founding or in confirming such a Company. For if he hath given, and ascertain'd to them, in express Words, an absolute and independent Right, with regard to some particular Affairs which concern the publick Administration; then he hath plainly abdicated part of his Authority, and, by admitting two Heads in the Constitution, hath rendred it irregular and monstrous; which no one in his Wits will do, unless upon extreme Necessity. But if the Sovereign is desirous to preserve the Power whole and unimpair'd, it is necessary that the subordinate Body should so restrain and moderate its Rights, as not to prejudice the supreme Authority, nor put any such Extent upon their Privileges, or to draw any such Consequence from them, as shall tend to the releasing the said Body from their inferior and subordinate Condition. Now after what manner the Power of these Bodies is limited, we are to learn from the particular Charters of their Foundation, or Confirmation; as likewise from the common Laws of the State, which are suppos'd to bind all and each of the Members,

^a Polit. l. 3. c. 1. See the rest of this Chapter where he thus goes on, *According to different States, the Members are different. Wherefore the Description we have given belongs especially to the Members of a Democracy; to those of other Governments it may accidentally, but doth not necessarily agree.* Idem Polit. l. 3. c. 8. *There being many Forms of Civil Bodies, there must, by Consequence, be many kinds of Members, who compose them.*

Mr. BARBEYRAC'S NOTE on § XXI.

¹ 'Tis not for this Reason: For the Sovereign doubtless believes his own Religion better than that which differs from it; and as long as he is of this Persuasion, nothing obliges him to alter it. But 'tis because Sovereigns, of what Religion soever, have no Right to hinder any one from peaceably serving GOD according to the Light and Dictates of his Conscience. See hereafter, Chap. iv. Sect. 11. Note 2.

unless where they have been expressly abridg'd or repeal'd. From all which it follows, that, if the Administration of such a Body be committed to a single Man, whatever he acts according to the Rules of their Foundation, or according to the general Constitutions of the State, shall be look'd on as the Act of the whole Body. But what he doth contrary to, or beyond either of these, shall be his own proper personal Act, which shall not affect the rest, and for which he alone shall be accountable. If the Government of such a Body be lodg'd in a Council of several Persons; when any thing is done by them contrary to Law, or to their Foundation, those only shall be liable to Punishment on this account, who agreed to the Proceeding; but they who either dissented, or were absent from the Assembly, shall be judg'd innocent: Whom therefore it concerns, for the sake of their own Security, to protest against the Decree of the rest, and to register their Protestation in the publick Acts and Memorials, lest they should happen to be involv'd in the Punishment of their Fellows Crime. Whereas on the other side, in an independent Assembly no particular Member hath the Liberty of protesting against a Decree; because this would be to deny the supreme Power of the said Assembly.

As to the Debts of these Bodies or Companies, the first thing to be consider'd is, in whose Name they were contracted. For what any Member owes on his own private account, is not a Debt of the Company. Only in this respect, that when the Sentence of the Court obligeth him to Payment, Execution may be taken, not only upon the rest of his Goods, but upon those likewise which belong to him as a Partner in that Society. But such Debts as are contracted by the Governors of the Company (whether this Power be lodg'd in the Hands of one, or of more Persons) according to their Charter of Foundation, and those Rules which are to guide their Proceedings, oblige the whole Body, as such; and unless they have a common Stock, each Member is to answer for his *Quota*. Yet here again there is this Difference, that such Creditors as do not belong to the same Commonwealth, upon Denial of Payment, may treat the Members no otherwise than if each had engaged for the whole. As in all other Cases, any Person under a foreign Jurisdiction stands liable to suffer Reprisals for the Debts of his Countrymen. Debts contracted otherwise than the Rules of the Company allow, bind those only who gave their express Consent to the contracting them; and not those who dissented, except to the Value of what they have been Gainers by them. And such a Debt, when the common Stock, so far as 'tis affected by it, will not hold out, is to be discharg'd by Contribution of the dissenting Members, according to their respective Proportion. But if a particular Member lend

Money to the Company, as such, he can only charge the Goods of the Company; and if they fall short, he must thank himself for the Loss a. If a Controversy arise between any Member and the Company, the Company shall not be Judge, but the State to which the Company is in Subordination. For 'twould be very inconvenient, that they should be allow'd to give Sentence in their own Cause, when the Matter may be referr'd to a common Power.

XXIII. *Unlawful* Bodies are not only those which unite on the account of some manifest Villany, or some Design contrary to express Law; as the Companies of Thieves, Beggars, Strowlers, Pirates, Highwaymen, &c. but likewise any Confederacies between Subjects built on a private Compact, without the Consent of the Government, and repugnant to the End of civil Communities: Which are usually term'd *Conspiracies* or *Factions*. The Design of these is various. Sometimes the Persons thus associating aim at the chief Command, and would seize the Government into their own Hands: sometimes they propose, by this means, to bring the Management of publick Business to their own Humour or Advantage. Some are for increasing their private Fortunes by plundering the Publick: Others bandy into Factions, only to secure themselves from Punishment. Nay, those Confederacies which carry a plausible Pretence, as suppose Protection from Danger, Redress of Grievances, Removal of evil Counsellors, and those likewise, the Cause of which is kept secret, are suspicious and dangerous. For in the first place, this is to invade the Office of the Sovereign, by entering upon those Affairs which belong solely to his Care and Direction; and then farther, when the Mutineers are grown confident of their own Strength, they may easily be encouraged to turn it upon the State b. Hence many Actions, not otherwise culpable in their own Nature, become unlawful, when perform'd in a tumultuous or factious manner. Thus to petition the Government, or to accuse any Person of a supposed Crime, are Proceedings which the Law allows; but to do either of these, with a numerous Body of Men gather'd for that purpose, bears the Appearance of Riot and Sedition. And so in martial Laws, it is usually made a capital Offence, for Soldiers to petition for Pay, in a large Company drawn together on that Design c.

XXIV. Besides that common Bond, which engageth all Subjects to their respective Sovereigns, there lies a particular Obligation on those who are entrusted by the higher Powers with the Exercise of some part of the Government, in their Name and by their Authority; and who pass under the general Style of *Magistrates* and *publick Ministers*. Distinct from these are the private Ministers or Servants of the

a Comp. *Hobbes*, *Leviath.* c. 22.

b Thus *Orbo* speaks in *Troitus*. (*Hist. L. 1. c. 84.* in the Beginning.) *At present indeed, and in the Po? You now hold, You are for me; but whilst You run up and down in the dark, and All are in Confusion round You, Chance or Opportunity may engage You against me.*

c *Act Acts* xxix. 39, 40. *Vid.* *Hobbes*, *De Civ.* c. 13, f. 12, 13. & *Leviath.* c. 22. where he compares *Lawful* Bodies to the *Meltes*, and *unlawful* to *Wens*, *Balls*, and *Posthumes*, engendred by the unnatural Conflux of *Evil Humours*.

Prince, who perform common Offices for him, as they would for any other Master. Amongst the former kind, or those who serve the Prince in this politick Capacity, there is this Difference observable, that some of them exercise a part of the Government and princely Office, and do therefore in such a particular Measure represent the Person of the Sovereign; who are properly and strictly term'd *publick Ministers*: Others barely assist in the Dispatch and Execution of publick Business. To the first Class belong the Regents, or Protectors of the Kingdom, during either the Minority, or Captivity, or *Delirium* of the Prince; then the Governours of Provinces, Cities, and Districts; the Commanders of the *Militia*, by Land or Sea; the Directors of the

Treasury; the Judges and others concern'd in pronouncing or executing Justice; the publick Censors of Doctrines, Ambassadors to foreign States, and the like. In the other Class, we are to reckon the Counsellors, who do not themselves exercise any part of the Sovereignty, but only declare to the Sovereign their Opinion about Affairs: Those likewise who are any other way serviceable to the publick Management; as the Secretaries, the Gatherers, Keepers or Dispensers of the Revenue, the Soldiery; those who lend an inferior Assistance in the Proceedings of Justice, and if there be any others of the like Characters; the Order and Distinction of which, in every particular State, may easily be understood.

a Comp. *Hobbes Leviath.* c. 23. & *Bodin. De Republ.* l. 3. c. 7.

C H A P. III.

Of the Generation of Civil Sovereignty or Majesty.

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| <p>I. <i>Sovereignty the Result of those Covenants by which the publick Body was first united.</i></p> <p>II. <i>This is done by the Divine Will and Approbation.</i></p> <p>III. <i>Whether the Majesty of Princes is immediately derived from GOD.</i></p> <p>IV. <i>The Arguments which some make use of to prove the Affirmative.</i></p> <p>V. <i>Civil Authority not the Effect of War.</i></p> | <p>VI. <i>Whether a Father of a Family may, without any new Act, commence a Prince.</i></p> <p>VII. <i>How a Vassal or Feudatory may become a sovereign Lord.</i></p> <p>VIII. <i>Whether a Free State, or a Monarch, resigning their Power into other Hands, are the efficient Cause of the Sovereignty produced.</i></p> <p>IX. <i>Who has properly the Power of conferring the regal Title.</i></p> |
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LET us proceed to examine, whence that Sovereignty or supreme Command, which appears in every State, and which, as a kind of Soul, informs, enlivens, and wields the publick Body, is immediately produced. In order to which Enquiry, we suppose, first of all, that Civil Authority, for the obtaining of its just Effect, requires as well natural *Strength*, by means of which the Subject, if he presumes to decline Obedience, may be terrified into his Duty, through the Fear of Punishment; as also a *Title*, by Virtue of which, as by just Right, the Performance, or the Omission of any Action, may be imposed on others: To which *Title* there answers in the Subject an Obligation to comply with what is thus enjoin'd. Now both these Requisites do immediately flow from those Pacts by which the State is united and subsists. For tho' no Person can transfer his Strength to another by any real and natural Conveyance, yet he is supposed to be Master of other Mens Strength, according to whose Pleasure they are bound to exert and apply it, not having any Power to resist or to refuse his Commands. In as much as there can be no other way of transferring Strength amongst Men. And since all the Members of the State, in submitting their Wills to the Will of a single Director, did, at

the same time, thereby oblige themselves to Non-resistance, or to obey him in all his Desires, and Endeavours of applying their Strength and Wealth to the good of the Publick; it appears, that he who holds the sovereign Rule, is possess'd of sufficient Force to compel any Persons to a Discharge of the several Injunctions, which he lays upon them^a. So likewise, the same Covenant affords a full and easy *Title*, by which the aforesaid Sovereignty appears to be establish'd, not upon Violence, but in a lawful manner, upon the voluntary Consent and Subjection of the respective Members. This then is the nearest and immediate Cause, from which sovereign Authority, as a moral Quality, doth result. For if we suppose Submission in one Party, and in another the Acceptance of that Submission, there accrues presently to the latter a Right of imposing Commands on the former; which is what we term Sovereignty or Rule. And as by private Contract, the Right of any thing which we possess, so by Submission the Right to dispose of our Strength and our Liberty of acting, may be convey'd to another. Whence, if any Person should, for Instance, voluntarily and upon Covenant, deliver himself to me in Servitude, he thereby really confers on me the Power of a Master. Against which

^a Liv. l. 2. c. 59. *The Force of the Supreme Command is built on the Consent of those who obey.*

way of arguing, to object the vulgar Maxim of *Quod quis non habet, non potest in alterum transferre*, No one can transmit to another what he doth not possess himself; is but a Piece of trifling Ignorance. Yet still to procure to the supreme Command an especial Efficacy and a sacred Respect, there is need of another additional Principle, besides the Submission of the Subjects. And therefore, he who affirms Sovereignty to result immediately from Compact, doth not in the least detract from the sacred Character of civil Government, or maintain that Princes bear Rule by human Right only, not by divine.

II. Yet this is beyond Dispute, that found Reason sufficiently intimated to Mankind, how that upon their Multiplication in the World, their Honour, Peace, and Safety could not subsist, without the Establishment of civil States, which cannot be understood without a supreme Authority. And thus both the States themselves, and the chief Government erected in them, are suppos'd to proceed from God, as the Author of the Law of Nature. For not those things alone are from God, which he institutes and ordains by his own immediate Act, without the Concurrence or Interposition of Men; but those likewise which Men themselves, by the Guidance of good Reason, according as the different Circumstances of Times and Places required, have taken up, in order to the fulfilling of some Obligation laid upon them by God's Command^a. And, in as much as the Law of Nature cannot, amongst a great Multitude, be conveniently exercis'd, without the Assistance of civil Government; 'tis manifest, that God, who impos'd the said Law on human Race, did command likewise the establishing of civil Societies, so far as they serve for Instruments and Means of improving and enforcing the Law of Nature. And hence likewise it is, that God, in the Holy Scriptures, expressly approves of such Government, acknowledging and confirming it, as his own Appointment, and guarding by the severest Penalties the sacred Awe and Veneration of it. But whether or no God expressly commanded the instituting of States, as to particular Times and Places, is a Point in which we have no certain Information. For the Precept of the Sons of Noah, concerning *Judicatures*¹, which may perhaps be urged to this Purpose, doth not specify the particular Time and Place of erecting them. So that we may understand it in this Sense, that the Methods of judicial Processes, when once settled, ought diligently to be exercis'd and administer'd. *Bœcler*^b explains the

Origin of civil Government with very little difference from what hath been here deliver'd on the same Head. *The Supreme Authority*, says he, *is not to be deriv'd from the bare Act of Man, but from the Command of God, and from the Law of Nature: Or from such an Act of Men, by which the Law of Nature is follow'd and obey'd. For he that enjoins Society, enjoins likewise the Order and Method to be observ'd in it: But now the very Soul of Society is Government; and of all the Societies the most perfect is a civil State.* Which is right enough; provided we add, that the Divine Command, concerning the Erection of civil States, exerted and discover'd it self through the Suggestion of Reason, by which Men came to understand, that the Honour, Gracefulness, and Peace, which the Law of Nature proposeth as its Aim, could not possibly subsist without civil Society; especially after Mankind was considerably multiplied. And in this very Point consists the Difference between civil Communities and other human Institutions: The latter also being introduced through the Persuasion of sound Reason, yet not after such a manner, as if the Honour, Safety, and Welfare of human Race could not be preserv'd without it. As to the Fifth Commandment in the Decalogue², which enjoins Obedience to the civil Magistrates (urg'd by *Bœcler*) we are to observe, that this doth not exclude the next and immediate Cause of Government; as the Commandment against Theft doth not, in the least, exclude or supersede the Origin of Property. And then for the Title of *God's Vicegerents upon Earth*, ascrib'd to Governours, we think it may very fairly and conveniently be explain'd in this Sense; that whereas the Peace and good Order of Mankind was not sufficiently procur'd by a bare Reverence towards the Law of Nature, and towards the Author of it, that End is now happily produced by the Virtue and Efficacy of civil Dominion. In which Sense the following Positions of the same Writer are plain and intelligible: *Therefore, That a State might properly be a State, and might obtain its End, God by the Law of Nature instituted a certain Order and Method of commanding and obeying, in which Order, by the Will of God, and by the Dictate of natural Reason, there must be somewhat supreme and independent, controulable by no human Pleasure, which as it is subject to God alone, so it is the Second or the Deputy of his Power; and this is nothing else but the supreme civil Authority. But it is purely the Act and Disposal of Men, whether they will intrust the supreme Authority with one, or with many Persons; and what particular Methods they will follow in establishing distinct Forms of Common-*

^a Comp. 1 Tim. ii. 2.

^b *Ad Grot. l. 1. c. 3. f. 6.*

Mr. BARBEYRAC'S NOTES on §. II.

¹ *Vid. Selden. de Jur. N. & G. sec. Hebr. 1. 7. c. 4. &c. & Le Clerc in Deut. i. 17.*

² 'Tis in the Original the *Fourth Commandment*, instead of the *Fifth*, in which our Author follows the *Lutheran* division of the *Decalogue*. Besides, he too freely grants, that it relates in that place to *Sovereigns*. I know very well, that *Divines* and *Preachers*, by Strength of Consequences, or rather Artifices, include all *Superiors* under the Names of *Fathers* and *Mothers*. But no good Interpreter will draw any such Conclusions from thence; and without examining the general Foundation of those tedious Expositions that are commonly made on the *Decalogue* (on which we may see what *Mr. Le Clerc* says in his Note on the first Verse of the XX. Chap. of *Exod.* and what our Author says, after *Gronovius*, Lib. VIII. Chap. I. Sect 4. towards the End) we need only but consider a little the reason that the Legislator subjoins, to induce the *Israelites* to observe this Precept, *That thy days may be long upon the Land which the Lord thy God giveth thee.* This is a manifest Allusion to the efficacy that is attributed to the Prayers of *Fathers* and *Mothers* for their Children who are obedient. See *Mr. Le Clerc* upon this Commandment, and upon *Gen. xxvii. 33.* This will appear more evident, if the ingenious Exposition of *Mr. des Maizeaux* (in his *Nouvelles de la Republique des Lettres, November 1700. p. 500. &c.*) be well grounded.

wealths. Grotius's Opinion concerning the Original of Government is not so profane, but that it may be born with, if assisted by a dexterous Interpretation. He says^a that *Men, not influenced by the express Command of God* (and no such express Command doth indeed appear) *but of their own accord* (yet not without the Dictate of right Reason, and the Will and Pleasure of God) *having experienc'd the weak Defence of separate Families against the Assaults of Violence* (after Mankind had considerably spread and increased) *united themselves in civil Society; the Effect of which was civil Power, styled on this Account by St. Peter*^b, *the Ordinance of Man*, as establish'd immediately by human Appointment. But as for the other Assertion of Grotius, *That the civil Authority is therefore term'd Divine, or said to be of God, because God approved of what Men wolsomly instituted*; we can on no account admit it in this Sense, as if God approved of the Establishment of civil Government (as 'twere) *ex post facto*, or after it had been actually settled; as he hath been pleas'd, in many Places of Scripture^c, to confirm and ratify the Condition of Servants, which no doubt is an human Invention. But 'twas absolutely requisite to add, that Men were able antecedently to apprehend the Divine Will, by duely weighing the Condition of Mankind upon its Multiplication; which as it could not be preserv'd without civil Societies, or in a solitary Life; so Men, whilst in this Matter they followed the Guidance of Reason, agreeably to the Scope and Design of the Law of Nature, must be supposed to have fulfill'd the Divine Pleasure.

III. Tho' we think what hath been here deliver'd, sufficient as well to sanctify the Original of civil Government, as to engage the Veneration of Subjects towards their Rulers; yet it may be worth our while to consider, what Solidity there is in the Arguments of a late Author^d, who maintains that we ought to go much higher in this Point. He supposeth then, that what is the Cause of civil States is not likewise the Cause of the Publick Government and supreme Authority in them. And therefore he allows the States themselves to be establish'd by Covenants; but asserts on the other side, that the Sovereignty is conferr'd on Princes immediately by GOD himself, and that nothing which proceeds from Men, doth at all contribute to its Production. And, consequently, that a

free People, when they voluntarily choose to themselves a King, do not confer Majesty upon him, but only mark out the particular Person on whom that Character is, by the Divine Gift, bestow'd: As in many Boroughs or Towns Incorporate, the Election of Magistrates belongs to such an Order of Men; and yet the Magistrates receive their Power of acting, not from that Order of Men, but from the supreme Ruler in the State. Which Position, tho' it may possibly take with some Persons, through a specious Appearance of more than ordinary Piety; yet 'tis manifest, that it tends to the breaking in funder all those Compacts and fundamental Laws which pass between Princes and Subjects, with regard to the publick Administration. And, in the first place, we cannot admit, that he should ascribe Majesty to Kings alone, and utterly deny it to free States and Democracies. It's true, the Custom of Speech, during these last Ages, seems to have appropriated the Term of Majesty to Kings, by placing it amongst their Royal Titles. Yet this doth not hinder but that the same Word may be used to denote the supreme Authority under any Form of Government. And thus too, that Definition of Majesty, poor and dry as it is, in which he calls it, *The chief Power every where over the State*, agrees as well to a Senate, or to a popular Assembly. Tho' in this respect Kings have the Pre-eminence, that each particular Member of the Senate, or of the general Assembly, is subject to the supreme Power of the People; whereas the Person of a King acknowledgeth no Superior upon Earth. Yet as to the Force and Efficacy of Command over Subjects, 'tis the very same under all sorts of Constitutions. To proceed, the sole Cause of this Majesty he makes God himself, *Who, upon the People's Election, immediately transfuseth it on the Prince*. Here I am mistaken, if he did not conceive Majesty under the Notion of a real and physical Quality; as they manifestly do, who affirm civil Government to be the *Creature*, or the *Act* and the *Work of God*, *so that no other Creature, either in an equal or in a superior kind of Causation, or by any innate Principles, doth at all contribute to its Institution*. By which Discourse their gross Ignorance of moral Things is sufficiently betray'd. The Argument which sets forth, how that Persons, exalted to the Throne from an inferior Station, have suddenly

^a L. I. c. 4. f. 7. n. 3.

^b Epist. 1. c. 2. v. 13.

^c Ephes. vi. 5, 6, 7, 8. Coloss. iii. 22. 1 Tim. vi. 1. Titus ii. 9.

Mr. BARBEYRAC'S NOTES on §. III.

^d Joh. Fred. Hornius *de Civitate*, l. 2. c. 1. Never were more pitiful and weaker Reasons given than in this Matter. If any one has a mind to see a Specimen of 'em, among abundance of Authors whom their Prejudices, Interest, or the Situation of Affairs where they liv'd, have most grossly perverted; let him only read, for Instance, *Bæcler's Dissertation de Auspicio Regio*, in the first Vol. of the Collection of his *Dissertations Academiques*; and Mr. Creech's English Notes upon his Translation of *Lucretius* in 1683. in King James II's Reign, p. 52, &c. The last is so much the more ridiculous, as he has brought it in by Head and Shoulders, and that of sixty Pages which he spends in giving us some few Notes upon his Translation, he wastes five or six in an impertinent Digression. But when he afterwards publish'd the *Original* with larger Notes in 1695. upon the Revolution, the Reader will find that he takes care not to mention any thing of this pretended immediate Emanation of Divine Authority. A Danish Divine has in our Time, in a more effectual manner, refuted the contrary Opinion, by causing to be burnt by the Hangman at Copenhagen, a Book of Mr. Thomasius, in which that Civilian maintain'd, that *God is not the immediate Cause of Sovereignty*. See what blind Zeal, or rather Flattery of Churchmen can do! As for *Hæctor Godefroy Musius*, who is the other I am speaking of, which is to be found in the *Bibliothèque Univers.* Tom. xi. Pag. 47. &c. Mr. Thomasius, from whom I have the Account of the Fact I have just now related, observes in the same place, *Inst. Jurispr. Div.* Lib. iii. Cap. vi. Sect. 68. that it was formerly propos'd in France, in the general Assembly of the States of the Kingdom, to canonize this Proposition, *that Kings derive their Authority immediately from God*; but it came to nothing, because several made it appear, that the Welfare of the State did by no means depend on any such Opinion; and if so, that the Question must be left to the Determination of the Schools. *Grand. Hist. de France*, Liv. I.

been furrounded with an unufal Glory or Splendor, which could not fhine from any other place than Heaven; may ferve for a Declamation before fuch an Audience, as are unable to diftinguifh empty Flourifhes from folid Truth. That Kings are the peculiar Care of GOD Almighty, ferves not in the leaft towards the Proof of his Opinion. And befides, the Divine Providence hath been pleas'd to fhew no lefs Evidences, as it were, of a particular Favour, to other Perfons preserv'd to be hereafter in an eminent manner ufeful to the World. At the fame time, we read of no inconfiderable Number of Kings, who have drunk Poyfon out of their precious Cups, or have fallen by the Treachery of their own People. As to that Temper and Constitution of Body in fome Princes², which is observ'd to produce Effects not unlike to Miracles, the Phyficians are to be confulted on the Point. Nor doth he prove what he aims at, by alledging the Punifhment, either of tyrannical Kings, or of ftubborn and rebellious Subjects; or by heaping up Testimonies in fo plentiful a Store (which too acknowledge God no lefs for the Author of aristocratical than of monarchical Government) or by reciting thofe Divine Predictions concerning fome Kings, the like to which have not been wanting in popular States. And as to what pafs'd in the Nation of the *Jews*, this can carry no Evidence as to the Original of Kingly Government in general; there having been many other Kingdoms establish'd long before: But it belongs rather to the manner of conferring the fupreme Command on a particular Perfon, according to particular People.

IV. Let us confider the Arguments by which he labours to make out, that all human Causes are of a far more inferior Power, than to be capable of producing Majefty or Sovereignty, the moft august thing upon Earth. Amongft which, that which carries the Prize from all the reft is this; *That neither particular Men, nor a loofe and ungovern'd Multitude, are themfelves endued with Majefty, therefore neither can they confer it on the Prince.* But now it may and often does happen, that a moral Quality (in which Clafs Government ought to be reckon'd) fhall be produc'd in another Perfon, by the Concurrence of thofe who had it not truly and properly in themfelves before; fo as that they may be rightly deem'd the productive Cause of the faid Quality^a. As many Voices joining in Confort produce a Harmony, which no fingle Perfon could pretend to by himfelf. And on this account it muft be censured as very falfe reasoning in *Socrates*, when he encouraged *Alcibiades* not to fear the venturing himfelf in an Affembly

of the People, by telling him, *If you defpife them Man by Man, you ought likewise to defpife them when gather'd into a Multitude* ^v. Farther, fince Sovereignty refults from the Non-refiftance of the Subjects, and from their Conceffion that the Sovereign fhall difpofe of their Wealth and Strength; 'tis eafily feen that fome fcatter'd Seeds, as it were, of Government lie hid in particular Perfons, which, by Means of concurrent Compacts, being excited into Motion, do grow and fhoot forth. So that 'tis grofly abfurd to infer, that Sovereignty is not *immediately* of human Original, becaufe it is not difcoverable in the natural Powers or Faculties of Men: As if we were all this while fpeaking of a physical Quality; or as if there were no moral Qualities, diftinct from the physical. I know not what Relifh wife and Christian Princes can have for fuch flattering 'Titles as thefe; that *God tranfcribes in the Perfon of the King that Right of governing Mankind, which he held alone by virtue of Creation*: Yet fo as that GOD ftill retains his antient Right, and therefore reacheth out this Power to Kings by *Accumulation*, and not by an *absolute Abdication*: Together with the like Infnuations, by which bafe and wicked Parasites delight in raifing the Glory of their Prince to the Difhonour of their God. You would think 'twas a moot Point with them, whether after the constituting of Monarchs, God referv'd to himfelf any Power or Command over mortal Race; and whether thefe who govern below, ought to own his fuperior Authority. Certainly nothing can be more manifelt, than that civil Government is quite different in kind from that Command of God, which he holds by Right of Creation; and therefore 'tis not only abfurd, but blafphemous to affirm, that *the Sovereignty which God alone is invested with, as the Maker of all Things, be out of his fingular Benevolence doth communicate to Men.*

Endeavouring to give us another Proof that God is the immediate Cause of Sovereignty, he diftinguifheth between *the immediate efficient Cause*, and *the immediate constituting, or appointing Cause*. The *Sovereignty* only is, he fays, immediately produced by God; the *Crown* and *Scepter* being commonly receiv'd from other Hands. Hence he obferves, "that we ought to feparate thefe two ways of fpeaking, *God is the immediate Cause of Sovereignty*; and *God immediately constitutes the Prince, or God immediately confers the Sovereignty*. It being fomewhat tolerable to affirm, that God confers the Sovereignty by the Mediation or Interpofition, either of the popular Vote, or of Succeffion, or of Occupancy^c. But that in every Act of producing Sovereignty, God

Mr. BARBEYRAC'S NOTES on §. 111.

^a The Souls of Kings and of Coblers are caft in the fame Mould. When we confider the Importance of the Actions of Princes, and their Weight, we imagine that they are produced from fome Causes as important and weighty. We are miftaken; they are mov'd to and fro in their Inclinations by the fame Springs as we are in ours. The fame Reafon that makes us quarrel with a Neighbour, happening in a Prince, makes him ruin a whole Province. Their Wills are as fickly as ours, but their Power is greater. The fame Defires move a *Worm* and an *Elephant*. *Montaigne's Effays*, B. 2. c. 12. p. 343. *Edit. Paris. in fol.*

^b See *Algernon Sidney's* Difcourfe upon Government, C. 2. f. 9.

^c *Vid. L. 41. t. 1. l. 46. D. de Acquir. Rer. Dom.*

^b In *Ælian*, V. H. l. 2. c. 1.

^c In this Senfe are we to underftand that *Paflage of Themifius*, Orat. 6. Ed. *Harduin*. p. 73. C. Do not imagine the Soldiers to have been the main Causes and Authors of this Election. The Concurrence of their Votes was the Act of Heaven: The Vacancy of the Throne was the Appointment of the Gods, and Human Affiftance was only the Inftrument of completing and executing the Divine Counfels.

cannot bear or permit any proximate or secondary Cause'. Now whoever looks more nicely into things, will perceive that these Men apprehend Sovereignty under the Idea of some physical Being, which, after the Production of it by God, wanders up and down in the World, without any certain Seat or Subject, till the Prince being at length design'd by the People, it falls upon him, and cloaths him with august Majesty and Splendor. Where they must certainly be at a Loss, if a Man should be so importunate as to demand, whether this Sovereignty, before it finds a place of Rest in the Person of some Prince, be a Substance or an Accident; and if the latter, how it can exist without a Subject? Farther, at what time it was created? at the Beginning of the World, or afterwards? As likewise, whether there be but one Sovereignty only, diffused through the whole World; or whether particular Princes have each a peculiar and entire Sovereignty of their own? Whether upon the Death of the Prince the Sovereignty dies with him; or whether it survives, like the Soul in Separation from the Body, or finds Reception, by a kind of *Metempsychosis*, in the new King^a? But in Truth, to enquire after the Cause of Majesty or Sovereignty, taken in a separate Sense, is no better than Impertinence; in as much as it never exists, but in the Subject. 'Tis just the same as if I should make a particular Search into the Cause of human Nature, separately consider'd; when as to the Cause of *Men*, as they exist, I have sufficient Information. And since this Author, before any hath obtain'd a Right to the Sovereignty, leaves it in the Power of the People, to elect what Person, and at what time they please, or to introduce any Form of Government^b; I would desire to know what would become of his Sovereignty, should all the People agree in preferring an aristocratical or democratical State to it? We acknowledge indeed, that Election, properly and strictly speaking, is no more than the *Manner* of acquiring Empire. But there seems to be no reason which should hinder, why by one and the same Act the *Person* may not be mark'd out, and likewise the *Sovereignty* conferr'd, as then first commencing its Existence. For 'tis very childish to imagine, that in moral Things, when any Right, or any moral Quality is conferr'd on another, it must of Necessity have somewhere existed separately before. On the contrary, it is evident, that Rights and all other moral Qualities do rather arise from the Concurrence of Mens Minds in mutual Compacts^c. Nor will there be any Difficulty in removing that other Scruple; *If the People be the secondary Cause of Sovereignty, then the Power, by which they produce it, must have been receiv'd from God; which doth not appear to be true in Fact.* For, since God hath implanted in Men a Care of their own Safety, hath command-

ed them to maintain a peaceable and well order'd Conversation, and hath likewise endued them with Reason, whence they are enabled to find out Means conducing to this End, amongst which the Establishment of civil Government justly challengeth the first place; who will make any farther Question, whether or no the Power of setting this Constitution on Foot was a Privilege vouchsafed to them by God himself? Those Maxims of Philosophy, which our Author so frequently lets fly against us, are partly but of slender Credit, and partly, through Ignorance and Mistake, are unskilfully transferr'd from natural to moral Things; which we are not now at leisure to discuss in particular. And then, as for the Account which *Ovid* gives of the Origin of Sovereignty, in the Fifth Book of his *Fastii*, 'tis meer poetical Fiction.

V. No less Pains hath he taken in confuting the Opinions of those, who derive the supreme Authority from any other Head. Upon which Argument, as he hath deliver'd a great deal of Truth, so are there some things which are justly liable to Censure. He is so far in the right, when he denies that Wars, occasion'd by the Ambition or the Lust of Tyrants, could give Rise to the sovereign Power. For *Wars occasion'd by Tyrants* do certainly pre-suppose civil Communities. Yet still, the notorious Violence of many Persons, and their Desire of oppressing others, might possibly give occasion to the Fathers of Families, living independent and scatter'd up and down, to unite in political Bodies¹. It is moreover evident, that most Empires, which have made a Noise and Figure in the World, if not all in general, have owed their Growth and Progress to War. And yet this is no reason why we should pitch upon War for the Original and Fountain of Government. For at least, that Band of Men, which first conspired to invade their Neighbours, voluntarily engaged in Subjection to a common Leader. And as for those who were invaded, no lawful Sovereignty could be establish'd over them, till by giving their Covenant and Faith, they had promis'd Obedience to the Conquerour.

VI. Yet it is not so utter an Impossibility, that civil Empire might arise from paternal Government²; such, we mean, as extended it self to some Breadth, taking many petty Villages under its Direction. 'Tis true, the Command of Fathers belongs properly to the Care of educating Children, as that of Masters doth to the Management and Improvement of Estates; nor can either be alter'd by the bare *Number* of Children, or of Servants. Yet there is not so wide a Distance between paternal and civil Government, but that Men might pass from one to the other, without the Production of any new Sovereignty by the immediate Power of God. For suppose a Father of a Family, bless'd with a

^a Add the Dispute in Father *Paul's* History of the Council of *Trent*, l. 2. p. 213. concerning the Nature of the *Sacramental Symbols*, where the Managers are put to great Shifts, by Reason of their Unskilfulness in *Moral Things*.

^b See *Deuteron.* xvii. 14.

^c *Comp. Hobbes de Cive*, l. 2. f. 4. see also above in B. 3. c. 5. f. 2, 3, 4.

¹ See Mr. *Barbeyrac's* First Note upon the Seventh Section of the First Chapter of this Book.

² See Mr. *Barbeyrac's* Second Note upon the Tenth Section of the Second Chapter of the Sixth Book, and Mr. *Lock's* second Treatise of Civil Government, C. 8. §. 105, &c.

plentiful Issue and with a numerous servile Train, to allow both the Children and the Servants, by Emancipation or Infranchisement, the Privilege of managing their own Concerns, and of constituting particular Families, upon this Condition, that in order to the common Security, they shall still be subject to his Government; I know not what such a Person wants to make him a compleat Prince, provided he be Master of so much Strength, as is sufficient to compass the End of a civil State. Upon his Decease, if he left any Appointment with regard to a Successor, especially if his Sons consented to the Disposal, that Settlement shall be followed. If he did not, then the People, as if they were to frame the whole Constitution anew, shall resolve what Government or what Governour they will hereafter receive. In which Case there will be no Breach of the Law of Nature, tho' the younger Son should, by the free Votes of the Assembly, be elected in his Father's room ^a.

VII. He farther endeavours to evince, that neither can such a Person be term'd the Cause of Sovereignty, who first possessing it himself, confers the regal Dignity on some one who is at present his Subject, releasing him from all future Dependence: As if a King remits to his Vassal his former Engagement, and allows him to hold as a sovereign Prince, what he before enjoy'd only as a feudatary Tenant; or if he makes a Grant to any of his Subjects of some Province in his Dominions, exempting it, for the future, from his own Jurisdiction. For a Cession of this kind is, he says, no more than the Manner of obtaining Sovereignty, and may be reduced to the Head of Elections. Now whoever thoroughly considers the Matter, will easily find out, how the supreme Authority is produced in this Case. And 'tis plainly thus; the King by quitting his Right, both over the Vassal and over the Feud, at the same time makes one Person capable of sovereign Power, and others capable of submitting to the Exercise of it. For that feudal Territory cannot hereafter belong to the *Vassal*, as an absolute and independent Prince, unless it be first utterly disengaged from the Authority of the *Lord*. And by this Means the Government, thus establish'd, really and truly proceeds from the Consent of the People. For if the *Lord* hath Power, by his own sole Act, to bestow such a Province on whom he pleaseth, he certainly, at the Beginning, receiv'd this Power from the Consent of the People, either voluntarily given, or obtain'd by the Issue of a just War. But if the *Lord* cannot do this by his own bare Authority, then 'tis evident, that the express Consent of the People must concur in the Disposal.

VIII. To conclude this Dispute; the same Author in the last place maintains, that even then the People are not the Cause of Sovereignty in the Prince, when having before liv'd under a democratical Form, they choose a single Governour. For, says he, the Sovereignty can-

not here be conferr'd on the Monarch, till such time as the People have first renounced their Right; but the People in that very Moment, in which they renounce their Right, have no longer any thing to do with the Sovereignty: therefore all that they do, is to elect a Person, who having receiv'd his Power from GOD, shall, for the future, rule over them. But now upon the same Argument, it may be denied, that Property can pass from one Man to another. For, just in this manner, another cannot become Proprietor of my Possession, till I have first resign'd my Property. But after my Resignation, I have lost my Property, and consequently cannot transfer that on another, which I have not my self; and therefore all that I do, is to choose a certain Person, into whom the Property (sprouting up anew, I know not where) is afterwards to be infused.

As to the voluntary Abdication of Monarchs, his Opinion runs in the following Sense; *That the Government being first abdicated, and the People loos'd from their Allegiance; the Sovereignty doth afterwards return to its original Author, in order to its being again brought back, and communicated to the appointed Heir.* This is manifestly a *Metempsychosis*, or *Transmigration* of the sovereign Power; which a wise Man will not require us to be at the trouble of confuting. In reality, he who abdicates the Government, does not give it up, but leaves it in the hands of the People, who are the true Authors of all Government, and who are the Order of Succession, and before given him a Right.

IX. It may not be improper, before we leave our present Subject, to enquire in short, to whose Power it belongs, to confer the regal Titles and the Ensigns of Majesty, or any Denomination by which the supreme and independent Authority in State, inhering in a single Person, is wont to be express'd. And here it's manifest, that to bestow the Name and Title, belongs to the same Persons, who have a Right to bestow the same thing it self, that is, the supreme Command. And by Consequence, a People, that either now first unite themselves in a civil Body, or else, laying aside their former Frame of Government, resolve on a monarchical Constitution for the future, whilst they confer on one Man the Authority over themselves, they, by this very Act, give him a Right to bear the Title and Style of King, and to signify his high Station by decent Badges of Honour. Such a King, as he owes his Dignity and Empire to no foreign Power, so he need not wait for the Consent and Approbation of other Princes or States, in order to the assuming the Actions or the Character proper to his Office. But as a Foreigner could not dispute his Right to the Government, without a manifest Injury, so would it be injurious likewise to deny him the Appellation of King. Nor can any Preference

^a See *Genes.* XXVII. 29, 37.

Mr. BARBEYRAC'S NOTE on §. IX.

¹ Mr. *Titus* (Observ. DLXI.) asserts *not*: And that Foreigners are at their Liberty whether they will acknowledge or not acknowledge such a Sovereign for King; because, says he, this Title generally gives a Rank and Prerogatives that may occasion some Prejudice to other States.

to the contrary be drawn from the small Extent of his Dominions. For a *Kingdom* doth not denote any certain Measure of Territory, or of Power; but a particular Form of civil State, which may happen to be greater or less. But to make him a King, who before own'd the Command of some Superior, 'tis necessary, that he obtain the Consent of his Superior, to release himself and his Dominions from the Bond, by which they stood engaged to their former Lord. Thus he who is under a *feudal* Obligation, cannot, without his Lord's Consent, take up the Character of a sovereign Prince. And unless he be releas'd from this Obligation, tho' his Lord should grant him the *Title*, yet he will hold the *Dignity* itself after an imperfect and subordinate manner. So we find that the Successors of *Alexander* the Great durst not assume the regal Style, till *Alexander's* own Family was extinct, to which the Sovereignty did of Right belong. And even after this, 'twas necessary for them to have the Consent of the People under their Command, which the numerous Forces kept in Pay about them, secured beyond the Possibility of a Denial a. In the same manner, he who subdues a

Territory by Arms, as he may, by the Right of War, acquire the Power and Authority, so may he likewise obtain the Title and Character of a King b. If a Prince would erect any particular Province of his Empire into a distinct Kingdom, the way of compassing this Design is to separate it from the rest of the Body, and to govern it by a peculiar Jurisdiction, independent of his other Dominions. That the *Roman* Senate frequently bestow'd the Title of *Friend* and *King*, as Marks of Esteem and Honour, is a piece of History vulgarly known. And this they might justly do with regard either to those Princes, on whom they themselves had conferr'd the respective Dominions, or to those, over whose Kingdoms they still held some superior and transcendent Right. But to have offer'd the same Title, as purely a Matter of Favour, to other Monarchs, over whom they could not pretend to the least Authority, had been a most insolent piece of Uturpation. And yet such a presuming Prerogative the Popes have not been ashamed to challenge over the most free and independent States of *Europe* c.

a *Vid.* Cornel. Nep. *Eumen.* Plutarch *Demet.* Justin. l. 15. c. 2. Appian. *Alexand. in Syriæ.* Diodor. Sic. l. 20. c. 54, 55.
 b *Vid.* Justin. l. 41. c. 4, 5.
 c See Father *Paul's* History of the Council of *Trent*, l. 5. p. 354. where he reports, how *Paul IV.* advanced *Ireland* to the Honour of a Kingdom; and *Thomas's* Hist. l. 36. about the Title of *Great Duke* conferr'd on *Cosimo* of *Flornce*.

CHAP. IV.

Of the Parts of Sovereignty, and their natural Connexion.

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| <p>I. In what Sense the supreme Power may be said to consist of Parts.</p> <p>II. The legislative Power.</p> <p>III. The vindicative Power.</p> <p>IV. The Judiciary Power.</p> <p>V. The Power of War and Peace, and of making Leagues.</p> <p>VI. The Right of appointing Magistrates.</p> <p>VII. The Right of levying Taxes.</p> <p>VIII. The Right of examining Doctrines.</p> | <p>IX. Government a more strict Obligation than bare Compact.</p> <p>X. Who may properly be said to hold a part in the Government.</p> <p>XI. The Connexion of Parts in the supreme Authority demonstrated;</p> <p>XII. And illustrated,</p> <p>XIII. Many are for dividing those Parts:</p> <p>XIV. Grotius amongst the rest; whose Opinion is particularly discuss'd.</p> |
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THE supreme civil Authority, tho' in its own Nature it be one indivisible thing, yet because it exerts its self in different Acts, according as it is employ'd about different Means, necessary to the Preservation of the State, is generally conceiv'd as consisting of many Parts; with Resemblance to those Parts which

are term'd *Potential*; in natural Philosophy. For the sovereign Command is by no means such an entire compound Being, as is made up of heterogeneous Parts, which as they are join'd and knit together by some common Band, compose one Body, yet so as that each Part is capable of subsisting separately by its self. But as the

Mr. BARBEYRAC'S NOTES.

* These are *Grotius's* Terms, in B. 1. c. 3. f. 17. n. 1. 'Tis founded upon a false Hypothesis, which our Author has confuted in the preceding Chapter; by which the *Supreme Civil Authority* is conceiv'd to be as a *physical* Being, that has no Parts, and that only receives different Names according to the Diversity of Objects, with regard to which it acts. Indeed, the *Supreme Civil Authority* contains an *Union* of different Rights, or different distinct Powers, but conferred for the same End, that is, for the good of the Publick, so that to consider them in themselves, nothing hinders but that they may be either entirely separate one from another, or in the Hands of different Persons. See Mr. *Titius's* Observ. DLXIX. Numb. 2. and his *Specimen Juris Publici*, &c. Lib. VI. Cap. VIII. § 26. &c. as also what the learn'd *Obrrecht* says against our Author, in his *Dissertation de Unitate Republicæ in S. Imperio Romano*, §. 5. 'Tis the XIV of the Collection publish'd in 1704.

† By that is understood the *Species* of the same *Genus*: For the *potential whole* is what the *Schoolmen* call in other Terms, the *Logical* or *universal whole*; upon which we may consult the *Metaphysicians*. Thus *Sovereignty* is conceiv'd as a *Genus*, whose *Species* are the *Sovereign Power* of making War or Peace; the *Sovereign Power* of punishing; the *Sovereign Power* of raising Taxes, &c. To that is oppos'd the *subordinate Parts of Sovereignty*, that is, the different Subjects,

Soul is one single Substance, dispensing Life and Vigour through the whole Body, and yet as it exerciseth different Operations, in Proportion to the Difference of the Objects presented to it, or of the Organs through which it works, is conceiv'd as having *Potential Parts*; so, in like manner, the Supreme Authority, as it is busied in prescribing general Rules of Action, is term'd the *Legislative Power*; as it determines the Controversies of the Subjects by the Standard of these Rules, 'tis the *Judiciary Power*; as it either arms the Subjects against Foreigners, or commands them to lay down their Hostility, 'tis the *Power of War and Peace*; as it takes in the Assistance of Ministers in the Discharge of publick Business, it is call'd the *Right or Power of appointing Magistrates*; and so with regard to its other Offices and Functions.

II. What therefore these Parts of Sovereignty are, may plainly be discover'd from the Nature and End of Civil States. A State then is a Moral Body conceiv'd to act by one Will. But in as much as it is made up of many Natural Persons, each of whom hath his particular Will and Inclination; and since these several Wills cannot, by any Natural Union, be join'd together, or temper'd and dispos'd into a lasting Harmony, therefore that one Will, which we attribute to the State, must be produced by the Agreement of all Persons, to submit their own private Wills to the Will of one Man, or one Assembly of Men, on whom the Government hath been conferr'd. Farther, since the respective Members ought in Duty to conform themselves to the Will of the State, 'tis necessary, that this Will be made known to them by clear and evident Signs. Hence we apprehend it to be one of the chief Offices of Sovereignty, to prescribe and declare to others what they ought to perform, or to omit. And because 'twould be impossible, in so great a Multitude, to give Injunctions to every particular Man, on occasion of every particular Action; therefore general Rules are establish'd, for the perpetual Information and Direction of all Persons in all Points, either of positive, or of negative Duty. Besides, since we easily discover amongst Men an immense Variety of Judgments and of Apperites, whence an infinite Field of Controversy might arise; it is on this Score highly conducive to the common Peace, that publick Determinations should settle what each Man ought to look on as his own, what as au-

ther's; what is to be esteem'd lawful, or unlawful in the State, what honest, or dishonest; as likewise, what Degree every Man retains of his natural Liberty, or after what Manner each Person is to moderate the Use and Exercise of his own private Rights, in order to the publick Tranquillity.

III. To proceed; the chief End of Civil Communities is, that Men, by conspiring mutually to aid and assist each other, may be secured against those Damages and Injuries, which they might otherwise suffer from their own Kind; and by this means may either enjoy Peace, or have sufficient Defence against any Assaults or Molestations. Now in order to the procuring of Peace, 'tis in an especial manner necessary, that each Person be so far guarded against the Violence of his Fellows, as that he may be able to live securely; that is, without having just Cause to fear Injury from others, whilst he himself is not injurious to others. Indeed, that Men should be absolutely protected from mutual Hurt, or that all Injuries should be impossible, the Condition of human Things will not allow. Yet such Care may be taken, such Provision made, as that there shall be no probable Grounds for the Apprehension of Danger. And this Security is the Aim which Men propos', when they submit themselves to the Direction of others. Of which, if no greater Degree could be obtain'd by joining Strength, than each private Man could give himself by standing singly upon his own Guard, 'twould be folly to renounce our natural Liberty, in which every Person is his own Protector. But to compass this Security, 'tis not enough that each of those who are about to form a Civil Body, do covenant with the rest, by Word, or Writing, that he will not kill, steal, or offer any other Harm or Prejudice: For 'tis manifest how far Human Nature is in most Persons corrupted; and experience sadly informs us, how little Force the Reverence of verbal Engagements, or the Authority of Oaths, hath with the generality of Mankind, towards the keeping them in their Duty, should the Fear of Punishment be once remov'd. For which reason likewise 'tis not enough to have one who shall prescribe Rules of Acting, if he be invest'd with no farther Power. Therefore, to engage Men to an Observance, both of the common Precepts of Nature, and those particular Laws, which are enacted for the good of the State, there must be added the Fear of Punishment,

or the different Persons among whom the Sovereignty is divided, as when the Roman Empire was in the Hands of the TRIUMVIRI, Augustus, Mark Anthony, and Lepidus, &c. But I must observe by the bye, that Mr. Courtin, according to his usual Exactness, says in his Index, that by *potential parts* of a State, Grotius means the parts that have the Sovereign Power; so that, adds he, it happen'd that the same Roman Empire has had two Sovereigns or two potential Parts, who reign'd at once, one in the East, and the other in the West, the Imperial Authority however remaining still one and indivisible. On the contrary, the *Subordinate Parts* are, according to him, those that are subject to the Sovereign Power, that is, the Subjects of the Provinces that compose the State, which are with respect to the State or Sovereign Power, what in the Schools several Species are with respect to the Genus. By this small Specimen one may easily see what Dependence there is upon this Translator's Explanation both of the Terms and of some Thoughts of Grotius; without saying any thing of the Translation it self. This heap of Nonsense is so much the more inexcusable in him, because he might easily have avoided it by following Gronovius, whose Notes 'tis plain he had read.

Mr. BARBEYRAC'S NOTES ON §. II.

¹ Tho' here our Author uses the Terms of *Hobbes* (*De Civ. c. 6. s. 9.*) yet he means always, that the Laws of a Sovereign include nothing contrary to the Divine Laws, whether Natural or Reveald, as he will prove in the first Chapter of the next Book.

² The latter Part of this Section is taken from our Author's Abridg-

ment, *De Off. Hom. & Civ. B. 2. c. 7. s. 2.*

and the Power of inflicting what is fear'd. And, that Punishment may produce the proper End of its Institution, it ought to rise to such a Measure and Proportion, as that there shall be manifestly a greater Evil in transgressing the Laws, than in obeying them; so that the Severity of what is to be suffer'd may over-balance any Pleasure, or Profit, which may now, or hereafter be obtain'd by the Offence: It being impossible for Men out of two Evils, not to choose that which to their Judgment appears the least. And thus the regard which Men have to their own Lives and Safeties secures mine. And altho' it may sometimes happen, that Persons shall be so transported, either through Rashness and Precipitancy, or some other extravagant Commotion of Mind, as to prefer the Satisfaction of the Crime to the Bitterness of the Penalty; yet this is to be reckon'd amongst those uncommon and extraordinary Accidents, which the Condition of our Nature, and the Circumstances of our Affairs will not suffer us to prevent. This Power of inflicting Punishment, on those who transgress the Commands of the Sovereign, is presumed to be then confer'd, when particular Men yield up the Use of their own Strength to the Service of the Community. By which Act they oblige themselves to execute Justice on Delinquents, when the Sovereign demands their Assistance in this particular; or at least, not to aid and defend those who are to suffer. But for a Man to oblige himself to undergo Punishment, without Reluctancy, or Resistance, is a void Engagement, and such as cannot hold good, on account of that natural Aversion, which we bear to all things destructive of our Safety and our Life. It is truly enough affirm'd by Mr. *Hobbes*, that this is the highest Degree of Power, which Man can hold over Man, to be able to prescribe to others, in whatever he thinks beneficial to the State; and by denouncing just Penalties, to terrify the Stubborn and Disobedient into a Compliance with what he thus enjoins. But then, as for what the same Author farther asserts, *That he who hath a Right of inflicting Punishment as he shall see fit, hath a Right of compelling all Persons to all things at his Pleasure*; it ought to have a Limitation affix'd to it, taken from the End of Civil Government: In as much as we are to presume, that he in whom the Supreme Authority resides, hath no other Will or Pleasure, but such as upon good Principles of Reason appears to have some Tendency towards the said End.

IV. Moreover, since under the exactest Systems of Laws there arise frequent Disputes, about the right Application of them to particular Cases, and many Circumstances are to be consider'd, before a Fact can be pronounced illegal, or the Author of it convicted: On this account the *Judiciary* Power is supposed to come in to the Assistance and Support of the two

^a *De Civ.*, c. 6. f. 6. ^b *Ibid.* f. 8. ^c See *Ecod.* xviii. 15.

^d *Add. Bœcler ad Grot.* l. 1. c. 3. f. 6. p. 218.

Mr. BARBEYRAC'S NOTE on §. VII.

^a This is what St. *Paul* intimates to us, when he says: *For this Cause pay you Tribute also (to the Magistrates) for they are God's Ministers, attending continually upon this very Thing.* Rom. xiii. 6. They can't (says Mr. *Le Clerc* upon this place) leave the care of their own Affairs to apply themselves to those of the State, without having some Recompence for it; nor maintain the Dignity of Ministers of

Powers already mention'd. The Office of the *Judiciary* Power is to hear and decide the Causes of the Subjects, to examine the Actions of particular Men, which are represented as Breaches of the Law; and to pronounce Sentence according to the Legal Penalties. Mr. *Hobbes* seems to have had an improper Notion of this Power: Since the Right of Judging, as to the Use and Exercise of any Part of the Sovereignty, is understood to be implied or included in the respective Part.

V. But tho' the Means hitherto prescribed may afford the Subjects full Security against those of their own Body; yet this is not enough to answer the End of civil Establishments. For 'tis to little Purpose for Men to be at Peace amongst themselves, if they are not able to defend themselves against Strangers; and this they cannot effect, unless they are united in their Strength. Because it's purely owing to Conjunction, that many are stronger than one; in as much as otherwise a thousand separate Men are not superior in Force to a single Person. In order therefore to the general Safety and Welfare, 'tis necessary, that there be such a Power in the State as may assemble, unite, and arm so many Subjects (or hire Mercenaries in their room) as shall be thought sufficient for the common Defence, with Proportion to the uncertain Number and Strength of the Enemy; and may likewise, when it shall be afterwards expedient, embrace Conditions of Peace. And since both the Seasons of Peace and of War receive a considerable Advantage from Leagues, for the better communicating the Benefits of different States, and for repelling and reducing to Reason some stronger Enemy, by a confederate Force; there must be inherent in the Sovereignty, a Power to enter into such Alliances as shall be serviceable in either Condition, and to engage all the Subjects to a just Observance of them; and at the same time, to derive upon the Publick such Fruits and Advantages, as shall accrue by their Means.

VI. Again, since the Affairs of the Community, occurring as well in Peace as in War, cannot be administr'd and executed without Officers and subordinate Magistrates, there is need of such a Power as may appoint Men to enquire into the Controversies arising between Subjects, to dive into the Policies of neighbouring States, to gather in and give out the publick Revenues, and lastly, in every respect to consult and promote the common Benefit. And then it must be another part of the same Power, to compel these Officers, when once constituted, to the Performance of their Duty, and to call them to account upon proper Occasions.

VII. Farther, in as much as publick Business in the time of War, or of Peace, cannot proceed without Expence, such a Power is like-

wife requisite, as may set aside for these Uses some part of Goods or Products of the Country; or may compel private Men to contribute so much out of what they separately possess, as is judg'd necessary to support the common Charges; as likewise to command and require the Hands of the Subjects, upon occasion of any needful Work. To the same Power belongs the Invention of other lawful Ways and Means of increasing the Riches of the State. The Principal of which is the Right of imposing Duties on Goods imported, or exported; and also of paring off some moderate Proportion from the Price of Commodities consumed by the Subject.

VIII. Lastly, Tho' to make away the intrinsic Liberty of the Will, and at the same time, to unite and compose Mens Judgments of things in a perpetual Harmony, by an inward Principle, be above human Ability to effect; yet to provide that these Sentiments and Persuasions, however different, may not disturb the publick Peace, is a Business absolutely necessary. For since all voluntary Actions take their Rise from the Will, and have a natural Dependence upon it; and since the Inclination of the Will, to the doing, or the not doing of any thing, is built on the Opinion of that Good, or Evil, of that Reward, or Punishment, which the Party conceives will follow from the Performance, or the Omission; and consequently, since Mens Actions are ever guided by their Opinions; some outward Means must needs be found out, by which these Opinions and Judgments shall be brought, as near as possible, to conspire and agree; at least shall be hindred from giving the State any Disturbance by their Opposition. To this End it is expedient, that the State do publickly own and profess such Doctrines, as are agreeable to the End and Design of Civil Government, and the Minds of the Subjects be from their Childhood grounded in them. In as much as the Generality of Mankind judge of things according as they have been accusom'd, and according to the common Notions, which they see obtain in the

World; very few being able, by the Strength of their own Parts, to discern what is good and solid in the Conduct of human Life. There is indeed scarce any one Opinion, either relating to the Worship of God, or concerning those things, the Knowledge of which is strictly term'd *human*, but may be made the occasion of Dissention, Discord, Reviling; and in the final Issue, of Blood and War. And this doth not happen on account of the Falsity of the Opinion, or because to admit the contrary, would bring heavy Inconveniences on Mankind, or on Civil Communities; but by reason of Mens unhappy Dispositions, who always imagining themselves to be wise, would gladly appear so to all others, and are violently enraged against those who presume to be of the contrary Persuasion. This any one will readily confess, who hath but chanced to cast his Eye on those Quarrels of the learned about meer Trifles, carried on with no less Heat and Fury, than if their Lives and Religions lay at Stake. Now such Differences and Disputes, tho' they cannot be absolutely prevented, yet they may be hindred from interrupting the publick Peace and Tranquillity, by due Penalties enacted against those who shall maintain and foment them. Yet, what we would observe on this Subject, is not properly level'd against those Opinions concerning indifferent Points, but against such as being obtruded upon Mankind, either under the Colour of Religion, or with some other fair Pretence, shock and confound the Laws of Nature, and the Principles of sound Policy, and tend to the breeding of Moral Diseases in a State. Nor will any true and just Opinions be in Danger of suffering by this Censure. For no true Doctrine is opposite to the common Peace; and that which doth contradict Peace cannot be true; unless we may at the same time affirm, that Peace and Concord are repugnant to the Laws of Nature. Wherefore the Power of examining the afore said pernicious Doctrines, and of banishing them from civil Societies, is justly attributed to the supreme ruling Authority b.

a Society, and defend it against those that disturb and invade it without an Expencc. So that this is the Foundation of all the Taxes of lawful Powers, and which consequently a Subject ought to pay; because every one is oblig'd to contribute to the support of the Society, in which he lives quietly, and enjoys the Protection of the Laws. And to this part of Sovereignty we may also refer the Right of *coining Money*, the Right of *Hunting or Fishing*; and in general the Power of appropriating the use of things that have been left in common, and that cannot conveniently be divided among private Persons.

^a Plato de LL. l. 11. p. 977. D. Ed. Wech. *Let no Man revile another; but in Cases of Doubt and Controversy, let the Parties behave themselves towards each other, and towards the Company, after the manner of Learners, as well as of Teachers; so as utterly to refrain from Reproach. For, to abuse each other in a Dispute with foul and scandalous Language, is to scold like Women: And very frequently Words, which in themselves are trifling Matters, give Occasion to the deepest Hatred and Enmity amongst Men.*

^b Diogenes Laert. (in Theophrast. §. 38.) reports a Law of Sophocles Son of Amphiclidas, to this Purpose, *That no Philosopher should keep a School, unless by the Decree of the Senate and Commons; and that to do the contrary should be a Capital Crime.*

Plato de LL. l. 7. p. 888. C. Ed. Wech. *Let no Poet presume to feign any thing, but what is consistent with the Laws of the State, and is just, honest and good. Nor shall he be allow'd to shew his Compositions to any private Persons, before the Guardians of the Laws, and the Judges appointed for this Service, have revised and approved of the Performance. To this Purpose see Casaubon Exercitat. in Baron. and his Epistle to Fronto Duceus, n. 624. Ed. Græv. Nor is it a despicable Remark of Mr. Hobbes, which he gives us in his Book de Homine, c. 13. §. 8. Many Books, says he, we have, compil'd by Romans, either under the Commonwealth, or soon after its Extinction, and by Grecians, during the flourishing Condition of the Athenian State, replenish'd as well with Precepts as Examples, by which the Minds of the Vulgar are render'd averse to Regal Power; and this for no other reason, but because they find these Authors making Panegyrics on the Villanies of base and perfidious Men, that is, on the Murthers of Kings, when they have before branded them with the Name of Tyrants. But still the Genius and Disposition of the Multitude is much more corrupted by the reading of those Books; and the hearing of those Preachers, who would have a Kingdom within a Kingdom, and Ecclesiastical within a Civil Supremacy. Hence instead of the Old Bruti and Cassii, we have our Modern Clements and Ravalliacs, who whilst in assassinating their Princes, they were only the wicked Instruments of other Mens Ambition, thought they did God Service.*

IX. Our next Business is to shew, that these Parts of the Sovereign Power are naturally so united, and, as it were, interwoven with one another, that should we suppose some of them to inhere in one Person, some in others, the regular Frame of the State must absolutely be destroy'd ^a. Which Truth that we may thoroughly apprehend, it ought to be observ'd, that there are, above all others, two Bands especially, by which the Wills of many Men, or of whole Assemblies, are clos'd and made to conspire into one; *Covenant* and *Command*: Of which, nevertheless, the latter adds a much stronger Tie than the former. They who are held together by bare Covenant, stand oblig'd by the Law of Nature voluntarily to perform the Terms of Agreement; their natural Equality, in other respects, remaining as before. Now so long as the Articles are on both sides observ'd, a fair Union and Concord may continue amongst them. And when any one Party, with a wicked Design, flies from the Engagement, he is guilty of a Breach of the Law of Nature: But then the rest, whose Interest it was that the Covenant should remain inviolable, have no means left of reducing the false Brother to Reason, but meer Force of Arms, in which he who offer'd the Injury, is frequently not inferior to him that receiv'd it. After the same manner, they, who upon equal Terms stand bound to each other by virtue of some League or Confederacy, are at Peace and Agreement, so long as each Party makes good what he promis'd; but when either proves perfidious, the Band of Union is dissolv'd, and an Occasion of Hostility ensues. Whence it appears, that bare Covenants are not Bands sufficient, at least, for the long holding together many Persons in a moral Body; especially since it doth not always so happen, that the smaller and weaker Party recede from their Obligation, to the Prejudice of the more numerous and the more powerful, but very often the direct contrary. And tho' we should suppose, in the principal Compact, a Clause to this Purpose, that whoever presumed to break this Article, should be prosecuted with the united Strength of all the rest, yet (not to say, that this Clause would be of no effect, in case many Persons should join in such a Breach, unless a Democratical Government were establish'd amongst the Members, or unless they who before compos'd a *Society*, do unite more closely in a formal *State*) there will be need of another Covenant, to determine what Method shall be observ'd in proceeding against him who shall refuse to stand to this additional Engagement; and so on, *in infinitum*. But now Sovereignty or Command is a much stronger Tie, for the keeping an united Body of Men in firm Agreement. For they who are bound to each other under the same Government, do not continue equal to the Government itself; but whilst the Power of prescribing Rules to, and of inflicting certain Evils, by way of Punishment, upon such as transgress the Rules precrib'd, is conferr'd ei-

ther on a single Person, or upon an Assembly; all Persons lie under a far greater Necessity to remain obedient, than if they were united by Compact only; which could not take away the Equality of the Members, or their Right of administering their private Affairs according to their own judgment.

X. It ought farther to be consider'd, that if any will maintain the *Potential* Parts of the Sovereignty (as they are term'd) to be within the same State, seated in distinct Persons or Councils, they must at the same time necessarily allow, that he to whom any Part belongs, must be furnish'd with sufficient Power, as well to compel the Subjects to the Obedience of what he ordains, by virtue of that Part, as to defend this his Right, when attack'd, or disturb'd; tho' that particular Limb of the Prerogative, which contains the Power of War and Peace, may possibly reside in another Person: And lastly, that he have a right of determining, by his own Judgment, at what time and in what manner, the Part of the Government which he holds shall be exercis'd and employ'd. For to possess a Right of declaring to others what you would have them do, and yet to be destitute of Power, for the obliging those to a just Compliance who refuse your Injunctions, deserves any other Name rather than that of Authority, or Command. And we hold *that* by a very precarious Title, which we cannot defend against others. Nor is he any better than another's Officer, or Minister, who exerciseth any kind of Right at the Pleasure and Disposal of that other Party.

XI. From what we have laid down, it will be evident, that there is so near and so necessary a Connexion between all the parts of the Sovereignty, as that not one of them can be separated from any other, but the regular Frame of the Commonwealth must be destroy'd; and instead of it an irregular Body must start up, held together only by an infirm and ineffectual Covenant. For if we appropriate the legislative Power to one, and to another the judiciary, each primarily and independently, it will of Necessity follow, that either the former is null and void, or that the latter ministers only to the former. Because, to make Laws which you can't put in Execution is vain and insignificant; and on the other side, to have Strength whereby you may compel and controul, and yet such as you must not use or apply, but at the Pleasure of another, is to be an Officer barely executive. Again, should we grant the latter the Privilege of applying his Strength according to his own Discretion, without being accountable to others, then we utterly overthrow the legislative Power, as before. It is necessary therefore, that both these Powers should depend upon one and the same Will. Nor can the Power of Peace and War, or that of exacting Tribute, be separated from this vindicative, or judiciary Right. In as much as no one can fairly compel the Subjects to bring in Contributions towards the Expences of the State, on either account, but he who hath

^a Add the Preface of Mr. Heber to his Book, as also *Leviath.* cap. 21. where he reckons up the Mischiefs, that have arisen from the *Arbitrary* and *Unlimited* Liberty. *Comp. de Civ.* c. 6. *Leviath.* c. 29, 46, 47.

also the Right to punish the disobedient. Farther, it would be absurd to give the Right of making Leagues for the Service either of Peace, or War, to any other Person, besides him who hath also the Right of decreeing Peace, or War, as he judgeth convenient. For otherwise, either the former will be only a bare Minister, or the latter will depend upon another's Pleasure, in acquiring Means for the Exercise of his own Right. So likewise, if you constitute any Person for the chief Management of Business, and do not, at the same time, empower him to appoint inferior Assistants, and to require their Service in their respective Posts (without which Assistants the Business cannot be perform'd) you really make him as meer a Servant as the rest. For which reason, neither can the Power of appointing Magistrates be divided from the other parts of the Supreme Authority. Lastly, to the same Authority it must belong, to take Cognizance of Doctrines and Opinions, of such especially, as bear any Relation to the End of civil Government, and which are of Force and

^a Comp. Hobbes lib. 1. c. Horn. l. 3. c. 11. l. 3.

^b See especially Grotius De Imperio summorum Potestatum circa, sacra, c. 1.

MR. BARBEYRAC'S NOTES on §. XI.

¹ See a Discourse of our Author's, intitled, *De Concordia vere Politicæ, cum Religione Christiana*, p. 11. and the *Rights of the Christian Church*, &c.

² It is, however, worth while to say something upon this important Matter. If we here make use of an unprejudiced Mind, it may be decided in few Words, at least as far as is necessary to establish general Principles, from whence we may easily draw Consequences in particular Cases; and in other Points depending upon that. The following *Letter concerning Toleration* contains what is sufficient to satisfy us. The Toleration of those that differ from others in Matters of Religion is so agreeable to the Gospel of Jesus Christ, and to the genuine Reason of Mankind, that it seems monstrous for Men to be so blind as not to perceive the Necessity and Advantage of it in so clear a Light. I will not here tax the Pride and Ambition of some, the Passion and uncharitable Zeal of others. These are Faults from which human Affairs can perhaps scarce ever be perfectly freed; but yet such as no body will bear the plain Imputation of, without covering them with some specious Colour; and so pretend to Commendation, whilst they are carried away by their own irregular Passions. But however, that some may not colour their Spirit of Persecution and Unchristian Cruelty with a pretence of Care of the Publick Weal, and Observation of the Laws; and that others, under pretence of Religion, may not seek Impunity for their Libertinism and Licentiousness: In a word, that none may impose either upon himself or others, by Pretences of Loyalty and Obedience to the Prince, or of Tenderness and Sincerity in the Worship of God; I esteem it above all things necessary to distinguish exactly the Business of Civil Government from that of Religion, and to settle the just Bounds that lie between the one and the other. If this be not done, there can be no end put to the Controversies that will be always arising between those that have, or at least pretend to have, on the one side, a care of the Commonwealth. The Commonwealth seems to be a *Society of Men constituted only for the procuring, preserving, and advancing their own Civil Interests*. Civil Interests I call Life, Liberty, Health and Indolency of Body; and the Possession of outward Things such as Money, Lands, Houses, Furniture, and the like. It is the Duty of the Civil Magistrate, by the impartial Execution of equal Laws, to secure unto all the People in general, and to every one of his Subjects in particular, the just Possession of the Things belonging to this Life. If any one presume to violate the Laws of Publick Justice and Equity, establish'd for the Preservation of those Things, his Presumption is to be check'd by the Fear of Punishment, consisting of the Deprivation or Diminution of those Civil Interests or Goods, which otherwise he might and ought to enjoy. But seeing no Man does willingly suffer himself to be punish'd by the Deprivation of any part of his Goods, and much less of his Liberty or Life, therefore is the Magistrate arm'd with the Force and Strength of all his Subjects, in order to the Punishment of those that violate any other Man's Right. Now that the whole Jurisdiction of the Magistrate reaches only to these Civil Concernments; and that all Civil Power, Right, and Dominion, is founded and confin'd to the only care of promoting these Things; and that it neither can, nor ought in any manner to be extended to the Salvation of Souls, these following Considerations seem unto me abundantly to demonstrate. *First*, Because the Care of Souls is not committed to the Civil Magistrate any more than other Men. It is not committed unto him, I say, by God, because it appears not that God has ever given any such Authority to one Man over another, as to compel any one to his Religion. Nor can any such Power be vested in the Magistrate by the *Consent of the People*; because no Man can so far abandon the Care of his own Salvation, as blindly to leave it to the choice of any other, whether Prince or Subject, to prescribe to him what Faith or Worship he shall embrace. For no Man can, if he would, conform his Faith to the Dictates of another. All the Life and Power of true Religion consist in the outward and full Persuasion of the Mind; and Faith is not Faith without Believing. What Profession soever we make, to whatever outward Worship we conform, if we are not fully satisfied in our own Mind that the one is true, and the other well pleasing unto GOD, such Profession, and such Practice, far from being any Furtherance, are great Obstacles to our Salvation. For in this manner, instead of expiating other Sins by the Exercise of Religion, I say, in offering thus unto God Almighty such a Worship as we esteem displeasing to him; we add unto the Number of our other Sins, those also of Hypocrisy and Contempt of his Divine Majesty. *Secondly*, The Care of Souls cannot belong to the Civil Magistrate, because his Power consists only in outward Force; but true and saving Religion consists in the inward Persuasion of the Mind, without which nothing can be acceptable to GOD. And such is the Nature of the Understanding, that it cannot be compell'd to the Belief of any thing by outward Force. Confiscation of Estate, Imprisonment, Torments, nothing of that Nature can have any such efficacy as to make Men change the inward Judgment that they have fram'd of things. It may indeed be alledg'd, that the Magistrate may make use of Arguments, and thereby draw the Heterodox into the way of Truth, and procure their Salvation. I grant it; but this is common to him with other Men. In teaching, instructing and redressing the Erroneous by Reason, he may certainly do what becomes any good Man to do. Magistracy does not oblige him to put off either Humanity or Christianity; but it

to discuss the Opinion of *Philo the Jew* ^a, who having shewn that *Moses* was a King, a Law-giver, a Priest, and a Prophet, adds, *Since all these Offices are reducible to one and the same Head, they ought by mutual Ties to be united and inclosed one with the other; and they are all requisite in the same Person, so that he who wants any one of the four, is to be look'd on as a lame Ruler of an imperfect Commonwealth.*

XII. This will be more clearly discern'd, if we examine those several Divisions of the Sovereignty, which might be propos'd. Let therefore the Power of Peace and War be in the Prince; the Power of making Laws and executing Justice, in the Senate; the Right of levying Tribute, in an Assembly of the People. Here, if the King commands the Subjects to Arms, and they refuse to obey his Orders, either the King may compel them by Punishments, which he himself has a Right of inflicting, or he ought to

deliver them up to take their Tryal before the Senate. Now should we admit the former of these, it doth not appear, how he, whom we suppose not to have the Power of putting the Laws in Execution, can punish the Subjects before they are actually list'd, and brought under martial Discipline. If you say, that, in this particular Case, the King hath a Right to punish the Disobedient, tho' not in other Cases; you, at the same time give him the Privilege of oppressing and grieving his People, as he thinks fit, and so you cancel the Rights of all beside. For when he orders them to take up Arms, he'll punish them, if they dare to refuse; and when he hath once led them out on an Expedition, then the Nature of military Discipline gives him the Power of Life and Death over them: And nothing is easier than for a General to cut off any Soldier, who hath the Misfortune to fall under his Hatred, or Displeasure ^b. On the other

^c is one thing to persuade, another to command; one thing to press with Arguments, another with Penalties. ^d This Civil Power alone has a right to do; to the other, Good Will is Authority enough. Every Man has Commission to admonish, exhort, convince another of Error, and by Reasoning to draw him into Truth: But to give Laws, receive Obedience, and compel with the Sword, belongs to none but the Magistrate. And upon this ground I affirm, that the Magistrate's Power extends not to the establishing of Articles of Faith, or Forms of Worship, by the force of his Laws. For Laws are of no Force at all without Penalties; and Penalties in this case are absolutely impertinent, because they are not proper to convince the Mind. Neither the Profession of any Articles of Faith, nor the Conformity to any outward Form of Worship (as has been already said) can be available to the Salvation of Souls, unless the Truth of the one, and the Acceptableness of the other unto God be thoroughly believ'd by those that so profess and practise. But Penalties are no ways capable to produce such Belief. It is only Light and Evidence that can work a Change in Mens Opinions; which Light can in no manner proceed from Corporal Sufferings, or any other outward Penalties. *Thirdly*, The care of the Salvation of Mens Souls cannot belong to the Magistrate; because tho' the Rigour of Laws and the Force of Penalties, were capable to convince and change Mens Minds, yet would not that help at all to the Salvation of their Souls. For there being but one Truth, one way to Heaven; what hope is there that more Men would be led into it, if they had no Rule but the Religion of the Court, and were put under a Necessity to quit the Light of their own Reason, and oppose the Dictates of their own Conscience, and blindly to resign up themselves to the Will of their Governours, and to the Religion which either Ignorance, Ambition, or Superstition had chanced to establish in the Countries where they were born? In the variety and contradiction of Opinion in Religion wherein the Princes of the World are as much divided as in their Secular Interests, the narrow way would be much straiten'd; one Country alone would be in the right, and all the rest of the World put under an Obligation of following their Princes in the ways that lead to Destruction; and that which heightens the Absurdity, and very ill suits the Notion of a Deity, Men would owe their Eternal Happiness or Misery to the Place of their Nativity. These are the Author's own Words: From whence he asserts, that the Magistrate ought to leave every one the Liberty of professing such Opinions as he believes the most reasonable, and to take care that no Violence be offer'd to any Person upon that Account. He shews at large the Inconveniences that there would be in submitting ones self to the Humours of Princes; who act nothing but by the Suggestion of the *Chorismen* that are about them. If a Man were obliged to follow the Religion of the Prince, he must change his Religion as often as his Prince; so that if Princes of different Opinions should succeed one another, as it has happen'd in *England*, the Inhabitants of a Country must in a few Years be of different Religions to be sav'd. But as in every Church there are two Things especially to be consider'd, the outward Form and Rites of Worship, and the Doctrines and Articles of Faith; the Author takes notice there of the Duties of a Magistrate with respect both to the one and the other. As for Ceremonies, or the outward Form and Rites of Worship, it appears by the Definition of a Church, which is, according to him, *a voluntary Society of Men joining themselves together of their own accord, in order to the publick worshipping of God in such manner as they judge acceptable to him, and effectual to the Salvation of their Souls.* It appears, I say, by this Definition, that the Prince has no Power to enforce by Law, either in his own Church, or much less in another, the Use of any Rites or Ceremonies whatsoever, in the Worship of God. We cannot say, that being things indifferent, the Prince has a Right to regulate them as he finds convenient, because when such things are brought into the Church and Worship of God, they are remov'd out of the reach of the Magistrate's Jurisdiction, and in that use they have no Connexion at all with Civil Affairs. Besides, if they are indifferent, in themselves, they do not by the Prince's Approbation become acceptable to God, who has not promis'd to be pleas'd with the Worship that the Magistrates should establish. As to the Doctrines and Articles of Faith: *First*, Princes ought not to tolerate any Opinions contrary to Civil Society. *Secondly*, They ought not in particular to tolerate those who under the pretence of Religion would divest private Persons, or even Magistrates of their Civil Rights and Possessions. *Thirdly*, They ought not to suffer Churches which are constituted upon such a Bottom, as that all those who enter into them, *ipso facto*, deliver themselves up to some Foreign Authority which they are ready to pay a blind Obedience to, notwithstanding they have Princes of their own. *Fourthly*, and lastly, Atheists who deny the Being of a God are not to be tolerated, because having no Religion, they make a Conscience of nothing but what is punishable by the Civil Laws. Two Reasons induced me to set down here the Principles of this little Treatise. One is, Their being a necessary Consequence of a Truth which our Author himself has solidly proved in his Discourse *de habitu Religionis Christiane ad Vitam Civilem*, I mean, that Religion is antecedent to Civil Societies, and that it has nothing at all to do with their Establishments. See Sect. 1, 2, 3, 4, 5, 6. The other Reason is the Authority of the Person who wrote the *Letter concerning Toleration*, which is of very great weight: Since the Learned Mr. *Locke* has, in his last Will and Testament own'd it for his. See also Mr. *Noord's* excellent Dissertation *de Religione ab Imperio jure Gentium libera*; publish'd by me in *French* in the beginning of the Year 1707. and since translated into *English*. The Reader will find, in my Notes, the principal Treatises that have been written upon this Subject, specified and referred to.

^a *De Præm. & Pæn.* p. 919. *A. Edit. Paris.* Our Author might plainly have said, that this Opinion, having no other Foundation than *Philo's* Authority, was not worth refuting.

^b *Vid. Liv. l. II. c. 23, 32, 58 l. III. c. 10, 20, 24. l. IV. c. 1, 5. 58. l. V. c. 2. 10.* and in many other places. *Divdor. Sic. l. XIV. c. 73. Quintus Curtius, l. VII. c. 2. Polyb. l. 1. c. 9.*

hand, if the King must be obliged to have recourse to the Senate for Justice, when any Persons refuse to list themselves under his Command; in this Case, either the Senators must pronounce the Sentence of their Condemnation, and give Orders for the Execution of it, barely by the King's Commission and Authority; which is contrary to the Supposition: Or they must judge whether the Act alledg'd be criminal, or not; and this Proceeding will certainly be vain and fruitless, unless the same Judges may likewise take upon them to examine, whether or no the War now engaged in by the Prince, be for the Advantage of the Commonwealth; and thus the King's Right will again be destroyed. We shall discover the same Inconveniences, if we compare the Right of the *Prince* with that of the *People*, under such a Constitution, as we did before with that of the *Senate*. For as the Measures of War are now settled in most Countries, *Tacitus's* Observation ^a holds true; that *Armies cannot be without Pay, and Pay cannot be had without Taxes*. If therefore the Prince have not a Power of compelling the Subjects, by virtue of his sovereign Command, to bring in their Shares of the publick Contributions, his Right over the Affair of War will be no more than a bare Power of persuading and advising the People, that, in such or such a particular Juncture, to engage in a War would be for the Advantage of the Commonwealth. On the other hand, if the People are not empower'd to judge whether the War, towards which these Subsidies are levied, be for their Interest, or not; then what have they to boast of, but the laborious, and servile Office of Assessors and Collectors? Nor will things be in a better Posture, should we separate the Branches of Sovereignty, according to any other Division that could be invented ¹. So just was that Remark of *Afinius Gallus*, in *Tacitus* c. that *As a Government hath but one Body, so it must be directed but by one Mind* (whether of a single Person, or of a Council, or Assembly.) This may be well illustrated by the Example of the human Soul, to which the sovereign Authority in a State seems to bear some Resemblance. Now should we suppose the potential Parts of the rational Soul, the Understanding and the Will, to exist separately, in two different Subjects or *Suppositums*, one of which should have only the Faculty of the Understanding, the other only the Faculty of the Will; neither of these *Suppositums* could be call'd a Man, nor could human Actions be expected from either; whilst one lay unactive and immoveable, the other blind and insensible. To which purpose the Epigram in the *Anthologia* ^d seems proper to be applied:

Πηδός ὁ μὲν γυνοῖς, &c.

*The blind Man bears the lame: What Fate denies
The wretched Pair, their mutual Help supplies;
One lends his Feet, the other lends his Eyes.*

Here the two unfortunate Persons were able in some sort to make up the Defects of Nature, so long as they agreed to afford their mutual Assistance. But should this Agreement have been once broken, and a Quarrel have happen'd between them, each Party would have been alike at a loss about their Way. In the same manner should any persist in dividing the Parts of the Sovereignty, he will by no means compose a regular State, but a disorderly Body, the Members of which holding these separate Limbs of the Government, shall be kept together, not by any common Authority, but bare Compact or Agreement. Now in such a Society some kind of Peace and Concord might be maintain'd, so long as particular Persons kindly conspir'd in their Opinions with regard to the publick Good, and were each of them ready voluntarily to perform what was requisite towards this End. But should any Dissention arise, no means of Redress would be left, but either to seek abroad for an Arbitrator, or to decide the Controversy by the Sword.

XIII. Tho' the Case be manifestly thus, as we have represented it, yet there is no inconsiderable Number of Men, who stand up resolutely for the Division of the sovereign Power, that hereby they may frame I know not what Mixture of Commonwealths, which being rightly temper'd and qualified must needs, forsooth, produce the most happy System of Government. They would gladly engage *Aristotle* to be of their Party, but without Effect; he in the place of his Works, which they alledge e, speaking of a Mixture far different from any that can be applied to the parts of the Sovereignty. Which makes it seem the more strange, that some Interpreters (and *Nich. Piccart* amongst the rest) when they come to treat of this Mixture, put such things together, as probably never entred into the Philosopher's Head. The Temperature which he so much adviseth and recommends, runs in the following manner: *That the King shall have the Power of making War, of coining Money, of engaging in Leagues, of conferring publick Rewards: that the Senate shall possess such Rights as demand Experience and Deliberation; the framing and the executing of Laws, and the administering of publick Justice: Lastly, that the Populacy shall manage such Affairs, as their Knowledge chiefly directs them to; the Examination of the Revenue, the Division of Lands, the Creation of Magistrates, the Inspection of Buildings, Highways, Aqueducts, Corn, and other Helps and Assistances of the State*. In like manner, it would not argue any Division in the Sovereignty, should we, for Instance, suppose that the Senate had the Power of condemning, but the Prince or the People of pardoning and acquitting. For here the Prince might by his Prerogative absolve any Person, against whom the Judges had pronounced Sentence; and consequently the latter would be only an inferior Court, whose Decisions must borrow their Force and Ratification

^a Hist. l. IV. c. 74.

^b *Alti. Bodin. De Republ. l. 2. c. 1. p. 287.* with the Observation made on that Author, by *Aristotels, De Republ. l. 2. c. 6. Sect. 1. §. 56.*

^c *Annal. l. 7. c. 12.*

^d *L. 1.*

^e *Poët. l. IV. c. 8, 7.*

from the Authority of the former. Whence it sufficiently appears, that if in any State, the Judgment of capital Causes belongs to the Senate, the King still retaining the Right of *Grace*, or Pardon; the Senate doth really hold, by Deputation from the King, this Power of presiding in criminal Processes, and of pronouncing Sentence as the Law directs; and this as well for the Banishing all Partiality from the Methods of Justice, as to divert the *Odium* from the King: Yet so as that the Power of Life and Death are radically, or originally, inherent in the King's Person. Some would frame a Division in the judiciary Power it self; so that the Prince should have the Power of Life and Death over strangers only, but the People over the Natives. But now, if the People exercise this Power over the Natives, only as an inferior Court, then they do not in the least intrench upon the Prerogative of the Prince. On the contrary, if they hold it originally and independently, then the King will have nothing left him but an empty Title, and will only perform the Office of *Prætor peregrinus*, a Judge of foreign Causes. As for what they add, about dividing the Right of Coinage, it is too impertinent to deserve a Repetition.

Arniseus^a is very large on this Point, and amongst many accurate Remarks, justly rejects some spurious kind of Mixtures in Government. And at last, the fairest Model he could invent, was, that the King should have the Power of War and Peace, of levying Tribute, of Coining Money, of distributing publick Rewards; that the Senate should be employ'd in judging Causes, and in receiving Appeals, as likewise in the Reformation of Manners by good Laws, and in exercising the Power of Life and Death; and lastly, that the People should be allow'd the Care of the Revenue, and the Creation of Magistrates. Of which Model a Judgment may be formed, by what we have before observ'd.

XIV. *Grotius* himself^b hath attempted somewhat towards dividing the Parts of the Sovereignty. Where he is so far in the right, when he denies that any such Partition of Power, between the Prince and the People, can be made, as that the prime Compact shall be thus loosely express'd, *If the King govern well, then the People shall obey him; if he govern ill, then the People shall compel him to his Duty*: Observing, that certain Bounds and Limits ought rather to be assign'd to the Power of either Party; such as may easily be apprehended from the Difference of Places, Persons, and Affairs; but that the bare Good or Evil of an Action, consisting in the Application of fit Means to the publick Safety, which often admits of very great and obscure Debates, cannot be a proper Bottom to ground a Partition upon; in regard to that extreme Confusion which must follow, whilst the King, on the one hand, would insist upon the Management of an Affair, alledging that he order'd it well; and the People, on the other hand, would challenge the Direction of it, pretending that it had been ill managed before. His other Remark is no less true, that for a Prince to promise the

People by an Oath, that he will perform, in such a peculiar manner, things which belong to the Administration of the Government, doth not argue a Partition of Power. But though all the rest of his Discourse he falls into the common Error. One way then, by which he thinks the Sovereignty may be divided, is, when a Partition shall be made by express Agreement. A Precedent of this kind he alledgeth from the *Roman* State in the time of *Probus*, when the Senate confirm'd the Prince's Laws, heard Appeals, created Pro-consuls, and supplied the Consuls with Lieutenants. As if any Person could be ignorant, how that, amongst the Emperors, those who affected to seem more modest than others, exercised the Sovereignty under the Mask and Disguise of the antient Commonwealth; leaving to the Senate some inferior and petit Affairs, such as had little Influence on the main Government; but reserving strictly to themselves the chief Force and Command, which consisted for the most part in the Soldiery. Another Project of dividing the Sovereignty he expresseth in this manner: *If the People, being as yet free, shall require thus much of him whom they choose to be their King, and shall lay it upon him after the manner of a standing Rule or Command*. Now here 'tis not easy to apprehend what kind of thing a *standing Command* is, when supposed to continue after that the Party hath lost the Power of Commanding. For every Command presupposeth a compulsive Force, to be exerted so often as the Command shall be transgress'd. Wherefore the People, who appoint themselves a King on such Terms, shall either keep this compulsive Power over him, or they shall not keep it. If the former, the King is only so in Name; the Force and Efficacy of the Government residing in the People: If the latter, the Command will be insignificant. He ought therefore to have said, that a People, as yet continuing in a State of Liberty, may oblige the future King to follow certain Rules in the Discharge of the Government. But that such a Compact doth not imply or infer a Division of the sovereign Power, we shall hereafter make appear. His last Instance of dividing Sovereignty is, *When in conferring the Government, some Clause was added, importing that the King might be compell'd or punish'd upon Default*. But indeed the Sovereignty can by no means be said here to be divided, but the People really possess it entire, only allowing the King, under a great and specious Title, the Office of an extraordinary Magistrate; in case the People have a Right, on any account, to compel or to punish their Prince. For Punishment ever proceeds from a Superior, consider'd in that Capacity. And as for Compulsion, this may be used two ways, either morally, or physically; that is, either by way of Authority and Command; or by way of Force and Violence. Authority over an *Equal*, as such, is impossible. Therefore when *Grotius* argues that the People at least are equal to the Prince, because in some particular Cases they may compel him; he must at the same time allow, that neither Prince nor People have Authority or Sovereignty over the

^a Rel. Polit. l. 1. c. 6. f. 1.

^b L. 1. c. 3. f. 9, 17.

other; which is repugnant to the Nature of a civil State. The other kind of Compulsion, by Arms and hostile Violence, takes place only between Equals, or such as are not properly subject one to the other. And of this Compulsion must we understand the Case urged by *Grotius*; *That a Creditor hath naturally a Right of compelling his Debtor.* For certainly he hath no such natural Right, by way of Command or Sovereignty, inherent in his Person; for then it must necessarily follow, that every one who commenceth a Debtor, must fall under *Subjection* to his Creditor. But still the Creditor hath the full Privilege of compelling his Debtor to Payment, either by the Assistance of the Judge (such as cannot be had between Prince and People) or else, if he live in a Condition of natural Liber-

ty, by hostile Force. If then we would assign this way of compelling to the People, we must withal allow, that both Prince and People live in a State of natural Freedom; that is, that the civil Government is utterly dissolv'd. To conclude, we readily acknowledge the Truth of *Grotius's* Observations, *That in civil Institutions there is nothing absolutely free from all Inconvenience; and that therefore we ought not, on account of the Inconveniences attending a divided Power, to conclude it impossible: In as much as every Right is to be measur'd, not by the Opinion of one or two particular Persons, but by the Will of him from whom the Right proceeds.* But then it must be granted us in requital, that if any please themselves with framing such a Partition, they will hereby constitute, not a regular State, but an ill-jointed and distemper'd Body.

CHAP. V.

Of the different Forms of Government.

- I. *The Accidents of civil States cannot constitute a new Species.*
- II. *Irregular Forms and Systems of Government.*
- III. *The three Forms of regular Government.*
- IV. *Democracy seems to be the most antient Form.*
- V. *Democracy no less invested with supreme Power, than Monarchy.*
- VI. *Democracy, how constituted.*
- VII. *The ordinary Requisites of Democracy.*
- VIII. *How Aristocracy is establish'd:*
- IX. *And how Monarchy.*
- X. *In Bodies politick there may be Vices of Men, and Vices of State.*
- XI. *Yet th se compose not a peculiar Species of Government.*
- XII. *As neither do the various Accidents of Democracies and Aristocracies.*

- XIII. *Of the mixt Government propos'd by modern Authors.*
- XIV. *The Nature of irregular States.*
- XV. *This Irregularity best illustrated by Examples.*
- XVI. *States which admit of Provinces do not, hence become necessarily systematical*
- XVII. *Of Systems occasion'd by a Common Prince.*
- XVIII. *Of Systems compos'd by League and Confederacy.*
- XIX. *Of the Communication of Councils and Business in these united Bodies.*
- XX. *Whether the greater part ought here to conclude the less.*
- XXI. *How these Systems are dissolv'd.*
- XXII. *The several Forms of Government compar'd.*

I. THE Sovereign Authority, besides that it inheres in each State, as in a common or general *Subject*; so, farther, according as it resides either in one Person, or in a Council (consisting of some, or of all the Members) as in a proper or particular *Subject*, it produceth different Forms of Commonwealths. And here, e're we proceed to enquire into this Variety, we take it for granted, that we may have free leave to retain the Word *Form*, when we would express that Constitution or Model of State, which ariseth from the Difference of the *Subject*, in which the supreme Power is primarily and originally seated. That the actual Administration of the Government recedes, in many Cases, from the particular Form, is a thing vulgarly known: As in *Democracy*, for instance, some Affairs are managed in the way of *Monarchy*, others in the way of *Polyarchy*; according as Business is committed to the Care of one Person, or to such a Number of Commissioners. And because it is a Matter of great Consequence, whether the Power any Person exerciseth be his own, or whether it be another's, of which he

may at any time be deprived, holding it only by a precarious Title; therefore 'tis great want of Accuracy in a certain Author to affirm, that 'When a King suffers himself to be led by the Nose by some few Counsellors, who abuse the easiness of his Temper, or a People by some powerful Demagogue, or when in a ruling Senate one Member leads the rest, by his Wisdom or Eloquence, or overawes them by his Interest and Strength; a *Polyarchy* is really introduced in the first of these Cases, and a *Monarchy* in the two latter; and that in the first Case there is nothing but an empty Name, and outward Semblance of Monarchy, in the second of Democracy, in the third of *Polyarchy* or *Aristocracy*. Thus also, no intelligent Person will imagine the *Form* of a Commonwealth to be alter'd, upon a Change either in the Persons, or in the Number of Ministers; no more than he will think, that when a new Successor banisheth from his Councils and Presence, one who was chief Minister under the former Prince, and had the Management of all Affairs, an *Interregnum* must hereupon ensue. The Cap-

city and Inclinations of him or them, who either by their own Right, or by Delegacy from others, exercise the sovereign Power, do indeed affect and vary their Administration, but do by no means touch the *Form* of Government. In the same manner, supposing the chief Authority to be exercis'd well in one Place, and ill in another; yet a new Model of State doth by no means result from the different Exercise of the same Power. Wherefore as a Person in sound Health doth not differ *in Specie* from one that is sick, and as the unnatural Distortion of the Body doth not produce Men of a new kind; so neither do the Vices of those who command, or of those who obey, nor the Corruption of Laws, make the least Step towards constituting another Species of a Commonwealth.

II. It may be useful farther to observe, that most Authors who have treated of civil Knowledge, have employ'd themselves in explaining the regular Forms of Government; as for the irregular Forms, many have not so much as thought of them, some few have very slightly touch'd upon them. Hence it came to pass, that if they happen'd to meet with a *civil body*, which did not exactly come up to one of those usually term'd *simple* Forms, they had scarce any Word left to express it by, besides the Name of a *mixt* Government. But now, not to urge how very ill this *Mixture* is applied to some Commonwealths; it is weak to imagine, that besides these three *regular* Forms, there are none other, which may be term'd *irregular*. For all Men don't build their House just according to that Model which the Rules of Architecture prescribe. The *Regularity* of a State we conceive to consist in this, that all, and each of the Members seem to be govern'd as it were by one Soul; or, that the supreme Authority is exercis'd through all the parts of the State by one Will, without Division or Convulsion. And hence the Nature of an *irregular* State may without much Difficulty be collected. Farther, there are some political Systems composed of several perfect States in Conjunction, which with unskilful Judges pass for single States, and these too may have their use in our Enquiries, concerning the several Forms of Commonwealths.

III. The Forms of a regular State are three, only arising from the *proper* or particular *Subject*, in which the supreme Power resides; which is either a single Person, or a Council select or general. For the Sovereignty is committed either to one Man, or to a Council of several Men. And this Council is made up, either of all the Members, or of the smaller indeed, but the better and more select Part. One Species or Form therefore is, when the Sovereignty is lodg'd in a Council consisting of all the Members, and where every Member hath the Privi-

^a Pyth. Od. 2. v. 157, &c. Ed. Oxon.

^b In Menexeno, p. 519. B.

Mr. BARBEYRAC'S NOTE on §. IV.

¹ Philo. Jud. De Mundi Opificio, gives this Centre of the Favourers of Polytheism; They who are not afraid to transfer, from Earth to Heaven, the worst Frame of Government, the Dominion of the Multitude. Our Author cites this Passage, as if Democracy were there acknowledg'd to be the worst Form of Government in the World. But what is said in that place is only meant of the Abuse that crept into it whenever the vile Populace is at the Head of Affairs (ἡ γὰρ οὐκ ἐστὶν ἡ ἀρετή) and besides the same Author in another Treatise (de creatone principis towards the End) says in express Words that Democracy is the best and most lawful Form of Government. Ἐν δὲ ἀρετῆν ἢ ἐπιματῶν τῆν

lege of a Vote; and this is call'd a *Democracy*. Another is, when the Sovereignty resides in a Council composed of select Members, term'd an *Aristocracy*. A third when the Sovereignty is in the Hands of one Man; call'd a *Monarchy* or a *Kingdom*. In the first, the Sovereign is sty'd a *People*; in the second *Optimates* or *Senators*; and a *Monarchy* in the third. Pindar hath express'd all the three together:

— — — When Choice of Fate
Puts to the Reins a single Master's Hand;
Or when th' impetuous Multitude command,
Or when wise Patriots guard the thriving State.

IV. In the first place, we will examine the Nature of a *democratical* Government; not that we think it to excel the other Forms, either in Dignity or Splendor, or in real Usefulness and Advantage¹; but because in the greatest part of the World it appears to have been the most antient; and because Reason shews it to be more probable, that many Men, being in a Condition of natural Freedom and Equality, when they resolv'd to join in one Body, should at first be inclined to administer their common Affairs by their common Judgment, and so to constitute a Democracy. Nor is it to be supposed that a Father of a Family, as yet free and independent, who upon weighing the Inconveniences of a separate Life, voluntarily join'd himself to those of his own Condition, in order to the forming a civil Community, should in a Moment have so far forgot his former State, under which he dispos'd of all things relating to his own Safety meerly as he pleas'd, as to be willing to submit himself immediately to a single Director, with regard to the common Interest, with which his own private Security had a necessary Connexion. But at the Beginning it seems rather to have been thought more equitable, that what belong'd to all, ought to be managed by all; till in Progress of Time, most receded from this Model, either voluntarily or by Necessity; whether this Necessity was brought upon them by some of their own Members, or by Strangers. What Plato^b discourseth concerning the *Athenian* Commonwealth, seems to be of weight on this Subject: *The Original* (says he) *of our Government* (under which the chief Authority was in the People, and the Magistracies were conferr'd on Persons of the greatest Ability and Merit) *was taken from the Equality of our Race. Other States there are, composed of different Blood, and of unequal Lines; the Consequences of which are disproportionable Sovereignty, tyrannical or oligarchical Sway. Under which Men live in such a manner, as to esteem themselves partly Lords, and partly Slaves to each other. But we and our Countrymen, being all born Brethren of the same Mother, do*

not look upon our selves to stand under so hard a Relation, as that of Lords and Slaves. But the Parity of our Descent inclines us to keep up the like Parity by our Laws; and to yield the Precedency to nothing but to superior Virtue and Wisdom. Now it is manifest, that most civil Communities arose, at first, from the Union of such Families as were allied in Race and Blood. Nor is this Judgment opposed by the Authority of antient Story, which, tho' it makes frequently mention of Kings, yet at the same time informs us, that most of them were such, as had rather an Influence in persuading, than any Power of commanding. So Justin^a, in the entrance of his Work, describes that kind of Government as the most primitive, which Aristotle^b styles an *Heroical Kingdom*; such, as is by no means inconsistent with a democratical State. To the same purpose Thucydides^c observes, that *the most antient Kingdoms pass'd by Inheritance, and were confined within settled Honours, and tied to certain Terms and Conditions.* Thus in most Nations, Liberty and popular Sway were at first establish'd; till, by Degrees, that vast Multitude of petit Commonwealths was reduced, chiefly by War and Violence, into some few great Empires. What Aristotle^c urgeth for the Antiquity of regal Government is as follows: *Wherefore Cities were at first under Kings, as the barbarous Nations are at this day; for the Persons who join'd in forming those States, were themselves before under the same Government, the Sovereign Rule in Families being that which is kept up in Kingdoms.* Which last Words receive a fair Illustration from the smart Saying of *Lycurgus*, who, when a Person advised him to introduce a Democracy in the State, answered, *Do you first establish a Democracy in your own House*^d. But really, Aristotle's Argument doth not conclude. The contrary might rather be infer'd; that these antient Fathers of Families, having been accustomed before to bear Rule, should be more inclined to a democratical Form, under which they might still enjoy the Privilege of giving their own Judgment upon Affairs, and might bear a part in the publick Administration. Nor do they settle the Point, who tell us, that ' paternal Government was the most antient amongst Men; being at first mild and gentle, till, upon the Increase of Families and of Vices together, it was strengthen'd with the Power of Life and Death. That this Government was continued down through succeeding Families, in the Persons of the First-born, who, by a kind of natural Right, held both the sacred Office, and the civil Authority; that, by this means, the Heads of Families grew into so many petit Kings; the great Multitude of whom, discover'd in the Land of *Canaan*^e, seems a plain Argument in the

' present Case. But indeed, as the Right of Primogeniture was not of so great Force and Efficacy, as to establish regal Dominion amongst Brethren without their Consent, and to oblige them to unite their Families to that of their Elder Brothers; so besides, these primitive Governours, whom we find dignified with the Title of Kings, were commonly no more than superior Magistrates in popular Societies; tho' this Honour was most frequently bestow'd on the chief of the Race, when the respective Society was composed of Families, which had the same Original; yet so as that this Right of Birth and Seniority was not always observ'd.

V. It seems needful, on the present Argument, to bring the Opinions advanced by *Hornius* under a particular Examination. He then, in relation to Aristocracies and Democracies, which he comprizeth under the General Name of *Free States*, passeth his Judgment to this purpose: *There may be such an Establishment found out, as shall avoid the Confusion of the promiscuous Multitude, and shall attain to a decent and agreeable Order, making Provision for the common Safety by Pacts and Covenants, without Subjection, and without the Loss of that Liberty which is extinguish'd under a Monarch's Reign.* Here we have almost as many Mistakes as Words. That the Order, which may be observ'd in free States, is the only thing which shields off the Confusion of the promiscuous Multitude; that free States are held together barely by Compact and Covenant, without any Sovereign Command; that particular Persons are not so strictly subject to a popular Assembly, or to a Council of Senators, as to a Prince under a Monarchy; that all the parts of Sovereignty are not so fully exercis'd under the former Governments, as under the latter; that the Power of Life and Death is less employ'd, with regard to private Men, by a People, than by a Prince. What he asserts farther, that *certain Fathers of Families, living at yet in a separate Condition, learnt from the neighbouring Kingdoms, what form of Government to introduce*; is so far from appearing true, that in the first Union of Families and Nations, most Communities seem rather to have been of the popular Form; till upon Discovery of the Inconveniences attending such a Government, they fell, sooner or latter, under the Command of a single Sovereign; some, by their own voluntary Act, some, by Force and Compulsion. No less vain is that Remark; *As Art endeavours to imitate Nature, but can never reach to equal or to excel her; so in these artificial Forms of Government, the Nature of Kingdoms is, in some sort, represented, as to the Influence which they have on the common Use and Benefit; but the inward Force, and Virtue, and Dominion, with which Monarchies are endued, being the Work of Almighty GOD, was beyond the Power of Men to produce.* Of

^a *Isocrates* is of the same Judgment, *I seem'd unjust to us (Athenians) says he, that many should be ruled by the Authority of a few; that those who were inferior in their Fortune alone, and in no other Respect, should be debar'd from a Share in the Magistracies and Honours: And last, whilst we have All the same Common Country, the same Privileges of Birth, some should be Masters and Proprietors of the State, others no better than strangers and Dependents; and that, under the Presence of Law, Persons by nature Members of the Commonwealth, should be denied the Offices and Employments in it.* *Ad Libanum Prologum. loc. comm. contra Tyrannum.*
^b *L. 1. c. 13. p. 8. Ed. Oxon.*
^c *Polit. l. 1. c. 2.*
^d *Plutarch in Lycurg. p. 57. A.*
^e *177. Josh. xii. & Judg. i. 7.*
^f *De Civitate, l. 3. c. 11.*

Mr. BARBEYRAC'S NOTES on §. IV.

* Principio rerum, Gentium Nationumque Imperium penes erat Reges, L. 1. c. 1. † In his Politicks, B. I. c. 14. the

the Origin of Majesty or Sovereignty we have already treated; and why may not this as well agree to a moral compound Person, as to a single Man? For surely 'tis no Contradiction to affirm, that the Senators, under an Aristocracy, are all equal, as to their private and separate Capacities, and yet are each of them subject to the Authority of the whole Council. And it requires no Depths of Parts to apprehend the Difference between all in general, and each in particular; between the Assembly of the People in Democracies, and private Men dispers'd according to their respective Habitations. Therefore 'tis but a trifling Argument which we find urged by this Author; *Where the Sovereignty is ascribed to all, there either all do really possess it, or some few only. If all, then they will have none to be their Subjects; because to command and to obey cannot belong to the same Person: If it be said that the particular Men are Subjects, then all cannot be Governours; because when each separate Person is in a Condition of obeying, the Multitude, which they compose, must likewise stand under the same Engagement; for Obedience is the only thing, which in this Case the private Members confer on the common Body.* Certainly in moral compound Bodies somewhat may be attributed to all in Conjunction, which we cannot assign either to each Member taken apart from the rest, or to any one of those particulars; and consequently the whole Society is in reality a moral Person distinct from the separate Members, to which such a peculiar Will, such Actions, and such Rights, may be appropriated, as private Men are not capable of possessing. Those Scruples likewise must soon vanish, which are rais'd from this Consideration, that in popular Assemblies the Majority always prevails. For this is one of the moral Affections which attends the very Essence of a compound Body, that the Consent of the greater part of those, who make up the Council, shall be deem'd the Consent of all; in as much as no other means can be assign'd, by which the Wills of many natural Persons, when they happen not exactly to conspire, should be brought to a moral Union. Wherefore it cannot be pretended, that in aristocratical or democratical States, the *Subject*, in which the chief Authority resides, is obscure and uncertain, tho' it should happen that those individual Persons, whose Voices upon one Occasion compos'd a Majority, upon another should prove to be of the weaker side. For none of these Circumstances take away that Unity of Will, which is to be attributed to the whole Body. In a Senate, if so many Members happen not to agree, as are required towards making a Majority, the Senate is presumed to design or to declare nothing, and therefore no Step is to be made in the new Affair. Which tho' it often turn to the Disadvantage of the State, yet doth not prove that the Senate is not invested with sovereign Command. Besides, that other Allegation is false: *True and proper Sovereignty cannot be ascribed to a Multitude, by reason that the Obedience, which is necessary upon such a Supposition, must be here wanting; since the Multitude cannot be bound always to keep the*

Resolution which they once embrac'd; and since the Obligation, rising from their Authority, doth not affect them as taken all together in a general Body. For as it doth not destroy the Sovereignty of a King, that he may, when his Pleasure alters, revoke a former Decree, upon which Act the Obligation of the Subject to the said Decree expires; so whatever Power the common Assembly may have, as to the altering of their own Decrees, yet in the mean time, particular Persons are no less engaged by them, than they would by regal Injunctions. If not, let those who maintain the contrary Opinion shew us, that Offenders against the Laws are not so liable to Punishment under free States, as they are under Monarchies^a. 'Tis no better than trifling to argue; that *if the Sovereignty be lodg'd indivisibly in the Hands of many together, then each of these many must necessarily hold some part of it, out of the Collection of which Parts the whole Sovereignty must at length be constituted. But at the same time 'twill be likewise necessary, that each of these parts be supreme; and thus in one State, there will be more than one supreme, which is absurd.* For in moral Consideration there is no manner of Absurdity in supposing, that those particular Wills, which unite and conspire to make up the Will of the Community, should want some Power or Quality which the general Will is possess'd of. So that 'tis no good Consequence to say, the Sovereignty is the supreme Right; therefore each Man holds a part of it, which part is likewise supreme. We might with as much reason infer, that because the Votes of particular Persons, separately and solitarily consider'd, are ineffectual towards the enacting of a Law, therefore many of them in Conjunction are still unable to perform this Work. Lastly, he adds, that *since in a governing Senate, there is no one Member, who may not, if he offend against the State, be brought to due Punishment by his Brethren; it follows, that in case all the Senators should prove guilty, the punishing of them would belong to the People. But each Member being thus punish'd and remov'd, the Sovereignty of the whole Council could no where subsist.* This Difficulty will admit of an easy Solution, if we first rightly explain what it is to offend against the State. He then is properly said to be thus guilty, who commits any thing tending to the Prejudice of the Publick, contrary to the Laws and Injunctions of the Sovereign. Wherefore the whole Body of Senators cannot offend against the State, unless they either violate those Laws, the Observation of which was made the Condition of their holding the Sovereignty; or turn profess'd Enemies to the People under their Charge: Upon which Suppositions their Fate will be the same, as that of Kings in the like Cases. What he farther vents in prejudice of free States is notoriously false. As that, *The Sovereignty exercis'd by a Monarch is quite a different thing from that which appears in free Governments, tho' their Effects may be alike. Because a Monarch, besides that personal Dignity and Splendor, of which no Man is capable in a Commonwealth, is endued with Majesty, which free States may not assume.* But now we look on it as a certain Truth, that GOD may with

^a *Add. Liv. l. 2. c. 30.*

equal Justice, be styl'd the Author of Monarchies and of free Commonwealths; and the former are no less produced by Covenants, than the latter; from which Covenants the Sovereignty results in both Cases; the immediate Cause of Obedience being in the People: That a Subject consider'd under that Capacity is obliged to the same Duties in a Commonwealth, and in a Kingdom; that his Obedience is no less strictly required, and his Subjection is in no less Degree, under the one Form, than under the other; and that both Governments have the same Right of punishing Criminals. For who will believe, upon the bare Word of this Author, *that in a Kingdom the Punishment of Offenders is grounded on a Right over the Lives of the Subjects, which is wanting in free States*; and that therefore under the latter, the Transgressors of the Laws are punish'd as Enemies; or only by the Right of War?

VI. We may now enquire how a Democracy is erected, and what this Form of Government hath in it peculiar from others. When therefore a Number of free Persons assemble together, in order to enter upon a Covenant about uniting themselves in a civil Body, this preparative Assembly hath already some Appearance of a Democracy; properly in this respect, that every Man hath the Privilege freely to deliver his Opinion concerning the common Affairs. Yet he who dissents from the Vote of the Majority, shall not in the least be obliged by what they determine, till such time as, by means of a second Covenant, a popular Form shall be actually confirm'd and establish'd. Mr. *Hobbes* ^a, for want of distinguishing these two Covenants, hath handled this Subject with great Confusion. For we have formerly proved ^b, that no Man can be obliged by the plurality of Votes, before he hath given his Consent to such a Form of publick Administration. Therefore what he asserts is false, that *by their voluntary assembling of themselves together, we are to suppose that they stand obliged to whatever the major part shall resolve*. What he farther delivers, may in the following manner be more clearly explain'd. When many Men upon a general Meeting, oblige themselves by Compact to unite their Strength and Wealth; either in this very Meeting a Decree is pass'd, for the introducing some particular Form of Government, or not. In Case no such Decree about the Government be made, nor the Time and Place assign'd for the holding another Assembly, then the present Meeting is presum'd to be void, and each Person continues in his natural Condition of Liberty as before. For a Number of Men cannot become one Body, unless they have agreed upon a constant Method of transacting publick Business. If they break up without settling this Point, yet prefix a Time and Place for considering and debating the Matter farther, in order to a final Resolution; we have then no more than the Rudiments and first Principles of a

State, which cannot be properly styl'd a Democracy. For we must not presently make use of this Name, when every Man hath a Right to give his Opinion, or when the Time and Place are pitch'd upon for another Congress; in as much as this way of proceeding is common to all kinds of Societies and Conventions at their first Rise, and before they are fully establish'd: But we are then to call it a democratical Government, when the Right of settling Matters, relating to the publick Safety, is confer'd for ever on a general Assembly.

VII. Towards compleating the Nature of a democratical State, these Conditions seem especially necessary. First, that a certain Time and Place be assign'd for holding those Assemblies, in which the common Affairs are to be debated and determin'd. For as on the one side, the private Business of particular Men will not suffer them always to attend the Publick, so on the other side, if nothing be agreed upon as to the Time and Place; those who belong to the Society may either meet at different Times and Places, by which means Factions are necessarily introduced; or else not assemble at all, in which Case they will not be a *People*, but a scatter'd Multitude, to whom no Action, and no Right can be attributed as to one compound Person. Secondly, that the Vote of the Majority shall pass for the Vote of the whole Body: Since, as the World goes, it so very rarely happens, that a great Multitude of Men agree in their Judgments as to the same Matter. In the last place; since some Affairs of the Commonwealth occur every Day, and are of inferior Moment; others are less frequent, and affect the main Interest; and since it cannot be convenient, for the whole People to meet about settling the former Concerns, either in daily Councils, or at Intervals of so little Distance, as to let nothing of this Nature escape their Examination; it is therefore necessary to appoint certain Magistrates, as Substitutes or Delegates, who, by the Authority of the whole People, may dispatch Business of every Day's Occurrence; may with mature Diligence search into more important Affairs, and in case any thing happens of greater Consequence, may report it to the popular Assembly; and may likewise see the Decrees of the People put in Execution: For a large Body of Men is almost utterly useless in respect of this last Service, as of many others.

VIII. An *Aristocracy* is then constituted, when the Assembly, who by means of their first Covenant united themselves, as it were, into the Rudiments of a State, do by common Decree entrust the supreme Administration in the Hands of a Council, consisting of some select Members. These Members, when they have been declared and design'd by the said Assembly, either by their Names, or by some other Mark of Distinction, and have also accepted of their De-

^a De Cive, c. 7. f. 5.

^b C. 2. f. 7.

^c *Thucydides* (l. 2. c. 22. Ed. *Oxon.* in the beginning) reports, 'That *Pericles*, once finding the *Athenians* to be of a wrong Opinion about the Method to be used in a War, would neither call an Assembly of the People, nor hold a select Council; lest some very false Step should be taken, whilst their Debates would be guided rather by

^d Passion than by Reason.

signation, are then supposed to enter upon the sovereign Command. And here we may observe, that Mr. *Hobbes* ^a is mistaken, when he draws the Origin of Aristocracy from Democracy, if his meaning be, that all Governments of the former kind were Changes from the latter, which are supposed to have been before completely establish'd. For Experience proves, and Reason does not deny, that Men might pass on from the first preparatory Covenant, either to Aristocracy or to Monarchy, without taking Democracy in their way. Besides, we have before made it appear ^b, that Mr. *Hobbes* doth but play with an Argument, when he tells us, 'That no Covenant can be transacted between the Senators and People, because the Government, being once conferr'd on the former, the latter do no longer exist after the manner of one Person'. For to make Men capable of sustaining Obligations towards others, 'tis sufficient that they still continue natural Persons, tho' the moral Personality, which they once bore, may be expired. We may add, tho' the People, upon transferring the Sovereignty from themselves, do not henceforth exist as one compleat Person, oppos'd to their newly received Head; yet this doth not dissolve them into a loose Multitude; in as much as being join'd to their Head, the Senate, they still constitute one Person. Farther, what he infers in another place ^c is false; that *As the People under a Democracy, so the Court of Senators under an Aristocracy, are free from all manner of Obligation.* For should we be never so willing to grant the Antecedent ^d, upon Supposition that the respect, which all in general bear to each in particular, may perhaps seem insufficient to found a mutual Obligation between them; yet it cannot hence be concluded, that neither is there any mutual Obligation betwixt Senators and People, as 'twould be no Consequence to say, I do not any way stand oblig'd to my self, whilst I manage my own Affairs in Person; therefore if I transfer the Care of them on another, he likewise shall be exempt from all Obligation. One thing this Author rightly observes ^e, that under an aristocratical, as well as under a democratical Form, unless certain Times and Places are appointed for the Senators to meet, there will be no longer any such thing as a *Court* or a compound Person, but a disorderly independent Multitude, without Authority or Rule. In as much as the Wills of the particular Members, from the Combination of which we apprehend the Will of the Court to spring, cannot be known otherwise than by their assembling together for this Purpose. For to take the Senators Votes, by a distant Scrutiny sent about in Writing, is a Method full of Inconvenience. Farther, it is no less necessary in an Aristocracy than in a Democracy, that the Times of meeting in a Council be not fixt too far asunder, unless the Exercise of the sovereign Power, at least with regard to Business of daily Occurrence, be in the mean Time entrusted with some one Magistrate, or with Commissioners not many in Number.

IX. Lastly, A *Monarchy* is settled, when the sovereign Authority is conferr'd upon one Man. And that this is done by means of a Covenant intervening, we have already sufficiently demonstrated against the Opinion of Mr. *Hobbs* ^f: Before we proceed farther, we cannot but take under Examination the pestilent Notion of a certain Anonymous *Dutch* Author, in his *Political Balance*, which runs in the following manner: 'Since the Act of conferring the sovereign Power is always design'd for the more convenient Prevention and Removal of Evils, whether proceeding from inward or from outward Causes; it cannot be presumed that a democratical Society should ever have devolv'd this Authority on one Man and his Heirs, by a perpetual Succession. For, in as much as their Hopes of a more commodious Protection under a single Government, were grounded purely on the Virtues which appear'd at first in the Person elected; and since no one can be ignorant, that all Men are changeable and mortal, and that, in a short time, either Age will render them unfit for Government, or, if they die sooner, they will leave either no Issue, or such as must be young and unexperienced; or that, should they happen to leave Children grown to mature Years, yet these may either not be more able to rule than others, by any natural Capacity; or may want Will and Inclination to defend their Charge; we must therefore by no means suppose that a popular Society ever intended to debar themselves of the Privilege of choosing a better Governour, in the room of one, who is either weak, or wicked. But that when Persons had thus got the Sovereignty into their Hands, it was easy for them, by drawing to their Assistance the greatest part of the People, especially the Soldiery, so to confirm their Power to themselves and their Posterity, as to be able ever to hold the Command even against the Will of the Subject. To which we reply, if it ever entred into the Thoughts of a Society, to confer the chief Rule on a Person under this Condition, that whensoever the People should vote his Government not so effectual towards procuring the common Safety, as their democratical State was before, he should be depriv'd of his Office, they did not, by such an Act as this, constitute a Monarch, but only an extraordinary Magistrate, who was to depend upon the Breath of the Multitude, and therefore was not invested with the supreme Authority. Besides, since 'tis evident, how little a State is a Gainer by frequent Changes in the Throne, other *Mens* rather than other *Manners* still succeeding; and how great a Blow it must be to the Publick to force a Prince from his Command, who hath had Opportunity, in his publick Administration, to strengthen his private Interest; it is but a fair and easy Presumption, that a People should be willing to trust their Fortune once for all, by fixing the Government irrevocably in a King: the Evils which naturally flow'd from their for-

^a *Ubi Supra*, f. 8.^b C. 2. f. 12.^c The Fifth Section of this Chapter.^d C. 2. f. 9. &c.^e S. 9.^f S. 10.

mer uncertain, unsettled Condition, being much more to be dreaded, than any which a degenerate Monarch might create. Especially, if we consider how far the exorbitant Inclinations of such a Prince may be limited and retrench'd by fundamental Laws. And lastly, 'tis by no means allowable to revoke all such Acts, the Issue of which doth not exactly answer our Expectation: Since human Affairs must be always liable to Accidents, and since we can establish nothing, but what will be attended at least with some Inconveniencies a.

A Monarchy differs from the Two former Species of Government in this respect, that under them, before any Matter can be debated or determin'd, that is, before Authority can be actually exercis'd, 'tis necessary that certain Times and Places be assign'd for this purpose: Whereas in a Monarchy (at least if it be such as we term absolute) Deliberations may be held, and Resolutions taken, at all Places and Times c. For a People, or a Senate, in as much as they do not compose one natural Body, must wait an Opportunity of meeting together. But a Monarch, who is but one Person in natural, as well as in moral Account, is always furnish'd with an immediate Power of exercising his sovereign Command, thr' all Instances of Government. It is likewise true what Mr. Hobbes d observes on this Head, that in a People, or in a Court of Senators, in case any Decree pass which is contrary to the Law of Nature, the State it self, or the moral Person, is not affected with the Guilt, but those Members only whose Votes concurr'd in the Resolution. For Sin regards only the natural or express Will, not the moral or political Will, which is purely artificial. Otherwise they also, who disliked the Proceeding, would be included in the Crime e. But in a Monarchy, if the Prince decree any thing which the Law of Nature forbids, the Prince himself is the Sinner; because, in his Person the civil or political Will is the very same with the natural.

X. To these regular Forms of Government, it hath been the Custom, with most Authors, to add certain others, which they term vicious, distemper'd, or corrupt. Now here it is certain, that in many Commonwealths, no less than in particular Men, we may observe a very plentiful Field of Corruption and Diseases; so that it

may be look'd on as some kind of Perfection to have the fewest Failings. Of those Diseases, which infect civil Societies, some we see, take their Rise from the Wickedness of particular Persons, others from some Defect in the publick Constitution. The former we may style the Vices of Men, the latter the Vices of the State. It may be proper to touch on some Instances of each Kind, for Illustration and Distinction. In a Monarchy then, the Vices of Men, or personal Faults, are as follow; if he, whom either the Chance of Blood, or the unhappy Suffrage of the People, hath advanced to the Throne, be destitute of the Arts of Government, and very little or not at all affected with any Care or Concern for the common Interest, which he prostitutes to the Ambition, or to the Avarice, of bad Ministers; if he render himself terrible by Passion or Cruelty, forgetting that he is a Man himself, or that he governs Men; if he take a delight in exposing the Commonwealth to unnecessary Hazard or Danger; if he squander away what hath been gather'd to defray the Expence of the Publick, either in Luxury, or in unadvised Grants and Bounties f; if he heap up Money beyond the Bounds of Reason, first squeeze'd out of the Subject; if he be notoriously abusive or unjust g; or guilty of any other Practice, which enters into the Character of a bad Prince h. The Vices of Men in an Aristocracy are: if, by Corruption and base Acts, Persons of no Honesty or of no Ability, find an easy Admission into the Senate, whilst true Merit is excluded; if the Senators break into Parties and Factions amongst themselves; if they make it their Endeavour to enslave the Commonalty to the Service of their private Interest, and to increase their own Estates at the Expence of the Publick. In a Democracy, personal Faults are such as these; if Men, who really want Judgment, turbulently and importunately maintain their own Opinions; if extraordinary Virtue, yet such as is not likely to prove too hard a Match for the Commonwealth, be oppress'd and born down by Envy; if through a Lightness and Inconstancy of Humour, Laws, are rashly made, and as rashly repeal'd; and what was embraced but now with Applause, is soon after disliked and rejected without Reason; and if sordid and worthless Persons are entrusted with the Management of Affairs i. Lastly,

a *Ad. Groc. l. 1. c. 3. s. 8. n. 1.*
 b *Ibid. Hobbes, De Civ. C. 7. s. 13.*
 c *Ibid. s. 14.*
 d *Herod. l. 1. c. 14. p. 13. Ed. Oxon. Ἐξεί τε ἢ Πάρι, ὅτε πρὸ ἀὐτοκρατορίας ἢ. Where the Emperour is, there Rome is.*
 e *See Luke xxiii. 51.*
 f *Drepan. Paneg. upon Theodosius, c. 27. n. 1. E. Cellar. 'Tis the last Defence of wicked Princes, to plunder some, that they may be bountiful to others.*
 g *'Tis remarkable what Philostratus reports (De Vit. Apollon. l. 3. c. 3.) in the Beginning of the old Indians, that they allow no manner of Honour or Privilege to the Heirs of the Crown; That neglectful Treatment may be a Lesson to them against unreasonabl: Pride.*
 h *Such as Claudian sets down, De Bello Gildon. v. 157, &c.*

Quocumque profundi
 Traxit vomitibus, luxu p. jove risulit:
 Instat terribilis visus, morientibus heres,
 Virginitibus raptor, thalamis obscuro adulter.
 Nulla quies: oritur preda cessante libido;
 Divitiibusque dies, & nox metuena in maritis.

Those Heaps which boundless Avarice supply,
 Vainly he spends in vilest Luxury;
 Tyrant to all that live, and Heir to all that dye.
 Alike the Nymphs and injur'd Matrons move,
 Or Brural Rape, or foul adult'rous Love.
 Sin never sleeps; new Spoils, new Lusts invite:
 The Wealthy fear the Day, the Married dread the Night.

Thomasi. Orat. 10. De Pace rd Valent. Imper. He is but a lame Prince or Legislator, who is fit for the Service of War, but unskilful in preserving Peace. i *In Plutarch, Dion. p. 978. E. Popular Ambition is term'd a wild Distemper, not inferior to Tyranny it self.*

such *Vices of Men* as may affect any Species of Government, are: If the Persons on whom the chief Administration lies, perform their Office negligently or dishonestly; and on the other hand, if the Subjects, who ought to rest contented with the Glory of obeying, grow refractory and aspire to Command.

The *Vices* or Faults of a State, in general, are; when the Laws and Institutions are not accommodated to the Nature of the People, or of the Place; or when they are so framed, as to breed inward Divisions, or to provoke the just Hatred of Foreigners; or when they render the Subjects incapable of performing such Service as is necessary for the Preservation of the Commonwealth: As suppose the Constitution be such, that Men, whilst they comply with it, cannot avoid sinking into effeminate Weakness, or, on the other hand, cannot bear the easy unactive Condition of Peace; or lastly, when they contradict some of the principal Maxims of civil Doctrine; and the Mischief will still be the greater, if these Irregularities happen to wear the Disguise of Religion.

XI. Though a sound and a distemper'd Commonwealth are vastly different from each other, yet we are not, on this account, to multiply the *Forms* of Government, and to oppose one or two vicious Forms to each of those which we term good and regular. For these *Vices* or Defects do neither change the Nature of the Authority it self, nor the proper Subject in which it resides. And thus far Mr. *Hobbes* ^c is in the right, when he denies, that *Anarchy* opposed to *Democracy*, *Oligarchy* to *Aristocracy*, *Tyranny* to *Monarchy*, are three other kinds of Commonwealths. I think (says he) *no Man believes that Want of Government is any new kind of Government.* But what he farther observes, is not universally true; That *Anarchy*, *Oligarchy*, and *Tyranny* are three Names impos'd by those who either misliked the Government, or the Governours. It being usual with Men to signify by Names, not the things only, but at the same time their own Affections, as their Love, Hatred, or Anger, their Contempt, or Esteem. For, as it happens in other Matters, that one Man loves what another violently abhors, so the same Form of Government meets with the Applaudation of some, and with the Aversion of others. And this not only because some perhaps reap a particular Advantage from such, or such a Species of Commonwealth; but likewise on account of peculiar Tempers and Inclinations. Men of haughty Spirits, and who dislike the Equality of a popular State, when they see all Men without Distinction, giving their Votes in publick Bu-

fincks, of whom the inferior Commonalty always make up the greater Number, call this an *Ochlocracy*, or a State where the base Rabble sit at the Helm, and where no Prerogative is allow'd to such extraordinary Merits, as they look on themselves to be possess'd of. And yet this Name, as full of Contempt as it is, might with Justice be applied to such a Government as we read of amongst the *Epheians* of old: Who when they expell'd *Hemodorus* out of the City, gave this reason for their Proceeding; *Let no Man amongst us excel his Neighbour; if he doth, let him find out another Seat, amongst another People:* And whom *Heracitus* for this Judgment, declared to be all worthy of Death. Again, if any Person is discontented that he hath not a place in the Senate, and at the same time thinks himself not in the least inferior to many of that Order; Envy and Contempt together prompt him to give them the Name of *oligoi*, the Few; that is some inconsiderable Morrals, who having in no respect the Advantage of those about them, do yet exercise Authority over their equals or their betters. And a Man under this Chagrine hath commonly in his Mouth the Complaint which *Ajax* makes in the Poet.

----- ἰ γὰρ ἔτ' ἐπιδόξ' ἔχει γέρας, &c.

*Merit no longer finds a just Reward:
Folly's a Favourite, and Vice perfer'd.*

People of a more lofty Genius, and those on the contrary who are more mild and tractable, both join in giving the Title of *Lords* and *Masters* to foreign Princes, who govern with a stricter Hand: Whereas 'tis well known, that when a Father treats a stubborn Child with Severity, and one that is more submissive with Gentleness and Kindness, in both Instances he exerciseth the very same paternal Power. The like may be affirm'd of the Name of *Tyrant*, which is now attended with an indelible Mark of Hatred and Detestation, from the Custom of the *Grecians*, who thought the chief Happiness of the States to consist in a popular Liberty. *Lucian* himself passeth this Censure upon them: *In general, says he, People, not considering whether the Person who bears Rule be just or unjust, have an Abhorrence to the bare Name of Tyranny.* Many of their Authors apply the same Word to any kind of Government in the Hands of a single Person. Thus *Aeschines* particularly says, *There are three political Forms in use in the World, Tyranny, Oligarchy, and Democracy.* Hence 'tis worthy our Remark what *Mnemou*, in *Photius*, reports of *Dionysius*, the Fourth *Tyrant of Heraclea*; Having,

discourieih ingeniously on some Disfeates of the State.
^a *Ad. Hobbes Leviath.* c. 29. about the Lind, where he
^b Such was the Authority of the Priests amongst the People of *Meroe*, mention'd by *Diod. Sic.* l. 3. c. 6. and *Strabo* l. 17. p. 566. Ed. *Gouss.* *Casab.* to whom the Kings themselves were accountable.
^c *De Civ.* c. 7.
^d So that we cannot universally allow that of *Lysias*, *De Populari Statu*, Grat 24. *No Man is more inclined by Nature either to a Popular or to an Aristocratical State; but every one endeavours to establish that Form of Government, which tends most to his particular Advantage.* With whom *Socrates*, *De Pace*, p. 320. joins his Opinion: *No Man hath a Natural Affection for any of these States; but all love that best, in which they themselves meet with the greatest Honour and Esteem.*
^e In *Cicero*, *Tull.* *Quaest.* l. 1. c. 36. *Diog. Laert.* l. 9. in *Heracit.* l. 2. *Strabo*, l. 14. p. 441.
^f *Opus.* *Calaber.* l. 5.
^g In *Paulan.* l. 1. p. 735. *con.* Ed. *Amst.*
^h *Contra Crephont.*
ⁱ *Ad. Cornel. Nep.* *Miltiad.* c. 8. n. 3.
^k Of the Tyrants of *Heraclea*, c. 5.

MR BARBEYRAC'S NOTES on §. X, XI.

¹ These Instances are taken out of our Author's *Abundantia*, *D. Offic. Hom. & Civ.* l. 2. c. 8. f. 10.
² See *Hobbes's Leviath.* B. 2. c. 19.

³ *De Civ.* *ubi supra.*

says he, arrived to a high pitch of Glory, he disdain'd the Name of Tyrant, and assumed that of King; the latter being less odious and more honourable. Yet there is no one who doth not apprehend, that these invidious Titles are sometimes affix'd with sufficient Justice, to distinguish the Government of bad Princes or Senators from that of good, the Fury of a turbulent and inconstant Multitude, from the wise Administration of a modest People. *Aristotle's* Decision of this Point differs little from what hath been here establish'd; who terms *Tyranny, Oligarchy, and Anarchy* (for as to this latter word, he useth the general Name of *Polity* for a sound popular Government) *παρὰ τὸν εὖτος* Deviations or Degeneracies from a Kingdom, an Aristocracy and a Democracy ^a. And who will pretend that a bare Deviation is sufficient to constitute a new Species? As for that Latitude of which the Word *Εἶδος* or *Species* is capable, we think it not considerable enough to afford any just Matter of Dispute ².

XII. But when we meet with such a Government, as we can neither bring under any of those Forms which are found and regular, nor yet explain how it differs from them, by the bare Notion of a Disease or Deviation, then the learned are put upon a more laborious Enquiry. Most Authors judge it the shortest way of getting over this Difficulty, to call such Governments *mixt* States; as if they were the Result of the more regular Forms, allay'd and blended together. *Aristotle* is called in by many to countenance this Project; and therefore it may be worth our while to examine his Opinion in the Case. First then, as for what he delivers, in the Fourth Book of his *Politicks* ^b, concerning the several Kinds of Democracy and Aristocracy, it bears no Resemblance to the Mixture proposed by our modern Designers. The chief thing he there insists on, is the reckoning up of certain Conditions and Qualities, to be found in those who are to be admitted into the popular Assembly, or into the ruling Senate. By which means, neither is the Sovereignty it self any way varied, nor are the Parts of it torn and wrested from each other, nor the State rent into two or more distinct Bodies; but the Forms of Government which he there mentions, are only hereby slightly diversified, according to their several *Accidents*, or circumstantial Differences. Thus, although in the Definition of a Democracy, the chief Authority should be laid to reside in a general Council, or a Council made up of all the Members, and at the same time tho' it be true, that Women and Children have as much Interest as others in the common Welfare; yet who will maintain that a new Form of Government is establish'd, when the Women, the Children, and Servants, are excluded from the public Debates? Tho', in our Judgment, 'tis sufficient for the constituting a Democracy, if those

Persons are allow'd the Privilege of Votes, who by uniting together, first compos'd the State, and after them their Successors, to whom their Places and Rights properly descended. But now it's manifest, that civil States were originally compos'd by Fathers of Families, who held the inferior Train before-mention'd, under their domestical Sway, and certainly did not intend to relinquish all Authority over them, or to set them on the level with themselves. It was necessary therefore, that Persons who were thus in Subjection, should be debarr'd from giving their Suffrage with their Lords. After the Democracy was once settled, 'twas in the Power of the Members to receive others into the State, or not; to give them a full, or imperfect Right; to let them have the same Share with themselves in the Administration, or utterly to exclude them from it. Whence it may happen, that in free Governments many shall want the Privilege of a Voice, whilst yet the popular Establishment continues as perfect as ever. On the other hand, 'tis possible indeed, that a State, at first democratical, may, by receiving large Additions, and by shutting out all these new Comers from their Honours and their Councils, at length commence an Aristocracy. In the same manner, the Species of aristocratical Government will not be multiplied, though; in one place, Virtue and Merit should be a sufficient Qualification for a Senator, in another, the Estate and Family should be likewise consider'd. No more could it be said, that there were so many several distinct Forms of Democracy; if, under one State, every free Denison had a Vote in the Assembly; under another, none but Men of such and such Fortunes were admitted; under a third some particular Profession rendred Persons incapable of this Honour. Much less do any new Forms or Species (properly so call'd) arise from the different Laws of Democracies, relating to the Election of Magistrates; whilst in some places, for Instance, all Persons promiscuously have a Right to bear these Employments; in others, again an Estate, to such a Value, is made a necessary Condition: As suppose, under one Government, the rich were allow'd to absent themselves from the public Councils without Censure, the Poor not; or *vice versa*. And indeed, this whole Matter is plain beyond Dispute. What Judgment we ought to pass on the Mixtures, supposed to be in the Commonwealths of *Sparta* and *Crete*, as described by *Aristotle*, we shall elsewhere discuss. The *Athenian* State, which *Aristotle* ^c and *Isocrates* ^d describe and commend, was in all respects truly popular. *Polybius's* Opinion ^e, concerning the mixt Government in the *Roman* Commonwealth, comes under our Examination in another place.

XIII. As for the Moderns, some of them have invented many kinds of mixt States;

MR. BARBEYRAC'S NOTE on §. XI.

^a *At.* Sallust. *Philosoph. de Div. & Mundo*, c. 11. and to the same purpose, *Themistius*, *Orat.* 16. p. 336. *Edis.* Petav. Who then will be so bold as to maintain, that the Corruption of a State is sufficient to constitute a new Form of Government? See likewise what Mr. *Parizonius* says concerning some of *Aristotle's* Terms, in his fourth Note on *Ælian. Var. Hist.* Lib. II. Cap. XX.

² *Vid.* *Polit.* l. 3. c. 7. §.

^b *C.* 3. c. 2.

^c *Polit.* l. 2. c. 9, 10.

^d *In* *Areopagit.*

^e *L.* 6. f. 20.

yet so as that, upon the whole, rejecting the greatest part of them as inconvenient, they applaud two ways, as especially proper and useful. The first is, when the parts of the Sovereignty reside separately and independently in different Persons, or Bodies of the same Commonwealth, so that each Person or Body hold their respective Parts by their own proper Right, and administer it according to their own Judgment, whilst in respect of the other parts they are altogether in the Nature of Subjects. Much after this manner was the Disposál of the Kingdom of *Numidia* by *Scipio*, after *Masinissa's* Death; his three legitimate Sons being all allow'd to bear the regal Title and Dignity; but with this Difference, that the Elder Brother *Micipsa* should keep his Court at *Cirtba*, the ordinary Seat of the Kings; that *Gulussa*, the next to him, should have the chief Command of War and Peace; and that the youngest, *Manastabales*, should preside in judicial Affairs. The other way which they propose is, when the sovereign Authority inheres indivisibly in many together, yet so as that neither the most considerable Majority, without some few dissenting Members, nor indeed all the rest, when any one of the Number stands out, can act to any purpose, or exercise any part of the supreme Power. And this again is subdivided into two Models, either that all the Members shall have equal Power; or that some one or two of the Number shall be invested with certain extraordinary Rights and Prerogatives, which they may use without the Assistance of their Brethren. They proceed to alledge many Authorities from the Antients, where Mention is made of *mixt* Commonwealths; with regard to which Authorities we have already observ'd, that what is deliver'd in them concerning the *mixture* of Governments, doth not in the least belong to the Division of the sovereign Power amongst several Persons or Councils; but either to the settling the due Qualifications of those Persons, of whom the governing Council is to be composed, or to the joining together of several good Institutions drawn from different States. Besides, we are of Opinion, that some Examples of these Mixtures might receive a convenient Explication, by distinguishing between the Sovereignty it self, and the manner of administering it. So that we may affirm those States to have mingled as it were somewhat of others in their Composition, in which the Method of Administration seems to have been borrow'd from another Form: As suppose for Instance, in a popular State, the main Business should be dispatch'd by some one principal Officer, or by a Senate; or if under an Aristocracy, one Magistrate should be invested with extraordinary Authority, or the People consulted in many important Affairs; or if in a Kingdom, the Difficulties of publick Business should be referr'd to the Debates of a Senate, or of a popular Assembly. And if this come not up to a full Solution of the Passages cited from Antiquity, the Point

^a Appian in *Libyc*, *bell.* p. 64. Ed. H. Steph.

Mr. BARBEYRAC'S NOTE on §. XIII.

¹ See Mr. Bayle's Reflections on *La difficulté de trouver un juste Milieu dans un Gouvernement mixte*, Tom. I. of the *Reponse aux Questions d'une Provinciale*, pag. 611. &c.

will be throughly clear'd from what follows. We have above demonstrated, that in order to completing the Essence of a just and regular State, such an Union is requir'd, as shall make all things, which belong to the Government of it, seem to proceed from one Soul. Now hence it is manifest, that the former way of Mixture constitutes such a Body as is held together, not by the Bond of one supreme Authority, but barely by Compact; and which therefore is to be rank'd, not amongst the regular, but amongst the irregular States; being but weakly guarded against foreign Assaults, and very obnoxious to inward Disorders and Convulsions. As to the other kind of Mixture propos'd, we think it ought to be consider'd, whether those Persons, in whom the sovereign Power is said thus indivisibly to reside, do make up a standing Senate, which is to guide and direct the whole State as one lasting Body. If so, the Form will be aristocratical; yet such as must be very unfit for the Dispatch of Business, whilst some few, or but one of a contrary Judgment, may vacate the Resolutions of all the rest. Again, if those particular Members, in other respects equal, do each of them hold some part of the Government, yet so as that the sovereign Acts cannot be exercis'd without the unanimous Consent of the whole Number, then the State is *systematical*, according to the proper Notion of that Word; yet such as will likewise have great Disadvantages, as to the Management of Affairs, by reason of this very great and unnecessary Streightness. If some one Person be endued with high Degrees of Authority, and several parts of the supreme Power above others in the Council, then the State will be plainly irregular, lying between such a Monarchy as is overawed by an assuming Senate, and a *systematical* Form. And this Irregularity will in Proportion be the greater, in Case more than one are invested with these signal Prerogatives above the rest.

XIV. For our part, as we envy no Man the Praise of his Constancy and Resolution, who will on no account lay aside the Term of a *mixt* State; so we think it the more commodious and easy Method, and the more expeditious for the Explication of certain *Phænomena* in particular Commonwealths, to call those Governments *irregular*, in which we can neither discover any one of the three regular Forms, nor yet any proper Disease or Deviation; and which at the same time cannot, with due Exactness, be rank'd amongst the *systematical* Models. Concerning which we may in general observe, that they differ from regular States in this respect, that all things do not seem to proceed in them from one Soul and one Will, nor all and each of the Members to be ruled by one common Power. Again, they vary from *systematical* Forms, because they are not compos'd of several compleat and distinct States. Lastly, they do not fall in with *Diseases* or *evolutions*, because a distemper'd State always appears under Circumstances of Ignominy, and hath as it were somewhat of the

Bastard in its Countenance ; in as much as it proceeds either from the ill Management of a good and regular Frame, or from incoherent Laws and improper Institutions. Whereas the Irregularity of a Government doth not only affect its Frame after an intrinsic and secret manner, but being openly confirm'd, and as it were declar'd legitimate, shews it self in publick without Shame or Guilt. Therefore the former, or the *Disease*, cannot be suppos'd to have entered into the Intention of those who first founded the Commonwealth, ever appearing as a subsequent Vice or Defect : But the latter, the *Irregularity* owes, if not its Original, yet at least its Confirmation to the Will and Approbation of the first Authors. It is just the same Difference as may be observ'd between two Buildings, one of which is design'd according to the Rules of Architecture, but either the Materials are naught, or through the Negligence of the Inhabitant, the Roof gapes, the Walls shake, the Beams crack, the Foundation sinks and gives way : In the other, either the Builder at first propos'd a Model not agreeable to the common Rules ; or some great Fault, which afterwards happen'd, hath been cur'd and made up after a strange and unseemly manner. Farther, some Irregularities appear'd upon the first Settlement of a State, others crept in by silent Steps, and in long Progress of Time. For it might so happen, that the Authors or the Reformers and new Modell rs of a Commonwealth might not be able to introduce a regular Frame, either on account of Ignorance, or because the present Posture and Exigence of Affairs would not suffer them to consider of a more accurate Constitution ^a. Sometimes too, Persons, who have been the chief Leaders and Assistants in winning a Kingdom, have beforehand contracted for such Lordships, or such Privileges in it, as that they cannot be rank'd in the Number of true and proper Subjects. Again, many times, either through Neglect of the Governours, or upon some other Occasion, a Distemper seizeth a State, and having taken so deep root, that it cannot be removed without the Destruction of the publick Frame, there remains no Cure for it, but this ; to divest it, as it were, of its Faultiness, and to vindicate it from Censure, by turning it into a solemn and legal Appointment ; by which means what was before term'd Usurpation, Faction, or Contumacy,

^a *Id.* Hobbes *Leviath.* c. 29. *post. princip.* among those just now cited.

shall, for the future, bear the Style of a just Right and Privilege.

XV. These irregular Forms of Government can neither be brought within any certain Number, nor divided into proper Kinds, by reason of that great Variety, which either really occurs in Fact, or at least may be framed in our Imagination. So that we have scarce any other means of discovering their Nature, but by gathering it from particular Instances, and the illustrious Examples in Story. Such an Example we endeavour'd to exhibit in the ^b *Roman Commonwealth* : As the like hath been attempted in the *German Empire* by *Severinus de Monzambano* ^c. At present, 'twill be sufficient to offer a Remark or two concerning the Irregularity, which some observe, in the Government of *Rome*, under the antient Emperours : Whilst sometimes the State appear'd a Monster with a double or triple *Body*, one Prince ruling the East, another the West, or three dividing the World amongst them ; sometimes again, with a double or triple *Head*, whilst two or three of the royal Family held the sovereign Power, as Copartners, and govern'd in common. Now as to the former of these Cases, we may note, that whilst two Emperours presid'd, one over the Eastern, the other over the Western World, separately and independently from each other, then there were really Two distinct Kingdoms, which, taken both together, still retain'd the Name of the *Roman Empire*, out of which they had been compos'd. Besides which Agreement as to their Original, the Resemblance of Laws and Manners, the natural Relation between the respective Sovereigns and between their Subjects, their strict League and Alliance, which insur'd their mutual Help and Support, all concurr'd to make up some Appearance of Unity. But what Name we are to impose on that Form of Government, when two or three royal Partners administr'd Affairs in Conjunction, it is not easy to determine. Certainly *two* Persons cannot make an Aristocracy. For since each is invest'd with equal Power (upon which Supposition the Case before us proceeds) they cannot be united, otherwise than by Covenant ; and there could be no Expedient found out for the Dispatch of Business, should they happen to disagree about any Proposal, there being no third Person to turn the Scales. And tho' the

^b In a Dissertation entituled, *De forma Reipublicæ Romanæ*,

Mr. BARBEYRAC'S NOTES on §. XV.

¹ See our Author's Dissertation *De Republica Irregulari* among his *Dissertationes Academicæ selectiores*, where he treats more fully of this matter.

² This Work is generally attributed to our Author : However, he has never, as I know of, publicly own'd it ; he has indeed strenuously defended it against several Authors who attack'd it, in his Dissertation *De Republica Irregulari* ; and those who are acquainted with his Style and Character, do not much doubt of its being written by him ; neither after all, is it a Work that does him any manner of Discredit, but rather the contrary, for not to mention the principal Design of the Work which the World has highly approv'd of, the Preface has abundance of Wit and Life in it. Since the first Edition of this Translation, the *Monzambano* has been printed in 1706, at *Berlin*, with the Author's Name to it ; who at his Death order'd his Heir to publish it from a Copy full of several Alterations, Corrections and Additions. There are likewise some things left out, which together with the Suppression of the Preface, will doubtless make the learned very well pleas'd to have the Edition, which was surreptitiously publish'd, as well as that which is now extant with the Author's Name and Approbation. Mr. *Titius* has taken care to satisfy their Curiosity in that point at an easy rate, in bethinking himself of a thing odd and singular enough ; which was his printing in 1708. at *Leipsick* the Book we are here speaking of in such a manner as to give 'em the two Editions all together ; for the Passages which Mr. *Pufendorf* had either retrench'd or alter'd are here interred again, in their proper Places between two Crotchets, and distinguish'd by a different Character. Besides, the Editor has made a sort of *variorum* of it, by putting at the bottom of every Page the Notes of several Commentators upon the old *Monzambano*.

same Inconvenience may seem to attend any ruling Council or *College*, where the Members are of an even Number; yet it cannot so frequently happen, that upon a Division in Judgment the Votes shall be equal. Besides, in this Case it is not difficult to bring over some one out of such a Number to the opposite Sentence: Or, if this can't be done, the next Expedient is to let that Opinion prevail, which declares against Innovation, and would have things continue in their present State. Farther, neither can we, properly speaking, affirm the united Government of three *Cæsars*, reigning together, to have been *aristocratical*. For this royal Triumvirate did not compose such a *collegiate* Body, as was to determine State-Affairs by the Plurality of Voices, or where two Members, agreeing in Opinion, might by their proper Right and Authority compel the third, who dissented, to follow their Resolution. And in all Cases, a Council or Body of Men, in which the Major part cannot influence and draw over the rest, seems to be held together, rather by bare Compact, than by any Government or Command. We may therefore say, as to the Question before us, that the sovereign Authority did truly and radically inhere in that Person alone, who assumed the other into a Partnership with him; tho' both might seem equal as to the exterior Ensigns of Majesty. Thus the Historian ^a tells us of *Lucius Verus*, *That he lived not as a free and sovereign Prince, but, under Marcus, invested with the imperial Authority.* Nor was it easy to suspect, that any Man would be guilty of so notorious Ingratitude, as to oppose the Will of his Patron, to whom he owed his Promotion and Honour. To which we may add this Consideration, that for the most part the Persons thus sharing the Government, were either Father and Son, Father-in-Law and Son-

in-Law, or two Brothers; so that the Party admitted as a second in the Dignity, might be farther restrain'd by the Ties of Blood or the Alliance of Marriage, from abusing the Power which had been given him, to the Prejudice of the Donor. Whence it appears, that this Practice of assuming a Colleague was not any Portion of the Sovereignty, but as it were the Designation of a Vicar-general and Heir apparent who was immediately receiv'd into the Business of State, and join'd with the other in the Administration; being likewise invested with the most shining Ornaments and the richest Trappings of Greatness. Now that which put the Emperours upon this Method, was the inconstant Humour of the Soldiery; who, on frequent Occasions, took a Pride in complementing their Leaders with the imperial Title ^b. If this Explication will not satisfy some Men, or if it seems not applicable to every particular Instance which we find upon Record; we have no way left but to affirm, that the *Government* then commenced *irregular*, when more Persons than *one* held the *Monarchy* (if it might still deserve that Name) in Conjunction; and yet were engaged to each other only by Compact or Faction. Amongst whom if any Dissension or Hatred should chance to arise, the Consequence could be nothing less than mutual Suspicions, Plots, and Designs, and in the final Issue, a civil War ^c. Such an Irregularity the *Roman State* was evidently sensible of, whilst *Romulus* and *Tatius* sat as Partners in the Throne ^d. In general, we may apply to all these *polyarchical Governments*, what *Solyman the Turk* observed in the *German Empire*; that it might be well compar'd to a Lute, which costs a great deal of Labour and Skill to put it in Tune, and is very easily put as far out of Tune as ever ^e.

^a *Julius Capitolinus*, c. 1.

^b *Themist. Orat.* 16, *Fratres Amantes*, p. 76. B. Ed. *Paris.* speaking of *Valentinian* who had admitted his Brother *Valens* into a Partnership with him in the Empire, useth the following Expression: *He receiving the Whole and giving the Whole, at the same time a Brother and a Father, the one by Nature, the other by his own Act and Choice, tho' he hath conferr'd an equal Share of his Power, yet, in effect, he still keeps it entire; by reason of the Obedience and Compliance of him on whom it was conferr'd.*

Thus *Solinus*, c. 8. reports of *Æneas*, that he reign'd with *Latinus* three Years, *sociâ potestate*, as his Fellow or Equal in the Supreme Authority.

^c *Lucan*, l. 1. v. 92, &c.

*Nulla fides regni sociis; omnisque potestas
Impatiens consortis erit.*

To trust a Partner's Rule impairs our own,
And Empire hates a Consort in the Throne.

Statius, *Theb.* 1. ver. 130.

————— *Sociisque comes discordia regnis.*

————— *Howe'er the Crown is shar'd,
Discord's a Partner.*

^d *Vid.* *Plutarch. Romul. Add. Eryc. Putean. Hist. Infubric.* l. 2. the Story of *Pertharite* and *Gundobert*, joint Kings of *Lombardy*. *Procopius* relates a like Case; *Hist. Goth.* l. 1. *The Goths, says he, and Odoacer's Army came to this Agreement; That Theuderick and Odoacer should reign in the City Ravenna with equal Power. And for some time the Compact was faithfully observ'd; but the Issue was, That Theuderick, according to the vulgar Report, inviting Odoacer to a Banquet treacherously slew him.* 'Tis a true Remark of *Euripides*, *Andromach.* v. 471, &c.

Two Tyrants can no more be born than one,
But press the Subjects with a double Load;
Till Discord and Sedition work their Fate.

Plin. Paneg. c. 8. n. 4. *What a small Difference is there between laying down the Imperial Honour, and sharing it with another; unless the latter be difficult and dangerous? Add. Herodian.* l. 4. c. 1, &c. See likewise *Racine's Freres Ennemis*, Act, I. Scen. V. and the *Fables de la Fontaine*, Lib. I. Fab. XII. intituled *le Dragon a plusieurs Têtes, & le Dragon a plusieurs queues.*

^e We do not think that we ought to admit, under the Head of Irregular Forms, what *Francis Carron* reports of *Dayre* in *Japan*; who he says was the true Heir of the Crown, yet was put off by the Prince in possession, with the outward Majesty, and empty Badges of Honour. Much to the same purpose, *Alexander de Rhodes* relates, That in the Kingdom of *Touquin* there are two Kings, one called *Bua*, the other *Choua*; yet so as that the former barely enjoys the Title, the latter really holding the Command; only *Bua* hath the Power of conferring the Degree of Doctor, and receives the Oaths of the Subjects when they renew their yearly Allegiance; as to other matters, he passeth his time shut up in an old Palace without Action or Business, *Irim*, par. 2. c. 6.

XVI. When several States are, by some special Band, so closely united, as that they seem to compose one Body, and yet retain each of them the sovereign Command in their respective Dominions; these we term *Systems of States*. Whence it is in the first place evident, that when a State is composed of several subordinate Bodies, we must not on this account presently give it the Name of *System*: 'Tho' Mr. *Hobbes*^a is pleas'd thus to style it, and to compare the said Parts with the Muscles in the Body natural. No more are we to apply this Term, in general, to all those larger States which have vastly increased their Dominions by swallowing up their little Neighbours, and by reducing them into the same Body with themselves. Which we may observe to be done chiefly in the following Methods. First, when the Victor either removes the vanquish'd into his own Territories, or however gives them the same Privileges with his former Subjects. Secondly, when the conquer'd Nation is left to possess its antient Seat, but utterly losing the Sovereignty which it held before, is rendred purely the Subject of the conquering People. In both Cases the State thus subdued loseth its Name; but in the former the conquer'd are made equal to the Conqueror; in the latter they are put under an inferior Condition, being reduced into the Form of a *Province*. Tho' it often happens, that the vanquish'd are partly left in Possession of their antient Laws or Privileges, how different soever from the Manners and Institutions of the conquering State^b. For in order to preserve the Unity of a Commonwealth, 'tis not required, that all its particular Parts shall use the same positive Ordinances, or shall stand exactly upon the same Bottom; but 'tis enough, if they depend upon one Government. And it is frequently the Art and Policy of a Conqueror, to make no Alterations in the Customs of those who are fallen under his Dominion: Or, at least to accommodate himself to them for such a time as he thinks convenient.

In relation to the Government of Provinces, we are to examine what Mr. *Hobbes* delivers on that Subject^c. *Whereas*, says he, *heretofore the Roman People govern'd the Land of Judea, for Example, by a President; yet was not Judea therefore a Democracy, because they were not govern'd by an Assembly into which any of them had Right to enter; nor by an Aristocracy, because they were not govern'd by an Assembly, into which any Man could enter by their Election; but they were govern'd by one Person: Which, tho' as to the People of Rome it was an Assembly of the People, or a Democracy; yet as to the People of Judea, which had no Right at all of participating in the Government, was a Monarch. For tho', where the People, are govern'd by an Assembly, chosen by themselves out of their own Number, the Government is call'd a Democracy or Aristocracy; yet when they are govern'd by an Assembly, not of their own choosing, 'tis a Monarchy; not of one Man over another Man, but of one People over another People.* So that Mr. *Hobbes*

seems to look on these Provinces which are dependent on some aristocratical or democratical State, as so many distinct Monarchies. Now tho' we easily allow, that 'tis the more usual Practice to govern *Provinces* by one Man, than by an Assembly consisting of many, as the same Author shews at large^d; yet we think it needful to enquire what Form of Government it establish'd over a dependent People. For *Provinces* have lost the Nature of *States*, and are made the Appendages of other *States*, having no kind of sovereign Authority in themselves. Whether therefore such a Province is govern'd by a President, or by an Assembly, is an indifferent Point, which doth not in the least affect the proper Sovereignty, in as much as both *he* and *they* bear only a subordinate or delegated Power. So that the Sovereignty, exercis'd over these additional Dominions, is exactly of a piece with that of the main State, and cannot, without Impropriety, obtain the distinct Name of a Monarchy or an Aristocracy; which are Terms belonging to true and independent States, such as really possess a supreme Government of their own.

XVII. Of *Systems* properly so call'd, these two kinds do especially fall under Notice: One, when two or more States are subject to one and the same King^e; the other, when two or more States are link'd together in one Body by virtue of some League or Alliance. In regard to *Systems* of the former kind, 'tis observable, that it implies no Contradiction in *Moral Bodies*, to have but one Head over several of them together, and consequently to have one Person the Head of many distinct Bodies; which in *Nature* would bear so monstrous an Appearance. But because the Union of these *Systems* is founded either in the sole Person of the Prince, or in his Family, hence it comes to pass, that when the Person is deceas'd, or the Family extinct, the respective People recover their particular Right of settling their own Government, and are no longer obliged to make Use of a common Head. Nay, during the Continuance of the said Head, the States are really distinct from each other. The Causes whence such Combinations arise are various; but the most frequent seem to be the Marriages of Princes, and the Right of Inheritance. For there are many States, in which the Crown descends to the female Issue of the royal House, not only when the male Line is utterly extinct, but when there is no male Heir in a nearer, or in an equal Degree. Now here if the Lady Sovereign happen to take another Sovereign for her Husband, the two Kingdoms will come to a Conjunction, if not in their Persons, at least in their common Issue. For it is not necessary, that, in a Match of this Nature, the Princess should put her self and her Dominions in Subjection to the Prince. So likewise in one undivided Kingdom, where the Hereditary Succession is establish'd, either according to the plain and direct, or the lineal Course, if one

^a *Leviath.* c. 22. ^b *Hobbes Leviath.* c. 26.

^c *Leviath.* c. 19.

^d *Ibid.* c. 22.

^e For Example,

Great-Britain and Ireland, See our Author's Dissertation, De Systematib. Civit. S. 9, 10.

Mr. BARBEYRAC'S NOTE ON §. XVII.

² See the Seventh Chapter of this Book, §. 12, 13

of the remote Heirs any way become Master of another Crown, and the Rule of Succession (all the rest failing who stood nearer) call him to receive that of his own Country, the two Kingdoms will by this means be united under his Reign. The Consequence is the same, if a People choose for their King one who bears the same Character elsewhere, in Possession, or in Reversion. Again, two or more Nations may engage by League to elect one Prince over both by joint Suffrages, and yet as to other Matters, continue separate Kingdoms, without transacting their Affairs in a common Assembly. Lastly, such a *System* doth then arise, when a Prince, constituted by the free Consent of the People, subdues by Arms another People, in his own Name, and at his own Hazard and Expence; not in the Name or at the Charges of the State over which he presides. For that this is no impossible Case, *Grotius*^a hath sufficiently made out, against the Opinion of *Hottoman* the Civilian^b.

As for the Dissolution of these *Systems*, 'tis manifest it must happen, either upon the Death of the Prince, if the Union was founded in his Person only; or upon the Extinction of the royal Family, in case the respective Kingdoms were all entail'd in the way of Inheritance. For then each separate People recover their Right of constituting a new King, or of introducing what Form of Government they think fit, without consulting the rest; they being supposed to have no other Bond of Union. If a Prince holds one Kingdom by Right of Inheritance, and another by free Election; upon his Decease the Union between them will be broken, and the latter Kingdom shall have no Obligation to advance his Son to the Crown.

But if this Union depend upon a League between the Kingdoms, 'tis no less manifest, that if the Agreement happen to be violated, especially in the principal Articles, then the injured State may disengage it self from the other. Yet here we ought carefully to distinguish between the Obligation by which particular Kingdoms are tied to their respective Kings, and the Obligation by which the same Kingdoms are united amongst themselves. A King once elected, and who hath receiv'd the Fealty and Allegiance of his People, may not afterwards be deserted on account of any Misbehaviour, or any Action contrary to his Engagement, so long as he doth not profess open Hostility towards the State. Unless perchance the Compact, between the Elected King and the People, had this conditional Clause expressly annex'd to it, that the Obedience of the latter should be due on no other account, but upon the former's performing all and each of the Articles settled betwixt them. On the contrary, the Engagements by which u-

nited Kingdoms are held together, may be renounced on that side, to the Prejudice of which the Laws of the Union have been violated, tho' the Injury be not very considerable; in case the other Kingdoms concurr'd in the Action, or if it was undertaken for their Sake, or converted to their Use and Service. Wherefore upon the Decease of the common Prince, the Injured State may disclaim the Union, reserving a Right to prosecute the Authors or Abettors of the Fact, and to recover what is lost by their means. If, by the Marriage of hereditary Princes several States are conjoin'd, which observe a different Course and Order of Succession, the Union will be dissolv'd, if such a Case happen, as that the same Person proves incapable of succeeding to both Crowns according to the publick Laws. Let us suppose two Kingdoms in Conjunction, one of which receives the Method of lineal Descent by *Agnation*, the other by *Cognition*. Here, if it so fall out, that the common Prince decease without male Issue, the latter of the two Kingdoms shall pass to his Daughter, the former to the Heir male in the next Degree. But if an Union, at first contracted on the Occasion of Marriage, shall be afterwards confirm'd, and turn'd into a perpetual Establishment, by means, either of a solemn League passing between all and each of the Kingdoms to this purpose, or a Decree made by the common Sovereign, with the Approbation of the respective States; then any difference, which was before observ'd in their way of Succession, shall be understood to be actually taken off. And, for the future, such a Method shall be followed, as is expressly specified in the League, or in the Decree; or such as the Authors of the Union appear to have been most inclin'd to; or such as is most agreeable to Reason, and most conducive to the Safety of the united States. But when one Kingdom happens to be join'd to another, in the manner of a *Province*, the Union founded on a precedent League expires, and a much closer Bond succeeds in its room, by means of which they unite into the same civil Body.

XVIII. The other kind of *System* is, when several States are join'd to each other by a perpetual League or Alliance; the chief Occasion of which seems to have been, that each particular People loved to be their own Masters, and yet each was not strong enough to make Head against a common Enemy. The Purport of such an Agreement usually is, that they shall not exercise some part of the Sovereignty there specified, without the general Consent of each other. For the Leagues to which these *Systems* owe their rise, seem distinguish'd from others (so frequent amongst different State-) chiefly by this Consideration; that in the latter each confederate People determine themselves by their own Judgment

^a L. I. c. 3. s. 12.

^b Quæst. Illustr. 1.

Mr. BARBEYRAC'S NOTES ON §. XVII, XVIII.

^a *Lex Commissoria*: See *Grotius* Lib. I. Cap. III. Sect. 16. Numb. V. by that is generally understood a conditional Clause added to a Contract, the not performing of which renders void or makes the thing in dispute to be forfeited. We have seen some Instances of it relating to the *Contract of Sale*, Book V. Chap. V. Sect. IV and of *Pawns* and *Mortgages*, Chap. X. Sect. XIV. So in that Place the *lex Commissoria* or *conditional Clause* is an Article imposed upon the King; by virtue of which, if he breaks the Engagement which that obliges him to perform, he forfeits *ipso facto* the Crown: Just so in *Manors*, when the *Vassal* does not do Homage, or does not pay the Rent due to his Lord, or becomes guilty of *Felony*, the *Fee* falls into *Lapse*, as the Law terms it; that is, is forfeited to the use of the Lord, and is re-united to the *Manor*.

! As for Example, the United Provinces of the *Netherlands*, the *Swiss* Cantons, &c.

to certain mutual Performances, yet so as that, in all other respects, they design not in the least to make the exercise of that part of the Sovereignty, whence those Performances proceed, dependent on the Consent of their Allies, or to retrench any thing from their full and unlimited Power of governing their own States. Thus we see that ordinary Treaties propose, for the most part, as their Aim, only some particular Advantage of the States thus transacting; their Interests happening at present to fall in with each other: But do not produce any lasting Union, as to the chief Management of Affairs. Whereas in those Leagues we are now speaking of, the contrary is observable; they being carried on with this Design, that the several States shall for ever link their Safety one within the other, and in order to this mutual Defence, shall engage themselves not to exercise certain parts of their sovereign Power, otherwise than by a common Agreement and Approbation. For the Promises made in the two Cases here compared, run in very different Terms; in the former thus: 'I will join you as a Confederate in this particular War, and the manner of our attacking the Enemy shall be concerted by our common Advice: In the latter thus; None of us, who have entered into this Alliance, will make use of our Right, as to the Affair of Peace and War, except by the general Consent of the whole Confederacy. We observ'd before, that these Unions submit only some certain parts of the Sovereignty to mutual Direction. For it seems hardly possible, that the Affairs of different States shall have so close a Connection, as that all and each of them must look on it as their Interest, to have no part of the chief Government exercis'd without the general Concurrence. Or, if there be any Communities thus mutually depending, it had been the wiser Course for them, rather to have incorporated themselves under the same Government, than to rely on the bare Engagement of a League. The most convenient Method therefore seems to be, that the particular States reserve to themselves all those Branches of the supreme Authority, the Management of which can have little or no Influence (at least directly) on the Affairs of the rest. The same must be said of such publick Business, as either occurs every Day, or else requires so speedy Measures as to prevent a general Debate. But then as to all Affairs, on which the Safety of the Allies hath a joint Dependence, these ought in reason to be adjusted by common Constitution. And in this Number War, whether offensive or defensive, seems to claim the first Place; after that, Peace as the Result and Issue of War. To which we may add Taxes and Subsidies, as they contribute to the mutual Support; and Alliances with foreign States, as they promote the common Safety. It falls under the same Head of Duties, that in Case any Dispute arise amongst

the Confederates themselves, the other Members who are unconcern'd, shall immediately interpose their Mediation, and not suffer the Controversy to come to Blows. Thus the wise Prince Philip of Macedon, declares in the Historian ^a, that *The mutual Wrongs of his Allies so particularly concern'd himself, as that he could not but use his best Endeavours for a Composition, by Words to the present, and by Letters to the absent Parties: Whereas those other Dangers or Injuries, which affected the whole Confederacy, belonged to the Care of the common Assembly, and were thence only to receive their proper Redress.* As for other Matters, which seem not so necessary to be transacted in common, as Negotiations of Traffick, Subsidies for the particular Occasions of any single State, the constituting of Magistrates, the enacting of Laws, the Power of Life and Death over the respective Subjects, the ecclesiastical Authority, and the like; there is no reason but that they may be left to the Pleasure of each distinct Government: Tho' at the same time, particular States ought so to manage these Privileges, as that they shall cause no Disturbance in the general Union. Whence 'tis evident, that one or more of the Allies cannot be hindred by the rest from exercising, according to their own Judgment, such parts of the civil Administration, as were not, in the Treaty of Alliance, referr'd to the common Direction. Yet as to the Power of Life and Death, some Scruple may be made on account of that Passage in the Civil Law ^b: *At sunt apud nos rei ex Civitatibus fœderatis, & in eos damnatos animadvertimus.* But some Persons, Members of our Confederate States, are here arraign'd in Judgment, and receive from us both their Condemnation and Punishment. Grotius ^c hath taken a great deal of Pains to solve this difficulty; but whoever thoroughly considers his Discourse, will find that he hath labour'd to little purpose. For he certainly leaves the following Question unanswered; How that State can entirely preserve its Liberty, the Subjects of which are liable to be arraign'd under another Government, and to be punish'd upon Conviction? We find that the Freedom of the *Achaians* was look'd on as considerably impair'd, when, by the Treachery of *Callicrates*, the most worthy Persons in that Commonwealth were accused of favouring *Perseus's* side, against the *Romans*, and were cited to *Rome*, there to answer the Charge, upon Occasion of *Xenon's* Protestation, who under a just Assurance of his own Innocency, happen'd to declare, that if any Man had Thoughts of impeaching him amongst the rest, he was ready to take his Tryal, not only in the Common Assembly of his Countrymen, but amongst the *Romans* themselves ^d. On another Occasion, the *Achaians* seem to have made a Breach on the Laws of regular Government, when they demanded those *Spartans* to be deliver'd up into their Hands, who had been the chief Instruments in promoting the Siege of *Las*, a *Laconian* Town ^e.

^a Polyb. l. 4. c. 24. ^b L. 49. t. 15. l. 7. §. 1. D. De Captiv. & Possess. ^c L. 1. c. 3. §. 21. ^d See the Case at large in *Pausanias*, *Achaias*. It is likewise touch'd upon by *Polybius*, *Excerpt. Legat.* 105. ^e Liv. l. 38. c. 31.

^a This Law is more naturally brought in hereafter, in the Eighth Book, c. 9. §. 4.

Whereas the Cause ought first to have been heard in a common Council of both States, and upon Conviction, the *Spartan* Government should have been moved either to punish the Criminals, or to surrender them to their Accusers. As for the Place alledg'd from the *Civil Law*, we think this the clearest way of replying to it; that whereas the precedent Discourse had explain'd what the Nature of Leagues would bear, and what *ought* to be done, the Words here cited declare what *was* actually done in later Times; when the *Romans*, growing insolent on Success, used their Allies, who by free and voluntary Leagues had engaged their Friendship, with the same Treatment as those whom they had conquer'd by their Sword. Of which Injustice *Cicero* himself complains.

XIX. Since in these *Systems*, 'tis necessary there should be a Communication of certain Affairs express'd in the League, and since this cannot be done so conveniently by Letters, a determinate Time and Place ought to be settled for the holding Assemblies, and one or more Persons appointed, who shall have Power to call the States together, in Case of any extraordinary Business, which will not admit of Delay. Tho' it seems a much more compendious Method, to fix a standing Council, made up of Persons deputed by the several Confederates, who shall dispatch Business of daily Occurrence, or of less Importance, according to the Tenor of their Commission; who in Matters of greater Consequence shall make report to the States, and shall publish and execute such Decrees as are return'd to them on these Occasions; to whom the Ministers of the Confederacy in foreign Parts shall give an immediate account of their Proceedings, and who shall treat with the Ambassadors of other Nations, and conclude Business in the general Name of the Confederates: But who shall determine nothing that exceeds the Bounds of their Commission, unless all the Subjects have been first consulted on the Point. How far the Power of this Council of Delegates extends, is to be gather'd either from the Words of the League it self, or from the Warrant by which they act. This is certain, that the Power, whatever it be, is not their own, but deriv'd to them from those whom they represent; and altho' the Decrees which they publish pass solely under their own Name, yet the whole Force and Authority of them flows from the States themselves, by whose Consent such a Council hath been erected. So that the Deputies are no more than *Ministers* of the confederate States, and are altogether as unable to enjoin any thing by their own proper Authority, as an Ambassador is to command and govern his Master.

XX. Yet it may still appear doubtful, whether or no the whole Body of the Associates, or the Majority of them, have not a Power over particular States, or over those whom they exceed in Number, with regard to such Matters as were the first occasion of the Alliance, and which by

the express Terms of the League were appointed to be managed in a common Assembly; so far as that the few dissenting States shall be bound, tho' against their Will, to do as the major part have determin'd. Here in our Opinion, the negative side of the Question ought to be preferr'd; if we speak of regular Systems, and where the particular States reserve to themselves the entire Possession of their former Liberty. In as much as the Liberty of a State, which is nothing else but the Power of finally resolving and determining, according to its own Judgment, all Matters in which its Safety is concern'd, cannot be understood, in case the State may, by virtue of the Authority held over it by some other, be compell'd to certain Performances against its Will. Nor can any reason to the contrary be drawn from hence, that in the League 'twas agreed not to exercise some particular parts of the Sovereignty there express'd, unless by common Consent. For 'tis one thing to say, *I engage not to use my Right unless you are willing*; and another to say, *I gave you a Power of compelling me to use my Right, tho' against my Inclination*. Now the first of these Forms is only implied in the League, not the latter. For the clearer Apprehension of which Point, it ought well to be observ'd, that when the Wills of many Persons are bound to conspire in one, this must arise either from a Compact between them to this Effect, or because one of them hath submitted his Will to the Will of the other. An Union or Concurrence of Wills, grounded on bare Compact, doth not in the least destroy the Liberty of which we have been now speaking. For they agree beforehand in settling those Affairs, which are referr'd to their joint Management; or if any new Business offers it self to their Debates, they desire to be influenced not by Authority, but Argument and Reason. But when I have submitted my Will to the Will of another, and by this means have given him a full Authority over me, I may then be obliged to things which are very inconsistent with my good liking. Nor doth *The Right of the Majority* - (which some may urge) oppose our Judgment in this Case. For first, *The greater part draws the less* only in Bodies already constituted, not in those which are still to be established. And then farther, the Prerogative of the Majority in a settled Council to oblige the rest is owing to human Compact and Institution, not to Nature; tho' natural Reason adviseth the Reception of this Method (as the most convenient in numerous Assemblies, and where Business of various kinds, and of every Day's Occurrence, is to be dispatch'd. Now in order to this, 'tis necessary that each Member do in such manner submit his Will to the Will of the whole, or of the major Part, as that he, tho' himself of a contrary Opinion, shall be bound absolutely to follow what they determine; which we cannot conceive, unless at the same time we suppose the latter to hold a Command or Authority over the former. Be-

a *Offe*. Add the Story of *Decius Magius*, who was laid in Irons by *Hannibal*, *Livy*, l. 23. c. 7, 10. and *Scipio's* Advice to the *Romans*, that they should not hear the Informers against the same great Enemy; *Livy*, l. 33. c. 47.

b See B. 7. c. 2. f. 15.

sides, in an Assembly of Confederates, there seems to be no Occasion for this Right of the Majority; inasmuch as they are seldom composed of any considerable Number of States, and are chiefly united by the Prospect of general Advantage, which 'tis presumed none in their Wits will obstinately oppose. Yet if any, through a malicious and unreasonablc Fervecitncfs, shall refuse to join in the wholesome Counsels of the rest, and by this means shall endeavour to betray the common Safety, or Interest; it will be then lawful to apply the same Methods of Redress, as they who live in a Condition of natural Liberty are allow'd to use against the Violaters of Faith and Contract. Unless it be judg'd the more eligible Course, utterly to purge the Society of so intractable a Partner. To all which we may add, that it must frequently occasion great Injustice, if in a confederate System the Plurality of Vote, were to bind the whole Body: As when the Allies are disproportion'd in their Wealth and Strength, and consequently some contribute more than others to the common Defence. For tho' we may be apt to imagine, that they who contribute according to the Proportion of their Ability, do really bring equal Shares; yet it may happen very frequently, that one who hath but slender Fortunes may be more willing to expose them to Danger, than another who hath larger Possessions. Thus let us suppose, that in a Confederacy, some one State contributes more to the common Security, than all taken together; here it would be a manifest a Breach of Equity, if this State should, by the Agreement of the rest, be compell'd to engage in any Action, the chief Burthen of which must lie upon its own Shoulders. On the other hand, if the Votes were to take place according to the Proportion of Force, or Treasure supplied to the common Cause; then the more powerful State would actually obtain a Sovereignty over all besides ^b. So that we may conclude from the whole, that where-ever Business is decided by Plurality of Voices, in such a manner as that the dissenting Parties are likewise bound to stand to the Resolution; there the regular Form of *Systems* or Confederacies is deserted, and the Members either break into an irregular Body, or close together in one undivided State.

XXI. The Dissolution of these Systems happens, when some of the Confederates voluntarily quit the League, and govern their own States apart; which they are induced to chiefly by this Motive, that they hope to receive more Advantage by a Separation, than they could expect under a Conjunction, and apprehend their Allies to be rather a Burthen to them, than an Assistance ^c. Intestine Wars are another Cause which must necessarily break these Unions, unless, upon the Establishment of the Peace, the League be also revived. If a confederate Power happen to be overcome in a foreign War, it is sometimes a Policy of the Conquerour to cut the Knot, and to make each Government inde-

pendent of the rest: As the *Romans* did in the Case of the vanquish'd *Achaïans* ^d. We are farther to observe concerning these Dissolutions, which arise from external Force, that the Enemy, by possessing himself of one or two more of the united States, acquires no manner of Right over those that remain, nor can demand to be admitted into the Confederacy, by virtue of that League which engaged the conquer'd States to the others. But a new Agreement must necessarily pass, before any such new Member can be receiv'd into the Alliance, in the room of those whom he hath subdued. Thus we find King *Philip*, by a Decree of the *Amphyctionians* obtaining a Seat in their common Assembly, in the room of the *Phocæans* ^e. For altho' the League, by which the several States are thus combin'd, may seem to be a real lasting Engagement ^f, and tho' a State doth not cease to be the same, upon the Alteration of its Government; yet the Alliance must always be presumed to expire, when any one People are brought under a foreign Yoke, or made the *Accession* of another Kingdom. Because, the League being made between *free* States, consider'd in that Capacity, whenever this Condition fails, the League must fall with it. Nay, tho' we should go so far, as to suppose, that in the Terms of the League there was an express Clause, that the Change of Government in any State should not exempt it from the Engagement, yet the Change here spoken of must be presumed to be made in a lawful manner, and with the Content of the People. And consequently neither an unlawful Usurper, nor any foreign Enemy, shall have a place in the Congress of Allies.

On the other hand, these *Systems* do more closely unite, and are incorporated into the same civil State, by the following means: Either if all the Confederates, by a voluntary Submission, put themselves under the Government of some one Person or Council; or if some one People, which hath the Advantage in Strength and Power, shall reduce the rest to the Condition of dependent Provinces: Which usually happens, when weaker States allow any lasting Preference of Prerogative to those that are stronger, and engage themselves in unequal Alliances ^g. Lastly, if some particular Man invade the sovereign Command, through the Favour of the Soldiers, the Esteem of the Commonalty, or the Strength of a prevailing Faction.

XXII. To conclude; the last Dispute upon this Head commonly is, concerning the Excellency of particular Forms of Government, and which ought to be perfer'd to another: whether that under which the publick Welfare may with more Expedition, and more Certainty, be procured, or that where the Sovereign Authority is less expos'd to Corruption and Abuse. Now as to the Point of Comparison, thus much in the first place is evident, that no Frame of civil Constitution can be so exactly

^a *Vid. Groc. Apolog. Cap. 7. sub fin.*

^b *Add. D'olor. Sic. l. 15. c. 28.*

^c *Add. Liv. l. 38. c. 31, 32.*

^d *Comp. Xenoph. l. 4. c. 6. Per. Grec. where he speaks of the Peace with Amalchidus.*

^e *Dial. Sic. l. 16. c. 61.*

^f See hereafter in B. 8. c. 9. B. C.

^g *Vid. Groc. l. 1. c. 3. l. 21. n. 10. circa fin.*

model'd, and so well guarded by Laws, but that either through the Negligence or the Wickedness of those who bear Rule, the same Government which was instituted for the Security of the Subjects, may turn to their Prejudice and Mischief. The Reason of which is, because Government was first establish'd as a Defence against those Evils, which Men were capable of bringing on each other. But at the same time, they who were to be invest'd with this Government were likewise Men, and consequently not free from those Vices which are the Spurs to mutual Injury. *Vitia erunt, donec homines a, Whilst there are Men in the World, there must be Faults*: And therefore we cannot but sometimes suffer from their Hands the very Evils from which they ought to protect us. Hence the old Remark is so often true,

Quicquid delirant reges, plerumque Achivi b.

The Kings grow frantick, and the People smart.

As therefore the Condition of human Affairs will bear an absolute Perfection; so 'tis controverted between many Persons, what Form of Government seems to have the fewest Imperfections: And the Generality of Judges pronounce in Favour of Monarchy c. It is not our Design to examine the particular Allegations of each Party. Only thus much we would observe, that Arguments of this kind are by no means so very strong and conclusive, as that the Inferences, drawn from them, must necessarily fall out in all places and at all times: And that the Actions of one or two Governours are no manner of Proof, that all others of the same Order or Title must needs follow their Example. And in our Judgment, the wise Speech of *Marcellus* in *Tacitus* d is what every good and useful Subject ought to meditate upon: He said, He could not but remember that happy Age, under which he himself came into the World, and that Form of Government which had been instituted by their Forefathers; yet 'twas his Principle, *Ultiora mirari, presentia sequi; bonos Imperatores voto expetere, qualescunque tolerare*: To admire what was past, but to follow what was present; to wish for good Emperours, but to bear with any e.

It may not seem improper on this Occasion, to shew briefly the Reason why, amongst the ancient *Grecians*, such Perions as under a *democratical*

or *aristocratical State*, assumed a *monarchical Power*, met with so universal Hatred and Censure: And what Motives induc'd them to maintain their Authority by such evil Arts, as we find described in *Aristotle* and other Authors; on account of which the Name of *Tyrant* hath been branded with an indelible Mark of Detestation. Now the *Grecian States* seldom stretch'd their Dominion beyond the Compass of a single Town. And to such the most agreeable Government was, either a Democracy, or an Aristocracy moderately exercis'd; or lastly, what *Aristotle* terms a *heroical Kingdom*, a princely Sway, founded rather upon the Authority of Persuasion, and upon the general Character of extraordinary Virtue, than upon any proper Sovereignty, or Force of Command. Besides, the *Grecian Nation*, being of a haughty Spirit, and of a stirring and restless Temper, was most in love with such a Constitution, under which every Man might bear a part in the Government. Wherefore in a State of this kind, he who had taken on himself a regal Authority, a thing so odious to the People, against their Consent, was obliged, for his own Security, to awe the Town with a Castle or Citadel, and to place a strong Guard round his Person; and then this Guard was to consist of Foreigners, because it had not been safe to trust his own Subjects, and because he had not the means of bridling one Province by another, by interchanging the Native Forces. Farther, the Truth and Loyalty of the Guard was not otherwise to be purchas'd than by the largeness of their Pay; and hence for the raising of sufficient Funds, the Subjects were to be drain'd by constant Impositions. Again, it was no less necessary that the Natives should be disarm'd, and render'd as weak and little as possible; that the Heads of the *Poppies* should be cut off; that all Meetings of the wealthier Subjects should be suppress'd; and that Informers and Court Spies should be maintain'd and encouraged. So that 'twas not Injustice only, but downright Madnes, in these *Tyrants*, to affect such a Government as was to be preserv'd by evil Arts, which could not be lasting, and under which 'twas impossible for them to gain the Love of their Subjects. And it is equally absurd to institute a Monarchy in a State, confin'd to a single Town; and a Democracy in larger Territories, and vastly extended Dominions. But since Princes who stand possess'd of wide and spacious Realms, have no need to make use of these Arts for their

a Tacit. *Hist.* l. 2. c. 74.

b *Herc.* l. 1. Ep. 2. v. 14. c Vide *Isocrat.* in *Nicoel.* *Herodot.* (*Thaliss*) where the *Persian Nobles* debate about establishing a Form of Government, after the *Magi* had been kill'd. *Euripid.* *Supplicibus*, vers. 475, &c. *Bodin.* *de Rep.* l. 6. c. 4. *Aristaus.* *Reliq. Polit.* l. 2. c. 7. l. 2. and many others. On the other hand, the *Dutch* Writer of the *Political Balance* seems to have omitted nothing that Malice or Envy could suggest against Monarchy. A great part of whose Arguments may be turn'd upon him by what *Mr. Hobbes* observes, *De civi.* c. 10. & *Leviath.* c. 19. d *Hist.* l. 4. c. 8.

Mr BARBEYRAC'S NOTE on §. XXII.

See *Maximus* of *Tyre*, *Dissert.* VI. p. 6. *Elit. Diss.* where he maintains, that as *Aristocracy* is better than *Democracy*, so *Monarchy* is preferable to both. See likewise *Montaigne*, *Liv.* III. Chap. IX. p. 711. *Ed. Par. in Polio*, where there is in the Margin, *Policee, la meill ure a chaque Nation?* And *les Caracteres* of *Mr. la Bruyere*, Chap. du Souverain, ou de la Republique at the Beginning. *Montaigne* however, says in another place, that *Democracy* is most natural and most equitable. *Liv.* I. Chap. III. p. 1. But after, all no body has better handled this Question relating to the Excellency of particular Forms of Government than *Mr. S. Bay* in his *Dissourse on Government*. 'Tis worth while to see what he says from the sixteenth Section of the second Chapter, quite to the End of it; or, if any one has a mind to have a general Idea of it at one view, he need only read the *Nouveaux de la Republique des Lettres*, Avril 1700, p. 444. &c. See also the *Parthians*, Tom. II. p. 161. &c. and the *Essay upon Popular Discontents*, which is the first Piece of *Sir William Temple's Posthumous Works*, Publish'd in 1704.

Support, inasmuch as they may be able to poize and balance one Province with another; those Persons are guilty of no less Baseness and Wickedness, who suggest any such Practices of Tyranny to the Imitation of great and potent Monarchs, than those who make it their Endeavour to turn the *Odiu* of the old *Grecian* Tyrants upon Monarchy in general. And hence likewise it is evident, that Princes live much more securely in ample Dominions; because there the diobedient

and rebellious cannot so easily communicate their Designs, unite their Strength, or touch and taint the Loyalty of others. Whereas when a whole State is confin'd within the same Walls; the way lies ready for a handful of Mutineers to spread the infectious Madness, and to corrupt the whole Body of the Subjects, before the Government can either prevent, or apprehend the surprizing Danger ^a.

^a Compare the Reflections which Mr. *Gardner* makes in his *Origines juris Civilis, &c.* Publish'd at *Lipsik* in 1703. with these of our Author in this Section.

CHAP. VI.

Of the Affections, or Properties belonging to Sovereignty.

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| <p>I. <i>How the ruling Power in a State comes to be styl'd Supreme.</i></p> <p>II. <i>He that is invested with this Power is unaccountable.</i></p> <p>III. <i>And above human Laws.</i></p> <p>IV. <i>Of the Distinction between real and personal Majesty.</i></p> <p>V. <i>That a King may be superior to a whole People, demonstrated.</i></p> <p>VI. <i>The Arguments to the contrary refuted.</i></p> <p>VII. <i>Absolute Government, what.</i></p> <p>VIII. <i>Not occurring alike in all Forms of civil Establishments.</i></p> | <p>IX. <i>Limited Governments, how occasion'd:</i></p> <p>X. <i>Founded on what Covenants.</i></p> <p>XI. <i>In what respect the different parts of the Government may be limited.</i></p> <p>XII. <i>Of the Power of Estates, and Councils.</i></p> <p>XIII. <i>Hobbes answer'd.</i></p> <p>XIV. <i>The various ways of holding the sovereign Power.</i></p> <p>XV. <i>A temporary Sovereignty, whether possible.</i></p> <p>XVI. <i>Of patrimonial Kingdoms.</i></p> <p>XVII. <i>Of Kings, assumed by the free Act and Grant of the People.</i></p> |
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WHEN we would enquire into the *Affections* and *Properties* of the *supreme Power*, the first Point, which falls under Examination, is how it comes to obtain that Name and Title. And the chief reason seems to be this; because 'tis impossible, that one Man should bear a greater Sway over another, than that the latter shall be oblig'd to imploy his Strength and his Fortunes for the Advancement of the publick Good, as the ruling Party directs, and shall farther be obnoxious to capital Punishment upon Default. To which may be added this Consideration, that as, setting aside the Divine Sovereignty, particular Men cannot enjoy a higher Degree of Liberty, than the Power of guiding and applying by their own Judgment their Actions, Persons, and Goods; so the Freedom of a Community or Body of Men consists in their being able, by their

own joint Discretion, independent of the Will of any Superior, to resolve and decree such Matters, as appear conducive to the general Benefit and Safety. And hence likewise it follows, by necessary Consequence, that such a Power being *supreme*, or not acknowledging any Superior upon Earth, the Acts, which proceed from it, cannot be disannull'd at the Pleasure of any other Mortal ^a. But that a Person or a State should be able to alter the Decrees and Resolutions of their own Will, is so far from abridging, that it really inhanceth their Liberty.

II. For the same Reason must the *Sovereign* be acknowledg'd *unaccountable*: That is, not obnoxious to human Judgment, or human Punishment ¹. For both these suppose a Superior; but a Superior to the Supreme, in the same Order of Men, and the same Notion of Govern-

MR. BARBEYRAC'S NOTES ON §. I. and II.

¹ *Proprio, & alio non dependente iudicio*; these are the Author's own Words; but if this be true, then Princes whose Power is limited, are not *Sovereigns*: Since they cannot do any thing good in Law, in some certain Cases without consulting an Assembly of the People, or of those who represent them: But our Author in the tenth Section of this Chapter plainly asserts the contrary. He ought therefore to have express'd himself here in such a manner as to have compriz'd more clearly what is agreeable both to an absolute *Sovereignty*, and to a *limited one*. See Sir *George Mackenzie's Jus Regium*, Archbp. *Usher* of the Obedience of Subjects to their Princes, and the Homily of the Church of *England* against Rebellion.

^a Vid. *Grat.* l. 1. c. 3. §. 7. n. 1.

¹ *Nam impune quaelibet facere il est Regem esse.* C. *Memmius* apud *Salust.* *Bell. Jugurth.* Cap. 36. 'To do with Impunity whatever one will, is to be a King. *Pliny the Younger* says, that what is most agreeable in Sovereignty, is the not being accountable for any Thing whatsoever: *Exoptumque principi [Nero] illud in principatu beatissimum, quod nihil cogitur* Panegy. Cap. 6. Num. 1. Our Author cites these Passages. See *Gratius* Lib. I. Cap. VI. Num. 6. Sect. 6. However all that our Author here says, is to be understood with this Restriction, *as long as he does not forfeit his Right.* See hereafter, Chap. VIII.

ment is a Contradiction. But it will be proper here to observe, that I may give an Account two ways, either to a *Superior*, who upon his Dislike may reverse all my Acts, and farther inflict a Punishment upon me : Or else to an *Equal*, whose bare Approbation of my Proceedings I am willing to obtain ; only to keep up my fair Character with him, and to justify my Integrity and Honour. In the former manner, supreme Rulers are not accountable to any earthly Power. But in the latter way, Princes who are tender of their Reputation, commonly endeavour to lay open their Actions and Counsels to the View of the whole World : Which being done only to secure the Credit of their Reign, cannot imply the least shadow of Subjection. In the same manner, I may expend my Money and Fortunes at my own Pleasure, and as I see Occasion ; and yet I am willing to keep Books of my Accounts, to satisfy my Friends, that I am no ill Husband.

And then as for the other Point, the being obnoxious to Punishment, this cannot affect him, who owns no Court that can give him his Tryal, no Judge that can pronounce or execute Sentence upon him. For the Courts of Justice in a Commonwealth reach no farther than the Subjects, and are beholden to the Sovereign for all their Authority and Power. But if, as it frequently happens, Princes condescend to answer an *Action* in their own Courts in Matters of Debt and the like Cases ; this is not done, as if they acknowledged any superior Force, that could oblige and compel them, but only expresseth their Desire of seeing the Plaintiff's Pretensions clearly made out ; which, if they once appear just, they are ready to satisfy and discharge in a voluntary manner. Yet we speak here of hu-

man Punishment only, inflicted by a superior earthly Judge. For the Divine Justice finds many ways of shewing it self on those high and potent Sinners, who violate the Laws of Nature, in Contempt of all earthly Tribunals. *Reges in ipsos imperium est Jovis* ^a. *Princes are but the Subjects of Heaven*. As to what History ^b tells us of the *Egyptians*, that when their Kings had been ill Governours, they denied them the usual Honours of Burial ; this piece of Disrespect can scarce fall under the proper Notion of Punishment.

III. Farther, when a civil Power is constituted *Supreme*, it must, on this very Score, be supposed exempt from human Laws, or, to speak more properly, *above* them. As for the Laws of GOD and Nature, to bring them into the Question, would be no less absurd than impious ^c. Now human Laws are nothing else, but the Decrees of the supreme Power, concerning Matters to be observed by the Subjects, for the publick Good of the State ^d. That no such Edicts can directly oblige the Sovereign is manifest ; because his very Name and Title supposeth that no Bond or Engagement can be laid on him by any *other* mortal Hand : And for a Person to *oblige himself* under the Notion of a Lawgiver, or of a Superior ; is an impossibility ^d. Yet in an indirect manner and by way of Reflection, the Force of his own Ordinance frequently reacheth the Legislator, on account of natural Equity, and publick Decorum ; to excite and encourage Obedience in the Subject, by acting that himself which he prescribes to others, as expedient for the common Interest ; and lest by forbidding such Practices, as he is himself observ'd passionately to pursue, he should seem to envy others the Sweetness of Vice, and

^a Hor. *Ode* 1. v. 5, 6. L. 3.

^b Vide Diodor. Sic. l. 1. c. 72.

^c The Generality of Man-

kind imagine, that the principal Advantage of Sovereignty consists in not acknowledging any superior Power--- who then shall govern the Prince ? That Law which *Pindar* calls the living and supreme Directress of Men and Gods : not written in Books, or engraven in Tables ; but imprinted in a lively sense upon the Reason, ever residing and keeping a constant watch, nor suffering the Mind to be one moment without a Guide and Ruler. *Plutarch ad principem indoctum*, p. 78. c. See also upon the same Subject Mr. *Buddens's* Dissertation, intituled, *Principum Legibus Humanis, sed non Divinis solutum*. Printed at Hall in 1695.

Omne sub regno graviore regnum.

Monarchs must answer to a higher Throne.

^d Vide *Hobbes de Cive*, c. 6. s. 14.

Mr. BARBEYRAC'S NOTES on §. 111.

¹ Our Author is here guilty of the very same Error which I have taken notice of in the first Note upon this Section. For neither does this agree with Sovereigns whose Power is limited ; because, tho' they ratify and confirm the Acts which the Assembly of the People, or their Representatives, have pass'd relating to publick Affairs, the whole Management of which they are not willing to leave entirely to them ; and tho' these Acts derive their Power and their Authority immediately from them, yet however they cannot revoke 'em, or make any Alterations in them without the Consent of the People. It must still be observ'd, that what our Author here says, only regards the Actions of the Sovereign, and not the Effects which the Laws that he has abrogated may have already produced with respect to the Subjects. See Book I. Chap. VI. Sect. 6.

² V. *Grot. L. 2. c. 4. s. 12. n. 10*. *Gronovius* in his Notes on this place of *Grotius* cavils like a true *Grammarian* at the same time that he reproaches that great Man with a wretched piece of Sophistry (*Sophistica cavillatio*.) When the People, says he, make a Law, does not the Law it self oblige them to observe it ? Do they not make the Law above themselves ? Whence then proceedeth that Remark of *Titus Livy* (Lib. II. Cap. 1.) that from the Time of the Expulsion of the Kings out of Rome, the Empire of Laws, more powerful than that of Men, immediately began ? If each particular Man can bind himself by a Promise, or by an Oath, why should not a whole People be bound by the Laws of their own making ? The Law is, according to the *Civilians*, a general Convention of the Citizens (*Communis Reipublice Sponsio*, Digest. Lib. I. Tit. III. Leg. 1, 2.) and a sort of Oath, by which they engage themselves to certain Things : And this is the Reason why *Justin* calls the Laws of an antient Society of *Pythagoreans*, *Sodalitii Sacramenta* (Lib. XX. Cap. IV. Num. 14.) But *I. Grotius* had a mind, and certainly he ought to speak with a Philosophical Exactness, and not as *Gronovius* does, to dispute about a figurative Expression very common both in Antient and Modern Authors, as well as in common Discourse. Properly speaking, one cannot say that the Law is either above the Legislator who made it, or even those to whom it is prescrib'd ; with less reason than that the Law it self imposes on them any Obligation. The Obligation proceeds from the Authority of a Superior ; and every Superior is a Person, and not a Thing. If we are bound to obey the Laws as Law, it is not directly because it seems to be or is even really just, or advantageous to the Publick (otherwise we might dispense with observing those which only related to indifferent Things) but because it is prescrib'd by a Superior, who has a Right to demand our Obedience in every thing that is not contrary to the Laws of God or of Nature. Therefore when a free People establish Laws of their own accord to govern themselves by, every engross

engross it all for his own Possession and Prerogative. *The Life of a Prince*, says *Pliny* ^a, is a perpetual Censorship; by this we are turn'd and directed in all our Proceedings; and to secure our Obedience, we have ever more need of his Pattern, than of his Prescriptions. For Fear is a most unfaithful Guide to Virtue. Men are much better influenced into Goodness by the Power of Examples which at first sight, discover this Advantage in themselves, above all other Methods of Instruction, that they shew the Possibility of obtaining what they advise us to pursue. There is a Remark, not unworthy the Majesty of Kings, which *Athenæus* ^b hath made from the Reports of more antient Histories, that of the two great Monarchs in *India* and in *Persia*; the former was absolutely forbid to exceed the moderate Bounds of Drinking; and the latter allow'd his Liberty in this Respect, but one Day in a Year, at a solemn Sacrifice and Festival. *Claudian's* Admonition to the young Emperor was wise and proper;

*In commune jubes si quid, censeturque tenendum,
Primus jussa sibi: tunc observantior æqui
Fit Populus, nec ferre negat, cum viderit ipsum
Authorem parere sibi: componitur orbis
Regis ad exemplum; nec sic inflectere sensus
Humanos edicta valent, ut vita regentis* ^c.

Would you your publick Laws should sacred stand?
Lead first the way, and act what you command.
The Crowd grow mild and tractable to see
The Author govern'd by his own Decree.
The World turns round, as its great Master draws;
And Princes Lives bind stronger than their Laws ^d:

IV. For the better asserting and vindicating the just Pre-eminence of the supreme Power, especially in monarchical Governments, it will be proper to take under our Censure that vulgar Distinction of Sovereignty into *real* and *personal*; which seems, in our Judgment, to be not only very absurd, but of very pernicious Consequence,

Member indeed promises to observe 'em as long as they are in being, because with respect to him they are so many Ordinances of a Superior, or of the whole Body of the Community, to whose Will he has submitted himself. But the whole People are not bound by any Compact, because they cannot be superior to themselves. I own that if these Laws are consistent with the Good of the Society, they ought not lightly to be abolish'd, as long as things remain in the same situation. But it is not because they are Laws that have been imposed and establish'd as superior to themselves; 'tis only by virtue of the Law of Nature which the Creator and sovereign Legislator imposes one very particular Society, as well as on every individual Person, to take care of their own Preservation. II. The Consequence that *Gronovius* draws from the Obligations, into which we enter by Promises or Compacts, and by an Oath, is evidently false. When I make a Promise to any one, he whom I promise acquires from that Moment a Right with respect to me; and I am actually bound by my Word till I have accomplish'd it, or he acquits me of it. But who does acquire, by the Laws that a People establish to govern themselves, a Right by virtue of which he can demand of them not to abolish 'em? The same is to be said of an Oath: For, in every valid Oath the Divinity which we call to witness, acquires, if I may say so, a Right to demand the Performance of what we have sworn; whether the Oath be reduced to a sort of Vow, or whether 'tis only instead of an Accessory, as in the Engagements which we enter into with other People. See what I have said in one of my new Notes, Book IV. Chap. II. Sect. 17. Note 2. III. The Laws properly speaking can never be look'd upon as Conventions. See what our Author has said Book I. Chap. VI. Sect. 2. IV. In short, *Grotius*, as well as our Author, is here only speaking of the Civil Laws purely positive, and not of the Laws of Nature: For with respect to the last, nothing is more true than what *Pliny* the Younger says, *Non est princeps super Leges, sed Leges super Principem*, Panegy. *Trajan* Cap. LXV. Num. 1.

^a In Panegy. c. 45. n. 6.

^b L. 10, ex Otet.

^c De IV. Consul. Honorii, v. 296, &c.

^d Liv. l. 26. c. 36. Would You lay an Injunction on an Inferior? The most likely means to engage his Obedience, will be to apply Your self, and those about You, to the same Practice. *Plin.* l. IV. Epist. 22. towards the End. As in a Body, so in a Government, the most dangerous Disease is that which flows from the Heart. Vide *Justin.* l. III. c. 2. n. 8. The Old Persian Proverbs to this purpose carry much good Sense in a very odd Dress: If a King pluck but an Apple in a Subject's Garden, his Servants will root up the Tree. If a King allows his Soldiers the stealing of half a Dozen Eggs; their next Exploit will be to visit the Camp with Hens. *Rosar. Pertic.* c. 1.

^e Those are call'd Rights purely Personal, which are only lodg'd in the Person who is invested with 'em; and those Real Rights, which indeed suit with a certain Person (for that is common to all sort of Rights) but which are also in some manner fix'd to a certain Thing, which they always follow, so that whosoever acquires the Thing, has from that moment the Right, by that very Circumstance, that he lawfully possesses it. See *Grotius*, Lib. I. Cap. 1. Sect. 4.

^f L. 1. c. 3. f. 7.

if applied to this Sense, that there shall be suppos'd at the same time, in the same Monarchy, a *real* and *personal* Sovereignty; the latter to be lodg'd in the King, the former in the People, as oppos'd to the King; and that in this, as in most other Cases, the *real* Authority and Right shall have the Ascendant of the *personal*. Nothing can be more evident, than that such a Notion contradicts it self, turning every Kingdom into a Monster with two Heads, and exposing it to utter Convulsion and Ruine. The Necessity of this Distinction doth by no means appear from the Reason commonly alledg'd, that the King or the royal Family being extinct, the People so far return to their first Right and Freedom, as that they may at their Pleasure either choose a new King, or set up another Form of Government. It may as well be affirm'd, that we ought to suppose a *real* Power in a Servant, contradicting to the *personal* Power of his Master, merely because if the Master dies without Heirs, the Servant is at his own Disposal. Nor can any better Argument be drawn from the Position of *Grotius* ^f and others, that there is a twofold Subject in which the supreme Power resides, one *common*, the other *proper*; the former the whole State or Kingdom, the latter a single Person, or a Council, whether consisting of many, or of few. For the Sense of that Observation can be only this, if we ask in a general and confused manner, Where the supreme Power is lodg'd? The Answer will be, In the whole Commonwealth: But if we propose the same Question distinctly, and enquire what Person bears the Sovereignty in the State? It will be answer'd, The King, or the Senate, or the People. But who will hence infer, two distinct sovereign Powers, one *real* in the People, another *personal* in the Prince? This would be no less ridiculous, than to conceive two distinct Sights in a Man; one residing a *common* Subject, the Person; the other in a *proper* Subject, the Eye.

V. Many have taken the Liberty to assert, that the Power of the Prince neither can, nor ought to be superior to that of all the People. *Aristotle* seems very much to countenance this Opinion, in the sixteenth Chapter of his third Book of Politicks¹. And in the fifteenth Chapter of the same Book, he discourseth to this purpose², *A King ought indeed to be invested with Strength and Power; but in such a Degree, as that he shall be greater indeed than single Persons: And than many in Conjunction; yet still inferior to the whole Body of the People.* *Grotius* hath undertaken the Controversy with these Men; and the first Argument he urgeth against them is, that as each particular Man may give up himself in personal Servitude to another; so a whole People or Nation may transfer on a single Governour all their Right and Power over themselves, without Limitation or Restriction³. Tho' indeed, in other respects, it seems by no means fair to compare the Condition of Subjects, under an *absolute* Monarch, with that of Slaves. For as *Claudian* well observes.

*Fallitur egregio quisquis sub Principe credit
Servitium: Nunquam libertas gratior extat,
Quam sub Rege pio. — — —*

They grossly err, that think a slavish Chain
Binds 'em beneath a virtuous Monarch's Reign.
When Justice, Piety, and Goodness sway
The regal Power, 'tis Freedom to obey^d.

Grotius proceeds to reckon up several Causes and Occasions which may induce a People to re-

nounce all their Right in this manner, and yield it up into the Hands of an absolute Lord. Many of these we find put together by *Tully*: *Men*, says he, *subject them selves to the Power and Command of another, for several Reasons. They are led by Kindness and good Will, by extraordinary Benefits, by superior Worth and Excellency, by the Hopes of Advantage, and by the Fears of Compulsion: large Promises of Bounty and Favour; and lastly, as we have seen it often happen in our Commonwealth, by downright Wages and Hire.* But those Cases which *Grotius* chooseth to insist upon are, if a People should chance to lie under manifest Danger of Ruine from an Enemy, and have no other means of being deliver'd, than to put themselves, without any reserve, under the Command of their Protector^e: Or, if being in Distress with violent Want, they cannot otherwise procure Sustenance and Support^g: If a Father of a Family, having large Territories, should refuse to admit any Person into his Lands, but upon Covenants of absolute Subjection: Or if a Master, who possesseth a vast Number of Slaves, should give them their Freedom on the same Condition. Besides, it's possible, that such a Form of Government may suit with the Genius of some particular People. Nor ought the Desire of living under an absolute Monarchy to be always judg'd a Token of a low and abject Spirit, tho' it hath usually lain under this Censure in the Opinions of Persons born in Democracies; who, on that Score, will never pardon the *Cappadocians* for refusing Liberty, when offer'd them by their *Roman* Conquerours^h. But on the contrary, to any People, amongst whom there are a Number

Mr. BARBEYRAC'S NOTES on §. V.

¹ In the Beginning: Where he cites the Reasons of those who are of Opinion, that *Absolute Monarchy* is contrary to Reason. For that Philosopher calls an *Unlimited and Absolute Monarchy*, a Government where the King manages as he thinks proper all the publick Affairs with the same Authority, as a Father commands in his Family, and a Commonwealth governs it self. In the seventeenth Chapter *Aristotle* decides this Question according to his Ideas; and says, that as the Temper and Genius of every People require one certain Form of Government more than another, if in a Nation proper for Monarchy, there be any Person or Family that surpasses all the rest of the Subjects in Virtue that then it is equally just and advantageous to the State, that that Person, or that Family, should reign with an absolute Power. Therefore that Philosopher does not assert that no King can ever be above the People, tho' our Author seems here to charge him with it. The Qualifications that *Aristotle* requires in an *Absolute Monarch* are very rare; and that gives room to Mr. *Sibney* in his Discourse upon Government (Chap. III. Sect. XXII.) to maintain, that that Philosopher supposes a Man that is not to be found in the World, to insinuate by that, that we ought not to trust any one whatsoever with absolute Power. But perhaps *Aristotle*, never conceiv'd any Idea of a perfect Virtue, and that only supposing Men to be as they generally are, he design'd only to exclude those enormous Vices which denominate a Tyrant. Besides, our Author here cites another Passage out of *Aristotle*, which does not at all relate to the Superiority of the People above the King, but only to the Strength and Power with which the King is invested to put his Laws in Execution, and to restrain his rebellious Subjects. *He ought, indeed to be greater than every Subject in particular, or than many in Conjunction, but still inferior to the whole Body of the People.*

² *Ibid.* l. 1. *Gronovius* here also finds fault with that great Man; but his Censure is no better grounded than that mention'd in our fourth Note, Sect. 3. He takes abundance of pains to prove that when a King degenerates into a Tyrant, and governs in a manner manifestly tending to the ruin of the State; or if he violates the fundamental Laws, to which he has sworn to conform himself, the People may resist him, and free themselves from that unjust Subjection. But this is what *Grotius* himself owns in express Terms, Cap. IV. Sect. 7. Num. 1, 2, 3, 4, 5. And Sect. 11, 13, 14. All that he pretends to establish in the place here mention'd is, that the *sovereignty does not belong to the People always, and without Exception, so that they may resist and punish their Kings as often as they abuse their Power.* So that *Gronovius* might have sav'd himself the Trouble of refusing what his Author does not maintain.

^a Towards the End.

^b *Vid.* Exod. xxi. c. Levitic. xxv. 39. *Add.* Selden, *De J. N. & G. sec. Heb. l. c. 7. V. L. 40. t. 12. l. 37. D. De liberali causa, & C. L. 7. t. 16. l. 10. D. d. t. l. 7. & l. 33. & D. Quib. ad Libert. proclam. non licet. L. 45. t. 13. l. 4. & L. 28. t. 3. l. 6. f. 5. D. De injust. Testam. &c. Novel. Leonis. LIX. Caesar reports of the ancient Gauls, that amongst them, most of the inferior Populacy, when oppress'd, either by Debts or Taxes, or the Injuries of too powerful Neighbours, fix'd themselves as Vassals on some of the Nobility, who enjoy'd all those Rights over them, which Masters ordinarily bear over their Slaves. *D. B. G. l. VI. c. 13. n. 2. c. De laudibus Strabon. L. 3. v. 113, &c.**

^d There is an excellent Saying to the same purpose in *Philostrat. De Vit. Apollon. l. 5. c. 12. p. 245. B. Ed. Morel. As some one Man in a Commonwealth, highly surpassing others in Wisdom and Virtue, seems by his good Management to turn the Popular Government into the Command of a single Person; so a single Person reigning Sovereign in a State, if he direct all his Counsels to the Publick Good, seems to express, in his Authority, the Freedom of a Popular Government.* *Add. Hobbes De Civ. c. 10. f. 8.*

^e *Offic. II. c. 6.*

^f *Vide Liv. l. 7. c. 31.*

^g *L. de Genes. xvii. 19.*

^h *Vide Strabo, l. 12. p. 273. & Justin. l. 38. c. 2. 'Tis a Saying of Euripides, in (Helen. v. 283) and 'tis no more*

Τὰ Βασιλέων δόξα πάντα πλὴν ἑνός.

In Barbarous Kingdoms all are Slaves but One.

of proud, insolent, aspiring Men, impatient of Equality, a popular Liberty must be the most pernicious thing in the World; and yet the same Men very contentedly submit to a monarchical Government. For they had rather serve One, and lord it over all others in the State, than live on the common Level; and, as *Aufonius* says ^a, *For the Sake of commanding, they are willing to obey.* The Eastern Nations have been of old, and are still so accusom'd to Monarchy, that we are told the *Chinese* could not form any Notion of the *States of Holland*, having heard of no Government, but that by Kings ^b. And a *Venezian Traveller* ^c reports, that the King of *Pegu*, when he was inform'd, that the sovereign Power at *Venice* was lodg'd in the *Senate*, burst out into a Fit of Laughter, taking it for a meer Jest in Politicks. On the other side such Men are fit only to live in a popular State, as have moderate Spirits and easy Passions, and know how to rest satisfied with the same humble Condition as their Neighbours. Lastly, it often falls out, that free States are by intestine Divisions brought into such Circumstances, as that they cannot be safe otherwise than under the absolute Command of a single Person; and, as *Lucan* observes,

Cum Domino Pax ista venit &c. —

They gain a *Master* when they gain a *Peace*.

VI. It may, perhaps, seem more to the purpose, to examine the Reasons of those Men, who are so fond of exalting, above Kings, that *real Sovereignty* of the People, which they have fram'd in their own Fancy. They tell us, then, that all Kings are constituted by the People, and that 'tis natural the Parties, who confer the Dignity, should be superior to the Parties who receive it. Now, as to this Point it must be observ'd, that altho', in the constituting of all Kings, the People interpose their Consent, yet there is a great Difference in the manner how such Consent is obtain'd and applied. Some Nations take a King upon their own free and voluntary Motion: Others under the Distress of War, or some other great Necessity, receive the same kind of Government; which they would have been very far from desiring, had they not been driven to it by these Misfortunes. It is agreeable to the common Usage of Speech, to say, that those Princes only are constituted by the People, whom the People appoint by their own free Act. On the other hand, those who extort the Peoples Consent by Arms, or the like means, are not said to have been made by the People's Appointment, but to have subjected the People to their Command. But farther, then only the Parties who constitute another are properly superior to him, when it is always in their Power to determine how long he shall possess the Dignity with which they have

once invest'd him. Whereas, in many Cases, it is at first a Matter of free Pleasure and Choice to appoint the Person, and yet the Appointment, being once made, becomes necessary and irreverfible. Others answer the same Argument with this Distinction; a Man may constitute another, either over a third Person, or over himself. In the former Case, the constituting Party is superior to him whom he thus constitutes. For 'tis suppos'd before-hand, that the third Man, both was, and still is, under the Power of him, who thus sets a new Ruler over him. Whence it follows, that this new Ruler must depend on the Will and Pleasure of the old. For since *no one can serve two Masters*, unless in Subordination; I cannot appoint another Lord over my proper Subject, without making him accountable to my self: And consequently, he is no more than a subordinate Governour. Thus a free State, when it gives a General the full Command of its Soldiers, was and still is superior to him and them. But he, who constitutes another with Authority over himself, can no more be suppos'd to continue superior to him, than he can, at the same time, and in respect of the same Person, command and obey.

But 'tis farther urged on the other side ^f; that since all Government is instituted for the sake of those who obey, not of those who rule; or, since the King is made for the People, not the People for the King; on that score, the People must be superior to the Prince: In as much as that, for which another thing is ordain'd, seems more noble and excellent, than what is thus fram'd on its account. Here the Assertion, if held in general, is false; for all Government or Command is not instituted for the sake of those who obey; as is clear in the Authority of Masters over their Servants: Altho' the Master cannot indeed well enjoy the Fruits of his Sovereignty, unless he take some Care of those, who are thus placed in Subjection under him. Besides, the Question is not, whether the Person of the Prince be of more value than the whole People; as it is in case either he or they were necessarily to perish: But, whether, since civil Government is set up for the Benefit of the Community, the means of procuring this End should be determin'd by the Judgment of those, who have submitted their Wills to the Will of the Prince, or by him, to whose Prudence and Conscience the Administration of Affairs hath been given in Charge.

Some, because we read of the Peoples being punish'd for their Princes Sins, thence infer, ^g that the People had a Power to restrain them from sinning, which cannot be suppos'd, without a right superior to the regal Authority ^h. For I am not chargeable with the Guilt of another Man's Action ⁱ, when I contributed nothing to it. But 'tis impossible to conceive how the People can partake in the Sin of their Prince, at which

^a ——— *Et dominum Ut possint, servare volunt.* — Idyll. 15 v. 37, 38.

^c Caspar Baibi, in *Elmorum*.

^d *L. b. 1. Pharsal. v. 670.*

^b Neuhof. in *L. g. t.*

^e Our Author hints at, especially, the famous Book, intitul'd, *Vindicie contra Tyrannos*. See Question III. of that Book, p. 67, *&c.* Ed. *Francos.*

^f *V. Grot. L. 1. c. 3. § 8 n. 13.*

^g *P. Grot. ubi supra, §. 14.*

^h See the *Vindicie contra*

Tyrannos Junii Boniti, p. 29, &c.

ⁱ *V. Grot. ubi supra, c. 16.*

they are heartily displeas'd, unless by neglecting to use some proper Method of Correction. In answer to what is thus urged, we take it for a certain Truth, that the Sins of the Princes do not directly, and on their own account, derive any Guilt on the Subject, unless the Subjects themselves have contributed some positive Assistance to them ^a. But they cannot contract a Guilt from the Omission of any Restraint or Punishment; because being inferior to the Prince, they had neither Power nor Obligation to apply such means of reclaiming him. For as our Ability, so our Duty of hindring another Man's Sins, ariseth from our Power over him, or from such an Authority, as implies our Right of directing and controlling his Proceedings. Therefore, what the Prince acts, before he receives that Dignity, certainly cannot affect the rest of the People; since *Equals* have no Command one over the other. No more can the Subjects be charged with what he commits after his accession to the Crown: Since 'tis ridiculous to say, that those who, during his private Station, had no Command over him to restrain him from offending, whilst he was in all Points their Equal, should then at last obtain such a Command, when they gave up themselves to his Direction and Sway. Nor doth that Act or Covenant, by which Subjects invest a Prince with *absolute* Power, by any means make them partakers of his Sins. For by such a Covenant the People do not indulge an Impunity to the King, but only leave him in Possession of that which he before enjoy'd by virtue of his natural Liberty: Since he could not exercise the supreme Authority, were he not exempt from human Punishment.

What some urge, that, as he who hath given himself up for a Slave, still keeps a Right of recovering himself from that State; so a People, who have submitted to the Yoak of Monarchy, retain an equal Right of reassuming their Freedom: This no Man in his Wits will allow for Truth, unless it be added, as a necessary Condition, that such a return to Liberty be made with the Consent of the Master, or the Prince, by their voluntary receding from that just Right and Authority, which they had before obtain'd over the Servant, or over the Subject ^c. Besides, 'tis a groundless Assertion, to say, that a People, to whose Temper and Disposition an absolute Monarchy was once agreeable, when they have, in Course of Time, worn off their servile Genius, may re-establish themselves in a free Commonwealth. For if such a Case should happen, it will be incumbent on the Prince, so far as Prudence permits, to humour this Change of Inclination in the Subject, by

softening the Rigour, and varying the Measures of his Reign. No less ridiculous is it to infer, that because a Master or Proprietor, who abuseth his own Possessions, may be punish'd, or deprived of his Goods, therefore a Prince too, who makes ill use of his Power, may be corrected and reduced to Reason. For that which makes such a Proceeding lawful in the former Case, is the Prince's superior Right over the Goods of the Subjects, which 'tis the Interest of the whole Community to preserve from being thrown away to no purpose. But who will pretend, that the People have a kind of Prerogative, or a more eminent Right over the Rights of their King; or, that they are Masters to their own Master?

As for the Sayings of some Princes, produced in favour of the opposite Opinion, it cannot be denied, but that many such fine Speeches have been used out of a principle of Ostentation. But they will all fall under this general Answer, that a Prince ought indeed to direct every thing to the Good and Safety of his People: But the People are not thereupon invest'd with a Power of punishing him, as often as they shall judge that he applies wrong Means towards the obtaining of that End. Alike senseless and trifling it is to argue, that, in as much as the People have not a Right of destroying themselves, or of practising any grievous Cruelty on their own Bouy, therefore they can transfer no such Right on the King. For who ever maintain'd, that Princes had a Right of destroying their People? We shall hereafter make it appear, that absolute Government is by no means so formid'le a thing, as these Men are willing to fancy: And how far a People may proceed, in case the Prince manifestly seeks their Ruin, will be likewise consider'd in its proper place ^d. When we are told of the antient *Consuls*, and other Magistrates, said to be plac'd over the People, and yet frequently reform'd by the Peoples Censure and Punishment; these Allegations are vain and idle, the Instances not coming up to the Question ^e.

Lastly, as to what is objected from Scripture History, that the *Jews* threw off the Yoak of the *strange Nations*, when they seem'd to have been sufficiently chastis'd for their Rebellion against GOD; we thus reply, that either they still continued in a state of War with those Nations, never engaging their Faith, or submitting as true Subjects; and so they had a Right of treating their Oppressors as Enemies: Or else, they acted in these extraordinary proceedings by express Command from Heaven; which if it seem to intrench on the common Measures of *Right*, is no Precedent for the Imitation of others ^e.

^a Lucipid. *de Jure*. l. 1. c. 879, 881.

----- The State which suffers in its Fame
For a bad Prince, it self is innocent.

^b The Argument urged from *Gen. xxiv.* is sufficiently answer'd by *Grotius*, in the place above quoted. See also marked Passage in *Martinius Hieronimus de Jure* (l. 2. c. 1.) applicable to the same Chapter, v. 17.

^c *Plut.* Nearchon Cyrop. l. 3. *princip.* ^d *Gen. p. 6.* ^e *Aut. sanction De Obligat. Consulat. Prælat. IX. § 16, &c. & Prælat. II. §. 13, 16, 22, 23.*

MR. BARBEYRAC'S NOTE on §. VII.

¹ For these Consuls and Magistrates were not Sovereigns, but the meer Ministers of the People.

VII. To proceed, nothing is more apparent, than that in some States the ruling Power (especially, if monarchical) is free in its Proceedings; in others, it is restrain'd to a particular manner of acting: Which Difference gave Occasion to the Distinction of Sovereignty into *absolute* and *limited*. And here we think our selves oblig'd, in the first place, to explain, with what Accuracy we can, the proper Signification of this Term *absolute*; which bears a hateful Sound in the Ears of Persons born under free Governments. Indeed the Word, if fallly applied and understood, may encourage ill Princes to grieve and oppress the State, and to commit the worst of Disorders. Especially, since there will be seldom wanting a Tribe of Flatterers to second the Motion, and under this fair Pretence to feed and inflame the Ambition, and other Vices of their Master. ' *You are absolute*, will they say, ' therefore your Pleasure is your Law: ' Therefore waste your Subjects and your Neighbours ' with unnecessary Wars, to procure your self ' the Name of a great Commander: ' Therefore, ' take the Liberty of treating with Insolence and ' Abuse, whomsoever you think fit: ' Therefore, ' drain your People with Rapines and Exactions, ' to supply your Luxury, or your Pride. A high Strain of this parasitical Rhetorick was that which *Anaxarchus* used to *Alexander*, when under Discontent for his Murther of *Clytus*; he told him, ' That Justice was therefore feign'd by the ' Poets to sit on the same Throne as the Gods, ' or to stand behind *Jupiter's* Chair, that Men ' might apprehend and acknowledge whatever a ' King acts to be good and right ^a.

Nay, there are Authors, who upon profess'd Principles maintain the absolute Right of Kings, by such Arguments and Reasons, as if they measured it only by a general Impunity, and a Licence to oppress and spoil the People. The true State of the Point then is this: As we cannot conceive, in single Persons, a higher and more absolute Liberty, than that they shall determine and dispose of their Goods and Actions, not by the Will of another, but by their own Judgment and Pleasure, yet still with a full Obedience to the Law of Nature; and as this Liberty naturally belongs to all Persons, who are not subject to the Command of others: So, where many Men cleave together in an establish'd State, there too, as in a *common subject*, must necessarily reside the same Liberty, or the Power of choosing, by their own Judgment, all Means and Methods tending to the Preservation of the whole Society. And this Liberty is attended with an *absolute Command*, or a Right of prescribing those Means to the particular Members, and of compelling them to a due Obedience and Conformity. Therefore in every State, properly so call'd, there must always be such an *absolute Authority*, at least in *Habit* and *Power*, if not always in *Exercise* and

Act. For 'tis a Contradiction to say, that such a Community is obnoxious or subject to none, but purely free and independent, and yet that it hath not a Right of administering its proper Affairs by its own Inclination and Judgment. And that this *absolute* Sovereignty implies nothing that can be term'd unjust or intolerable, we may easily apprehend from the End of civil Establishments and Communities. For these publick Bodies were never instituted with a Design, that Men should throw off the Restraints and Commands of Nature, and run into all the Extravagancies of evil Lusts; but that, by the united Strength of a Multitude, a better Provision might be made for the Interest and Security of each Member; and consequently, that we might be put into an easier and safer Course of observing the Edicts of natural Law.

VIII. But when we consider the supreme Power, as it inheres in one Man, or in a Council, whether of all, or of a few, as in its proper and peculiar *Subject*; it is not every where thus free and absolute, but in some places we find it under the Restraint of certain Rules and Laws. Indeed, as for Democracies, the Distinction between *absolute* and *limited* Sovereignty is not in them so easily discoverable. For although, in every such free State, there must be some settled Rules, founded either upon Custom, or upon written Law, determining at what Time, and by what Persons, the People shall be call'd together, publick Affairs propos'd, and the Resolutions executed (for we can form no Notion of a civil Community without these constant Methods of proceeding) yet since the Council, in which the Sovereignty resides, consists of all the People, and consequently every Man is there who *obtains any Right* by such Rules or Orders; therefore nothing hinders, but that the People thus assembled may, at any time, alter or repeal them: b. *Anacharsis* in *Plutarch* ^c laugh'd at *Solon* for hoping that he should be able to curb the Injustice, and the other Vices of his Countrymen, *by written Ordinances, things of no more Strength than Cobwebs*: *Solon* wisely answer'd, that Men commonly stand to Bargains and Agreements, when it is the Interest of neither Party to break them: And that he would so frame and temper his Prescriptions, as to make it evident to all Persons in the State, that it would be much more for their Benefit and Advantage to obey the Laws, than to transgress them. But the Event of Things confirm'd the Judgment of *Anacharsis* rather than the Hopes of *Solon*. The most likely Means that can be thought of, for the ensuring and perpetuating these Decrees, is for the People to bind themselves by a solemn Act of Religion, that they will ever observe them: As was practis'd in *Rome*, with regard to the Law prohibiting regal Government. Yet whether such an Oath is any longer obligatory;

^a Plutarch. *ad Princip. Indo*. p. 780. And so in *Sophocles, Antigone*. p. 234. Ed. H. Steph.

Kings have large Privileges; and, in chief,
The Power to act or speak whatever they please.

^b Add *Mauroceni Hist. Venet.* l. 13. p. 517, &c.

^c In *Solon*, p. 81. A. B.

when none of the Persons survive who first engaged in it, hath been the Subject of a former Enquiry a. *Cæsar* found an easy piece of Sophistry to elude such a publick Constitution. The *Roman* People had laid up a certain Sum in the Treasury, with a solemn Execration of any one that should dare to touch it, unless in case of an Invasion from the *Gauls*: *Cæsar* laid Hands on the Money, and solv'd all Scruples with this *Bravado*, that by subduing the *Gallick* Nation, he had at once freed the Commonwealth from their Oath, and from their Enemy b. *Herodotus* c informs us, that the *Athenian* Lawgiver but now mention'd made his People swear, that they would not reverse one of his Ordinances within the Space of Ten Years. Others have endeavour'd to preserve such publick Rules, by decreeing a Penalty against any Person, who should move to have them repeal'd; tho' the Penalty, in this Case, may as well be abrogated as the Law. Thus the *Thasians* made it Death for any Man to propose a League with the *Athenians* d. And the *Athenians* themselves denounced a Fine against him who should prefer a Bill for the Recovery of the Island *Salamis* e. *Charondas* decreed amongst the *Thurians*, that whoever attempted to correct or alter the settled Laws, should come into the publick Assembly with a Halter about his Neck f. In the same manner *Xenophon* g reports, that by an Order of War in *Cyrus's* Expedition, it was declared capital for any Person to speak of dividing the Army.

But in Aristocracies and Monarchies, where the Persons governing are different from those who are governed, and consequently where the latter may obtain a Right by the Pacts and Promises of the former, the Distinction between absolute and limited Sovereignty is clearly discernible. He then, under such States or Kingdoms,

is properly *absolute*, who exerciseth the publick Administration by his Judgment, not according to any settled Rules or perpetual Decrees, but as the various Conditions of Affairs seem to require: Or, in short, who procures the Safety of the Commonwealth by such means as his own Prudence suggests, in every Exigency of Things and Times. And in this Sense the Term *absolute* is so far from implying any thing that looks odious and tyrannical, that it lays on Princes a Necessity of applying a stricter Care and Caution, than those who proceed in all Business by constant Forms; if they would fully satisfy their Conscience and their Duty. *Dio* the Orator h speaks admirably to this purpose: *A good Prince*, says he, *covets nothing, because he thinks himself to possess all things: He abstains from Pleasures, because he knows they are all within his reach, if he should be inclined to make use of 'em: He is juster than all others, because he knows himself to be the Fountain of Justice to the whole State: he takes a Delight in Business and Labour, because he engageth in it by his own free Motion: and he loves the Laws, because he doth not fear them. And in this way of arguing he proceeds truly and rationally. For who hath need of greater Prudence, than one who is to steer and direct such important Affairs? Who of a stricter and more accurate Justice, than one who is above the Laws? Who of a more tender Modesty, than one who hath a Licence to do all things? And who of a more resolute Courage, than one, who is by his Office the common Guardian and Protector?*

IX. But since, in consulting the publick Safety, the Judgment of a single Person may easily be deceiv'd; and since all Men are not arriv'd at such a Strength of Soul, as to be able to rule their Passions under so vast and so tempting a Liberty; many Nations have thought it the more secure and prudent Course, not to put so un-

a B. 4. c. 2. f. 17.

b Appian. Alexand. de Bell. Civ. l. 2.

c Clio.

d Polyæn. Strateg.

l. 2. c. 33.

e Plutarch. Solon. p. 82. B.

f Diodor. Sic. l. 12. c. 17.

g Περὶ ἀρχαῶν. l. 6.

h Orat. 63. de Regno. & Tyranno. p. 588. A. B. Ed. Morell.

MR. BARBEYRAC'S NOTE on §. IX.

This is what *M. Antoninus* acknowledges in *Herodian*, B. 1. c. 8. Ed. Oxon. *καλεπὸν δὲ μετρηταί τῶν ὀντων ἐπιβῆναι ἐπιθυμίας, ὑπερβύσους ἐξουσίας*. This is a Quotation of the Author's. *Plato* said long before that time, that tho' a Prince should be perfectly instructed in the Maxims of true Politicks, yet if he were to be accountable to none, he will not be able during the whole Course of his Life, to have only in view the publick Good and to prefer it always to his own private Advantage: The Propensity of human Nature, which inclines to seek Pleasure, and rashly to avoid Pain, will constantly put him upon trampling under foot the Laws and Interest of the State, to satisfy his immoderate Desires, and to bring at last, by that means, both upon himself and the Publick an infinite number of Evils. *Εάν ποτε ἢ τὸ γινώσκαι τίς ὅτι ταῦτα ἔγωγε πύρουκα*, &c. de Legibus, Lib. IX. p. 87 c. B. C. Edit. Serran. As for the rest, I refer the Reader to *Mr. Sidney's* Discourse upon Government, Chap. II. Sect. XXX. where that skillful Politician shews for several Reasons, and by a great number of Instances, how very difficult it is for a Monarchical Government to be regulated as it ought to be, when it is not limited by some Laws; and I shall content my self with only relating the following Words taken from another place of the same Author. 'If the Rulers of Nations be restrain'd, not only the People are by that means secur'd from the Mischiefs of their Vices and Follies, but they themselves are preserv'd from the greatest Temptations to Ill, and the terrible Effects of the Vengeance that frequently ensues upon it. An unlimited Prince might justly be compar'd to a weak Ship, expos'd to a violent Storm, with a vast Sail, and no Rudder. We have an eminent Example of this in the Book of *Esther*. A wicked Villain having fill'd the Ears of a foolish King, with false Stories of the *Jews*, he issues out a Proclamation for their utter Extirpation; and not long after being inform'd of the Truth, he gave them leave by another Proclamation to kill whom they pleas'd, which they executed upon seventy thousand Men. The Books of *Ezra*, *Nehemiah*, and *Daniel*, manifestly discover the like Fluctuation in all the Councils of *Nabuchodonosor*, *Cyrus*, *Darius*, and *Artaxerxes*.—If a frantick Fit come into the Head of a drunken Whore, *Persopolis* must be burnt, and the Hand of *Alexander* is ready to execute her Will. If a dancing Wench please *Herod*, the most venerable of all human Heads must be offer'd in a Dish for a Sacrifice to the Rage of her impure Mother. The nature of Men is so frail, that wheresoever the Word of a single Person has had the force of a Law, the innumerable Extravagancies and Mischiefs it has produc'd have been so notorious, that all Nations, who are not stupid, slavish, and brutish, have always abominated it, and made it their principal Care to find out Remedies against it, by so deciding and balancing the Powers of their Government, that one or a few might not be able to oppress and destroy those they ought to preserve and protect. This has always been as grateful to the best and wisest of Princes, as necessary to the weakest and worst (Chap. III. Sect. XLIII.)—*Moses* was a Man of as great Parts as any in the World, and yet could not bear the weight of Government alone; and therefore GOD chose out several Persons to ease him of it.—Power, as *Theopompus* King of the *Lacedæmonians* says very well, was secur'est when 'twas less courted and less hated. Book II. likewise *Mr. Titius* Obf. in *Pufen*. DCI. bounded

bounded a Power entirely into the Hands of one Man, who can neither be infallible in his Understanding, nor inflexible in his Will; but rather to prescribe to him a certain Method of governing: It having been first discover'd, that these fixt Rules and Forms of publick Business, are agreeable to the Genius of the People, and the Constitution of the State. Nor is this Limitation of Power an Injury to those Princes, who owe their Crown to the free Gift of the People. For if they thought it hard to receive an Authority, which they could not exercise at their own Pleasure, they were at Liberty to have refused it. But when they have once accepted of the Sovereignty under these Conditions, the solemn Oath by which they engage to observe the Conditions, utterly forbids them to use any Means, whether of secret Contrivance, or of open Violence, in order to subvert the Laws of the Kingdom, and render themselves absolute. Because, as *Pliny*^a observes, *No one ought more religiously to observe his Oath, than he who hath the greatest Interest in not being forsworn*.

'Tis a very poor Argument which some make use of, when they tell us, that since Princes are ordain'd by God, and since he hath commanded them fully to discharge their Duty, which cannot be done without the Exercise of the sovereign Power; therefore we ought to suppose, that God, by the same Act, gives them such a certain Measure of Authority; of which as they ought not to suffer themselves to be in the least abridg'd; so the People cannot, with any Justice, desire to make an Encroachment upon it; nor, if they did, could they be able to blind the Prince, by a Contract so prejudicial to his Right, and to the Trust which he receiv'd from God. At the same rate, they say, a Wife might engage her Husband, by Covenant, to wink at her stolen Amours: So as to answer the Poet's Character.

— — *Doctus spectare lacunar,*
Doctus et ad calicem vigilantium stertere naso.

Who his taught Eyes up to the Ceiling throws,
And sleeps all over but his wakeful Note.

Mr. Dryden.

Or the Bargain might be mutual;

Ut faceres tu quod velles; necnon ego possem
Indulgere tibi:

The Parties should be pleas'd on either side;
And both may for their private Needs provide.

Mr. Dryden.

But, as we have already evidenced the Origin of Sovereignty to be from God, so we take it for a certain Truth, that it was left to the Pleasure and Judgment of Men to choose what particular Form of Government they thought

most convenient; except where civil Laws have been divinely instituted, by the extraordinary Interposition and Appointment of Heaven. 'Twas a wise Saying of *Melancthon*^b, *States and Kingdoms differ in their Frame, some admitting Liberty in one Degree, some in another. But God approves of all Forms of Government, which are agreeable to Nature, and to Reason.* None will pretend that when a free People are about to elect a King, one Candidate can plead the divine Designation more than another: Or that there is any peculiar Form of Words establish'd by GOD himself, under which the Investiture of Sovereignty must necessarily be made.

Nor will the famous Description of a King by *Samuel*^c, do these Authors any Service, which they expound as a general Right belonging to every Monarch; whilst others will have it to be a bare account of Matter of Fact, what some Kings will do, tho' none may justly do it. *Grotius*^d takes the middle way between these contrary Interpretations, and tells us, that the Prophet's Words do neither express a Matter of Right, nor yet a bare Fact, supposed to be wrong and injurious; but such a Fact as carries in it the Force or Consequence of a Right, tho' it hath not the Foundation; and this Force or Consequence is, that it obligeth the Subject to Non-resistance: In other words, that however the Prince may in Actions violate his Duty, yet the People have no more Licence to oppose his Proceedings, than if he did nothing but what was highly just and equal. And on this Account he observes it to be, that *Samuel* foretels the People, they should cry to GOD under these Oppressions; intimating, that the Things were above human Relief or Remedy. In fine, he says, such Acts as these in Kings may be term'd *right*, by the same way of Speech, as when the Civil Law^e affirms the Prætor *jus reddere*, to do Right, even when his Sentence is unjust. But the true Import of that place of Scripture may perhaps better appear, if we take this plain and easy Method of explaining it. The Jewish Nation had hitherto liv'd under a Democracy, but such a one as often bore the Semblance of that kind of Government on which *Aristotle* bestows the Title of *Heroical*. Their Judges, rais'd up for the most part by divine Impulse, either deliver'd them from their Oppressors by War, or administer'd Justice in Peace: Yet, in ordinary Cases, they had more Authority to persuade, than Power to command: And no Taxes were allow'd them beyond the standing Revenues to increase their Strength, or to adorn their Dignity^f. At length the People, grown weary of this Constitution, desir'd a King, after the manner of other Nations; that is, one who should shine with external Pomp and Grandeur, and should either keep a constant Body of regular Forces, or at least should train up the Subjects to Arms, that they might be ready to make Head against any sudden Invasion g. When Matters stood thus in the Peoples Opini-

^a *Paneg.* c. 65.

^b *In Epitom. Morul. Philos.*

^c *1 Sam.* viii. 11, &c.

^d *L.* i. c. 4. l. 3.

^e *L.* i. r. i. l. 11. D. *De Just. & Jure.* This is what *Pedo Albinovanus* calls, *Jus injustum*, *Eleg.* I. *Verf.* 54. *Edit.* *Gorall.*

^f *Add. Grot.* ad *Judic.*

^g See *1 Sam.* xiii. 2. xix. 48. 52.

Mr. BARBEYRAC'S NOTES on §. IX.

¹ See *Sisney* upon Government, C. 3. S. 14.

² *Juvenal. Satyr.* i. v. 56, 57.

³ *Juvenal. Satyr.* 6. v.

281, 182.

⁴ In the Third Chapter of this Book.

nion, *Samuel*, to put them upon a serious Deliberation, before the thing was past recovery, sets out to them, in lively Colours, the Rights of such a Sovereign, and the Inconveniences which would attend the Government. You would have a King, says he, who should appear with State and Magnificence: why, to compass this End, he must be attended with a numerous Train of Guards; therefore, *He will take your sons and appoint them for himself, for his chariots, and to be his horsemen, and some shall run before his chariots.* You would have a King, who should be furnish'd with a standing military Force: It will be necessary therefore for him, to *appoint captains over thousands, and captains over fifties*, out of your Sons, who might otherwise have been employ'd in the Improvement of your private Estates. Again, the Care of publick Affairs will not allow such a King to undertake the Culture of his own Lands; therefore he will take your Sons to *ear his Ground, and to reap his Harvests*; as likewise, to *make his instruments of war, and instruments of his chariots.* Besides, since his Court will be large and full, and since it will be beneath the Dignity of his Wives, or Daughters to govern the Kitchen, and to provide Sustenance for so vast a Household; *he will take your daughters to be co-factionaries, and to be cooks, and to be bakers.* He will have Occasion for a Multitude of Officers, to inspect and regulate the Affairs of War and Peace; and all these must have their fix'd Salaries to reward their Service; for which purpose, *he will take your fields and your vineyards, even the best of them, and give them to his Servants: And for the same use he will require the tenth of your Cattle.* And, after all, if need be, he will not stick to *take your servants, and your beasts, and put them to his work.* In a word, if you resolve to have a King, you must maintain him like a King, and settle a large Revenue for his support; and should you afterwards grow weary of the Burthen, you cannot lay him aside at your pleasure; your Election having given him such a Right to the Crown, as may not be taken from him without his Consent. It is plain then, on the whole, that this Passage in the Scripture-History doth by no means patronize ill Princes, nor doth contain any certain Measure and Standard of regal Power, there prescribed by God in

the manner of a Law, so as to be incapable of receiving Addition or Diminution from any human Agreement; but that the Prophet barely enumerates the Burthen and Charges of a monarchical State, whether absolute or limited. 'Tis certainly therefore left to the Judgment of a free People to determine, whether they shall confer the Sovereignty on a Prince in an absolute manner, or whether they shall bind him to certain Conditions; provided these Conditions imply nothing, which is either impious towards GOD, or destructive of the proper End of Government. For although it be true, that Men first entred into regular Bodies and States, upon their own free Choice, yet in as much as they were always under the Command of the Law of Nature, they ought, on all accounts, to institute such Rules of Sovereignty and of civil Obedience, as should be conformable to that Law, and to the just Design of political Societies.

X. But that we may rightly apprehend what Promise or Engagement (for all have not the same Force) is required to the rendering a Monarchy *not absolute* (and the same will hold of an Aristocracy) we must observe that a King, at his undertaking the chief Government, binds himself to the due Discharge of it, either by a general, or by a particular Promise, to which is usually added the Confirmation of an Oath. A general Promise may be made either *tacitly*, or *expressly*. A King, by the Act of accepting the Administration, is supposed *tacitly* to engage, that he will conscientiously perform his Trust; altho' no *express* Promise be given. But the most common way is to make this Promise in *express* Words, with the addition of an Oath, and the Solemnity of certain Rights and Forms. And nothing is more frequent, than to have the Prince's Duty described in these set Speeches, by way of *Periphrasis*, or an Enumeration of its principal Parts: As suppose, that he will be diligent and watchful in promoting the publick Security, that he will protect the good, and punish the bad, that he will faithfully administer Justice, will not oppress the Subject, and the like. Now Promises of this kind do not in the least prejudice the *Aboluteness* of a Sovereignty. The King is indeed obliged by them to govern well; but they leave it to his Judgment and Pleasure,

MR. BARBEYRAC'S NOTES ON §. IX, A.

* How ingenious soever our Author's Paraphrase on this Place may be, it is highly probable that *Samuel* does not represent what Kings have a Right to do, but only to set before the Jews the Misfortunes that they would be exposed to under a Royal State, to endeavour to put them out of Conceit with it. See Mr. *Sidney's Discourse upon Government*, Chap. 3. Sect. 3, 4, 5, 7. The Assertors of absolute Power depend chiefly upon the first Words of *Samuel's* Discourse, which they thus translate: *This will be the Right of the King, &c.* but the Word מִשְׁפָּחַת in the original, *Mischpach*, often signifies, as Mr. *Le Clerc* observes, the manner of acting, the common Method whether good or bad, just or unjust. 'Twill be sufficient to give one single Instance of it, taken from the same Book of *Samuel*: Now the Sons of *Eli* were Sons of *Belial*, they knew not the Lord. And the Priests (*Mischpach*) Custom with the People was, that when any Man offered Sacrifice, the Priests Servant came while the Flesh was in seething, with a Flesh-Hook of three Teeth in his Hand: And he struck it into the Pan, or Kettle, or Cauldron, or Pot; all that the Flesh-hook brought up, the Priest took for himself. 1 Sam. Chap. ii. 12, 13, 14. Now the Priests had no right to do that; for only the Breast and the right Shoulder of the Sacrifices here mention'd belong'd to them, *Lev. vii. 32*, &c. Mr. *Le Clerc* has likewise shewn by the sequel of *Samuel's* Discourse, that the Interpretation which they put upon it, is entirely contrary to the Rules of Criticism, as well as to the Maxims of Reason.

† These Princes who have been the most jealous of their absolute Authority, have sometimes acknowledged that they could do nothing contrary to the Laws. There is a remarkable Instance of it, which Mr. *Sidney* has taken Care to relate; it is, that in the Treaty of the Rights of the Queen of France, printed in 1667. by the Command of Lewis xiv. to justify that Monarch's Pretensions to possess the Spanish Netherlands; there are these very Words, *That King Lewis was that happy man of France, that they can do nothing contrary to the Laws of their Country.*

‡ See also on 2 Kings xi. 17. The People prohibited the King's Safety under their Care. So says *Josephus*; For, though the King should promise any thing to the People, was not the Custom amongst the Jews: That is, by an express Promise and such as should be made at the Coronation.

to choose and apply the Means in order to the obtaining this End. A particular Promise, which specifies the manner and means of governing, may be divided according to its different Force and Effect. For sometimes it only binds the Conscience of the Prince; sometimes it makes his due Performance the Condition of his Subjects Obedience. The former is done, when the Prince engageth, for Instance, that he will confine the Offices and Places of Trust to Men of such Rank, or of such Qualifications; that he will invest no Person with Privileges and Immunities, burthensome or prejudicial to others; that he will enact no new Laws, impose no new Taxes or Tributes, employ no foreign Soldiers, and the like. But then we suppose the People to demand all this of the Prince, without constituting any certain Council, to which he shall be bound to apply himself, in case the Necessities of the Commonwealth require a Digression from such Promises and Engagements; which are always to be understood with this tacit Expression, *unless the publick Safety* (the Supreme Law) *command the contrary.* Such a Council, we mean, as might proceed, not precariously, but by its own proper Right, in determining these Affairs, and without the Consent of which the Subjects should not be obliged to obey the Prince's Orders, in Points of this nature. Now in such a State as we have been here describing, the Administration of the Government is bound and confin'd by certain Laws; and the Prince, who shall act otherwise, except in Cases of Necessity, hath no doubt violated his Word and Faith. And yet the Subjects are not empower'd to reject his Commands, or to reverse his Proceeding upon this Pretence. For whilst he declares, that the Safety of the People, or some extraordinary Benefit to the Publick, is the Cause and Motive of what he does, as indeed this Presumption always attends the Acts of sovereign Princes, the Subjects are cut off from all farther Answer or Plea: Inasmuch as they have no Authority to take Cognizance of those Matters, and to judge whether the Necessities of the Commonwealth require them, or not. Whence 'tis easy to draw this Observation, That a People do not sufficiently guard and secure their Liberties, when they create a King only with a limited Sovereignty, and yet do not appoint a Council, without the Approbation of which those Acts, excepted in the limited Grant, shall not be perform'd: Or unless they oblige the King to hold an Assembly, in which these extraordinary Affairs may be debated. For this is a much better Expedient, than if the King should be only bound in these Cases, to follow the Opinion of a smaller Council: Since it might so happen, that the private Interest of those few Members, who compos'd such a Meeting, should interfere with the publick Good; whence they might be prevail'd on by the Motive of particular Advantage,

to with-hold their Consent from the salutary Proposals and Intentions of the Prince.

But Monarchy is brought into much narrower Bounds, and under much stricter Ties, if at the first conferring of Sovereignty, it be expressly covenanted between the People and the Prince, that the latter shall govern according to certain fundamental Laws, and in all such Affairs, as are not left to his absolute Disposal, shall have recourse to a Council of the Commons, or of the Nobles, and determine nothing without their Consent: That in case he do otherwise, the Subjects shall not be obliged by any of those illegal Commands. A People, who constitute a King over them in this manner, are supposed to have promised him Obedience, not absolutely and in all Points, but so far as his Government is agreeable to the original Contract and the fundamental Laws: From which whatever Acts of his recede are thereby void, and lose all Force of engaging the Subjects to a Compliance. Nor yet can it be truly said, that these fundamental Laws render the supreme Power lame and imperfect. For all the Acts of Government may be exercis'd here, as well as in an absolute Kingdom: Only, that whereas in the latter, the Prince proceeds by his own sole Judgment, at least as to the final Determination of things; in the former there is a Council establish'd, which doth, as it were, bear him Company in the adjusting of Affairs; and on the Authority of its Decisions the Sovereignty depends; not as on the proper Source of Power, but as on a necessary Condition. Neither are there in such a State two Governing Wills; since whatever the common Body acts by the Will of the Prince: The Limitation of the original Grant only producing this Effect, That, unless under such a Condition, the Prince shall not incline his Will to some particular Designs, or that such Acts of his Will shall have no Force or Virtue. No more can it be pretended, that the King in a Realm thus constituted, loseth his sovereign Power, or that the Council is superior to him. For these are very faulty Consequences, 'The Prince cannot act in every thing according to his own Pleasure; therefore he hath not the supreme Authority: I am not obliged to obey him in all things; therefore I am his superior, or at least his equal: I can't command a Subject in an arbitrary manner; and therefore he must have his Turn of peremptorily commanding me who am his Prince. There is a great deal of Difference between these two Propositions, 'I am bound to act with this Person's Approbation, because I have engaged my self to it by Covenant: And I am bound to follow this Person's Will and Pleasure, because, by virtue of his Sovereignty, he hath a Right of laying these Injunctions on me'. *Supreme* and *absolute* are by no means one and the same Term. For the former only denies a superior or

Mr. BARBEYRAC'S NOTES on §. X.

¹ *Wile Grot. L. 1. c. 3. s. 16.* Numb. 1. where he explains this matter by the Example of a Father of a Family, who if he has promis'd his Family any thing even relating to its Management, he is indispensibly obliged to keep his Word, without ceasing, upon that account, to be less the *Head*, or *Sovereign* if I may say so, of that little Society. A Husband likewise does not lose any thing of his Authority over his Wife, for having promis'd her something, which he cannot lawfully dispense with the performing of it.

an equal in the same Order: The latter farther imports a Power of exercising any kind of Right, according to one's own Judgment and Inclination.

But what shall we say, if in the original Agreement it was expressly ^a made a Condition, that if the Prince acted otherwise, he should forfeit his Sovereignty? We have many Instances of this Practice in History. *Diodorus Siculus* ^b reports, that amongst the *Sabæans*, the King, though in all other respects unaccountable, yet if he set a Foot beyond his own Palace, was to be stoned by the People. And this, he says, was ordain'd by the Advice of an antient Oracle. The People of *Arragon* heretofore, when the King had taken an Oath to preserve their Privileges, engaged their Allegiance to him in this Form, *He who have as much Power as you, make you our sovereign Lord, upon Condition you keep inviolably our Laws and Rights, and not otherwise* ^c. *Severus*, when he entred upon his Reign, not only swore that no Senator should be ever put to Death by his Order; but likewise publish'd a Decree to this Effect, *That whatever Emperor should take off one of the Senatorian Rank, he himself, his Children, and the Agents be made use of, with their Children, should be declared Enemies of the Commonwealth* ^d. Though *Julius Solon*, who by the Emperor's Command wrote this Decree, in a little time after lost his Life. To come then to a Resolution of the Question before us, 'tis plain that no *absolute* Prince can receive his Authority under such a Clause or Condition as we have now describ'd. Yet nothing seems to hinder why a limited Government, and yet a true and proper Monarchy, may not be conferr'd on a Person under the Terms of Restraint. For though we should allow, That a *temporary* Authority cannot rightly be term'd *supreme*, yet we must not call that Authority *temporary*, which depends on a Condition in the Power of the Prince to perform. Nor do we by this means subject the Prince to the Judgment of the People, as if they were in a solemn manner to determine whether he hath broken his Engagement, or not. For, besides that the *Condition* we speak of usually consists of such Matters as are clear and obvious to Sense, and therefore not easily liable to Doubt or Dispute; such an Act of the People, whereby they take Notice of the Prince's Miscarriage and Forfeiture, doth not carry in it the Semblance of a judicial Proceeding, for the taking Cognizance of a Subject's Offence: But is no more than a bare Declaration, by which the one Party observes and protests, that its manifest Rights have been violated by the other Party; and such a Declaration may be made by an Inferior ^e.

Grotius ² speaks somewhat obscurely when he observes that the Obligation, arising from the Promises of Kings, may restrain either the

Exercise of the Act, or *directly the very Power*. That an Act contrary to Promises of the former kind is *Unjust* and yet *Valid*; but an Act repugnant to Engagements of the latter sort, is not only *unjust*, but void and ineffectual. As if he had said, sometimes a King promiseth that he will use such a part of his Sovereignty only in a certain manner; sometimes he plainly abridgeth himself of such a part of his Power. Concerning which Distinction we may offer these two Remarks: First, that an Act committed against Promises of the former kind, may likewise be *void*: For Instance, suppose a Prince hath engaged, that he will not levy new Taxes without consulting the *States* of the Realm, we conceive that the Levies which he shall make in this arbitrary manner are null and unbinding. And, Secondly, that as to the latter part of the Distinction, what *Grotius* there supposeth, cannot but maim and dismember the sovereign Power.

XI. But to give us a deeper Insight into the Nature of limited Monarchies, it will be useful to remark, that the Affairs which offer themselves in the publick Administration, are chiefly of two kinds. Some may be settled and regulated before-hand; because, whenever they happen, they have the same constant Nature. Others there are on which Judgment cannot be given, whether or no they are expedient to the publick Welfare, but at the very time when they appear: Because the Circumstances which attend them are not to be foreseen. Now a People, who have settled themselves in a limited Monarchy, may provide that, in neither of these kinds of Affairs, any Prejudice shall arise to the Good and Safety of the Commonwealth. As to the former, by ordaining perpetual Laws, which the King shall be bound to observe: And as to the latter, by appointing a Council of *Peers*, or of *Commoners*, who shall always be consulted on such Emergencies. Thus a People who are fully satisfied of the Truth of the Religion they profess, and likewise of the Decency of their external Rites, and their ecclesiastical Polity, may oblige a Prince, when they invest him with the Government, to make no Alteration in the Establish'd Worship, by his own sole Judgment and Authority. Again, no Man is ignorant how much the Justice of a Nation suffers, when Causes are determin'd, not according to written Laws, but by the bare Sentence of the Prince, and by what they term *Equity*: Since in this way of proceeding, Passion, or Ignorance, must frequently get the Advantage over Reason ^f. To avoid which Inconvenience, a People may engage the Prince whom they create, that he shall either observe the Laws already extant, or enact new and reasonable Statutes; and that according to these Constitutions, Justice shall be given by certain *Colleges*, or standing Courts; no Causes,

^a We say expressly, for if the Clause run only thus, *In case the King act otherwise, the Subject shall not be obliged*; it will not amount to such a peremptory Condition, as the *Civilians* call *Lex Commissoria*. ^b L. 3. c. 47. *Add.*

Agatharoid. de Mari Rulro. c. 50. Strabo, l. 15. pag. 488. Edit. Genev. Casaub. tells us of a Custom much like this; that in *Sulcis*, if the Prince happens to drink to excess, the very Women have Liberty to kill him; and she that doth the Feat, for her Reward, may claim his Successor in Marriage. ^c See *Hottomann. Franco Gall. c. 1:.*

^d *Xiphilin. Epit. Dion. in Sever.*

^e *Comp. Bœcler ad Grot. l. 1. c. 3. s. 16.*

^f *Vide Tacit. Annal. 13. C. 4 & 42.*

except of very weighty Concern, or by way of Appeal, being allow'd to come before the King. Yet, as to this Point, Kings themselves are often fond of referring invidious Causes to the Decision of others ^a. And this Excuse is often serviceable, in putting off the importunate Intercessions of great Persons on the Behalf of Criminals. 'Twas a brave Saying of the Emperor *Andronicus Comnenus* ^b, *That the Severity and Authority of the Laws ought to be of more Force than his private Will and Inclination; and, that 'twas fit the Sentence of the Judges should over-rule the Opinion of the Prince.* No less obvious is it to remark, how easily Luxury or Ambition may squander away what hath been got by the Industry and Sweat of other Men. On this Score therefore, lest the Riches of the Subject should serve only for Fuel to the Vices of the Sovereign, many Nations have wisely assign'd their Kings such fixt Revenues, as they thought sufficient for his ordinary Expences on the Commonwealth; and lest the raising of larger Sums, when there should be Occasion for them, to the Consideration of a Council or Assembly. In like manner, since some Princes, out of too great a Fondness for martial Glory, hazard themselves and their Realms by engaging in unnecessary Wars; it was a prudent Caution in those People, who, when they conferr'd the Sovereignty on their Kings, oblig'd them not to enter upon a War, at least not on the offensive side, without the Advice and Concurrence of a proper Council. We are told of the Inhabitants of the Island *Borneo* ^c, that they have such a Natural Aversion to War, and to martial Princes, that when they find their Monarch to be of a fiercer Disposition, they oblige him to fight at the Head of his Army, where he may meet with the greatest Danger. In these therefore, and in all Instances of Business, which a People find to be of publick Use and Benefit, they may provide for their own Security, by settled Constitutions and Decrees: Lest if they should leave the absolute Disposall of such Affairs in the Hands of the Prince, the common Interest might possibly sometimes suffer.

From what hath been observ'd on this Head, it appears in what Sense we ought to explain that common Assertion of the *Grecian* Politicians, and others who follow them, when they tell us, *That the Government of a State ought rather to be committed to Laws, than to Men.* For the only rational Interpretation of such a Maxim must be this, that it is more expedient the Rulers of Commonwealths should govern according to

the standing Prescriptions of the Law, than according to their own private and unconfined Pleasure. For otherwise bare Laws are no fitter to govern a State, than the bare Needle to govern a Ship, without the Assistance and Direction of a Pilot.

Many Examples and many Methods we find in History, how the regal Power hath been limited and restrain'd ^d. But perhaps no Relation is so extraordinary as that which *Solinus* ^e gives us of the People of the Islands *Hebrides* in *Scotland*: *Their King, says he, hath nothing of his own; all Possessions lie in common: He is tied to Equity by establish'd Laws. And lest Covetousness should tempt him from Truth and Right, he is taught Justice by the Discipline of Poverty; having no fixt Revenue, nor private Estate, but owing his Maintenance to the publick Stock. He is allowed no Wife, but makes free with any of his Subjects Beds, as he thinks convenient. And thus he hath no Hopes of a Family and Children, to engage and to ensnare him.* *Apollonius Rhodius* ^f tells us a lamentable Story of the Kings of the *Mosynæci*, that if at any time they pronounced an unjust Sentence, they were immediately shut up in a Tower, and there starv'd to Death.

XII. But whereas, as hath been already shewn, Princes in a limited Monarchy are for the most part oblig'd, in such Affairs as the People thought fit not to leave to their absolute Disposall, to apply themselves to a Council, either of all the Subjects in general, or of Deputies, representing the particular Classes and Orders; it is farther to be observ'd, that the Power of such Councils is not in all places alike. For there are Realms, where the King, being in other respects absolute, appoints a Council or Senate, the Approbation of which he makes essential to the Validity of his Decrees ^g. Now a Senate of this kind is, as to its Authority, no more than a Board of Counsellors; and when it proceeds to take the royal Edicts under Examination and Censure, and to reject such as seem less expedient to the Commonwealth, it does this, not by its own proper Right, but by a power delegated from the Prince; who makes this prudent Provision, that nothing may be enacted prejudicial to the Publick, either through his own Inadvertency, or through the Instigation of Flatterers. *Plutarch* ^h reports it as *'A Law of the Egyptian Kings, which they constantly observ'd, to bind the Judges by Oath, that they should not obey the Prince himself, if he desired them to pass an unjust Sentence. And on the same Occasion he tells us, that Antigonus the Third gave Notice to the States, 'That in case he*

^a Ovid. *Metam.* (l. 12. v. 626, &c.) makes *Agamemnon* use this wise Conduct in disposing of *Achilles's Arms*:

*A se Tantales odium involuntumque removit;
Arceolæque duces in illis considere castris
Iussit, & arborum litis traiecit in omnes.*

The King throws off the *Odium*, and denies
To sit sole Judge upon so vast a Prize:
But cites a Council of the Martial Peers,
And to the general Vote the mighty Cause refers.

^b Nicetas Acominat. l. 1. De Imper. Andronic.

^d How the Power of the *Egyptian* Kings was confin'd, see *Diodor. Sic.* l. 1. c. 71. *Add. Plin. Nat. Hist.* l. 7. c. 22. *in fin.* & *Solin. C. 66. Philostratus (Vit. Apollon. Tyrann.* l. 3. c. 33.) reports, that the ancient Constitutions of the wise *Indians* permitted the King to stay amongst them but a single Day at once.

^e See what *Neuhof* relates of the Empire of *China*, *Descrip. Sin.* c. 1.

^c Franc. Lopez de Gomara *Hist. Ind. Occidental.* c. 95.

^f *Argonaut.* l. 3.

^g *Apophtheg.* p. 174 B. 183. F.

Mr. BARBEYRA C'S NOTES on §. XI, XII.

¹ *Grotius*, B. 1. c. 3. f. 16. Numb. 3. is more worthy to be consulted upon this, than the Places just mention'd.

² See *Grot.* B. 1. c. 3. f. 18.

³ should,

should, by any Letter to them, command any thing contrary to the Laws, they should not perform such an Injunction, but should take it for granted that he had forgot himself a. By this means too Princes often get rid of bold Petitioners, whilst in appearance they grant the Request, but at the same time know, that the Senate will cancel and reverse it b.

Yet, under this Constitution, if at any time the Prince positively insists in having his Will take place, and doth not own the Reasons, urged by the Senate, to be of strength enough to persuade the contrary; the Senate cannot proceed farther in opposing the Prince's Power. For it is not supposed, that he, in appointing such a Council, intended to give up irrevocably his absolute Right of governing, and of his own accord to make his Subjects Obedience only conditional, when he might have claim'd it without any such Terms of Restraint. The Senate therefore, in this Case, hath its Authority only by Commission from the Prince, who may consequently put a Stop to it, when he thinks fit: Tho' indeed he ought not to think fit, unless on very extraordinary Occasions. But thus much may be done on the Peoples side; when one King hath, by his own free Act, constituted such a Senate, they may oblige his Successors (by an Oath, at their Admission to the Government) not to dissolve it.

A Senate thus form'd, and especially if it be left in the King's Power to suppress it, doth not hinder the King from being absolute. For when we apply this Denomination to a Prince, we do not presume that he acts whatever he pleaseth, according as he is led by the Blindness of Lust, or the Rashness and Inadvertency of Passion; but only that he determines, by his own final Judgment, all Matters belonging to the Commonwealth: Which is very far from being inconsistent with a Necessity of hearing good Reason and sound Advice. Hence, altho' the Coun-

sel, which such a Senate offers the Prince, doth not oblige him by its own Force, or by any Authority inherent in it self, yet, it affords the Ground and Occasion of an *Obligation*, by representing to the Prince after what manner he may truly discharge his Duty, in the Business at present under Debate c. For so a Physician cannot be said to *oblige* a Patient by his own Power and Authority; yet when he shews him what will conduce to his Health, the Patient is bound to follow his Prescriptions by the Law of Nature, which enjoins every one to take care of his own Health and Safety. The same must be said of the Assemblies of the Estates in a Realm; which serve only for a larger Council of the Prince, by means of which the Complaints of the People, which are often neglected or suppress'd in private Councils, may be brought to the Prince's Ear; who hath the Liberty of taking what Method he pleaseth for their Redress d. It is well observ'd by Mr. *Hobbes* e, that unless we would rob the King of his Sovereignty, and make a State with two Heads, such an Assembly cannot undertake more Business than the King hath propounded to them: *Since the People cannot choose their Deputies to other Intent, than is, in the Writing directed to them from the Sovereign, express'd.* For the same Reason, when the Sovereign shall declare, that nothing more at present remains to be propounded to their Debate, the Body is dissolv'd. Yet they are allow'd, of their own accord, to inform the King of some Matters in the way of Address and Petition.

But the Sovereignty may then properly be term'd *Limited*, when the People at first conferr'd it on the Prince, under this Condition, that before he proceeded to the Exercise of certain Acts, he should consult the Assembly of the Estates, and that without their Consent his Decrees should be of no Force. Yet still we ought to leave it in the King's Power, to call this Assembly, and to dissolve it: As likewise to

a *Vide C. L. l. 1. c. 19. l. 1. De Precib. Imperat. offerend.*
Bodin. *de Republ.* l. 3. c. 4. p. 455. Gramond. *Hist. Gall.* l. 5. p. 277. &c. Joh. Labardæ, *Hist. Gall.* l. 3. p. 132, 133. Ed. Paris. 1671.

b *Vide L. 10. c. 12. l. 1. C. De Petit. Honor. sublat.*
c Add 1 Kings xii. 7, 8. *Martinus* in his History of *China* (l. 5. c. 37. p. 122) relates, that the better sort of Princes amongst that People, made it a Custom, when they were admonish'd by Persons celebrated for Wisdom and Goodness, of shunning Vice, or of pursuing Virtue, or of any Affair relating to the Publick Welfare, to receive the Advice with bended Knee. *Add.* l. 6. c. 1. p. 204.

d See *Grot.* l. 1. c. 3. f. 10. e *Leviathan*, c. 22.

MR. BARBEYRAC'S NOTE ON §. XII.

'Tis worth the while to explain that Point a little. Let us hear Mr. *Sidney* upon it: 'The Power of calling and dissolving Parliaments, is not simply in Kings. They may call Parliaments, if there be occasion, at times when the Law does not exact it. They are placed as Sentinels, and ought diligently to observe the Motions of the Enemy; and give notice of his Approach: But if the Sentinel falls asleep, neglects his Duty, or maliciously endeavours to betray the City; those who are concern'd may make use of all other means to know their Danger, and to preserve themselves.—The Consuls, or other chief Magistrates in *Rome* had certainly a right of assembling and dismissing the Senate: But when *Hannibal* was at the Gates, or any other eminent danger threaten'd them with Destruction; if that Magistrate had been drunk, mad, or gain'd by the Enemy, no wise Man can think that Formalities were to have been observ'd. In such Cases every Man is a Magistrate; and he who best knows the danger, and the means of preventing it, has a right of calling the Senate or People to an Assembly. The People would, and certainly ought to follow him, as they did *Brutus* and *Valerius* against *Tarquin*, or *Horatius* and *Valerius* against the *Decemviri*; and whoever should do otherwise, might for Sottishness be compar'd to the Courtiers of the two last Kings of *Spain*. The first of these, by name *Philip* the Third, being indispos'd in cold Weather, a *Brazier* of Coals was brought into his Chamber, and plac'd so near to him, that he was cruelly scorch'd. A Nobleman then present said to one who stood by him, *The King burns*; the other answer'd it was true, but the Page whose Office it was to bring and remove the *Brazier* was not there; and before he could be found, His Majesty's Legs and Face were so burnt, that it caus'd an *Erysipelas* of which he died. *Philip* the Fourth escap'd no better, who being surpriz'd as he was a Hunting by a violent Storm of Hail and Rain, and no Man presuming to lend the King a Cloak, he was so wet before the Officer could be found who carried his own, that he took a Cold, which cast him into a dangerous Fever. If Kings like the Consequences of such a Regularity, they may cause it to be observ'd in their own Families; but Nations looking in the first place to their own Safety, would be guilty of the most extreme Stupidity, if they should suffer themselves to be ruin'd for adhering to such Ceremonies.—The Law for annual Parliaments expressly declares it not to be in the King's Power as to the point of their meeting, nor consequently their continuance: For they meet to no purpose, if

propose

propose the Matters which are to be debated in it; unless we would give him the Name only and Shadow of a King, or would throw the Commonwealth into an irregular Shape. And altho' it be granted, that the Estates assembled may, of their own accord, lay before the King Considerations relating to the publick Safety, yet the Decrees which they form on such heads, shall derive their Force from the royal Assent and Ratification. The Difference between such a Body of Representatives, and *Counsellors* properly so call'd, is this, that although, in their Applications to the Sovereign, they both act in the same manner by Reasons and Advice; yet the Sovereign may reject the Reasons of the latter, but not of the former. Nor ought the Prince to think it hard, if the Estates do sometimes deny their Concurrence to what he offers. For he hath engaged himself by his Promise, to have always an Eye and Regard to the common Welfare, which in all Probability must be better understood, and more surely consulted by a Number of select Judges, than by a single Man. The Prince therefore, in case his Estates should thus happen to dissent from his Opinion, must attribute the Misfortune to his own Inadvertency or Passions, or to the ill Fate of the Kingdom. 'Tis an idle Fear which possesseth some Men, that by this means we shall put it in the Power of the Estates to preserve, or to destroy the Commonwealth, as they think fit. For 'tis ridiculous to suppose so much Imprudence, either in the King, as that he shall be unable to represent to the Assembly the real Necessities of the Kingdom; or in the Assembly, as that, when they see the Business thus clearly laid before them, they shall obstinately betray their own Security. But this is certain, since the Persons who first invested the Prince with a limited Sovereignty, cannot be presumed to have been desirous, either of overturning and destroying the Government, or of hindring, by their Acts and Covenants, the true End of civil Communities from being obtain'd; it may hence be gather'd, that these original Covenants and Agreements are always so to be interpreted, as that they may consist with the publick Safety, and on no account contradict and oppose it: And consequently, that the Persons thus covenanting must be supposed to have done all with this Reserve in their Mind, that the Terms and Conditions, which they now settled, should not in the least prejudice the general Interest or Security, or cause a Convulsion or a Dissolution in the Commonwealth. If then such a Case should happen, that the Covenants first entred upon by the People should afterwards, in any Instance, appear prejudicial or destructive to the publick Welfare, it will be convenient, if the Matters shall admit of Delay, to propose them in an Assembly of Estates. When this cannot well be

done, the King hath it in his own Power to correct, by Wisdom and Art, those dangerous Establishments. And the same Rule will hold, with regard to the standing Laws; which are now and then enjoind Silence by the supreme Law, the Safety of the People. Thus *Agésilans* commanded the Laws to *sleep one Day*; that those who had fled in the Battle of *Leutra*, might have Leave to return, without the usual Penalty and Disgrace. In the same manner, the ordinary Course of judicial Proceedings is often hindred either by the Necessity of the Times, or by the Condition of the Parties offending; who perhaps, were they to be formally arraign'd, must first be vanquish'd as Enemies, before they can be try'd as Criminals. Therefore Mr. *Hobbes's* Position will not stand, without some Grains of Allowance, when he asserts ^a, *That the Evil inflicted by publick Condemnation is not to be styl'd by the Name of Punishment, but of an hostile Act.* He speaks Truth, in case there was no precedent Crime: But when the Offence is evidently proved, the Evil inflicted will be truly and properly a Punishment, tho' the present posture of Affairs hinder the Offender from being condemn'd in the common Method of Justice.

XIII. But Mr. *Hobbes* seems inclin'd to allow no Distinction between supreme and absolute Power; or rather to make all Power absolute, that is, supreme. To whose Notions this general Remark may be applied, that what he so crudely delivers, should be limited with this Condition, *So far as the End of civil Government will admit*: As, for Instance when he says, that *he, to whom the Right of Punishing belongs in a Commonwealth, may justly compel all Men to all things that he pleaseth* ^b. And indeed he himself inserts this Restriction; for he tell us, that by *all things*, he means, *all things that are necessary to the common Peace and Security* ^c. And so again, he observes, that *there is connect'd with the Right of the Sovereign, so much Obedience in the Subjects, as the Government of a State necessarily requires*. By the same Rule therefore, when he affirms ^d, that *he, who hath in such a manner subjeckt'd his Will to the Will of a Prince, as that the Prince may, without Restraint, do what he lists; make Laws, judge Causes, inflict Punishment, use the Strength and Riches of the People at his Pleasure, and all this by Right; hath certainly granted the highest Power of Sovereignty that can be given*: We are to consider, with what Purpose and Intention Men first applied their Minds to the constituting of civil States: And then we shall suppose no Person to have voluntarily transferr'd on the Prince any farther Degree of Power, than appears conducive to that End, in the Judgment of any wise Man: Tho' to determine what is thus conducive according to particular Circumstances and Occasions, doth not belong to those who transfer their Right, but to him, on whom it is transferr'd. The Sovereign

^a they may not continue to do the Work for which they meet; and absurd to give them a Power of meeting, if they must not continue till it be done: For as *Grotius* says, *Qui dat finem, dat media ad finem necessariis*, the only reason why Parliaments do meet, is to promote the publick Good; and they by Law ought to meet for that end. ^b They ought not therefore to be dismiss'd, till it be accomplish'd. Mr. *Stancy's* Discourse upon Government, Chap. 3 Sect. 38. See the rest of the Chapter.

^a *Leviath. c. 28.*

^b *De Cive, c. 6. f. 6.*

^c *C. 5. f. 6. & f. 9. in fin.*

^d *Ibid. c. 6. f. 13.*

therefore hath a Right of compelling the Subj^{cts} to all such things as he judgeth to be of any Consequence to the publick Good. But to constrain them to that which is inconsistent with the Safety of the Commonwealth, or with the Laws of Nature, is what he ought not to entertain, even in Thought and Inclination. And if he should engage in any such Attempt, no doubt he transgresseth the proper Bounds of his Authority.

It may not be amiss, if we here examine the Arguments alleg'd by the same Author^a, by which he endeavours to make out, that it would be a vain Design to introduce a limited Sovereignty. For, in this Case, says he, 'The Assembly, which prescribed Laws to the future Prince, had certainly an absolute Power, at least actually, or virtually. If then, the Assembly continues; or, proroguing it self from time to time, meets again at a fixt Day, and at a certain Place; this absolute Power remains ever as it was first seated; and so the Prince will not have the supreme Authority, but will be a bare Magistrate. (And thus much we grant, if the Assembly thus meets by its own Right, and hath the Power of determining all kinds of publick Business, and of calling the King himself to an account.) 'But if the Assembly dissolves it self, unless the State be dissolv'd with it, there must be left somewhere a Power of punishing those who transgress the Law; *which cannot be done without absolute Authority*: This Clause we deny, as utterly false; and we have no better Opinion of the Reason, on which he builds it: 'A Prince (says he) who hath so much Strength granted him in rightful manner, as to enable him to punish any Subject whatsoever; enjoys the greatest Power that a People can give. For the Weakness of this Argument will easily be discover'd by any one, who reflects on the Design of civil Establishments, and considers, that by submitting their Will, and their Strength, Men do not turn themselves into meer Engines, to move no otherwise than as they are drawn; but that they only grant to another the Use of their Powers under a Condition; so as that they themselves are to judge whether this Condition be made good, and if it be not, are at Liberty to retract what they gave. Alike absurd is it to pretend, that there is not more Security against the Abuse of Power in a limited, than in an absolute, Government. He who hath Strength enough to defend his People (as all wise Subjects must allow their Prince) hath not always Strength enough to oppress or to destroy them. The Commands of a General may work with good Force upon his Soldiers, when he orders them vigorously to attack the Enemy: And yet they would be found very insignificant, should he

bid them turn their Swords against each other. On the whole he is a prudent Prince, who tho' intrusted with an absolute Sovereignty, yet in some Instances waves his own particular Advantage, when he finds the Subjects are not to be brought to a Compliance, without endangering the publick Welfare. But they are no less a prudent People, who well knowing what things would be inexpedient to their Constitution, have, by means of fundamental Laws, put it out of the Power of Princes to constrain them in those Instances.

XIV. Lastly, it is incident to the supreme Power, that it may be enjoy'd, either fully, or under more or less Degrees of Diminution: And this chiefly belongs to monarchic^l Government. For some Kings possess their Realm in the way of Patrimony, others in the way of Use only, not of Property; and this either for the Term of their own Life, or with the Power of transmitting it to their Posterity under certain Conditions: And others are commission'd to hold their Sovereignty only for such a fix'd period of Time, which being once elapsed, their Power passeth away with it, and they return to the Condition of private Men. Indeed Mr. *Hbbes* will have those Monarchs likewise to be call'd temporary, who receive their Power for life, and affirms them to be properly no Monarchs, but only the Ministers^u of the People. But it is contrary to the common Custom of Speech, to call him a temporary Prince, who doth not lay down his Dignity, but with his Life: This Term being properly applied to those, whose Authority expires at such a certain and definite point of Time, not by Chance, but by Right.

XV. But learned Men are not agreed to acknowledge any such Thing, as a temporary Monarch. *Grotius* will have the Dictator, amongst the *Romans*, whose Power lasted but six Months, to have been truly a Monarch: *Because*, says he, *whilst this Period lasted, he exercis'd all the Acts of supreme Authority, with the same Right, as those who are most justly and properly sovereign Princes; neither could his Acts be revers'd by any other Power. But we understand the Nature of moral Things by their Operation, and consequently those Powers, which produce the same Effects, ought to go under the same Name.* Tho' the continuance of a Thing doth not change the nature of it; yet there is no doubt to be made, but that a temporary Command is in Dignity much inferior to one perpetual; since Men are wont to respect those with a much more solid Veneration, whom they apprehend to be incapable of returning to a private Condition, than those whom in a little time they are again like to see on the same Level with themselves. But

^a De Cive, c. 6. f. 17.

^b De Cive, ubi supra, c. 7. f. 16.

^c C. 9. f. 11.

^d L. 1, c. 3. f. 11.

Mr. BARBEYRAC'S NOTES ON §. XIV, XV.

¹ *P. Hobbes, c. 6. f. 13. ibid. Answer.* not excepting the Clause by which it is stipulated, that the Prince shall be of such a Religion. See Mr. *Hortius's* Dissertation de Superioritate Territoriali; which makes part of the second Tome of his *Commentationes & Opuscula*, &c. Sect. 13. p. 217, &c. as also *La Reponse aux Questions d'un provincial*, by Mr. *Bayle*, Tom. 1, p. 535, &c.

² *That is true* (says Mr. *Buddeus*, in his excellent Dissertation, entituled *Jurisprudentia Historice Specimen*, among his *Selects*, §. Natur.) *provided that the Nature of a thing has so close a Connexion with the Continuance, that the change of the one necessarily takes away the other.* Sect. 47. See his 43d Section to the 48th.

indeed,

indeed, *Bodinus* a before *Grotius*, and many good Authors since him, have shewn, that the Dictator was by no means a Monarch, but only an extraordinary Magistrate. Nor doth that Axiom stand on very sure Ground, *Those are the same Powers, which produce the same Effects*: For it must be farther consider'd, whether the Person exerciseth this Power as properly *his own*, or as *delegated* to him by *others*, to use in their stead. On which account, it is a Mistake likewise in *Grotius* b, to rank those Persons in the Class of temporary Monarchs, *Who during the Minority of Kings, or in the time of their Captivity, or Lunacy, are appointed Protectors*: In as much as they are neither subject to the People, nor is their Power revocable, before the time fix'd by Law: For these Governors exercise the supreme Authority, not in their own Name, but in another's; and therefore can no more be term'd Monarchs, than we call a *Guardian* the Proprietor of the Goods of his *Ward*. And then no Man, who is vers'd in the *Roman* History, will allow that the Dictator had all, and each precise part of the Sovereignty so committed to him together, as that during the six Months Space he might exercise it as he pleas'd. And as for what is urged, that *his Acts could not be revers'd by any other Power*; it is not absurd to suppose a Magistrate so commission'd and empower'd, that, at least in some certain Affairs, there shall lie no Appeal from his Sentence; and yet he shall be no more than a Magistrate c.

It is worth observing on this Head, that the Power of the Dictators, and of all other Magistrates appointed for a certain time, doth at that very Instant expire, and the Persons do by Right return to a private Station; and that therefore, whatever they do, after this precise point of Time, is look'd on as a private Act, to which any Man may refuse Obedience d; tho', perhaps they still bear the external Ensigns of Power. Hence to abrogate the Command of such Representatives, there is no need of a new Decree of the People; but, if they refuse to resign, the old Decree is sufficient to be immediately put in Execution against them. For those Rights, the Validity of which depends on a certain space of time as on a necessary Condition, do cease with the elapsed Time, without farther Process: But in Controversies about Rights, when the Quality of certain Actions is to be proved, there is need of long Debate, and of a formal Sentence. The reason of which Difference is this; there can be no Dispute whether such a point of Time is pass'd, but whether an Action was good or bad, may be argued with Probability on both sides e.

But it is by many thought impossible to give an Instance of temporary Sovereignty, if we speak of such Power as is properly supreme, and not conferr'd by Deputation. For what we read of *Augustus* f, that he would suffer his Empire to be granted him only for ten Years, and upon the expiring of that Term, renewed it again for ten Years more; was a meer Jest and a popular Cheat. *Narbarzanes*, in *Q. Curtius* g, hid the vilest Treachery under the same specious Proposal: *Put your Government*, says he to *Darius*, *into the Hands of another, who shall bear the Name of a King, till such a time as he shall have driven the Enemy out of Asia; and when his Victory hath secured the Kingdom, let him restore it to its proper Master. Let Bessus enjoy the sovereign Command, during this Juncture; and when things are settled, let him deliver to you, the lawful Prince, that Power which he receiv'd only in Trust* h. In *Nicephorus* i we find *Michael Paleologus* obliged by Oath to administer the Government, 'till the lawful Heir and Successor should be grown up, and then to resign freely to him the Throne and all the Ensigns of Majesty. Tho' indeed his Oath was never kept. And for the Compact between *Eteocles* and *Polynices*, that they should reign each a Year by Turns, this Instance may easily be answered, by saying, that it was contrived only as an Expedient to keep the Kingdom undivided; each Brother thus possessing the entire Command, tho' in an alternate Course j.

XVI. As for that way of possessing Kingdoms, by which they are said to be *in the Patrimony of the Prince*, we are first of all to observe, that a Man's Patrimony is not, strictly speaking, so much what he derives by Inheritance from his Parents, as what he enjoys with full Property or Dominion, by whatever Means it came into his Hands. Hence, as *Property* is chiefly applied to *Things*; so they too are especially term'd *patrimonial*, in as much as they have no inherent Right, which might hinder the Possessor, either from employing, or from abusing them at his Pleasure. Afterwards Slaves came to be added to the Things or Goods, which compos'd the Patrimony of their Lords; who challeng'd so absolute a Right and Title over them, as to make the Servant not at all concern'd in his own Safety or Destruction, affirming the one and the other to be entirely the Master's Advantage and the Master's Loss. And within these Bounds did the Fathers of Families confine Patrimonies in the early Times. For as to the Right of governing their Wives and Children, tho' this indeed belong'd to them, and to them alone; yet in as much as these near Relations were Persons con-

a *De Republ. l. 1. c. 8.* b Chap. 3. §. 11. c Such were heretofore among the *Romans*, the *Præfetti prætorio*; upon which see a Rescript of *Constantine*: *A præfettis autem prætorio provocare non sinimus.* Cod. Lib. vii. Tit. xlii. de *Appellat. & Consule. Leg. xix.* see also *Tit. xlii. de Sententiis præfett. prætor. & Digest. Lib. iv. Tit. iv. de Minoribus, Leg. xvii, xviii.* The Bishops, who never fail'd to take the Advantage of the Indulgence of Princes to satisfy their own Ambition, obtain'd that Privilege of the Emperors *Arcadius, Honorius*, and *Theodosius*, with respect to the Causes that were determin'd by them. *Episcopale judicium ratum sit in omnibus, qui se audiri a sacerdotibus elegerint; eamque illorum judicationem adhibendum esse reverentiam jubemus, quam vestris deferre necesse est potestatibus, a quibus non licet provocare.* Cod. Lib. I. Tit. iv. de *Episcopali Auctoritate*, &c. Leg. viii. see *Genf. xli. 46, 44.*
d *Vide Livy, l. III. c. 38, &c.* e *Dio. l. 53.* f *L. V. c. 9.* g What we meet with in *Diod. Sic. (l. IV. c. 23, & 31.)* may be produced with a better Colour, for an Instance of a Kingdom *in Trust.*
h *L. VI.* i *Vide Euripid. in Phœniss. Statius Theb. l. 1.*

Mr. BARBEYRAC'S NOTES on §. XIII.

1 See *Rosin Antiq. Rom. L. 7. c. 17.*

2 See *Sidney upon Government, c. 2. f. 24.*

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siderable

siderable on their own account, they did not pretend to put them amongst their Possessions, or to reckon them part of their Wealth and Estate ^a. Nor are Men wont to set down their Learning and their Skill in the List of their Fortunes, however advantageous to them ^b: tho' many a Person by these Accomplishments supplies, the want of real Possessions, and comes under that Character in *Ovid* ^c;

Ars illi sua census erat. —

—His Art was his Estate.

But when the Ambition of Princes began to rank, amongst the chief Goods, a Power and Command over Men; and many of them brought it into a Custom to maintain their own Pleasures and Vices at the Subjects Cost; those Kingdoms came to be look'd on as Patrimonies, which the Sovereign had receiv'd a Power of alienating, as he should think fit: This being esteem'd the utmost Force of *Property*, and the very Essence, in which a real Possession did consist ¹. Whereas other Monarchs, who had not obtain'd so vast a Privilege, and so unbounded a Power over their Realms, were said to hold them in the manner of *Personal* Possessions, and rather to have the *Use* of them, than the *Property*. Which Distinction seems to have taken its Rise from the different ways of acquiring Government, especially monarchical. For altho' no Prince can be lawfully constituted, without the Consent of the Subjects, yet there are different manners of exerting and applying this Consent. So that, in some Cases, the King confers a Benefit on the People, in taking them under his Sovereignty; in others, the King is highly obliged and indebted to the People, for advancing him to the Throne. Those, who have given a Prince just Cause of proceeding to Hostility against them, in case they lose the Day, may, by the Right of War, be deprived of all their Possessions, and of their personal Liberty itself. Therefore, if Men under these Circumstances are admitted to any Terms or Conditions, they are to acknowledge it as the pure Favour and Mercy of the Conquerour: Who, tho' he leaves them to enjoy their Life and personal Liberty, and their private Estates; yet is supposed to challenge the Sovereignty over them in the fullest and most irrevocable manner, for himself and his Posterity ². The same Claim is presumed to be made by a Prince, who receives a People into his Protection, when they had otherwise been inevitably ruin'd ^d. Now the Effect resulting from a Sovereignty thus obtain'd, is chiefly seen in this, that not only the Condition of the Subjects depends entirely on the Pleasure of the Prince; but that Prince may transfer his ^e Right of governing such a Realm on

any Person, whom he shall choose; and consequently may appoint any Method of Succession that shall be agreeable to his Judgment or Inclination.

XVII. But where the King receives his Crown from the Grant of the People, there each Person thus concurring is supposed to have reserv'd and secured to himself so much of his former Rights and Privileges, as is consistent with the Nature of a civil State. And therefore, the Condition of the Subjects, under such a Constitution, rather depends on their own Choice, than on the Prince's Pleasure. Yet they could not but find it necessary, to abridge themselves of their natural Liberty in such a Degree, as the Form of Government required, which they are now about to introduce. Farther, since in conferring Sovereignty by a voluntary Act, Men are usually prevail'd upon by the Consideration of some peculiar Merit or Advantage in the Person, and therefore would not perhaps submit to the Authority of *another*, as they are willing to yield to *his*; it follows, that according to the regular Course, the People are to determine on whom the Crown shall devolve, after the Decease of the King now elected. And here, if the People should not think it proper to constitute every new King by a particular Election, it shall be in their Power to settle the Method of Succession; and the Prince's Nomination shall, in this point, by no means hold good against their Act. Upon this account chiefly it is, that many Authors have affirm'd these Monarchs to hold their Realms *jure usufructuario*, by the Right of *Use* and *Profit*; as we have already hinted: In as much as by their own Pleasure, and without the Consent of the People, they can settle nothing, either in regard to the inward Frame and Constitution of the State, or to the alienating and transferring it on any Person ^e. We are by no means for extending the Comparison farther between Princes, constituted by the free Grant of the People, and those Persons whom the civil Law terms *Usufructuarii*, Possessors of things with a Title only to the *Use*. And therefore we utterly dislike the Assertion of Mr. *Hobbes*, which we meet with in his Book *De Cive* ^f; *If*, says he, *the People, e'er they departed from the Election of a temporary Monarch* (that is, in his Notion, a Prince who receives the Government for Life) *made a Decree to meet again at a certain Time and Place after his Death; then, so soon as he shall happen to decease, the Sovereignty returns in full to the People; not by any new Act of theirs, but by the Right which they before enjoy'd. For during that whole Interval, the supreme Dominion was in the People, as to the Property, and only as to the Use and Exercise in that temporary Monarch.* This Notion, if taken in the gross Sense in which it is deliver'd, we cannot but look upon

^a Vide L. 50. t. 17. l. 126. f. 1. D. De divers. Reg. Jur. & ibi Jac. Godofred. & L. 9. t. 2. l. 33. D. ad. L. Aquil.

^b Philo. Jud. De Plantatione Noe, p. 224. C. Ed. Paris. The Painter reckons his Art, and every Mechanick the Mystery of his Calling a kind of Inheritance or Fortune to him; not as an Earthly Possession, but as a free Reward. For these Advantages, tho' they do not fall under Property, yet are highly beneficial to the Persons who enjoy them. ^c Metam. l. 3. v. 588.

Mr BARBEYRAC'S NOTES on §. XVI.

¹ See the next Chapter, f. 11. and B. 8. c. 5. f. 9. &c.

² 'Twas thus among the Jews, that the King chose which of his Sons he pleas'd, to be his Successor. See 1 Kin. i. 35. 2 Chron. xi. 20, 22. with Mr. Le Clerc's Notes thereupon. The reasons urged against Patrimonial Kingdoms by Franc. Hortomann. Quest. Illustr. 1. are answered by Grotius, l. 1. c. 3. f. 12.

^d Comp. L. 7. t. 1. l. 13 f. ult. f. 15. f. 1. D. De Usufuct. & L. 3. t. 33. l. 9. c.

^e 1. Grot. ubi supra, f. 13.

^f C. VII. f. 16.

as highly dangerous and prejudicial to all those limited Princes, who are ordain'd by the voluntary Donation of the People, and bound up to certain fundamental Laws. And the rather, because, since he hath taken the Liberty to call a King for Life a *temporary Monarch*, others may with as much reason extend the Name to those who receive the Sovereignty, with the Privilege of transmitting it by Inheritance, yet so as to keep it within their own Line and Family. Besides, since Mr. *Hobbes* hath not determin'd how far he would stretch the Parallel which he useth, he may easily be intangled in a Train of very pernicious Consequences. For since Property, consider'd in it self, is a much more noble Right, than that of temporary Use; some Men may, on these Principles, conclude that the People are superior to the Prince, and have a Power of bringing him to Correction, in case he doth not govern according to their Pleasure and Humour. On the like Score we ought to reject what the same Author lays down in his *Leviathan*, that *Fleeting Kings have not the supreme Power*; that *They, who have the Privilege of appointing a Successor after the Death of the present King, do really hold the Sovereignty even in his Life time: since none have Right to give that which they have no Right to possess*. For as to the Power of a Sovereign over his Subjects, it matters little what Provision is settled, or what Method agreed on, in Case of an *Inter-regnum*. And even when this Point is stated and determin'd by Law, the Subjects may nevertheless

yield a most strict Obedience to the Prince, and be far from invading any part of the Sovereignty, or from thinking of a Successor, or of a new Form of Government, during the Life of their present Master. And then, besides, 'tis a very weak Consequence to say, that because an elective Prince cannot appoint a Successor at his pleasure, therefore he hath the *Use* only, and not the *Property* of the supreme Command, and is no more than the Minister of a Power which resides in others. For all the Power which, in this Case, continues in others, is, that upon the Decease of the Prince, the Liberty of consulting their own Security, and of governing their Actions by their own Judgment, shall return to them. But for the maintaining of this Power, 'tis by no means necessary so to break and divide the Sovereignty, as to say that the *Property* or real Possession resides in the People, and the *Use* only, or the *Use*, in the Prince. Since even in Case of an *absolute* Lord or Governor, when he is extinct, the Person who was under his Dominion falls again into the Liberty which Nature gave him, and the Force of which seems now to revive in him. Thus who for instance will pretend, that a Father hath only the *Use* of paternal Authority, because upon his Death the Children are at their own Disposal? Or that a Master hath only the *Use* of the despotal Power, because in case he die without Heirs, the Slave recovers his Liberty?

^a C. 19.

C H A P. VII.

Of the Ways of acquiring Sovereignty, especially monarchical.

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| <p>I. <i>The way of acquiring Sovereignty in democratical States is uniform.</i></p> <p>II. <i>In Aristocracies and Monarchies various.</i></p> <p>III. <i>How far Government may be serv'd on by just Force.</i></p> <p>IV. <i>How far by unjust Force.</i></p> <p>V. <i>How a Person may be releas'd from the Government of another.</i></p> <p>VI. <i>Election, of how many kinds.</i></p> <p>VII. <i>Inter-regnum, what.</i></p> <p>VIII. <i>And Inter-reges.</i></p> <p>IX. <i>Hobbes examin'd.</i></p> | <p>X. <i>The Case of posthumous Issue in the hereditary Line.</i></p> <p>XI. <i>Of Succession in a patrimonial Kingdom.</i></p> <p>XII. <i>Of the same in the Kingdoms establish'd by the free Act of the People: And this either simply hereditary,</i></p> <p>XIII. <i>Or lineal,</i></p> <p>XIV. <i>Or transverse.</i></p> <p>XV. <i>Of the Judge of Controversies arising in the Case of Succession.</i></p> |
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SINCE in examining how Sovereignty is acquired, it must regularly be supposed before hand, that the Person who acquires it, is different from those over whom he acquires it; 'tis manifest that the Question before us is but little concern'd with Democracies; under which those who command, and those who obey, are distinguish'd by a moral respect only, and not a physical. And though this Form of popular Government is sometimes set up, upon the Expulsion of a King, or of the ruling Members in an Aristocracy; yet since still the governing

and the governed Parties are the same, 'tis absurd to say, that the People have obtain'd the chief Command by a violent Course; or that the People have, by such Force as properly belongs to Subjects, erected a Sovereignty over themselves. In Democracies therefore (contrary to what we see in Monarchies) the way of holding Sovereignty is ever one and the same. Yet these, as well as other States, sometimes owe their *Increase* and *Improvement* to the Force of Arms, tho' never properly their *Original*.

II. In *Aristocracies* there appears some Difference, with regard to the manner of obtaining the sovereign Power. Not only because, in some places, this Form of Government was introduced by the voluntary Act of the People, and in others by Violence; but likewise because, upon the Decease of any Member in these ruling Councils, the vacant Seat is fill'd up in some Places by Election; and in some again, Birth and Inheritance give a Title to the Honour. But in Monarchies, this Difference of Acquisition most visibly discloseth it self. For tho' all Princes in order to legal Establishment of their Authority have need of the People's Consent, yet this Consent is obtain'd several ways; and even when the Sovereignty is conferr'd by the free Motion and Grant of the People, there is still this Distinction, that some Princes are advanced to the Crown by Election, others by Succession.

III. The way of acquiring Sovereignty by Violence is usually term'd *Occupatio*, or *Seisure*: Which yet we must observe to be different from that by which we lay hold on things that want a Proprietor, and thus make them our own. For since, in things of this kind, there is no inherent Right, which might cause them to belong rather to one Man than to another (excepting the Determination of civil Laws) hence to obtain the Property of them, there is no need of a particular Title, but it is sufficient barely to lay our Hands upon them, with a Desire of possessing them. But since every Man is by Nature equal to every Man, and consequently not subject to the Dominion of others, therefore this bare seising by Force is not enough to found a lawful Sovereignty over Men, but must be attended with some other Title. When *Grotius* therefore tells us, *That of Things which properly belong to no Body, two are capable of Seisure, Sovereignty and Property*; we must not understand the word *Sovereignty* in the strict Sense, for such as is exercis'd over Men; but for a Sovereignty over Lands, the Effects and Virtue of which amounts to this, That no Person ought to fix in such a Lordship, or District of ours, against our Consent, or unless he will yield himself a Subject to us. For Men cannot be said to *belong to no Body*; he is his own Man, who is not another's. And on this account the same Author truly remarks, *That in case a Person dies without Heirs, his Servants regain their Freedom, and his Subjects are left to their own Judgment and Disposal*; inasmuch as neither of these fall under the Right of Seisure. But as for the Limitation which he adds, *unless they voluntarily relinquish their Liberty*; it might perhaps

have been better omitted. For where can we find a Man, who will thus utterly wave and abdicate his Freedom? He may perhaps think it convenient always to be under some Master; but he will likewise claim it as his Privilege to choose one Service rather than another. Such *Occupancy* then is a proper Means for the obtaining of Sovereignty, as presupposeth a just Cause of the Invasion, and is confirm'd by the Consent of the Subject, and by subsequent Articles and Covenants. For without these mutual Ties the *State of War* continues; and there can be no Fidelity or Obligation, and therefore no true Authority or Command. On which Score *Hornius* ought to fall under Censure, when he asserts, *That he who subdues another upon precedent Injuries and just Provocation, immediately obtains a lawful Dominion over the conquer'd Party, and needs not to wait for his Consent*. For how is it possible to descend from the Condition of War to that of Peace, without some intervening Compact? Or how can Allegiance be due to him, who hath not purchas'd and receiv'd it by some certain Terms of Agreement? All the Advantage which the Conqueror in a just War gains in this respect is, that he lies under no Necessity of caressing those whom he hath subdu'd, and of winning their Consent by Flatteries or Intreaties, but may extort it by denouncing the severest Evils. And therefore *Hornius's* Argument comes to nothing, when he says, *That if the Consent of the conquer'd were, in this Case, necessary, a lawful Conqueror could never gain Dominion by Occupancy: In as much as the Occupancy would be of no force, should this Consent of the conquer'd be withheld*. For since such Occupancy supposeth the Victor to be superior in Strength to the vanquish'd, and therefore able to set before them any Pains or Punishments; it can't but have so much Effect, as to hinder them from withholding their Compliance. Because, as there is no Man who would not rather conquer than be conquer'd, so every wise Man, when he finds himself worsted, will be glad to come off as cheap as he can, and will by no means think himself prejudic'd, in yielding a Consent to the Victor's Sway, when without this he must have inevitably perish'd.

IV. But what shall we say in case the Dominion be seized by unjust Force? As to this Question, it is first acknowledg'd, on all Hands, that a popular State, or the Majority in such a State, may, for the avoiding any grievous Evil (whatever be the occasion which threatneth it) relinquish their present Liberty, and put themselves under the Command of a single Person, or of a select Coun-

Mr. BARBEYRAC'S NOTES on §. II. and III.

¹ This manner of acquiring Sovereignty by the *Right of Succession*, takes place in Kingdoms originally establish'd by a forc'd Consent of the People, as will be shewn hereafter in the 11th Section.

² See above in B. 4. c. 6. the last Section.

³ 'Tis not only by this Act of Clemency which the Victor shews to the vanquish'd, that he obtains a lawful Dominion over them. The Title of his Sovereignty is farther grounded upon the Reason, that the vanquish'd (having undertaken a War against him) upon precedent Injuries, and a refusal to give him that just Satisfaction which was due to him, have expos'd themselves by so doing to the Fortune of Arms, and have tacitly consented beforehand to whatever Conditions the Victor should think fit to impose upon them. Our Author's Abrigment, *De Offic. Hom. & Civis*, l. 2. c. 10. f. 2.

a L. 2. c. 3. f. 4.

b Xenophon. *Cyrop.* l. 4. l. c. 9. Ed. H. Steph. *Nothing is so much as our selves.*

c L. 2. c. 9. f. 1.

d It was a wise Rule with the *Incas* of Peru, to advance the Empire by the slowest and most insensible Degrees, and rather to invite new Subjects by Clemency and Kindness, than to compel them by Arms and Violence. *Vid.* Garcil. de la Vega, *Com. Reg.* l. 2. c. 19.

e *De Civitate*, l. 2. c. 9. f. 2.

f *Ibid.*

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cil. And for the same reason, that a People subject to Kingly Government, may, to escape Destruction, and when their Prince can no longer assist or protect them, submit themselves to another. But all the stress of the Difficulty lies in this, that since Fear unjustly caus'd invalidates a Covenant, and since he, who by his injurious Proceedings hath endamaged another, is obliged to make Restitution, how such a Consent of the Subject, as is extorted by unjust Force, can confer the Sovereignty in so lawful a manner upon the Invader, as to give him Quiet of Conscience in the Possession. For what *Hornius* says¹ is meer trifling, *That since the Sovereignty, which the Invader receiv'd by the Consent of the People, he did not take from the People, but was invested with it by GOD, therefore were it to be restor'd, it must be restor'd to GOD, not to the People.* But we should rather conclude, that since the People, as *Hornius* himself allows, have the Power of appointing the Person in whom the Majesty should be infused by God; therefore it is sufficient, if the Oppressor restores this Power only to the People. For if the People do but recover the Privilege of marking out the Person who is to govern them by their own free Choice, they will not think themselves much concern'd, whether the Invader retains the pretended Majesty he hath seiz'd, or restores it to Heaven. Our Judgment on this Point is, that we ought first to consider, whether the forcible Invader hath turn'd a Democracy into a Monarchy, or whether he hath driven out a Monarch, and settled himself in his room. In the latter Case, the Obligation to Restitution doth not expire, till the expell'd Prince and his Heirs, who had a Right of succeeding, are all deceas'd; or till such an unfortunate Prince hath quite abdicated, or relinquish'd his Claim to the Kingdom: And this he is presumed to have done, as by other Inclinations, so if in a long course of time he hath made no Effort towards the recovering of his Crown. And in the mean time, even whilst the Invader's Title and Conscience are both unsettled, the Allegiance, promis'd by the Subjects to him, holds strong and binding; provided they did not give it, till they had done all that could be requir'd of them towards serving their old Master. As for the former Case, this seems the most probable way of determining it, to say, that since a Nation may live in all respects as happy under a Monarchy, as under a Democracy, 'twill be easy for them to digest the Loss of their popular Liberty, if their new Sovereign proves a good Governor. And we may presume, they are thus satisfied, when their quiet Deportment and long Use seems to have reconciled them to the Alteration. As for the few Murmurers and Malecontents which remain, they are not worthy to fall under regard: Since there will not want some of this uneasy Temper in every Form of Government, however freely and fairly constituted by the Community. But in case the Invader, after having made this Charge and Revolution

in the State, should treat his Subjects in a wicked and injurious manner, we can scarce conceive, that they are by any intrinsecal Obligation engaged to obey him. We must therefore grant *Hornius*^b what he asserts without Proof, *That it doth not belong to the Nature of Sovereignty, to consider what way it was obtain'd; inasmuch as at all times, and in all places it demands the same correspondent Obedience.* For indeed, when a Person hath not only intruded into the Throne, by Force or Fraud, but likewise still grievously oppresseth the People, and seems to make open and arbitrary Violence the Standard of his Reign; this is a Guilt which seems incapable of being purg'd by any Course of years, tho' Time in other Cases be thought sufficient to found a Right of Prescription. For long Possession is here nothing else but a long continued Injury^c.

V. To these Enquiries another may be added, by what means and at what times a Community which hath thrown off monarchical Government, is confirm'd in its new Democratical Frame? In resolving which Doubt different Judgments must be given, according to the difference of the Cases that may arise. *First*, then, if a City or Country hath on any occasion whatsoever discarded the Sovereignty it once stood under, and set it self up for a free independent State, upon Supposition that it hath transacted the Affair in a friendly manner with its former Lord, and hath by him been acknowledg'd for a free Commonwealth, it immediately commeth such, with the fullest Right of Liberty, and need not wait for the tedious Confirmation of Prescription and Use. *Secondly*, if a Sovereign hath upon just Reasons been divested of his Power, the Liberty is presently valid so soon as it is actually asserted; nor is there any Necessity of its being either confirm'd by long Possession, or acknowledg'd for lawful by the former Lord; except so far as this last Circumstance may be a means of preventing all unjust Claims and quarrelsome Pretensions for the future^d. *Thirdly*, if the Constitution be alter'd by an unjust Rebellion, the Liberty thus usurp'd so long continues unlawful, as the rightful Prince shall labour to reduce the Rebels to Obedience, or at least by solemn Declaration shall protest and preserve his Right over them; till by long Acquiescence and Silence he may be presum'd to have given up his Claim. *Fourthly*, if it so happen that a City or Country, being in great Distress and Danger from an Enemy, shall in vain beg the Assistance of its Sovereign, who is unable to afford any Shelter or Support, so as to be put on its own Defence, and oblig'd to seek for Safety from its own Strength and Counsel; we are of Opinion that the Right of the said Sovereign doth expire, when for a considerable time the People have manag'd their own Affairs in a separate manner, and have no Intercourse, or Communication with their former Governour: Inasmuch as this manifestly argues a *Dereliction* or *Desertion* on the part of the Sovereign. For

Mr. BARBEYRAC'S NOTES on §. IV.

¹ *Ubi supra.*

² *Comp. Grot. l. 2. c. 4. s. 14. & l. 1. c. 4. f. 19.*

³ *Comp. Grot. l. 2. c. 4. f. 14. & l. 1.*

^c 4. f. 19.

^a *Vide Justin. l. 4. c. 2. n. 3. Ed. Grav.*

^b *De Civitate, l. 2. c. 9. f. 4.*

^c *Ibid. Justin. l. 3. c. 5*

^d *Vide Baudium de Inducis Belli Belgici, l. 3. p. 178.*

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tho' a King, or a Commonwealth should be forc'd by the most pressing Necessity, thus to abandon a City or a Country under their Dominion, to its own Care and Defence a; yet so soon as they recover out of that Necessity, they ought immediately to return to the Exercise of their former Sovereignty. Otherwise how can he pretend to be my Prince, who for a long time hath neglected every part of his Princely Office towards me, when 'twas in his power to have perform'd it b?

VI. The manner of acquiring Sovereignty by *Election* is, when a People already incorporated, or now about to incorporate, do, by their own free Choice and Judgment, *design* or *nominate* a certain Person for the supreme Command; who, upon receiving such a Decree of the People, or of their Representatives, together with the Promise of their Obedience, and having accepted the Offer, is thereby invested with the governing Power. *Election* is usually divided into *free* and *limited*. By the former any Person, without Exception, may be *designed*, who either is at present, or probably will be hereafter, in all natural respects fit for Empire. By the latter no Person can rightly be pitch'd upon who is not of such a Nation, or of such a Family, or endued with such a particular Qualification. But indeed, if we consider the Right of Electing, as it radically and fundamentally inheres in the People, every Election will appear to be in it self *free*. For tho' an Order may have been once made, excluding such a certain kind of Men from the Crown; yet nothing hinders but that this Order may be repeal'd and disannull'd. But if the People devolve their Right of electing on a few Deputies, they commonly tie them up to certain Laws, defining the Conditions and Requisites to be consider'd in those who are Candidates for the Sovereignty. In some Places the Government is conferr'd by a kind of Mixture of Election and Succession: When the Crown descends, in course, to the Sons of the deceas'd Prince, yet so as that the Consent of the People, or of the Nobles, shall first intervene. Which Consent is not a bare Ceremony, like that of Inauguration, or of doing Homage, but hath the Force and Virtue of a negative Vote. As supposing a People to have first conferr'd the Government on the Author and Founder of the present royal Family under this Condition, that he should transmit it to his Descendants, provided they appear'd fit to receive it: In such Kingdoms the People or the Nobles assemble on

the Vacancy of the Throne, not properly to choose a new Prince, but only to declare that they find no Objection in the Son to hinder him from inheriting his Father's Crown.

VII. An Election may be made, either in a *rising* State, now about to be set up, or in one formerly erected and establish'd. In the former, after the original Compact between the Members thus uniting, after a Decree pass'd for the introducing of such a Form of Government; the Community or the deputed Representatives proceed to Election. Which being finish'd, and the Grant accepted, and a Covenant thereupon ratified between the Prince elect, and the People, there immediately commenceth a State perfectly monarchical. But, in a Kingdom already establish'd, it may happen that a Monarch deceaseth before his Successor is appointed; and then the Nation is said to suffer an *Interregnum*. Now what Frame a State falls into during such an Interval, may easily be apprehended, if we consider what those Bonds were which held it together, in its former more regular and perfect Condition. Since then the *Intrinsic Perfection* of the State, and the actual Existence of the sovereign Power, were both owing to the *latter* Compact between the Prince and People; it follows, that the Person in whom the Sovereignty properly resid'd being extinct, the Kingdom sinks into an *imperfect* Form, and is united only by the *first* antecedent Pact, by which we conceive the particular Members of the Community to have agreed to incorporate in one Society. Not but that this primitive Pact uniting the general Body, is during the time of an *Interregnum* considerably strengthen'd and assisted, by the Endearment of a *common* Country, and that kind of Relation or Affinity which results from thence: Together with this Consideration, that the Fortunes of most Men are fix'd and rooted in that particular Soil, and the Effects of others not easily to be transported or removed d. And this too is the reason why a Commonwealth, under an *Interregnum*, holds more firmly together than an Army (especially if compos'd of Mercenaries) when it hath lost its General: Inasmuch as the Persons, who compose the latter Body, are such as either have no proper Country, or else a Country at a Distance. But now the wealthy part of a Nation, to preserve and secure what they possess, will be ever most forward in maintaining a good Agreement, and most industrious in re-establishing and settling a Government.

Mr. BARBEYRAC'S NOTE on §. VII.

a See a Discourse of our Author's, *De Inter-regnis*, which is amongst his Academical Dissertations.

b *Vide* Liv. l. 3. c. 6. l. 23. c. 21.

c *Vide* Liv. l. 35. c. 16.

d See a Discourse of our Author's, *de*

Obligations erga patriam, which is in the same Work of his just now mention'd.

e *Lysias contra Philon. Orat. 30. c. 2. p. 471. Those who are natural Subjects, but yet of such an Opinion, as to esteem any Country their own where they can promote their own Interest and Gain, must certainly neglect the common Good of the State, to serve their own private Advantage: Since 'tis not the Place where they were born, but the Fortunes and Riches they possess, which they look upon as their Country, and their dearest Concern. Livy, l. 2. c. 1. well observes, That Brurus would have done the Roman Commonwealth a bad Office, if through a too eager desire of Liberty, he had driven out one of the first Kings, before the Minds of that vast Multitude of People, which were gather'd together from all Parts, had been engaged and united by the dear Pledges of Wives and Children, and by a kind of natural Affection to the Soil where they had so long taken Root.*

Antiphon, Orat. 16. Nor was it an easy thing for him to desert the City; his Children and his Wealth being sufficient Pledges for his Stay. Hence, as Plutarch remarks (in Mario, p. 401. A.) the Romans chose Men in their Army according to their Estates; these being Pledges and Securities for Fidelity, whilst they seem'd now to have pawn'd or staked all they were worth.

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Tho' we may, with *Livy* ^a, call a Nation, during an *Interregnum*, *A State without Government*, and as it were, an Army without a General; yet because Communities at their first uniting, before the Sovereignty hath been conferr'd, either on a single Man, or on a Council, seem to bear the Semblance of Democracies ¹; and farther, since it is natural that all Persons upon the Decease of him to whom they committed their Guidance and Safety, should take Care of themselves; therefore an *Interregnum*, regularly speaking, hath the Appearance of a kind of temporary Democracy: At least so far, as that the Consent of the whole People is to determine all Points, both in regard to the Administration of publick Affairs, and to the Creation of a new Prince; unless they are more inclin'd to introduce some other Frame and Constitution. And yet it is not properly a perfect Democracy; in as much as no Decree hath yet pass'd to fix the Sovereignty in a Council of the whole People, by perpetual Right; and because the Laws and publick Institutions are still adapted to monarchical Government. Tho' it may likewise happen, that when a Kingdom consists of very large integral Parts, as suppose of diverse Nations, Provinces, or great Cities, it shall, in case of an *Interregnum*, appear like some collective or *systematical* Form ².

Hence 'tis evident in what sense we are to expound that Assertion laid down by *Grotius* ^b and others, *That when a King dies without a Successor, the Sovereignty returns to the People*. That is, altho' during an *Interregnum*, the sovereign Authority may so far be said not to be properly in the People, as that they have not receiv'd it in a formal manner, or by a perpetual Decree; yet they may in the mean time, either by themselves, or their Delegates, exercise all those Acts of Sovereignty, which appear conducive to their Safety and Preservation. For those Authors are manifestly in an Error, who assert, that upon the Extinction of the royal Family, the *Sovereignty* doth not return to the People, but only the Power of designing and choosing a new King. As if, in the Case of an *Interregnum*, the People were necessarily obliged to constitute another Monarch! And as if they could not confer the ruling Power on a select Council, and so make an Aristocracy; or, establish the present Democracy, for a regular and standing Government!

VIII. But those States have consulted their own Peace in the safest manner, which to avoid the Inconveniences usually arising from an *Interregnum*, have ordain'd beforehand on what Persons the chief Administration shall fall, when there happens to be a Vacancy in the Throne. And these, by whatever Names or Titles they pass, whether of *Interreges*, Protectors, Regents, or the like, are temporary (or, as we may say,

provisional) Magistrates, who, by the Authority of the whole People, are to perform during the present Exigency, the Acts of the supreme Power, at least such as are necessary to hold the Community together; yet so as to be accountable for their Management to the People; which account the new King doth, as in the Name of the People, demand. The Power of these Officers, upon the Election of another Prince, or the setting up another Form of Government, presently expires.

In those Kingdoms where there are constant and perpetual *Senates*, yet such as in the Lifetime of the Prince do not hold the sovereign Authority; upon the Prince's Death, the Senate cannot, by any proper Right, claim that Authority which before they wanted. Yet 'tis most convenient, that in case of an *Interregnum*, the chief Administration of Affairs shall for that time be delegated to them; as they were before employ'd by the King to assist him in his Counsels and his Cares. But then the Power which they exercise on this Occasion, shall be supposed to be conferr'd on them by the Grant of the whole People. For whatever Authority they receiv'd from the King, as a Body of Magistrates, expires upon his dying without a Successor ^c; and if they are allow'd to proceed in the Exercise of their former Function, the Privilege is not owing to the Commission of the Prince, but to the Favour of the People ^d. And therefore they can hold their Power no longer than the Community pleaseth; much less can they challenge a perpetual Sovereignty, or, by their own Authority, erect themselves into an *Aristocratical* Body, or a select governing Council. For 'tis the Prerogative of the Community, to establish what Frame of Government they think fit; unless they have, by Oath, obliged themselves to avoid some particular Constitution. *Dionysius Halicarnassens* ^e reports, that when the frequent Changes of the *Interreges* displeas'd the *Romans*, who seem'd thus to have brought a hundred Kings upon themselves by getting rid of one, the Senate referr'd it to the Judgment of the People to put the Commonwealth into the hands, either of Kings, or of annual Magistrates; as should suit best with their Inclinations. Tho' indeed we find the People returning the Complement, and leaving this Option to the Senate ^f.

IX. To give farther Light to this Enquiry, it may be worth our while to examine the Case which Mr. *Hobbes* ^g puts, and the Issue of his Opinion upon it. *If*, says he, *the People assembled deliver the Sovereignty to one particular Man to hold, only during Life; and when they have so done, depart, without ordering any thing about the Place where they shall meet to make a new Election after his Death; they will be no longer one compound Person, but a loose independent Multitude: In which it shall be*

^a L. 1. c. 17.

^b L. 1. c. 3. f. 7. Numb. 2.

^c *Vite Connoctag. de Unione Lusitan.* l. 3. p. 116.

^d *Ad. Bodin. de Republ.* l. 3. c. 2. p. 217

^e *Vide* l. 2. & *Liv.* l. 1. c. 17.

^f See the History of

the *Interregnum* in *Poland*, upon the Death of King *Stefismund* in *Paul. Piafec. ad Ann. Christi*, 1632.

^g *De Civ.* c. 7. f. 17, 16.

Mr. BARBEYRAC'S NOTES on §. VIII.

¹ See above in Ch. c. S. 6.

² Upon this see above in Chap. c. S. 16. See also a Discourse of our Author's *De Systematibus Civitatum*, which is amongst his *Academical Dissertations*.

lawful for any Man to meet and consult with any others, at any Time, and at any Place. Whence he concludes, that such a Monarch is, by the Law of Gratitude, obliged to take Care that the State be not dissolv'd upon his Decease; either by fixing a certain Time and Place, when and where as many of the People, as think fit, may meet and form an Assembly; or else by nominating a Successor; according as the Interest of the Commonwealth, shall seem to require. Now here Mr. *Hobbes* is in a Mistake, whilst he thinks, 'That the People, by departing from one Assembly, without appointing the Time and Place for another, do disband and separate into a disorderly Multitude; applying it, as he doth, to those who, in choosing a King, have establish'd themselves into a regular and perfect State; and not to those who have it still under Doubt and Consultation, what State or political System they shall introduce. For when a Multitude come together on the last account, and depart without agreeing to meet again, 'tis plain they are dissolv'd *re infecta*, and consequently remain in the same divided independent Condition, in which they were before. But they, who have once incorporated themselves into a regular Commonwealth, and have subjected themselves to a King, have fix'd all their Fortunes in this Seat, and cannot be presum'd guilty of such a Folly as to desire, that, upon the King's Decease, the State shall likewise be extinct, and themselves thrown into the natural Condition of Anarchy, not without manifest Danger of losing the Security, which they enjoy under the present Establishment. Therefore, if they have not conferr'd the Sovereignty on the Prince, with the Right of Inheritance, or with a Power to dispose of the Succession as he shall think fit, they must be supposed, at least, to have tacitly agreed, that immediately upon the Prince's Death they will hold an Assembly, either at the usual Place, or where the Prince kept his Court. Nor will there be wanting, in a whole People, some Persons of great Authority and Worth, whose Influence will be able to keep the Multitude in good order, and to bring them as soon as possible to a general Consultation, for settling the Commonwealth. Hence too it is evident, how far we are to admit of another Assertion of Mr. *Hobbes* ^a, that *When a Monarch renounces and abdicates the Government for himself and Heirs, the Subjects return to their absolute and natural Liberty.* For it

can never be true in this Sense, that the People, on such an Occasion, relapse into a confused Multitude, without any Tye or Relation to each other; but only that they receive an absolute Right of lifting and disposing themselves anew, under any Frame and Constitution.

X. In hereditary Realms there ariseth some Semblance of an *Interregnum*, when the King dies leaving his Queen with Child, or, at least under probable Hopes of Breeding. Now by the Consent of most Nations, a Right may be transferr'd even on un-born Heirs, so as to give them the just Title and Property, tho' as yet incapable of the Use or Exercise. But now, whereas there is a proper *Subject*, in which the supreme Authority resides, there cannot be really an *Interregnum*. On which account neither the Minority, nor the Captivity of Princes create an *Interregnum* in the strict Sense of the Word. Yet as to the latter Case it hath been a frequent Practice in the World, for the Relations of a captive Prince to hold him for dead, and to proceed accordingly; whereas they ought rather to administer the Government in his Name, 'till he shall return from his Imprisonment, or die under it. Now altho', before the royal Issue be brought into the World, it cannot certainly be known whether the Child will prove alive or dead, a Son or a Daughter (in Nations where the fair Sex is excluded from the Crown) yet till this Point is clearly determin'd by time, the People can by no means challenge such a Right, as they obtain in a proper *Interregnum*; but the Kingdom must, in the mean while, be govern'd in the same Method as is wont to be observ'd, during the Minority of a Prince ^d.

XI. By the way of *Succession* or Inheritance, the sovereign Right which one Person hath obtain'd or receiv'd, is continued to his Posterity. This Succession ¹ is appointed, either at the Pleasure of the Prince, or at the Pleasure of the People ². Those Princes who possess their Realms after the manner of *Patrimonies*, have a Right to dispose of the Succession, according to their own Inclinations; and when they have once declared their Pleasure in this Point, it ought no less strictly to be observ'd, than the last Will of any Testator. And in this Case a King may divide his Dominions amongst his Children by equal Portions, and without regarding the Difference of the Sex. Or if his legitimate Issue fail, he may transmit the Crown to his na-

^a *Leviath. c. 21.*

^b Hence the *Perkins*, when their Prince *Hirnisias* died, leaving his Queen with Child, proclaim'd the unborn King, and crown'd him too, by fixing the Diadem on the Royal Burthen: Nay, they voted the Infant a particular Name, firmly believing it would be a Son. And this proved the great *Sapores*, so renown'd in *Story Archib. l. 4. c. 10.* ^c *Vide Justin l. 36. c. 1. Trebell. Pol. in Gallien. c. 1.* We have a Story to this purpose in *Dion Cassius, l. 36.* *Tyrannes*, the *Armenian* Prince, had vast Treasures, laid up in the fortified Places of *Sophene*. When *Pompey* demanded all his Wealth to be deliver'd up to him, by those who had it in Charge. their Answer was, *That they would do nothing without express Orders from their Master.* And when *Tyrannes*, though against his Will, commanded them to open the Castles, they still refused to comply, urging that the King laid this Injunction on them, not voluntarily, but through Compulsion. Yet they afterwards were oblig'd to deliver all up, when they found their Prince was severely used, and thrown into Chains upon their Refusal. *Demetrius*, being made a Prisoner by *Seleucus*, commanded his Son, with his Captains and Friends that were at *Athens* and *Corinth*, not to believe his own Writing or Seal, when they should be shewn to them; but to keep for *Antigonus* his Towns, and the Remains of his Kingdom, as if he were actually dead. *Plutarch. in Demet. p. 914. D.*

^d *Vide Serran, Hist. Gall. in Philipp. Valef. ab init.*

Mr. BARBEYRAC'S NOTES on §. XI.

¹ *Vide Grot. l. 2. c. 7. s. 12, 13.* ² See Mr. *Bede's* Dissertation *de Successione Primogenitorum*, Sect. 22. &c. and also that *D. Testamentis summorum Imperantium, & speciatim Caroli. II. de Hispan. Reg. c. 1. f. 21, &c.* see likewise *Sidney* upon Government, C. 3. s. 18. and Tom. V. of the *Reponse aux Questions d'un Provincial* by Mr. *Bayle*, p. 138, &c.

tural ^a, or to his adopted Son; nay, if he thinks fit, to one no way related to his Family ^b. But when such a Monarch hath made no Provision about the Succession, it must then be consider'd, what Person the common Course and Order of Nature calls to inherit the Throne. For though the Prince, in his Life-time, did neither by Testament, nor any other way, signify his Resolution in this Affair; yet we must presume, that he did by no means desire the State should upon his Decease fall into Anarchy; common Humanity not suffering him to leave his Subjects in a Condition of Misery and Ruin. Especially since, if he purposely declin'd to make a future Settlement, it had been easy for him to have given the People Notice; so that, upon this Intimation they might have agreed on some Expedient for their own Security. Besides, we ought in Reason to suppose, that Princes, as well as other Persons, are unwilling that the Rights or the Possessions, which they have acquired, should at their Decease, either be imbezeld, or left as it were to the first Taker; but that they would have them devolve entire to their dearest Friends. Therefore when such an Omission happens in patrimonial Kingdoms, the same Order is to be observ'd as in private Inheritances; except so far as the Disposition and Safety of the Nation made it advisable to recede from that Method. For although 'tis very likely, that a Father bears an equal Affection towards all his Children; yet if he be wise, he will so far moderate and restrain it, as not to weaken the hereditary Estate, on which the Security and Honour of a Family in a great measure depend: and he shall be presumed to have taken this Resolution, if he hath not expressly declar'd any thing to the contrary. From these Considerations it follows, that such a Prince as we are now speaking of, is desirous to have the monarchical Frame of Government preserv'd after his Death; in as much as he shew'd his Approbation of it by his own Example, and did not afterwards reverse, or alter it, by his Word or Deed. And farther, since Men are naturally inclin'd to wish best to those, from whose Success some Honour and Glory is reflected on themselves, rather than on others; and since the Power of Children casts the brightest Glory on Parents after their Decease; it must be concluded, that a Father is more heartily concern'd for the Happiness and Greatness of his own Issue, than of Strangers. If he had any other Design, he ought in express manner to have declared it: since, commonly speaking, we do not suppose a Man to have been so little Master of his Wits, as to deprive his Children of so fair an Advantage, and to leave it, as it were, on purpose to create Quarrels and Disputes. But Mr. *Hobbes* is in the wrong, when, amongst the Tokens which a reigning Prince may give of his Resolution not to transmit the Crown to his Family, he reckons

^c for one, *long Custom*, ^d In as much as he who says nothing about his Succession, is supposed to consent to the ordinary Custom of the Kingdom; which Custom, whether it derives its Original from the primitive Founder of the Race, or from any of his Posterity, hath in time pass'd into the Force and Authority of a fundamental Law. But the Enquiry which we are now upon is, What Order is to be observ'd in the Succession, when it is neither determin'd by the Appointment of the last Prince, nor by the Law or Custom of the Nation? To proceed then, our *silent* Monarch must be presumed to desire, not only that the Kingdom shall preserve its regular Frame, that is, that the Sovereignty shall not be divided into Shares amongst his Sons, or near Relations, nor yet held in Common by them all, with equal Power; but likewise that the State shall not be parted into distinct Governments, and many Kingdoms introduced instead of one: In as much as either of these Alterations would draw after it, not only the exceeding great Hazard and Detriment of the Realm, but also the utter Convulsion of the royal Family. The next thing which, in this Case, must be presumed to have been the Will of the Monarch, is, that notwithstanding the Prerogative of Age, his Sons should be preferr'd before his Daughters; because Men are, for the most part much fitter to command, and the Government of Women is generally attended with a long Train of Inconveniences, which must needs be increas'd, if the Brothers are to be set aside to make room for a female Sovereign. Another thing to be taken for granted on these Occasions must be, that amongst Children of the same Sex, the eldest is to be advanced rather than any of the rest: and this not only, because he is judg'd to excel the younger in Wisdom, as well as in Years, but because, if we consider them with Relation to the Father, all Brothers are equal: And were the Crown to be bestow'd on the most worthy of them, they could not avoid falling into irreconcilable Differences and Contentions. A famous Instance of which Truth we have in the Revolutions, that not long since happen'd in the Empire of the *Mogul*, described at large by Monsieur *Bernier*. To prevent therefore all such Confusions, it is the best and safest Method to follow the Order of Birth, which is embraced by the universal Agreement of all Nations, as a Rule which Nature her self seems to have prescribed. Yet here it will be necessary, that the eldest Son, who is thus preferr'd to the Crown, take effectual Care for the honourable Subsistence and Support of his younger Brothers. But that he should be obliged to make their Fortunes as large, as if the Kingdom were to have been divided into equal Shares, is both needless and indeed impossible. For let us suppose four Brothers; whence can the elder, who is to fill the Throne, procure so much

^a Thus *Alphonfus*, King of *Aragon*, gave the Kingdom of *Naples*, which he had conquer'd, to his base Son *Ferdinand*: whereas others pretended, that it ought to have been united to *Aragon*, by the Arms and Wealth of which Nation it had been subdued. *Galactophil.*

^b *Act.* *Justin.* l. 41. c. 5. n. 10. where *Phraates* leaves the *Parthian* Empire to his Brother *Mithridates*, all his own Children being excluded.

^c *De Civ.* c. 9. f. 15.

^d *Add.* *Xenophon* *Crop.* l. 8. p. 139. Ed. *H. Steph.* in *Cyrus*'s last Speech.

Treasure to pay the Portions of the rest, as shall be equal in Value to three Parts of the Realm: *¶* In Monarchies of this kind, the Prince dies without Issue, his Brothers or Sisters are to succeed; and upon Failure of these, the next in Blood to the deceas'd King; with due regard still to the Prerogative of Sex, and of Age. Nay the Government may, at length, devolve to those who were actually related to the last Possessor, tho' of a different Blood from the Author of the regal Line. And this, not only, if the deceas'd Prince thus declared his Will, but if, by the Custom of the Country, the same Method of Succession obtains in private Inheritances: for then, we must suppose, that the Prince would have the Custom hold in regard to his own *Patrimony*; as well as to those of others, when he hath made no express Disposal to the contrary.

Mr. *Hilles* seems to have carried this Point a little too far, when he tells us *c*, *By the same way as the Sovereignty descends, the Right of Succession likewise descends: For in case the eldest Son dies before his Father, he shall be supposed, unless the Father hath made any other Settlement, to transmit the Right of Succession to his own Children; and therefore the Nephews and Nieces shall sooner come into the Succession, than their Uncles by the Mothers (he means by the Fathers) side.* It cannot indeed but be acknowledg'd, that this Right of the Children to represent their Father and come into his place, looks very fair and equitable *d*; and that his untimely Death should not be the Cause of a new Loss and Prejudice to them, seems to be but a reasonable Favour. And yet, since the Son, during the Father's Life, hath not a full Right to the Inheritance, but only a just Hope and Expectation; and since it doth not appear, that this bare Hope can be so well transmitted to Children, as the Right it self might be; we may with more probability conclude, that by the meer Right of Nature the Nephews have not the Precedency of their Uncles; unless their Title is strengthen'd and supported by the Laws or Customs of the Kingdom *e*.

XII. But in Kingdoms which were first constituted by the voluntary Act of the People, the Order of the Succession doth likewise originally depend on the Peoples Will. And if they expressly confer on the Prince, not only the Sovereignty, but likewise the Right of nominating his Successor (which is seldom done, unless upon a very extraordinary account) then he shall leave his Crown to whom he pleaseth. But, if the People themselves settled the Succession, they either were willing to have it pass in the usual

way of other Inheritances, so far as that Method can conveniently be applied to Kingdoms; or else they appointed a particular Course, by which it should be regulated and determin'd. Now the Safety of the State requires, that the Succession of a Kingdom, *simply Hereditary* (or where it is barely appointed that the Crown shall pass from each Prince to the next of his Kin) should vary from the Order and Method of private Inheritances; chiefly in the following respects. *First*, That the Kingdom shall not be divided amongst several Brothers, or other Joint-heirs *g*, equally distant in Blood from the deceas'd Prince. In as much as this Prohibition is highly conducive to the Agreement of the Subjects, and to the Support of the Nation and Government. *Secondly*, That the Succession shall stop at those Persons who are descended directly from the Monarch; and not pass to the collateral Line, much less to the Degrees of Affinity *h*. For the People, by their primitive Grant, design'd only to confer the Kingdom on such a Person and his Posterity; upon Failure of which they again recover the Right of settling the Commonwealth, as they judge convenient. *Thirdly*, That no Person shall be capable of succeeding, but such as are born according to the Laws of the Country. By which Caution are excluded *natural* or *base* Sons, however they stand in the Father's Affection, who may perhaps equal them to his legitimate Issue. For in those Nations at least, which have any Honour or Spirit, such Men must lie open to Contempt, whose Mothers were not thought worthy of legal Matrimony, and were used rather for occasional Instruments of Pleasure, than for agreeable Companions of Life. Besides, since the Ladies of that Profession are seldom famous for Constancy and Fidelity, and since they want the Advantage of a fix'd Cohabitation, it cannot so very certainly be known, whether the Prince be really the Father of this unworthy Progeny, which they charge upon him. But now 'tis highly expedient, that the Person of a King should be awful and venerable, and as little as possible exposed to Controversy and Doubt *i*. For which reason, 'tis the Custom in some Nations for the Queen to be *delivered* in an open Chamber, to take off all Suspicion of a supposititious Birth. And we read that Queen *Constance*, Mother of *Ferdinand* the Second, was brought to Bed of him, when she was past Fifty Years old, in a Pavilion erected in a most publick Part of the City, before a large Assembly of the Nobility of both Sexes *k*. *Adopted* Sons come like-

a Ald. Bacler ad Grot. l. 2. c. 7. s. 13.

b V. Grot. l. 2. c. 7. f. 11. n. 2.

c D. Civ. c. 9. f. 19.

d See above in B. 4. c. 11. f. 12.

e Ald. Bodin. de Repub. l. 6. c. 5. p. 143. &c.

f V. Grot. d. l. f. 14. &c.

g This is a Remark which the Historian *Justin* attributes to the Soldiers of *Dionysius*, Tyrant of *Sicily*, who after the Death of that Prince, advanced to the Throne *Dionysius* his Eldest Son. *Extincto in Sicilia Dionysio Tyranno, in locum ejus Milites maximum numerum ex filiis ejus, nomine Dionysium succedere; & natura jus scuti, & quod firmius futurum esset, regnum, si penes unum remansisset, quam si partionibus inter plures filios divideretur, arbitrabantur.* Justin. Lib. XXI. Cap. 1.

h Ald. Bacler ad Grot. l. 2. c. 7. f. 15.

i See a famous Instance of this in *Martinus's* History of *China*, l. 6. c. 1. p. 202.

When *Perseus* and *Demetrius* disputed which should succeed *Phillip*, it was urged on behalf of the latter, that although he was the younger of the two, yet he was born in honest Wedlock, whereas *Perseus's* Mother was only a Mistress of the King's: and that, for Evidence of this Distinction, *Perseus* had no Mark of *Phillip* in his Body, whilst *Demetrius* exactly resembled his Royal Father, *Livy*, l. 59. c. 53. Add the Story of *Ferdinand King of Neapl.* in *Paul. Jov. Hist. Neapol.* l. 2.

k *Pandulf Collet. Rer. Neapol.* l. 4.

wife under this Rule or Exclusion; as well because to be descended from the true regal Line makes a Prince more respected, and fills the Subjects with better Hopes, that he will resemble his great Ancestors, no less in Virtue than in Blood; as because the People originally conferred the Crown on the immediate Race of the first Possessor; designing, when that should prove extinct, to resume the Power of settling the Government for the future. But allowing Adoption to give a Right to the Kingdom, this Power of theirs might be for ever forestall'd and eluded. *Fourthly*, That in the same Degree of Kindred, whether amongst the Children or the Grandchildren of the last Monarch, the Males shall be preferr'd to the Females, tho' the latter happen to be their Superiors in Age ^a. *Fifthly*, That in the same Degree, and the same Sex, the Advantage shall be given to the Elder ^b. *Lastly*, The Succession of such Realms differs from the Course of vulgar Inheritances in this, that altho' they are deliver'd, as it were, *from hand to hand*, and do not devolve to a new Possessor, 'till the Death of the former; yet of these Persons, the one is the *Occasion* only, and not the proper Cause of transmitting them to the other; whereas common Inheritances pass to a *new* Proprietor by the Right, and Will, and the Favour of the *last*. For 'tis not the Pleasure of the Prince, under these Governments, which bestows the Crown on the next Wearer; but it descends in the royal Line, by virtue of the original Act and Constitution of the People. And for the same reason it is not necessary, that the Prince who succeeds, though the nearest in Blood, should take upon himself the private Affairs, Incumbrances, and Debts of the deceas'd. But, if he thinks fit, he may take Possession of the Kingdom, and refuse the Inheritance of the private Patrimony ^c, to which that nobler Right of the Crown is by no means inseparably united; but is of it self an entire, distinct, and transcendental Inheritance. For the People must be supposed willing to have the Crown descend by a clear and unquestion'd Title; but as for the peculiar Estate and Fortune of the Prince, they are not in the least concern'd or affected with it. Besides, it might prove a Burthen to the Nation, were the royal Heir, at his Entrance on the Government, obliged to discharge such Debts as his Predecessor personally contracted; since in Case the private Patrimony would not hold out, the Deficiency must be supplied by the publick Stock. To conclude, the chief Reasons which move any

People to establish such an Order of Succession; as we have been all along describing, seem to be these: That the Throne may be fill'd without any Controversy or Doubt; and the Inconveniences of new Elections avoided: that the Splendor of the Prince's Birth may increase his Respect, and his Race and Education give the Promise of more illustrious Virtue; and that the reigning Monarch may still govern the Kingdom with more Vigilance, and defend it with more Courage, whilst he is to deliver it down to those Persons, who on the Score of natural Affection, are the dearest to him in the World ^c.

XIII. But since, in this way of Succession, which we call *simply hereditary*, it may easily happen amongst Persons, far remov'd from the Author of the Race, that it shall not be clearly known which of the many ought to be preferr'd, if the Crown fell thus absolutely to him who was next in Blood to the deceas'd Prince; especially since the Favour of *Representation* (or of letting the Children *represent* their Parents in *Right*) quite vanisheth in these distant Degrees: to prevent any such Controversy, many Nations have introduced a more accurate Succession, which they term *lineal* ^d. Now according to this, all the Descendants of the royal Founder are conceiv'd to form a Number of perpendicular Lines, each of which approacheth nearer to the Throne, according as the Persons, in the same Degree, stand possess'd of those natural Advantages, the Prerogatives of Sex and of Years. And the Kingdom shall not pass into another Line, till the former is quite exhausted and extinct. It is needless therefore for persons in this List of Succession, to shew in what Degree they are related to the last Possessor, or to appeal to the Right of *Representation*; but according as they are born, the Law gives them a perfect Right of inheriting, in their proper Order: which Right, tho' they should happen themselves not to wear the Crown, they transmit in the same Order to their Children. Here then the first regard is to be paid to the Children of the deceas'd Prince, and not to the living only, but to the dead, in case they have left Issue in any Degree whatsoever; for such Issue shall exclude all others, if their Parents were the nearest lineal Heirs: yet so as still to allow, in the same Degree of the same Line, a due Preference first to the Advantage of Sex, and then to that of Age. (For that the bare Prerogative of Age should out-weigh and overrule the Prerogative of Sex, can perhaps be instanc'd in no Example of History.) If

^a *Alf. Bæcler ad. J. I. Grot. s. 17.*

^b Thus *Perseus* urgeth against his Younger Brother *Demetrius*, Competitor with him for the Crown. ^c That he endeavour'd to invert the Order of Age, of Nature, of the Customs of *Macedon*, and of the Laws of Nations. *Livy. l. 42. c. 11.*

^c The *Perseus* had a very extraordinary Custom.

by which One ey'd Persons, and those who labour'd under any other Corporal Blemish were excluded from the Crown. *Procop. de B. Pers. l. 1. c. 11.*

MR. BARBEYRAC'S NOTES ON §. XII, and XIII.

^d This is *Grotius's* Opinion, Lib. II. Cap. VII. Sect. 19. *Grotius* in his Note upon this place finds fault with his incomparable Author, but without the least appearance of Reason. *Grotius* is speaking only of what a Prince has borrowed, or owes upon any other Account whatsoever, not as Head of the State, but as a private Person; so that his own private Patrimony which he possesseth independent of the Crown-Lands, are as it were mortgaged for the Payments of such Debts and Incumbrances. Whereas all *Grotius's* Reasons only prove, that a Successor is obliged to discharge all Debts and Incumbrances that were contracted by his Predecessor as Head and Governour of the People, and for the Occasions of the State, as could easily be proved, if the Thing were not evident to any one who with never so little care will examine that Note. Now this is what *Grotius* does not deny: On the contrary he confirms it himself sufficiently at large in Chapter XIV. of the same Book, Sect. 11, 12. See what our Author says after him, Book VIII. Chap. X. Sect. 8.

^e See *Grot. B. 2. c. 7. l. 22, 23.*

the last Possessor dyed childless, the account passeth back to the next Line above him, and so on; still *ascending* from the *deceas'd*; and not *descending* from the first *Progeni*: or: with the same Allowance as before to the two Prerogatives of Nature.

The two Species of *lineal* Succession, commonly assign'd, are what they term *cognatical*, and *agnatical*: The former kind which, on account of its being receiv'd in the Kingdom of *Castile*, goes likewise by the Name of *Castilian*, hath its Peculiarity in it, that in the same Degree of the same Line, the younger Males are preferr'd to the elder Females; yet so as that no Transition is made from one Line to another on the bare Obstacle of Sex. Thus it doth not exclude the Women, but postpones them to the Men; and runs back to the Female again, in case the Males, who were superior or equal to them in other respects, shall happen to fail together with their Issue. By Consequence therefore, a Granddaughter by a Son comes before a Grandson by a Daughter, a Niece by a Brother before a Nephew by a Sister. The other kind of *lineal* Succession, or the *agnatical*, differs from this, in that it excludes from the Crown, the Females and their Descendants for ever. A Custom which seems chiefly to have been taken up, to hinder the Kingdom from passing by Marriage to Strangers; and to maintain the antient Stock in its due Veneration, which might be in danger of growing weak and despicable, by suffering so many foreign Grasse. This is commonly known by the Name of *French Succession*, having long obtained in that Nation. In some places the *agnatical* Method is temper'd with this Reserve, that in case all the Male Line fails, the Right returns to the Females ^a.

We may remark in general of *lineal* Succession, that since 'tis so very plain and easy, it might be a principal means of deciding Controversies in Kingdoms, to enquire first of all, what kind of Succession hath been there by Custom establish'd. A remarkable Instance of this the History of the last Age presents us with in the Dispute about the Succession to the Crown of *Portugal*; when *Raimundus* of *Parma* stood on the Right of *lineal*, the other Competitors on the Right of *simple* Inheritance ^b.

XIV. Another Method of Succession ² may be introduc'd, by Virtue of which he shall always stand nearest to the Crown, who is nearest to the Founder of the royal Family. Thus then the

MR. BARBEYRAC'S NOTES on §. XIV, and XV.

¹ These Names come from the Words *Cognati* and *Agnati*, the former whereof signifies the Kindred by the Mother's side; the latter, the Kindred by the Father's side. The latter only inherit the Crown by an *Agnatical* Succession, but one or other may obtain it by a *Cognatical* Succession.

² The best way is to refer it to an Arbitrator that is of the same Royal Family. *De Offic. Hom. & Civ. l. 2. c. 10. §. 12.*
³ If then the King or People, find that either of the Competitors refuses to make use of such amicable Methods of deciding Controversies, as are practis'd by Persons living in a State of natural Liberty, and that he endeavours to involve the Commonwealth in Civil Wars, only to gratify his own Ambition; they may certainly bring him to reasonable Terms by forcible means, tho' the Determination be not in the way of Judicial Sentence. If *Gronovius* had minded that, he would not have thrown away so many Words in censuring his incomparable Author, on whom he puts a wrong Construction in his Note upon Lib. II. Cap. VII. Sect. 27. for I doubt not but that *Gravius* suppos'd what I have just now said. I likewise find that Mr. *Hertius* takes Notice pretty near of the same Thing in his *Notes*, which were publish'd almost at the same time of the first Edition of *mine*.

^a Vide Guicciardin. l. 12. p. 367.

^b Vide Connettag. de Unione Lusitan. l. 3.

^c L. 29. c. 29.

^d Jodoc. Schouten in Descript. Regn. Siam

^e Thuanus l. 65. ad Ann. 1578. & Connettag. de Unione Lusitan. l. 1.

the last of which Authors seems to hint, that this proceeded from a particular Compact between the Brothers.

^f Garcilass. de la Vega, l. 4. c. 10.

^g Petrus de Valle, Itin. Par. III. Epist. 6. & Hieron.

^h Oforius, in several Places of his Work.

ⁱ Franc. Lopez de Gomora, Hist. Ind. Occidental. c. 28.

^j Id. m. c. 12.

^k Franc. Creuxius Hist. Canad. l. 1.

^l L. 15. p. 528. Ed. Genev. Casub. ^m L. 2: c. 7. §. 2.

Founder's Sons are the first in the List, according to their Age; next to them his Nephews, with regard still to their Father's Age, and to their own: upon Failure of all these, the Founder's Grandsons come in, then his Grand Nephews, and so on. This was the Course observ'd of old in *Namidia*, as we may gather from *Livy* c. The like is practis'd in the Kingdom of *Siam* ^d; and hath been in *Fes* and *Morocco* ^e: as it was heretofore amongst the *Chittas*, or petty Kings in *Peru*, under the Empire of the *Incas* ^f. Thus in many Parts of the East *Indies*, especially on the Coasts of *Malabar*, 'tis the Custom for the Father to be succeeded not by his own Son, but his Sister's Son: the People fancying themselves to have more evident Proof, that the latter is of the royal Blood ^g. In *Hypaniola*, the Nephews by the Sister are admitted for the same Reason; tho' not till the direct Line fails ^h. And amongst other *Indian* Nations, in that Neighbourhood, even in private Inheritances, the present Possessor prefers his Sister's Children to his own; excepting the Family of the *Incas*, where the Son constantly succeeds the Father ⁱ. The same Rule is follow'd in *Camida*, with regard to Honours as well as to Estates ^k. *Strabo* ^l reports a very strange way of Succession amongst the *Chabramotite*, a People of *Arabia*. *The Crown passeth*, says he, *from the present Possessor, not to his Son, but to the first Nobleman that was born in his Reign. For as soon as every new Monarch is settled in the Government, a List is taken of all the Wives of the Nobility, who appear to be with Child; and Keepers are set over them to observe which Lady is first brought to Bed of a Son: and the Child which thus gets the start is declared lawful Heir, and educated in a royal Manner against the next Vacancy in the Throne.*

XV. 'Tis a Question usually canvass'd, who shall be judge of the Controversy between two or more Competitors for a Crown; especially if the Kingdom be not patrimonial ³? For to try out an uncertain Title by the Sword, is a manifest Breach of the Law of Nature. Here then it is evident, in the first place, that Disputes of this kind cannot possibly be determin'd in the way of Jurisdiction, or proper Sovereignty; and that therefore they must be left to that Method of Decision, which holds amongst Persons living in a State of natural Liberty, in subjection to no judicial Authority ⁴. In which Sense we ought to understand what *Grotius* ^m hath deliver'd on this Point. Now

those are said to live in a State of Nature, who are neither subject one to the other, nor both to a common Lord. And tho' the *Parties* themselves may perhaps, whilst they are contending, acknowledge a Sovereign; yet the *Cause* is of such a Nature, as not to bear the Sentence of any Person under the Notion of a superior. First, a Foreigner cannot pretend to interpose as a Judge. Nor, Secondly, is the King himself, if the Controversy happen'd to be started in his Life-time, a sufficient Arbitrator; in as much as the People, in these Monarchies which we now speak of, are not supposed to have left the Method of Succession to the Pleasure of the Prince. Not but that we have many Examples in History of Kings, who relying on their own Authority and Worth, have assumed greater Power in this respect, than the Constitution of free Kingdoms would otherwise allow. Thus *Darius* in *Herodotus*, decides the Quarrel between his own Sons: And in *Polymnia*, *Artaxerxes* and *Cyrus* submit to their Father's Determination. And lastly, it may be maintain'd, that neither the People themselves can have such a Competition in an authoritative manner. Yet not for the Reason assign'd by *Grotius*, because the People have transferr'd all their Jurisdiction to the King and royal Family, and therefore can claim no Reliques of it for themselves, whilst any of that Line survive. For Succession in such a Case doth not belong to that Jurisdiction, which the People conferr'd on the King: And if a Quarrel of this kind should arise during an *Interregnum*, the People cannot be debarr'd, at least, from a temporary Jurisdiction. But the true Reason must be drawn from the Nature of these Disputes. For the Effect of judicial Power, as exercis'd over Subjects, is, that they shall be obliged to acquiesce in the Sentence given, and upon Refusal, shall by virtue of the sovereign Authority be compell'd to submit. And this, because 'tis one part of civil Subjection, to expect from their Superior the Decision of any Controversy that may happen between them and their Fellows. But now, if we run over all the various Doubts which may be rais'd on the Point of Succession, we shall find that not one of them is capable of being solv'd by the People, in the same commanding manner, as the Causes of private Persons are ended by the Ordinary Judge. For suppose a Prince already settled in the Throne, with the Approbation of the People, should have a Claim put in against him by another of the royal Family who pretends to be the nearer Heir: In this Case, the People having acknowledged the Prince in Possession, it cannot be imagin'd, that the new Claimant will appear, or stand to their Verdict. Nor, on the other side, will the Possessor of the Throne submit to be judg'd by those who have already own'd him for their Sovereign. Much less have the People a sufficient

Power to give Judgment, when they refuse to own the Person who puts in his Pretensions. But if, upon a Vacancy in the Throne, two Competitors offer themselves, and engage in a Dispute about their Title, and the People only stand ready to receive him for their Prince, who shall have the better Right; there is here no need of Judgment properly so call'd, or such as is given by the Sentence of the Court, to compose Matters between private Men. For in this Case the controverted Point must be one of these two; either barely, which of the Rivals stands in the nearest Degree, or else which Degree ought to have the Preference? When the former happens to be the Question, the contending Parties are to clear their Descent as well as they are able; and he who shall appear to the People to make out his Claim most evidently, ought to carry the Day. Now tho', in this Method of proceeding, the People's Vote weighs considerably towards turning the Scale, yet it is not pronounced like a Sentence from the Tribunal, but only in the way of a bare Approbation; as a Debtor who is ready to pay, desires only to see the Bill, and to satisfy himself in the Truth of what he is charged with.

But if the Dispute be, which Degree or which Line ought to have the Preference, this shall be adjusted by the common Declaration of the People, since every one is presumed to understand what way he likes best; and since the People is still reckon'd the same as it was heretofore, when the Order of Succession was originally establish'd. Thus the Controversy between *Edward* King of England, and *Philip Valois*, as likewise that which happen'd before between *Jane*, Daughter to *Lewis Hutin* and *Philip the Long*, was discuss'd before an Assembly of the Estates of France. Thus we find in *Mariana* nine select Judges settling the Succession in the Kingdom of *Arragon*. And in *Dionysius Halicarnassus*, the People end the Differences between *Sylvius* and *Iulus*, in favour of the latter; chiefly on this Argument, That he was born of a Mother who had been the true Heiress of the whole Kingdom. And yet, this Declaration hath no more of the Nature of a judicial Sentence in it, than when a Person, who hath first conferr'd a Grant, afterwards explains some Terms that were thought ambiguous or obscure in the Instrument of Donation.

In Case either of the Competitors shall represent it as a Grievance, that the Affections of the People seem prejudiced in favour of his Rival, it may be the most ready Expedient to refer the Contest to proper Arbitrators; such as are neither inclin'd to one Party more than to the other, and in regard to whose Interest, 'tis an indifferent Matter which of the Two gets the Victory.

a *Polymnia, init.* Yet *Justin* (l. 2. c. 10. n. 9, 10.) reports that the Cause was referr'd by the Consent of the Brothers to their Uncle *Artaphernes* as to a Domestic Judge.

b *Artaxerx. init.*

c *Add 1 Kings* i. 5, &c.

d See the *French* Historians, and *Polybor Virg. Hist. of Engl.* l. 19. *init.*

e *Hist. Hispan.* l. 20. c. 2, 3.

f L. 1. g *Vide* *Conneftag. de Unione Lusitan.* l. 3. & 5. The most usual Controversies that occur on this Head, see in *Grotius*, l. 2. c. 7. f. 28, &c. *Arniseus Relect. Polit.* l. 2. c. 2 f. 10, &c. and in other Authors;

CHAP. VIII.

The Supreme Power is to be held Sacred in Civil States.

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| <p>I. <i>The Supreme Power not to be resisted in lawful Commands.</i></p> <p>II. <i>Whether a Private Member can suffer Injury from the State.</i></p> <p>III. <i>Subjects very prone to unjust Complaints against their Governours.</i></p> <p>IV. <i>How many ways a Sovereign may injure his Subjects.</i></p> <p>V. <i>Whether in the Case of grievous Injury and Oppression a lawful Prince may be resisted.</i></p> | <p>VI. <i>The Name of a Tyrant does not justify the use of Violence in the Subject.</i></p> <p>VII. <i>Grotius's Opinion.</i></p> <p>VIII. <i>No Princes are to be held sacred, but such as are truly invested with royal Authority.</i></p> <p>IX. <i>In what Case an Usurper may be acknowledged for a lawful Prince.</i></p> <p>X. <i>How far the Commands of an Usurper oblige the Subjects, while their lawful Sovereign is alive, tho' in an exil'd condition.</i></p> |
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I. **A**S civil Empire, or Sovereignty, was first introduced to guard the Safety of Mankind, and to take off the almost infinite Miseries of a State of Nature, so that it be held sacred and inviolable by all Men, is highly the Interest of the whole World^a. And thus much indeed every Man in his Wits will confess, that 'tis a Sin to oppose a lawful Ruler, whilst acting within the Limits of his Authority. In as much as it appears evidently from the Nature and Design of Government, that there must of Necessity be join'd with it an Obligation to Non-resistance; or to a ready Obedience in performing or omitting any thing, which it shall command or forbid. The main Question therefore must be, whether in case the Sovereign should enjoin the Subjects what is unlawful, or treat them in an injurious manner, he is then also to be esteem'd Sacred; and so, that the Subjects ought not in a violent way to resist and repel the Injury?

II. Mr. Hobbes^b indeed maintains, that *A State cannot do Injury to a Subject, as neither can a Master to his Slave.* And he builds his Notion on this Argument, 'That no Covenant hath pass'd between the State and the Subject (all Injury, according to him, consisting in the Violation of a Covenant) and that the Will of the Subject is entirely submitted to the Will of the State; so that whatsoever the State acts is supposed to be done with the Subject's Consent. But now that what a Man willingly consents to receive, can be no Injury to him, is a Maxim that every Body is acquainted with. But we have already evinc'd, both that Injury doth not barely consist in the Violation of a Covenant, and that there doth really a Covenant pass between the Monarch and his Subjects. And as for Subjects submitting their Will to the Will of the State, this must be interpreted and restrain'd according to the true End and Design of civil Communities; and then the whole Matter will come to this Issue: Every Subject submits his Will to the Will of the State in all those Affairs which respect the common Interest and Safety;

and in any Business of this kind a private Member cannot complain of Injury, tho' he should happen to dislike the publick Proceedings. But since it is very possible, that the sovereign Power may enjoin the Subject such Performances, or inflict on him such Evils, as bear no regard to the publick Welfare, but intrench on the particular Person's Right, whether acquired by Covenant, or by the universal Law of Humanity; there appears no reason why we should not affirm that a private Member is capable of being *injur'd* by the State, to which he belongs.

III. But here it ought well to be consider'd, that turbulent and querulous Subjects are wont to censure many Actions of their Prince as Injuries, which are by no means such. Every thing is by them condemn'd for Oppression and Mismanagement, that doth not exactly suit with their private Judgment. Now as the great Variety of Mens Inclinations and the Irregularity of their Aims and Wishes, make it impossible that the publick Administration should be equally grateful to all Persons; so he who exclaims against all Proceedings as injurious, which do not hit his particular Humour, is either contriving to overthrow the Constitution, or hath a Mind to be tampering in the Government himself. The last is the Case with many Murmurers; who are discontented only because the Commonwealth is not in their own Hands. Of this Number was *Avidius Cassius*^c, who boasted that he took up Arms against *Marcus Antoninus*, because he was displeas'd at the Prince's Greatness, and *could not bear the Name of an Emperor.* The same Pretence was made use of by *Peisacimus Niger*^d, and by *Clodius Albinus*^e, in their Rebellions against *Severus*. Many complain of their Prince for employing bad Ministers; when if we search into the Bottom of their Discontent, we shall find it to be only that they are not themselves prefer'd to a Share in the Ministry. The common People often grumble at the Hardship of Taxes, when no more is demanded than what the present Occasions of the Publick, or such Neces-

^a *Add. Diodor. Sic. l. 1. c. 90.*

^b *De Civ. c. 7. l. 14. & c. & l. 7.*

^c *In Valtat. Gallican c. 1.*

^d *In Elian Spartian.*

^e *In Jul. Capitolin.*

Mr. BARBEYRAC'S NOTES on §. I. and II.

¹ *V. Grot. l. 1. c. 4. f. 2.* And two Latin Discourses of Mr. Nolet's Publish'd in French by Mr. Barbeyrac in the beginning of the Year 1707, Entitul'd, *Du Pouvoir de Souverain, & de la Liberté de Conscience*, at Amsterdam.

² In the seventh Chapter of the first Book, Sect. 13. See above in the second Chapter of this Book, Sect. 8. & Citations

sities as are likely to arise hereafter, seem to require. And what Answer they ought to receive, Mr. *Hobbes* ^a will inform us. As for the strict and severe Execution of the Laws, no Person can make this the Ground of his Dissatisfaction, but such an one as desires a Liberty of committing Wickedness. After all, in case any Man looks on those Burthens as intolerable, which the Affairs of the Commonwealth make necessary, he hath the Privilege of quitting the State. And if he is not inclined to make use of that Privilege, he hath nothing to blame but the common Condition of Mankind, who are not to expect in this World any Degree of pure and untainted Felicity. But should he think it allowable for him, on this account, to rid himself of the lawful Government by violent means; 'twere the same thing, as if he should resolve to improve his Fortune by Rapine and Theft, because he thinks it a Hardship to maintain himself by his own Industry and Labour.

IV. Tho' all this must be acknowledg'd to be true; yet there is no doubt, but that a State, or the sovereign Ruler of it, may do an *Injury* to a private Subject: Since here the Parties are both under the same common Law of Nature at least, which is sufficient to make them capable of being *injured* one by the other. Now a Sovereign may be conceiv'd to *injure* his Subjects two ways, if in his Dealings with them he violates either the Duty of a *Prince*, or the Duty of a *Man*; that is, if he either treats them *not as Subjects*, or *not as Men*. The Duty of a Prince respects either the whole People, or particular Persons. Thus much a Prince owes to the whole People, that he procure the Good and Safety of the Community, either by his own Judgment, in case he be absolute, or if his Power be limited by Laws, according as those Laws shall direct and prescribe. Therefore he *injures* the whole People, if he quite throws off all Care of the Government, in his own Person, and doth not so much as see that the publick Business be dispatch'd by his Ministers. As for Instance, if he should neither undertake the Defence of the Kingdom against foreign Enemies, nor by a due Execution of the Laws secure its inward Peace; and yet, in the midst of all this Neglect, should continue to enjoy the Title and Revenues, and should judge the Greatness of a Prince to consist in the unbounded Extent of his vicious Pleasures. For if, together with the Administration, he lays aside the Honours and Profits of the regal Office, he shall be supposed to have plainly abdicated the Government. Which Privilege of resigning the Crown ought to be allow'd him, unless he hath first, by evil Counsels, put the State under great Difficulties, and then would desert it in the midst of its Danger. And this must be own'd for a manifest Injury, thus to discharge no part of a Duty, and yet to desire the Reward and

Advantage of it. But it will be a much greater Injury, should he with hostile Intentions directly endeavour to overthrow the common Safety, and put on the Person of an Enemy, which cannot possibly consist with the Person of a Sovereign ^d. But such a Case as this can never happen, where a Prince is Master of his own Reason. For who, in his Wits, would ruin what belongs to himself? Or where will he meet with *Subjects*, who useth them as *Enemies*? Yet indeed, if he happens to enjoy two Kingdoms at once, 'tis possible that he may seek the Destruction of the one, to advance the Interest and Greatness of the other ^e. But we have an Instance even of the former Madness, in the Story of a certain King of *Peru*, in the last Age, who by the Practice, as 'twas reported, of some Magicians, was possess'd with so utter an Aversion to his Subjects, that he took up a Resolution to make them all away; and in order to this, commanded that no Person, under Pain of Death, should till the Ground for the space of Three Years. Which occasion'd so grievous a Famine, that the People murther'd each other for Food ^f. Again a Prince injures the Community, if he subverts the fundamental Laws without the Consent of the People, and upon no urgent Necessity; or if he go about to change the manner of holding the Government. As likewise, if he should ruin the publick Patrimony; or if, by imposing greater Tributes than the Occasions of the State require, he should first imploy the Subjects Purfes, and then squander away the Money in Extravagance, or send it out of the Realm; with many Acts of the same Nature. To all which may well be applied the smart Conclusion of the Old *Greek* Epigram ^g.

Ἄλλὰ λύκος ἔργει τι δὲ τὸ πολέου, εἰ τὸ φύλαξθαι
Ὀλλύει, ἢτε λύκοις, εἴθ' ὑπὸ τοῦ φύλακος;

But he keeps off the Wolf; we own the Deed;
But where's the Difference, if the Sheep must bleed,
Whether the Keeper, or the Wolf they feed?

The Duty which a Prince owes to his particular Subjects is, that he permit them to enjoy the same Rights with others of their Rank and Order; that he protect and defend them, and administer Justice to every one, so far as his regard to the publick Safety will allow him. If he fails in any of these Performances towards particular Persons, when the Condition of the Commonwealth would give him leave to discharge them, he certainly does the respective Person an Injury ^d. An Old Woman who came with a Petition to the Emperor *Adrian*, and was by him told that he had no leisure at present to hear her, in a very angry mood made him this smart Reply, *Ergo noli imperare, Therefore don't pretend to Govern* ^e.

^a *D. Civ. c. 12. f. 2.*
^{1.} 9. c. 6. near the end. Tho' indeed *Pausanias's* Action is by no means to be commended.
Dion. & Zonar. T. 2.

^b *Joan. Moquet. Itiner. l. 4.*

^c *Antipater in Antolog.*

^d *V. Justin.*

^e *Xiphilin. Epit.*

Mr. BARBEYRAC'S NOTES on §. IV.

¹ As the Emperor *Caligula*, who wish'd that the *Roman* People were but one Head, that he might dash its Brains out, as we have it related in *Sueton. c. 35.*
² *V. Groz. l. 1. c. 4. f. 11.*
³ This is what *Phillip* King of *Macedon* formerly did, as is related in *Livy, B. 40. c. 3, &c.*

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That Duty which the Prince stands under as a Man, he may violate several ways, in his Transactions with particular Subjects. As suppose he should undeservedly brand an honest Person with Disgrace and Ignominy; if he should withhold the Reward promis'd to his Service; if he should refuse to discharge his Debts, or to fulfil his other Contracts or Engagements, or to repair a Damage which he hath occasion'd by some extravagant Humour; if he should assault the Honour of chaste Virgins should defile his Subjects Beds by Adultery, should hurt their Bodies, seize or destroy their Goods; lastly, if he should take away the Life of an innocent Person, either by direct and downright Violence, or by suborning false Witnesses against him, or compelling the Judges through Threats and Promises, to pass an unjust Sentence of Death: *Ammianus Marcellinus* a hath made a very sensible Reflexion on the Grievances last mentioned. *Amongst Arms and Trumpets*, says he, *the Equality of Condition makes the Danger seem lighter; and the Power of martial Valour either possesseth it self of what it attempted; or, if taken off by the Surprise of unexpected Fate, carries no Mark of Infamy alone with it, but concludes Life and Pain together. But when the Pretence of Rights and Laws serves to cover and disguise wicked Counsels, when the Judges sit masqu'd in the severe Gravity of Cato or Cassius, but act every thing according to the arbitrary Pleasure of their insolent Master, and the whole Affair of Life and Death is weigh'd and determin'd by his Humour, nothing else can ensue but capital Destruction and precipitate Ruin.*

V. But 'tis a Point of greater Difficulty to explain, whether Subjects are obliged to endure all those Injuries without resisting, or whether in some Cases they may not repel them by Force? Our Judgment on the Matter is this: Since such is the Condition of human Life, that it cannot be exempt from all Inconveniences, and since 'tis not easy to find a Man in the whole World, who is so nicely exact in his Behaviour, as to give a compleat and universal Satisfaction; 'twould be equal Folly and Impudence to oppose a Prince for every Fault; especially since we our selves on the other hand are not so very punctual in the Discharge of our Duty towards him; and since even in private Persons the Laws are

went to pass over slight Miscarriages. Therefore how much more just and reasonable must it be to overlook the pardonable Failings of a Prince, on whose Care the Tranquillity of the whole Nation, and the Security of every Man's Life and Fortune depends? And so much the rather, since Experience informs us; with how fatal a Destruction of the People, and how miserable a Convulsion of the State, the very worst of Princes have been dethron'd. We are to forgive then the slighter Injuries of Rulers; as well in regard to their high and noble Office, and to the many Benefits we constantly derive from them in other respects, as out of a due Concern for our Fellow Subjects, and for the whole Commonwealth b. *We ought to bear*, says *Tacitus* c, *with the Tempers of Princes; since frequent Alterations can never turn to the Advantage of a State.* 'Tis a sensible Argument, that which *Cerialis* (in the same Author d, useth to the *Rebellious Treviri*. *As you would endure*, says he, *the Barrenness of a Soil, the immoderate Force of Rain, and the other Inconveniences of Nature, so endure the Luxury or the Avarice of your Rulers.* *There will be Vices in the World so long as there are Men; but then these are not perpetual, and are amply recompens'd by the Intermixture of better Qualities.* *Plato* e speaks admirably to the same purpose, *We ought never to use Violence to our Parents, unless they are depriv'd of their Reason: But if we dislike their manner of Living we must not provoke them by unprofitable Remonstrances, or cherish in them by servile Flattery and a criminal Compliance, the Vices to which we would not be subject our selves.* *A wise Man will take up this Resolution in regard to his Country; then only to reprehend the Miscarriages in the State, when his Reproof is likely to meet with good Effect, and not to draw down Ruin on himself: But when a Reformation cannot be wrought without the Expulsion and Slaughter of many Persons, he will never attempt to introduce a Change in the Government by violent means; but will give himself up to Quiet and Retirement, and pray for his own and the publick Happiness f.* Besides, a Man consults his own safety, when he chooseth rather to dissemble the Affronts of too powerful an Oppressor, than to draw on himself some greater Mischief, by unreasonable Resentments and Complaints g. Add to this, that as we are commanded by the Holy Scriptures h, so are

Mr. BARBEYRA C's NOTES on §. V.

^a *V. Groet. l. 1. c. 4. f. 4.* That must be duly consider'd. For the Sovereign has never any Right to do the least Injustice. If then we ought not to resist him but in the last Extremity, 'tis not for his Sake, or by Virtue of his Power, but on account of the Interest of the State; which would by that means be expos'd to Troubles and Commotions. Besides that (as *Gronovius* observes, in his Notes upon *Grotius*, Lib. I. Chap. III. Sect. 8. Num. 15.) it often happens that a People upon the Expulsion of one bad Prince, fall under the Dominion of another worse than the former; the specious Name of Liberty serving those for a Pretence who are ambitious of bringing them under their Subjection. 'Tis a Reflection which *Tacitus* puts into a General's Mouth, *Ceterum Libertas & speciosa nomina preetextantur, nec quisquam alienum servitium & dominationem sibi concupivit, ut non eadem ista vocabula usurparet*, Hist. Lib. IV. Cap. LXXIII. Another Latin Historian gives us an Instance of it in the Person of *Sandrocroctus*, who made himself Master of the *Indies*, after the Death of *Alexander the Great*. *Auctor Libertatis Sandrocroctus fuerat; sed titulum Libertatis post victoriam in servitutem converterat.* Justin. Lib. XV. Cap. IV. Num. 13. ² 1 Ep. Pet. ii. 17, 18.

^a L. 26. c. 13.
1281. D. Ed. Weck.
Familiares.

^b *V. Justin. l. 15. c. 4.*

^c *Ann. 12. c. 11,*

^d *H. 4. c. 74.*

^e *Epist. 7. p.*

^f *Cicero* produceth this Passage out of *Plato* in the Ninth Epistle of his First Book ad

^g See the Sentences cited to this purpose by *Grotius*, *ubi supra*. *Æschylus* *Prometh. Vinct.*

— ἡ δὲ ἐν πρῶτῳ κέλυτος, &c.

— When a self-will'd Lord
Too big to be controul'd and fiercely bent
On Cruelty and Rage, ascends the Throne;
Strive not in vain, nor kick against the Goad.

we advised by sound Reason, patiently to suffer the Moroseness and Severity of our Parents and Masters ^a .

Nay farther, this too is most certain, That when a Prince with plain hostile Intentions, threatens the worst and most cruel of Injuries, it is better if we can to withdraw our selves from the Stroke, and either to secure our selves by Flight and Concealment, or to remove into another Country and Government for Protection. But what if a Prince should with this hostile Fury attempt to destroy an innocent Subject, without leaving any Possibility of Escape? Many as to this Case are not able to conceive how the same Man can thus bear the *Person* of a Prince, and of an Enemy together, in respect of the poor Sufferer, or with what Face he can claim the Privilege of being held inviolable, who thus is bent on sacrificing a guiltless Member of the State, as a miserable Victim to his Lusts. But they are of Opinion, that if he who owes another his Protection and Patronage, shall upon no Cause at all, or upon an unjust one, assume the Mind of an Enemy towards him, he releaseth the other Party from his Duty of a Client or Dependent ; so far at least, as that it shall be lawful for the latter to make use of Force in defending himself from the unreasonable Cruelties of the former. Which Defence may the better plead for Favour, the greater the Number is of those whom the Prince endeavours thus injuriously to destroy. But since 'tis hardly possible to find any Examples of Princes, who entertain a Design against the Lives of innocent Men, and openly profess that they do it out of meer arbitrary Pleasure ; a greater Doubt ariseth, what Course can be lawfully taken, when a Prince goes about to exercise Cruelty under the Pretence and Colour of Right ; as suppose, in way of Punishment, for the Neglect of an unjust Command. Now here we first of all take it for granted, that since in conferring any Power there is a *Salvo* made to the Right of all Superiors, therefore the Subjects, upon the establishing a

sovereign Civil Authority, neither could, nor would by that Act renounce the Subjection which they before stood under to Almighty G O D, and consequently that they are not bound by any Injunctions of the civil Power, plainly repugnant to the Divine Commands. What a Subject ought to do in this Case, if threatned with Violence on the account of his Christian : Profession, it is not our Business to determine : In as much as the same Scriptures, in which that holy Doctrine is deliver'd, may fully inform any Person how infinitely it concerns him, not really, nor so much as seemingly to act any thing contrary to his Religion ^b, and at how great a Price, if Occasion be, he ought to purchase his Innocence. But that, upon the Apprehension of certain Death, a Man may undertake the Performance of an Action in it self repugnant to the Law of Nature, without any Sin on his part, we shall by and by make out ^c. Yet if the Action enjoin'd be such, as I cannot perform without deriving Guilt on my self, or such as I esteem to be, in its own Nature more bitter than Death, and at the same time no reason is shewn, nor so much as Probability pretended, either from some Fault of mine, or from the publick Good, why I should be put under this Necessity of doing what might either have been done by another, or ought not to be done at all ; it is manifest, that the whole Design of such a Command is, that I may be destroy'd, who have committed no Offence, purely to gratify the Will of the Enjoiner, and his cruel Disposition towards me. By which Act, since he lays aside the *Prince* to put on the *Enemy*, he is suppos'd at the same time to have remitted the Obligation, which lay on the part of the Subject. But still as far as 'tis possible, we are to avoid this Danger by Flight, and to seek the Patronage of some third Person, who is not by any Ties engaged to the same Prince. Nay, if all means of escaping are cut off, we ought rather to be kill'd than to kill ^d : yet not so much out of Veneration to the Person of such a Ruler, as out of regard to

MR. BARBEYRA C's NOTES on §. V.

¹ *Ut Parentum severitiam, sic Patria, patiendo ac ferendo, leniendam esse*, Livy, l. 27. c. 34. See *Epiſt. Enchirid.* Cap. XXXVII. and *Justin.* Lib. XV. Cap. III. Num. 10. *Plato* in the Dialogue, Intituled, the *Criton*, compares likewise the Patience wherewith we ought to suffer any Injustice we receive from our Country or the Commonwealth, to the manner in which a Child ought to bear with the Moroseness and Severity of his Parents, or a Slave the ill Usage of his Master. Nay, he even says, that the Subject ought to suffer with so much the more Reason, as the Obligation which we are under with respect to the State, is greater than that which a Man owes to a Master, and to those from whom he receiv'd his Being. Ἡ τῆς ἀρετῆς τῶν Πατέρων ἐκ ἡμῶν τὸ δίκαιον, &c. Tom. 1. p. 50, 51. *E. I. Steph.*

² As it cannot be prov'd, neither by the Principles of the Law of Nature, nor by the Holy Scripture, that Sovereigns are vested with a Power to hinder any one from serving God in a peaceable manner, according to the Dictates of his Conscience (see above, *Chap. IV.* S. 11. *Note 2.*) it follows from thence, that the People have as natural and as unquestionable a Right to defend their Religion by Force of Arms against a Sovereign, who endeavours to compel them to renounce it, or to forbid them the free Exercise of it, as to defend their Lives, their Estates, and Liberties against the Attempts of a Tyrant. This Right is even more allowable than any other, in as much as it regards the greatest of all Interests, and the strongest of all Obligations, or rather that which is the Foundation and Source of all others, I mean, the indispensable Necessity that obliges every Man to follow the Light of his own Conscience. 'Tis to no purpose for *Grotius*, after having approv'd of the Conduct of the *Maccabees*, to maintain however that the Christian Religion leaves its Followers no other Remedy but Flight, or Patience. The Passages which he produces regard only private Persons who are not in a Capacity to resist. But (as *Mr. Bernard*, *Nouv. de la Rep. des Lettres*, Mai 1700. p. 557, observes) Jesus Christ moreover gives People the Liberty of defending their Rights by the common ways of Justice. See also *Gronovius's* long Note upon *Grotius*, Lib. I. Cap. IV. Sect. 7. Num. 8. and *Mr. Vaucler Muelen's* Dissertation de *Sanctitate summi Imperii civilis*, &c. p. 70, &c. *Mr. Rechenberg* the present Professor of Divinity at *Leipsick*, likewise publish'd a Dissertation de *Religione armis defensa* in the Year 1689. at the same time that he had a Professorship in another place. He applies the general Proposition to the *Protestants* in particular.

³ See *Sir George Mackenzie's Jus Regium*, p. 113, &c.

⁴ B. 8. c. 1. f. 6.

⁵ V. *Grot.* l. 2. c. 1. f. 9. cum not. Gronov.

^a *Pliny*, L. 7. Ep. 14. speaking of Masters being murder'd by their Slaves, says, *Non judicio, sed scelere perimuntur*, They are kill'd, not in the Method of Judgment, but of Villainy.

^b See *Matth.* x. 31, &c.

the Commonwealth, which on such an occasion, cannot but be imbroil'd in the most unhappy Troubles. But when a Ruler proceeds against a Subject in way of punishment for a real Crime, altho' here the Subject is not bound to meet the Mischief by voluntarily appearing and offering up himself; yet the Reason why he cannot, in this Case, defend himself by Force is, that the Prince acts nothing here but what is consistent with his Right; and therefore it would be highly injurious, whatever the Pretence might be, to offer him any Hurt on such an account. It ought farther to be observ'd, that altho' we should grant never so fully, that a particular Subject may, in some Cases, guard his Safety by Violence against the injurious Assaults of his Superior, and this without Sin; yet it doth not hereby become lawful for the other Subjects to throw off their Allegiance, or protect the innocent Party by forcible means. For besides, that they ought not to make Inquisition into these Acts of the Prince, which he exerciseth as it were by Virtue of his judiciary Power, and that many guilty Persons, to draw *Odium* on the Government, make high Pretensions to Innocence; tho' the Person should happen to be really injured, the

rest of the People are not at all releas'd from their Obligation to Obedience. And that for this Reason, Because, in the first Contract, every particular Subject engageth the Prince's Care and Protection only for himself, and doth not suppose it a Condition of his own Obedience, that all and each of his Fellows shall be justly treated. Nor is the Fear of being hereafter used in the same manner, sufficient to break off this Obligation in the other Subjects; First, because it is uncertain; and, Secondly, because 'tis possible the Prince's Hatred to this Person might be founded on some particular Reasons, which do not appear in others. But whilst the Subject's Obligation towards the Prince remains in Force, it shall not be lawful for him on what Pretence soever, to make any violent Resistance.

VI. Now, as what hath been hitherto deliver'd is, in the Opinion of many Men, not at all derogatory from the Sacredness of Princes; so, on the other hand, those Persons are not to be endured, who assert in gross, that a King, when he degenerates into a Tyrant, may be deprived of his Crown, and brought to Punishment by the People. For since the Acts of civil Government are for the most part so obscure, that

MR. BARBEYRAC'S NOTE on § VI.

When we speak of a Tyrant that may lawfully be dethron'd by the People, we do not mean by the Word *People* the vile Populace or Rabble of the Country, nor the Cabal of a small Number of factious Persons; but the greater and more judicious part of the Subjects of all Ranks in the Kingdom. Besides, the Tyranny must be so notorious, and evidently clear, as to leave no body any room to doubt of it. See what Mr. *Buddeus* says to this Matter, upon *Tarquin the Proud*, in his Discourse Intituled, *Jurisp. Historica Specimen*, Sect. 3. &c. Among the *Selecta Jur. Nat. & Gent.* See likewise Mr. *Le Clerc* upon *Judges* iii. 20. v. 24. Now a Prince may easily avoid making himself so universally suspected and odious to his Subjects: For, as Mr. *Locke* says, in his second Treatise of *Civil Government*, Chap. XVIII. Sect. 209. *It is as impossible for a Governor, if he really means the Good of the People, and the Preservation of them and the Law together, not to make them see and feel it; as it is for the Father of a Family, not to let his Children see he loves and takes care of them.* And therefore the general Insurrection of a whole Nation does not deserve the Name of Rebellion. We may see what Mr. *Sidney* says upon this Subject in his *Discourse concerning Government*, Chap. III. Sect. XXXVI. Neither are Subjects bound to stay till the Prince has entirely finish'd the Chains which he is preparing for 'em, and has put it out of their power to oppose. 'Tis sufficient that all the Advances which he makes are manifestly tending to their Oppression, that he is marching boldly on to the Ruin of the State. In such a case, says Mr. *Locke* admirably well, *ubi supra*, Sect. 210. *How can a Man any more hinder himself from believing in his own Mind which way things are going, or from casting about how to save himself, than he could from believing the Captain of the Ship he was in, was carrying him and the rest of his Company to Algiers, when he found him always steering that Course, tho' cross Winds, Leaks in his Ship, and want of Men and Provisions did often force him to turn his Course another way for some time, which he steadily returned to again, as soon as the Winds, Weather and other Circumstances would let him?* This chiefly takes place with respect to Kings, whose power is limited by fundamental Laws. If it is objected that, the People being ignorant and always discontented, to lay the Foundation of Government in the unsteady Opinion and the uncertain Humour of the People is to expose it to certain Ruin; the same Author will answer you, that on the contrary, People are not so easily got out of their old Forms as some are apt to suggest. *England*, for Instance, notwithstanding the many Revolutions that have been seen in that Kingdom, has always kept to its old Legislative of King, Lords, and Commons: And whatever provocations have made the Crown to be taken from some of their Princes Heads, they never carried the People so far as to place it in another Line. But 'twill be said, this Hypothesis lays a Ferment for frequent Rebellion. No more, says Mr. *Locke*, than any other Hypothesis. For when the People are made miserable, and find themselves exposed to the ill Usage of arbitrary Power; cry up their Governors as much as you will for Sons of *Jupiter*, let them be sacred and divine, defended or authoriz'd from Heaven; give them out for whom or what you please, the same will happen. The People generally ill treated, and contrary to Right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them. 2. Such Revolutions happen not upon every little Mismanagement in publick Affairs. Great Mistakes in the ruling part, many wrong and inconvenient Laws, and all the slips of human Frailty will be born by the People without Mutiny and Murmur. 3. This Power in the People of providing for their Safety a-new by a new Legislative, when their Legislators have acted contrary to their Trust by invading their Property, is the best Fence against Rebellion, and the probablest means to hinder it, For Rebellion being an Opposition, not to Persons but Authority, which is founded only in the Constitutions and Laws of the Government; those whoever they be, who by Force break through, and by Force justify the Violation of them, are truly and properly Rebels. For when Men by entering into Society and civil Government have excluded Force, and introduced Laws for the preservation of Property, Peace, and Unity among themselves; those who set up Force again in Opposition to the Laws do *rebellare*, that is, do bring back again the State of War, and are properly Rebels as the Author shews. In the last place he demonstrates, that there are also greater Inconveniences in allowing all to those that govern, than in granting something to the People. But it will be said, that ill-affected and factious Men may spread amongst the People, and make them believe that the Prince or Legislative act contrary to their Trust, when they only make use of their due Prerogative. To this Mr. *Locke* answers, that the People however, is to be Judge of all that; because no body can better judge whether his Trustee or Deputy acts well, and according to the Trust, reposed in him, than he who deputed him. He might make the like Query (says Mr. *Le Clerc* from whom this Extract is taken) and ask whether, the People being oppress'd by an Authority which they set up but for their own Good, it is just that those who are vested with this Authority, and of which they are complaining, should themselves be Judges of the Complaints made against them? The greatest Flatterers of Kings dare not say, that the People are obliged to suffer absolutely all their Humours, how irregular soever they be; and therefore must confess, that when no regard is had to their Complaints, the very Foundations of Society are destroy'd; the Prince and People are in a State of War with each other, like

the Multitude cannot apprehend the Equity or the Necessity of them, and often, through Prejudice or Passion, will not apply their Minds to a Discovery of the Truth; and since, generally speaking, it makes for the Interest of the Commonwealth to let the Reasons of the State and the Grounds of publick Counsels and Proceedings be known by a very Few: it will be a most difficult Task to point out exactly those several Actions, on the Performance of which a Prince may justly be call'd a Tyrant, and as justly be oppos'd by the People, with any Violence whatsoever. Whence it may easily come to pass, that an *Odium* of this Nature shall be brought even on a good Prince, by such as either dislike his Person, or the present Constitution; since Men have been now long accusom'd in the Use and Signification of Words, to make them stand not only for the real Nature of Things, but for their own Humour or Affections. Thus much is acknowledg'd by general Opinion, that neither private and personal Vices, nor smaller Neglects in the publick Administration, are sufficient to denominate a Tyrant. Are heavy Taxes impos'd? The Subjects who are not admitted to Council, cannot possibly judge whether the Necessity of the State requires this Provision, or not. Are severe Penalties executed? Why, if this be done upon some precedent Offence, and according to the Laws, no Man can with Justice complain; tho' perhaps the Case would better have allow'd of Mercy and Pardon. Are some great Men innocently taken off, on the account of private Hatred or Suspicion; which, in vulgar Estimation, passeth for

the highest and most provoking Grievance? yet if Plots against the Prince's Government, or other Crimes are, in pretence at least, laid to their Charge, or the ordinary Court of Judgment observ'd in condemning them; although perhaps the Persons themselves, and some few others may be throughly satisfisd of their Innocency; yet how is it possible that the rest of the People should have the same Certainty and Assurance? Especially since the Presumption of Justice always lies on the Prince's side. Well, but perhaps, Promises are broken, or Privileges formerly granted retrench'd. Still, if the Prince be absolute, 'tis but to alledge some Offence in the Parties, or some signal Advantage to the Commonwealth, and then he shall be supposed to have acted according to his sovereign Right; and whether these Pretences be real, or no. the Subjects are not able clearly to judge. And all Privileges must be construed with this Limitation and Exception, *Unless the Safety or Necessity of the Publick forbid them to hold any longer.* No small part of the Arguments, usually brought for the opposite Opinion, fall of their own accord, if it be well consider'd, that these are two very different things; A People have power of applying Force to their Rulers, and of reducing them to Amendment, when they do not govern according to their Will; and, There is in the People, or in particular Persons, a Right of defending their Life and Safety against their Prince, upon the Approach of extream Danger, and when the Prince is manifestly turn'd an Enemy towards them. For the Reasons which prove the latter of these Positions do not in like man-

two Independent States that are doing themselves Justice, and acknowledge no person upon Earth who in a sovereign manner can determine the Disputes between them. *Bibliothèque Universel.* Tom. XIX. pag 591. Mr. *Sidney* in his *Discourse upon Government*, Chap. III. Sect. 41. says, 'They who create Magistracies, and give to them such Name, Form, and Power, as they think fit, do only know whether the End for which they were created, be perform'd, or not. They who give a Being to the Power which had none, can only judge whether it be employ'd to their Welfare, or turn'd to their Ruin. They do not set up one or a few Men that they and their posterity may live in Splendor and Greatness; but that Justice may be administer'd, Virtue establish'd, and provision made for the publick Safety. No wise Man will think this can be done. if those who set themselves to overthrow the Law are to be their own Judges. If *Caligula*, *Nero*, *Vitellius*, *Domitian* or *Heliogabalus* had been subject to no other Judgment, they would have compleated the Destruction of the Empire. If the Disputes between *Darius*, *Eveus* the Third, *Dardanius*. and other Kings of *Scotland*, with the Nobility and People might have been determin'd by themselves, they had escap'd the punishments they suffer'd, and ruin'd the Nation as they design'd. Other Methods were taken; they perish'd by their Madnels; better Princes were brought into their places, and their Successors were by their Example admonish'd to avoid the ways that had prov'd fatal to them. If *Edward* the Second of *England* with *Gauvesson* and the *spencers*, *Richard* the Second with *Trevelin* and *Vere*, had been permitted to be Judges of their own Cases, they who had murder'd the best of the Nobility, would have pursu'd their Designs to the Destruction, of such as remain'd, the enslaving of the Nation, the Subversion of the Constitution, and the Establishment of a meer Tyranny in the place of a mix'd Monarchy. But our Ancestors took better Measures. They who had felt the smart of the Vices and Follies of their Princes, knew what Remedies were most fit to be applied, as well as the best Time of applying them. They found the Effects of extreme Corruption in Government to be so desperately pernicious, that Nations must necessarily perish, unless it be corrected, and the State reduced to its first Principle, or alter'd. Which being the case, it was as easy for them to judge whether the Governor who had introduced that Corruption should be brought to Order, or remov'd if he would not be reclaim'd; or whether he should be suffer'd to ruin them and their posterity; as it is for me to judge whether I should put away my Servant, if I knew he intended to poison or murder me, and had a certain Facility of accomplishing his Design, or whether I should continue him in my Service 'till he had perform'd it. Nay, the Matter is so much the more plain on the side of the Nation, as the disproportion of Merit between a whole People, and one or few Men entrusted with the power of governing them, is greater than between a private Man and his Servant.' To this let us add the following Verses of an ancient *Greek* Poet.

A. Σέβειν δὲ τὰς κρατῦνας νόμῳ.
B. Οὐ ταύριλῶς δὲ τοῖς πονηροῖς ἐπιτρέτειν,
"Ἄλλ' ἀντιτάττεσθαι, εἰ δὲ μὴ, τ' ἀνο κατῶ
Ἡμῶν ὁ βίῃ λήπει μετασφύρεται ὄλιῳ.

An Atient Law commands us to obey
Those who in Government do bear the Sway:
But wicked Magistrates we may resist,
Nor suffer them to do what e'er they list;
For then the World would in Confusion lie,
And Civil States be Scenes of Anarchy.

Philomon in *Adelph.* Fragm. IX. *Edit. Cleric.*

² *Comp. Bœcler. ad Grœc. l. 1. c. 4. s. 12*

ner evince the former: And yet many Men confound the one with the other. And thus too when it is said, that a People who have given themselves up to Slavery, have not thereby lost all Right of rescuing themselves into Liberty and Security²; the Assertion will hold true only in this Sense, that a People may defend themselves against the extreme and unjust Violence of their Prince: Which Defence, if it succeeds prosperously, brings Liberty along with it as a necessary Attendant. In as much as the Lord, by thus changing himself into an Enemy, seems to absolve the Subjects from their Obligation towards him: So that they are not bound to return under his Yoak, tho' he should alter his cruel Resolutions. Excepting in this Case, a People who have given themselves up for Slaves, or rather who have put themselves under the Command of an absolute Sovereign, have no more a Right of regaining their Liberty by Force, than I have of recovering a thing by Force, which I have already upon Bargain deliver'd to another

Man. For this civil Servitude is not so abhorrent from Nature, as some imagine; as that a Person, who at one time, to avoid a greater Evil, finds it necessary for him to consent to it, may afterwards, when Occasion favours him, throw it off again, by the Right and Privilege which Nature allows him. And although the State of Slavery should be contrary to the Inclinations of a particular People, either from the beginning, or upon the changing of their Minds; yet 'tis by no means lawful, barely on this account, to deprive the Prince of that Right which he hath already obtain'd: No more than it is lawful for the Seller to take away from his Chapman what he before deliver'd to him upon Contract; tho' he should happen to find that the Sale did not prove to his Advantage.

VII. *Grotius*^a, in adjusting these Matters, hath taken a Course not very different from that which we have here follow'd. Amongst other things he well observes, that whether or no the extreme Injuries of Sovereigns may be forcibly

Mr. BARBEYRAC'S NOTE on §. VI.

² No Man can so far part with his Liberty as to give himself up wholly to an arbitrary Power, to be treated absolutely as that Power thinks proper; for this would be to dispose of his own Life, of which he is not Master. Much less has a whole People such a Right, as every one of those who compose it, is entirely destitute of. 'The natural Liberty of Man is to be free from any superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule. The Liberty of Man, in Society is to be under no other Legislative Power, but that establish'd by Consent in the Commonwealth; nor under the Dominion of any Will, or Restraint of any Law but what the Legislative shall enact, according to the Trust put in it. Freedom then is not what Sir Robert Filmer tells us, *A Liberty for every one to do what he lists, to live as he pleases, and not to be tied by any Laws*: But Freedom of Men under Government, is to have a standing Rule to live by, common to every one of that Society, and made by the legislative Power erected in it. A Liberty to follow my own Will in all things, where the Rule prescribes not; not to be subject to the inconstant, uncertain, unknown, arbitrary Will of another Man: As Freedom of Nature is to be under no other Restraint but the Law of Nature. This Freedom from absolute arbitrary Power is so necessary to, and closely join'd with a Man's Preservation, that he cannot part with it but by what forfeits his Preservation and Life together. For a Man, not having the power of his own Life, cannot by Compact, or his own Consent, enslave himself to any one, nor put himself under the absolute arbitrary Power of another, to take away his own Life, when he pleases. No body can give more Power over it. Indeed, having by his Fault forfeited his own Life by some Act that deserves Death; he, to whom he has forfeited it, may (when he has him in his power) delay, to take it, and make use of him to his own service, and he does him no Injury by it. For, whenever he finds the hardship of his Slavery outweigh the value of his Life, 'tis in his Power, by resisting the Will of his Master, to draw on himself the Death he desires. This is the perfect Condition of slavery, which is nothing else but the State of War continu'd between a lawful Conqueror and a Captive. For, if once Compact enter between them, and make an Agreement for a limited Power on the one side, and Obedience on the other; the State of War and Slavery ceases, as long as the like Compact endures. For, as has been said, no Man can by Agreement pass over to another Nation, that which he hath not in himself, a Power over his own Life. I confess, we find among the Jews, as well as other Nations, that Men did sell themselves; but, 'tis plain, this was only to Drudgery, not to Slavery. For, it is evident, the Person sold was not under an absolute, arbitrary, despotical Power. For the Master could not have power to kill him at any time, whom at a certain time he was obliged to let go free out of his Service; and the Master of such a Servant was so far from having an arbitrary Power over his Life, that he could not at pleasure so much as maim him, but the Loss of an Eye or Tooth set him free. Mr. Locke of *Civil Government*, Book II. Chap. IV. Let us add the following Reflections of Mr. *Abbadie*. The natural Right of our Preservation is altogether unalienable, that is to say, such as we can never renounce entirely and absolutely. It is true, that when I confederate my self with other Men to form a Society, 'tis upon this Condition, that I shall expose my own particular Person for the preservation of the whole; there would be no way for a Society to subsist, if every one consulted his own Safety only; and I should lose the support that I meet with for my own preservation, in my Union with others. But we cannot say that Soldiers, who maintain themselves in their Ranks, and fight valiantly in War, do renounce the natural Care of their preservation, so we cannot say that private Persons renounce the Right of their preservation, when for the Love of their Country, they expose themselves to the Danger of perishing. 'Tis a Contradiction that we should for ever alienate this Right. How have Men, who enjoy the Privileges of civil Society, renounced this Right of Self-preservation, when those who are cut off from Society, as Criminals condemn'd to Death, do not renounce it? So that if they make their Escape, and are taken again, they shall suffer the punishment that their former Crime deserv'd, in Execution of the Sentence that was pronounced against them before; but there will be no Indictment brought against 'em for their being willing to save themselves, which is founded upon this Principle, that as Nature always returns, so the Rights of Nature are never lost—A Man, that finds himself ill, may, and ought to make choice of a skilful Physician, to whom he will give a power apparently arbitrary over his Body: I put my self into your Hands, *he will say*, do with me what you please, I will not contradict your Prescriptions, and when I would do so I desire that my Servants may execute your Orders and not mine, and that you may have the sole power in this Matter. I am certain that you would believe that such a Man has notwithstanding all that renounced neither the Right nor the Care of his preservation; if the power which he gives over himself, unlimited in appearance, were so in reality; and if it were evident that the Physician would poison the sick Man, might he not oppose him without breaking his Word and his Engagements? Is it not apparent that there are in that Case two Extremities to be avoided? That a sick Man ought not to be suffer'd to be Master of his Physician; but that 'tis also just for him to oppose the Physician, when it is notorious that he would poison the sick Man? If it were not justifiable to dethrone a King who is evidently endeavouring to ruin and undo us, it would follow that the Right of destroying us, without being capable of losing the Crown on that score, passing from Father to Son, we should have lost, or alienated for ever the Right of our own Preservation. *Defence de la Nation Britannique*, p. 260, 261. See the Homily of the Church of England against Rebellion, the second Part.

resisted, is best to be understood by considering, as well the Nature of Sovereignty, as the presumed Design of those who first incorporated themselves in a civil State. As for the former, 'tis not in the least repugnant to the Nature of Sovereignty, that all the Actions of the Subjects should by it be directed towards the publick Good, and that those who oppose its Decrees, should undergo the severest Punishment; without allowing it the Power to murder Men out of meer Humour, so as on no account to be resisted. Nor is there any natural Connexion between an absolute Power of procuring a Man's Safety, and an absolute Power of destroying a Man at pleasure. And 'tis impossible to make out what such a Power in the Sovereign, or such an Obligation in the Subject, can contribute to the Peace and Security of the Commonwealth. On which Score it is evident, how false that Inference is which some Men make; the supreme Authority is accountable only to God, therefore we have sufficient Reason to conclude, that the Persons who first united in a Community, designed to reserve to themselves no Degree of Right which should hold good against the ruling Power. As if to defend one's Life against an injurious Assailant, were to proceed against him in a judicial manner a! Nor is their Scruple of any Moment, who disallow the Liberty of resisting Governors, in Cases of barbarous Cruelty, on this Argument, *Because we cannot frame to our selves any lawful Call, that the Subjects have to take up Arms against the chief Magistrate; since no Mortal can pretend to have a Jurisdiction over a Person of that Character.* As if Defence were the Effect of Jurisdiction! Or, as if he who sets himself to keep off an unjust Violence, which threatens his Life, had any more need of a particular Call, than he who is about to fence against Hunger and Thirst with Meat and Drink b!

As to the latter Consideration proposed by *Grotius* about the Design of Societies, he rightly judgeth, that if those Persons, who by incorporating themselves in States, gave the first Rise to sovereign Power, had been ask'd whether they intended to lay this Burthen on all their Consciences, that they should rather choose to die, than in any Case to oppose by Arms the unjust Violence of their Superiors; they would certainly have answer'd, that it was never in their Thoughts to enjoin such a Hardship. For this would have been a greater Inconvenience, than that which they endeavour'd to avoid by entering into a civil Community. For before they lay open to the Injuries of many, but still with the Right and Power of resisting them: Whereas by this means they must have bound themselves quietly to suffer any Injuries from him, whom they had arm'd with their own Strength. And no doubt Fighting and Contention is a less Evil than certain Death.

VIII. But this Sacredness which we have been hitherto touching upon, doth not belong to any Kings, but those who are really and strictly such. It cannot therefore be claim'd by those, who though they bear the Title of Kings, are yet subject to the Power of the People; as were the ancient Kings of *Sparta*, and many elsewhere; invested rather with the Authority to persuade, than with Power to command. Such a King was *Mezentius* in *Virgil*, against whom

—*furiis surrexit Etruria justis,
Regem ad supplicium præsentis morti reposcens.*

By just Revenge the *Tuscans* set on fire,
With Arms their King to Punishment require.

Those Princes do likewise forfeit this Sacredness, who have either laid down their Dignity, or have utterly deserted and abandon'd the Kingdom; against whom, in case of grievous Injuries offer'd by 'em to others, it is lawful to proceed altogether in the same manner, as we might against private Persons. As for the Example of *Semiramis*, who having prevail'd with her Husband to resign the Sovereignty to her for Five Days, made use of the Grant to take away the Life of the Giver; this Story proves nothing else but the great Wickedness of the Wife, and the no less Folly of the Husband d. Yet it sometimes happens, that those who have either voluntarily laid down their Authority, or have been deprived of it by some Misfortune, are still permitted to enjoy that formal Veneration of the People, which used to be paid to Princes, and all other external Badges of Majesty. Which Privilege, as it is to be look'd on as meer Imagery, made up of nothing but the regal Trappings and Ornaments; so unless it hath been confirm'd by some Pact and Agreement, it must be conceiv'd to depend entirely on the Favour and Complaisance of others e. Thus *Labardée*, in his History of *France* f, rightly observes, that whilst *Sedan*, and the Territories depending on it, was neither feudatary to the Emperor; nor to the King of *France*, nor to any other Monarch, or State, the Lords and Proprietors were truly sovereign Princes. But after that *Frederic Maurice*, Duke of *Bouillon*, had resign'd this City, with its Dependencies, to *Lewis* the Thirteenth of *France*, receiving in lieu of it certain Lands belonging to the *French* Crown; he required Security to be given him, that he and his Posterity should retain the Title and Character of the former Dignity: Which could not be afterwards reckoned a true independent Honour, such as accompanies sovereign Power; but only a nicer Shadow of princely Greatness, having no farther Effect, than the obtaining such a certain place among the noble Families of *France*, and some other ornamental Privileges. And the

a *Comp. Bæcl. ad Grot. d. l.*
d *Diodor. Sic. l. 2. c. 18.*

b *Comp. Ziegler ad Grot. d. l.*

c *Æn. 8. v. 494, 495.*

e An Instance of which we have in *Dairo* of *Japan*.

f *L. 10. p. 684.*

Mr. BARBEYRAC'S NOTES on §. VIII.

1 *V. Grot. l. c. 4. f. 8.*

2 This is what *Tacitus* relates of the ancient Kings of *Germany*; *Mex Rex vel Princeps, prout Decus bellorum, prout facundia est, audiuntur, auctoritate magis suscipiendi, quam jubendi potestate.* *De Morib. Germanor. c. 11. Vide etiam, c. 7.*

Truth of this appears evidently from that Act of the Duke, in desiring Security for his Titles, when he gave up his Dominions. Since those who truly and properly possess the sovereign Dignity, have no need thus to bargain for the Enjoyment of it.

Another way by which a King falls back into the Condition of a private Man, is in case his Kingdom be seiz'd upon as forfeited either by *Felony*, committed against him whose *Fief* it is; or by virtue of some Clause inserted in the Donation of the Crown, importing that if the King should act thus or thus, the Subjects should be immediately releas'd from all Obligation to Obedience. So likewise if in conferring the Sovereignty it were expressly agreed, that the Prince in some particular Designs or Practices might be resisted; such a Covenant may no doubt be put in Execution. Lastly, if a Prince constituted by the People shall go about to alienate his Kingdom, or to change the manner of holding the Government, 'tis manifest not only that any such Act of his is null and void; but likewise that in case he endeavour to compass his Design by Force, the People may oppose him in the same manner ^a.

IX. It is another difficult Question what may lawfully be done, and what not, against Invaders and Usurpers of Sovereignty; and this, not after that long Possession, or some subsequent Pact, hath given them a proper Right to govern, but so long as the unjust Cause of their possessing the Throne continues, and whilst they seem to be supported only by Strength. On this Head we are first of all to enquire, whether the Commands of such Usurpers, whilst in Possession, have the Power of obliging? And here we must recollect from what hath been formerly observ'd, that no Obligation to Obedience can be produced in me, unless the other Party had a lawful Authority over me. Meer Violence may indeed lay on a Man some extrinsecal Necessity of doing this or that; but it cannot impose an Obligation, which is an intrinsecal Engagement so binding to the Mind, as to make the Neglect or Omission of it sinful. When therefore a Man is threaten'd with Violence from a stronger Hand, he is perhaps compell'd to perform those

things to which he hath no Obligation, and which he really hates and abhors. But if he afterwards find Opportunity, no Man will censure him for breaking his way through these unjust Impositions. But what is to be done, if a Person, who at first indeed seiz'd upon the Government by Violence and evil Arts, would yet be thought to obtain it by Right, and tho' he repositeth his Confidence in Arms, yet professeth to be no Enemy, but a true and proper Prince? As to such Cases this seems in general to be the most probable Solution, that he who actually possesseth the Sovereignty, by whatsoever means he acquires it, is so long to be acknowledg'd by the Subjects for their lawful Prince, as there appears no one who can claim the Crown by a better Right. For then it is consonant to Reason, that the Possessor's Power shall hold good, provided he act like a legal Governor: It being the common Interest of the People, that the Care and Direction of the State should rather lie in any one Person, than that, on the account of having no certain Head, it should be involv'd in endless Disputes and Disturbances. Since therefore the Subjects must be, in this Case, supposed to have, at least tacitly, consented to the Authority of their new Master, they shall be truly oblig'd to yield Obedience to him. Thus 'tis well known by what means the Family of the *Cæsars* rais'd themselves to the imperial Dignity; and yet *St. Paul* ascribes the *εξουσία*, the proper Power to them, as those who were to be obey'd for *Conscience sake*. And 'twas our Blessed Saviour's Command, *Render unto Cæsar the things that are Cæsar's*. For at that time there was no particular Person who had a better Title to challenge the supreme Authority; and as for the *Senate and People of Rome*, they had receded from their ancient Right, though more out of Fear, and for want of Strength to make Opposition, than because they approved of this Alteration in the Government. It was a remarkable Law of *Henry VII.* of *England*, which enacted, that no Person who had follow'd the Party of the Prince then reigning, should be ever impleaded or condemn'd for that Act as a Criminal, either by legal Process, or by Act of Parliament. The Reasons of which are discuss'd by my Lord *Bar-*

^a Add. *Boeker ad Grot.* l. 1. c. 4. f. 10.

^b *Aristophanes* (in *Ranis*, Act. 5. Sc. 4. v. 21, 22, 23.) hath a notable Remark to this Purpose: 'Men should not breed up a Lion's Whelp in their City; but if he be once bred up, his Temper must be complied with.'

Mr. BARBEYRAC'S NOTES on §. IX.

¹ *Ide* *Grot. ubi Supra*, Sect. 12. See our Author in the sixth Chapter of this Book, *Self.* 10, 11.

² *Rom.* xiii. 1, 5.

³ *Matt.* xxii. 21.

⁴ 'They who have more regard to the prevailing Power than to Right, and lay great weight upon the Statute of *Henry* the Seventh, which authorizes the Acts of a *King de Facto*, seem not to consider that thereby they destroy all the pretended Right of Inheritance; that he only is *King de Facto* who is receiv'd by the People; and that this Reception could neither be of any value in its self, nor be made valid by a Statute, unless the People and their Representatives who made the Statute, had in themselves the Power of receiving, authorizing, and creating whom they please. For he is not *King de Facto* who calls himself so, as *Perkin* or *Simmel*, but he who by the Consent of the Nation is possess'd of the Regal Power. If there were such a thing in nature as a natural Lord over every Country, and that the Right must go by Descent, it would be impossible for any Man to acquire it, or for the People to confer it upon him, and to give the Authority to the Acts of one who neither is nor can be a King, which belong only to him who has the Right inherent in himself, and inseparable from him. Neither can it be denied, that the same Power which gives the validity to such Acts as are perform'd by one who is not a King, that belongs to those of a true King, may also make him King; for the Essence of a King consists in the validity of his Acts. And 'tis equally absurd for one to pretend to be a King, whose Acts as King are not valid, as that his own can be valid if those of another are; for then the same indivisible Right which our Author, and those of his Principles assert to be inseparable from the Person, would be at the same time exercis'd and enjoy'd by two distinct and contrary Powers. Moreover it may be observ'd, that this Statute was made after frequent and bloody Wars concerning Titles to the Crown; and whether the Cause were good or bad, those who were overcome were not only subject to be killed in the Field, but also to be prosecuted as Traitors under the Colour of Law. He who gain'd the Victory was always set up to be King by those of his Party, and he never fail'd to proceed against

con in his History of that Reign ^a. After the same manner in an hereditary Kingdom, when the Right seems to lie doubtfully between two or more Competitors; whilst the Controversy is yet in Agitation, and 'till such time as it may be determin'd, either by an amicable Accommodation, or by Arms, 'tis the safest Course to obey him who hath the actual Possession ^b. And much more will this Conduct be justifiable in Strangers, whom it doth not concern to examine the Titles by which the Sovereignty hath been obtain'd, but who barely go along with the Possession; especially when the Possessor is supported by great Strength and Power.

X. But when a Person, driving out the lawful Prince, seizeth the Government, and sets himself up for King, tho' he be really the Usurper of another Man's Right; what Course shall an honest Subject take under this Difficulty; in as much as he seems still to owe Allegiance to his rightful Sovereign during his Life? On which Point it appears reasonable to affirm, that things may often come to such an Issue as shall make it not only allowable, but good and necessary to obey the Ruler in Possession by what means soever the Possession was gain'd. As if the lawful Sovereign be reduced to such Streights, that he can no longer exercise any part of the regal Office towards his People. For then, tho' the Commands of the Usurper, being destitute of legal Power, are not in themselves obligatory; yet it becomes a wise Man to consult the Welfare of himself and his Affairs, to make Pro-

vision against the Future, and with Wariness and Caution to reflect on his present Condition; that he may not rashly thrust his Life and Fortunes into Danger: As he would do, should he by vain Obstinacy and Opposition, draw the Usurper's Rage upon his own Head, without procuring the least Advantage, either to his Country, or to the ejected Prince. Some are willing to deduce this Doctrine from the 13th Chapter of the Epistle to the *Romans*, where the Apostle says we ought to obey, *ὁ μὲν εἶδ' ἰν' ἐξουσίᾳ*, not only for *veritas*; as if he should have told us, it was not the part of a prudent Person to provoke the Anger of him, who bears the Sword, by an unnecessary Stubbornness; and that therefore, out of regard to our own Safety, we should be subject *τοῖς βουσι ἐξουσίας*, to the Powers that are in being, that is, which have the present Possession. Since then a State, cannot subsist without some Government, and since he who actually wears the Crown, doth at least in some tolerable Measure, maintain the publick Security; an honest Man and a Lover of his Country ought not, when the Posture of Affairs requires this Proceeding, by an useless Resistance, to give Occasion to farther Troubles. But what seems hardest of all to be resolv'd is, how the Subjects can at the same time keep up two contrary Obligations, one to the lawful Prince now expell'd, and the other to the Possessor, who hath constrain'd them to swear Allegiance to him, and for the present executes the regal Office. For how can a Man pay Fidelity to two together, who are bent upon mutual

his Enemies as Rebels. This introduced a horrid Series of destructive Mischiefs. The Fortune of War varied often; and I think it may be said, that there were few if any great Families in *England*, that were not either destroy'd, or at least so far shaken, as to lose their Chiefs, and many considerable Branches of them: And Experience taught that instead of gaining any Advantage to the publick in point of Government, he for whom they fought seldom prov'd better than his Enemy. They saw that the like might again happen, tho' the Title of the reigning King should be as clear as Descent of Blood could make it. This brought things into an uneasy posture; and 'tis not strange that both the Nobility and Commonalty should be weary of it. No Law could prevent the dangers of Battle; for he that had Followers, and would venture himself, might bring them to such a Decision as was only in the Hand of God. But thinking no more could justly be required to the full performance of their Duty to the King than to expose themselves to the Hazard of Battle for him; and not being answerable for the Success, they would not have that Law which they endeavoured to support, turned to their Destruction by their Enemies, who might come to be Interpreters of it. But as they could be exempted from this Danger only by their own Laws, which could authorize the Acts of a King without a Title, and justify them for acting under him, 'tis evident that the Power of the Law was in their Hands, and that the Acts of the Person who enjoy'd the Crown, were of no value in themselves; the Law had been impertinent, if it could have been done without Law, and the Intervention of the Parliament useless, if the Kings *de Facto* could have given Authority to their own Acts. But if the Parliament could make that to have the Effect of Law which was not Law, and exempt those that acted according to it from the Penalties of the Law, and give the same force to the Acts of one who is not King as of one who is, they cannot but have a power of making him to be King who is not so; that is to say, all depends entirely upon their Authority. Besides, he is not King who assumes the Title to himself, or is set up by a corrupt Party; but he who according to Usages requir'd in the Case is made King. If these are wanting he is neither *de Facto* nor *de Jure*, but *Tyrannus de Titulo*. Nevertheless, this very Man, if he comes to be receiv'd by the People, and placed in the Throne, he is thereby made *King de Facto*. His Acts are valid in the Law, the same Service is due to him as to any other: They who render it are in the same manner protected by the Law: that is to say, he is truly King. If our Author therefore do allow such to be Kings, he must confess that Power to be good which makes them so, when they have no Right in themselves. If he deny it, he must not only deny that there is any such thing as a King *de Facto*, which the Statute acknowledges, but that we never had any King in *England*; for we never had any other than such, as I have proved before. By the same means he will so unravel all the Law, that no Man shall know what he has, or what he ought to do or avoid; and will find no Remedy for this, unless he allow that Laws made without Kings are as good as those made with them, which returns to my purpose: For they who have the power of making Laws, may by Law make a King as well as any other Magistrate. And indeed the Intention of this Statute could be no other than to secure Mens Persons and Possessions, and so far to declare the power of giving and taking away the Crown to be in the Parliament, as to remove all Disputes concerning Titles, and to make him to be a legal King whom they acknowledge to be King. *Sidney's Discourse upon Government, Chap. III. §. 35.*

^a 'Tis *Irene's* Advice in the Historian (*Nicet. Choniat.*) *Nec imperatorem qui absit querendum, nec qui adsit possidendum esse*; Neither to seek after a Prince who hath deserted the Crown, nor to disturb a Prince who possesseth it.

^b *Cassius Clemens*, who had stuck to the party of *Niger* against *Severus*, thus makes his Defence to the latter: 'I own'd neither You nor *Niger* for my proper Master; and tho' I appear'd on the other side, yet my Aim and Endeavour was not to oppose You, but to vanquish *Julian*. Since then my design was the same with Yours, I am in this respect certainly Guilty of no Fault. Nor am I more worthy of Blame for not revolting afterwards to Your Party. For You would not Your self have been willing that any Friend of Yours should have relinquish'd Your Cause, and gone over as a Deserter to *Niger*. *Xiphilin. Epit. Dion. ad Ann. 193. & Zonar. Tom. 2.*

Destruction? And yet, on the other Hand, the Covenant made with the Usurper by the Subjects, and the Faith which they have engaged to him, seem utterly unable to take away the Rights and Pretensions of the lawful Sovereign: as the Composition which a Countryman makes with Robbers, to hinder them from wasting his Estate, is incapable of extinguishing his Landlord's Right and Property. *Grotius's* Opinion on the Case is this, that *if whilst the Usurper is in Possession, the Acts of Sovereignty, which he exerciseth, have a Power of obliging; not by Virtue of his Right (for Right he hath none) but because 'tis in the highest Degree probable, that he abolishes the just Right to the Throne, had rather, as things now stand, that the Commands of him who is thus in Possession should hold good, than that by the ceasing of all Laws and Justice, the Commonwealth should be thrown into utter Confusion* ^a.

And indeed, we ought by all means to presume, that every Prince hath so much Humanity, as to desire that his Subjects should be preserv'd by any Method whatsoever, rather than by striving in vain with their ill Fortune and unreasonably expressing an Affection without Strength to support it, they should give themselves up for a fruitless Sacrifice. When the *Romans*, being themselves in Distress, were petition'd by their Allies the *Petili* for Relief, their Answer was, 'They confess'd themselves to be no longer in a Condition of supporting their distant Dependents, and therefore desired the Petitioners to return Home, and since they had already given the utmost Specimen of their

' Fidelity, to consult amongst themselves for the future how to make the best of their Affairs' ^c. There appears nothing therefore that can with more probability be affirm'd in the Point before us, than this, that if the lawful Prince be brought into such Streights, as that neither he himself is able to afford his Subjects due Protection, nor they on the other hand able to resist the Usurper, without their imminent Ruin; it must be taken for granted, that he hath for a while releas'd his Subjects from their Obligation towards him, till such Time as Providence shall open a way to his Restoration; so far as is necessary to secure them from Destruction and Danger. And thus too the Fealty promis'd to the Usurper, seems so far only to be binding, as that it shall be a kind of temporary Engagement, to expire so soon as the expell'd Prince shall recover his Dominions; and consisting not so much in any internal Necessity laid upon the Conscience, as in the Force of that Terror under which they now stand. *Grotius* ^d, in another Case, allows of *external* Right and Property; and we see no Reason why there may not be admitted some kind of *external* Obligation, not affecting the Conscience ^e. If we put all these Considerations together, we shall find, that there is scarce any Case, in which a private Person may, by his own Authority disturb an unjust Possessor of the sovereign Dignity: especially since Experience witnesseth, that such Conspiracies do commonly exasperate the usurping Powers to greater Violence and Oppression ^f.

^a L. 1. c. 4. l. 15. Add. l. 2. c. 4. f. 14.

^c Add the Speech of King *Ferdinand I.* when he fled from *Naples*, in *Guicciardine*, Book I. near the latter End.

^d L. 3. c. 7. f. 6.

^e See *Kings* ii. 2 *Chron.* xxiii. on which place *Mr. Hobbes* rightly observes that *Abasab* was dethron'd, not by any Right which the High Priest had in that Capacity, but by the Right of the young King. *Leviticus*. c. 44. What Opinion we ought to entertain of those Laws which permit or reward the killing of Tyrants, see in *Læ. l. r.* on *Gen.* l. 1. c. 4. f. 17.

^b Comp. 2 *Sam.* xv. 25, 26. 1 *Kings* iii. 26.

^f *Vid. Justin.* l. XVI. c. 5. sub. fin.

Mr. BARBEYRAC'S NOTES on §. V.

^a *Vid. Liv.* L. 3. c. 27. ^b As this whole Chapter regards one of the general Duties of Subjects, I think I cannot do better before I proceed to the following one, which treats of the *Duties of a Sovereign*, than to let down here in a few Words the principal *Duties of Subjects* of what Rank and Condition soever. Our Author has said nothing of 'em in this Work: But he has given us a concise and clear Idea of them in the last Chapter of his *Abridgement of the History of the World*, which I shall here translate, and add something to it here and there, which will clearly be distinguish'd by Clotchers. The *Duties of Subjects*, says he, are either *general* or *particular*. The first arise from the common Obligation which they are all under as submitting to the same Government, and as Members of the same Civil State. The others result from the different Employments and particular Offices, with which each Subject is entrusted by his Sovereign. I The *General Duties* of Subjects respect their Behaviour either towards the *Governour of the State*, the *whole Body of the People*, or their *Fellow Subjects*. 1. As to the *Governour*, every Subject owes them the Respect, Fidelity and Obedience which their Character demands: So that consequently they ought to live easy under, and be satisfied with the present Government, and not to form any Cabals or seditious Practices against it; to be attached to the Interest of their Prince, to respect and honour him more than any other, to speak and think favourably and with Deference of him and all his Actions. [We ought even to have a Veneration for the Memory of good Princes: But for those who have not been such, behold the judicious Reflections of *Montaigne*: Among those Laws, says he, which relate to the Dead, I take that to be the best, by which the Actions of Princes are to be examin'd and search'd into after their Decease. They are equal to at least, while alive, if not above the Laws: So that what Justice could not inflict upon their Persons, is but reasonable should be executed upon their Reputation, and the Estates of their Successors, things that we often value even above Life itself. This is a Custom of singular Advantage to those Nations where it is observ'd, and by all good Princes as much to be desired, who have Reason to complain that the Memories of the Tyrannical and Wicked should be treated with the same Honours and Respects as theirs. We owe indeed Subjection and Obedience to all our Kings alike, for that respects their Office; but as to Esteem as well as Affection, those are only owing to their Virtue. Let it be allow'd then, that according to the Rule of Politicks we are patiently to endure unworthy Princes; to conceal their Vices, and to assist them in their indifferent Actions as long as their Authority stands in need of our Support. But the relation of a Prince and Subject being once ended, there is no Reason why we should deny to our own Liberty and common Justice, the publishing of our real Wrongs and Sufferings; and to forbid good Subjects the Glory of having with Respect and Faithfulness serv'd a Prince, whose Imperfections were to them so well known, were to rob Posterity of so useful an Example. And those, who out of regard to some secret Obligation, do contrary to their own Knowledge and Conscience, espouse the Quarrel and vindicate the Memory of a faulty Prince, do a particular Act of Justice at the Expence of, and to the Disadvantage of the publick one. *Livy* with abundance of Truth says, that the Language of Men educated in Court, was always full of Vanity and Ostentation, and that the Characters they give of their Princes are seldom true; every one indifferently magnifying his own Master, and stretching his Commendations to the utmost extent of Valour and sovereign Grandeur. And perhaps some may condemn the Boldness of those two Soldiers, who, the one being ask'd by *Nero*, why he did not love him, answer'd him plainly to his Face,

‘ I lov’d thee whilst thou wert worthy of it, but since thou art become a Parricide, an Incendiary, a Waterman, a Player, and a Coachman, I hate thee as thou dost deserve: The other, Why he should attempt to kill him, as warmly reply’d, Because I could think of no other Remedy against thy perpetual Mischief. But the publick and universal Testimonies that were given of him after his Death, and will be to all Posterity, both of him and all other wicked Princes like him, his Tyrannies and abominable Deportment consider’d, who in his right Senses can blame? I am scandaliz’d, I own, that in so sacred a Government as that of the *Lacedaemonians*, there should be mixt so hypocritical a Ceremony at the Interment of their Kings; where all the Confederates and Neighbours, and all sorts of degrees of Men and Women, as well as their Slaves, cut and slash’d their Foreheads in Token of Sorrow, and repeated in their Cries and Lamentations, that that King (let him be as wicked as the Devil) was the best that ever they had, by this means attributing to his Quality the Praises which only belong to Merit; and that which is properly due to the supreme Merit, tho’ lodg’d in the lowest and most inferior Subject. *Essays*, Lib. I. Chap. III.] 2. With Respect to the whole Body of the People, ’tis the Duty of every good Subject to make it an inviolable Law to himself, to prefer the Good of the Publick to any other Motive or Advantage whatsoever; cheerfully to sacrifice his Fortune, Life, and even all that he values in the World for the Preservation of the State; and to employ all his Wit, Industry and Address to advance the Honour, and to promote the Advantage of his own Country. [But we must here observe, that a private Interest is not always oppos’d to that of the Publick. Moreover, the common Duties of Subjects answer in this respect to one another, so that the Engagement of every particular Person does in some manner depend upon the performing of what the rest are oblig’d to do, as well as himself, for the publick Good. For, indeed, the publick Good is only the Consequence of the united Forces and Services of many conducting to the same End. If then, in a State, it is as it were become customary for the Generality openly to prefer their own private Interest to that of the Publick; a good Subject will not in that case be to blame in the least, in not caring to expose his Person or his Fortune by a Zeal impotent and useless to his Country. *Titius Orosio*, DCCXXVII.] 3. And lastly, the Duty of a Subject towards his Fellow-Subjects is to live with them in a peaceable and friendly manner; to be good-humour’d and complaisant to ’em in the Affairs of Human Life, to give Mankind no Uneasiness by peevish and obstinate Tempers; and in short, not to envy or oppose the Happiness or Advantages of any one.

II. The Particular Duties of Subjects are annex’d to certain Posts and Employments, the Discharge of which influences in some measure either the whole Government of the State, or only one part of it. There is one general Maxim which serves for all of ’em, and that is, that no one aspire to any publick Employment, or even presume to accept of it, when he knows himself not duly qualified for it. [Those few wise and good Men who are Members of the Commonwealth, would doubtless be better pleas’d to retire into themselves and live at Ease; full of that sweet Content, which excellent and intelligent Persons know how to give themselves, in the Contemplation of the Beauties of Nature, and the Works of Providence, than to sacrifice all this Satisfaction to Business and a publick Post; were it not that they hope to do some good in being serviceable to their Country by their own Endeavours, and in preventing the Administration of Affairs from falling into ill or unskilful Hands. This may and ought to prevail with Persons of this Character, to consent to the trouble of being Magistrates: But to cabal and make Parties, and court Employments of Trust with Eagerness and Passion, especially such as are judicial, is a very base and scandalous Practice, condemn’d as such by all good Laws, even those of pagan Republicks (as the *Julians* Law among the *Romans* abundantly testifies) unbecoming a Man of Honour; and the shrewdest sign that can be, that the Person is unfit for the Trust he seeks so vehemently. To buy publick Offices is still more infamous and abominable, the most fordid, and the most villanous way of Trading in the World: For it is plain, he that buys in the piece, must make himself whole by selling out again in Parcels. Which was a good Reason for the Emperor *Severus*, when he was declaiming against a Fault of this Nature, to say, *That it was very hard to condemn a Man for making Money of that which he had given Money for before.*—Just for all the World as a Man dresses and sets his Person in Order and Form, putting on his best Face before he goes abroad, that he may make a Figure, and appear well in Company; so is it fit that a Man should learn to govern his own Passions, and bring his Mind to good Habits, before he presume to meddle with publick Business, or take upon him the Charge of governing other People. No Man is so weak, as to enter the Lists with an unmanag’d Horse, or to hazard his Person with such an one in any Service of Consequence and Danger; but trains and teaches him first, breeds him to his hand, and uses him to the Exercise he is design’d for: And is there not the same Reason that this wild and restless part of our Soul should be tamed and accustomed to bear the Bit? Should he perfectly instructed in those Laws and Measures which are to be the Rules of our Actions and upon which the good or ill Conduct of our Lives will depend? Is it not reasonable, I say, that a Man should be Master of his own private Behaviour, and expert in making the best of every Accident and Occasion, before he venture out upon the publick Stage; and either give Laws to others, or correct them for the Neglect of those they have already? And yet (as *Socrates* observ’d very truly) the manner of the World is quite otherwise: For, tho’ no body undertakes to exercise a Trade, to which he has not been educated, and served a long Apprenticeship; and how mean and mechanical soever the Calling be, several Years are bestowed upon the Learning of it; yet in the case of publick Administrations, which is of all other Professions the most intricate and difficult (so absurd, so wretchedly careless are we) that every body is admitted, every body thinks himself abundantly qualified to undertake them. These Commissions are made Compliments and things of Court, without any Consideration of Mens Abilities, or regarding at all, whether they know any thing of the Matter; as if a Man’s Quality, or the having an Estate in the Country, could inform his Understanding, or secure his Integrity, or render him capable of discerning between Right and Wrong, and a competent Judge of his poorer (but perhaps much honest and wiser) Neighbours. *Charron de la Sagesse*, Liv. III. Chap. 17. Sect. 1, 2.] But we must still say something more. 1. *Ministers of State*, or *Privy Counsellors*, ought with the greatest Application to study and perfectly know the Affairs and Interests of the State in all the parts of Government: and to propose faithfully, and in the most proper manner, whatever appears to them to be advantageous to the Publick, without being influenced by either Affection, Passion, or any sinister Views: The publick Good ought to be the only design of all their Advice and Endeavours, and not the Advancement of their own private Fortunes, and the promoting their own Greatness and Power. Nor must they ever by vile and nauseous Flattery, countenance or encourage the criminal Inclinations of the Prince. They should never be engag’d in any Faction or Party whatsoever; keep nothing secret that ought to be discover’d, nor discover any thing that ought to be kept secret, should still show themselves above the Power of all Temptations; and never neglect the Affairs of the State for their Pleasures, or their own private Concerns. [Now in Persons thus to be chosen and employ’d, several Qualifications are necessary: As, first of all, it is necessary to choose such as are faithful, and fit to be trusted; that is, in one Word, Men of Virtue and good Principles. I take it for granted (says *Pliny*) that the better Man any one is, the more such and true he is, and more safe to be depended upon. 2. They must be Persons of Ability, and proper for this Office, not only in regard of their Knowledge and Learning in general, but upon the Account of their Skill in Politicks, and that express Form of Government in particular; such as have been used and try’d before, and have come off with Honour and Success, versed in Business, and accustomed to Difficulties: For Hardships and Adversities are the most useful and improving Lessons. *Fortune*, says *Mithridates* in *Salust*, in the room of many Advantages which she has torn from me, has given me the Faculty of Advice and Persuasion. And in one word, they must be wise and discreet, moderately quick, and not too sprightly and sharp, for such Men will be always projecting. And Men of Fire are more for Change than for steady Management. Now in order to these Qualifications, it is necessary they should be Men of ripe Years, to give them Staidness, Experience and Consideration: Nay, I may add, to inspire them with Caution too, for it is one of the many Unhappineses attending Youth, that Persons then are easily impos’d upon; of which the Tenderness and Softness of their Brain may

perhaps be one Reason, that may dispose them the more easily to receive any Impression, and consequently to Credulity and easiness of Temper. It is for the convenience of a Prince to have notable Men of all sorts about him; both those that excel in Subtilty and Cunning. The former indeed ought to be more numerous, and are more especially requisite, because they are more for the Honour of their Master, and of more constant use; for these are the managers of all regular and ordinary Proceedings. The Men of Art are for cases of Necessity and extraordinary Emergencies, to help at a pinch, and to countermine a Danger. A third Qualification necessary for privy Counsellors, is Openness and Freedom and Courage in all their Behaviour, when consulted with. They must use their utmost Care that all their Proposals be for the Honour and Advantage of their Prince; and when once they have secured this point, that the Advice be wise and good, all Flattery and Disguise should be laid aside; all Equivocations and Reservations, and Craftiness of Expression detested and despised, by which they may seem to aim at ingratiating themselves, or to contrive that what they say may be acceptable to their Master. These are the Men *Tacitus* describes, who accommodate their Language as they see occasion, and do not so properly discourse with their Prince, as with his present Inclinations and Circumstances. They consider him as a great Man, as one able to make their Fortunes; they observe what he would do, not what is best for him to do. Whereas, indeed, all these Regards ought to be utterly banished their Thoughts, they should have a constant Eye upon the Sacredness of their Office, and the Importance of the Trust reposed in them; and looking no further than the Reason, and Justice, and Convenience of the Thing, speak the Truth, and spare not: I or however harsh and distasteful this Liberty, and Openness, and honest blunt dealing may be at the present to those Persons, whose Opinion and Inclinations it happens to cross; yet there will soon come a time when 't will obtain Respect and Esteem. Opposition is offensive just at the instant; but upon cooler thoughts the very Persons you opposed will commend and admire your plain dealing. A Man should likewise take care to be consistent with himself, firm to his Principles, without veering and wheeling about perpetually, as oft as other Peoples Humours shift into a fresh Quarter. But as he must not be changeable and obsequious in a base compliance with the Passions and Pleasures of others, so neither must he be stiff and peremptory in his own Opinions. There is always a decency to be observed, and great difference to be made between Constancy and Contradiction. For Opiniatry and Fierceness confounds all manner of Deliberation; and therefore I am far from desiring my good Counsellor to be inflexible; as knowing very well, that hearkening to other Mens Reasons, and changing our own Opinions upon them, is so far from deserving the Reproach of Rashness and Inconstancy, that it ought rather to be looked upon as a Testimony of Modesty, and Ingenuity, and great Prudence. For although the wise Man always walks in the same way, and by the same rule, yet he does not always go the same pace, nor tread in the same steps; change he does not then so properly as accommodate and mend himself; like the skilful Sailor, who plies to every Wind, and whose excellency lies in trimming the sails that way that the Gale blows freshest. Thus the Man must often go about to make the Port he designs, when there is no coming at it by a straight Course. And it shews the Dexterity and Address of a Statesman to be able to change his Methods, when those which were first chosen are either disapproved, or by some Accident rendered useles and ineffectual. Another necessary Accomplishment for this Post, is the making of a Conscience of revealing any Debates he shall be privy to. For Silence and Secrecy are exceeding necessary in the management of all publick Affairs: Inſomuch, that a great Author has pronounced it impossible for that Man to manage any matter of Consequence, who is not so much Master of himself as to keep his own Council. For how should he support the weight of Publick Business, to whom even Silence is a Burden? But upon this occasion the concealing what one knows is not sufficient, I must likewise caution him against knowing too much. A curious and inquisitive Temper, which loves to be busy and inform it self of other peoples Actions and Concerns, is no commendable Quality in any case; but to pry into the Affairs of Princes, and to value one's self upon knowing their Secrets, is as dangerous as it is unmannerly: And as *Tacitus* has well observ'd, nothing is more hazardous, nothing more unfit for us, than officiously to dive into, and be bold with their retired Thoughts and Intentions. And therefore whatever a Man knows of this kind should come freely and without his seeking; nay, I make no difficulty to affirm, that it is commendable in a Man to decline the Opportunities of having such things imparted to him, and to know as little of them as possible he can. This argues Reverence and Modesty, prevents all Jealousies, and suits the distance between a Prince and his Subjects. Thus have I given my Reader a short Account of those good Conditions which seem necessary for the qualifying Men to be Politicians or privy Counsellors. And by these he will be able to tell himself, what are those ill Qualities which incapacitate a Man for such a Trust. That a Prince in making his choice should be sure to reject all such as are of confident, assuming, and presumptuous Tempers; because these Vices make Men hot and arrogant in Debates, positive and bold in their own sense: And a wise Man, quite contrary, will be content to allow second and third Thoughts, to examine every thing over and over. It is the Character of such a one to suspect himself, to be jealous of the consequence, fearful in advising and resolving, that so he may afterwards be more vigorous and assured, when he comes to execution. For the mind that knoweth how to be afraid, and undertakes warily, will act more securely, and go upon surer grounds. Fools, quite contrary, are eager and assured, blind and bold in Debate; but when they come to Action, cowardly and tame. Advice given with Heat and Confidence, looks fair and gay at first sight; but the Execution of it is hard and desperate, and the Event of it full of grief and disappointment. Next to this presumptuous Vanity and Heat, Passion is improper for such Ministers of State; all Anger and Envy, Hatred and Spight, Avarice and Ambition, all selfish Narrowness of Spirit and private Interest; for these are all of them Corrupters of the best Sense, the very Bane of all sound Judgment; Integrity and faithful Discharge of a publick Character cannot dwell in the same Breast with these personal Piques, and private Affections. Private Advantage ever did, and ever will obstruct and confound Publick Counsels, and each single Man's Profit is that which poisons all good Sense, and kind Inclination to the Common Good. Nothing more remains absolutely necessary to be avoided, and that is Precipitation; an irreconcilable Enemy to Prudence and good Counsel; and fit for nothing but to put Men upon doing amiss, and then being alham'd and unfortunate upon that Account. *Charron de la Sageſſe, Liv. III. Ch. II. Sect. 17.* 2. The Clergy as being the publick Ministers of Religion, ought to discharge their Function with the utmost Gravity and Application; should teach no Doctrine, nor advance any Opinion in Religion, which does not appear to them to be sincerely true; should be themselves a shining Example by their own Deportment, of those Instructions which they deliver to the people; nor should ever dishonour their Character, or lose all the Advantage and Efficacy of their Calling, by the Disgrace of a scandalous and irregular Life. [Since then the Clergy are, or should be at least, the publick Masters of Virtue for the People, who gladly hear them, and put a mighty confidence in them; it is of great moment to make a good choice of them, especially in places that are very full of People. They are in some measure, like the Demagogues among the Greeks, and the Tribunes among the Romans; with this Exception, that they do not meddle, or ought not to meddle with, State-Affairs. Those who gain the Hearts of the Populace, can often set 'em in a Flame, and retain 'em just as they please, can raise them in what passion they have a mind to, or on the contrary persuade them to Moderation and Peace. If the People, from some Accident or Opinion, take the Opportunity of making Disturbances, 'tis not so much the People whom we ought to condemn, as those who spirit them up and excite them to it. One shall rarely hear of any Commotions in a Town, unless backed by them whose Business it is to teach in publick or privately. Those who take upon themselves to discharge with Reputation to difficult an Employment, ought chiefly to be endow'd with two Qualifications. The first, is their having a Knowledge, and being acquainted with Religion, that is to say, that they have with Care and Diligence applied themselves to the Study of the Holy Scriptures, and meditated so upon them, as to be able perfectly to understand all the Duties of Christianity, and all their Consequences, together with the Grounds on which they are built. This ought to be the Foundation of their Studies, and the End to which all their Reading and all their Meditations

ons should be directed. To this purpose all their Knowledge in *H. story*, in *Morality*, in *Philosophy*, in polite Learning, and all in general that they make their study, ought to be employ'd by them, nor ought they to esteem any thing but according as it may be of service in putting them in a Condition to persuade Men to the Obedience of the Gospel. The second Qualification necessary for them to have, is that *their Behaviour be consistent with what they teach*, so that they be a Pattern of those Christian Virtues which they instruct others in. For tho' an Angelical Perfection, as being above the Power and Abilities of Human Nature, is not to be required of them, and one ought to excuse their Frailties as well as those in other Men; yet it is certain that Mankind expect from them and with good Reason too, not only more Knowledge and Learning, but more Virtue also. An *Honest Man*, when we speak of such as follow another way of Living, is a Man who acts nothing that is scandalous, or punishable by the Laws, and who performs the external Duties of Societies, so as not to deserve to be reproach'd by the World with any thing that's base and infamous, according to the manner of Living and the Custom of the Country for Persons of his Rank and Circumstances. This Notion of an *Honest Man* is conformable to all the vicious Customs, and all the Corruptions of the Times and Places where those who made it, happen to be educated in; and tho' the Depravation of Manners is not every where equal, nor it may be the same, yet it is too true, that there is no place whatsoever, where Men do not forgive in each other a great many Vices, and even to a degree far beyond what the *Evangelical Rule* allows of. For example, a Man may be immoderately ambitious, or aim at Employments that he is not qualified for, and endeavour to get into them by all the Methods that are not liable to Punishment; and this purely to gratify his own Vanity, and not with a design to be serviceable to the Publick; yet not be reputed a dishonest Man, nor be looked upon by any with scorn and indignation. A Man may, and still maintain this very Character, be infinitely more covetous, and more addicted to his Pleasures than the Gospel suffers, or do any thing that does not give any occasion of scandal in places where he lives, either to improve his Fortune, or to waste his Time in greater Variety of Voluptuousness. But a great deal more is required to make such a kind of *Honest Man* pass for a *Good Man*, according to the Precepts of the *Gospel*, or indeed according to those of *Moral Philosophy*: They, whose Profession it is to instruct others in the Principles of Religion, must not be satisfied with being *Honest Men*, in the sense which those Words are generally taken; but must be *Good Men* in the Gospel Sense; that is, they must be subject to no habitual Sin, but especially to such as are upon all Accounts inconsistent with true Piety and Devotion. Now if the Persons who are chosen in this Affair, are not of the clearest Characters, two Evils must necessarily arise from thence. The first is, that their bad Example will do abundantly more Mischiefs, than their good Sermons can do good. Mankind are by Nature much more inclin'd to follow the World; and therefore a *Clergyman*, who lives a regular Life, does by his Manners much better convince the People, that 'tis their Duty to live well, than the greatest Orator could do by the most studied and Rhetorical Discourse; as on the contrary, if he leads a disorderly one, his vicious manners will make a deeper Impression upon their Minds, than all he can be able to say to 'em. There is no need of producing Instances to prove this; 'tis what daily Experience tells the whole World. And therefore advise People as much as you will, to do as such Men say, and not as they do; they will always be sure to follow the Ill they do, and forget all the Good they say. Never did a Person of an ambitious and wrangling Temper, inspire by his Discourses, a Contempt for the Grandeur of the World, or the Love of Peace. Never did a covetous Preacher make his Hearers liberal. Never did a voluptuous *Clergyman* persuade any one to abstain from Pleasures, or to use them with Moderation; at least when those Persons were discovered to be what they really were. *Parrochiana*, Tom. II Pag. 235, &c.] 3. The *Publick Professors and Masters of Arts and Sciences*, must not teach any thing that is false or pernicious to the Minds of the People whom they are employ'd to instruct; nor advance any Principle tho' never so true, that they do not prove by solid and convincing Reasons, sufficient to enlighten the Understanding of their Scholars; must carefully avoid broaching any Opinion that may be likely to disturb the Government; and ought to look upon all Human Learning that is not useful to Mankind either in private or publick Affairs, to be vain and empty Speculations. 4. *Magistrates*, and all other *Officers of Justice*, should be easy of Access to every Body; protect the common People against the Oppressions of the more powerful ones; be as forward in doing Justice, and that with the same Impartiality to the Mean and the Poor, as to the Great and Rich; not spin out a Cause to an unnecessary length; never suffer themselves to be corrupted by Bribes and Solicitations; examine thoroughly into the Matter before 'em, and then determine it without Passion or Prejudice; regardless of every thing while they are doing their Duty. [*Magistrates* have a mixt Quality, and are placed in a middle Station between sovereign Princes, and private Subjects. These Subalterns therefore have a double Task incumbent on them, and must learn both how to command and how to obey. To obey the Princes, who trust and employ them, to submit to, and truckle under the paramount Authority of their superior Officers; to pay Respect to their Equals; to command those under his Jurisdiction, to protect and defend the poor, and those who are unable to contend for their own; to stand in the Gap and oppose the powerful Oppressor; and to distribute Right and Justice to all sorts and conditions of Men whatsoever. And, if this be the Business of a Magistrate, well might it grow into a Proverb, that the Office discovers the Man, since no mean Abilities, no common Address, can suffice for the sustaining so many Characters at once, and to act each part so well as to merit a general Applause and Approbation. As to the Sovereign, by whose Commission the Magistrates act, his Commands must be the rule of their Behaviour. Some of his Orders they ought to execute speedily; some again they must by no means comply with; or be in any Degree instrumental in the Execution of them; and in others the most adviseable Course of the Matter to the Magistrate, such as those of *Oyer and Terminer*; and in all others where there is this Clause (*so far as to you shall appear*) or any other Clause equivalent to this, inferred; on which, tho' they do not refer the Cognizance to him, yet order such things, as are either manifestly just, or at least lawful or indifferent in their own Natures, he ought readily to obey, and without demur; for here is no difficulty, nor any ground at all for a just and reasonable Scruple. In such Commissions and Orders, as do not leave the Cognizance of the Matter to him, but only decree some point of executive Obedience; as in those particularly, which we commonly call *Mandates and Warrants*; if they be contrary to any positive Law, which the Sovereign has power to dispense with, and there be clauses of *Non-Obstante* for that purpose, to save the party harmless; he is obliged to obey his Orders without more to do. Because, according to the Civil Constitution, and the Laws of the Land, the Sovereign has a Liberty reserv'd to him of relaxing, or setting aside the Laws in such particular Cases. And the having such a Power over all Laws whatsoever, is the very thing in which absolute and unlimited Sovereignty consists. In cases contrary to Law, or such as manifestly make against the publick Good (tho' there should be an indemnifying Clause) or where the Magistrate knows his Orders to be obtain'd by surpris or upon false suggestions, or by corrupt Methods, he ought not, in any of these cases, to be hasty in the executing his Orders; but let them lie by a while, and with all Humility remonstrate against them; and, if occasion be, repeat those Remonstrances a second or a third time; but if the Command be peremptory, and unalterable, and repeated as often; then he is to comply so far as in Honour and good Conscience he may, and for the rest to excuse himself as well as he can. In matters contrary to the Law of God and Nature, he must lay down his Office, and be content to quit all; nay resolve to suffer the worst that can come, rather than be instrumental in, or consenting to them. I cannot so much as allow him to deliberate, or once to doubt in such Circumstances what to do; for natural Justice cannot be hid, it shines clearer and brighter than the Sun; and all Men must see it, except those who wilfully shut their Eyes, and wink hard against it. All this Advice relates to things in agitation, and intended or ordered to be done; but, as for those which the Sovereign has done already, let them be never so wicked and unreasonable, a Man had better dissemble the Matter as well as he can, and try to wipe out all Remembrance of it, than lose all by provoking and expostulating with a Prince to no purpose; as *Papinian* did

did. For it is the very extremity of Madness to strive against a Stream; where no Ground is got, nor any thing but Hatred and Disfavour for our Pains. As for their Duty, when considered in their other Capacity, and with regard to the private Subjects under their Government, Magistrates must always remember whose their Authority is, and from whence they derive it. That this is none of their own proper Right, but merely a Trust; that they hold it from and under the Prince; that he has the Fee, and is the Lord and constant Proprietor; but they are Tenants and Stewards at Will, put in to exercise this part of his Jurisdiction for so long a Term only, as their Commission purports; or during his pleasure, and no longer. Now hence it is very natural and obvious to infer, That a Magistrate ought to be easy of access; always ready and at leisure to hear and receive the Petitions and Complaints preferred to him: That his Doors should be open to all Comers, and he as seldom out of the way as possible; but especially not so wilfully, and by contrivance; for he should consider himself, as no longer at his own disposal, but a Servant of the Publick, and devoted to the use and benefit of the People: And this was the Reason why *Moses's* Law commanded that the Judges should keep their Sessions, and decide Controversies in the Gates or their Cities; that so Justice might offer it self to all that went out and in, and none might find any Difficulty in addressing for, or obtaining it. He ought to receive the Applications of all Persons and Conditions alike; and be open and kind to all, the mean as well as the great; and the poor no less than the rich. Upon which Account it is, that one of the Philosophers compares a Magistrate to an Altar; to which all People have recourse in their Affliction and extreme Necessity, pour out their Souls there, and depend upon Relief and Consolation for their Troubles from so doing. But, though in point of Justice, he should be free and open, yet in Friendship and Acquaintance he ought to be exceedingly reserv'd, not to make himself cheap and common, not to admit any one into his Familiarities, and intimate Conversation, except some very choice Persons, such as are known to be Men of sound Sense, and staunch Virtue; and these too but privately. For, a large and general Acquaintance debases the Authority of his Character; and abates of that Firmness and Vigour which is necessary for the discharge of it. When *Cleon* was chosen and admitted to the Government, he called all his Friends together, and solemnly renounced from that time whatever Friendship had been formerly between them, as thinking the continuing under such Engagements by no means reconcilable with the Trust he had now taken upon him; and *Cicero* observes accordingly, that a Man must put off the Character of a Friend and lay that quite aside, before he can do Right to the part of a Judge. There are two things, wherein the Office of a Magistrate consists; the one is, to preserve and keep up the Honour and Dignity, and just Right of the Prince who has employ'd him, and of the Publick, whose Representative he is, with a becoming State, with Gravity, authoritative Behaviour, and a well-tempered Severity. Next, he is to act like a true and faithful Transcript, from the Original; an Interpreter and Executor of his Master's Will; and to see that this be duly declared, and diligently observ'd. By his Will, I mean the Law; for this is the authentick Will of the Prince, and the only Declaration of it, which Subjects are bound to take notice of. Of this the Magistrate is to exact a faithful Account and punctual Obedience; for which Reason we often find him termed by Authors, *The Living and the Speaking Law*. Now, tho' it be the Duty of a Magistrate, and an excellent Qualification in him, to temper Justice with Prudence; and Severity with Gentleness and Forbearance; yet, it must be confess'd much more for the common Advantage, to have such Magistrates as incline to the Excess of Sharpness and Rigour, than those who are disposed to Mildness, and Easiness, and Compassion. For even God himself, who highly recommends, and so strictly enjoins all those human and soft Dispositions upon other Occasions, yet positively forbids a Judge to be mov'd with Pity. The strict and harsh Magistrate is the better Restraint, the stronger Curb; he contains people in bounds, and preserves a due Awe and Obedience of the Laws. The mild and merciful one exposes the Law to contempt; makes Magistracy cheap, and lessens the Prince, who made both the Law and the Magistrate, in the Eyes and Esteem of his People. In one word, there must go two Qualifications to the capacitating a Man for the discharging this Office compleatly, Integrity and Courage; the first cannot subsist alone, but stands in need of the second to support and back it; the former will be sure to keep the Magistrates Hands clean from Avarice and Partiality, and Respect of Persons, from Bribery and Gifts, which are the Bane, and utter Exterminators of Truth; and from any other Violation of Justice; which *Plato* calls (which indeed it ought to be) a pure unblemish'd Virgin: This will also be a Guard to him against his Passions; the Aversions or Affection he may bear to the Parties concerned; then he will find great occasion for Courage too, to stand his Ground against the Menaces and imperious Solicitations of great Men, and Requests and Importunities of Friends, who fancy they have a sort of Right to dispose of him, and will not take a reasonable refusal: To harden him against the Prayers and Tears, the loud Cries and bitter Complaints of the miserable and afflicted; for all these are very moving and forcible Inducements, a great Violence, upon Reason and Duty; and yet so committed, that there is plausible Appearance of both, in the very diversion they labour to give us from both. And the Truth is, this Firmness and inflexible Constancy of Mind is the most masterly Virtue, and particular Excellence of a Magistrate; that he neither be terrified and subdued by Greatness and Power, nor melted by Miseries and deplorable Circumstances. These are what very brave Men are often transported by; and therefore it is the greater Praise to continue proof against them. For, though being soften'd by the latter, it have an Air of good Nature, and is more likely to prevail upon the better sort of Men; yet either of the extremes are sinful, and both foreign to the Merits of the Cause, which is the only thing that lies upon a Judge. The Motives of Pity then are very dangerous Temptations; and what a Man in Authority ought as much to stop his Ears against, as Promises or Threatnings; for even that God himself, who is Love and Mercy in perfection, has discountenanced this unseasonable Compassion. And the same Legislator, who said *Thou shalt not receive a Gift to blind thine Eyes therewith, neither shalt thou accept the Person of the Meek*, found it no less necessary for the good of Mankind, and the equal Distribution of Justice, no less agreeable to his Goodness, to add that other Command, *Thou shalt not favour a poor Man in his Cause*. *Charron de la Sagesse. Liv. 3. Chap. 17. Sect. 3, &c.* 5. The Generals, Captains, and other Officers in the Army ought to exercise their Soldiers carefully and at convenient Times, to inure them to bear the Hardships and Fatigue of War; should strictly observe all the Rules of Military Discipline; never expose, nor hazard their Troops, but when there is an absolute necessity for it; should take care as far as in them lies, that their Soldiers have a constant regular supply of Provisions, and not defraud them of their Pay and Allowance; never strive to win their Affection to the prejudice of the Government, but always inspire them with Sentiments conformable to the Good of the Country and the publick Welfare. 6. Soldiers, on the other hand ought to be content with their Pay, and not plunder, nor abuse in any manner whatsoever, either Citizens, or the Country-people; should cheerfully and with resolution expose themselves to the Fatigues and Hazards to which they are called for the Defence and Honour of their Country; should as much avoid the imprudent Ardour of running into unnecessary Dangers, as the base Cowardise of flying when there is occasion for their standing; should shew their Valour and Intrepidity upon the Enemy, and not upon their Comrades; should valiantly maintain their Posts, and prefer a glorious and honourable Death to an ignominious Flight and Life. 7. Ambassadors, Plenipotentiaries, Envoys, and others that bear any Publick Character abroad, ought to behave themselves with great Prudence and Circumspection; to be Persons of deep Penetration, carefully to distinguish Solidities from Trifles, and Truth from Falshood; inviolable in keeping a Secret, and proof against any Corruption or Temptation that might make them neglect or abandon the Interest of their Prince. [A publick Minister, or a Plenipotentiary, is a *Camelion*, a *Proteus*; sometimes, like a cunning Gamester, he dissembles his very Humour and Temper, as well to avoid the Conjectures and Penetration of others, as to prevent any Secret escaping thro' Passion or Weakness; is always ready to put on that Shape his Designs and Occasions require, and artificially appears what it is his Interest to be thought. Thus when he designs to dissemble that his Master is very Formidable or very Low

Low, he is resolute and inflexible, to prevent any large Demands; or easy and complaisant, to give others occasion to make them, and to secure the same Liberty. At other times he is profound and subtil, to conceal a Truth in the very publishing of it; because it concerns him to divulge it, and that it should not be believed: Or else free and open, that whenever he shall have occasion to conceal what must be kept secret, People may not so much as suspect him; but on the contrary, believe he has discover'd whatever he knew. In like manner he is warm and verbose, to excite others to talk, or to hinder their speaking what he desires not to hear, or their acquainting him with what he would be ignorant of; talks of indifferent Things which soften and destroy one another, and leaves the Mind confounded betwixt Confidence and Distrust; that he may make amends for one lost Opportunity by dextrously gaining another: Or he is cool and silent to engage others to talk; hears patiently a tedious while to obtain the same Favour himself; talks with superiority and weight when he designs to make such Promises or Threats as may carry a great stroke with them, and make a strong Impression upon such to whom they are directed. Sometimes he speaks first, the better to discover the Oppositions and Contradictions, Intrigues and Cabals of foreign Ministers upon the Propositions he has to advance, and take his Measures from their Answers. At another Meeting he stays till the last, that he may be sure not to lose his Labour; to be more exact; to observe every thing that may be serviceable to his Master, or his Allies: To know what to ask, and what he can obtain: He knows how to be clear and expellive, or obscure and ambiguous; can use equal Words and Turns, which he can render more or less forcible, as his Interest and Occasions require. He asks little, because he won't grant much; or his Requests are large, that he may be sure of a little: Desires small things which he pretends to be of no value, that they may not hinder him of greater; avoids the gaining an important Point at first, as it is like to hinder him of several, which, tho' in themselves of less value, yet united exceed the other. His Demands are extravagant, with design to be denied, that he may be furnish'd with a just Excuse for refusing those he knows will be made: As industrious to aggravate the enormity of these, and as warmly to urge the Reasons why he cannot hearken to them, as earnestly to endeavour to enervate those which they pretend for their Denial: Equally concerned to aggrandize the little he offers, as to slight openly the little they are willing to grant. Feigns extraordinary Proffers which beget a Distrust, and oblige them to reject what indeed accepted would be useles; this serves to colour his exorbitant Demands, and to throw the blame of the refusal upon them: He grants more than they can ask, to get more of them; shews himself very hard and unwilling to grant trivial things, that he may quash all Hopes and Expectations of better from him; or if he is persuaded to part with any thing, 'tis on such Conditions that he may share the Advantages of it. He directly or indirectly espouses the Interest of an Ally, as he finds it profitable, or as it tends to advance his Pretensions; talks of nothing but Peace and Alliances, the publick Good and Tranquillity; in all which he means nothing but his Master's Interest; sometimes he reconciles disagreeable Parties, at other times he divides those he found united; terrifies the strong and potent, and encourages the weak: Unites several feeble Interests against a powerful one, to render the Balance equal; joins with the former, that they may desire his Alliance and Protection which he sells at a dear rate: knows how to interest those with whom he treats, and by a dextrous Management, by fine and subtil Turns, makes 'em sensible of their private Advantage, the Riches and Honour they may hope for by a little Easiness which will not in the least clash with their Commissions, nor the Intentions of their Masters. And that he may not be thought impregnable on this side, betrays some small Concern for his own Fortune; discovers by this their most secret Intentions, the most profound Designs, and last Efforts; which he turns to his own Advantage. If he is injur'd in any considerable Article, he is very loud, but if he finds he is not so, is yet louder, and throws the injur'd on their Justification and Defence. All his Measures were order'd, his Steps pointed out, and his least Advance preferib'd by the Court, yet he appears as complaisant and free in the most difficult Contexts, as if all his Compliances were *extempore*, and purely owing to his condescending Temper. He dares even engage to an Assembly that the Proposals shall be approv'd of, and that his Master will not ditown him. He spreads false Rumours concerning those things which he alone is entrusted with; he closely reserv'd some particular Instructions, these he never discloses, but at such Extremities as to neglect the use of them would be pernicious. All his Intrigues tend to solid and substantial Ends, for which he willingly sacrifices Punctilio's, and imaginary Points of Honour. He has a great deal of Phlegm, and is arm'd with Resolution and Patience; fatigues and discourages others, but is himself unwearied. He's forewarn'd and fortified against all tedious Delays and Affronts, Jealousies and Suspicions, Difficulties and Obstacles; fully persuaded that Patience and an happy Conjunction will influence their Minds and accomplish his desired Ends. He feigns a secret Interest to break off the Negotiation, when he passionately desires its Continuance; but on the contrary, when he has strict Orders to use his last Endeavours to break it off, thinks the best way to effect it is to press its Continuation. After a very great Event, he is either stiff or easy, according as it is advantageous or prejudicial; and if by a vast Prudence he can foresee any thing advantageous to the State, he follows it close, temporizes and manages himself according to the Hopes, Fears, and Necessities of his Master; takes his Measures from Time, Place, and Occasion, his own Strength and Weakness, the Genius of the Nation he treats with, and the particular Temper and Character of their Ministers. All his Maxims, Designs, and most refin'd Politicks tend only to prevent being deceiv'd, and to deceive others. Mr. *de la Bruyere's Caracteres at Chap. du Souverain & de la Republique.* This indeed is a very fine Description of a publick Minister, or a Plenipotentiary; but, however such a Description in which every particular is not to be imitated. We may also consult Mr. *Wicamefort's* Book intitled, *L'Amassadeur & ses Fonctions.*'] 8. The Commissioners, or Receivers of the Revenues belonging to the State, and in general all those who have the Management of the publick Money, ought to take care not to use any unnecessary Severity, nor to exact more of the Subjects than what they are tax'd at, to enrich themselves, and burden others; should apply none of the publick Treasure that passes through their Hands to their own use, and satisfy those whom they have Orders to pay out of it, without making them stay a long time for their Money. But all these particular Duties of Subjects cease with the publick Posts and Employments from whence they flow. Whereas the General Duties remain still in force, as long as Men are Subjects and live under any Form of Government.

C H A P. IX.

Of the Duty of Sovereigns:

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| <p>I. <i>The Office and Duty of Sovereigns, whence to be discover'd.</i></p> <p>II. <i>The Obligation that Princes have to be well instructed in it.</i></p> <p>III. <i>The People's Safety is the supreme Law.</i></p> <p>IV. <i>The Subjects are to be train'd up in good Manners.</i></p> <p>V. <i>Fit Laws are to be enaſted,</i></p> <p>VI. <i>And put in Execution.</i></p> <p>VII. <i>Penalties are to be inflicted with Juſtice and Moderation.</i></p> | <p>VIII. <i>The Subjects are to be refrain'd from mutual Injuries.</i></p> <p>IX. <i>An able and honeſt Miniſtry is to be employ'd in State Affairs.</i></p> <p>X. <i>Taxes are to be equally laid, and rightly gather'd.</i></p> <p>XI. <i>The Wealth of the State is to be advanced.</i></p> <p>XII. <i>Factions to be prohibited.</i></p> <p>XIII. <i>A ſufficient Force to be kept up for the oppoſing of foreign Invaders.</i></p> |
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IT remains that we take a View of the Duty of Sovereigns; which ought to be explain'd with eſpecial Care and Diligence; as well in regard, that the Ignorance or Neglect of this Duty is the Occaſion of ſo many Miſchiefs in the World, as becauſe to deliver the Rules and Meaſures of it, is the proper Buſineſs of this general Part of civil Knowledge, it being placed beyond the Bounds of municipal Laws. Yet in as much as others have frequently inculcated theſe Points, we ſhall reckon our Task diſcharg'd, in barely repeating the chief Heads ^a. The Precepts then which unite in the making up of

this Duty, may eaſily be gather'd, by examining the Nature and End of civil Communities, and the proper Offices belonging to the ſovereign Power.

II. Here then it is before all things neceſſary that Princes induſtriouſly apply themſelves to the underſtanding of every thing, that falls under the compleat Diſcharge of their Truſt; ſince no Man can manage with Commendation what he hath not firſt rightly learn'd and conſider'd ^b. And as the ^c Art of Government is ſo very difficult as to require the whole Man, tho' of the greateſt Parts and Abilities, they

^a See Lord Bacon's Sermon ſid. c. 19.

^b See 1 Kings iii. 9. *Virg. Æn. 6. v. 857, 853. Iſocrates* has a wife Remark on the ſame Subject; It is, ſays he, 'that according as Princes cultivate their own Minds, ſo they muſt expect to find their Kingdom. And therefore no Champion at the Games has ſo much need to exerciſe his Body, as a Governour has to exerciſe and improve his Wit, *Ad Nicoclem.* And the Admonition of the Satyrift, as it belongs to Mankind, ſo it eſpecially affects Princes.

*Diſce —————
————— quom te Deus eſſe
juſſit, & humanâ qua parte locatus eſt in re.*

Perſ. Satyr. III. v. 71, 72.

Study thy ſelf, what Rank or what Degree
The wiſe Creator hath ordain'd for Thee,
And all the Offices of that Eſtate
Perform, and with thy Prudence guide thy Fate.

MR. DRYDEN.

See alſo *Philip de Comines*, Lib. I. p. 342. & Lib. III. p. 388.

^c That thoſe things which appear neceſſary to be known, in order to the well-governing of a State, are not ſo very trite and vulgar, ſo obvious to all Capacities, may be gather'd from what Mr. *Hobbes* has particularly deliver'd on this Point. *De Cive* c. x. ſ. 10.

MR. BARBEYRAC'S NOTES on §. I, and II.

¹ 'How happy is that Poſt which every Minute furniſhes Opportunities of doing good to thouſands! How dangerous is that which every moment expoſes to the injuring of Millions' (*Caractères de la Bruyere*, Chap. du Souverain & de la République, p. 337. *Ed. de Bruxelles 1697*) the Good which Princes do, reaches even to the moſt diſtant Ages as the Evils that they occaſion are multiplied from Generation to Generation to laſt Poſterity. Theſe are the Archbiſhop of *Cambray's* own Words in his *Avantures de Telemoque* (Page laſt but one of the laſt Tome) a Work from whence I ſhall take ſeveral fine Paſſages, with which the Reader, I preſume, will not be diſpleaſed to have his Memory reſreſhed, to renew the Pleaſure which he took in the firſt reading of ſo many excellent Precepts, where the Solidity of the Thoughts, and the Beauties of the Expreſſion, ſtrive in emulation of each other, which ſhall moſt charm thoſe who have a taſte of fine Things.

² 'The moſt painful and difficult Employment in the World, in my Opinion (ſays *Montagne*) is worthily to diſcharge the Office of a King. I excuſe more of their Failings than Men generally do, in conſideration of the inſupportable weight of their Office, which amazes me. 'Tis hard to keep meaſure in ſo unmeaſurable a Power. Whether it is, that it is to thoſe who are of a leſs excellent Nature, a mighty Incitement to Virtue to be fix'd in a place where you cannot do the leaſt good that is not put upon Record; and where the leaſt Benefit accrues to ſo many Perſons; and where your Capacity, like that of Preachers, is principally addreſſ'd to the People, no very exact Judge, eaſily impoſed on, and eaſily contented. *Eſſais*, Liv. 3. Chap. 7. de l'Incommodité de la Grandeur, p. 681. in Fol. See alſo Lib. I. Chap. XLII. where there is in the Margin, *Sceptre de Grand poids*. Here are Mr. de la Bruyere's Thoughts, which are as beautiful as ſolid. 'There are, ſays he, no general or certain Rules of governing well; they depend on Times and Conjunctures, the Prudence and Deſigns of the Governours: So that perfect Government is the Maſter-piece of the Underſtanding, and perhaps it would be impoſſible to arrive at it at all, did not Subjects contribute one Moiety to the Work by an Habit of Dependence and Submission. — If the care of a ſingle Family be ſo burdeſom, if a Man has enough to do to anſwer for himſelf; what a weight what a load is the charge of a whole Kingdom? Is the Sovereign recompens'd for all his anxious Cares by the Proſtrations of his Courtiers, or the Pleaſures an abſolute Power ſeems to afford? When I think on the troubleſom, hazardous and dangerous Paths he is forc'd to tread to arrive at publick Tranquillity; and when I reſlect on the extremely difficult, tho' neceſſary, Methods he is frequently oblig'd to uſe to compaſs a good End; that he is accountable to God even for the Felicity of his People, that Good and Evil are in his hands, and that Ignorance is no Excuse; I can't forbear asking my ſelf, Wouldſt thou reign? Would a Man meanly

ought therefore as it were to forget their own Persons, and live only for the Sake of the People. From these Considerations it follows, that Princes ought to renounce all those Studies and Pursuits which contribute nothing to this good End, much more are they obliged to re-

trench their Pleasures and useles Diversions, so far as they intercept their main Employment: For the same Reason they ought to admit into their Familiarity none but Men of Wisdom and Experience; and on the contrary, to discountenance and chase away all flattering

meanly happy in a private Condition, quit it for a Throne? Is it not even to one, who comes to it by Hereditary Right, almost insupportable to be born a Monarch? — There is a sort of Commerce or Reciprocal Return of the Duties of the Sovereign to his Subjects, and of theirs to him. Which are most strongly binding, or most difficult in the Performance, I won't determine: 'Tis not indeed very easy to judge between the strict Engagements of Reverence, Assistance, Service, Obedience and Dependence on the one side; and the indispenfible Obligations to Goodness, Justice and Protection on the other. To say the Prince is the supreme Disposer of the Lives of the People, is to tell us only that the Vices of Mankind have entailed on them a natural Subjection to Justice and the Laws, with the Execution of which the Prince is enrull'd: To add that he is absolute Master of his Subjects Goods, without any Reason or legal Process, is the Language of Flattery, the Opinion of a Favourite, who will recant it when he feels Death upon him. When on a fine Evening you see a numerous Flock of Sheep spread over a little Hill, quietly grazing on the fragrant Thyme; or in a Meadow, nibbling the short and tender Grass that has escap'd the Mower's Scythe, the diligent and careful Shepherd, you observe, is always amongst them, suffers 'em not to go out of his Sight, leads 'em, follows 'em, changes their Pasture; if they wander, he fetches 'em in; if the greedy Wolf appears, he sets his Dog on, to beat him off; he nourishes and preserves them; the Morning finds him in the open Field in which the Sun left him: What Care! What Vigilance and Slavery is this! Which Condition looks to you the most delightful and free, that of the Sheep or the Shepherd? Was the flock made for the Shepherd, or the Shepherd for the Flock? The genuine Image of this is of a good Prince and his People. There is no Occasion (on the contrary) for Arts and Sciences in the Exercise of Tyranny; the Policy which consists only in Bloodshed, is very shallow, and has nothing of Fineness in it. It prompts us to murder all whose Lives are Obstacles to our Ambition; and this a Man, naturally cruel, does with Ease. 'Tis the most barbarous and detestable way of supporting and aggrandizing our selves. *Caracteres ou Moeurs de ce Siecle. Chap. du Souverain & de la Republique.* See likewise *les Aventures de Telemaque*, Tom. V. p. 18. *Ed. de Bruxelles.* Xenophon, as our Author has remark'd, said a long time since, That *Man is able more easily to govern all other Creatures, than those of his own kind;* Ὅς ἀνθρώπων περὶκότι, πάντων ἢ ἄλλων ζώων ἐπιρᾶον ἢ ἀνθρώπων ἀρχεν, *Cyrop. lib. 1. init.* See also in *les Choses memorables*, *Socrates's* Dispute with a Youth, named *Glaucou.* *Socrates* (ad *Nicoclem*) in the Beginning, calls a Kingdom the greatest of humane Affairs, and such as requires more than ordinary Degrees of Prudence and Foresight; and says, that the Cause of all the Misfortunes which Kings are expos'd to, and of the Diversity of Opinions about their Condition is, That *People think that all the World is as capable of reigning, as of discharging the Offices about the Temple.* Ταυτὸς δὲ τῆς ἀνομιλίας, &c. Yet nevertheless, adds our Author, there are many that think the *Italian* Proverb not altogether groundless, that *there needs but a very little Brains to rule the whole World;* nor this other *Latin* one, *The World does not know what little Wisdom it is that governs it:* Upon which I have read a Dissertation of a Professor at *Leipsick*, named *Mr. Adam Rechenberg*, printed in 1676. He might add, that if they mean by that, that generally the Government of States is the Thing of the World in which the least Ability, Care, and Application is employed, one might admit of these Proverbs. But it must likewise be acknowledged, that if the Rulers of States would discharge their Duty as they ought to do, they would be more sensible of the Weight of Government than they are; and that if they would inform themselves of the Rules of so nice and difficult an Art, and practise them exactly, the World would be much better governed than it is, and the People infinitely more happy.

'Tis a sort of an Affront and Mockery to extol a Man for Qualities misbecoming his Rank and Condition, tho' otherwise commendable, and for Qualities also that ought not to be his principal Endowments: As if a Man should commend a King for being a good Painter, a good Architect, a good Marksman, or a Runner; Commendations that do him no Honour but when mentioned together, and in the Train of those that are more properly belonging to him, to wit, his Justice, and his Knowledge in governing his People, both in Peace and War. 'Twas after this Manner that *Agriculture* was an Honour to *Cyrus*, and the Knowledge of Letters to *Charlemagne* — *Demosthenes's* Companions in the Embassy to *Philip*, extolling that Prince as being handsome, eloquent, and a stout Drinker, were answered by *Demosthenes*, that these were Commendations more proper for a Woman, an Advocate, or a Sponge, than a King.

Imperet bellante prior, jacentem
Lenis in hostem.

Horace Carm. Saecul. V. 51, 52.

First, let his Empire from his Valour flow,
And then by Mercy on the prostrate Foe.

'Tis not his Profession to know either how to hunt, or how to dance well.

Excudent alii spirantia mollius aera,
Credo equidem, vivos ducent de marmore vultus:
Orabunt causas melius, caligine mætas
Describent radio, & surgentia sidera dicent:
Tu regere imperio populos, Romæ, memento
(Virg. Æneid. VI. 846, &c.)

Let others better mold the running Brass,
And soften into Fleh a marble Face;
Plead better at the Bar; describe the Skies;
And when the Stars descend, and when they rise.
Roman, 'tis thine alone with awful sway,
To rule Mankind, and make the World obey.

DRYDEN,

Plutarch says moreover, that to appear so excellent in these less necessary Qualifications, is, to produce a Witness against a Man's self, of his having mispent his Time, and applying his Studies ill, which ought to have been employed in the Acquisition of more necessary and useful things. So that *Philip*, King of *Macedon*, having heard *Alexander* the Great his Son singing at a Feast, in Emulation of the most skilful Musicians there, *Art thou not a Jhmed,* says he to him, *to sing so well?* And to the same *Philip*, a Musician with whom he was disputing about his Art; *Heaven forbid, Sir, that so great a Misfortune should ever befall you, as to understand those things better than I.* A King should be able to answer, as *Iphicrates* did the Orator, who press'd hard upon him in his Invective, after this Manner; *And pray what art thou, that thou dost swagger at this Rate? Art thou a Soldier, dost carry a Musket, art thou a Pikeman? I can none of all this, but I am one who knows how to command all these.* *Essais de Montague, Liv. I. Chap. XXXIX*

The wife *Mentor* says to *Homenus*, in *les Aventures de la Telemaque*, Do you not see that Princes who are corrupted by Flattery, take every thing to be harsh and austere that is free and ingenuous? They are become so nice, that every thing that is not Flattery, offends and provokes them. But let us proceed a little further: Suppose that *Philocles* is really harsh and austere, is not his Austerity much better than the pernicious Flattery of your Counsellors? Where will you find a Man without Faults? And should not you fear, least of all, the Fault of one who tells you the Truth a little too boldly? But is not this a Fault necessary to the Correction of your own Faults, and to the

Parasites; all trifling Genius's, and such as are skilled in nothing but what is empty and insignificant. But now to render themselves capable of applying as they ought the general Maxims of State Policy, Princes must be perfectly acquainted with the Constitution of the State, and

conquering that Aversion to Truth which Flattery has raised in you? You ought to have a Man about you, that loves nothing but Truth, and who loves you better than you know how to love your self; who will tell you the Truth in spite of you, who will force through all your Intrenchments; and this necessary Man is *Philotes*. Remember, that a Prince is extremely happy, when but only one Man of such an Elevation of Mind is born in his Reign, and who is certainly the most valuable Treasure of his Kingdom; and that the greatest Punishment he ought to fear from the Gods, is to lose such a Man, if he renders himself unworthy of him, for want of knowing how to make use of him. As for the Faults and Errors of good Men, you ought not to be ignorant of them; but however you should make use of their service. Set them right; but be not implicitly managed by their rash and indiscreet Zeal; give them a favourable hearing, honour their Virtue, and shew the publick that you know how to distinguish it; but more especially take care that you be not like those Princes, who, contenting themselves with despising corrupt Men, do notwithstanding employ them, trust in them, and heap Favours upon them; and who, pretending to have Judgment to know virtuous Men, yet give them nothing but empty Commendations; not daring to trust them in any Employments, nor to admit them into their familiar Conversation, nor to bestow any Kindnesses upon them, *Tom. III. p. 3, &c. Iocantes*, as our Author observes, gave likewise this Advice to *Nicoles*: *φίλος πῶ μὴ πάντας τὸς βυλομένους, ἀλλὰ, &c. p. 34. Ed. Par. min.* Receive into your Friendship not every Body, but such only as are worthy of your high Birth and Station; not those with whom you might pass your Life most pleasantly, but those by whose Assistance you may best govern the Commonwealth. Use your self to take Delight in such Company, as may both increase the Stock of your Wisdom, and raise the Character of your Virtue among others.—Rely upon the Fidelity, not of those who praise every thing you say or do, but of those who admonish you when you commit any Fault. Suffer wise and prudent persons to speak with Freedom to you, that when you are in any Difficulty you may find people that will endeavour with you to clear Matters up. Distinguish artful Flatterers from such as serve you with Affection; that Rogues may not have a larger share in your Favour than Men of Honour and Honesty.

5. A King is not to be believ'd when he boasts of his Constancy in standing the Shock of an Enemy for his Glory, if for his Good and Amendment he cannot stand the Liberty of a Friend's Advice, which has no other power than to wound his Ear a little, the rest of its Effects being still in his own Hands. Now there is no Condition of Man whatever that has so great Occasion for true and free Informations as theirs. They support the publick Life, and are to please the Opinion of so many Spectators, that, as it has been customary for Men to conceal from them whatever might have power to divert them from the Course they are taking, they find themselves insensibly involv'd in the Hatred and Detestation of their People, often upon such trivial Occasions as they might easily have avoided, and without the least prejudice event to their Pleasures themselves, had they been advised and set right in Time. Their Favourites have commonly more regard to themselves, than to their Masters; and certainly 'tis their Interest to do so, forasmuch as the greatest part of the Offices of true Friendship, when used to a Sovereign, are esteemed to be a rude and hazardous Undertaking: And therefore there is Occasion not only of very great Affection and Freedom, but for Courage too.—There is none of us all that would not be worse than Kings, if so continually corrupted as they are by such kind of Vermin. *L'Essai de Montagne, Liv. III. Chap. XIII. p. 803. 804.* There follows in that Place some solid Thoughts upon the Way that ought to be taken to inform Princes of their Faults, and to make them give Ear to Truth. See also Two *finis Chapters* of *Charron*, in his *Treatise de la Sageffe, Liv. III. c. 9, 10.*

It were indeed to be wish'd, that *Carnades's* Observations were not too often found true, that *the Sons of Princes, and other wealthy and great Men, learn no Art well but that of Horsemanship, because their Horse cannot flatter them.* Add *Diodor. Sic. Lib. I. cap. 71. & Lib. XII. cap. 12.* Where the same Author reports, that *Charondas* among his other Institutions, order'd an *Action of ill Company*, and set a very severe Penalty on those, who, being prosecuted upon this *Action*, should be convicted. See *Plutarch de Descrip. Anic. & Adulator.*

6. The rest of this Paragraph is not in the Original, but is taken from our Author's Abridgment *de Offic. Hom. & Civ. Lib. II. c. 11. §, 2.*

7. In the first place he must apply himself to Study, and understand the Humour and Complexion of his people. For this Knowledge will be a very great Direction, and model the Person to whose Government they are committed. Now the reigning Qualities of the People in general—are Fickleness and Inconstancy; a Spirit of Faction and Discontent; of Impertinence and Folly; Love of Vanity and Change; Insolence and insupportable Pride in Prosperity; Cowardise and Dejection of Mind in Adversity. But besides these Characters, which are common to Persons of that Condition every where, a Man must be still more particularly instructed in the Temper and Complexion of that Country, and those Subjects, where himself is concerned. For the Dispositions of Men differ extremely, and are almost as various as the Towns wherein they dwell, or the Persons that inhabit them. Some Nations are in a peculiar and distinguishing Manner, passionate or choleric, bold and warlike, cowardly or luxurious, addicted to Extravagance, to Wine, to Women; laborious or slothful, frugal or expensive. And of those who agree in these Qualities, there is a Difference in the Measure; in some they are more, in others less predominant. So necessary is that Rule, *nosceda natura vulgi est, & quibus modis temperanter habeatur.* That the common people must be studied, first to know what they are, and then what is the best Method of dealing with them. And in this sense it is, that we are to understand the old Philosophers, when they pronounce Subjection and Obedience a necessary preparation to the Art of Ruling: *Nemo bene imperat, nisi qui ante paruerit imperio.* No Man (says *Seneca*) ever governs well, who has not first liv'd under Government, and known what it is to be commanded himself. Not that we are to infer from hence any Necessity, or indeed so much as a possibility, that all Princes ought to be rais'd to that Dignity from an inferior Condition; for several of them are born Princes; and a great many Governments pass on in a Line, and come by Succession and Proximity of Blood: But the true Importance of that Maxim is, that whoever is desirous to be a good Governour, must inform himself of the Humours and Inclinations of his Subjects, and understand which are the reigning Qualities in them, as perfectly well as if he had been one of the same Rank himself, and had felt and had been acted by them in his own person. But then it is no less necessary, that the Condition of the Government should be likewise thoroughly understood, and that not only what Sovereignty and Power is in general; but the Frame and Temper of that Government and that State in particular, where this person himself presides, what the Form and Constitution of it is, how it was fix'd and adjust'd, and what Extent of Power is vested in him; whether it be an old or later Establishment; whether it descends by Inheritance, or whether it be conferr'd by Election; whether it were obtained by regular and legal Methods, or whether acquired by Force of Arms; how far this Jurisdiction reaches; what Neighbours are about him; what Strength and what Conveniences he is provided with. For according to all these, and a great many other Circumstances, too tedious to be specified here, a different sort of Conduct will be found necessary. The Sceptre must be sway'd, as such Considerations shall declare; one and the same Method will not serve all alike; but the Rules and Administration must be suited to the Temper of the Beast, and as this proves to be harder or softer mouth'd, so the Rider must take Care to keep a stiffer or a slacker Rein. *Charron de la Sageffe, Liv. III. Chap. 2. Sect. 1.* We shall see the Usefulness of these Instructions, when we come a little farther to treat of the Manner in which Laws ought to be made. (see *sect. 5.*) *Plutarch* likewise gives it as the *first Maxim* to those whose Business it is to govern the State, to study the

Disposition

the Temper of their Subjects⁸; they should excel in such Virtues⁹ as will be of Service to also in a more particular manner endeavour to them in supporting the weight of so difficult and

Disposition of the People, and to accustom themselves to it as much as possible, or else, says he, if they should endeavour to introduce Changes and Alterations in it all at once, they would be engag'd in an Affair that is neither easy nor safe, and that requires a great deal of Time, and a Power firmly establish'd. Τέταρτον γὰρ τῶν ἀγαθῶν &c. *Præcept. Reip. gerendæ*, p. 749. B. Ed. *Wich.* There are in the rest of this Treatise many excellent Maxims for the Art of Government.

⁸ After the Knowledge of the State and Government, which is in the Nature of a Preface or Introduction, the next both in Order and Dignity, is Virtue. And no Man can wonder that so honourable a Place is assign'd to this, among the necessary Qualifications of a Governour, who at all considers how absolutely and indispensably needful it is to a Prince, and that both upon his own account, and for the Benefit of the Publick. First of all it is highly reasonable, as *Cyrus* well observes, that he who is above all the rest in Honour and Authority, should be so in Goodness too; this is no more than what such a great and elevated Station may justly seem to require of him. Then his own Reputation is nearly concern'd in it; for common Fame makes it one great part of its Business to pick up and disperse every thing our Governours do or say: The Prince stands expos'd to the publick View, every Eye is upon him, and he is curiously watch'd. There is no such thing in Nature as Privacy in Princes; they can no more be hid than the Sun in the Firmament. They are the constant Subject of Discourte in every Company and so are sure to have a great deal of good, or a great deal of ill said of them. And it is of exceeding great Consequence to any Governour both with respect to his personal, and the common Interest and Safety, what Opinion the World have of him. Nor is it enough, that the supreme Governour be virtuous in his own Temper and Conversation, but he is likewise oblig'd to take good Care that the Subjects be like him in Goodness. And how deeply this concerns him I appeal to the universal Consent of all good and learned Men, who, with one Voice, declare it impossible for that Kingdom or Nation, that City or less Society of Men, to prosper; nay, so much as to subsist long, who have banish'd Virtue from amongst them. And those nauseous Flatterers prevaricate much too grossly, who pretend that it is for the Advantage and Security of Princes, that their Subjects should be abandon'd to Wickedness and Vice. Because they say, this emasculates their Minds, and renders them more tame and servile in their Dispositions. So *Pliny* in his Panegyrick (Chap. XLV) says, *Patientioris servitutis, quod non deceat esse nisi servos.* They are more patient under Slavery, who are fit to be nothing but Slaves. For, quite contrary, we find by unquestionable Experience, that the more vicious Men are, the more do they blinch and grow unruly under the Yoke: The good and the gentle, the meek and sweet temper'd Men, these are much better qualified to live in Fear and Awe of Authority themselves, than to be an Awe or give Occasion of Jealousy to their Governours. *Pessimis quisque asperime relictorem patitur* (Salust. ad *Cæsar.* de Rep. Ordinand. Orat. 1. init.) Every Man is more ungovernable, in proportion as he is a worse Man. Mutiny and Discontent, and perpetual Uneasiness are the sure Attendants of a profligate Mind. *Contra, facile imperium in bonos, qui metuentes magis quam metuenti.* On the other Hand, good Men are very easily kept in order; they give their superiors little Trouble, but had rather submit with Reverence and Fear than be a Terror and Disturbance to them. Now there cannot be a more powerful Motive, a more efficacious Means of bringing over the People, and forming them unto Virtue, than the Example of the Prince. For (as daily Experience shews) every one affects to be like him; and the Court is the standard of Manners, as well as of Fashions. The Reason is, because Example is what Men are sooner mov'd with, and sooner wrought upon by, than Laws; for this is a Law in dumb-shew, but has more Credit and Authority than the Voices of the Law speaking in Commands. *Nec tam imperii nobis opus, quam exemplo* (Plin. Paneg. Cap. XLV. *num. 6.*) & *mitius jubetur exemplo.* We do not want Precepts so much as Patterns, and Example is the softest and least invidious way of commanding. Now if all Example be a mighty Inducement, that of great Persons must be so in a degree proportionable to their Quality and Station. For all the little ones fix their Eyes and Hearts here, and take their Observations from those above them. They swallow all without chewing; admire and imitate at a venture; and conclude, that their Superiors would not be guilty of any Behaviour unbecoming their Character; and if they do any thing, it must be excellent and good. And on the other hand, Governours are so sensible of the Force of this Motive too, that they think their Subjects are indispensably oblig'd to those Rules which they are content to be governed by themselves; and that their own doing what they would have done by others, is singly a sufficient Inducement to bring it into practice and common Vogue, without the Formality of a Command to enforce it. From all which it is abundantly manifest, that Virtue is exceeding necessary and advantageous to a Prince, both in point of Interest and in point of Honour and Reputation. *Charron de la sagesse*, Liv. III. Chap. 2. §. 2. Let us add to this the following Reflection of *Montaigne*: I know not how 'tis, but the World requires of Princes more than other Men, to hide and conceal their Faults: For what is only reputed in us Indiscretion, the People esteem in them to be Tyranny, and a Contempt of the Laws. And besides their propensity to Vice, are apt to censure, that, as a heightning pleasure to their Crimes, they insult over and trample under Foot the publick Ordinances. *Plato* indeed, in his *Gorgias*, defines a Tyrant to be one who is at his Liberty in a State to do whatever his own Will leads him to. And 'tis by reason of this Impunity that the publication of their Vices does often more Mischief than the Vice it self. Every one fears to have his Actions discover'd, and to be censur'd in his Pleasures: But Princes are even to their very Gestures, Looks, and Thoughts, the Observation of the People, who think they have a Right and Title to be Judges of them. Besides that, the Blemishes of the Great naturally appear greater by reason of the Eminence and Lustre of the Place they are seated in; as a little Scar, or a Wart in the Forehead, is a much greater Deformity than a considerable Gash any where else. And this is the Reason why the Poets feign the Amours of *Jove* to be perform'd in the Disguise of so many borrow'd shapes, that among those many amorous Intrigues, there is but only one, as I remember, where he appears in his own Majesty and Grandeur. *Essais* Liv. I. Chap. 42. p. 190.

⁹ The Virtues proper for this Purpose are, 1. *Piety*, which is the Foundation of all Virtues; but it must be a solid and reasonable Piety, free from Hypocrisy, Superstition, and Bigottry. 2. *The Love of Justice and Equity.* For the chief Design a Prince was made for, is to take Care that every Man has his Right. This obliges him to study, not only that Part of *humane Learning* which qualifies those famous *Civilians* that are fit to be Legislators themselves; who go up to that Justice which at first regulateth *humane Society*, who exactly know what Liberty Nature has left us in *Civil Governments*, and what Freedom the Necessity of States take from private People, for the Good of the Publick: But that part of the Law too, which respects the Rights, and descends to the Affairs of particular Persons. 'This is a part of Education which is left the Gentlemen of the long Robe, and is not admitted into that of Princes, as being beneath them, tho' they are every Moment of their Reign to pass Judgment upon the Fortunes, Liberties, and Lives of their Subjects. Princes are perpetually talk'd to of Valour, which is of no Use but to destroy; and of Liberality, which is good for nothing but Extravagance, unless regulated by Justice. 'Tis true, every Temper must be instructed, if I may so say, in a Virtue proper for its respective Occasion; the Covetous must be aspir'd with Generosity, the soft and the slothful must be inflam'd with the Desire of Glory, and the Ambitious must, as much as possible, be restrain'd within the Rules of Justice. But whatsoever Variety there may be in the Disposition of Princes, Justice is always the most necessary; for that Virtue keeps up Order in him who does it, as well as in those to whom it is done. 'Tis not any Constraint that limits the Powers of the Prince, seeing that at the same Time that he renders it to others, he teaches them to return it to himself, and that willingly too, tho' his Power necessarily obliges us to receive it from him. (*St. Evremond*, Tom. III. p. 74, 75.) From whence it follows, that he ought especially to be a religious Observer of

his Word. Let us hear what the Oracle of *Gascoigne* says farther upon this Subject. 'Those of our Time, who have considered in the Establishment of the Duty of a Prince, the Good of his Affairs only, and have preferred that to the Care of his Faith and Conscience, might say something to a Prince, whose Affairs or Fortune had put into such a posture, that he might forever establish 'em by only once breaking his Word; but 'twill not go so. They often buy in the same Market; they make more than one Peace, and enter into more than one Treaty in their Lives. Gain tempts them to the first Breach of Faith, and almost always presents its self, as in all other ill Acts, Sacrileges, Murders, Rebellions, Treason, as undertaken for some kind of Advantage: But this first Gain is attended with infinite mischievous Consequences; throws the Prince out of all Correspondence and Negotiation, by such an Instance of Infidelity. *Solyman* of the *Ottoman* Race, a Race not very solicitous of keeping their Words and standing to their Articles, when in my Infancy, he made his Army to land at *Oronto*, being inform'd that *M. reurino de Gratinare* and the Inhabitants of *Castro* were detain'd Prisoners, after they had surrendered the Place, contrary to their Articles of Capitulation, order'd them to be set at Liberty, saying, *That having other great Enterprizes in hand in those Parts, this Perfidiousness, tho' it carried with it a show of present Advantage, would for the future bring on him a Discredit and Distrust of infinite Prejudice.* (Essais Liv. III. Ch. 7. p. 478.) 'To whom ought not Treachery to be hateful, when *Tiberius* refused it in a thing of so great Importance? He had word sent him from *Germany*, that if he thought fit, they would rid him of *Ariminius* by Poison. This *Ariminius* was the most potent Enemy the *Romans* had, who had so basely beaten them under *Varus*, and who alone put a stop to the Growth of their Power in those Countries. *Tiberius* retained Answer, that the People of Rome were always usel to revenge themselves of their Enemies by fair and open Ways, with their Swords in their Hands, and not clandestinely and by raud. He quitted the advantageous for the honest Part. You will tell me he was a Deceiver, and did not speak as he thought. I believe so too, and 'tis no great Miracle in Men of his Profession. But the Acknowledgment of Virtue is of no less Importance for being in the Mouth of one that hates it; since it is Truth that forces it from him; and if he will not inwardly receive it, he at least puts it on to make himself outwardly fine. *Liv. II. Ch. 1.* at the Beginning. See what *Telemachus* says to dissuade his Allies from making use of the Treason of a certain Citizen of *Phuustium* who offer'd to deliver up to them one of the Gates of the Town by Night, *Tom. 8. p. 41, &c. 3.* Valour is likewise a very necessary Qualification in a Prince; but then it must be managed by Prudence. *Mentor* gives *Telemachus* very excellent Advice upon this Matter. Go, says he, into the greatest Dangers, as often as it is necessary you should go. A Prince dishonours himself more by avoiding the Dangers of a War, than by never going to it at all. The Courage of him who commands others should never be doubtful: It is necessary for a People to preserve their General and King, it is still more necessary for them not to see him in an uncertain Reputation of Valour.—But then on the other Hand do not run headlong into Danger, when there's no Necessity for it; for Valour can no longer be a Virtue, than as it is managed by Prudence; otherwise 'tis a senseless Contempt of Life, and a brutal Ardour. *Inconsiderate Valour* is always unsecure; he that is not Master of himself in Dangers, is rather fierce than brave. He is forc'd to be beside himself, that he may be rais'd above Fear; because he cannot overcome it by the natural Disposition of his Heart; now in this Case, if he does not run away, he is at least confounded; he loses the liberty of the Mind, which would be necessary to him in making use of Opportunities to defeat the Enemy, or serve his Country. If he has all the Courage of a Soldier, he has none of the Prudence of a Captain; nay, he has not even that of a private Soldier; for a Soldier ought, during the time of Action, to keep such a Presence of Mind, and such a Moderation as is necessary to obey Orders. He that rashly exposes himself, discomposes the Order and Discipline of the Troops, sets an Example of Temerity, and often exposes the whole Army to very great Dangers. Those who prefer their vain Ambition to the Safety of the common Cause, deserve Punishments instead of Rewards. Take care then not to search after Glory with too much eagerness: The most certain way of finding it, is patiently to wait a favourable Opportunity: Virtue gains so much the more Respect and Esteem, as she shows herself plain, modest, averse to Pride and Ostentation; and the greater the necessity of exposing your self to Danger grows, the greater still your Courage and Foresight ought to be. *Tom. 8. p. 43, &c.* See likewise *Montagne's* *Essais* Liv. I. Chap. 14. and Liv. II. Chap. XVI. that treats of *Glory*. 4. A Prince ought to be very reserved in discovering his Thoughts and Designs. This Virtue is apparently necessary to all those who are concern'd in Government. It includes a wise Mistrust and innocent Dissimulation. See *Charron de la sagesse*, Liv. III. Chap. 2. f. 6, 7. And what our Author has said above, *Book IV. Chap. 2. Sect. 17.* 5. A Prince must above all things accustom himself to moderate his Desires: For having it in his power to satisfy them, if once he should give a loose to them, he would be tempted to proceed to the last Excess, and by ruining his Subjects, would, in the End, ruin himself. To prevent these terrible Inconveniencies, and to form himself to this Moderation, nothing can be more proper for him than to accustom himself to Patience. 'Tis the most useful of all Virtues for those who are to command. A Man must be patient, if he will become Master of himself and others. Impatience, which appears to be the strength and vigour of the Soul, is only its weakness. He that can't wait and suffer, is like one who can't keep a Secret: Both of 'em want Resolution of Mind to contain themselves, as a Man that runs a Race in a Chariot, and has not a Hand strong enough to stop where he ought, his unruly Courfers.—An impatient Man, by his mad ungovernable Desires, is thrown into an Abyss of his Misfortunes: The more powerful his Authority is, the more fatal to himself is his Impatience. He will not stay, he will not allow himself time to measure any thing; he forces all things to satisfy his Pleasures; he tears off the Boughs, to gather the Fruit before it is ripe; he breaks down the Gates, rather than stay till they are open'd to him; he will be a reaping while the prudent Husbandman is but sowing; every thing that he does in a hurry, is ill done, and has no longer Duration than his own fickle Inclination. Such are the foolish projects of a Man who believes that he is at liberty to do every thing, and who is entirely governed by his Passions, to the Abuse of his power. (*Avant. de Telemaque*, Tom. V. p. 179, 180.) The Philosopher *Arrian* (*de expedit. Alex. Lib. IV. cap. 7.*) says, That it is easy to see by the Example of *Alexander*, that whatever fine Actions a Man performs to outward appearance, it signifies nothing to true Happiness, if one does not know at the same time how to rule and moderate ones self. Τὸ τὸν ἄλλεν τι ὄρελος ἐς εὐδαιμονίαν ἀνθρώπου, ἐι μὴ σωφρονῆεν ἐν ταύτῳ ὑπάρχει τὴν τῷ ἀνθρώπῳ τῶν τὰ μεγάλα, ὡς δοκεῖ, πειγματι πειζάντι. 6. Goodness and Clemency are also Virtues, very proper in and very useful to a Prince. Let him shine bright (says *Montagne*) in Humanity, Truth, Fidelity, Temperance, and especially in Justice; Marks that are rare, unknown, and exiled. 'Tis by no other Means but by the sole good Will of the People that he can do his Business; and no other Qualities can attract their good Will like those, as being of the greatest Advantage to them. *Nihil est tam populare quam bonitas.* Nothing is so popular as Goodness (*Cicer. Orat. pro Ligur. cap. XII.*) *Essais* Liv. III. Chap. 17. p. 477. See *Charron de la sagesse* (Liv. III. Chap. 2. Sect. 12.) 7. Liberality, well understood and well applied, is so much the more necessary for Princes, as Avarice and Niggardlines are a Disgrace to a Person whom it almost costs nothing to be liberal. But then also there are no People that ought to take more care in regulating the Use of this noble Virtue. As this requires abundance of Circumpection, and supposes moreover very commendable Dispositions in Princes, who know how to place their Favours as they ought to do, and to confer them on deserving Persons; one can't, in my Opinion, absolutely say with *Montagne*, that Liberality is not in its true Lustre in the Sovereign's Hand, and that private Men have the most Right to it; that it is a very improper Subject to be preached up to young Princes; and that it is but of little value in comparison of other royal Virtues. However, there is nothing more solid than the Reflections which this Author makes in the same place. 'To take it exactly, says he, a King (as King) has nothing properly his own; he owes his very self to others. Authority is not given in the Favour of a Magistrate, but of the People. A Superior is never made so for his own profit, bus for the profit of the Inferior: And the Physician for the sick Man, and not for himself. All Magistracy, as well as Art, has its End without its self. *Nulla ars in se versatur.*—A Prince being to give, or, to say better, to pay and render, to so many People according to what they have deserved, ought to be a trusty and prudent Disposer of what he has to lay out. If the Liberality of the Prince be without Bounds or Discretion, I had much rather he were covetous; Royal Virtue seems to consist most in Justice, and of all the parts of Justice, that best denotes a King, that accompanies his Liberality; for that they have particularly reserv'd to themselves, whereas all other sorts of Justice they remit to the administration of others.

important a charge¹⁰; and also learn how to regulate their outward Behaviour in a manner suitable to the Grandeur and Dignity of so exalted a Station.

III. The general Rule which Sovereigns are to proceed by, is, *Salus Populi suprema lex esto*; Let the Safety of the People be the supreme Law. 'Tis Plato's Description of a Prince, that *He neither thinks, nor commands, what may advance his own*

private Interest, but what may promote the Benefit of his Subjects: and whatever he says or does, is said or done for their Advantage, and for their Ornament and Grace. For the Authority which Governours bear, was first conferr'd on them with this Intention, that it might prove a Means of procuring that End for which civil Societies were establish'd. And therefore they ought to esteem nothing as contributing to their own private or

others. An immoderate Bounty is a very weak means to gain them good Will; because it balks more people than it encourages. *Qua largitione quod in plures usus, eo minus in multos uti possis--Qui autem est stultus, quam quod libenter facias, curare ut ille diutius facere non possit?* (Cicero. de Offic. Lib. II. cap. 15.) By how much you use it to many, by so much less will you be in a Capacity to use it to many more. — And what greater Folly can it be than to order it so, that what you do willingly, you cannot do long? And where it is conferr'd without due respect of Merit, it puts them out of Countenance, on whom it is bestow'd, and is receiv'd without a just acknowledgment, and that grateful Sense which the Bounty of a Prince ought to meet with. Some Tyrants have been sacrific'd to the Hatred of the People, by the Hands of those very Men whom they have unjustly advanced. — The Subjects of a Prince, profuse in Gifts, grow exorbitant in their Demands; and accustom themselves not to Reason, but Example. — The more a Prince exhausts himself in giving, the poorer he grows in Friends. How should he satisfy Desires, which still increase the more they are fill'd? He who has his Thoughts fix'd upon getting, never thinks of what he has already received. Covetousness has nothing so properly its own as Ingratitude. *Essais*, Liv. III. Chap. 6. p. 609, &c. The best may be seen in the Original; for it would be too much to transcribe it all. See also Mr. le Clerc's Reflections upon Happiness and Misfortune, &c. Chap. XII. p. 282, &c. and *Charron de la Sagesse*, Liv. III. Chap. 2. Sect. 13. Here is a general Idea of Virtues which are most necessary for a Sovereign, besides those that are common to him with private Persons, and of which some are included even in those we have been mentioning. Cicero is not very wide of these Ideas in the following Enumeration. *Fortem, iustum, severum, gravem, magnanimum, largum, beneficum, liberalem* [dicit]; *he sunt regie ludes.* Orat. pro Rege Deiotar. Cap. IX.

'Tis thus that I thought the Latin, *moreque ad tanti fastigii dignitatem* ought to be rendred. For besides that the Author plainly distinguishes *Manners* from *Virtues*, I am mightily tempted to believe, that he form'd all this little Addition upon *Charron's* Notions in the Chapter I have so often quoted, and to which he himself refers in the second Edition of my Original. Here is what *Charron* says. The next thing that comes under our Consideration, after the Prince's Virtue, is what they call his *Manners*, that is, his Behaviour and Way of Living; the Mien, the Posture, the Address that suit with the Majesty of a Prince; and all those profound Respects so necessary to be kept up. — Now tho' Nature contributes a great deal to this in the Form, and Temper, and Person, yet all that Nature does is capable of Amendment and Improvement, both by the additional Helps of Industry and Art. Under the Head we are now upon, we may reckon the Air of his Face, the Composure of his Countenance, his Fashion and Behaviour, his Gate, his Tone and manner of Speech, his Clothes and Dressing: The general Rule to be observ'd in all these particulars, is such a Mixture of Sweetness and Moderation, of Staidness and Gravity, as may win upon Mens Minds, and move their Affections pleasantly; such as may keep the middle way between Familiarity and Fear; engage their Love, and yet command their Honour and Respect. His Court and Conversation are likewise worth taking Notice of. For the former, it is convenient that it should be very publick, that the Palace he dwells in should be noble and magnificent, fit for Resort and Correspondence; and that if it can be well contriv'd, not far from the Middle of his Country, or at least the most significant part of it; that so his Eye may command all his Quarters; and like the Sun in the midst of the Firmament, pierce, enlighten, and warm all round about him with the influence of his Beams. For when a Prince resides in some very remote Corner of his Dominions, his Distance emboldens those in the contrary Extremity to behave themselves insolently and grow tumultuous and unruly. As for his Conversation, that should be very reserved, his Confidants and familiar Friends but few, his Progresses and other Appearances in publick but seldom; that the People may be glad to see him: For the shewing himself often, and giving too easy access to his Person, will mightily lessen the Majesty of his Character. *Continuus aspectus nimis reverendus magnos homines ipsa satietate facit* [Majestati major ex longinquo veneratio. Tacit. Annal. l. 47. quia omne ignotum pro magifico est. Idem. Agricol. Cap. XXX.] The being always admitted to the sight and presence of great Persons, does mightily impair and diminish our Respect, by glutting our Curiosity. Majesty is always most revered at a distance; for Nature forms all our Ideas bigger than the Life; and what we are not acquainted with, is always vastly'd to be very great and stately. *Charron de la Sagesse*. Liv. III. Chap. 2. Sect. 15.

The Words our Author uses, after several others, to express this common Maxim, are taken from Cicero; *Omnia salus populi suprema lex esto*. De Legib. Lib. III. Cap. 3. Here is what a great Emperor says to this Matter. *Δὸ τὸ ἄλλο εἰς τὸ εὐεργετῆσαι τὸν λαόν, &c.* that is, according to Mr. Dacier's Translation, you ought always to have these two Maxims in view; to do for the Good of Mankind all that the Condition of a Legislator and a King requires of you: And the other, to change your Resolution, whenever Men skilled in such Matters give you better Advice. But still the change must be made from the Motives of Justice, and the publick Interest, and never for your own Pleasure, your own Advantage, or your own particular Glory, *Marc. Antonin. Lib. IV. Cap. 12.* You will find several excellent things upon the same Subject, in the *Cyrop.* and in the 3d Book of *Socrates's Chæses memorables* by *Xenophon*; as likewise in the Works of *Plato* and *Aristotle*. According to these wise Heathens, whose Ideas are very different from those of many Christian Princes, who rather follow *Machiavel's* Politicks, a good Prince is one who endeavours to make his Subjects happy; *ὁ εὐδαιμόνος πρὸς τὸν ἀνὴρ ἡγήταια* [*Socrat. ad Xenophon. ubi supra*] a Tyrant, on the contrary, is one who has nothing but his own private Interest in view, *ὁ μὲν γὰρ τυραννίς ἐστὶ μοναρχία πρὸς τὸ συμφέρον τὸ τῷ μοναρχῶντι.* *Aristot. Polit. Lib. III. Cap. 7.* See *Cicero de Offic. Lib. I. Cap. 25.* *Plin. Panegy. Cap. 67.* and the *Parrhasians*, Tom. 1. p. 212, &c. of the first Edition, But after all, the Maxims of good Politicks have nothing in them contrary to natural Right; and our Author has also written a fine Dissertation in 40 pages in *Ozruo*, in which he proves in a few Words that they are very agreeable to the Precepts of the Gospel. This Dissertation is entituled, *De concordia vere Politice cum Religione Christi*, and is among his *Academical Dissertations*. One may also see that of Mr. *Buddeus*, which is entituled, *Concordia Religionis Christianæ Statuque Civili*, where he has treated more exactly of this Matter, for it consists of a hundred and forty Pages in *Quarto*. It was printed at *Hill*, in 1701. and is very well worth reading. But as the Actions of Sovereigns, and the Body of a State, seem often to depart from the Rules of those Duties, which private persons are obliged to observe to wards each other, our Author had a Design to compile a Treatise, to shew expressly how far what is call'd a *Piece of Policy*, or something done for a Reason of State may be justifiable; as he informs us himself in his little Preface to the second Edition. It was indeed to be wish'd for the sake of the publick, that Death had not prevented his executing that project, and several others. I find in *Charron* some Thoughts upon the same Subject, which, I presume, no one will be displeas'd to see here. The Justice, and Virtue, and Probity of a Prince is not in all points tied up to the same Methods and Manner of proceeding with that of Persons in a private Capacity. It has a larger range, and freer scope allow'd; and all this Latitude is Indulgence little enough; no more than is absolutely necessary for the weighty and hazardous Office our Governours are engag'd in, and the infinite inconceivable Difficulties that arise in the Administration. This makes it reasonable for 'em to be in a Way

personal

personal Good, which is not at the same time profitable to the Commonwealth: *Would it not seem a Wonder to You* (says *Socrates* to *Xenophon*^b, *if he should be owned for a good Herdsman, who lessens the Number, or multiplies the ill Qualities*

of his Drove? 'Tis a much greater Wonder, if he who hath the Command of a State, and both wastes the Strength, and corrupts the Manners of his Subjects, doth not blush at his Mismanagement, and confess himself an ill Governour.

by themselves; the common and direct Tract is too narrow; they are obliged to shift and dodge, and wheel about, and whatever Censures People, who understand not the Nature of the Case, may pass, as if every thing that is unusual and indiscreet, were presently wicked and unjust; yet those, who are capable of considering, and competent Judges of the Matter, must admit it to be lawful and allowable, as well as prudent and needful for them so to do. For Prudence must be mix'd with Justice; some Leints and Stratagems, and little Slights made use of, and (as they commonly express it) when the Lion's Skin is not big enough of its self, it must be eked out, by tacking a Fox's Skin to it! Nor would I be so mistaken here neither, as to be thought a Justifier of these crafty Dealings at all times, and in all Cases indifferently. By no Means; this is not a standing Rule of Action, but must be reserved for special Occasions, and particularly there must be three Conditions to warrant it. The first is absolute Necessity, or at least, some evident and considerable Advantage to the publick — And this must by all means be contulded and the chief Aim. This is a natural and indispenible Obligation: For the publick Good is a Condition paramount to all others; and the Man who is procuring it, cannot but be doing his Duty. *Salus populi suprema lex esto.* The safety of the People must be the supreme Law. The second Qualification which these Methods must have to recommend them, nay, indeed to acquit them of Blame, is, that they be used defensively only, and not offensively; with a Design to preserve a Prince or a State, but not aggrandize them, and oppose others. For this Reason they should seldom or never be begun with, but only return'd back again; and are then in proper Time and Place, when employ'd to save the Publick from Snares and subtil Designs, and not to conceal, but to discover and defeat mischievous and wicked Practices. For one Trick may be answer'd with another, and it is reasonable to play the Fox with the Fox. The World is exceeding full of Malice and Cunning: And *Aristotle's* Observation is most true, that the Subversion of Kingdoms and States is usually owing to Treachery and Deceit. What then should hinder? What forbid? Nay, in such Exigencies, what can excuse the Conservators of the *publick Safety*, from preventing and disappointing such Calamities and villanous Inrentions by countermining? Why may not the State save it self by the same Methods that were practis'd to ruin it, and retort the Artifice of Factions and wicked Male-Contents back upon their own Heads? For a Man to be too squeamish in these Cases; to play constantly above board, and upon the square; and to deal with those Men according to the Rules of that rigorous Equity and plain dealing, which Reason and Conscience require from us in private Affairs, is inconsistent with the Nature and the Measures, nay, with the very End of all Government; and the Event would often be the betraying and losing all, and sacrificing the Publick to an unreasonable Scruple. The Third Qualification is, that these Methods be used moderately and discreetly; as they are not fit for all Times, nor all Occasions; so neither are all Persons fit to be trusted with them. For they are capable of great Abuses: And if abused will prove of ill Example and ill Consequence, by ministring occasion to ill Men, to practise and justify their Frauds and indirect dealings, and to give Countenance to Wickedness and Injustice, even in private Commerce and Transactions: For a Man is never at Liberty to forsake Virtue and Honesty, to follow Vice and Injustice; these things are so far from indifferent, that there is no possibility of reconciling those distant Extremes, no satisfaction capable of being made for so ill a Choice. And therefore away with all Injustice and Infidelity, all treacherous and illegal Proceedings, and cursed be the Principles and Politicks of those Men who would possess sovereign Commanders with a Belief that all things are lawful, if they be but expedient for them. There is a vast Difference between such an arbitrary Notion of Right and Wrong, and the Rules of Limitations I have here laid down. Reasons of State may sometime make it necessary to temper Honesty with Profit, and try if these two can be so mingled together as to make a good Composition. But, tho' we may try to compound and soften the Matter a little, yet we must never act in Opposition to Justice: We may, nay, we must sometimes wheel off a little, and fetch a Compass about it; but we must never lose sight of it, much less turn our backs upon it, and cast all Regards for it sacred a thing behind us. For there is a Cunning very consistent with Virtue and strict Honour, such as *St. Basil* the great calls a *great and commendable Cunning* (*magna & laudabilis astutia*) such as tends to good; and may be used as Mothers and Physicians deal by their Children and their Patients, when they tell them fine Stories to amuse and entertain them, and by Degrees cheat them into Health. In short, many things may be acted secretly and in the Dark, which are not fit for publick View, and will not bear an open process. Prudence and Stratagem may be added to Courage and Strength; Art and Wit may supply the Defects of Nature and Force, in Cases which these are not sufficient to manage: A Governour may, nay he ought to be, as *Pindar* calls it, a Lion in the Field, and a Fox at the Council-Table; or as that divine Saviour, who was Truth it self, has express'd himself upon another Occasion, he may be a subtil Serpent, but still a harmless Dove, *Liv. III. Chap. 2. §. 2.* The Author afterwards proceeds to particulars in this Affair; but how nice and delicate so ever the Speculation of them may be, the Practice is infinitely more difficult; and there are but few Princes who keep themselves, on many Accounts, within the just Bounds there mentioned. See *Mr. Bayle's Diction. Histor. & Crit. Tom. II. p. 114. Col. A. 2 Edit.*

² The Truth of it is, that the very Interest of the Sovereign requires that he should direct all his Actions to this End.

*Qui scriptis duro servus imperio regit,
Tinet timentes; metus in auctorem redit.
Senec. in Oedip. vers. 705, 706.*

The following Words of *Mr. de Cambray* will serve to explain and illustrate this Sentence. 'Where the sovereign Command is most absolute, there Princes are least powerful. They take, they ruin every thing, and are the sole Possessors of the whole State; but then the State languishes, the Country is unmanur'd and almost desert, the Towns every Day decay and grow thin, and Trade is quite lost. The King who can neither be such by himself, but must be such with regard to his People, undoes himself by degrees, by insensibly undoing his Subjects, to whom he owes both his Riches and his Power; his Kingdom is drain'd of Money and Men, and the Loss of the latter is the greatest and most irreparable of all Losses. His arbitrary Power makes as many Slaves as he has Subjects; they all seem to adore him, and all tremble at the least Motion of his Eye: But see what will be the Consequence upon the least Revolution; this monstrous Power rais'd to too excessive an Height, cannot long endure; it wants supplies from the Hearts of the People; it has wearied out and exasperated the several Ranks of Men in the State; and forces all the Members of that Body to sigh with equal Ardour for a Change. At the first Blow the Idol is pull'd down, and trampled under Foot. Contempt, Hatred, Fear, Resentment, Jealousy; in a Word, all the Passions combine together against so injurious and detestable a Power. The King, who in the Days of his vain Prosperity could find no person that durst tell him the Truth, shall not find one in his Adversity that will vouchsafe to excuse him, or defend him against his Enemies. *Tom. III. p. 74, 75.*

β Απομν. L. 3.

IV. In order to the internal Tranquillity of States, it is necessary that the Wills and Inclinations of the Members be so moderated and directed, as shall appear conducive to the Safety of the whole Body. Hence it is the Duty of supreme Rulers, not only to prescribe Laws fit for the obtaining of this End, but likewise so to keep up the Strictness of publick Discipline, especially as to what relates to the Education of Children, as that the Subjects may conform to the Laws, not so much out of fear of Punishment, as out of Habit and Custom: In as much as bare Penalties are not so apt to produce a Care of doing well (this being the proper Effect of Reason and Institution) as a Solicitude to avoid Discovery in doing ill.

Towards the accomplishing of so good an End in States, where Christianity is profess'd, this Religion it self doth in a high manner contribute; provided it be such as is preserv'd in its primitive Sincerity, purg'd from human Corruptions, and inculcated both by the Doctrine and Example of a learned and pious Clergy: In as much as that holy Institution doth not only comprize all the Points conducing to Eternal Salvation, but likewise the most perfect Scheme of moral Precepts, which are admirably useful in disposing the Minds of Men to a Compliance with civil Life, and yet which cannot so conveniently be establish'd by the bare Force of civil Laws. For this Reason, in all Christian Governments, which we

¹ Οὐκ ἔστι γὰρ ἕτι ἢ ἢ ὧν ἐλεμωτ' αὐτῶν νόμων, &c. 'The best and most useful Laws, and which are approved of by all such as are subject to them, are of no use, unless Subjects be trained up and educated in a Manner of living conformable to Government, *Aristot. Polit. V. Cap. IX.* *Plato* says, that to lay the Foundation of a good Government, we must first begin by the Education of Children, and must make them as virtuous as possible: As an experienced Gardiner employs his Care about the young and tender Plants, and then goes on to others. *Καὶ εἰνεταί μοι ἢ πολιτικῶν μὲν ἢ ἀρχεῖσθαι ὀρθῶς. ὀρθῶς* (*Harry Stephens* corrects it *ὀρθῶν*, but without any Necessity, as might be demonstrated, if this were a proper Place to do it) *γὰρ ἐστὶ τῶν νέων πρῶτον ἐπιμεληθῆναι, ὅπως ἐσονταὶ ὅτι ἀεῖοι, ὡς περ γαργυρῶν ἀγαθῶν ἢ νέων φυθῶν εἰκὸς πρῶτον ἐπιμεληθῆναι, μετὰ δὲ τοτο ἢ ἢ ἄλλων.* *Euthyphron. p. 2. Et Serrini.* Children belong less to their Parents than to the Publick, says *Mentor*; they are the Children of the People, they are the Hope and Strength of the State: 'Tis too late to mend them, when they are spoiled; it signifies nothing to debar them from Employments, when they have render'd themselves unworthy of them; it is much better to prevent the Evil, than to be obliged to punish it. A King — who is the Father of all his People, is still more particularly the Father of all the Youth, who are the Flower of the whole Nation; and it is in the Flower that Fruits are prepared. Let not the King then disdain to watch over them, and make others do the same also in their Education; let him take Care that the Laws of *Minos* be duly observ'd, which ordain that Children be taught to contemn Pain and Death; to place an Honour in the Neglect of Pleasures and Riches; to look upon Injustice, Lying, and Slothfulness to be infamous Vices; that from their tenderest Infancy they be instructed in singing the Praises of Heroes who were belov'd by the Gods, who have done glorious things for their Country, and who signaliz'd their Valour in Battle; let the Charms of Music seize their Souls, to make their Manners gentle and fine; let them learn to be tender of their Friends, faithful to their Allies, and just to all Men, even to their most inveterate Enemies; let them learn less to fear Death it self, and all manner of Torments, rather than the Stings of Conscience. If Children are instructed betimes in these noble Maxims, and if they are instilled into them gently, there will certainly be few but what will be inflamed with the Love of Glory and Virtue. — It is of the highest Importance also to establish publick Schools, to accustom Youth to robust Exercises of the Body, to hinder them from growing lazy and effeminate, which will spoil the best Tempers in the World. There ought to be a great Variety of Games and publick Shews to animate the People, but especially to exercise their Bodies, to make them sprightly, supple, and vigorous, with Rewards and Prizes to inspire them with a noble Emulation. But what is chiefly to be wish'd for, to encourage good Manners, is, that young People should marry early, and that their Parents, without any base or fardid Prospect of Interest, should leave to them the Choice of their Wives, such as are most agreeable to them both in Body and Mind, with whom they might live for ever happy. *Avant de Telemaque, Tom. III. at the End.*

² *Quid Leges sine moribus*

Laws without Manners are but Words and Wind.

Vana proficiunt?

Horat. Lib. III. Ode XXIV. 35, 35.

Upon which see Mr. *Dacier's* Note. The Method of the ancient *Athenians*, which an Orator of that Country makes an Encomium on, in a Place which our Author has quoted after that of *Horace*, is indeed admirable, and deserves to be proposed as a Pattern to all Princes. *Ἀλλὰ γὰρ οὐκ ἐκ τοῦτ' αὐτοῦ, &c.* 'They censur'd those as guilty of extreme Ignorance, who imagin'd, that where there were the most accurate Laws, there must be the most excellent Men; when 'tis evidently so very easy a Matter to borrow and transcribe the good Regulations of other States. Therefore they did not believe, that Virtue deriv'd so much Advantage and Assistance in its Growth from good Statutes, as from Custom and Practice. That the greatest part of Men must, of Necessity, frame their Minds according to those Patterns by which they were first taught and instructed; but that a numerous and accurate Establishment of Laws was really a Sign of the ill Condition of the Commonwealth: Edicts and Ordinances being then heap'd upon one another, when Governments find themselves obliged to endeavour the restraining of Vice, as it were by Banks and Mounds. That it became wise Magistrates, not to fill the publick places with Proclamations and Decrees, but to take care that the Subjects should have the Love of Justice and Honesty firmly rooted in their Minds. That not the Orders of the Senate or People, but good and generous Education, was the Thing which made a Government happy: In as much as Men would venture to break through the nicest Exactness of political Constitutions, if they had not been bred up under a strict Obedience to them: Whereas those who had been form'd to Virtue, by a regular and constant Discipline, were the only persons, who, by their just Conformity, could make good Laws obtain a good Effect. The principal Design of the *Athenians*, when they made these Reflections, was not how they might punish Disorders, but how they might find a Way of making the people to be willing not to do any thing that might deserve punishment. This last View seem'd to them worthy of themselves and their Employment: But as for the other, or an exact Application to punish people, they thought it a Business proper only for an Enemy; and therefore they took care of all the Subjects in general but particularly of the Youth. *Isocrat. in Areopagit. p. 254, 255. Ed. Paris. min.* What follows in the same place very well deserves to be read. See also *Maxim. de Tyr. Diss. III. p. 64. Ed. Davis,* and *Jamblique de Vita Pythagor. §. 171, &c.*

³ We must not here forget the following Reflection of *Montaigne*: 'The Christian Religion has all the Marks of the exactest Justice and the greatest Usefulness: But none more manifest than the severe Injunction it lays indifferently upon all to yield Obedience to the Civil Magistrate, and to maintain and defend the Laws. Of which what a wonderful Example has the divine Wisdom left us, who, to work and establish the Salvation of Mankind, and to carry on his glorious Victory over Sin and Death, would do it no other Way than at the Mercy of our ordinary Forms of Justice, submitting the Progress and Issue of so high and salutiferous an Effect, to the Blindness and Injustice of our Observations and Customs, suffering the innocent Blood of so many of his Elect, and so long as

are acquainted with the exhortatory Part of the Law of Nature is given in Charge to the Ministers of the Church, to be by them press'd and enforced upon the Conscience; tho' the dogmatical Part belongs rather to those who have made this Science their peculiar Profession ^b. Of great Advantage to the same Design are publick Schools, if employ'd for the teaching not of useles Trifles, and the Inventions of idle Brains, the Reliques of *the Kingdom of Darknes* ^a, but solid Learning and Knowledge, the Use of which, diffuseth it self through all the Business of Life. Amongst these Studies, the chief is that which, upon sound and rational Principles, explains the Right of Sovereigns, and the Obligations correspondent to it in the Subjects ^b. Another thing which adds Strength and Vigour to publick Discipline, is the Example of those who hold the supreme Authority. *The Manners of the whole State* (as *Isocrates* ^c well observes) *are drawn and express'd from the Pattern of the Prince*. And therefore *Spartian* ^d had Reason to say of *Caracalla*, when he married his Mother in Law, *He engaged in such Nuptials, as had he understood himself to be a true Lawgiver, he, of all Men, ought to have prohibited*. To see

then, that all these Particulars are duly regulated in a Commonwealth, should be the Care of the Supreme Directors.

V. Of great Service and Benefit it is, in order to the same End, to have a System of just, plain, and perspicuous Laws, for the settling of such Affairs, as the Subjects are most frequently concern'd in with one another, and suitable to the Condition and Genius of the People they are prescribed to. 'Tis the Advice of *Isocrates* ^d to a young Prince, *As for Laws, seek those in general which are equitable and useful, and such as may render the Differences amongst the Subjects, as few as possible, and the Accommodation of them no less easy and expeditious*. The Marks which the same Orator hath set ^e to distinguish good Laws, are, that they be *Few in Number*, yet *satisfactory and intelligible to those who are to use them; just and profitable, and consonant to each other; and rather directed towards keeping up the publick Institutions, than towards preventing the petty Frauds of private Dealings* ^f. It ought to be a settled Rule in this Point, not to enact more Laws than conduce to the Good of the Subject and of the State. For since Men, in their Deliberations about what they ought, or ought not,

^a Loss of many Years to the maturing of this inestimable Fruit? *Effigis Liv. I. Chap. 22.* towards the End. ^b Add *Grocius, de Imperio Summ. Potest. circa Sacra. Chap. I. Num. 13.*

^a Vide *Hobbes Leviath. c. 46. &c. Lucret. I. VI. v. 981.* ^b Vide *Hobbes Leviath. c. 30.* There is a famous Passage, relating to the Instruction of Youth, in *Dio Cassius* (l. 52) in *Mecenas's* Speech to *Augustus*. Add the Dispute about suppressing the University of *Comimbra* in *Comestrag. De Unione Lucitan. l. 8.* Nor is that to be disregarded which *Græmond* in his History of *France* (l. 3.) offers concerning the Number of Schools. ^c *Ad Nicoclem, p. 36.*

^d *Ibid. c. 32.* ^e in *Panathen. p. 453.* ^f *Lycurgus (Orat. contra. Leocrat.)* says, that *Laws, by Reason of their Brevity, do not teach* (as is done in the Science and Study of the Law) *but command Men how to act.* *Quintil. Declam. 264.* *Where's the Difference, whether there be no Laws, or such as are ambiguous and uncertain?* To this let us add what *Cicero* says, 'That the Use of Law having been established for the Good and Advantage of States, and to make Mankind better and happier; no Law that is unjust or prejudicial to a State, can have the Force of a Law, nor deserve to be call'd by that just and equitable Name. *Constat profecto ad salutem civium, &c. de Legib. Lib. II. cap. 5.*

MR. BARBEYRAC'S NOTES on §. IV, V.

1. C. 10. ² 'Tis upon this Account, that those who make Laws, and govern States, ought thoroughly to know the Disposition of the people they have to command, as we have observ'd above §. 2. Note 5. Legislators and Magistrates, who are not sufficiently instructed in this Matter, fall unavoidably into a very grievous Inconvenience, which is this; supposing the people to be of a Temper and Complexion quite different from what they really are, they give them Laws which they cannot observe; upon which either a vast Number of people must be punished, without the State reaping any Benefit from it; or else they must behold the Authority of the Law contemn'd, that is, the Constitution upon the Brink of Ruin. On the contrary, when they give a people no Laws but such as are fitted to their Capacities, and such as suppose them to be what they are, they have the satisfaction of seeing them observ'd by every Body, without proceeding but rarely to the punishments which those that violate them are made to suffer: And they peaceably enjoy all the Advantages that result from the Observation of those Laws. The Fault I have been now mentioning, was notorious in the *Roman* Commonwealth, which could not subsist but upon supposition that those who possess'd the chief Employments in the State were exempt from Ambition, Luxury, and Avarice: This was a ridiculous supposition, and what ruin'd that Government in a very short time, after it was arriv'd at the last period of its Greatness. The Consuls and Pretors, who generally govern'd large Provinces, and who often commanded powerful Armies, were absolute in their Governments and in their Armies, during the Time of their power; so that there was no Appeal, either from their Judgment, at least in Favour of the people of the Provinces, or any way of making them alter their Conduct, by any Authority whatsoever---without even being assur'd of having Justice at *Rome*, when the Time of their Magistracy was expired---But besides, their punishment was very inconsiderable, and to be fear'd only by such as had been guilty of the most horrible Excesses; as we may be inform'd by *Cicero's* Harangues against *Verres*---If, on the contrary, we compare the Laws of *Moses* to the Genius of the people to whom he gave them, we may remark, that God suited himself, if I may so speak, to the Temper of the *Jews*, and that he tolerated some things, which he would never have suffer'd in a more enlightened Nation, and which are at this Day likewise forbidden under Christianity. For Example, our Lord tells us that he had not allow'd of Divorce (*Mat. xx. 8.*) but for the Hardness of their Hearts: And he has forbidden it Christians, except in one Case only. The same Commendation is also given to *Solon*, who, before he undertook to prescribe Laws to the *Athenians*, had studied their Tempers, and managed himself thereupon accordingly, as far as the Good of the State would permit him:---Being afterwards ask'd, whether he believ'd he had given the *Athenians* the best Laws that it was possible to give them; he reply'd, he had given them the best Laws that it was possible to make them receive (*Plutarch. p. 86. C.* (in *Solon*.) I have taken all this from *Mr. le Clerc's* Reflections sur ce que l'on appelle Bonheur & Malheur en matiere des Loteries, Chap. X. Pag. 127, &c. But it would be well to read all the rest of that Chapter. ³ A Multiplicity of Laws is a Sign of an ill govern'd State. *Corruptissima Republica plurime Leges*, says *Tacitus*, *Annal. Lib. III. Cap. 27.* The more the *Roman* Government was corrupted, the more Laws there were. See *Strabo*, *Geogr. Lib. VI. p. 260. Ed. Paris. 399. A. Ed. ult. Augt.* and the *Paraphrasia*, Tom. II. p. 300. &c. As for whatever relates to Laws and the Administration of Justice, we may consult *Mr. Baillet's* *Philosoph. Practic. Part III. Cap. 5. §. 4.* There are also a great many excellent things in a Dissertation of *Mr. Thomassin's* entitled, *Morum cum Jure scripto contentio*, and printed at *Hall* in 1701.

to do, are more frequently guided by their natural Reason, than by reflecting on the publick Constitutions ^a; wherever there are more Laws than can easily come within the Compts of their Memory, and those prohibiting such things as Reason, of it self, doth not prohibit, here the Subjects must through meer Ignorance, without any ill Intention, fall into the Laws as into so many Snares. And by this means, the Government brings the People under an unnecessary Inconvenience; which is contrary to the original Design of civil States. Moreover, the ordinary Form and Course of Justice ought to be fix'd in such a Manner, as that every Subject may recover his Right, by as short and as cheap a Process as can be contrived. The *Persians* have a Proverb, that *Short Injustice is better than tardy and tedious Justice.*

VI. And because 'tis in vain to enact Laws, if Governours suffer them to be transgress'd with Security; it is therefore their Part carefully to put their own Decrees in Execution, and to inflict due Punishments ^b, according to the Nature and Circumstances of the Fact, and the Intention and Malice of the Offender. In which Affair they ought so to proceed, as that the true Force of the Laws may be exercis'd, not only upon the Subjects of moderate Fortune and Condition, but upon the Wealthy and Powerful; whose Riches and Honours ought on no account to give them the Privilege of insulting over their Inferiors with Impunity; especially since Commonwealths are never in more Danger, than from the Fury of the Populacy, exasperated by unreasonable Op-

pressions ^c. Nor ought Indulgence or Pardons to be allow'd without any true Cause: since not to treat alike those who, *ex crisis punitus*, have deserv'd alike, is not only unjust, but hath also a peculiar Efficacy towards inflaming the Minds of the Subjects ^c.

VII. But as nothing is to be guarded with penal Sanctions, which doth not contribute to the Advantage of the State, so in the annexing of those Punishments, such Moderation is to be us'd, as that they may bear a just Proportion to the same End; and consequently that they may be no more to the Grievance of the Subject, than to the Benefit of the Publick. In general, if it be desired, that Punishments should obtain their due Effect, they ought to be rais'd to such a Degree of Severity, as that the Pain and Sharpness of them may outweigh the Profit, or Pleasure, which might arise from the Transgression ^c.

VIII. Farther, since Men first incorporated themselves in Communities, to obtain Security against the Injuries of others ^a; it concerns every Government to forbid the mutual Injuries of Subjects, so much the more strictly and severely, as their perpetual living together affords more easy Opportunities of Hurt and Mischief. Neither ought the Distinction of Orders, or Dignities, to be allow'd such a Force, as to encourage the great and powerful in tyrannizing over those of meaner Condition. The way to purchase an *honest Popularity*, is (in *Isocrates's* Words) *neither to let the Commonalty grow extravagant and abusive, nor to let them suffer from the Insolence of the superior Order; but to bestow Honour*

^a *Hobbes* De Cive, c. 13. f. 15. *Leviath.* c. 30.
^d *Pindar.* *Olymp.* Od. 13. v. 6, &c.

^b *Leviath.* *id.*

^c See the *Phrynasiens*, Tom. II. p. 578, &c.

Εὐνομία βᾶθρον πολιῶν, &c.

Good Law, the Basis of a State,
Here with her Sitters takes her Seat;
Strict Justice, with unshaken Mind,
And Peace, engaging to be kind,
Through their fair Hands the Treasure flows,
Which Heaven on craving Men bestows;
Daughter of Themis, who presides
In Councils, and wise Motions guides.

^e Add *Hobbes* *Leviath.* c. 30.

^f *Ad Nicodem.* p. 31.

Mr. BARBEYRA'S NOTES on §. VI, and VIII.

¹ 'The Crimes and Disorders that are not to be prevented, must be immediately punish'd with severity: 'Tis an Act of Clemency to put a stop to the Course of Iniquity, by making early Examples of those who presume to offend. A little Blood shed in due time prevents the shedding of a great deal, and makes a Prince to be dreaded without making use of severity too often. *Avant. de Tolon.* Tom. III. p. 73. We shall treat of Punishments more at large in the Third Chapter of the following Book. See Mr. *Buddeus's Philosoph. Pract.* Part III. cap. 5. §. 1. concerning the Manner of the Distribution of Punishments.

² 'What signifies it to me or to any of my Fellow-Subjects, that my Sovereign is successful, that the prudent Management of his Ministers, nay, that of his own personal Merits, exalt him to the highest Pitch of Glory: that my Country is powerful, the Terror of all the neighbouring Nations? What should I be the better for all these things, if I were forced to labour under the dismal and melancholy Burthen of Poverty and Oppression? If, whilst I was secur'd against the Sallies from without of a cruel Enemy, I was expos'd within the Walls of Cities to the Barbarity of a treacherous Assassin? If Rapine and Violence were less to be feared in the darkest Nights, and in the widest Deserts, than at a mid Day in the Streets? If Safety, Cleanliness, and good Order had not rendred living in Towns so delightful, and had not added to the Plenty the Means of our conversing with so much Ease one with another? Or if being weak and defenceless, I were encroached upon in the Country by every neighbouring great Man? If there was not a Provision made to protect me against his Injustice? If I had not at hand so many Masters, and those eminent Masters too, to breed up my Children in those Arts and Sciences which will one Day raise their Fortunes? If the promoting of Trade had not made good substantial Stuffs for my Clothing, and wholesome Food for my Nourishment, both plentiful and cheap? If, to conclude, the Care of my Sovereign had not given me reason to be as well contented with my Fortune, as his extraordinary Virtues must needs make him with his? *Caracteres ou Mœurs de ce Siècle, par Mr. de la Bruyere,* p. 334.

always on Persons of the greatest Merit, and to see that the rest are not wronged or trampled upon." 'Tis a good Saying of the Historian ^a, *Tho' it be enough for private Men to do no Injury themselves; yet 'tis the Duty of Princes to take care farther, that others do none.* It is likewise repugnant to the End of Government, to allow Subjects in revenging, by their own private Force, the Injuries which they think themselves to have suffered.

IX. Besides, altho' a single Ruler cannot, in Person, discharge all the Affairs of an extended Realm, so that he must of Necessity assume Ministers into the Partnership of his Cares; yet these, as they derive all their Authority from their Master's Commission, so whatever they act, whether well, or ill, must finally be set to his Account. And therefore *Isocrates* ¹ prudently adviseth, *So appoint others over the Business which you can't excuse your self, as considering, that whatever they perform, will be ascribed to you.* And again, *If you happen to obtain a Magistracy, never use the Service of a wicked Person in exercising your Office; for in whatsoever Point he offends, the Guilt will be laid to your Charge* ^b. For which Reason, and because as the Ministers are, so the Business will be well or ill managed; Governours are obliged to employ, in publick Trusts, Men of Integrity and Ability; often to inspect their Proceedings, and to reward, or punish them, according as they find them deserve; to the End that the rest may understand how strictly they stand engaged, to apply no less Fidelity and Diligence to the Affairs of the State, than they would to their own personal Concerns. The *Chinese*, to avoid all Inconveniences that might arise from Favour on the one hand, and from Repentment on the other, allow no Man to bear an Office in the Place where he was born; it being most likely that he should there meet with Persons whom he particularly loves, or hates. Thus too, since wicked Men are tempted to the Commission of the greatest Sins, through Hopes of Impunity, which they easily entertain, where the Judges lie open to Bribery and Corruption; it's

the Duty of Sovereigns severely to punish such Judges, as the Patrons of all those Villanies which disturb the publick Security ^d, and to revoke their unjust Sentences and Proceedings. For the Practice said to be observed in *Arragon*, seems reasonable; to punish the Judges for a false Sentence, and yet to put the same Sentence in Execution. Besides, tho' the ordinary Management of Affairs is entrusted in the Hands of Ministers, yet the supreme Rulers themselves ought never to disdain the lending a patient Ear to the Complaints, or Requeits, of their Subjects.

What Qualifications Sovereigns ought to regard in those, whose Advice they would use in the Dispatch of publick Business, and what seems the most convenient way of getting out their Opinion, Mr *Hbbes* ^e hath shewn at large. As to the latter Point, there's a remarkable Instance in *Dowla's* History of the Civil Wars of *France* ^f, where the Pope consults the Cardinals, not in a Consistory, but each apart, about the Absolution to be granted King *Henry*. *Isocrates* ^g calls a Counsellor, *The most useful of all Treasures, or Possessions, and the most worthy of a King.* *Neubof* ^h, in his Description of *China*, reports many things very worthy of Observation, concerning the Magistrates of that wise People. Nor ought we to undervalue the Directions of King *James* the First of *England*, in his *ΒΑΣΙΛΙΚΩΝ ΔΕΥΣΕΩΝ* ⁱ; that a Prince should choose his Counsellors chiefly by his own Judgment, not at the Pleasure of others; and that he should take them indifferently out of all Orders of the People, in as much as he is the common Father of all. In the same Piece, the King hath assign'd the Reasons, why Men of moderate Condition should be pitch'd on, for the Offices relating to the publick Money ^k.

X. Since the Subjects are obliged to the bearing of Taxes, and the like Burthens, on no other account, but as they are necessary to defray the publick Expences in War, or Peace; it is the Duty of Sovereigns, in this respect, to draw no farther Supplies ^l, than either the

^a Xiphilin. *Epit. Dion. in Galba.* See also the *Parrhasiana*, Tom. II. p. 283, &c. where it is shewn, that every Man ought to have Justice done him.

^b *Themist. Orat. 8. p. 117.* *Mentor* gives *Telmachus* very excellent Advice and very judicious Rules relating to this Point (*Tom. 5. p. 124, &c.*) but as this Chapter is already clogged with Notes, it would be too much to copy it out here. See also *Charron de la sagesse*, Lib. III. Chap. 2. f. 16, &c. And Mr. *Buddeus's Philosoph. Pract.* Part III. Cap. 5. f. 6. Our Author has here cited that Verse of *Martial*, *Principis est virtus maxima, nisse suos.* Lib. VIII. Epigr. 15. But it relates to quite another thing: For the Poet means that the great Virtue of a Prince consists in the Knowledge how to gain the Affections of his People, as it plainly appears from the Design and Fancy of the Epigram: The following Example is more to the purpose. — When *Satibarzanes* petitioned his Master *Artaxerxes* for the Government of a certain Province, of which he was very incapable, together with the Sum of three Thousand pieces of Gold; the King granted the latter part of his Request, but denied the former: for, *says he*, to give you so much Money will not make me more indigent, but to give you such a Government, would make me more unjust. *Euripides* (in *Rhes. v. 626*) Every Man ought to be assigned that part in which he is capable of doing most service. *Libanius* (*Legat. ad Julian.*) According as the Man is, whom you place in the Box, accordingly the Chariot will be guided.

^d *vid. Diodor. Sic. l. 2. c. 75, 76.*

^e *Leviath. c. 15, 30.*

^f *L. 14. p. 966.*

^g *Ad Nicoclem.*

^h *Descript. gen. Sinic. C. 1.*

ⁱ *L. 2.*

^k *Ad Liban. Orat. 5. De Assessoribus.*

Mr. BARBEYRAC'S NOTES on §. IX, X.

¹ *Ad Nicoclem, p. 35.* ² *Charron, d. 1.* ³ Too great Exactions do considerably lessen the publick Revenues, tho' at first sight they seem to increase them. The Reason of it is, that Trade is thereby quickly ruined, and so that Source of the publick Revenues is entirely, or in part, dry'd up. For when there is very little to be got by Trading, People grow tired of it, and traffick as little as possible. Being by degrees destitute of Money, or having no considerable Sum by them, they can undertake no great Enterprize; so that Trade is at last, by degrees, reduced to what is only necessary for the support of Life, and brings but a small Matter to the Prince's Treasury. This is what one of the most antient *Greek* Poets above a thousand Years ago says, speaking of his Brother, who had bribed the Judges, who, in those Days, were called Kings, that he might have a larger share in the paternal Estate than *He-*

meer Necessity, or the signal Benefit and Interest of the State shall require a. And then they are to see that these Impositions be levied according to the justest Proportion; and that no Immunities or Exemptions be granted to certain Persons, to the defrauding or oppressing of the rest b. Farther, that the way of gathering them be with as little Charge as possible, and that much do not stick to the Collectors Fingers: Lest it should happen to the Treasury, as it fares with Buckets in a Fire; they are fill'd to throw upon the Flames, but by passing through so many Hands, and being frequently shook from side to side, they are scarce half full, when they reach the Place, which requires their Service. 'Twas a notable Answer, that which *Hybreas* the Orator gave *Mark Antony* the *Triumvir*, when order'd by him to double the 'Tribute in *Asia*; *You should, at the same time, command us (says he) to have a double Summer; and a double Autumn this Year* 2. Care ought likewise to be taken, that what is collected, be laid out on the Occasions of the Commonwealth, and not wasted in Luxury, Donatives c, superfluous Magnificence, or idle Vanities. Lastly, Matters are to be so ordered, as that the Expences, as near as possible, keep a Proportion to the Revenues; or where they fail, the Defect must be made up by frugal Management, and by retrenching unnecessary Charges. 'Tis of pernicious Consequence to affect more Pomp and State than the ordinary Income will support; and he doth, in Reality, live *great* enough, who gives every one their due. Nor ought we to be moved with that Sentence of *Tully* d *'Tis no great Commendation in a Prince to be reputed a frugal Man*: Which Mr. *Hobbes* e thus explains; *Frugality, tho' in poor Men a Virtue, maketh a Man unapt to atchieve such Actions, as require the Strength of many Men at once; for it weakens their Endeavours, which are to be nourish'd and kept in Vigour by Reward.*

hance to their Subjects (only, so far as Charity commands them to have a particular regard to those, who, by some undeserved Calamity, are rendred insufficient for their own Support f) yet, in as much as the Sums, necessary to the common Safety, are collected from the Ability of private Persons; farther, since the Strength of a State consists in the Valour, and the Wealth of the Subjects; and because,

— *gravis est domino, quæ servit egestas* 3;

Poor Vassals are a Burthen to their Lord;

therefore, so far as in them lies, they are to take care, that the Estates and Possessions of their People be well cultivated and improved. *Isocrates* g is admirable in his Advice to this purpose; *Keep a strict Eye (says he) over the Fortunes of private Men; believe the Prodigal to spend out of your Stock, and the good Husband to increase your Wealth. For all the Substance of the People is (as it were) the domestick Treasure of a good Prince.* It will contribute much towards this End, if the Subjects be encouraged to take as plentiful Supplies as possible, from the Land and from the Water; to improve industriously the Materials of their own native Growth, and never to hire other Hands for those Works which they can conveniently perform themselves; and this is done by furthering, and promoting Manual Arts. And, in pursuance of the same Design, it will be of mighty Use, to advance the Exercise of Merchandize and Navigation in Maritime Countries h. Nor is it enough to banish Idleness, but Men are to be brought to a frugal Method of living by *Sumptuary* Laws i, which may forbid all unnecessary Expences; especially those by which the Wealth of the Natives is translated to Foreigners. 'Twas a Saying of *Mæcenas*, that *great Riches are gathered, rather by spending little, than by receiving much* j;

XI. Tho' Rulers are not bound to afford Suste-

nod: We have formerly, says he, divided our Inheritance; but you took from me what did not belong to you, by presenting many Gifts to the Kings, who are greedy of 'em, and pretend that they determin'd the Cause. *Blind Wretches, who know not that one half is much better than the whole!*

Νῆπιος ἐστὶ ἵσταται ὄσω πλέον ἡμῖν πατρὸς.
(*Oper. & Dier. verif. 40.* upon which see *Le Clerc.*)

a He means, that it were better for Kings to be satisfied with one half of what they exact from the People, than to extort from them all that they have, and by that Means render them incapable of contributing any more to the supplying of their Wants. *Parrhasiana*, Tom. I. p. 281, 282. See what follows; and in Tom. II. p. 291, &c. As also *Charron de la sagesse*, Liv. III. Chap. 2. f. 20.

b *Vide Phil. De Comines*, l. 5. c. 18. circa fin. *Grotius* on *Luke III.* 13. 'Tis the Duty of Princes to adjust the publick Burthens, according to the publick Necessities; so as that they may lawfully provide for their own Support, in a way agreeable to their Quality; but not to make the Luxury and the Lust of themselves, and their Court-Slaves, the Measure of what they demand, which are indeed without measure.

c *Add. Tho. Mori Utopl.* 1. *Drepan Panegy.* c. 27. *It is the last Defence and Refuge of wicked Princes, to take away from some, what they may bestow on others.* *Add. Montagne's Ess.* l. 3. c. 6. p. 175. *Add. Machiavel Prim.* c. 16. *Plin. Panegr.* c. 4.

d *Orat. pro Rege Deiotaro*, c. 9. e *Leviath.* c. 11. f The *Yucas* of old in *Peru*, amongst all their Titles, delighted chiefly to be styl'd *Lovers of the Poor*, as *de la Vega* informs us (*Commento Reg.* l. 2. c. 14.) who likewise reports (*l. 4. c. 7.*) that the Lands of Widows, in that Kingdom, had more Privileges than those of their *Tuca* himself. g *Ad Nicoclem*, p. 33.

h See an Instance of this, in the Diligence of *Sesostris*, by which he rendred *Egypt* capable of Trade, and convenient for the Communication of Goods and Products. *Diodor. Sic.* l. 1. c. 57. See also upon this whole Matter, the *Parrhasiana*, Tom. 1. 264. &c. Tom. II. p. 291, &c. And *les Avant. de Telsmaque*, Tom. I. p. 85, &c. Tom. III. p. 50, &c. And *Mr. Buddeus's Philosoph. Pract.* Part III. cap. 5. sect. 8. Where he also treats of what relates to Money. *Add the Rules laid down by Mr. Hobbes (Leviath. c. 30.)* to be observed in relation to the *Companies* of Merchants. i *In Dion. Cass.* l. 52.

MR. BARBEYRAC'S NOTE on §. XI.

1 *V. Hobbes De Cive*, c. 15. f. 0. 2 *Plutarch. in Marc. Antonin.* p. 926. B. See also upon this whole Matter, the *Philosoph. Pract.* of *Mr. Buddeus*, Part III. cap. 5. sect. 7. 3 *Lucean. Pharfal.* L. 3. v. 152. 4 See the next Book, c. 5. f. 3:

Yet, in this Respect, the Example of Sovereigns hath more Efficacy, than the Force and Authority of any Laws ^a. But if a Country abound with Men and Money, it is there convenient to tolerate some unnecessary *Consumptions*, and such as may seem to border upon Luxury; that the common People may hence be furnish'd with Opportunities of maintaining themselves, and that the vast Stock of Money may not lie dead and useless. Provided, that no Encouragement be given to Extravagance and Excess, and that those Commodities be not idly wasted at Home, which might be exported with Advantage to foreign Parts.

XII. Farther, since the internal Health, and the firm and robust Habit of a Commonwealth depends on the Unity of the Subjects; the more exactly this Unity is observed, the more effectually the Force and Authority of Government diffuseth it self through the

whole Body of the State; it is, for this Reason, incumbent on Sovereigns, to prevent all Factions amongst the People; from which 'tis but an easy Slip into Sedition, and Civil War; a Condition so much worse than a War carried on, with universal Consent, against Foreigners; as War is in general less amicable than Peace ^b. As likewise to take care, that the Subjects do not bandy and associate themselves by particular Covenants and Engagements ^c; and that neither the whole People, nor any Part of them, place a greater Dependence, or rely more for Defence and Succour on any other Person, within or without the Realm, under any pretence whatsoever, whether sacred or civil, than on their lawful Prince. And that, on the contrary, there be no Person to whom *Seneca's* Description may be applied,

^a *Tacitus* Ann. L. 3. c. *Uspisium* was the principal Author of these strict and grave Fashions; himself using the antique Habit, and the antique Diet: Hence there arose in Men a Desire of expressing, by such Observances, their Duty to their Prince, accompanied with a Love of Emulation, stronger than any Fear of Law or Punishment. Add *Bernier's* Description of the Empire of the *Mozul*, near the End, where he speaks of the Causes contributing to the great Consumption of Gold in that Kingdom. ^b *Herodot.* *Uran.* init. Add *Evagrius* (H. E. l. 4, c. 13.) concerning *Justinian's* Favour to the *Fallica Veneta*, with the Mischiefs that arose from it; as likewise *Procop.* *Hist. Arcan.* & *De Bell.* Pers. l. 1. c. 24. & *Bacon's Serm. sci.* c. 15. & 49. ^c Vide *Diodor.* Sic. l. 1. c. 21.

Mr. BARBEYRAC'S NOTES on §. and XII.

' No Body doubts that Union will make a Nation flourish, and that Dissension is very dangerous to it; but there must be Care taken to have a just Notion of the Meaning of those Words. An Union serviceable to a Monarchical or Aristocratical Government, is what designs the universal Good of those who live under it. If in a Monarchical State, where the Power of the Sovereign is limited by the Laws, the principal Subjects of the State should willingly, or by Force, consent to submit all the Laws to the Prince's Pleasure, such an Union would not be advantageous to him in any Respect. It would change a Society of free People into a Company of miserable Slaves. The ready Compliance of the *Chinese* to obey their King blindly, does but strengthen his Tyranny, and add to their Misery. For those who depend on the Will of one Man, addic'd to a thousand Passions, whose Fancies are above the Restraint of Law, can be certain of nothing; such a Man has some Favourites, who have other Favourites of their own, and suffer themselves to be bribed; and such a Form of Government is only a Subordination of Tyrants, every one of them endeavouring to get something by the Subjection of the People. But it is asserted, that the general Obedience of the *Chinese* is of service to preserve the Peace of their Country, and that they enjoy by it all the Advantages that the strictest Union can procure. They mean, all Advantages that can be possess'd in Slavery. But sure there is not a Freeman but had rather see more frequent Commotions, than suffer an eternal Slavery. Moreover, 'tis false to affirm that there are no intestine Wars under such a Form of Government. The most enslaved People will, in Time, grow weary of an exorbitant Tyranny, and upon the first Opportunity shew, that the Desire of Liberty is not quite stifled in their Souls. This has happen'd often among the *Chinese* and *Turks*. As there are few People concern'd in supporting arbitrary Power in a particular Family, or a particular Person, and the generality having Reason to complain of it, so few will be against a Change in the Government, and others believe that if they get nothing, they will lose no great matter by it. The same ought to be said of an Aristocratical Government. The Union of those who govern such a State, would be useless, if it did not procure the Observation of the Laws, and the universal Good of the Commonwealth. This we may understand from the History of the *Thirty Tyrants of Athens*, and the *Decemviri of Rome*. The Union of those Men serv'd only to crush the People, and make them miserable; because their principal Design was to gratify their Passions, without having the least Respect to the publick Good. Union may also be consider'd with Regard to the People, who, when the State is so fixed as that they may peaceably enjoy the Fruits of their Labours by obeying the Laws of their Country (which are not to be chang'd or transgress'd by any Member of the Society at his Pleasure) ought to esteem themselves happy, and to obey unanimously the Commands of the supreme Power. Now to keep the Populace in so firm an Union, it is requisite that not only they may be the better for it, but also that they should be sensible of their own Happiness. Without that, there will be always some turbulent Men, who, having wasted all their Substance in Debaucheries and Idleness, would endeavour to recover it by some new Commotion. Such Men will easily induce People, who fancy they live unhappily, to take up Arms against their Prince at the first Opportunity. On the other hand, when the People are of Opinion that they cannot mend their Condition by a Turn of Affairs, and that they should venture losing a great deal by it, 'tis a very difficult Matter to seduce them.—The Agreement and Union both of Governours and People ought to tend to the publick Good; from whence it follows that whatsoever has not such a Design, is injurious to it, and ought rather to be term'd a Conspiracy than an Union; since the Name of a Virtue cannot with Reason be attributed to a thing which injures and ruins a Society. What has been said of the Civil, may also be said of the Ecclesiastical Society, which can only flourish by the great Number of its Members, and by Learning (which is in that Society what Riches are in the other) and by Union. Not to mention here the Number and Learning of such a Society; I shall only take notice, that the Union of those who govern'd it, ought not to be a tyrannical Combination, which destroys it. Such is, for instance, the Union of the Inquisitors in *Spain* and *Italy*, who perfectly agree among themselves: But to do what? To hinder both Lay-Men, as they term 'em, and Ecclesiasticks (who might discover the Errors that were introduced into Religion, through Ignorance, or the Abuses crept into the Discipline out of Ambition or any other Passion) from proposing a Reformation, be there never so much Occasion for one; and of course, to keep every Body in extreme Ignorance, or a sinful Dissimulation and Hypocrisy. It would be more for the Advantage of the Church, that there were many Contests, rather than a perpetual Tyranny, that quite overthrowes the very End of its Establishment, which was, to be taught the Principles of the Christian Religion, and convinced of the Certainty of it, by very substantial Reasons. *Farrington*, Tom. I. p. 289, &c. See *Hobbes de Cive*, c. 13, l. 12.

—*Stat ingens arbor, atque umbrâ grati;
Sylvas minores urget a.*

————— He stands a mighty Tree,
The Underwood oppressing with his Shade ¹.

XIII. Lastly, since the Condition, under which different Nations and Kingdoms stand, in regard to each other, is but a deceitful kind of Peace, and such as cannot be relied on with any Security; it is a part of the Office of supreme Governours to take care, that as well the Courage of the Subjects, as their Skill in Arms, be kept up and improved; and that all things necessary to be employ'd against an invading

Enemy, as fortified Places, Arms, and Men, be provided betimes: For, to use the old Proverb in *Plautus*, 'Tis a lamentable Work to begin digging a Well, when we are almost dead with Thirst. But to be the Aggressor in a War, how just soever the Occasion of it may be, is what ought not to be practis'd; unless a very fair Opportunity offer it self, and when the State of the Commonwealth may with Convenience bear such an Undertaking. To the same End, the Councils and Motions of the Neighbouring Governments are nicely to be divid'd into and observ'd (in which Respect the *perpetual Residence*, now fix'd in most Courts, are of very great Use) and Friendships and Alliance prudently to be contracted c.

^a In *Oedip.* v. 542, 543.
Ad. Hobbes De Civitate, c. 13. f. 7, 8.

^b In *Mostellar.* Act. II. Sc. 1. v. 32, 33.

^c Vide *Marfelaer Legat. l. 2. c. 11.*

Mr. BARBEYRAC'S NOTES on §. XII.

¹ Vide *Bacon's Serm. fid. c. 35.*
Jazoffe, Liv. III. Chap. 3. sect. 18, &c.

² See the *Avantures de Telemachus*, Tom. IV. p. 5, &c. and *Charron à la*

' Ah! with what Deliberation ought Princes to consider every thing before they begin a War. The Motives of it ought to be just; nor is that sufficient, they ought to be necessary: The Blood of a People must not be shed, unless for their own Preservation in Cases of Extremity. (*Avantures de Telemachus*, Tom. IV. p. 91.) The Evils of a War exhaust a Nation, and always put it in danger of being destroyed even while it is most victorious: With what Advantage soever they may undertake a War, they are never certain of concluding it without being expos'd to the most tragical Reverses of Fortune; whatever Superiority you have in the Fight, the least Mistake, a sudden Terror, a meer Nothing snatches the Victory out of your Hands, and carries it to the Enemy: Nay, tho' you should hold Victory chain'd as it were in your Camp, you ruin your self in ruining your Enemy; you depopulate your Country, let the Ground be almost uncultivated, put a Stop to Trade; and which is worse, you weaken your Laws, and suffer Corruption of Manners. The Youth no longer apply themselves to Learning; the pressing Necessity of your Affairs makes you tolerate pernicious Liberties in your Army; Justice, Order, every thing suffers by this Disorder. A King who sheds the Blood of so many Men, and occasions so many Mischiefs, only to gain a little Glory, or to extend the Bounds of his Kingdom, does not deserve the Glory he is in Pursuit of, but rather deserves to be depriv'd of what he possesses, for desiring to usurp what does not belong to him, p. 4, 5. of the same Tome.

OF THE
LAW of NATURE
AND
NATIONS.

BOOK VIII.

CHAP. I.

Of the Power to direct the Actions of the Subject.

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| <p>I. <i>Of the Nature of Civil Laws in general.</i></p> <p>II. <i>Whether a Civil Law may contradict the Natural?</i></p> <p>III. <i>Whether the Definitions of Crimes is left arbitrarily to the Determination of the Civil Laws?</i></p> <p>IV. <i>The Precepts of the Decalogue whether Civil Laws.</i></p> | <p>V. <i>Whether any thing was just antecedently to the Civil Laws?</i></p> <p>VI. <i>Whether a sinful Command of a Superior may at any time be obey'd without Sin?</i></p> <p>VII. <i>No Sin lawfully committed at the Command of a Superior.</i></p> <p>VIII. <i>Whether a Subject may lawfully bear Arms in an unjust War, at the Command of his Prince?</i></p> |
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HAVING explain'd what related to the Nature of *Sovereign Power* in general; I come now to consider the most material Difficulties that arise upon the particular Parts of it. And since I at first supposed, that the Power to direct the Actions of the Subject, was that from which all civil Laws were deriv'd; to what I have already said of Laws in general ^a, I now shall add what more particularly relates to Laws *civil*, and the Commands of the *sovereign Power*. A Law therefore is call'd *civil* either with respect to its *Authority*, or to its *Original*. In the former Sense, all Laws may be call'd *civil*, which are the Rules for the Administration of Justice in *civil Courts*, from whatever Original they arise ^b. The Laws of God and Nature, it must be own'd, are of universal Obligation, and they that break them must expect to be punish'd by divine Justice. But it is the *civil Power* that gives them the force of Laws in *civil Courts*. And the same Power must determine, what Crimes are to be punished by the *civil Justice*, and what shall be left to the *divine*; as also, upon what natural Obligations an *Action* may commence in the *civil Court*; and what will not bear an *Action*, but must be left to the common Ingenuity and Probity of Mankind. Hence under *civil Government* no Man is call'd to account, or can, properly speaking, be *punished* for the Violation of those Laws of *Nature*, which have not the Authority of *civil Laws* stamp'd upon them. For the Evils that attend such

Crimes are only such as are usually called *Natural Punishments* ^c. Those Laws of *Nature* indeed, upon the Observation of which the common Quiet of Mankind entirely depends, have in all Commonwealths the force of civil Laws. But there are others that have no such force allow'd them, either in express *Terms*, or in any *Practice of civil Courts*; as well because the Controversies about the Violation of them would be very perplex'd and intricate, as to prevent the Multiplication of litigious Suits; and also that the Good and Virtuous might not be deprived of the most valuable part of their Character, the doing well out of Reverence to their Creator, without regard to the Fears of human Penalties; for this they must necessarily lose, when there is no Distinction made whether a Man doth well out of Love to Virtue, or out of Fear of Punishment. ^d And indeed, as *Seneca* saith, how cheap a thing is it to be good only as far as the Law obligeth us, when the Rule of our Duty is of so much wider Extent? For how many things do Piety, Humanity, Justice, and Fidelity require of us, which yet are without the Reach of the Law ^d? *Civil Laws* with respect to their *Original*, are such as flow entirely from the Will of the *supreme civil Power*, and respect only such things as are left indifferent by the *Laws of God and Nature*, and which particularly conduce to the Benefit and Advantage of the Commonwealth. And these demand the same Obedience

^a B. 1. chap. 6. ^b *Vid. Grot. de Imper. Summar. Potest. circa sacrz, c. 3. n. 4, 11. &c. c. 4. n. 1.*
^c See above in B. 2. chap. 3. §. 21. ^d *Sen. de ira, l. 2. c. 27.*

Mr. BARBEYRAC'S NOTES on §. 1.

¹ *Quod non vetat Lex, hoc vetat fieri Pudor & nec.* Tread. v. 332. *Grot. L. 3. c. 10. §. 1.* See likewise what has been said above in B. 3. c. 4. §. 6. from

from the Subject as other Laws do; since it must evidently be more for the good of Society, that in indifferent things the Determination of the Government should take place, and the Subjects should look upon that to be good, which is thought so by their Governors, than that there should be endless Disputes between them about it, which do not usually end but in War and Bloodshed, certain and undeniable Evils. 'The publick Good, saith Cicero, ought to be the End of all Laws, and is the best Comment upon, and Interpretation of them; and we do not desire the Preservation of our Laws merely for the sake of the Laws themselves, but for the common Interest and Advantage. And hence the Constitutions of particular Commonwealths, made for the Publick Good, are call'd by some, *Appendages to the Law of Nature*. But it must be observ'd, that tho' all these Laws put together, are commonly call'd the *Civil Law*, yet, that there are several Particulars contain'd in the *Bodies and Codes* of the *Civil Law*, which are not properly and strictly Laws. For besides those *Commands* which the *sovereign Power* lays upon the Subject for the particular Utility of the Commonwealth, there are many other things insert'd, which should be reduc'd properly to the *Law of Nature*. What belongs more particularly to the *Civil Law*, may be reduc'd to these two Heads: First, to certain *Forms* prescribed, and certain *Methods* to be observ'd in civil Affairs, either in *transferring Rights*, or else in laying Obligations upon *Persons*, which shall be look'd upon to be valid in the *Civil Court*: And Secondly, To the several Ways how a Man is to *prosecute his Rights* in the same *Courts*. So that, if we give the *Law of Nature* all that belongs to it, and take away from the *Civilians* what they have hitherto engross'd and promiscuously treated of; we shall bring the *Civil Law* to a much narrower Compass; not to say at present, that whenever the *Civil Law* is deficient, we must have recourse to the *Law of Nature*; and that therefore in all Commonwealths the *natural Laws* supply the Defects of the *Civil*. For which reason *Hobbes* calls the *Law of Nature*, the *unwritten Civil Law*.

a Cic. de Invent. l. 2. c. 38.

b *Philo Judæus de Josepho* p. 351. B. Ed. Paris.

c De Civ. c. 14. §. 14. Vid. *Quintil. Decl.* 252. *Actio inscripti Mithridæi*; upon which *Law Quintilian says*, That the old *Romans* seem'd to have made it with the greatest Wisdom possible: For since, saith the Declaimer, they knew that no Prudence or Foresight could be cautious enough to prevent all the several Ways of Mischief that bad Men devise, they made this Law for an universal Security, that what Crimes escap'd the others might fall under the reach of this.

d Ibid. Sect. 9.

Mr. BARBEYRAC'S NOTE on §. 1.

1 Besides, as there are a great many things which the *Law of Nature* prescribes only in a general and indefinite Manner; so the *Time, Manner, Place, Application* to such or such *Persons*, and the like Circumstances, are left to the Discretion and Prudence of every private Man. The *Civil Laws* generally regulate all that matter, for the Order and Tranquillity of the State; sometimes they propose Rewards to those who by the Natural Bent of their own Inclinations would willingly perform such Actions, to which they are not determinately bound, in such and such a particular Case. They also explain whatever may happen to be obscure or doubtful, either in the Maxims of the *Law of Nature*, or their Application; and private Men are bound to submit to the Decisions that are made by publick Authority, even tho' they should not find 'em upon Examination to be very just. In short, they limit in several Respects, the Use of those *Rights* which naturally belong to every one; which they ought not to do any farther than the Good of the State requires it. Moreover, every private Man is oblig'd to comply with all these Regulations, as far as they contain nothing that is manifestly contrary to the *Divine Laws*, whether Natural, or Reveal'd; and that not only through Fear of the Punishments which are annex'd to the Violation of 'em, but even upon a Principle of Conscience; and also by the Virtue of a Maxim of the *Law of Nature*, which commands to obey our lawful Sovereign in every thing we can do without committing a Crime. The Author's Abridgment, *De Offic. Hom. & Civ. B. l. c. 12. Sect. 6, 7, 8.*

II. But notwithstanding, *Hobbes de Civ. c. 14. §. 10.* will maintain this strange sort of Opinion, 'That it is impossible any *civil Law* should be made repugnant to that of Nature, except it be to the Dishonour of God. The Argument he uses to prove it, is this: Men, saith he, d when they enter into *civil Societies*, oblige themselves by Compact to obey his Commands, who hath the *sovereign Power*, that is, to obey the *civil Laws*; and this Compact they are oblig'd by the *Law of Nature* to observe. But since the Compact it self, and consequently the Obligation to obey the *Civil Laws*, was antecedent to the *Promulgation* of the *Laws* themselves; by the force of the same *Law of Nature*, which commands not to violate the *Compacts*, we are oblig'd also to obey every *civil Law*. For where we are oblig'd to Obedience before we know what will be commanded, there we are oblig'd to obey *universally* and in every Respect".

But the Truth is, it must be presum'd, that when Men enter into *civil Societies*, they have already a competent Knowledge of the *Law of Nature*; and that one of the chief Ends of erecting civil Governments was, that the *Laws of Nature*, upon which the common Peace of Mankind is established, might be obey'd without Danger. And in short, that there is nothing in the *Laws of Nature*, which is any way repugnant to the Nature and End of *civil Society*; but on the contrary, that they are entirely necessary to assist and promote it. And therefore when Men form'd themselves into *civil Societies*, and oblig'd one another by Compact to obey the *civil Laws*, we must suppose that they took it for granted, that nothing would be establish'd by the *civil Law*, which was contrary to the *natural*; and that the particular Advantages of the Commonwealth could not be contrary to the common End of all Government. It is possible indeed that a *civil Law* might be made in Opposition to the *natural*; but no Man in his Wits would ever attempt to make such a Law, unless he resolv'd to ruin and overturn the whole Commonwealth. And therefore *Stratocles* was

very justly taken for a Madman, when he publish'd his Law at *Athens*, that whatever King *Demetrius* commanded, should be Law to Gods and Men. And *Parysitis* was guilty of detestable Flattery, when she persuaded *Artaxerxes* to marry his own Daughter, and despise the Greek Law; adding, that Heaven had made him the Persian Law, and the proper Judge of Good and Evil.

III. The same Author argues further in defence of his Opinions, *de Crue*, c. 6. §. 16. c. 14. §. 9. 10. ' That tho' Theft, Murder, Adultery, and all kinds of Injuries, are forbidden by the Law of Nature; yet that what is to be call'd Theft in a Subject, what Murder, what Adultery, and what an Injury, is not to be determin'd by the Law of Nature, but by the Civil Law. For barely the taking away what another Man is in Possession of, is not Theft, but only to take away that which of right belongs to another. But what of Right belongs to me, and what to another, is a Question of the Civil Law. And in the same manner, barely to kill a Man is not Murder, but to kill him the Civil Law forbids. And so also, no Act of Generation is Adultery, but that which the Civil Law declares such; and lastly, Breach of Promise is indeed an Injury, where the Promise itself is lawful; but where there is no Right to make an Agreement, there no Right is transferred, and consequently no Injury follows; but what we may make Agreements about, and what we may not, depends upon the Civil Laws. To which I answer, that all that believe the Scriptures, as to several sorts of Crimes, are sufficiently assured, both from the Laws of the Jews, which were of divine Institution, and from other Parts of the holy Book, how God, the Author of the Law of Nature, would have them desir'd; so that tho' the civil Government should desir'd to make some particular Acts not criminal, yet they would nevertheless be contrary to the Law of God. Especially since there can be no sufficient Reason given, why God in his Laws should give such Definitions of such Actions, unless they ought equally to be observ'd in all Nations. The Spartans allow'd the frigid and impotent to supply their Deficiency in the Conjugal Duties, by the Assistance of the young and vigorous: And this was done at Sparta, without any bad Imputation of the Husband, the Wife, or the Gallant, when they had no Hopes of Children otherwise: Because the Civil Laws of that State did not comprehend that Method of answering the Husband's Part at his own Request, under the Name of Adultery. And yet, since it is evident from the Laws of God, that by the Law relating to Adultery, any Familiarity

of the Bed with a Woman actually married to another is forbidden; it is evident, that those Assurances also were contrary to the Law of Nature. But if it be reply'd, that the Definitions of particular Acts in the Scriptures were intended for, and only belong'd to the Jewish Commonwealth, and so are of positive Institution; yet thus much however must be allowed, that the Civil Law ought to have so cautious a Regard to the Definitions of Acts forbidden by the Law of Nature, as not to defeat the Intention and End of it, the Preservation of a peaceable Society and honourable Correspondence among Men. And therefore if any Definitions of the Civil Law be opposite to this End, it must be granted, that it is also contrary to the Law of Nature. For Example; if the Civil Law should define Adultery to me, by telling me that it is when a Man invades another's Bed against his Wife's Consent; or of Theft, that it is, when a Man takes away something from another by Night; or of Murder, that it is when a Man openly assaults another, and kills him: It is manifest, that the publick Quiet and Security of the Commonwealth could not long subsist under such Methods of Government. For we are not to imagine, that the Universality of such Definitions would sufficiently secure the publick Peace; that is, that though particular Persons might perhaps sometimes be sensible of Inconveniences from them, yet that at other times they might find Advantages proportionable to the Inconveniences; and that the Equality of Right, which such Laws would settle among the Subjects, would take off all occasion of Complaint: For tho' perhaps a Man might desire that some particular things might be lawful only for himself; yet if others should have as large Immunities granted them in Opposition to him, he would soon be willing to throw up his Privilege. And should the Civil Laws make any such Establishments, it must be impossible that the Peace and Order, which Nature intended, should be preserv'd. And if the Equality of such Laws alone were Reason enough to introduce them, why must we any longer be confin'd by any Laws at all, since by taking them wholly away, we should make the greatest Equality? Which it is impossible any Man in his Wits should think of doing. In some Accounts of the Tartars we are told, that they are utter Strangers to all Justice; and that when any of them wants any thing, he may take it without fear of Punishment wherever he finds it: And when the Party robb'd complains to the Magistrate of the Injury done him, the other doth not deny the Fact; but pleads only that he wanted what he took; and then 'tis usual for the Magistrate to give Sentence, That the Party who complains, may, if he pleases, right him in

^a Plut. Demetrius, p. 90, 901.

^b Plut. Artaxerxes, p. 1022. B.

^c Sigismund. Baro Herberstein de Rebus Moscov.

MR. BARBEYRAC'S NOTES ON §. 111.

¹ See above in B. 6. c. 1. §. 15. It was sometimes common among the Romans to lend their Wives to Persons comely and well-born. See Plutarch. in Numa, p. 76. D. & in Catone, p. 771. A.

² 'Tis necessary to observe here, that tho' some Nations, that were not much enlightened, have permitted and authoriz'd in some Measure, Things manifestly contrary to the Law of Nature, it was not through Ignorance of this Opposition; much less still out of a Conceit that the Sovereign had a Power to determine the Nature of Crimes according to his own Fancy; but most commonly on account of some Circumstances which made 'em judge it proper to let some Crimes go unpunish'd, to prevent greater Inconveniences.

³ This Permission takes place likewise in Cholchis; See Busbequius's 3d. Ep. p. 155.

the same manner upon others. There are others indeed a who give a more favourable Account ; telling us only that the *Tartars* are very free in communicating what they have to Strangers ; but that they will expect a Return of the same kind, or else will take it by force. A *Tartar's* Definition therefore of *Theft* would be, When something is taken away without the Consent of the Proprietor, which the other had need of ; a Definition evidently imperfect, and which manifestly subverts the *Law of Nature* relating to *Theft*. 'Tis certain, none but the worst of Men could wish for such a Law, since it might often happen, that a Man might have the ill Fortune to be robbed of that, which of all things he was most unwilling to lose, and which he either might never find another Man possess'd of, or else so secured, that he must despair of being ever able to take it from him. But besides, the Supposition Mr. *Hobbes* goes upon is false ; that what belongs of *Right* to me, and what to another Man, is a Question of the *Civil Law* ; and that out of civil Government there is no *Propriety* : For tho' Men that live under it have a more secure Enjoyment of their *Proprieties*, than they that live out of it ; since the *first* are defended in their Rights and Fortunes by the united Strength of a Number of Men, besides the Assistance of the Magistrate ; and the latter can support themselves only by their own single Power ; yet notwithstanding, there can be no Grounds of Proof to assert, that there was no *Propriety* before the Institution of *Civil Government*. For all sovereign Princes and Commonwealths are now actually in a *State of Nature*, and their *Proprieties* are not determin'd by any common *Law* or *Judge*, but solely by Compact, and the natural means of *Acquisition* ; and yet I believe no Body ever imagin'd, that Princes might ravage, or steal from one another, without incurring the Guilt of *Rapine* or *Theft*. So that admitting, that a Man cannot make any Compact that will be valid about what is forbidden by the *Civil Law*, yet certainly it cannot be denied, but that they who live in a *Liberty of Nature*, may make certain Compacts, which it will be an Injury to violate. And therefore it is false to say, we must be oblig'd entirely to the *Civil Law*, to know what an *Injury* is. Besides, neither will it, I think, be denied, that a Man is guilty of *Homicide*, tho' he be only under the Government of the *Law of Nature*, when he takes a

way another's Life without making War upon him, or in his own defence. Nor is it difficult to understand barely by the *Law of Nature*, without any Assistance from the *Civil*, that *Adultery* is the *Violation of conjugal Faith* : But that the *Civil Laws* may superadd certain *Obligations* to the *matrimonial Contract*, for want of which the Marriage may be look'd upon to be deprived of certain *Effects*, was never deny'd. But further, it may be necessary to distinguish between what is commanded by the *Civil Law*, and what is only permitted and not forbidden by the *Sanction* of any Penalty to be inflicted by *civil Justice*. For a *Prohibition* of the *Law of Nature*, and a *Permission* of the *civil* about the same thing, are not oppos'd to one another ; for a *Permission* of the *Civil Law* doth not make any Act not to be contrary to the *Law of Nature*, that really is so, or excuse the Man that is guilty of it from Sin against God : But it only declares, that the *Civil Power* hath laid no restraint upon the Person that will commit such Acts ; that if a Man doth commit them, he is not to be punished on that account ; and that *human Justice* alloweth such Acts to have the same Effects with other Acts, that are agreeable to the *Law of Nature*. And therefore the *Laws of Tartary* do not, 'tis presumed, command Men to steal, nor, I suppose, forbid the *Proprietors* to defend their own : Only the Person that robs is not liable to be punish'd, nor oblig'd to make Restitution ; so that according to the common Justice of that Nation, Robbery and Stealing are look'd upon to be lawful ways of *Acquisition*. And the same may be said for the *Children at Lacedæmon* ; for we need not translate that Sentence of *Plutarch* β δὲ πλείων νεβόησο τὸς παῖδας, the *Children were commanded by the Law to steal* ; since the Sense of it may as well be, that they were permitted by the *Law*. *Xenophon* indeed says, That it was so far from being thought scandalous for the *Children to steal at Sparta*, that they were under necessity of doing it : But this was spoken only in a way of Raillery, and to mortify *Chirofophus* the *Lacedæmonian*. Neither was that Practice so inexcusably bad as some believ'd it, or deserved so severe an *Invective* as *Isocrates* gave it d. For the Truth of the matter was, that the *Liberty* the *Boys* were allowed in was only that of robbing Orchards, and stealing Victuals ; and then too if they were taken, they pay'd severely enough for it e. We are told too

a Haytho de Tattaris, c. 48.

b Plut. Apophth. Lacon. p. 175. F.

c Xenoph. περὶ ἀναξαρ. l. 4.

d Hocr. Panathen.

e Vid. Plut. Lycurgus. Xenophon de Repub. Lacedæmon. Busbequius gives a much

worse Account of the Liberties allow'd among the Mengrelians, Ep. 3. p. m. 155. Vid. Lib. 11. c. 5. l. 1. D. de Aleator.

Mr. BARBEYRA C'S NOTE on §. III.

i " There are certain *Evils* in a Commonwealth, that are suffer'd to remain in it, because they hinder, or prevent greater Evils. There are other Evils, which are only so by their Establishment ; and which being in their Original, an Abuse, or ill Custom, prove less pernicious in their Consequences, than a Law or Custom which is more just and reasonable. There is a sort of Evils that might be corrected by a Change or Innovation, which is a very dangerous *Evil*. There are others, which are hidden and sunk like Ordure in a Common-Sewer, I mean buried between Shame, Secresy, and Obscurity, so that one cannot stir or rake into 'em, without their casting forth Poison and Infamy. The wisest sometimes doubt whether 'tis better to understand these *Evils*, than to be ignorant of 'em. Sometimes a great *Evil* is tolerated in a State, but it is such as prevents a Million of little *Evils*, or Inconveniences, which were all inevitable and irrecoverable. There are *Evils* under which every private Man groans, and which however become a publick Good : Tho' the publick is nothing but a Combination of private Men. There are also personal *Evils*, which concur toward the Good and Advantage of each Family. There are some which afflict, ruin, and dishonour Families ; but they tend to the Good and Conservation of the Machine of State and Government. *La Bruyere, Caracteres ou Mœurs de se siècle, Chap. du Soverain & de la Republique, pag. 316, 317.* See also a Fragment of *Philemon's*, related by *Athenæus*, Lib. xiii. pag. 569. and a passage of *St. Augustin*, cited by *Mr. Le Clerc*, p. 298. which shews the Reason why a State is sometimes oblig'd to tolerate *Curtesans*. See also the Dissertation of *Velshuyfen*, entituled, *Disquisitio de tolerando malo in Republica.*

of *Dionysius* the Tyrant, 'That tho' he punish'd other Crimes very severely, yet he would often pardon them that stole Cloaths, in hopes that by this Method he might restrain the *Syracusians* from the Riot and Drunkenness they were given to. Neither do I think, that the Law of *Sparta* before-mention'd laid any Command either on the Husband, or Gallant; that matter seems to have been no more, than that if they two agreed, the Law did not interpose; but look'd upon the Children so begotten to be legitimate, and admitted them Heirs to the Estate of the Family. So also, where *Duelling* is permitted, the Blood which is shed in them may be excused from the Punishment of Murder at the Bar of *civil Justice*, but will not be so acquitted hereafter at the *divine Tribunal*. That the *civil Power* may with Justice permit things of such a nature, and that not by bare Silence and Connivance only, but by express mention made in the *publick Laws*, is what I dare not affirm; by such a Method the *civil Power* would seem almost to invite the Subjects to transgress the *Laws of Nature*: Possibly it may be excusable to dissemble things, where the Times or the Humour and Dispositions of the People will not endure a Reformation by direct Remedies. And so there was good Reason why the *Roman Law* call'd that, *Actio rerum amotarum*, when there was indeed a real *Theft* committed.

IV. Our *Author* also, *de Cive* c. 14. §. 9. affirms, 'that the *Precepts* of the *Decalogue* are merely *civil*, and not *natural Laws*, and that they are to be explain'd after this manner: *You shall not deny your Parents the Honour the civil Law alloweth them. You shall not kill any Man, the Law forbids you to kill. You shall avoid every unclean Act which the Law forbids. You shall not take away what belongs to another Man against his Consent. You shall not frustrate the end of Law and Judgment, by bearing false Witnesses.* But it will here be easily observ'd, that he depends upon an utterly false *Hypothesis*, and supposeth what will never be allowed, that there was no *Propriety*, no *Marriage*, and that *everything* was *lawful* for every *Man* before the Institution of *civil Governments*. It is certain, the *Precepts* he speaks of, are obligatory, and bind even those Persons to one another, who do not live under any common Government, but only in a *State of natural Law*. For certainly Men could, and actually did divide things between one another by Compact even in such a State; and therefore would have sinn'd as much against the Eighth Commandment, if they had neither openly or secretly robb'd one another, as they do that rob their Fellow Subjects in *civil Governments*. It may also be perhaps denied, that a Man in a *State of Nature* is guilty of *Adultery*, when he violates his Neighbour's Bed: But the answer may be seen, *Gen. xx, 3. xxvi, 10.* And further, since *Arbitrators* must be often made in a

State of Nature, to decide Disputes about matters of *Fact*, by intervention of *Witnesses*, as Mr. *Hobbes* admits himself, *de Cive* c. 3. §. 23. we may hence find the use and necessity of the *ninth Commandment*. In general, the *Precepts* of the *Decalogue*, it is evident, may be reduced to the *Law of Nature*; but when they are consider'd as written in *two Tables*, and promulg'd to the *Israelites* by *Moses*, they may properly enough be call'd *Civil Laws*, or rather the *general Heads of the Jewish Civil Law*, which are afterwards divided into particular *Laws*, with penal *Sanctions* added to them^a. Upon which Account, *Gratius* saith^b, the *Decalogue* does not in express Words comprehend every Crime, not even all those which are punishable by the *Civil Law*, but only such in every kind as are most heinous and malignant. For there is no mention made of *Wounding*, but only of *Murder*; nor of any other sort of *Gain made by another's loss*, but that of *Theft*; nor of any other *Falsity*, but *False Witnesses*.

V. It may be proper in the next place to consider, that the same Author in his Book *de Cive*, c. 12. §. 2. among those seditious Doctrines he supposes to be the internal Diseases, and Causes of the Dissolution of the Commonwealth, sets down this for the First: 'That every private Man is Judge of good and evil. For, saith he, the Measure of good and evil, of just and unjust, is the Civil Law, and whatever the Legislator commands must be look'd upon as just and good, whatever he forbids, as unjust and evil; and therefore it is a very ill Maxim, that we are to obey our Sovereign only, when his Commands are just. There was nothing just or unjust before Civil Government; their Nature relates to the Commands of the Sovereign: and every Action is in its own Nature indifferent; that it becometh just or unjust, is owing to the Will of the Sovereign. And therefore lawful Princes make those things just, which they command, by commanding them; and those things which they forbid, unjust, by forbidding them. But while private Men assume to themselves the Cognizance of good and evil, they affect to be like the Sovereign, which it is impossible should be consistent with the Quiet and Peace of any Commonwealth. In Answer to him, it may be readily allow'd, that *sovereign Princes* have indeed Power, by annexing or taking away the Penal Sanction, to give or take from the Laws of Nature the Force of *civil Laws* in human Courts of Justice; as also to make many things, which do not belong to the Law of Nature, *just*, by commanding, and *unjust*, by forbidding them. But to say that before *civil Governments* were erected, there was nothing *just* or *unjust*, either defin'd by Nature, or obliging Mens Consciences, is as false, as to assert, that *Truth* itself hath only a precarious arbitrary Dependence upon the

MR. BARBEYRAC'S NOTE ON § III.

^a 'Twas when a Husband or a Wife, upon their separation, had kept back something that ought to be restor'd to the Party it belong'd to, after the Divorce; but because of the strict Union that was between 'em, by their Marriage, they soften'd the Notion of *Theft*, which he is guilty of in reality, that does not restore whatever he is not the lawful possessor of, and only barely call'd it, *the detaining another's Goods*. Vid Digest, Lib. 25. Tit. 2. *De Actione rerum amotarum*. And Mr. *Noodt*, in his *Julius Paulus*.

^b Vide Philon Judæum, de Decalogo.

^c Grot. ad Math. v. 27.

Pleasure of Men, and is not founded in the Nature of things; or that *Sovereign Princes* may fashion and dispose the nature of things as they please, or that the same Truth may be different from it self. And indeed the thing it self sufficiently confutes *Hobbes*. For is it at all probable, that those *Masters of Families*, who at first united, and form'd themselves into Commonwealths, should, all the time they liv'd separately, behave themselves only like so many wild Beasts; break all manner of Compacts they ever made; rob one another of Life and Fortune at pleasure, upon every pretence of a Right, and that all their Actions were to be thought purely indifferent? Upon the same grounds, *sovereign Princes* now, who are still with respect to one another in a *State of Nature*, should not be thought guilty of Injustice, when they break their Compacts, and invade one another's Rights: And yet it is certain, they are not subject to *civil Laws*. But on the contrary, it is not to be conceiv'd, that *civil Governments* could ever have been establish'd, or after their Establishment, preserv'd; if there had not been something just or unjust antecedent to their Existence. For 'tis certain, Compacts must have been made use of at the first forming of Commonwealths. But how could Men persuade themselves, that such Compacts could be of any Force, except they knew before, that it was just to observe them, and unjust to do otherwise? And if it be no Justice to stand to Compacts antecedently to the Definition of the *Civil Laws*, there can be no reason why Subjects may not, when they please, renounce their Obedience, dissolve *civil Government*, and so utterly abolish all the Distinction between just and unjust. For it is extravagant to imagine, that such Numbers of Men, as a Commonwealth consists of, will always be kept in Subjection by no other Restraints, but Fear and Power. Nor therefore can I believe there was ever any Prince heard of, so far depriv'd of Reason, as to have commanded what the general *Laws of Nature* forbid, or forbid what they commanded; for Instance, that it should be unlawful to perform Trust or Promise, or to give any Man his due; that it should be a Crime to live with any Respect to Reason or Justice, that every Man might have full Liberty to do all the Mischiefs he could, and the like. But now, why might not such Laws have been made, if there had been nothing just or unjust, antecedent to the Determinations of the *civil Laws*? 'Tis certain the Command of the *civil Power* may as well make Poison it self wholesome and neces-

sary Food, as make such Things as these just and good. And therefore *Polybus* was equally in the wrong, when he seems to derive the Original of Justice and Injustice from *civil Government* a. In another Sense indeed, what *Mr. Hobbes* saith, may be safely enough admitted; that is, supposing that by good and evil we understand no more than the advantage, or disadvantage of the Commonwealth. For then it will really appear to be a seditious Doctrine, that every private Person is Judge of good and evil, meaning by it, what is for the Advantage or Disadvantage of the Commonwealth; that is, that every private Man is a competent Judge, whether those are proper Means, which the Prince commands shall be made use of in promoting the publick good; and that, in Consequence, every Man's Obligation to Obedience may depend upon that Judgment. For it is necessary that Subjects (as *Cicero* in *Tacitus* told his Soldiers) should be ignorant of some things as well as know others. For if everyone should have the Liberty to dispute what he was commanded, Obedience and Authority would soon sink together b. It was *Cato's* Saying, that the Tenant ought not to think himself wiser than his Landlord; and of *Plato*, that no Man should pretend to be wiser than the Laws c.

VI. Our next Consideration shall be, whether a Subject may be guilty of Sin, in executing the Commands of his Prince; supposing he pretends, that he barely undertook the Performance of the Action, and left the Design, Contrivance, and the Necessity of Account, entirely upon him who gave the Command? For there is a Difference between the Laws and the Commands of Princes: The Laws are general Precepts, which affect every Subject; the Commands are only occasionally imposed upon particular Persons; but have the same effect the Laws have in obliging those they are directed to. In this Case it is the known Opinion, that a Man may sometimes sin by obeying the Commands of the *civil Sovereign*, and therefore that the Subject may and ought to examine such Commands by his own Conscience rightly inform'd d. For certainly it ought to be supposed, that good Men promise Obedience upon certain Conditions only; that, since they are sure to give an Account of their Actions at the *Divine Tribunal*, and since all the Governments of this World are under an infinitely great overruling Power; they are always ready to obey the Commands of their Sovereign, except when they contradict or interfere with the Law of Nature, or the manifest Laws of God. For with-

a *Polyb.* l. 6. where he is transcrib'd with very little Judgment, by *Machiavel*, Disc. in Liv. l. 1. c. 2. Vid. *R. Cumberland*, de Leg. Nat. l. 5. c. 5.

b *Tam nescire quedam milites, quam scire oportet*, *Tacit. Hist.* l. 1. c. 83. *H. L.* 2. c. 39. It is one part of the Character of a good Soldier, that he had rather put his General's Commands in Execution, than make any Debates upon them. *Cato de Repub.* c. 5. And so far *Terentius* was in the right, *Tacit. Ann.* 6. c. 8. We are not to examine whom you prefer, or upon what account Heaven hath given you the supream Disposal of things, and it is our Glory to obey.

c *Plat. Polit.* p. 555. D. Ed. *Wech. Arist. Rhetor.* l. 1. c. 15. To endeavour to be wiser than the Laws, is what the best Laws take care to forbid. That is to be understood in Reference to the written and perpetual Laws establish'd by the consent of the People; whereas in this place the matter in Question is chiefly concerning particular Orders given by a Prince, according to the present Circumstances, and posture of Affairs.

Mr. BARBEYRAC'S NOTE on §. VI.

d An ancient Greek Poet in one of his Tragedies, makes *Antigone*, who had buried her Brother *Polynix*, contrary to the Prohibition of *Creon* King of *Thebes*, answer that Prince, when he demanded of her, how she durst act contrary to his Laws, "I could not think, that the Edicts of a Mortal Man, as you are, could be of such Force as to oblige me once to violate the fix'd unwritten Laws of Heaven; for they are not of yesterday or to day, but subsist perpetually, and for ever; and no one knows from whence they came. I ought not then, for fear of any Man, by violating them to expose my self to the Punishment of the Gods." *Sophocles Antigone*, v. 453, &c. *Ed. H. Steph.* OUT

out Dispute, should a *Prince* give out any Command contrary to the *Civil Laws*, he may be obey'd without Sin. But on the other Hand, Mr. *Hobbes de Cive* c. 12. S. 2. declares this for a seditious Doctrine, 'That Subjects are guilty of Sin, when they obey those Commands of their Sovereign, which they think unjust. And it may indeed be allowed to be dangerous not only to the Commonwealth, but also to the Consciences of private Subjects, to believe, that upon any Scruple or Doubt, concerning the Equity of what is *commanded*, Obedience may lawfully be refused. For should this Doctrine be admitted, it must often necessarily happen, that a Man must be reduced to a Necessity of Sinning; if he obeyeth, he must act contrary to his *Conscience*; and contrary to his *Allegiance*, if he doth not. For I think it is on all Hands allowed, that in Cases where the Conscience is doubtful, the best resolution a Man can come to, is, to take that Side where there will be least danger of Sin. But now the danger of Sin is in a much nearer View, when upon an uncertain Doubt, a Man quits his *Allegiance* which he hath expressly sworn to keep; since

² *Procop. Hist. Goth. l. 1. p. 175. Ed. August Vindel. Senec. Tro. v. 868, 869.* The Guilt of a Crime forc'd upon a Man, recoils back upon the Authors of it. *Vid. Lib. 3. t. 1. D. de his qui infam. not. Quique suo nomine non jussu ejus, &c. M. Senec. l. 4. Contro. 27.* That Woman is not immodest that hath been corrupted in her Chastity by a Tyrant, neither is he guilty of Sacrilege, that takes the Offerings of the Gods, and brings them to the Tyrant; or that sets up his Statue among the Images of the Deities.

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¹ This Distinction does not remove the Difficulty. For in what manner soever the Subject acts, whether in his own Name, or in that of his Prince, his Will always consents in some sort, to the unjust and criminal Action, which he executes by the Order of his Sovereign. So that we must either always impure these sorts of Actions partly to him, or else never any of 'em. And it would signify nothing to say, That in the Case our Author is speaking of, the Action is of the Number of those that are call'd *Mixt*; or to alledge in their defence, the Laws and Privileges of Necessity. *Vid. Remark, Book 1. Chap. 5. Sect 9. Note 3. and Book 2. Chap. 6. Sect. 12. Note 5.* The surest way then is to maintain in general, and without any Restriction, that the severest Menaces in the World should never induce us to act, even by the Order, and in the Name of a Superior, the least thing that manifestly appears to us to be unjust or criminal; and that tho' we may be very excusable before the *Human Tribunal*, for having been conquer'd by so severe a Tryal, we shall not be entirely so, before that of the *Divine*. There is but one single Case, where we may conscientiously obey the Orders of a Prince, which plainly appear to be unjust; and that is, when the Person concern'd in the unlawful Action which the Prince commands to do, dispenses himself with our exposing our selves in his Favour, to the grievous Consequences of a Refusal: provided the Business in hand is a Thing, as to which 'tis in his Power to consent to the Mischief that the Sovereign commands to be done him, or the Violation of any Right, which it is lawful for him to renounce. For if any one should give me leave, for example, to kill him, I could not however innocently make my self the Minister of my Prince's Anger; because no Man is Master of his own Life. Yet, nevertheless, our Author pretends (in his own Apology, Sect. 20.) that if we do not admit of the Opinion which he here maintains, we shall necessarily be forc'd to acknowledge, that all Soldiers, Executioners, and other inferior Officers of Court, ought to understand *Politicks*, and the *Civil Law*; and that they may excuse themselves from their Duty of Obedience, upon pretence that they are not sufficiently convinced of the Justice of what they are commanded: which would reduce the Authority of a Prince to nothing, and render him incapable of exercising the Functions of Government. But that only proves, that Subjects may not, nor ought not, always to examine all the Orders of the Sovereign, to know if they are just, or not. If that were to be done, I must own, there would be scarce one Soldier in the World, that innocently follow'd his Trade. How few are there that know the true Reasons of a Prince, for whom they fight? And suppose they did know, how few are capable of judging of 'em? Thus generally speaking, the greatest Part of those whom the Sovereign lifts in his Dominions, may not excuse themselves on account of their Doubts of the Justice of the War, whither they are order'd to march; because that demands an Examination much above their Capacity; whereas they have no need of any great Knowledge or Penetration, to be clearly convinc'd of the Obligation they lie under, of obeying their Prince. But if a Commander that is skill'd in *Politicks*, and thro'ly acquainted with the Affairs and Interest of the State, plainly perceives that his Prince is engag'd in an unjust, or an unnecessary War; ought he not to sacrifice every thing, nay even his own Life, rather than serve in such a War as that? There is not always an occasion of any great Penetration, or the admittance into the Cabinet-Council, to discover the Injustice of the Wars that ambitious Princes undertake. The Manifestos they publish themselves, compar'd a little attentively with those of their Enemies, are often sufficient to shew to any one that has but a moderate ll are of good Sense and Honesty, the Weakness of their Reasons, and the Iniquity of their Cause. In such a Case as that, we are not only exempted from our Duty of Obedience, but we ought also to forbear, and refuse doing it upon any Terms whatsoever. The same thing must be said of a Parliament whom a Prince commands to register an Edict which is manifestly unjust; of a Minister of State whom a Prince will oblige to dispatch or put in execution an Order full of Iniquity or Tyranny; of an Ambassador to whom his Master gives Instructions, attended with an apparent Injustice; of an Officer whom his King commands to kill a Man in secret, whose Innocence is as clear as the Day, &c. And they are not only Persons of a distinguish'd Condition, or of Parts and Understanding above the common Level of Mankind, that may and ought to excuse themselves from obeying the above-mention'd Reason; but sometimes, tho' very rarely, the most simple and ignorant find themselves also under an indispensable Obligation to deny their Sovereign the Ministry of their Arms, at the hazard even of their own Lives. Such was the Case of the Soldiers that were sent by King *Absziah* to apprehend *Elijah*, and who were punished for it by the Fire which came down from Heaven upon them, at the Prayer of that Prophet, and consum'd them all, *ii Kings. c. 1. v. 9.* A Tip-staff, or a Sergeant at Arms indeed is not, generally speaking, bound to enquire, whether the Magistrate that orders him to take the Body of such an one into Custody, has any just reason or no, for commanding him to execute that Order; that is not his Business, and he ought to have a favourable Opinion of those that administer Justice, as long as there are no evident

to take with him these Cautions : First, That he be commanded barely to execute the Action, that is, only to apply the Strength of his Body to the Performance of the Action, and neither give Occasion to it, or furnish Pretext, or make use of any Excuse for it ; but undertake it as an Action that belong'd wholly to another Person, and which he will not take upon himself. *Secondly*, That he should shew his unwillingness to be employ'd in such a Service, and desire earnestly to be excused from it ^a. And *Lastly*, That upon declining the Action, he be threaten'd with present Danger of Life, or some other great Evil, which he is not obliged either in Justice or Charity, to suffer for another Man, and which the Person that commands him hath Power to inflict ; and especially if he sees that tho' he refuseth his Assistance in the Action, it will be executed by other Hands. It is undoubtedly true indeed, that no Commands of Men, contrary to the Law of God, can have any binding Force, that is, lay an intrinsic Necessity of Obedience on the Conscience, and that therefore it can be no Crime to refuse to obey them. But there is a wide Difference between being bound in Conscience to do a thing, and being able to do a thing without Sin. to avoid some very great Evil. For there are several things which we are under no manner of *intrinsic* Obligation to do ; which yet upon pressing Necessity we may lawfully undertake. And in this Case the Question is, not whether we are bound to do such a thing, but whether we can do such a thing without any Guilt of our own, when we see we must otherwise lose our Lives to no purpose. Neither is any thing I have here said, in the least weakn'd by what *Pliny* saith, Ep. 9. l. 3. ' Where he tells his Friend of a very ill Cause he had been engag'd against, that he had prov'd before the Senate, that it was criminal even to have

assisted in it. (*Ministerium etiam crimen esse*). For the Persons he pleaded against, had not been barely the Instruments of another Man's Crimes, but had charg'd innocent Persons with false Crimes, that the Proconsul might take occasion to seize on their Fortunes and Estates ; and their informing against, and wrongfully accusing them, was entirely their own Act ; the Impeachments they made, were all in their own Names, and not in the Proconsul's, nor were they pretended to have been made at his Command ; neither were they forced to be Delators, by any immediate fear of Death, if they had refused to be so. They pleaded indeed, that they were provincial Subjects, and therefore were obliged by Fear to be absolutely at the Command of the Proconsul. But what look'd most probable was, that the Expectation of the Gain they hoped to make, was their greatest Encouragement ; tho' perhaps it might be true too, that the Proconsul had given them reason to be afraid, if they refused to obey him ; yet it is not likely he should threaten them with Death, and there was no other possible Method left for them to escape it ^b. And in this Case, the Desires, or Intreaties of Superiors must not be supposed to have the same Force in them, as Necessity or their Commands ^c, though in others it may sometimes be true, that *the Intreaties of Tyrants are mixt with a sort of Necessity*. Neither is the Example of *Doeg*, 1 Sam. xxii. 18. any Objection against what has been said. For it was expressly added, that a Man ought to desire earnestly to be excused, as *Paul's* Guards very honourably did (And thus the Midwives were commended for defeating the barbarous Command of *Pharoah*, tho' it were with an Untruth, *Exod. i*) But *Doeg*, on the contrary, shew'd himself ready and willing to put the King's Command in Execution upon the Priests, tho' we do not find that any Threats were added to it, when he had himself

Proofs of the contrary. But supposing they had in reality such Proofs, I maintain they ought not in that Case to obey. And this Supposition contains nothing that is impossible. It may happen, for example (and every one will easily conceive it) that an Officer of Justice may fully know the Innocence of a Person falsely accus'd, of either Murder, or Robbery, who is infallibly ruin'd, if ever he should once be taken. In the late Persecutions in *France*, could not they plainly see, that were sent against those poor Creatures whose only visible Crime was serving God according to the Dictates of their Conscience, the tyrannical Injustice, and barbarous Cruelty of the Orders they receiv'd, and ought they not to have seen it? If in those Cases, they can reconcile their Interest with their Conscience, by pretending to search after those unfortunate Creatures, whom they will not find, and at the same time, contriving under hand, the Means for 'em to make their Escape ; Well and Good. But I cannot persuade myself, that Men can punctually execute such Orders, without making themselves Accomplices of the Iniquity of him that gives 'em. The same must be said of Executioners. Upon which consult *Grotius* Lib. ii. cap. xxvi. Sect. 4. Num. 9. as also *Mr. Sidney's Discourse upon Government*, Ch. III. Sect. xx. and the Apology of *Socrates* by *Xenophon*. In which there are several fine Passages which shew that we ought never to obey our Superiors to the prejudice of our Duty ; but very far from it, and unless we are in an entire Incapacity to resist 'em, we ought to exert our selves to the utmost of our power, and endeavour to hinder those that would oppress the Innocent, from doing them any Mischief. *Saul's* Guards refused to put to the Sword a great Number of Priests, whom that Prince sacrificed to his Anger against *David*, 1 Sam. xxii. 19, &c. but as *Mr. Le Clerc* has observed, they would have been still more commendable, if they had interceded with the King in behalf of those innocent Persons, by representing to him in the best manner they could, that he had commanded a Thing that was forbidden by the Laws, both Divine and Human ; and if, after all their Prayers and Representations had prov'd ineffectual, they had seiz'd upon the King as a mad Man, and secur'd him till the Priests had made their escape. Since the first Edition of this Note, one *Mr. Adam Rechenberg*, a Professor at *Leipsick*, has publish'd a Dissertation, Entituled, *de Ministerio, quod crimen est, Dignissimo politico*. In which the same Opinion that is here advanc'd, is maintain'd, and confirm'd by several Examples and Authorities. There is also a Dissertation *de injusto Pontii Pilati judicio*, written by *Mr. Thomassius*, against a Civilian nam'd *Stellerus*, who was willing to justify *Pilate*, in a Treatise call'd *Pilatus defensio*, upon this Principle, among the rest, that the Governour of *Judea*, in condemning *JESUS CHRIST* to Death, had only acted as a bare Executor of the Sentence of the *Jews*. This Dissertation of *Stellerus* was Printed in 1674, but it was suppress'd by publick Authority.

^a We have a particular Instance of this Nature in *Olearius's Travels into Pers.* l. 5. c. 32.

^b *Vid. Tacit. Ann. l. 13. c. 43.* Where *Silius* pleads that he had done nothing out of any Design of his own, but that all was entirely out of Obedience to his Prince. Afterwards he pretended the Commands of *Messalina*, and wav'd his Defence. For why was there no body else made choice of that would sell his Voice to oblige that cruel and impudent Woman? But it is necessary that the Instruments of Oppression and Tyranny should be punish'd : For when they have receiv'd the Rewards of their Wickedness, they shift the Crime over upon some body else : and therefore *Jul. Gracianus* very well deseriv'd Commendations, who was commanded to accuse *M. Silanus*, and was kill'd for refusing. *Tacit. Agricola* ; and *Seneca* gives him a very great Encomium. *De Benef. l. 2. c. 21.*

^c *Plato Epist. 7.*

before falsly accus'd them, insinuating that they had entred into a secret Conspiracy with *David*, against the King: For it is evident from *Psal. lii.* that he had brought some false Accusations against them. But notwithstanding, it must be confess'd, that there are some Actions, the bare execution of which a Man would rather die, than undertake: Such as to *murder* Parents, or Children; to commit Incest with a Mother, or a Daughter, or to lie with a Beast. A small Stock of Courage would make a Man prefer Death to the guilt of being an Instrument in such Actions. And I cannot but think it was a noble Spirit of Constancy and Bravery in those *Romans*, 'Who when singled out by *Hannibal*, to fight with one another, Brothers with Brothers, Fathers with their Children, and Kinsmen with their near Relations, chose rather to die under Torture, than be stain'd with Blood which Nature had so naturally ally'd.'^a Neither can I think it at all lawful, that to save my own Life, I may assist to take away another Man's; for that would be to make another's Life the Price of my own: And there are many things which we cannot do for Price, which upon other Considerations we may b.

VII. But in general, that a Man may not at the Command of a Superior undertake an Action, as his own, which is repugnant to the Dictates of a good Conscience, is what no Man that hath any Sense of Religion can deny. The *Judges* therefore *Josephus* speaks of^c (to consider some Examples under this Head) refus'd to condemn the innocent *Zacharias*, tho' they were sensible what danger threaten'd them from the Fury of the Zealots. And on the other hand, the *Judges* mention'd, 1 *Kings*, ch. xxi. were certainly guilty of a very great Sin; because they pass'd Sentence not by Order from the King, but as the pure Result of *judiciary Process* upon the Evidence of the Crime; nor can the *Witnesses* be excus'd from an equal share of guilt. Nor were the Detectors Persons less guilty, whose Business it was to charge false Accusations upon the great and rich, that ill Princes might have a Pretence to ruin them in Circumstances less criminal. *Marcellus Epirus* was once a Person very well known by that Character, but more particularly infamous, for the *Impeachment* of *Thraseas*: Tho' *Tacitus* tells us he pleaded in his Excuse for that, that his Accusation charg'd no more upon *Thraseas*, than what the Judgment of the whole *Senate* confirm'd; which was only to spread the Crime wider, not clear himself. 'Tis true indeed, as the Historian says, That *Nero* endeavour'd only to disguise

his own natural Cruelty, under the Formality of *secret Accusations*^d. But still it was the Avarice and Ambition of such auxiliary Villains, which provoked and encouraged him. Others engaged in the same Practices excus'd themselves by saying, that in those Times they were under a necessity to do what they did, to secure their own Honour and themselves: A kind of Defence which means no more than that they chose rather to expose others to Danger, than hazard themselves. Neither did *Curtius Montanus*^e, as the same Historian says, allow it to be a tolerable Excuse, because he thought the Persons that us'd it not to be criminal in the Occasion of it; but in a *Rhetorical* way he chose to pass by some things, that he might press others with more Vehemence. And the Senate acted with great Justice, when after *Nero's* Death, they decreed his Instruments the *Informers* should be punish'd as a Race of *Miscreants*, who lived upon the Ruin of private Men^f. The Emperor *Titus* with the same Justice commanded all such Persons to be publickly whipt and beat in the *Forum*, then dragg'd through the Amphitheatre, made Slaves, and sold; and some of them to be transported to uninhabited Islands; and after him *Trajan* sent away Numbers of them in a few shatter'd Vessels, that they might be left to the Mercy of the Sea, and be shipwrack'd wherc-ever the Waves threw them^g. Neither could the secret Command of *Tiberius* excuse *Piso* from the Guilt of *Germanicus's* Death, if he was really the Cause of it: And if he had confess'd such a Command in the Senate, tho' that must have been enough to have put even *Tiberius* to the blush, and depriv'd him of all his Shifts, to excuse himself from commanding so barbarous an Action; yet the Senate had still Power very justly to condemn him as the Criminal, because he did not pretend any publick Authority for it, but voluntarily undertook an Action which *Tiberius* had not the least Pretence of Justice to command, only that he might engage the Emperor to him, by such an Act of Villany^h. Neither do I think that *Joab* was absolutely free from the Guilt of *Uriah's* Murther, 2 *Sam.* xi. 14, 15, 16. tho' Chap. xii. 9. *David* only is mention'd as the Principal in it. And it was very brave in *Papinian* to refuse to defend the Murther of *Geta*, with that noble Saying, That it was easier to commit Parricide, than to excuse it. Others tell the Story, that he refused to speak an Oration for the Emperor, in which he would have had him inveigh against his Brother; and that he excus'd himself by saying, that to accuse a murther'd innocent Person would be a

^a Vid. *Diod. Siculum* l. 25. in excerpt. *Peirescanis*. Vid. *Laonic Chalcondyl.* l. 1. where *Amurath* Emperor of the *Turks*, commanded that the Parents of all those who had been in the Insurrection with *Sauzes*, should kill their Sons with their own Hands. There were two Fathers that would not obey so cruel a Command, and were therefore cut to pieces at the same time with their Sons. For *Amurath* us'd to say, That the Sons would not have join'd with *Sauzes*, without the Advice of the Parents.

^b *Abr. Rogerius*, in his Account of the *Bramins*, saith, That the *Bramins* believe that the Wife may do any thing, tho' never so bad, which the Husband commands her, without Sin; for the Sin, they say, cannot be imputed to her, but is to be charg'd upon the Husband, whom she is oblig'd to obey.

^c *Josephus* de Bello Judaic. l. 4. c. 19. The Author here takes an occasion of praising the Intrepidity of the seventy Judges mentioned by *Josephus*, who chose rather to expose their own Lives, than unjustly give Sentence of Death against *Zacharias* the Son of *Baruc*, one of the most considerable *Jews* at that Time, whom the Zealots would fain have destroy'd upon any Terms. But this Example does not well suit with this place; for those Zealots were nothing but a set of factious and wicked Persons, that had no Authority over the seventy Judges, whom they had chosen out from among the People, to try and destroy *Zacharias* with some colour of Justice, supposing that they would have seconded their furious intentions against him.

^d *Tacit.* Hist. 4. c. 8.

^e *Tacit.* Hist. 4. c. 42.

^f *Tacit.* Hist. l. 4. c. 30.

^g *Suetonius*, *Titus* c. 8. *Plin. Pan.* 34. 35.

^h *Tacit.* An. l. 3. c. 16.

Second Parricide. But *Spartianus* in his *Life of Caracalla*¹, denies this Account, because he says, *Papinian* could not, as being Prefect, make any such Oration (tho' it doth not appear why it might not have been extraordinarily commanded by him) and only adds, that it was certain he was put to Death, for being a Favourer of *Geta*. However this be, that Man is certainly in the right, who refuses to prostitute Wit and Parts to defend Wickedness, tho' the Defence be publish'd afterwards in another's Name. For the Invention of specious Arguments, set off with the Art and Dexterity of an Eloquent Speaker, can never be supposed to be barely the Execution of another Man's Action. In this particular Case the Thing would have appear'd otherwise indeed, if *Caracalla* had only commanded some Person to have recited such an Oration in the Senate, as a Piece of his own, or some other Man's Composition, under a capital Penalty, if he refus'd it.^b But still it must be remember'd, that where the Actions of Princes do not plainly appear to be unjust, Subjects ought to be very cautious, and especially publick Ministers, how they give them an ill Character; because it is their Duty, always to presume for the Justice of their Master.^c

VIII. Upon the same grounds we may determine, whether a Subject may lawfully bear Arms in an unjust War, at the Command of his Prince. *Grotius*, L. 2. Cap. 26. §. 3, 4. is of Opinion, that when it manifestly appears that the War is unjust, it is not lawful for a Subject to maintain so bad a Cause: And that when the Case is doubtful, he ought to take the safest side, which is to sit still, and not engage himself at all in the War. But I think, a Man ought to be very cautious, how he resolves in such a manner, about Things of such Consequence as these. When according to this Opinion, the Power of the civil Sovereign, and the Obedience of the Subject, in a Case of so great Importance, are made to depend upon every particular Man's Judgment; and when, especially, it would be easy for a Man to pretend scruple of Conscience, only to disguise his Fears and Cowardise.² 'Tis true, where a Man is ad-

mitted to the Counsels and Debates, and hath a Right to give his Voice in them, if he is not obliged by the Determination of the Majority, without his own Consent, he cannot, with Justice, so much as undertake any thing manifestly unjust. Which will hold true too, if it be left to his Choice, whether he will take Arms, or not: But if he should be commanded simply to obey, in this Case it must be consider'd, that all Nations, acted by any Sense of Justice or Honour, before they engage in a War, always suppose, that the Cause of it is just; and where they do not, it is to no purpose to talk of Conscience. But the Point in dispute turns chiefly upon this, Whether in regard of certain particular Circumstances, it be convenient for the Government to begin a War, notwithstanding the truth of such a Pretence? In this Case, the Person particularly intrusted with the Government of the Commonwealth, and entirely acquainted with its Strength, must be presumed to see better what will be for the Advantage of the Publick, than any private Man can. And if a Man, admitting the Justice of the Cause, should yet doubt whether it might not be better to neglect, or forgive, the Injury done the Commonwealth, than revenge it with a War; it must be told him, that this is by no means a sufficient Reason, for a Subject to refuse to obey his Sovereign, and provoke him to use Severity upon him; that he supposeth his Sovereign hath not observed a certain Virtue, which hath only the Force of an imperfect Obligation. And therefore the safest Method a Subject can take, is simply to obey³, and leave his Sovereign to answer for the Justice of the War before God.^c But yet it must be observ'd, that what hath been said affects only Subjects, who take Arms at the Command of their Sovereign. For they that voluntarily put themselves into the Service of a foreign Prince, ought by all means to be sure of the Justice of the Cause they engage in. And therefore the sensible part of the World will always justly condemn those that set their Lives out to hire, without any manner of Consideration of the Cause they fight for.^d

Mr. BARBEYRAC'S NOTES on: §. VII, VIII.

¹ Chap. 8.

² See our Author's Dissertation *De Obligatione erga Patriam*, f. 19. ³ Vid. What has been said concerning Soldiers in Note ... Sect. 6. Yet Mr. *Buldcus* however pretends, that upon a bare Doubting of the Justness of the Cause, the Subject is not bound to obey their Prince when he commands 'em to serve in the Wars; yet after all, he does not deny the Reasons that our Author makes use of to establish the contrary Opinion.

^a There are several Passages in Plato's *Dialogues* of Socrates, which might be applied this way: And to this we may refer the Account Dio Cassius gives of Sallust. l. 43. who he says was made Prefect of *Numidia* by *Caesar*, upon pretence of his taking the Administration of that Province, but in reality only that he might squeeze all that he could from it. But after he was come home, he was accus'd of Extortion and Corruption, and of several Oppressions in the Province; and so was look'd upon to be more particularly infamous, because having wrote an History, where he frequently, and very severely reflects upon such as made their Fortunes by publick Rapine in their Governments, he himself had not made his Actions agreeable to his Writings, and therefore tho' he was acquitted by *Caesar*, yet he sufficiently publish'd his Crimes, by the lively Character he had drawn of them, in his own Writings.

^b See the *Solacium* in Politics, *Abbas* Chancellor of France was guilty of. *Gramond. Hist. of France*, l. 16.

^c Hector in Homer saith very well, *Iliad* 12. v. 243.

Εἰς κλονὸς αὐτῶν ὄντων, ἀνὴρ ἐδούρει πρὸς πᾶσι.

In *Tacitus Hist.* l. 3. 25. it is call'd a publick Crime, when a Son had kill'd his Father in the Field. Vid. l. 9. c. 4. l. 2. 1. *D. de noxal. act.* l. 9. t. 2. l. 37. *D. Ad L. Aquilianum.*

^d *Gunther. Ligurinum*, l. 7.

*Ære dato conducta cohors, & bellica Miles,
Dona sequens, pretioq; suum mutare favorem
Suetus, & accepto pariter cum munere bello,
Hunc habuisse, dator pretii quem jussit, hostem.*

Lur'd to the Field by Pay, and hopes of Spoil,
In servile Arms the Mercenaries toil;
Inconstant, False, and Faithless to their Trust;
The Cause that is most Gainful seems most Just:
He that first hires, commands them to the Wars,
And those he calls his Enemies, are theirs.

CHAP II.

Of the Power of the Sovereign over the Lives of the Subject, in Defence of the Commonwealth.

- 1. *The Sovereign may hazard the Lives of his Subjects in War.*
- 11. *Whether lawful to refuse bearing Arms upon a Compact with an Enemy.*

- 111. *No Man to make himself unfit to bear Arms.*
- 1v. *The Obligation of a Soldier what?*
- v. *Whether the Commonwealth may give up an innocent Subject?*

I. THO' the End Men propos'd to themselves, by entering into civil Societies, was to provide, not only for the Security of their Estates, but more especially of their Lives; yet it was found necessary to the Preservation of civil Government, that the Sovereign should have some Power over the Lives of his Subjects; and that for these two Ends: *First*, To Guard the Commonwealth from Evils and Dangers; and *Secondly*, To suppress Disobedience to the Laws. By the *First*, The Sovereign hath Power to hazard the Lives of his Subjects in Defence of the Commonwealth, and to assert the Rights that belong to it; since in War Men always propose to take away one another's Lives. And since the Art of War it self is not to be learn'd without Experience, it was *Plato's* Opinion ^a, that the Lives of the Subjects might be expos'd to some Danger for the Attainment only of the military Accomplishments (tho', I confess, I am not of his mind) and accordingly he propos'd, that the Weapons us'd in all military Exercises should differ little from the real and dangerous ones, such as might strike some Apprehensions of Fear into the Persons that us'd them; and he afterwards adds a Law, *That if any Man happen'd to be kill'd in those Exercises, that the Person who kill'd him should be acquitted by the Law, and be look'd upon as innocent.* For, saith he, the Legislator ought to consider, that tho' perhaps he may lose some few of his Subjects by this Method, yet that the rest will suffer nothing by it; but that if there were no Apprehensions of Danger in these Exercises, there would be no way to distinguish between the Brave, and the Coward; and the want of such a distinction would certainly be of worse Consequence to the Commonwealth, than the other Evil. And such Military Exercises we are told are now in use in *Japan* ^b. *Demosthenes* mentions an Athenian Law ^c, by which if a Man kill'd another accidentally in any Exercise, he was not to be banished: The reason of which was, saith he, because Law doth not consider the Event, but the Intention of the Person, which was only to overcome his Adversary, not to kill him: But if his Adversary was too weak to bear the Fatigue a Victor must expect, the Law thinks him the Cause of the Misfortune which befalls him. And indeed there is very good Reason that even the Exercise in military Duties should be under a severe Discipline, since in War the Fate of things may frequently turn upon a very small Neglect. And therefore tho' civil Courts are sometimes easily induced to make Allowance for

those Passions, that have generally a violent Influence upon us, yet a Court martial hardly will ever afford them any Favour. And hence military Judicature makes it capital to desert the Post a Man is commanded to, tho' perhaps to avoid present Death ^d. (Though some have thought the Shame of some ignominious Punishments might be a better Expedient to prevent Cowardice) And therefore to refuse to List into the Military Service hath in some Nations been severely punished ^e. There was a Law at *Sparta*, which made it Death for any Man to refuse to hazard himself for his Country; so that as the Orator speaks upon it, 'The Occasion of their Fear was made their Punishment; and there being two such Extremities in View, there would be hardly any Man who would not sooner venture the loss of Life among Enemies, than suffer it to be taken away by the Laws in his own Country ..' 'Tis true there are few Nations in which there are not Numbers of Subjects by their Years and Strength of Body fit to bear Arms, who have nevertheless Immunities from that Service granted them, either out of Respect to their way of Life; or upon some particular Indulgence of the State; but it must be understood that all such Privileges are to continue no longer in force, than while there are other Subjects enough, or else Allies, or hired Forces in readiness to defend the Commonwealth: In Cases of the last Extremity, they must be superseded; and they that enjoy them must arm, as well as others, in the common Defence. For certainly it is more reasonable that such Privileges should be laid aside for a time, than that, by an unreasonable Superstition for them, the whole Commonwealth should be ruin'd. And therefore at *Rome* all Exceptions from military Service, allowed to the Old, and the Priests, always ceased upon Expectation of a *Sabellick* Invasion ^g. That should too be observ'd, as a wise and good Institution made by *Solon* or *Pisistratus* (which is mentioned by *Plutarch* in the Life of *Solon* ^h) *That such as were disabled in the Wars should be allowed Pensions out of the publick Treasure.* And indeed if the State of the Commonwealth will permit, there is all the Reason in the World that they should have some Consideration made them, who are upon hard Duty, while others sit at ease, and are not only forced to neglect the Concerns of their Families, but to undertake a larger share of Service for the Publick, than other Subjects ⁱ.

^a De Leg. l. 8. p. 927. A. B. Ed. Wech. ^b Vid. Bern. Varen. Deser. Japon. c. 19. ^c Orat. adv. Aristocrat. ^d Vid. Liv. l. 5. c. 6. *Festivarium meretur qui signum relinquit, aut praesidio decedit.* He deserves the *Bastinado* that flies away from his Colours, or deserts the Post he was commanded to. *Nich. Montagne's* Essays, l. 3. c. 12. p. 775. *Justin.* l. 3. c. 3. in *fin.* *Ferdinandus Pinto.* c. 10. ^e *Lycurgus* Orat. contra *Leocrat.* ^f Vid. *Leg. Longobardorum*, l. 3. Tit. 13. s. 1. ^g *Appianus* de *Bello Civili.* l. 2. p. 523. Ed. H. Steph. ^h Vid. L. 10. t. 38. l. ult. *C. de quibus muneribus Num. Lic. se excusare.* *Andreas* *Mauropeneus* Hist. Venet. l. 7. p. 147. ⁱ Vid. *Diodorum Siculum*, l. 1. c. 73. where he gives an Account of the Egyptian Laws relating to the Soldiery. H. And

II. And here it may be inquired, whether, if a Man detain'd Prisoner by an Enemy, to obtain his Freedom, promiseth *that he will never for the future bear Arms against him*, his own Country can afterwards oblige him, contrary to his Promise, to draw his Sword against the same Enemy? Some, I know, suppose, that such a Compact in it self is void, because it is contrary to the Duty every Subject owes the Commonwealth: But, I should not think it so sufficient an Answer, to say that every thing contrary to Duty is therefore immediately void and null; as to deny that it is contrary to the Duty a Subject owes the Commonwealth, to procure himself Liberty, by promising that which is already in the Enemy's Power. For except the Enemy give the Captive his Liberty, he can never bear Arms against him. And therefore the Commonwealth loseth nothing by such a Compact; for unless the Captive recover his Freedom, he must be consider'd as lost already. And therefore when the Commonwealth receives him again from his Captivity, it is supposed to receive him upon such Terms, as leave him power to keep his Promise with his Enemy, especially if he gain'd his Liberty by his own Interest only, without any publick Assistance from the Commonwealth. But cannot the transcendent Power of the Sovereign rescind such an Obligation, when the common Safety requires it; as suppose the Commonwealth be in eminent Danger, except he in particular take Arms? In this Case, I think, that since it is next to a Contradiction for me to be a Subject, and yet to be under an Obligation which must make me unserviceable to the Commonwealth in the greatest publick Extremities; no less absurd is it for me to imagine it possible, that I should be obliged by a simple Compact, not to resist the unjust Violence of a Person, that attempts the Ruin of my self and all that belongs to me: therefore the Force of such a Compact extends to the offensive only, and not to the defensive Wars; especially if the hazard of the common Safety of the whole State be like to endanger mine too. For to what purpose did my Enemy grant me my Liberty, if he intended to tie me up so that I could have no power left me to make any opposition against him, if he should ever after, design any thing against my Life and Fortunes? And therefore such a Compact is no Objection against my taking Arms at my Sovereign's Command in Defence of the Commonwealth. It is a Question something like this, Whether a Captive that hath his Freedom given him by his Enemy upon a certain Condition, upon Non-performance of it, a be obliged to return to his Captivity? And it is affirmed of private Persons: But *Buffiere's Hist. Franc. l. 16.* speaking of King Francis, doubts whether it may be so of sovereign Princes. I shall not determine the Controversy: But I think it would

be the safest and wisest way, not to let a captive Prince have his Liberty, before the Conditions of it are actually performed.

III. From what hath been said it follows, That tho' the Necessities of the Commonwealth do not at present require military Service from the Subject, yet that it is a Crime which ought to be severely punished, for a Man to make himself or others unfit for that Service: For *tho' other parts of my Body*, as *Seneca* saith, *are my own, yet my hands belong to the Publick.* Instances of this sort of Cowardice are frequent to be found even among that martial People, the *Romans* themselves. *Suetonius* tells us the reason why *Tiberius* reform'd the Houses of Correction in *Italy*, was, *because the Keepers of them were suspected, not only to have often taken up Travellers, but to have conceal'd Persons that fled to such Holes for fear of being impress'd Soldiers*. And this might perhaps be the reason why the Emperor *Hadrian* afterwards suppress'd all those Houses. *C. Vettienus* was known to have cut off the Fingers of his left Hand, that he might be excused from serving in the *Italic War*; and his Goods were confiscated for it by the Senate, and himself condemned to perpetual Imprisonment. And *Augustus* expos'd a *Roman Knight*, with all his Estate to Sale, for cutting off his two young Sons Thumbs, that they might not be forced into the Wars. And therefore *Ammianus Marcellinus*, speaking of the Dispositions and Manners of the *Gauls*, saith, *That none of them ever cut off their Thumbs, to make themselves incapable of military Duties as the Italians had done.* And accordingly there were several Laws made among the *Romans*, to restrain such practices. *Trajan* made a Law, *That the Person who disabled his Son, when any Levy was made for War, so that he could not be fit for military Service, should be banished*. And there is another of *Constantine's* extant to this purpose. *That the Sons of veteran Soldiers fit for the Service of the War (some of which have refused to list themselves out of Sloth and Laziness, and others have been so cowardly as to maim themselves, only to avoid the necessity of that Duty) if they are thought incapable to serve in the Army, shall be forced to at endth most servile Offices about the Court*. He that thinks to excuse himself from bearing Arms, by cutting off his own Fingers, shall not escape what he designed to avoid, but shall with that Mark of Infamy be forced to undergo the Drudgery of the Service, since he refused the Honour. And further, *These provincial Subjects, that by such Practices are forced to make their Levies weaker, shall be allow'd so much favour as to bring two maim'd Persons for one whole.* But the severest Law is that in *D. ubi supra, l. 5. de Re Mil.* *If there be any Person that, to avoid being impress'd for the War, hath, as he thinks, secured his Body from danger by cutting off his Fingers,*

a Vid. *Grotius* Lib. III. cap. xxi. Sect. 6. and Mr. *Buddeus* in his *Specimen Jurispr. Hist.* Sect. 6. among his *Selectis Juris Nature*. But when the Effect of the Condition fails, without any Fault of the Person; as if, for Example, a Prisoner of War that is to be exchange'd for one that has been releas'd, should happen to die before the exchange was made. In that Case (says *Grotius*) he that is at Liberty ought not to return to Prison, but only pay the Price of what he cannot effect, that is, give for his Ransom as much as would have been given for the Person that is dead.

b *Seneca*, l. 1. Controv. 7. c *Suetonius*, *Tiber.* c 8. d *Spartianus*, c. 18. Vide Not. *Salmaf.* in loc. *Philos.* l. 6. c. 7. e *Suetonius*, *August.* c. 24. *Am. Marcellinus*, l. 15. sub fin. f L. 49. t. 16. l. 4. l. 12. D. de Re Militari. g V. *Theod.* de fil. militar. apparitor. & veteran. l. 1. Et de *Tironibus*, l. 4. 10.

he shall be condemn'd to be burnt, and the Master that doth not hinder him, shall incur a severe Penalty. But it is probable that this Punishment was to be inflicted only on *Slaves*, but the Laws before mention'd comprehended the *Freemen*. For it is very well known, that the *Romans* would not at first permit their *Slaves* to bear Arms, but in Cases of the greatest *Extremity*. Tho' it is manifest, that this was not observ'd in the latter End of the Empire, as appears from *l. 16. C. Theodos. Tit. cod.* where there is this Law of the Emperors, *Arcadius and Honorius*: *Against the Irruptions of the Enemy we command, that not only the Persons, but their Abilities shall be regarded; and tho' we believe, that Freemen may be moved with a more generous Concern for their Country, yet by the Authority of this Edict, we command the Slaves also to list themselves with all speed for the War, and if they are found fit for the Service, they shall be rewarded with their Liberty, &c.* For that Law in the *Eleventh Book* under the same Title, which is also extant in the *Twelfth Book* of the Codes of *Justinian, Tit. 44. l. 2.* speaks of *Slaves* that were *alieni juris, belong'd to other Men, that the Person that offer'd to send them to the Wars, should be forced to pay a Libra of Gold into the Treasury.* But the *Eighth Law* in the *Theodosian Code*, under the same Title, doth not simply forbid the levying of *Slaves* for Soldiers, but only commands that no *Slaves* should be taken into the choice Companies. And † *Vegetius* complains, that, either by the Favour or Connivance of the Officers, the new listed Men all pass'd the Muster, and that such as were not fit for their Masters Service, were taken to serve the Publick. But some will have it, that the *Italians* and *French* derive their word *Poltrones* from this cutting off the Thumbs: But I am inclin'd to think *Menage* is more in the right ^a, in deriving it from the *Italian* word *Poltro*, which signifies one that always lyes at home upon his Couch.

IV. A Man therefore that is obliged to attend the War, is bound to defend the Post his Commander appoints him to, tho' perhaps he foresees he must in all probability lose his Life in it. And tho' in the general, all Burdens ought to be laid proportionably on the Subjects, so that they may assist one another in the bearing them; or where that cannot be, or there is no necessity of it, that they may relieve one another by Turns, or else excuse themselves by an Equivalent another way, or else appoint every one his share by Lot; yet the Nature of War will not permit, that those dangerous Posts should always be appointed by Lot. And therefore it must be left to the Commander to choose the Persons he thinks fittest, or if there be any Number fit, which of them he pleaseth. Unless there be any that will voluntarily undertake the danger, as *Calpurnius Flaccus* did ^b, and before him *Decius Mus* ^c. And no Man of Bravery or Spirit will ever complain that he is commanded upon such Duty, but will rather commend his

General's Judgment and Conduct in it ^d. And besides, since 'tis by the Protection of the Commonwealth that we enjoy our Lives for a long space of time, which, if we had been expos'd to a State of Nature, we should soon have been deprived of; we must not think it a severe piece of Duty to part with them in defence of the Commonwealth, especially since we are so many other ways indebted to it. And therefore it is not at all unjust, that upon an extraordinary Command of the Commonwealth, and in its greatest Extremities, we should hazard that Life in its Defence, which it doth in effect bestow upon us every day; and especially, since in a State of Nature every Man must be forced to defend himself with his own single Strength, unless he will choose to die, or be enslaved. But now in Commonwealths it is much better to hazard ourselves with a Number, not only because the hopes of Victory are greater, but because, tho' a Man be kill'd in the fight, yet by the protection of the Commonwealth his Goods and Fortunes will be preserv'd for his Relations; which in a State of Nature there could be no hopes of. But however, it ought to be observ'd, that the Design of such Commands is not, or at least ought not to be; to take away the Lives of the Soldiers directly: I say, ought not to be; for we have an Instance in *David*, that Generals are sometimes guilty of such Crimes, *2 Sam. xi. 15.* and he is therefore call'd a Murtherer, *Ch. xii. v. 9.* And it is not uncommon to expose such as are less beloved where they must inevitably be cut off by the Enemy ^e, as *Micopsa* sent *Jugurtha* to *Numantia*, that either his own Valour or the Enemy's might be fatal to him. But the Design of such severe Commands ought to be, either to avert some great Evil; or to procure some great Good to the Commonwealth, and then the Soldiers may justly be engaged in such hard Parts of Duty; tho' it may happen; that they may fall in the Enterprize. For the Conditions of a decisive Combat are either, kill your Enemy, or die with him: For this is better than to fall alone. And therefore I think those Commanders at Sea may justly be acquitted from the Guilt of Self-Murder, that upon the express Order of their Superiors, or at least upon a Presumption of it, from the State of the Engagement; blow themselves up with their Ship, rather than be made a Prize to the Enemies. For let us suppose the Number of Ships equal on both sides; when one of ours is taken, the Enemy hath an Advantage of two Ships more than We: If ours only be lost, then they have but one more; but if both sink together, the Strength on both sides will still be equal. And 'tis scarce possible if our Ship be blown up, but it must ruine one or more of the Enemy's with it. For the greatest Danger of being taken, is when the Ships are Grappling; side by side; and generally the Enemy must suffer more than we by such an Act: For 'tis evident

† *Vegetius de Re Militari, l. 1. c. 7.* ^a In Origin, Ling. Franc.

^b *Flor. 1. 2. c. 2.*

^c *Liv. 1. 7. c. 34.*

^d *Sensar de Provid. c. 4.* Why are the Bravest Men in the Army commanded upon the most difficult Enterprize? It is the Choice of the Troops that the General sends out to surprize the Enemy by Night, to observe their Motions, or to force a Party to dislodge them; and yet none of them that are sent, complain that their Commander deals hardly with them, &c.

^e Vide *Q. Curtium, l. 7. c. 2. Polyb. 1. 1. c. 9. Diod. Siculus, l. 14. c. 85. Et. l. 19. c. 48. Justinus, l. 12. c. 5. n. 8. Zonar. T. 2. in Maurit. Sallust. B. Jugurth. c. 7.*

they must have much the Advantage of us, when they force us to fly to so desperate an Expedient. But to blow up only to avoid being funk, is I think, a very ill Choice; because a Man may have some Hopes of escaping by *swimming* ^a. It was an old Law among the *Chinese*, *That the General should forfeit his head, that had the Misfortune to succeed ill in the Fight, tho' not through his own Fault*, by which they design'd to oblige their Commanders, whenever they engaged an Enemy, to think of nothing but Victory, or Death ¹.

V. But what if the Life of a Subject be demanded without the Hazard of a Fight; for Instance, to appease a powerful Neighbour, and in consequence to divert some imminent Evil, or perhaps prevent the Ruine of the Commonwealth? In such a Case it must be consider'd, what Reasons such a Neighbour may have to demand the Subject to be yielded up to him. If it be for any Crime he hath been guilty of, tho' perhaps there may be some easy way, or other, for him to escape, yet he ought to be particularly cautious how he exposes the Commonwealth to Danger upon this Account. And therefore though we may suppose, that a Man under such Circumstances is not obliged to deliver himself up to his Enemy; yet he is bound to dispose of himself so as to bring no Inconveniences upon them that give him Reception. And I make no doubt but his own Country and Commonwealth may for that reason eject him against his Consent: For perhaps it may be thought less Cruelty to do so, than to surrender him up. But it may be supposed that the Lives of certain Subjects may be demanded for some publick Crime, of which those particular Persons are wholly innocent. Such a kind of Calamity is related to have befallen the *State of Athens* for the Death of *Androgeos*; in Revenge of which *Minos*, after he had subdued the *Athenians*, demanded of them, by way of Tribute, Seven young Men, and as many young Women, to be devour'd by the *Minotaur* ¹. And in a Case like this I do not see how any Subject can refuse to take the Chance which falls to his Lot (which is the fairest way of Decision between Equals) unless there be a *Thesaurus* found, who will voluntarily undertake to conquer the Monster. But the Difficulty will be greater, if we suppose the Life of an innocent Person to be demanded, or suppose some other Evil threaten'd him as great as Death, without any pretence of publick Guilt, or private Crime. We have an Instance of a Case in *Libanius*, Tit. 1. Decl. 27. where a Tyrant demands a certain beautiful young Man of a neighbouring City, threatening War if he was denied. The City chooseth to hazard a War, rather than deliver him up. But when it was closely besieged by the Tyrant, the Father of the young Man kills his Son, and throws him over the Wall; and afterwards when the

Siege was rais'd, he is accused of Murther ^c. I shall not hear either accuse, or defend the Father: He might possibly make a better *Defence* for himself than *Virginus* did in *Livy*, L. iii. c. 50. however, I think it is past dispute, that the Commonwealth is not obliged to protect such a Person to its own Ruine: For so the Commonwealth must be destroy'd, and the innocent Person be far from being secured by it. Neither can any Man desire that the whole Commonwealth should perish with him, and upon his Account. The only Refuge such an unhappy Person can take, must be either to provide for himself, if he can, by fight; or else by attempting some bold and dangerous Enterprize. When all fails, he must submit to unavoidable Misfortune, in which it may be possible at least for him to preserve his Mind innocent ^d; since it is utterly unlawful for a Man to destroy himself to avoid the most injurious Usage. And the Commonwealth (after it hath defended such an unfortunate Person to the utmost of its Power, and endeavour'd as far as possible to assist his Escape some way or other; and all proves to no purpose, and imminent Ruine cannot be well otherwise avoided) may at the last forsake him; that is, not hinder his Enemy from taking him: For it is a cheap Peace that can be bought with the loss but of one Subject. But that the Commonwealth should deliver him up to his Enemy, or force him to surrender himself, is, I think, neither lawful nor necessary. We have an Example of this Nature in *Megacles* of *Messana*, *Marselaer Legat.* l. 1. c. 33. and of something greater in the Story of *Sperthias* and *Bulis*, who voluntarily surrender'd themselves up to *Xerxes* to satisfy him for the Injury the *Lacedemonians* did him in killing his Ambassadors ^e. But however the Commonwealth ought to set a greater Value upon the Lives of the Subjects, than to squander them away profusely upon the Fear of uncertain Danger, or upon prospect of unnecessary Good; neither is any Subject obliged to sacrifice himself upon such Occasions. And therefore the two Brothers, the *Phileni*, did more for their Country than could have been desired of them ^f. And *Caiaphas* made a very ill Application of what was otherwise a good Saying, *John xi. 50.* implying that it was lawful to take away an innocent Person's Life, that the *Romans* might not be jealous of any Revolt among the *Jews*, and so take an Occasion to bring a War upon them; especially since it would have been easy to have prevented such Suspicions by Measures much gentler than that of the Death of an innocent Man. And I do not see how the Action of *Darius* was excusable, when he threw away so many thousand Lives only to gain *Zopyrus* Credit among the *Babylonians* ^g.

VI. It is also often necessary, that for the Ratification of publick Compacts, some of the Subjects be given for Hostages ². And the civil Power

—Whose greatest Care Was not to be depriv'd of Death.

^a *Lucan*, l. 3. v. 701, 702.

— Non perdere letum.
Maxima cura fuit.

^b *Vid.* *Virg. Æn.* VI. 20 *Hvgin.* Fab. 41. *Ovid.* *Met.* VIII. 170. *Plut.* *Thesius.* ^c *Vide* *Bœcler in Grot.* L. 1. c. 1. s. 6. p. m. 95.

^d *Vid.* L. 3. c. 1. l. 1. §. 6. *D. de Postulando*

^e *Herodot.* *Polym.* 1. *Grot.* l. 2. c. 25. f. 3.

^f *Vide* *Sallust.* *de Bell. Jugurth.* *Pomp. Mela.* l. 1. c. 7.

^g *Herodot.* *Thalia, in fin.*

Mr. BARBEYRAC'S NOTES on §. IV, VI.

² See our Author's *Abridgm. De Offic. Hom. & Civ.* l. 2. c. 13. §. 2. ² See hereafter in C. 8 f. 6. and *Grot.* l. 3. c. 20. f. 52, & may

may force them to undertake this Duty, when there are none that offer themselves voluntarily. And if any over powerful Enemy demand certain particular Subjects for Hostages, they cannot, I think, upon any pretence refuse. But where there is any Number of Persons proper to be given for Hostages, and it is indifferent to the Party we make the Agreement with, or our selves, which of them be given; to take away all Occasion of Complaint, or Suspicion of Partiality, the proper Method will be to determine the Matter by Lot. And if the Hostages are to be detain'd for any long time, it will be reasonable to relieve the first, by sending new ones in their places: As also to take Care, that the extraordinary Service the Hostages undertake, more than other Subjects, shall be compensated to them some other way. And here it may be enquired, Whether the Lives, or only the Liberties of Hostages are engaged? And, I think it sufficiently appears, by giving up the Hostages, that thus much is actually done and intended: 'We deliver these Persons into your hands as a part of the Commonwealth we particularly value, and if we break the Articles of Compact, we leave it entirely to your Mercy to do with them what you think fit. Thus the City of *Liege* gave Hostages to *Charles Duke of Burgundy*, upon Condition, *That if they did any thing contrary to the Agreement, he might freely give himself Satisfaction upon the Hostages; tho' the Duke afterwards dismiss'd them*.' And therefore since the Breach of Compacts of this Nature is a just Reason for levying War against the Party which is guilty of it; it is manifest, that after such Breach of Compact, and after the War is begun, that the Hostages themselves may be look'd upon to be Enemies, in the same manner, as all the Subjects of that Commonwealth, comprehending such as were no way necessary to the Occasion of the War. And 'tis certain that Hostages have often suffer'd in the same manner as profess'd Enemies. Tho' on the other hand there have been many others, who have thought it barbarous and inhuman, to revenge the Injuries others have done, with the Deaths of innocent and unhappy Persons ^b. And it is certainly false to say, that the Hostages are given with Intention that they should suffer Punishment for the Compacts violated by the Commonwealth. For I cannot see how the End Men ought to propose to themselves from punishing, can possibly be obtain'd by the Punishment of an innocent Hostage, who did not properly consent to the Violation of the Compacts, but only did not refuse to suffer Evil in another's stead,

which in it self is no Crime. And the Hostages will notwithstanding be a sufficient Caution, tho' by the Law of Nature they cannot properly be punished for another's Default: For it is enough that they are in such a State, as leaves them at any time expos'd to the Liberties of War, and that their Security depends solely upon the pleasure of an injured and angry Enemy. But however, the Truth is, the Commonwealth directly engageth only the corporal Liberty, and not the Lives of its Hostages; because it firmly resolves (or at least ought to do so) to observe its Faith; and therefore morally supposeth no such Case by which it shall give the other Power over the Life of the Hostage. And without dispute, the Commonwealth offers great Injury to the Hostages, either by unjustly breaking Compacts, and exposing them to the Mercy of the Enemy; or by giving them up, only with a Design to betray him into Security, and so make the greater Advantages upon him. But on the other hand, let us suppose the Party that receives the Hostages may take Advantage from thence, either to imploy them in some secret Treachery against us, or to provoke us with open Injuries, threatening Death to them, if we resist him: In such a Case it must be thought reasonable, that if the Injuries are so great, as to make it more supportable, to hazard the Lives of innocent Hostages, rather than the Commonwealth should suffer them, we may very justly neglect the Consideration of their Danger, and make all the Strength we can to resist the Enemy. And the Commonwealth in such a Case doth no greater Injury to the Hostage, than it doth when in War; it appoints particular Subjects to certain Posts, in a brave Defence of which they must either die, or be made Prisoners. And the Hostages ought patiently to submit to such fatal, unavoidable Misfortunes, and not be dissatisfied with their Country, since it could not be supposed to foresee so unexpected a Case ^c. Neither ought we upon this Account to set the less Value upon a civil State, since such extraordinary Cases seldom happen in it; when in a State of Nature, it is impossible but such Inconveniences must be very frequent. And this Reasoning must determine the Case that happen'd to the People of *Utica*; some of the Subjects of which City *Agathocles* intercepted, and tied in certain Engines which he placed in the Front of the Battle, that so their Fellow Subjects might be under a Necessity of killing them, whenever they attempted to beat him back ^d.

^a *Phil. de Comins*, l. 2.

^b *V. Groc* l. 3. c. 11. f. 18.

^c *V. Ammian. Marcellinum*, l. 28. c. 6.

^d *V. Diosd. Sicul.* l. 20. c. 55. *Gunter. Ligurinum*, l. 10. *Groc.* l. 3. c. 27. f. 52. *Et. Bzeler.* in *Groc.* l. 1. c. 1. p. m. 102.

Of the Power of the Sovereign, over the Lives and Fortunes of the Subjects, in Criminal Cases.

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| <p>I. <i>The Power of Life and Death, whether, and how transferr'd, from particular Men to the Commonwealth.</i>
 II. <i>In a Liberty of Nature no human Punishment;</i>
 III. <i>But only in a Commonwealth.</i>
 IV. <i>Punishment what.</i>
 V. <i>Punishing, to what Species of Justice reducible.</i>
 VI. <i>That one Man should punish another not unjust.</i>
 VII. <i>The power of punishing where lodg'd.</i>
 VIII. <i>Human Punishment ought to have some End.</i>
 IX. <i>The first End of Punishment the Amendment of the Offender.</i>
 X. <i>Whether lawful for any Man to correct any.</i>
 XI. <i>The second End of Punishment, caution for the Injured.</i>
 XII. <i>The third, the general Security.</i>
 XIII. <i>How far private Men are allowed to inflict Punishment.</i>
 XIV. <i>What Offences it is needless for human Justice to punish.</i>
 XV. <i>Whether lawful at any time to pardon.</i>
 XVI. <i>How far this is lawful antecedently to the Civil Law.</i>
 XVII. <i>How far after it.</i>
 XVIII. <i>The Quality of the Crime to be estimated from the Object of it.</i></p> | <p>XIX. <i>And from the Passion that gave the Impulse.</i>
 XX. <i>And from the force of the Inclination and Intention.</i>
 XXI. <i>And from the Obstinate and Resolution of the Criminal.</i>
 XXII. <i>And lastly, from Custom and Habit.</i>
 XXIII. <i>What to be regarded in demanding the Quantity of the Punishment.</i>
 XXIV. <i>The Measure of Punishments what.</i>
 XXV. <i>In Punishments the Person of the Sufferer to be regarded.</i>
 XXVI. <i>The Jewish Law whether an universal adequate Measure of the Punishment.</i>
 XXVII. <i>Of Retaliation.</i>
 XXVIII. <i>A Corporation or Community how punish'd.</i>
 XXIX. <i>The Crimes of Corporations wear out in course of times.</i>
 XXX. <i>Every fatal Evil not an human Punishment.</i>
 XXXI. <i>Difference between Damage suffer'd directly and by Consequence.</i>
 XXXII. <i>Difference between the Occasion and the Cause of Evil.</i>
 XXXIII. <i>No Man to be punish'd for another's Crime.</i></p> |
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THE civil Sovereign hath also a Power over the Bodies and Lives, as well as Fortunes of the Subjects, in criminal Cases, which is usually call'd in short, *The Power of Life and of Death* (a Power manifestly different from that which God hath over his Creatures, *Pf. l. xc. 3.* or that of Men over Beasts.) And the first Dispute that riseth upon this Subject, is, How such a Power could by Compact, from particular Men, be transferr'd to the Commonwealth? For since Punishment is an Evil inflicted against the Consent of the Party punished, and that which a Man inflicts upon himself, cannot be said to befall him against his Consent; it will be some Difficulty to account, how a Man can have a Power to punish himself, and consequently be in a Capacity to transfer such a Power to another. For the Severities of the monastick Life, and the Pains Men inflict upon themselves by *ecclesiastical Discipline*, are either no Punishments properly speaking, but are rather applied by way of Physick to suppress the Force of Lust, or else are wholly involuntary and imposed by the Priests upon the Pretensions of the Divine Authority of their Office. And therefore it makes no Alteration in the Nature of the Punishment, that the Stripes are inflicted with their own hands, because the Fear of a greater Evil threatned to the Disobedient, forces them to execute that Rigour upon themselves; as we see Malefactors go to the place of Execution, who would be dragg'd thither, if they refused. So it is the Custom in some Nations for the condemn'd Criminals to dispatch themselves ^a. And therefore as to the matter in Dispute, it will be easy to conceive, that as in natural Bodies the Mixture and Temperament of several simples forms a compound, in which we often perceive such Qualities as cannot be found in any of the Ingredients that compose the Mixture: So Bodies politick, which are compounded of a number of Men, may have a Right

resulting from such a Composition, which no one of the particulars was formally possess'd of; which Right, derived from the Union, is lodged in the Governors of such Bodies ^b. Thus it was never pretended, that every particular Man hath a power to make Laws for himself, and yet when every Man submits his Will to one, 'tis confess'd there commences a Power to prescribe Laws to all. After the same manner the Head of a Body politick may have a Power to inflict Punishments on the particular Members, though the Members had no such power before themselves. And this will be easy to account for, since every particular Man obligeth himself, not only to defend the Person that is to be punished, but if need be, to assist the Sovereign as far as he is able against him ^{c d}. And from hence the reason is evident, why it does not follow, as some suppose, that whatever the Sovereign takes away from the Subjects by way of Punishment, is done by their Consent, because they at first consented to allow of, and confirm every Action of the Sovereign; because, since that particular Case, which gives the Sovereign a power over the Life of the Subject, is left entirely in the power of the Subject himself, so as he may for ever prevent it, if he pleases; therefore such a Case is never consider'd by particular Men as ever liket to happen. *Hobbes* indeed in his *Leviathan*, c. 28. in the beginning asserts, That the Right the Commonwealth has to punish is not grounded on any Concession, or Gift of the Subjects, but that the Foundation of that Right is built upon that other, which, before the Institution of Commonwealths, every Man had to every thing, and to do whatever he thought necessary to his own Preservation. And therefore that that Right was not given, but left to the Commonwealth; which yet, since it has power sufficient, it may make use of, as it pleases, to the Security of the Subject. To which it may

^a *Dial. Sculuz*, l. 3. c. 5. speaking of the *Ethiopi*s, says, One of the Officers is sent to the Criminal to carry him the Signal of Death, upon the Sight of which he goes home and kills himself. ^b *L. 41. c. 3. l. 46. D. de acquir. rer. domin.* The Author here cites a Law of the *Dixells*, which does not concern the Rights that belong to whole Societies in general, tho' the particular Members of which they are compos'd are not invest'd with 'em; but which only shews that we may make over to another, a Right that we have not our selves; as for Example, a Creditor that sells his Debtor's Pledge, makes the Purchaser Master of the Pledge, tho' he himself had no property in it. *Non est novum, ut non Dominum non habet, alio Dominum prebeat. Nam & Creditor, pignus vendendo, causam domini prebet, quam ipse non habuit.*

^c *Citat. Hobbes de Civ. c. 2. s. 18.*

^d See above in *B. 3. c. 7. s. 5.*

be answer'd; That the Right of Punishing is different from the Right of Self-preservation : and by the Exercise of it upon Subjects, we can never understand what a State of Nature allowed, where there is no Subjection. But I must farther add, That the Punishments I here speak of, are such only as human Legislators arbitrarily prescribe against *Offenders*, and as are distinguish'd from those Evils which are the natural Consequences of Sin.

II. But in treating of the Right of punishing the Subjects, I will premise that I intend to confine my self to that Right only which one Man exercises over another, without Regard to the Methods and Proceedings of *Divine Justice*, which it must be allowed is in many Cases of a Nature much different from human Judicature. To begin therefore as high as we can ; it must be observed, that, in general, in almost every Sin, but especially in such as bear Relation to another Person, there are two things considerable ; *First*, the Defect or Deviation from the Law : *Secondly*, the Harm or Damage another Person sustains, either *directly*, or *indirectly* by it. And so far we may be certain, that every Man is obliged by the Law of Nature to make satisfaction for the Harm or Damage another suffers on his Account ; and in case it proceeded from malicious Design, to give *Caution* for his good Behaviour for the future. But there is a Difference indeed between such Caution, when it is to be given by Men that live in a Liberty of Nature, and them that are *Subjects* of a *Commonwealth*. The Law of Nature seems to oblige the First to give no other Caution, than that after they have express'd a *Concern* for what they have done, and voluntarily offer to compensate the Damage, they should either by simple *Asseveration*, or at farthest by Oath, oblige themselves to forbear the like Injuries for the future. For a voluntary Repentance is a sufficient Evidence of an Alteration of Mind, and that their Resolution to abstain from Violence for the future is sincere. And therefore if the injured Party refuses to accept of such an Accommodation, and is either so diffident, or so perverse, as to endeavour to force upon them Articles of larger Extent ; since the others are not obliged by the Law of Nature to comply so far ; the Blame of Breach of Peace must lie on his side, and the others may justly resist him. And in such Circumstances the Justice of the War must be determined for them that offer'd the Injury, and the Injustice will be on his side that receiv'd it. But when a Man will give no *Satisfaction*, unless he be forced to it, since from thence he sufficiently discovers the obstinacy of his Temper ; and when no Terms of Composition will be accepted, unless the Party injured has Strength enough to overpower the injurious ; it must be left to the Pleasure of the Conqueror, to insist upon what Proposition he thinks most likely to secure his future Quiet. And when the difference is grown to that height, the Conqueror may take the liberty, not only to disarm his Enemy, to demolish and take Possession of fortified Places, to condemn him to perpetual

Imprisonment, and the like ; but may also put him to Death, upon sufficient Assurance, that if ever he recovers Liberty, he will renew his Outrages, and there can be no other effectual way found to prevent it. But then, as this Caution is demanded rather in a way of War, than Punishment properly so call'd (tho' tis usual with some to call all manner of Evils, whether such as are the natural Consequences of Sin, or those that are inflicted in a Liberty of Nature for Injuries committed, by the Name of Punishments, in a more loose Sense of the Word) so it cannot properly be said that a Man is obliged † to stand to it. Because it supposes and implies a sort of Blemish and Stain upon the Mind, and a Sin against the Law of Nature, in the Person 'tis extorted from, *viz.* his refusing to give a voluntary Satisfaction, and a violent Defence of his Fault. Nay, since the Evils that are the Effects and Incidents of War, cannot properly be call'd Punishments (as will sufficiently appear from what follows) it is manifest that human Punishments in a strict Sense, or such as are derived from human Authority, cannot affect them that live in a Liberty of Nature, though it cannot be denied, but that they too are subject to those Evils which flow by a natural Connexion from Sin.

III. But in Commonwealths if a Man suffer Harm or Damage, it is not only recovered with much greater Ease, than in a State of Nature, by a War that must be supported by his own single Strength ; but there is before hand as much Care taken, as the Nature of human Affairs will permit, to prevent Injuries or Harm that he offer'd the Subject, by awarding Punishments to be afflicted by publick Justice on all Offenders against the Law. For since the Wills and Inclinations of Men are so easily byas'd either to Good or Ill, it was certainly the most effectual Expedient that could have been pitch'd upon, to direct, or restrain them, to set in View the dread of some present Evil.

IV. *Punishment* therefore, in general may be thus defined ; *It is an Evil of suffering, inflicted for an Evil of doing, Or, it is some uneasy Evil inflicted by Authority, in a compulsive Way, upon View of antecedent Transgression*. For though 'tis common to enjoin several sorts of Labour in Punishment ; as suppose a Man be condemn'd to the *Mines*, to the *Gallies*, to the *Work-house* ; to raise a *Fortification*, to cleanse the *common Sewers*, or the like ; yet these are to be look'd upon only, as they are Hardships, or servile laborious Employments, and cause an Uneasiness in the Person who is forced to submit to them ; and therefore may be reduced to Sufferings. It is said therefore, that *Punishment is inflicted upon view of antecedent Transgression*. And hence it follows that none of those Inconveniences a Man suffers by an infectious Distemper, by an infirm or maim'd Body, or by any Uncleanness, can properly be call'd Punishments. Many of this Nature are mention'd in the *Jewish Law* ; as when the *Lepers* are commanded to be *separated*

^a And this *Plutarch* seems in some measure to be sensible of, *L. de Sera Num. vindict. p. 449. F.* A Man can hardly conceive any thing Good with better Assurance, than that he is one that exactly knows the proper time for the Cure of Vice, that Punishment is the usual Remedy he applies to every Sin, which he does not always distribute in the same Proportion to all, or at the same time.

Mr. BARBEYRAC'S NOTES on §. II, and IV.

¹ See above in B. 2. c. 5. f. 3. towards the End. † The Author here follows a false Idea of the Nature of the Obligation. See the 8th Note on the 4th Section.

² V. Grot. L. 2. c. 20. f. 1.

³ See *Levit. Ch. xiii.*

⁴ See *Deuter. xxiii. 4.*

⁵ See *Levit. Ch. xv.*

from the rest of the People; and when such as were maim'd or blemish'd in any Limb, were to be excluded the Priesthood, and the like^a; which are no more Punishments, than it is for a Stranger, or a Person of mean Quality, to be made incapable of certain Offices in the Commonwealth, or than it is for a Man to be in pain at the setting a broken Leg. Tho' sometimes such Misfortunes are improperly call'd Punishments, by the Resemblance they bear to the real. As we say in common Discourse of Persons extremely infirm, or miserably deform'd, that *their Life is a Punishment to them*. And hence it also follows, that Imprisonment, the Design of which is only the safe Custody of the Party accused, is not properly Punishment, because no Man can be suppos'd to be justly punish'd, before he be judicially heard. And therefore whatsoever Hurt a Man suffers by Bonds or Restraint, before his Cause be heard, and

he be declar'd guilty, more than is a necessary to secure his Person, is against the Law of Nature, and ought to have Satisfaction, or at least some Allowance¹ made for it in the subsequent Punishment. I add, inflict by² Authority, to distinguish Punishment from those Evils a Man suffers, either by War, particular Quarrels, and Self-defence, or by private Malice. And therefore, there is no real Disgrace in losing an Ear, suffering the Blows of a Cudgel, or the like, but only in the Cause of it. 'Tis *Selden's* Opinion indeed³, *That the Slaughter and Spoils committed in War are a sort of Punishments*; which may be true enough in this Sense, that a just War, begun upon just Provocations, and the Calamities the injurious Party suffers by it, may be look'd upon as natural Punishment, and that a conscientious Warrior should endeavour to reduce the Outrages of War to the same Calmness and Proportion the civil Court ob-

^a *Solent praesides in carcere continendos damnare, aut ut in vinculis continentur. Sed id eos facere non oportet: Num hujusmodi poena sunt interdicta: carcer enim ad continendos homines, non ad puniendos haberi debet. D. l. 48. t. 19 De Poenis, l. 8 l. 9.*

^b *De J. N. & G. sec. Heb. l. 4. c. 11.*

Mr. BARBEYRAC'S NOTES on §. IV.

¹ See *Levit. xxi. 17, &c.* ² By a Rescript of the Emperors *Honorius* and *Theodosius*, it is ordain'd, that those who were condemn'd to Banishment, should be releas'd and discharg'd from the Punishment, provided it was found upon Examination, that during their Imprisonment the Term of their Banishment was expir'd. *Omnnes, quos damnationis conditio diversis exiliis destinatos, metas temporis praestituti in carceris implevissent, custodiam deprehenderit, solutos poena vinculisque laxatos, custodia liberari praecipimus, nec formidare miserias ullas exilii. Sit satis immensorum cruciatuum semel luisse supplicia ne hi qui diu privati sunt aerae communis haustu, & lucis aspectu, intra breve spatium catenarum ponderibus praegravati, etiam exilii poenam sustinere compellantur. Cod. Lib. 9. Tit. 47. de poenis. Leg. xxiii.*

³ The Author here leaves *Grotius*, and in my opinion, without any Necessity; tho' he is very much follow'd in that respect, by those Authors that have lately written Treatises of the *Law of Nature*, and even by *Mr. Titius*, who also extols abundance of things in his Observations on his Abridgement *de Officio Hom. & Civ.* However I will contradict 'em both, with so much the more Confidence, since besides the Advantage of defending *Grotius*, I shall have nothing to do but to follow the Opinion of *Mr. Lock*. The *Laws of Nature* (says that great Philosopher, in his second Treatise of Civil Government, Chap. ii. Sect. 7. &c.) as well as other Laws that are impos'd on Men here below, would be entirely useless, if in the State of Nature, no body had the Power to put 'em in Execution, and punish those who break 'em, whether with respect to private Persons, or in reference to Mankind in general, whose Preservation is the end of those Laws which are common to all Men. Perhaps they will say, That in the State of Nature there are some Evils annex'd to ill Actions by a necessary Consequence, and which our Author calls upon that Account, *natural Punishments* (see above Book ii. Chap. iii. Sect. 21.) without speaking of the Punishments which God exercises besides at his own Pleasure, by virtue of his being our Sovereign Legillator, and Author of the *Law of Nature*. *Mr. Lock* has not thought fit to obviate this Objection: But if it had been propos'd to him, he would have answer'd in all appearance, that neither of these two sorts of Punishments are sufficient to restrain human Malice, or procure the Peace and Tranquillity of Mankind; as it appears by the Complaints that have been made in all Ages, of the Prosperity of the Wicked, and the unfortunate Condition of the Good. Moreover (says *Mr. Bernard*, in his *Novel. de la Rep. de Lettres Juin. 1706. pag. 648.*) neither those who suffer the Punishments here in Dispute, nor those who are Eye-witnesses of 'em, do regard 'em as Punishments inflict'd for such or such Crimes. How many Distempers and Illnesses are there occasion'd by Debauchery, which no body imputes to the true Cause that produced 'em? This is still more true in the Punishments that God inflict, and whose Crimes are not the physical Cause. Thus he causes an Adulterer, an Usurer, or a Murderer, to perish by a Shipwreck, or break their Limbs by a Fall; but yet it is very seldom, that either the Person to whom these Accidents happen, or those who see 'em happen, ever guess the true moral Cause of 'em. Now that the Punishment inflict'd for a Crime may work some Effect, both upon him who suffers it, and upon them that are Witnesses of it; both must throughly be persuaded, that the Punishment was inflict'd for such and such a Crime. One cannot then forbear acknowledging, that in the State of Nature, it is requisite to have some Body here below, to punish Crimes; and if so (continues *Mr. Lock*) then every one is invest'd with that Power with respect to any other, since all Men are by Nature equal. However, this is not absolute and arbitrary: We must never suffer our selves to be so far transported with Passion, as to punish a Crime with too much Severity. All that is to be done on this Occasion, ought only to tend towards the Reparation of the Injury, and preventing them for the future, from doing the like. When any one violates the *Laws of Nature*, he in so doing demonstrates to the World, that he tramples under Foot the Maxims of Reason and Equity, which are the Rules God has prescrib'd to human Actions, as a common Security to Men; and thus he becomes dangerous to Mankind. As then every one has a Right to take care of every thing that relates to the Preservation of human Society, he may, by following the Light of quiet Reason, inflict on such a Person, what Punishment he thinks most likely to produce Repentance in him, and hinder him from falling again into the same Crime, or to deter others by his Example. When a Man kills another on purpose, he ought to be destroy'd himself, like *Lions, Tygers*, and other wild Beasts, with whom no Society or Security is to be had. *Who ever shall meet me, will kill me*, is the voice of Nature, which the Remorse of Conscience forced from *Cain*, after he had slain his Brother *Abel*, *Gen. Chap. iv. v. 14.* By the same Reason, we may punish, out of any civil Community, the least Infringement of the *Law of Nature*, as well as in a State, if it be necessary to the End for which indicting of Punishments ought to be design'd. The very same Laws that forbid the Crime, prescribe also the Manner and Degrees of the positive Laws which often have no other Foundation than the capricious or vicious Passions of the Legislators of the Earth. If any one thinks it strange, that we give to every individual Person, in the Independency of the State of Nature, a Right of punishing those who are guilty; let 'em tell us, by what Right Sovereigns punish, even with Death, any Stranger that has committed a Crime in their Dominions: For the Laws have no Force in relation to Foreigners: and Sovereigns, or Magistrates of Civil Communities, have no more power over those who are not Members of 'em, than each Person has in reference to another in the State of Nature. However, the Practice we are here speaking of, is very common and universally allow'd. Yet, I fancy our Author would not have fail'd to have answer'd this last Reason of *Mr. Lock's*, that every Foreigner, that enters into a State, either by way of Travelling through, or to make some stay in it, tacitly submits to the Laws of the Country, and becomes in some measure a Subject to the Prince, as long as he resides in his Dominions. (See above in Book 7. chap. ii. Sect. 200.) But it may be answer'd, that this tacit serves

erves in inflicting Punishments. But 'tis evident, there are other Distinctions between the Evils of War, and Punishments; since, as *Tacitus* observes, *In time of Peace the Cause and Merits of the Person are always regarded, when ill at the Sword makes no Difference between the criminal and the innocent.* Neither does the civil Court look upon those Evils to be Punishments, that are only the natural Consequents of Sin; as when a Man loſes his health by committing any unlawful Act, or by assaulting another, is beat himself; for these are Evils not inflicted by the Authority of the civil Sovereign. And therefore if a Man by ill Courses happens to weaken his Constitution, impair his Estate, or lose the good Opinion of his Friends, from whom otherwise he might possibly have expected Favours; this does not make him the less liable to Punishment. And lastly, it was necessary to subjoin, that the *Penalty was to be inflicted in a way of Compulsion, or by Force*: Because otherwise it would be impossible to attain the End design'd by punishing; which is to deter Men from offending by the Severity of the Punishment. And therefore some have not thought it proper to allow the Criminals the Choice of their own Punishment; because, as the

Declaimer says ^a, 'It might seem to give Countenance to Vice; and because it would take off those Fears that are generally the strongest Guard upon Mens Innocence, to allow *Delinquents* to suffer what way they pleas'd. For, as he reasons, a Man allow'd the Liberty before-hand to compose himself to an obstinate resolute Temper of Mind, may defy all our Racks and Tortures. 'Tis a Mistake to measure the Security of the Punishment by the Terror only of the Name of it, for there can be no Punishment but that which a Man suffers unwillingly and with Regret. And there can be no Pain but that which our own Impatience gives us. 'Tis our Fears only that make Cruelty itself look terrible. How can we call that a Punishment, which Men will meet half way, and which they are ready to demand? Condemned Criminals should be drag'd to Execution, and not left to go as they please". But after all, such a Choice does not always make the Punishment involuntary, but only perhaps mitigates the Degree, or alters the Manner of it; still the Punishment, whatever it be, that at last determines the Choice, is certainly involuntary and the Effect of Force.

Submission does not seem to extend to the giving the Sovereign a Power of punishing a Foreigner with Death, especially for certain Crimes committed in secret, or which are not hurtful to the State, but by the ill Example they give the Subjects; as Sodomy, Bestiality, &c. would be. All that could be done with respect to a foreigner would be to oblige him to make reparation for the Injury he had done to any of the natural born Subjects of the State, and then force him to depart from thence. If then Sovereigns put a Foreigner to Death, in form of Punishment; it must certainly be by virtue of a *Right*, that every one naturally has, of punishing the Violation of the *Law of Nature*. 'Tis thus that I answer'd before-hand the Reason alledg'd by Mr. *Hersius* in his Dissertation, *de Societate, primo Juris Naturalis Principio*. Sect. iii. xxv. which I had not seen before the first Edition of this Work. All that the same Author says there farther, is nothing to the point, since he will not prove that in the State of Nature, the Interest of Human Society, and the Laws of Sociability do not require the Punishment of the Wicked, tho' the injur'd Person, would not, or could not, either by himself, or the assistance of Friends, do them any Mischief: certainly we ought to concern our selves for the general good of Mankind, without any Exception; and to prevent as much as possible, the Evils to which they might be expos'd: And if so, 'tis also our Duty, to restrain, or discourage the Malice of those, who either by themselves, or by their ill Example, or through hopes of Impunity, will probably be the Occasion of doing an Injury to somebody, in defiance of the *Laws* both of *Nature* and human Society. 'Tis true, that in the State of Nature, these sorts of Punishments are not inflicted by Authority; and 'tis the source of their Illusion, who will not bear to have the *Right* of punishing out of civil States mentioned in their hearing. Yet, however, the Reality and Foundation of this Truth is no less certain for all that. But to return to Mr. *Lock*. He observes farther, that besides the *Right* which is common to all Men in the State of Nature, to punish the Violation of the *Laws of Nature*, he that is directly injur'd, or that receives some immediate damage by a Crime, has an entire and particular Right to demand Reparation for the Injury that has been done him. And if another Person find his Complaints and Pretensions to be well grounded, he may join with him, and assist him to make the offender give him satisfaction. (*It is also much more honourable and generous, as Gro-tius* very well observes upon this Subject, Lib. II. Chap. xx. Sect. 40. Num. 7.) *to pursue the Reparation of Injuries done to another, rather than to demand Satisfaction for those done to our selves, which is more to be fear'd on Account of the last, that an Excess of Resentment should make us exceed the Bounds of a just Revenge, or at least fret our Spirits too much.*) Of these two sorts of *Rights*, the first, I mean that of punishing the Violation of the *Laws*, is intirely confer'd upon the Magistrate, to whom, every one upon his entrance into any State, immediately submits, so that whenever the good of the Commonwealth allows it, he may, barely upon his own Authority, shew Mercy to the Guilty: But he has not the same *Right* or *Power* to demand Satisfaction for an Injury, or Reparation of a Damage done. The Magistrate cannot excuse the Offender; and the injur'd Person still keeps his *Right*, so that they do him wrong, if they hinder him from the Reparation that is due to him. Mr. *Lock* afterwards makes an Objection himself against the *Power* which he gives to every particular Person, in the *State of Nature*, of putting the *Laws of Nature* in Execution, and punishing those that infringe 'em; which is, that Men being by this Means become Judges in their own Cause, and being besides full of Passions, especially the Spirit of Revenge, they would generally exceed the bounds of Equity; from whence a thousand Evils and Disorders follow. I own (*answers he*) that the Civil Government is a proper Remedy for these Inconveniencies, which without dispute are very grievous. But if the *State of Nature* is to be disannull'd upon that account, we ought to think the same thing of a Government, where one Person alone, having a supreme and absolute Authority, is Judge in his own Cause, and executes what he pleases, without being liable to be call'd to an account, or oppos'd by any one. If we must always submit to whatever he commands, by what Principle soever he does it, whether he acts reasonably or no; we shall find our selves in that respect, in a worse State, than that of Nature, in which we are not bound to submit to every one, after that manner.

^a *Quint. Decl.* 11. p. 156, 157 Edit. *Lug. Bat.*

^b *Senec. L. 4. Controv.* 24. p. 234. Ed. *Gronov.* Imprisonment was no Punishment to me, I came thither of my own accord. *Arrian. Epict.* L. 1. c. 12. Where-ever a Man is detain'd against his Will, that Place is his Prison. *Attil. Charron de la Sageſſe, L. 1. c. 6. f. 8. & c. 39. f. 9.*

And therefore it may be further inferr'd, that it is an improper Expression to say, a Man is obliged to be punished, or that such a one owes a Punishment; because Punishment signifies Harm inflicted against a Man's Consent, and implies an Aversion of the Will to it. But now it is always suppos'd, that what we are properly obliged to, we ought to be ready and willing to perform. And therefore the Reason is plain, why, for instance, in working upon a Fortification, a Servant at the Command of his Master, without any particular Wages, and a Malefactor condemn'd to that Labour, may be employ'd in the same Service, and the Work be a Punishment to one, and not to the other; because the Servant undertakes it upon the Obligations he is under to his Master, and is therefore suppos'd to do it voluntarily; but it is impos'd upon the other as a Task, which he cannot submit to, but with Unwillingness and Reluctance c. And when we are told that in some Countries (as particularly in *Japan*) the condemn'd Criminals are their own Executioners, we are not to look upon that as a voluntary Action, any more than that with us they usually go to the place of Execution; or than that in *Spain*, the Executioner suffers his Pri-

soner to be unbound, and only commands him to follow him; or when (as it was the old Custom in *Lituania*) the Malefactors are forced to erect their own Gibbets, and hang themselves. For these can never be suppos'd to be properly the Acts of the Criminals themselves, but to be only Compliances they submit to, in hopes of avoiding greater Evils that might be the Effects of the Refusal. Thus it was very particular when *Gracchus*, in *Livy* a, is said to have made some of his Soldiers, who had not behaved themselves with the same Bravery as the rest of his Army, take an Oath, *That they would not eat or drink in any Posture but standing, as long as they should be in the Service.* For as they could not refuse the Oath, so they thought they ought rather to bear the Disgrace than be perjured. But further, neither can a Man properly be said to be punished, who is bound for another, and is afterwards forced to pay the Bond. For the other Man's Misdemeanour is only the bare Occasion of his sustaining that Damage, but the Obligation which he voluntarily took upon himself, is the proper and immediate Cause of it. Moreover from what has been said it follows, that, as a Man is not oblig'd to inform against himself b, that

a *Hus fustium infamiam non importat, sed causa propter quam id pati meruit, si ea fuit, quæ infamiam damnato irrogat. In cæteris quoque generibus pœnarum eadem forma statuta est.* L. 3. t. 2. l. 22. D. de his qui infam. not.

a L. 24. c. 6.

b All that our Author says here and a little farther, upon the Subject of Obligation, cannot be admitted but in this Sense, that Men are not oblig'd to go before a Magistrate and inform against themselves: For that is not necessary to the End for which the Establishment of Punishments was design'd. But he is in the wrong to deny, that there is absolutely an Obligation, in reference to the Punishment in the Person committing a Crime punishable by the Law. It is certain, that the *Sovereign* has a *Power* to punish Criminals; and one cannot conceive a *Right* annexed to a Person, without supposing at the same time, an Obligation in him, towards whom he may lawfully exercise that *Right*. Our Author distinguishes, in another place, Book iii. Chap. v. Sect. 1. *between what one has a Right to demand of another, and what one has a Right to do, with respect to him*; the First, according to his Opinion, always imposes a true Obligation on him, from whom we may demand to have something given us, or something done in our Favour, but the other does not always suppose an Obligation answerable to it. For my Part, I do not see, by virtue of what the first *Right* does not take away the Obligation, as well as the last; if I can lawfully do a Thing, in Reference to a Person, methinks he is bound to suffer it, or not to resist me, when I make use of my Power; otherwise it would be useless and of no Effect. Mr. *Titius* (Observ. DCXLI.) seems to make the Obligation of a Criminal, with respect to Punishment, consist only in our not doing him any wrong in punishing him, and in his not complaining of our Usage. But we must go farther, in my Opinion. 'Tis already granted, that when the Question is concerning a bare *pecuniary Punishment*, to which we have lawfully been condemn'd, we ought to pay it, without expecting to be compelled by the Magistrate to do it: we are oblig'd to it, not only by the Maxims of Prudence, because it would be to no purpose to refuse doing what we may be forced to, but still more by the Rules of Justice, which require us to make Satisfaction for the Damage, and to obey a lawful Magistrate. The greatest difficulty in this Point then regards *Corporal Punishments*, and especially those that tend to taking away Life. Now I must here own, that the *publick Good*, and the Power of him who holds the mighty Sword of Justice in his Hand, do not require, that a Criminal should go merrily to suffer the Punishment that is inflicted on him; or that he should not endeavour to make his Escape, provided he can do it, without doing any mischief to any Body. But at the same time, it is just without dispute, that when the Criminal has been taken, and condemn'd upon a thorough Hearing of the Cause, in Form of Law, if he finds no way to escape, either by breaking open the Prison, or some other Stratagem, he should suffer the Punishment without murmuring, and having Recourse to any unlawful means, to get away, or opposing the Magistrate in the lawful Exercise of his *Power*. Neither ought he to resist or defend himself, against those who endeavour to hinder him from making his Escape, as he would have a Right to do against an unjust Aggressor, or Magistrates of Justice, whom supposing their being convinced of his Innocence, he finds manifestly endeavouring to destroy him, and cannot avoid being unjustly condemn'd, if once he falls into the Hands of Judges that are exasperated and prejudiced against him. The Reason our Author alleges for acquitting Criminals of all Obligations in relation to Punishment, has nothing in it that is solid; and if it were allow'd of, it would as well prove, that a Criminal is no more oblig'd to pay a Fine, or make Satisfaction for damage done, because the generality of Mankind have much ado to persuade themselves to it, and violent Means must be used to force 'em to do it; we should conclude from thence, against what our Author himself maintains, that a Soldier is not oblig'd to go to, or defend a Post, where, according to all Appearance, there is but little hopes of escaping with Life. See the former Chap. §. 4. & B. iii. c. vii. §. v. Moreover, tho' I yet see no reason, why I should here change my Opinion;

that the Penalty the Law appoints may be put in Execution upon him, after he has made Satisfaction for the damage or harm he has done; so for the same Reason he may lawfully endeavour to escape from it, either by denying the Matter, concealing himself, or flying, without the Violation of any Obligation whatever^a.

Bæcker indeed in his Preface before *Grotius* writes very obscurely upon this Subject, p. 9. "The Merits of human Punishments, says he, belong to the Law of Nature, both as it is a Law, and as it is natural. If it be a Law, it produces an Obligation; but there can be no Obligation, neither can it be conceiv'd how there should be, without some Penalty attending the Violation of the Law". 'Tis beyond Dispute, that such as transgress the Law of Nature must expect to be punished, because Punishments are unavoidably annex'd to every Law; and it is not in the least repugnant to Nature^a, that a Man that does Evil, should suffer Evil. But it would be false Reasoning to infer, that because the Law produces an Obligation, therefore every Man that breaks it, is obliged voluntarily to deliver himself up to be punished by the civil Sword. *Hobbes* in his Book *de Cive*, c. 14. § 7. says very well, That the second Part of the Law, which is call'd the penal, is mandatory, and speaks only to the publick Ministers. There is no particular Clause in the Law, which commands the Criminal to go voluntarily to the place of Execution; but there is a particular Injunction to the Magistrate, to take care that Malefactors be exe-

cuted. And therefore the Delinquent is not in fault; if he be not put to death, but the blame lies wholly upon the Magistrate, who neglects a Matter of such Concern and Importance to the Commonwealth. *Socrates*, when *Crito* persuaded him to make his Escape out of Prison, told him^b, that *that would be to break the Laws of his Country, which every good Subject was bound to obey; that every Man ought to yield to the Sentence the Government passes upon him; and not return the Injury upon the State, or pretend to shew it has been unjust.* But these are only noble Sayings, which perhaps, in some particular Circumstances, a Person truly brave and innocent might resolve to practise, but which can be or no Force (as I can see) against any thing here asserted. And therefore we may further conclude, That as no Man is bound to accuse himself in the civil Court, or to make any voluntary Confession of his Crime, so it is unjust in criminal Cases to put the Prisoner to declare his Innocence upon Oath: Tho' this Custom was usual at *Athens*^c, and the thing might look very dreadful, when the Party was obliged at the solemn Sacrifice of a Boar, a Bull, and a Ram, to imprecate, as the Form ran, *Destruction to himself, his Race, and Family.* And hence *Hobbes* inters, *de Cive*, c. 2. § 19. "That the Answers which are forced from a Man in Torture, are no Evidence to the Fact; but only helps to find out the Truth. So that a Man has a Right to give a true or false Answer, or if he please, not to answer at all^d". 'Tis an odd Story to the purpose we have in *Ctesias's* Account of

I will inform the Publick, that since the first Edition of this Work, I have seen two Treatises written by Mr. THOMASIVS; in one of which he refutes the Opinion I have here establish'd, and in the other maintains it himself. See his *Instit. Jurisp. div.* Lib. iii. chap. vii. and his *Fundamenta Jur. Nat. & Gent.* See what also the same Civilian has said in his Notes upon *Huber. de Jure civitatis.* Lib. ii. Sect. vi. cap. i. sect. xx, &c. where they had undertaken to refute our Author upon the Question in debate.

^a V. *Grot.* l. 2. c. 20. f. 1.

^b *Plato* in *Criton.* p. 37, &c. Ed. Wech.

^c *Demosthen.* contra Aristocrat.

MR. BARB. NOTES on § IV.

⁹ *Quintil. Declam.* 314. All Confession is of such a nature, that a Man would be thought Mad that were guilty of it. *Id. Declam.* 328. Neither is there any Man so desperate, or that hath so little love for himself, that doth not commit his Crimes with a design to deny them.

¹⁰ *Vid.* L. 48. t. 18. l. 1. f. 23. *D. de Questionib. Charron. de la Sageſſe,* L. 1. c. 4. f. 6. "This Invention of the Rack is a dangerous Invention; and seems rather a trial of Patience than Truth. And he that can bear, and he that cannot bear it, conceals the Truth. For why shall Pain make me rather confess what is, than force me to say what is not? And, on the contrary, if he, that has not committed the Fact of which he is accus'd, is patient enough to suffer these Torments, why will he not be so that has, when so great a Reward as Life is propos'd to him? I believe that the foundation of this Invention was owing to the consideration of the effort of Conscience. For to the Guilty it seems to aid the Torture, to make him confess his Crimes, and to enfeeble him; and, on the other hand, to fortify the Innocent against it. To speak the Truth, 'tis a Method full of Uncertainty and Danger: For what would not one do, what would not one say, to avoid such intolerable Pains? *Etiam innocentes cogit mentiri dolor.* Publ. Syr. ver. 191. From whence it happens, that he, whom the Judge has put to the Rack, that he may not put him to Death innocently, dies both innocent and rack'd. Thousands and Thousands have loaded themselves with false Accusations; among whom I place *Philotas*, considering the Circumstances of *Alexander's* Persecution against him, and the manner of his Torture. But however, say they, 'tis the least Evil that human weakness could invent; very inhuman however, and in my Opinion, very useless. Several Nations, less barbarous in that respect, than the *Greeks* or *Romans* that call'd 'em so, hold it horrible and cruel to torment and tear a Man in pieces, for a Crime of which you are still in doubt; what can it be but the Effect of your Ignorance? Are you not unjust, who rather than not kill him without a Cause, do worse to him than killing it self? Let it be so, see how often he had rather die without a Cause, than to undergo this Scrutiny, which is more painful than the Punishment; and often by its Severity, antedates both the Punishment and Execution of it". *MONTAGNE's* Essays, Book ii. chap. v. *GROTIUS* in one of his Letters (Let. DCXCIII, Printed at *Amsterdam* in 1686.) says, that there are infinite Examples of People that have been put to Death unjustly, upon a Confession extorted from 'em by the Rack; and therefore he does not at all wonder that there have been several grave and pious Persons of Opinion, that *Christians* ought not to make use of Torments, to force Men to a Confession of Crimes, since it is certain, that there is no such thing in the Law of *Moses*; that in *England* People live in as great Security as in any other Nation. tho' the Rack is not used there, and that during the time that *Rome* preserv'd her Liberties, no Citizens could be put to the Torture. It may not be improper to add here the Reflection of Mr. *LECLERC*, on this Subject; in his Abridgment of a Book, where 'tis maintain'd, that the inevitable necessity of using the Rack, for the preservation of the State, has made it lawful, as War, and other violent Remedies, are employ'd against the Enemies of the publick Tranquillity. "This Reason, says he, may prevail when they are persuaded that there are several Persons, that are Accomplices in a Crime, and when it is necessary to discover 'em, in order to defend our selves from 'em; but certainly, where they use the Rack, only because the Formality of the Law requires a Confession from a Criminal before he is punish'd, there it is an useless Cruelty: Since if there are sufficient Proofs, they need search for no more, and since a Criminal, who knows that he is in no less danger of being put to Death, tho' he does not confess, than if he does, suffers not himself to be put to the Torture to confess the Truth, when he finds that the Judges are convinced of his Crime. On the contrary, when the Fact is doubtful, and he knows that by resolutely suffering

of the *Indies*; he says, "That there is a Spring in *India*, the Water of which, as soon as drawn, turns into a Curd like that of Cheese, and that if a very little Quantity of this be infused in Water, and so drank, there will follow a Distraction upon it, which, the same day, will certainly make a Man discover every thing he hath been concern'd in. He adds, the King takes the Advantage of this Water, when he would make a full Discovery, whether the Party accus'd is really guilty of the Crimes he is charged with, or no; and if a Man discovers himself to be guilty of what he is indicted, he is forced to be his own Executioner; but if his own Confession proves nothing against him, he is immediately acquitted. But it should be carefully observ'd, that generally in all Laws the dispositive part, or that which contains the matter of the Law, and the comminatory, or that which comprehends the penal Sanction, are express'd by two distinct forms of Words; as thus, *You shall not do this*; and, *He that does so, shall suffer the Penalty*. In some Law the latter part seems to be no more than the Condition of the forgoing Prohibition, thus, *You shall not do so and so, except you pay so much by way of M^{ul}t*. And in Laws of this nature, that which looks like a penal Sanction, is in reality no more than a Tax since it is left to the Discretion of Subjects, whether they will pay the Money the Law demands, or forbear such a particular Act. And this is generally the method observ'd in sumptuary Laws; the design of which is commonly alternative, either to induce the Subject to a frugal way of Life, or to enrich the publick Treasury. For to allow of any price for Privilege, or exemption from the Law of Nature is absolutely unlawful. But the common design of other Laws is only to dispose Men to Obedience by the fear of Punishment. And therefore that Person knew nothing of the true nature of Punishment, who when he had ask'd the Magistrate what was the Fine for striking a blow on the Face, throw down the Money, and struck the Magistrate himself. For the Laws were made to redress Injuries, not to allow of Dispensations to commit them upon the Payment of a Sum of Money. And therefore it is evident, that those Laws only, where the prohibition is alternative or conditional, excuse a Man from the Offence who has paid his M^{ul}t, or is in a readiness to pay it; which he is likewise obliged to do upon Demand; but not in other Laws, where the Interdict laid is absolute. But it must be confes'd, that there ought to be no such Laws as the purely penal, or such as propose no other End, but to make Advantage by the Fine. Some indeed call such a Law purely penal, which barely annexes a Penalty to a plain Command, and neither exprestly com-

mands or forbids any thing; and this is given for an Instance, A Person *elect* Mayor of a Town, *refusing the Office, shall be fined an hundred pounds to the Publick*. But in my Opinion, this and all other Statutes of the like nature, imply some such Precept as this: *No Man, when he is lawfully elected, shall refuse to assist the Commonwealth*; so that, that before seems to be a penal Clause annex'd to this *.

V. But further, since we look upon a Judge to be just, when he inflicts Punishments agreeably to the demerit of the Offender; and since Justice is said to be administr'd, whenever the Penalties are duly allotted; it has from hence been disputed among Philosophers, what Branch of Justice the Imposition of Punishments belongs to; whether to the commutative or distributive; or as *Græciv* ^b changes the Terms, to the expletive or attributive. They that refer the Infliction of Punishments to distributive Justice, give us these Reasons for it, that in the Distribution of Punishments, as well as Goods, there is a proportionable regard had to the greater or less desert of the Persons. And since, according to their Opinion, distributive Justice is concern'd in all those Things, which the whole apply to the Parts, or the Commonwealth to particular Subjects; it is evident that the Commonwealth inflicts the Punishments on particular Subjects. But it may be replied, That it is a Mistake to suppose that distributive Justice takes place, as often as there is an Equality to be made between more than two Persons; or whenever any thing is to be divided proportionably between more than One. For in Partnership, the Dividends of the Profit are shared among every one of the Members, according to their different Proportions; and yet in this Contract, the Dividend of the Profit becomes due a quite different way from that of Rewards and Punishments. For I think it is manifest, that Punishments are not consequent upon force of Compact, and that no Man, when he submits himself to Government, makes any particular Agreement to be punished for the Crimes he may commit. And therefore the Imposition of Punishments does not any way agree with the Description of distributive Justice which I gave before. But farther; it is only by Consequence, and purely accidental, that greater Criminals are punished with greater Rigour, and less, with proportionable Severity, not that it was primarily and in it self intended. For there is no necessity that in awarding Punishment to any particular Crime, the Magistrate should make a Comparison between that Offence and some other, and so proportion the measure of the Punishment for both, according to their different degrees of Malignity: But every Crime has, as it were, a separate Punishment allotted to it with more or less Severity, as the publick Benefit requires it; tho' it usually happens, that the Punishment is

"the Torture without confessing, they will do nothing to him, how great soever their Presumptions against him may be: the desire of avoiding the Punishment he deserves, make him often resolve to suffer that ever's Trial, to see if he can bear it, and thus it renders him more obstinate and harden'd." There are several Instances of *Jews*, that have eluded the *Spanish* Inquisition, by maintaining in the middle of their Torments, that they were *Christians* in reality. *Biblioth. Univers.* Tom. xvii. pag. 484. See the Example of *Tam O' Shan* mention'd in the vii. Tom. of the same Journal, pag. 239, &c. and the *Diab. Hist. & Critique* of Mr. BAYLE, Tom. ii. pag. 1399. 2 Edit. as also a curious Dissertation written by Mr. THOMASius *de Tortura ex feris Christianorum proferenda*. Printed at Hall in 1705.

MR. BARR. NOTES on § V.

* This is true: But, since upon a Sovereign, the Right of Life and Death, or the Right of the Sword is confer'd: His Subjects are oblig'd not to resist him, tho' he makes Use of it upon their own Persons.

^a *Viti Sanderfon de Obligat. Conscient. Prælect.* 7. §. 13. §. 77.

^b See *Græc.* B. 2. c. 20. §. 2.

^c See above in B. 1. c. 7. §. 11.

either increas'd, or alleviated, according to the different degrees of the Transgression.

Some Persons that reduce Punishment under commutative Justice, consider it, as if Punishment were something assign'd to the Delinquent in the same manner as is usual in Contracts. A Mistake they were led into upon a common Expression, *that Punishment is the due of every Offender*; which is manifestly an improper way of speaking. For a Man that has any thing due to him, has a right over the Debtor to oblige him to the Payment of it. But I think there will be no body so absurd as to say, that the Delinquent has a right to challenge his Punishment of the Magistrate. And therefore the meaning of that Saying is only this, that the Magistrate may justly punish a Criminal as the Law directs. *Grotius*, l. ii. c. 20. § 2. says, "That the Distribution of Punishments does originally and principally belong to expletive Justice, for this reason; because no body can punish another lawfully, unless he has a right to do it; which right ariseth from the other's Crime." But he was impos'd upon by the doubtful meaning of the Word *Right*. For there is a very wide difference between a right to do a thing, and a right to receive something from another. The meaning of the former right is this, I have a Power to exercise this particular Act, and no body ought to hinder me in it; the sense of the latter is this, I have a right to receive something from another, and he at the same time is under an Obligation to let me have it. Now when the Discourse relates to expletive Justice, the Word *Right* is not to be taken in the former Signification, but in the latter. And this right is fix'd in him that receives the Thing, and not in him that bestows it; as for instance, when I pay my Servant his Wages, I am engaged in an Act of expletive Justice; not because I have a right to pay him his Wages, but because he has a right to demand it of me. Thus, I may safely say I have a right to command my Servant to take off my Shoes; but certainly 'twould be strangely impertinent to infer from thence, that therefore to command him that Service was an Act of Justice. And it is an Argument much of the same nature, to say, that because Punishment cannot lawfully be inflicted but by a Person that has authority to do it, therefore punishing is a branch of expletive Justice. Another Argument produced by *Grotius*, is this, "That in Crimes and Penalties there is something that much resembles the nature of Contracts; for as the Seller of any Commodity is supposed to have oblig'd himself to every thing natural to the Sale, tho' he mention nothing particularly; so every Delinquent seems voluntarily to oblige himself to be punished; for every Man's Reason tells him, that it is absolutely necessary that every great Crime should be punishable; and therefore a Man that chooseth to transgress, directly and deliberately, may by consequence be said to consent to be punished: And therefore in Scripture we find that Sin is frequent-

ly call'd by the name of a Debt, which we are as much oblig'd to discharge, as they that are under Bond to their Creditors ². To which I answer, That thus much is certain, that if a Man knows the Penalty the Law appoints for such a particular Crime, and yet is wilfully guilty of it, he can have no reason to complain of unjust usage, or to think himself hardly dealt with, when he is brought to Punishment. But it cannot from hence be infer'd, that a Man gives a direct and immediate consent to his own Punishment; or rather, that he has oblig'd himself by his own consent to suffer it; since no Man is ever guilty of a Crime, but he has some hopes, either by concealing himself, or some way or other to secure himself from Justice ³. *Lasquinus* indeed ^a attempts to prove, that Criminals are oblig'd by their own consent to suffer Punishment, because the penal Laws, as well as others, are made by the consent of the Subject; or at farthest, because the legislative Power is deriv'd originally from the consent and agreement of the People. But I think there is little or no force in the Argument: For as I have prov'd elsewhere, Laws are not Compacts or Agreements. And I think there is no absurdity in the thing, that I should give my consent to the Establishment of a Power, which may perhaps afterwards exercise certain Acts upon me, whether I will my self, or no. Only, I can pretend no reason of Complaint, if I do afterwards feel its severity, because I consented to such a Power. But Sin is compar'd to a Debt, not because a Man is oblig'd to consent to his own Punishment, but because the Legislator has the same right to challenge the Penalty of the Delinquent, as a Creditor has to demand the Money lent to the Debtor; and because the Body and Goods of the Offender are no less liable to the Magistrate on a criminal Account, than the Goods of the Debtor are to the Creditor in cases of Debt. In the Elements of the *Roman* Law, ^b Obligations are divided into such as arise from consent, and such as are the result of Transgression; but it should be observ'd, that from Transgression there arises an Obligation, only to make Satisfaction for the harm that is done, but not to suffer the Punishment: And that Obligation it self is not properly founded upon a Man's consent to the Penalty; but upon that necessity of Restitution, which, upon a Settlement of Property, evidently flows from the Law of Nature. Thus *Aristotle* distinguishes Contracts into the voluntary, and the involuntary ^c. But his meaning may be thus explain'd; that as in Contracts of Duty there is a return made of equal for equal, so in criminal Cases, the Satisfaction ought to be an Equivalent to the Damage. But the reason why he calls the Obligation to make Satisfaction, an involuntary Contract, is because, for Example, in cases of Debt, it depends upon the Creditor's pleasure whether the Debtor shall receive the Money, or no: But, for Example, the Obligation a Thief is under, to restore me what he has robb'd me of, or the value of it, bears no manner of relation to any consent of

² V. L. 49. t. 14. l. 34. D. de *Jure Fisci*. L. 9. t. 8. l. ult. C. ad L. *Julian Majestatis*. In *Tacitus*, Ann. 12. c. 53. The Woman that married another Man's Slave without the Knowledge of his Master, is said to have contented to her own Slavery.

³ *THUCYDIDES*, l. 3. c. 45. Edit. *Oxon.* init. There are several Crimes which the Commonwealth hath forbid under pain of capital Punishment; and yet Men have Hopes strong enough to persuade them to venture and run that risque; and there is no Man that will undertake an hazardous Enterprize, when he despairs of the Success of his Plot. And we never heard that one State revolted from another, which did not imagine it self stronger and better prepar'd for War.

^a *Vaiq.* Controv. Illustr. l. 1. c. 28. n. 12, 13.

^b *Institut.* L. 3. t. 4. De *Obligat.* l. 2.

^c See above in B. 1. c. 7. f. 12

mine, but he brings it upon himself much against my Will. For 'tis certain, I had rather he should have left me in quiet Possession of what was my own, than have given me the trouble of bringing an Action of Theft against him, especially where there is no hope of recovering more than barely the principal by it. But it may be further considered, that generally every Right has an Obligation that answers it in another Person. And therefore upon Commission of the criminal Action, the Party that is injured has a right to demand reparation for his Loss, or the harm he has suffered; and the injurious is under Obligation to make him Satisfaction; and this is the matter which executive Justice relates to. But as the criminal Action is a deviation from the Law; the Governors of the Commonwealth have power to punish as they think necessary; but the Delinquent is under no Obligation to offer himself voluntarily to be punished. For which reason the Infliction of Punishments cannot fall under executive Justice. So that it may be said, upon the whole, that Punishment does not belong to either Species of Justice, but makes a particular branch it self. Unless it may be thought more proper to say, that both the imposition of Punishments and the distribution of Rewards, which have not been determined beforehand by particular Compact, are parts of Prudence necessarily belonging to the Government of others, and therefore should be rank'd under Justice in general.

VI. It will therefore, I think, be allowed by every Man that pretends to Reason, that tho' by Nature all Men are upon the level, and Punishment it self seems to be a severe and rigid sort of Discipline, while Men endeavour only to afflict and ruin one another; and tho' the wise Creator of the World hath so disposed the nature of Man, and the events of Things, that ill Actions are generally punished by ill Consequences, which in a manner revenge themselves upon the Causes of them: yet that positive human Punishment, after all, hath nothing in it repugnant to natural Equity; but that, on the contrary, it is absolutely necessary to the common Quiet and Security of Mankind. For as it was requisite to the publick Peace of the World, to put an end to the equality of Nature, by erecting civil Governments; so in the general Looseness and Corruption of Manners, and natural Aversion to Virtue, the force of Government would soon be dissolved, if bad Men were not confin'd, and frighten'd into obedience, by the dread of some present Evil. And since every Man is beforehand told publickly what he ought to do, and what forbear doing, and what Punishments will be inflicted on such as act otherwise, no Man can blame any body but himself, if, by a wilful Transgression of the Laws, he falls under the Severity of the Punishment.

VII. As to the Persons the right of punishing is to be lodg'd in, and exercised upon, 'tis *Grotius's* Opinion, *l. ii. c. 20. § 3.* "That Nature has not given any Determination upon it. So far indeed, says he, we may discover from Nature, that 'tis most convenient, some Superior should be impower'd with it; tho' that is not absolutely necessary neither; unless we take the Word *Superior* in such a sense as will imply, that a Man which is guilty of a criminal Action, shall be thought to

"have made himself inferior to all the rest of Mankind by that very Act. The consequence of which is, that no Man ought to be punish'd by one equally guilty with himself^a. But I confess I cannot be persuaded but that the power of Punishing is a part of Sovereignty, and consequently that no body can properly be said to inflict Punishment upon a Man, unless he has^b Authority over him. For tho' upon a view of the ill Dispositions of Men, and how easily they are inclin'd to injure and molest one another, we find it absolutely necessary to the Preservation of Society in the World, that Punishments should be inflicted; and tho' every Man ought to contribute his Actions to the support of Society, as being generally good to all Mankind; yet it does not follow that every Man is oblig'd to undertake every Action that tends to advance that end; since that would be to no purpose, without a concurrence of certain other particular Requisites. Thus, it is necessary Men should be under some sort of Government or other; tho' no body imagines, that it is left at hand in for any Man to assume a Right or Power over others as he pleases. Now then, every Evil which is inflicted upon antecedent Transgression, cannot properly be call'd Punishment, but that which was threaten'd before, and is inflicted after the Crime is known. And therefore the Evils of War, and all Acts of Hostility, must not be call'd Punishments, tho' 'tis true that we procure Caution against future Injuries by them, for in a State of War, every Man provides Caution for himself by his own force, and in what manner he pleases; but the Caution an injured Person receives from Punishments must be procured by the power, and according to the determination of the Superior; in War the injured Party only is directly concern'd to punish and suppress his Enemy: but in civil Government the whole Commonwealth is as much concern'd, as the Party that is injured, to punish a Criminal. Again, 'tis left to the Discretion of the injured only, whether he will revenge himself upon his Enemy, with a War or not; but 'tis left entirely to the Superior, whether Punishment shall be put in Execution, or not; nay, he has Power to inflict it, tho' the injured Party desire the contrary. And lastly, the quantity of the Punishment is generally determin'd, before the Fact is committed; but in War the Caution must be settled according to the Circumstances of my own, or my Enemy's Condition. But besides, tho' Nature has not determin'd, whether I, or any other particular private Man ought to have the right of inflicting Punishments, any more than it has design'd us to be Princes; yet I think it is sufficiently clear from Reason, that Punishment, as it is the Execution of a judiciary Sentence, ought to be derived from some Superior, or from a Person who has Authority over the Criminal. Neither is there any reason why we should be so nice in the Explication of the Word *Superior*; for 'tis absolutely false, that every Sin leaves such a blot upon a Man's Honour and Character, that he must presently be thought no better than a Beast. Neither is it good reasoning to infer, that because such a Man is guilty of such a Crime, therefore I have power to punish him. For if I suffer by the criminal Action, in a liberty of Nature, I may demand Satisfaction of him for

^a See *John* Ch. viii. v. 7. *R* 7. ii. 22.

^b See what has been said in Note 2. Sect. 4. All the Reason our Author alleges, prove nothing, unless we allow of his Definition of the Word *Punishment*.

the Injury, and Caution for the future in a way of War: If the Action does not affect me, but some other Person whom I am not particularly obliged to defend, I can have no more pretence to engage my self in his Cause, than I have to prescribe Laws to those that owe me no Subjection. *Ex. ii. 14.* It was a Saying of *Democritus*, That it was most agreeable to Nature, that the most deserving Person should govern; which is perhaps true enough in this sense, that where the Government is to be conferr'd upon a single Person elected by a plurality of Voices, and no one Man has any particular claim of Right to it more than another, it would be the most rational way of proceeding, to make choice of a Person of the greatest Merits, and that seem'd to be best acquainted with the Arts of Government. But such a Person can pretend to no Authority over others, except they voluntarily submit to him. As for what *Grotius* says, 'That a Criminal ought not to be punished by a Person as guilty as himself; this does not properly concern them that have publick Authority to punish, but only affects such People as love to censure and impeach others, barely upon their own private Authority, and out of a pretended hatred to Vice, without Warrant from any Obligations they are under by the Duties of their Office and Place. Tho' without dispute it is very unbecoming, and must necessarily lessen the respect that is due to the Magistrate and the Laws, when the Person that administers Justice, is guilty of the same Vices he punishes in others, for a Man that punishes that in others, which he allows himself to be guilty of, does not seem to be out of love with the Crime, but to envy others the enjoyment of it ^a. Yet I don't think it had been unlawful for *Nero* himself, after he had kill'd his Mother, to have put others to death that had been guilty of the like Crime ^b. And in this, *Hubbes* is of the same Opinion, *Leviath. Chap. xxviii.* that Punishment is derived from the Superior as such. The Definition indeed, which he gives of Punishment is hardly so full as it ought to be, containing only those Punishments that are inflicted by the civil Power, and making mention but of one End only.

Punishment, says he, is an Evil inflicted by publick Authority on him that has done or omitted that which is judg'd by the same Authority to be a Transgression of the Law, to the end that the Will of Man may thereby be the better disposed to Obedience. But he rightly infers from thence; that neither private Revenges, nor Injuries of private Men, nor Pains inflicted by publick Authority without precedent publick Condemnation; nor Evil inflicted by usurped Power, nor Harms inflicted on the Subject without regard to future good, are properly Punishments, but rather acts of Hostility. But it must be observ'd, that such false Punishments as these do not immediately place us in a State of War, or give us Licence to make use of the Liberties of an Enemy, or that a Man who has suffered such Evils is left to his Freedom to return Hostilities upon those that inflicted them. The same Author also excludes those Evils from being Punishments, which are the natural Consequences of evil Actions; as when a Man in assaulting another, is himself slain or wounded, or when he happens to fall sick upon the Commission of some unlawful Act; tho' this indeed will look like a Punishment from God. Again, he says, that when the harm inflicted is less than the benefit that naturally follows the Crime committed, it is rather the Price or Redemption, than the Punishment of a Crime. And among his Acts of Hostility, he mentions the excess of Punishment; or when a greater Punishment is inflicted than the Law allows of; and when hurt is inflicted for a fact done before any Law forbid it; and when any Evil is inflicted on the Sovereign; and when Harm is inflicted upon a declared Enemy. But what he adds to this afterwards; that one who has been a Subject, and declares himself an Enemy, is not to suffer as a Subject, but an Enemy, and therefore that such as are guilty of Treason, may be made to suffer whatsoever the Representative of the Commonwealth will, or as Enemies. I cannot agree with him; because whatever Punishment is inflicted upon Treason, is inflicted upon the Force of Authority, and proceeds from the supreme Power, tho' the Traitor himself may rebel and deny his Authority, and sometimes

^a Vide *Plin. l. 8. Epist. 22. Plato Minor.* He is a wicked Man that does one thing himself, and commands another. *Add. Gratian. Caus. 3. Quest. 7. c. 3. 4. seqq.* ^b But yet not for *Domitian* to punish Women convicted of Adultery, when he himself had debauch'd them. *Zmaras, Tom. 3.* To this we may refer that which *Medea* saith in *Seneca's* *Trag. v. 500. &c.*

He did the Crime, that hath th' Advantage of it,
He's Innocent to You, who only was
Your Instrument.

And certainly all voluntary Informers and Censurers of others, ought to take care how they fall under the reach of what *Juena* saith, *Sat. 2. v. 23. &c.*

*Loricpedem restus derideat, Aethiopen albus.
Quis tulerit Gracchos de seditione querentes?
Quis caelum terris non misceat, & mare caelo,
Si fur displiceat Verri, aut homicida Meloni,
Clodius accuset macesbos, Catilina Cethegum,
In tabulam Sylla si dicant discipuli tres?*

And again the same Satyr, *v. 38.*

-----*Felicitia temporis; quae te
Moribus opponunt; habent jam Roma puarum.
Tertius e caelo cecidit Cato.*

Seneca, Controv. l. 2. contr. 14. There is nothing more despicable than a Man that chastises Vice, and yet imitates it. *Cic. Tusc. Quest. l. 3. c. 30.* It is the particular Character of Folly, that it discovers another's Faults, and forgets its own. *Plant. Trucul. Act. 1. Scen. 2. v. 58.* He that accuseth another of a dishonest Action, ought to be cautious himself. *Ovid. Fast. l. 6. v. 647.*

*Sic agitur Censura, & sic exempla parantur,
Cum Judex, alios quod monet, ipse facit*

Unenvied he a brave Example stands,
Who by his Deeds confirms what he commands,

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put the Commonwealth to a Necessity of Suppressing him by Arms, before he can be proceeded against as a Criminal; as when a Man is in pursuit of his Slave who is run away, he does it by a right of Property, and not of War. I may further add, that the Evils an Enemy suffers, are none of them thought to be infamous, whereas the Infamy of it is a particular addition to the Punishment of Traitors.

VIII. The next Thing that falls under Consideration, is the End^a of Punishment, which every Man ought to propose to himself in inflicting it, after Satisfaction made for the Damage, or when the Nature of the Case will not admit of Satisfaction. And here my first Assertion is, that though it does not appear to be unjust in it self, that the Man that did Evil should suffer Evil,^b yet that Punishment ought never to be inflicted without a prospect of making some advantage from it. And therefore *Hobbes* makes this one of his Laws of Nature, *de Civ. c. iii. s. 11. That in Revenges or Punishments, Men ought not to look at the greatness of the Evil past, but the greatness of the Good to follow; whereby we are forbidden to inflict Punishment with any other design than for the Correction of the Offender, or the Admonition of others.* And 'tis *Plato's* Judgment^c, *That a Man that acts with Prudence, will never punish barely for the past Offence; for it is impossible for him to undo what is done already; but he will always regard what is to come, either to prevent the same Offender from being guilty a second time, or else to frighten others from transgressing by his Example*^d. It is indeed absolutely necessary, that some regard should be had to the Crime committed, because, without that, 'tis evident there can be no Punishment; but then the end of Punishment ought also to be considered, that a Man may not suffer Evil for what is too late for him to remedy; for tho' he be a Criminal, yet he is of the same Flesh and Blood with other Men. And *Hobbes* proves this Law by these two Reasons; first, *Because a Man is obliged by the Law of Nature upon Caution for the future, to pardon them that repenting desire it;* and secondly, *Because Revenge, as it respects only the past, without regard to the Example and Profit to come, is only a triumph and glorying in the Hurt of another, tending to no End, and is therefore vain and contrary to Reason.* It might perhaps be a Saying proper for an *Attila*^e, that *he knew nothing sweeter than Revenge, and thought no Satisfaction in nature greater:* But a Judge when he is forced to punish, ought by no means to take pleasure in the Sufferings of the Criminal^f.

*Qui fruitur poenâ ferus est, legumque videtur
Vindictam præstare sibi; diis proximus ille est,
Quem ratio, non ira movet: qui facta rependens
Consilio punire potest ---*

^a See *Grot. B. 2. c. 20. Vid. B. de. Serm. fid. 1. 4.*

^l *Pindar. Nem. Od. 4. v. 52.*

Πῶς αὖτις ἴδωμι τὸν ἄνθρωπον;

He that doth ill, 'tis just should suffer.
When you have had the guilty Confidence
To do a Crime, learn to submit and bear
The Punishment.

Em. 5. in. Heecub. c. 1250, 57.

^e *Plato Protog. p. 226. A. B. Edit. Wech.*

^d *Seneca de Irâ, l. 1. c. 16. speaks to the same Sense.*

^e *Jornandus*

de Rebus Geticis, c. 39. ^f *Claud. de Cons. Miltii, v. 223, &c. Valer. Max. l. 2. c. 9. l. 3. Fulcat. Gallicanus*

in Avid. Cass. c. 12. It never looks well for a Prince to be guilty of Revenge, purely to satisfy his own Repentments.

^g *Suetonius Aug. c. 32.*

^h *Seneca de Irâ, l. 1. c. 16.*

ⁱ *Levit. th. c. 28. Add. L. 18. c. 7. de fac. l. 7. L. de jereis*

exportandis.

^k *Cons. Seneca de Clem. l. 1. c. 22.*

^l *Plato, Gorgias, 325, &c.*

^m *Seneca de Irâ, l. 1. c. 5.*

to bring crooked Timber to straightness, by plying it over Fire, or by opening its parts for use, by the Wedge and Sawe. Though we need not go so far, as to agree to what the same Author saith in another place; *That when either by our Selves, or by Friends, we have injured another Person, it is our duty immediately to apply our selves to the Magistrate to be punish'd, as we would to a Physician; lest the injurious Distemper should so far infect us, as to settle in an incurable Disease:* For a Man that is of so good a Disposition, as to be in a readiness to deliver himself up to Justice to punish his own Faults, has no need of making the Magistrate his Physician, but may be safely trusted with his own Cure ¹.

X. As to the Person who is to inflict this sort of Discipline, *Grotius* thinks ², "That 'tis naturally free for any Man to exercise that sort of Punishment, which designeth only the Reformation of the Offender; provided he be Master of a good Judgment, and not guilty of the same Faults, or others of the like nature himself." (*For they are certainly the most unpardonable Criminals, who have the Impudence to impeach others of Crimes they are guilty of themselves; and if a Man would reform others, he must first mend himself* ³. "But that as to other sorts of Punishments which are of a compulsive nature, such as Whipping, Beating, and the like; Nature hath made no Distinction between the Persons that may, and those that may not, inflict them upon others; except it be, that Reason hath particularly allow'd Parents the use of this right over their Children, upon the force of natural Relation. And therefore generally the civil Laws, to prevent Confusion and Disturbances, have justly restrain'd the common Affinity of Mankind, only to the nearer branches of Blood." But there does not seem to be much Satisfaction in this; for, as I said before, no Punishment, whatever the end of it be, can be inflicted, but by the Authority of the Sovereign: And therefore all Reproof by Words looks rather like

Counsel and Advice, than Punishment; which when vehemently delivered and pressed in harsh Language, seems to be founded rather upon the particular Laws of Friendship ⁴, than upon any common right. And the truth of this appears from the common return that is made to any Man, who undertakes to reprove a Person he has no acquaintance with (as *Terence* ⁵ represents it) *Have you so little Business of your own, as to intrude into another's, and meddle with what doth not concern you?* And therefore *Chremes*, in that Author, when he justifies his reprimanding *Menedemus*, appeals to the right of a Neighbour, which, he said, he thought might claim the next title to Friendship ⁶. But besides this, a very necessary part of Prudence, to know how to apply our Reproof; for an unseasonable mistake of this nature may be of very ill consequence to a Man's self, and harden the Person he intended to reform in the vicious course he was in before. Parents ⁷ indeed have a right to correct their Children upon a double Account; both because the Methods of Education, which Nature obliges them to bestow upon their Children, would be to no purpose, if they had not the Liberty, as they see occasion, to use them with a little Sharpness and Severity; and because, out of civil Government, they would have an absolute Sovereignty over them. And though in many Commonwealths this Power is reduced to a very little compass, yet they have so much almost every where left them, as giveth them leave to correct their Children at Discretion, for those petty Misbehaviours, which are the Effects rather of the levity and imprudence of Youth, than of any inveterate settled ill habits of the Mind; and which more disturb domestick Quiet, than the publick Peace. And 'tis as necessary, that such as in the Parents stead have the care of educating young People committed to them, as Tutors, Governors, and Masters ⁸, should be allowed the same Power; because they can never discharge their Duties as they should, without the moderate use of gentle Discipline ⁹.

Mr. BARB. NOTE on § IX.

¹ *Apuleius de Dogm. Plat.* p. 615. Edit. in *opum Delph.* There is more disquiet and uneasiness in the Impunity a Delinquent enjoys, than there is in the most severe Punishment. *Plato* de LL. l. 9. in the beginning. No Punishment appointed by Law is intended for an Evil, but only to effect one of these two Things, either to make the Offender better, or at least not so bad as he was. *Aristot. Eth. ad Nicom.* l. 2. c. 2. p. 20. Ed. *Paris.* Punishment is a sort of Physick, and Physick commonly works by contraries. *Athen. de Doctrin. Platon.* c. 32. 'Tis as necessary for an Offender to be punish'd, as it is for a sick Man to apply himself to the Physician: For Correction is a sort of Remedy for a vicious Mind. *Tacitus*, Ann. iii. c. 54. A debauched, a crazy and violent Temper, must be cooled and kept under by Restraints as strong as the force of its Lusts. *Plato* in *Critias*, in the beginning. The proper Punishment for one that transgresseth out of Negligence, is that which makes him cautious.

Mr. BARB. NOTES on § X.

¹ *Uerat. de Permutatione.* p. 539. Edit. *Paris.* *Laërtius* Div. Inst. l. 4. c. 23. When *Crispus* in *Tertius*, *Hist.* l. 2. c. 10. towards the end, *C. micromid* *Fausus*, *tho' he himself had been employ'd and rewarded for bringing in the kind before, 'tis said*, That Punishment of the Crime did not grieve *Fausus* so much, as it did that such a one should inflict it. *Arnobius* adv. *Gentes*, l. 1. It is a great Injustice in you, to make that Criminal in us, which you do your selves; or to allow your selves in the Practice of those things, which you strictly forbid to others.

² *2. Curtius*, l. 3. c. 12. n. 16. speaking of *Hephestion*, No one could take that Liberty to reprove the King which he did, which yet he was so tender of using, that the King seem'd rather to allow him in it, than he to assume it. *Cic. Off.* l. 1. c. 17. Advice, Persuasion, Exhortation, Consolation, and sometimes Reproof, are particularly used in Friendship. *Hæc.* *Iliad.* l. 11. v. 92. *Ἄρα δὲ πᾶσι παρὲς ἔστιν ἐπέου.* And to this we may refer that of *Mysippus Rufus* in *Tacitus*, *Hist.* l. 3. c. 81.

³ *SENeca* de Irâ, l. 2. c. 27. The Corrections of Parents and Masters must be look'd upon to be of the same nature with Cutting and Abstinence, and other severe Methods of Cure, which do us good when they hurt us. *What Power o'her Relations have over others in this Case, may be seen* *L. 9. t. 5. C. de Emendatione propinquorum.* *PLATO* de LL. l. 7. p. 893. *A decree, that in his Commonwealth.* Since young People are as intractable as the wildest of Beasts, those Children that were Free should be subject only to the Correction of those that had the Charge of their Education. But that any Freeman should have the Liberty to chastise any Slave, whether Boy, Master, or Tutor, if he took him in any Fault. *Xen. 2d. de Repub. Lacedæmon.* *Lycurgus* made a Law, That no Man should command his own, or another Man's Children, to do any thing but what was just. And that if a Child should be beaten by another, and complain of it to his Father, it should be thought mean and irreputable, if the Father did not Correct him again. *But what, Xenophon says, l. 5. πεινᾶν δὲ οὐδενός.* (That, if I strike any Man for his own good, I own I deserve to be punish'd, but then it must be so as Parents are punish'd by their Children, or Masters by their Scholars: For thus Physicians are allow'd to cut and burn their Patients, when it is in order to their Cure *was only to evince that severity and moroseness of humour that was observ'd in him.* *But what may be laudable for a General or a Commander to do, is not therefore laudable for every one else.*

⁴ *L. 2. c. 20. f. 7.* ⁵ *Vid. Terent. Heautontimor. Act. 1. Sc. 1. v. 24, &c.* ⁶ *Iliad. Act. 1. Sc. 1. v. 23, &c.*
⁷ *V. L. 47. t. 10. l. 7. f. 3. D. de Injuriis. Libanius Declam. 20.* ⁸ See *Mr. N. de la Roche's Treatise of Ligen Aquilian, c. 6.*

But this sort of Punishment, *Grotius* says, ought never to proceed so far as Death; since 'tis very absurd to hope to reform a Man by throwing him into a Condition, in which 'tis impossible for him to express any amendment: though 'tis the Opinion of some, that when a Man is grown incorrigibly vicious, 'tis just and reasonable to deprive him of Life; especially since such sort of Persons are generally very bad Neighbours to others. So *Seneca* says, "That Death is the best Remedy for an incorrigible Disposition; and that 'tis the safest way for him to leave the World, who is never like to be Master of himself in it ⁴." And *Plato* says, "That a wicked Man had better not live, since he is under a Necessity of living ill." *Sulpitius Asper*, in *Tacitus*, gave this Reason for his engaging in the Conspiracy against *Nero*, that it was impossible for him to stop his Cruelties otherwise; or as *Suetonius* telleth the Story in his Life of *Nero*, some of the Conspirators charg'd all the guilt of the Plot upon *Nero* himself; as if they could not have better express'd the respect they had for him, than by killing him, after he had dishonour'd himself by such variety of Wickedness ⁵. Yet Charity should persuade us not to be too easily prevail'd upon to give any Man over for desperate. But this sort of Punishment may also promote the good of others. For 'tis certainly sufficient Caution to others, when a Man reforms upon the sense of the severity of his Punishment; and when an incorrigible Person suffers Death, greater Security cannot be given that he will never create fresh Disturbances. And that none but such incorrigible Persons should suffer Death, may perhaps be well enough admitted, in Crimes of a lower rank, and less malignity; but Crimes of a deeper stain must not be allowed the same Privilege. For since no Man is to be declared incorrigible, till he hath been frequently guilty of the same Fault, it would be but little for the advantage of the Commonwealth, to defer the punishment of a Criminal, till he had frequently repeated perhaps the worst of Villanies.

XI. Another end of Punishment is his good, whose Interest it was the Criminal should not have offended, or who suffer'd by the other's Offence; that he may not for the future be in danger of the like injury from him, or any one else ^a. And this is to be obtained these three ways: First, by the Death of the Criminal; or Secondly, if he be allowed Life, by depriving him of Power to hurt; as by keeping him in Custody, taking

his Arms, and other Instruments of Mischief from him, securing him in some distant place, and the like: or else Thirdly, by obliging him to learn, at his own Peril, not to incur further guilt, or offend any more; which falls in with the amendment, I before treated of. But now there can be no effectual way to secure the Party injured from suffering the like from other Hands, but by such a Punishment, as shall be publick, conspicuous, and make the Criminal an Example. And for this reason Malefactors are seldom executed in Prison, but in places of common resort, and with such frightful Solemnity, as may strike Terror into the Multitude. And this is an end so natural to Punishment, that when, in heat of Passion and Revenge, a Man thinks he hath had sufficient Satisfaction from the Person that had abus'd him, 'tis usual to add, as you like this, provoke me another time. But however, the Sovereign only has just power to inflict this Punishment: Though Legislators in several Commonwealths, in compliance with the fierce and obstinate Tempers of their People, have made several Allowances and Indulgences to that ill-natur'd Passion, which urges Men to prosecute their own Revenments, and do themselves Justice. The Revenger of Blood in the divine Law seemeth to have been establish'd by such an allowance ^b; except we rather think this to have been some remainder of the State of Nature. And some think they discover a Custom like this in *Homer*, in that Passage which relates to *Theoclymenus*. Indeed, I think the Law *Euripides* mentions, can hardly be explain'd in any other sense ^c, *εργασίῳ δ' ὀσίῳ, ἀναποκτείναι δὲ μὴ* that is, they made Satisfaction by Banishment, and did not kill one another; implying that the old Custom of private Revenge was abrogated, to prevent the danger of its going too far; which, in Punishments inflicted by the Magistrates, there is no fear of. It appears indeed from *Homer*, that it was usual to buy off the Banishment, by paying a pecuniary Mulct to the next of Kin to the Party kill'd ^d. And at this Day, in *Morocco*, 'tis permitted the Kindred of the murder'd Person, either to compose all difference by an agreement with the Murderer, or to dispatch him without formal Process, if publick Justice hath not apprehended him before; because it is there taken for a settled Rule, that Revenge is no Sin. And *Tacitus*, in his Account of the Germans, c. 21. tells us, That the Father, or the next of Kin, are under a necessity of engaging in the quarrel; but the difficulty of an Accommodation (saith

⁴ *SENECA* de Irâ, l. 1. c. 16. in the beginning. You are now grown incurably Wicked, and are perpetually adding one Crime to another; you no longer give your self the trouble to bring Excuses (which ill Men are seldom without) for your Vices, but think the Sin it self reason enough for you to sin on. You have such a Thirst after Wickedness, and have indulged, and pleas'd your self in it so long, that it is impossible you should quit it, till you take leave of your self. You will one time or other endeavour to lay violent Hands upon your self. Well; we will be your Friends, and remove that Madness from you, which so disorders you; and since you are so deeply engaged in your own and other Mens Punishments, will shew you all the good that is now left for you, and that is, Death. *Senec.* de Benef. l. 7. c. 20. *Plato* in *Gorgia*, p. 349. B. *Tacitus* Ann. xv. c. 53.

⁵ *Sueton.* *Nero*, c. 36. *Jamblicus* in *Protrept.* c. 2. As it is safer to apply Causticks to a Swelling, than leave it to it self; so 'tis better for a wicked Man to die than live, *Rosar. Persic.* c. 1. When a Man is never Innocent but in his Sleep, 'tis better he should die than live, as *PLATO* will have it, *de LL.* l. 9. p. 928. D.

^a See *Grot.* B. 20. c. 2. f. 8. ^b *Numb.* xxxv. *Deut.* xix. Vide *Selden* de J. N. & G. sec. Hebr. l. 4. c. 2. *Grotius* upon *Exod.* xxi. 12. Add *Rochefort Deser. Antill.* p. 2. c. 19. *Homer.* *Odyss.* 6^o v. 276. ^c *Euripid.* *Orestes*, v. 512.

^d *Homer.* *Iliad.* 9. v. 628. Vid. *Apoll. Rhod. Argonaut.* l. 1. v. 90.

he) is not great, for 'tis usual to expiate a Murder, by a Present of a certain number of Sheep, and other Cattle, and then all of the Family will be fully satisfied ¹.

XII. The third end of Punishment is the good of all indifferently; the Severity of the Punishment being sufficient Caution for every Man's Security ¹. The design of which sort of Punishment is, either to prevent Malefactors that have done Injuries to some, from doing the like to others; an effect to be obtain'd, either by putting them to death, by confining or disabling them in such manner, as shall deprive them of the Power of doing harm ², or by the rigour of the Punishment, overcoming their Inclinations to transgress: or else to better others, that might be encouraged by the impunity of Delinquents, from hurting and disquieting their Neighbours. And this may be effected by publick Executions, or as they are usually call'd, publick Examples, at the sight of which others are to take warning ³. And the more publick the Punishment is, the greater effect it is like to have in reforming others. The *Lacedemonians* had a Custom contrary to the rest of the World, in punishing their Criminals in the Night ⁴; thinking perhaps that the darkness added something to the Terror of the Punishment ⁵. And under this end of Punishment we may comprise all those Advantages, which result from the Support and Preservation of the Authority of the civil Government, among all the impudent and violent Invasions upon the Laws, which so frequently disturb and weaken it. For 'tis the Interest of the whole Commonwealth, to be concern'd for the preservation of the supreme Authority; and as long as that continues entire, the most profligate Criminals may be kept under restraint. But besides these ends of Punishment I have here mention'd, I see no necessity of allowing those other *Selden* mentions *de J. N. & G. l. 1. c. 4.* as the *satisfactory, purgatorial, or expiatory*, or either that the *deviation* from the Law may in some measure be made up, and the inequality of the Action be corrected. The Arguments he produces from Scripture, seem to relate only to divine Justice, or the particular Sanctity of the *Jewish* Nation.

XIII. As to those Exceptions which *Grotius* ⁶ adds to this Proposition, *That the Infliction of all exemplary Punishments ought to be lodged in the Government of every State*, it must be observed, that whatever is inflicted in certain Places, and on certain Persons, which are not subject to any determinate Court of Judicature, as for example, upon Pirates, must be reduced under the right of War, which is utterly different from the Power of punishing. For Pirates and Freebooters are common Enemies, and every Man may draw his Sword against them. 'Tis good Advice indeed which *Grotius* gives afterwards ⁷, that it would be the most proper method for Merchants and Seamen, before they begin their Voyage, to procure Commissions for themselves from publick Authority to take all Pirates, where ever it be their fortune to come up with them, that so, when they are obliged to it, they may engage them, not as by their own, but upon the publick Authority. The Law mentioned *Deuteronomy*, Chap. xiii. v. 9. doth not give every private Man right to kill the Person that would lead him into Idolatry; but only to bring him forth to Justice, that upon cognizance of the matter, the People should stone him. But yet, admitting that every private Man had Power given him to punish one convicted of such a Crime, the establishment of such a Power by a previous Law makes the private Person an Instrument of the Government; and what Actions he undertakes on this account, must be look'd upon as commanded by publick Authority ⁸. The Action of *Phineas* ⁹ tho' favour'd by God's particular approbation, is not an Argument to be insisted on; for such a Zeal allow'd to any Man indifferently at other times would soon confound and distract all civil Order, and give Colour and Protection to every one's Rashness and Passion ¹⁰. The Power of Life and Death, which in some Commonwealths, Masters of Families have over their Children and Servants, tho' it does not originally flow from the Commonwealth, yet under civil Government we may imagine it to be a branch of publick Authority, which the Sovereign permits Heads of Families to exercise over those under their Charge. And there is no reason to the contrary,

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¹ Vid. *Dionys. Halicarnass.* l. 1. p. 68. Edit. *Lips.* Leaving *Numitor* to inflict the Punishments as he pleas'd, because he thought it reasonable, that the Party that was injured should have the Right to punish.

Mr. BARB. NOTES on § XII.

¹ PLATO de LL. II. p. 977. B. Criminals are punish'd, not because they have offended, for what is done can never be undone; but that for the future the Criminals themselves, and such as see their Crimes punish'd, may take warning, and be put out of love to Vice. TULLUS in *Livy*, l. 1. c. 28. Let others at their Peril, attempt the like afterwards, when I have made him an Example to all Mankind.-----And let the World learn, by your Punishment, to think those things sacred which you have violated. *Livy* l. 1. c. 33. *Ancus* built a Prison in the middle of the City, just by the *Forum*, to frighten the growing boldness of Vice. Add. *Agathias*, l. 4. init. *Lucian. Phalaris*, 1. p. 735. *in fin.* It would be to no purpose to expect any benefit from any thing, if Malefactors were not perpetually terrified by the fears and expectations of Punishments.

² *Gunth. Ligurin.* l. 1. c. 527, &c.

*Nec melius stultæ, furor atque superbia, plebis
Puniri poterat, quam tantæ causa tumoris
Eriperentur opes, ut, quos opulencia dudum
Fecerat elatos, in se revocaret egestas.*

What happier Art could he have us'd t'assuage
A haughty Town, and a bold Faction's Rage;
Than to deprive them of that Wealth, from whence
The fatal Ills unhappily commence?
Seditions are by Wealth and Ease maintain'd,
But soon by Want and Poverty reclaim'd.

Speaking of the Citizens of Utrecht, who had been fined a great Sum of Money by Frederick, for an Insurrection there.

³ Vide L. 9. t. 27. l. 1. C. ad L. *Jul. repetund.* L. 9. t. 20. l. 7. C. ad L. *Fabiam de Plagiar.* *Quintil. Declam.* 274. When Criminals are executed, the most publick Places are chosen, where there will be the greatest Number of Spectators, and so the most, for the fear of the Punishment to work upon 'em. *Senec. de Ira*, l. 3, c. 19. The more publick the Punishments are, the greater Effect will they have upon the Reformation of others.

⁴ *Herodot.* *Melpom.* p. 107. Edit. *H. Steph.*

⁵ *Comp. Val. Max.* l. 2. c. 9, f. 3.

⁶ L. 2. c. 20. f. 9.

⁷ *Ubi supra*, f. 14.

⁸ See *Grotius* upon the Place.

⁹ *Numb.* xxv.

¹⁰ *V. Selden de J. N. & G.* &c. l. 4. c. 4.

why there may not be a Magistrate in every Commonwealth, who in certain Cases may be allow'd Power to punish Criminals extraordinarily, without any judicial hearing, provided care be taken he shall not abuse an Authority of so large extent. Thus when the Government sets a certain price upon the Head of a Traytor, the Person that kills him, is supposed to do it by publick Authority; for altho' such a Declaration has not always the force of a Command, yet when the Traytor is kill'd upon a view of that encouragement, the action may be defended as undertaken by publick Allowance and Authority^a. *Grotius*, in his Comment upon *Esther*, Cap. ix. v. 10. observes, *That it was an Opinion which obtain'd among the Jews, that if any Man attempted to betray an Israelite, or his Estate, to the Gentiles, or put any publick Affront upon the whole Body of their Nation, that it would be no Sin for a Jew to kill him, his Estate being left his Heirs.* But the Liberty which the *Jews* at that Time took in the Execution of their Revenge, does not seem to be agreeable to the nature of the civil Government. There is a Law mention'd in *Andocides*, Orat. 1. *That if any Person attempted the Subversion of the Democracy at Athens, or if any Person, upon the dissolution of the popular form of Government, should create any Magistrate, he should be pronounced an Enemy to the State; and no body that kill'd him should be punishable; and then follows the Oath which all the Athenian Tribes engag'd in, to kill the Person that should do so.* And *Valerius* instituted a Law at *Rome*, *That no Magistrate should ever be created, from whom there should lie no appeal; and that it should be lawful to kill any Person that should make such a Magistrate. And that it should not be capital for any Man that did kill him*^b. And the *Pauchæi* are said to have lookt upon it as unlawful for their Priests to pass the borders of their consecrated Country; and if any Man found them without those Limits, he was allow'd to kill them^c. Here therefore we may observe, that in these, and all other Laws of the like nature, upon such evidence of the fact, as admits of no scruple and dispute, the general Edict has the force of a positive Sentence of Condemnation; and the Death of the Person that follows upon it, seems to be authorized by the command of the Magistrate^d; and if a private Man, upon the influence and instigation of such a Law (supposing the Reasons of it be just) should kill the Party, he will not only be indemnified in the civil Court, but may be fairly acquitted

by his own Conscience, so he was not induc'd to that action by any private grudge or resentment, but barely by a belief, that by such an action he should do good to his Country; and especially, if the reason why the Law permitted or commanded any Man to be the Executioner of the Penalty was, that the Commonwealth was in imminent Danger from such treasonable Attempts. But the Case is different as to the Blood which is spilt upon an Indulgence, the Law sometimes alloweth to a just Concern and over violent Passion; which only takes off the civil Punishment, but doth not excuse the guilt of the act. Of this nature are the Laws which permit Husbands to kill Adulterers and their Wives, when they surprize them in the Act; for human Laws pardon only the violence of a Discontent conceiv'd upon the most severe Injuries. Though possibly it might be a more convenient way, to leave such Injuries to be punisht by the Magistrate, so the Commonwealth might be in no danger by the delay of the Revenge^e.

XIV. But notwithstanding, from the ends of Punishment, and the State of human Nature, 'tis manifest, there may be some Actions in themselves evil, which yet it wou'd be needless, and to no purpose for human Justice to punish. Such as are, *first*, Acts meerly internal, as sinful Thoughts, evil Inclinations and Desires; though it may afterwards happen, they may (as suppose by a subsequent Confession) be discover'd^f. For since no Man is injur'd by such an internal Motion, no Man can be concern'd for the Punishment of it^g. 'Tis true indeed, as *Philo* saith, *That while we entertain, tho' it be only, our Imagination, with bad Thoughts, we are guilty of those Thoughts*: but this holds true with Relation only to divine Justice. Though *Grotius* in his Comment upon the 5th of *St. Matthew*, v. 28. shews from several Testimonies of Heathen Writers, that such Thoughts, from bare Reason only, may be proved to be real Sins^h. But 'tis a quite different thing, when the internal Acts are considered in Conjunction with the external; for the influence these have upon the Quantity and Quality of our Actions, is very considerable. And therefore many Crimes are punish'd, which have yet been stopt in the Attempt, and fail'd of final Successⁱ. But besides, it would be too rigorous to make every Peccadillo subject to the severity of human Punishments, since, in the present state of human Nature, the greatest Caution and Intention imaginable, is not sufficient to guard us from a Multitude of

MR. BARB. NOTE on § XIV.

^a Add. *Bodinus* de Repub. l. 4. c. 7. p. m. 734. *Amnianus Marcellinus* gives us a very strange Instance of Calumny, l. 15. c. 2. The Story he tells is of one *Mercurius*, whose Practice it was, when any Man happen'd to tell his Friend his Dreams, (and Dreams in Nature we know use to be odd and extravagant) to paint them in the worst Colours his Malice could give them, and then represent them to the suspicious Emperor: upon which the Dreamer was Indicted, as guilty of as great and high a Misdemeanour, as if he had actually committed some unpardonable Fact. So that when this came to be publickly known, People were so far from telling their Dreams before strange Company, that they would hardly own that they had been asleep. And some Learned Men were concern'd, that it was not their Fortune to be born among the *Atlantæi*, where they say, no body Dreams.

^b Add. C. L. 3. t. 27. *Quando liceat unicuique, sine iudice se vindicare, vel publicam devotionem.* L. 1. ^c *Diodorus Siculus*, l. 1. c. 46. ^d Vide *Grot.* L. 2. c. 20. f. 17. ^e Vide *Gratian* Can. quicumque, &c. Cauf. 33. Qu. 8. *Senec.* Controv. l. 1. Controv. 4. l. 4. Controv. 24. *Xenoph.* de Educat. Cyri. l. 3. p. 41. Edit. *H. Steph. Valer. Max.* l. 6. c. 1. f. 13. *Bæcher* ad *Grot.* l. 2. c. 1. f. 14. *Ant. Matthæus* de Criminib. ad L. 48. D. t. 5. *Grot.* in flor. sparf. ad *Jus Justinian.* ad L. 48. t. 5. D. l. 22. f. 4. ad L. *Jul.* de Adult. ^f Ad *Grotius* Imper. de Summar. Potest. circa sacra, c. 3. f. 1. ^g *Cogitationis pœnam nemo patitur.* Vide L. 48. t. 19. l. 18. de *Pœnis.* *Philo* Lib. quod det. pot. infid. The *Origines Juris Civilis* by Mr. *Gracina*, Lib. 3. p. 584. & seqq. and the *Observationes Jur. Civil.* by Mr. *Bynckerhoek*, Lib. 3. Chap. 10. ^h Vide *Grot.* in *Flor. sparf.* ad Lib. 48. t. 8. l. 14. D. ad L. *Cornel.* de *Sicariis*.

Slips and Infirmities. And therefore *Themistius* ^a when he had divided Mens Failings into three sorts, *viz.* *Misfortunes, Mistakes, and criminal Actions*, very justly adds, that a Prince ought to pity the first correct the second, and punish the third ^b. 'Tis said of *Alphonfus* King of *Arragon*, "That having carefully read over the whole Body of the *Portugueze* Laws, he highly commended the Wisdom, and the Order, and Administration that was observed in the Commonwealth; but was as much displeas'd to find so many particular Laws calculated for the most trivial and minute Cases; and to expose the scrupulous exactness of them, he ask'd the *Portugueze*, in way of raillery, How a Man was to be punished that set his Foot to the Ground ^c? *Grotius*, in his 2d Book, C. xx. § 19. speaking to this Subject, seems not to have said what is exactly proper, or true: *Our slips and failings, saith he, can hardly be call'd sins; because, if we consider them in the general, they are not committed with that liberty, which in particular they seem to be:* for I can't think it is a Consequence, that if it be morally impossible, but a Man must fall into some Sins; therefore such Sins of daily Infirmity, or Incurfion, as they are call'd, cease to have the nature of Sin. He adds in the same Chapter, that those Sins do not deserve punishment, which neither directly, nor indirectly, bear any relation to human Society, or other Persons; for that there can be no reason, why we should not leave such Sins to be punished by GOD Almighty, who has the highest Wisdom to know them, the greatest Justice to examine them, and the most absolute Power to punish them; and that therefore 'tis without any prospect of Advantage, and consequently to no purpose for Men to institute such Punishments. Though, I think, it may be very well made a Question, whether there be any such Sins as those he speaks of, if we except Thoughts before they are produced into Action. Besides, the civil Laws deny to some Acts the power of producing an Action, or exempt them from human Penalties; either for publick Peace and Quiet, or upon other reasonable Accounts; sometimes it may be supposed that a certain Action would look better, if it could not seem to have been undertaken upon fear of human Punishment, sometimes the matter may be too frivolous to give the Judges the trouble of hearing it; or perhaps be too perplex and intricate, to be determin'd; or when the evil is grown inveterate, and so rooted in the Temper of the People, that it is not likely to be suppress'd without a Convulsion, which might prove fatal to the Commonwealth ^d; or else to prevent an unreasonable Increase of Suits at Law ^e. In fine, it is absolutely necessary, that all those Dif-

orders of the Mind, which are the Effects of the common Corruption of Mankind, should be exempted from Punishment; since they are so general, that 'tis impossible but all civil Government should be dissolv'd, if such Sins should fall under the Severity of human Penalty, before they discover themselves by an open Enormity; such as are Avarice, Ambition, Inhumanity, Ingratitude, Hypocrisy, Envy, Detraction, Pride, Anger, Discord, and the like: all which Vices, it was our Saviour's great Design, by the Holiness of his Doctrine, to extirpate and suppress. For 'tis certainly true, as *Seneca* says, "That if every Man was to be punish'd that was of a wicked and deprav'd Disposition, none could be excus'd from Punishment ^f."

XV. But neither is it always necessary that such Misdemeanours, as may properly be punished by the civil Court, should therefore always be punish'd by it ^g; but there may be sometimes room left for Pardon. The *Stoicks* indeed, as *Stobaeus* ^h represents them, were violent against this Opinion: For a wise Man, they said, ought never to pardon any Body; because the Person that pardons must suppose that it was not the Offender's Fault that he transgress'd; tho' 'tis certain, that every Man's own natural Depravity is the cause of his Transgression: And therefore 'tis still true, that Offenders ought not to be pardoned. What they meant by this Argument seems to be this: Either 'tis a Man's own Fault that he offends, or is it not; if it be not his Fault, there is no Offence committed, since every Man transgresses from his own natural Depravity, and therefore in this case there is no need of Pardon; and if it be a Man's own Fault, then he can't be admitted to Pardon, because Pardon is not to be allowed to any wilful Transgressors. Which Reason manifestly begs the thing in dispute. They add, that a good Man is not to be compassionate or merciful; for a compassionate or merciful Man deprecates and endeavours to alleviate the Punishment a Criminal deserves, but every Man ought to have Retribution made him, according to his Deserts. But now, the nature of Desert or Merit is different with respect to good, and with respect to evil. The good which is due to a Man cannot in Justice be denied him; but the Nature of evil is such (it not intending the Benefit of the Person that must suffer it) that it is no Injury to deny it him. They argue further, that a Man cannot be inclinable to Mercy, without thinking that the Punishments, which the Law appoints for Delinquents, are too severe; or that the Legislator has prescrib'd Penalties without due regard to Fact. But this is still but weak Reasoning. For 'tis no Contradiction, that the

^a *Orat. IX. ad Valentin. Jun. Ad. Sanderfon. de Juram. Oblig. Praelect. 3. f. 18.*

^b *Hier Olorius, l. X.*

^c *Julianus in Caesaribus de Probo.* 'Tis very difficult for a Man to govern an Horse, or any other Beast, and much more Men, without indulging them in some things they have an Inclination to; as Physicians usually allow their Patients in little Irregularities, that they may be the stricter in the Observation of the great and chief Prescriptions. The great Lord SHAFESBURY, in an imperfect Piece of *Mr. Lockes*, says, "That in every Person, there are two Men, the one Wise, and the other a Fool; and you must allow 'em the Liberty of following their Genius, each in his turn. But if you pretend to have the Wise, the Grave, and the Serious one, always sit at the Helm, the Fool will grow so uneasy and troublefome, that he will disorder the Wise one, and render him incapable of doing any thing: You must let the Fool also in his turn, have the Freedom to follow his Whims, to play, and divert himself according to his own Fancy, if you will have your Affairs go on smoothly and easily."

^d To this purpose is *Tiberius's* Epistle about Luxury, *Tacitus*, Ann. iii. 53.

^e *Add. Seneca*

de Clementia L. 1. c. 22.

^f *De Ira*, l. 2. c. 31, in fin.

^g *V. l. Grot. ubi supra, l. 21.*

^h *Stob. Serm. XLIV.*

Punishments prescrib'd by the Law may be just, and yet may sometimes be mitigated; for the Law determines only in general, what Punishments are to be inflict'd on such and such Crimes, without consideration of the particular Circumstances which may sometimes happen, in certain Persons, in certain States and Conditions of the Commonwealth. But particular Men are pardon'd for certain Reasons, which do not take place either in all Offenders, or at all Times. *Seneca* ^a, in his Book *de Clementia*, says, That Pardon is a Remission of the Punishment which is due (*pœnâ delictæ*) but that a wise Man always doth what he ought to do. But here the Mistake lies in the word *due* (*debitæ*) for if it be meant, that Punishment is due to Offenders; that is, that an Offender may be punished without injury or just occasion of Complaint; in this sense it will not follow, that if a Man doth not Punish an Offender, he doth what he ought not to do: For a Man may very justly and lawfully do many things, which he is not always necessarily oblig'd to do. Besides, as it is a mistake to say, that Punishment is due to an Offender, meaning by it, that there is an inherent Right in the Delinquent which the Punishment is to satisfy (for I think no Man ever complain'd that his Punishment was remitted; except it may be said, that a Man may wish that such Correction, as might have reclaim'd him when he was young, was neglected, when he finds that his childish Levities and Faults are grown up into bold and manly Vices) so 'tis improper to say, that a Delinquent ought to suffer Punishment (*pœnam dare*) meaning by it, that he is under an Obligation to suffer it: the reason of which I have explain'd before. But if by the Word *due* (*debita*) it be understood, that a wise Man is oblig'd to inflict the Punishment; I answer, first, That no Man can be under any such Obligation, unless the executive Power of the Laws be either publickly or privately committed to his Care. And, secondly, That the Obligation which lies upon the Governors, doth not relate to the Delinquent, but to the whole Commonwealth or Society, whose safety they are bound to provide for, and especially this way, by punishing the Insolence of Offenders; which if they neglect to do, there is no Injury done the Criminals, but they have violated the Obligations which they owe to the Commonwealth. But 'tis evident, that the Peace and Safety of the Commonwealth is so far from being subverted, that it is sometimes secured and establish'd by granting Pardon, in proper Times and Places.

XVI. *Grotius*, l. ii. c. 20. Sect. 21, 22. says, That there is room for Pardon even antecedently to the penal Law; but this ought to be dexterously explain'd, otherwise it will appear to be but a very vulgar Thought, that where there is no Law, there is no Punishment, no

Transgression, or Pardon of Transgression. And a penal Law is not only a Law, which defines the particular sort of Punishment; but that Law also is a penal Law, which leaves the Determination of the Quality and Quantity of the Punishment to the Discretion of the Judge. Here therefore it must be observ'd, that in Commonwealths which have no written Laws, the Laws of Nature serve instead of civil Laws, and Justice is administr'd according to them; and Persons transgressing them are punish'd at the Pleasure of the Judge: but even, where the civil Laws are written, yet since it is impossible they should be so express and particular, as to comprise all that variety and compass of Action, in which Mens Impieties may be discover'd; it is necessary that Reason and the Law of Nature should supply the Defects of the civil Law: and where the express penal Sanction is not sufficient, it must be left to the Discretion of the Judge to determine the Penalty ^b. And thus we may understand how Punishment came to take place antecedently to the penal Laws ^c. But although, in such Commonwealths, the Magistracy hath Power to inflict Punishment on Malefactors, yet this is no Reason why every Malefactor should be punish'd; but that must depend upon the Connexion there is between those Ends for which Punishments were at first instituted, and the Punishment it self. And therefore, if in a particular Case, those Ends, upon a moral Estimation, do not appear to be necessary; as suppose, first, 'tis thought most advisable, that such a particular Crime should not be divulg'd; or, secondly, if there be other opposite Ends of no less Utility and Necessity, as suppose, the same, or a greater Good might be obtain'd by omitting the Punishment; or, lastly, if the Ends propos'd by punishing, may be more conveniently obtain'd some other way; I can see no direct Obligation that lies upon the civil Court to inflict Punishment ^d. To instance in the first Case, we must imagine some Sin, which is not yet grown into common Acquaintance, and in consequence, the publick Impeachment and Prosecution of which will appear neither necessary, nor safe: for many Mens Obedience depends more upon their Simplicity and Ignorance of Vice, than any real Love they entertain for Virtue; and the punishing such a Crime, so new and strange, would not frighten so much, as sollicite and provoke their perverse Curiosity, to make an Experiment upon it too, and to love what is forbidden them. For this reason, 'tis said, *Solon* instituted no Law against Parricide, that he might not seem by forbidding it, to have put People in mind of it ^e. And *Busbequius* tells us, "That the *Turks* seldom make Inquiries after secret Criminals, for fear they should only find Occasion for Scandal; but that every open Breach of Law they severely punish ^f. An Instance to the second Case may be conceiv'd in a

^a *Senec. de Clementia*, l. 2. c. 7. in fin. *Vid.* *Ciceron. Orat. pro Muræna*, C. 29.

^b *Lycurgus contra Leocratem*. It was not through any oversight in the Legislators, that the Punishments for such Crimes happen'd to be omitted; but because in the first Times there were no such Actions ever heard of.

^c And from hence that Passage in *Cicero* may be explain'd, l. 1. in *Verrem*. c. 42. No Law takes cognizance of the Time past, except it be in a Thing in its own nature criminal and wicked, so that if there were no Law in force, it ought nevertheless to be absolutely avoided.

^d *V. Gratian. Caus. 23. Quæst. 3. c. 18, 24.*

^e *Apuleius Metamorph. l. 10. p. 319. Edit. in usum Delph.* 'Tis the same thing almost, not to be, and not to be known.

^f Which is almost the same with the Counsel *Mæcenas* gave *Augustus* concerning the Imposition of Punishments. *Dio. Cassius*, l. 52.

Criminal who pleads his own, or his Parents, or his Ancestors Merits to balance his present Transgression; for it may sometimes be equally, or perhaps more beneficial to the Commonwealth, to reward a brave Action of a particular nature, than to punish a bad one: and the Expectation of future Benefits, as well as the Memory of past, may be thought sufficient to expiate the Crime, *For though what is once ill done can never be remedied, yet it may be atoned for by the brave Actions of the same Persons afterwards, and so be honourably forgotten*^a. An Instance in the third Case may be taken from a Man who is won by good Advice to reform, makes a verbal Satisfaction to the Person injur'd, and giveth Security that there shall be no further occasion of Punishments to these ends, and that his Fault shall not be of any mischievous Influence. And then *Seneca* himself says^b, "That a wise Man will be very ready to pardon a guilty Person, when his Sorrow for his Fault giveth him promising hopes of amendment; and when he perceives he acted not by Principle, but only out of Rashness and Folly; nor will the Impunity so given either be dangerous to the Person that receives, or to him that gives it." From all which, by the way, it appears how far a Crime may be released by Composition and Agreement with the Accuser or injured Party; namely, that they may safely remit and forgive it, so far as their private Concerns are engaged in it; but that no particular Composition with them can supersede or prejudice the right of the Commonwealth. And therefore such agreements between private Men may take away the second end of Punishment, but not the third^c. But to this Case we may reduce those Misbehaviours which we commonly call Follies of Youth, which any Man of candid Temper is willing to pardon; since, when the warmth of that Age is over, Men usually

admit of cooler and more sober Thoughts^d. And so also, when a Man has been injured^e, as he thinks the Injury much the less, if the injurious Party confesses, that it was a rash and inconsiderate Action; so in all such Cases he will be more inclined to pardon than punish^f. For since all sorts of Punishment, and especially the more severe, seem to have something in them, which, consider'd in its self, is, though not repugnant to Justice, yet contrary to that Love and Affection, which should be the result of the common Affinity of Mankind; upon this account Reason will easily permit the Punishment should be sometimes superseded. And so we find *Plutarch* reasoning^g, "Why, says he, were the Rods and Ax always carried tied and bound up before the Roman Magistrates? unless either to signify to us, that their Anger ought not to be left loose and unconfid'd; or else that the slow unbinding the Instruments of Execution might give them occasion to demur and delay Sentence; and, as it hath sometimes happen'd, to reverse the Punishment, after it hath been pronounced^h?" For some Vices are curable, others are past Remedy; the Rods are to correct those that may be reform'd, and the Ax cut off what there is no hopes of amending". For sometimes a greater and juster Charity forces Justice to inflict the Punishment, that the pardoning one Man might not incommode many others: For 'tis but cruel Compassion to spare one Malefactor to the wrong and hazard of a number of innocent Personsⁱ. King *James* in his *Donum Regium*, l. ii. gives us this Catalogue of Crimes that ought never to be pardoned; namely, *Sorcery, Robbery, Incest, Sodomy, Witchcraft, falsifying the Coin, Oppression or publick Violence*. In these Cases I have mentioned, therefore, the *Stoicks*, say, *A wise Man would spare, and not pardon*^k.

MR. BARR. NOTE on § XVI.

^a The Words which our Author here makes use of, shew that he had in view a Passage of *SENECA'S*, quoted by *GROTIUS*, Sect. 22. Numb. 1. But as that great Man has manifestly cited it without Book (for he does not so much as mention the Treatise where it is) so he entirely changes and perverts the Thought of the *Stoick* Philosopher, in writing *Injuriam* instead of *Injuria*: And it is surprizing, that this oversight was not taken notice of by *GRONOVIVS*, who, before his writing a Comment on *Grotius de Jure Belli & Pacis*, had publish'd an Edition of *Seneca*. The Philosopher handles this Question, whether we are oblig'd to shew any acknowledgement of gratitude to a Person, who, after he has been serviceable to us, does us an Injury? And he concludes, that the Injury effaces the former Service or Benefit. *Quomodo si quis scriptis nostris alios supernè imprimat versus, priores litteras non tollit, sed abscondit; sic beneficium SUPERVENIENS INJURIA adparere non patitur. De Benefic. Lib. vi. Cap. vi. in fine.* *GROTIUS* on the contrary, makes him say, That the Benefits efface the Injury. But this last Maxim will be better illustrated by the following Passage in *CICERO*, to which *GRONOVIVS* refers in his Notes, and which that great Orator made use of in an Oration in favour of *Julius Cæsar*; *Si jam violentior aliquà in re C. Cæsar fuisset, si cum magnitudine contentions, studium Gloriæ, præstans Animus, excellens nobilitas, aliquo impulisset ---- maximis rebus, quas postea gessit, obliterandum. Orat. in Vatin. Cap. vi.* To which may be added, that Law of the *Digests*, that allows Pardon to a Deserter, who since his Desertion has discover'd a considerable Gang of Robbers, or several other Deserters. L. xlix. tit. xvi. de re militari Leg. v. Sect. 8.

^a *Procop. Hist. Vandal. l. 2. c. 16.* ^b *Seneca de Ira, l. 1. c. 16. p. 20. Edit. Gronov.* ^c *Tacitus, Ann. iii. c. 70.* There was Reason why he ought to be slow in pardoning the Indignities offer'd to himself, that he might be cautious how he forgave those that injured the Publick. ^d *Juvenal, Sat. viii. v. 166, &c.*

Quædam cum prima rejecantur crimina barba.

Some Faults of course with Childhood end.

Vid. Aristot. Rhet. l. 2. c. 3. init.

^e *Vid. Arrian. de Expedit. Alexand. magn. l. 7.*

^f *V. Grot. l. 2. c. 20. s. 22.*

^g *Plut. Quæst. Rom. 82.*

^h *Juvenal, Sat. vi. v. 220. Nulla unquam de morte hominis cunctatio longa est.*

ⁱ *Julian. in fin. Misopog. p. 371. Ed. Spanhem.*

'Tis an Encouragement to the growth of Wickedness, to shew any Favour to Thieves and Villains. *Appianus Alexand. Mithrid. Bello, p. 250. Ed. H. Steph.* There is nothing more ungrateful than a pardon'd Criminal. *And therefore none ought to be pardon'd, but such as repent of their Wickedness.*

^k *Guntb. Ligurin. l. 1. v. 478, &c.*

-----*Plus sæpe nocet sapientia Regis,
Quam rigor: ille nocet paucis, hic incitat omnes
Dum se ferre suos sperant impune reatus.*

Excess of Mildness in indulgent Kings,
More Danger, than the strictest Rigour brings.
Some few perhaps may by Injustice die,
But who can any pleasing Sin deny,
Secure of Pardon and Impunity?

Sadus Rosar. Perf. c. 8. 'Tis brave and generous to forgive. But there is no Reason we should find a Cure for his Wounds, who hath been a publick Enemy. A Man ought to think it an Injury to Mankind to let go a Serpent. To this relates what *Lepidus* said in *Tacitus, Ann. 2.* when he was against dealing severely with the foolish Poet; If he be pardon'd, the Commonwealth will be in no Danger by it; and if he be punish'd, his Example will have no Effect.

But

But 'tis a ridiculous Nicety to refuse to call that a pardoning with the rest of the World, which they themselves will have to be sparing; and 'tis certainly beneath Men of Sense to dispute about Words, when the Sense of the thing is agreed upon.

XVII. But after the Establishment of the penal Law, the Difficulty seems to be greater, how the Delinquent can be excused from Punishment ^a. For there seems to be more room left for Pardon, where the Penalty is arbitrary, than where 'tis expressly determin'd by a Law; and that, not so much, because 'tis expected that the Legislator should act conformably to his own Laws; as because the Authority of the Laws will be lost, if the due Execution of them is without good reason neglected; and because the Magistrate himself would seem to invite others to transgress, when the hopes of Pardon which he gives the Criminal is equal, or greater than the fear of Punishment ^b ^c. Therefore, though the force of human Laws depends upon the Will of Man, not only as to their Original, but also as to their Continuance; yet they ought not, but upon very urgent and weighty Reasons, to be alter'd or repeal'd. For this would be a breach of the Rules of Prudence in the Art of Government. But I don't know whether it be not a more dangerous Mistake, without very good Reason, to suspend the Execution of a Law still in force, for the sake of certain Persons; than utterly to abrogate it: since generally, none of the common grievances of Men seem more insupportable than this, that Persons of equal Merit are not used with equal Justice. But notwithstanding, as the Sovereign may, when he sees good reason for it, repeal an intire positive Law; so he has Power to suspend its Effect, with regard to certain Persons, and certain Crimes, the Law in other respects being still in force. The Sovereign I say; for subordinate Judges are not to make or alter Laws, but only to pass Sentence, according to those already made ^d. *Grotius*, in the Chapter beforemention'd, *Sect.* 25, 26. distinguishes the Reasons of Pardon given after the penal Law, into intrinick and extrinick. The intrinick Reason, according to him, is, when the Punishment would not be unjust, as being before lawfully enacted and promulg'd, but however has the Appearance of too much Severity, when set in Comparison with the Fact; though I confess, I should think, that if the Penalty the Law enforces be in general too severe, it would be a wiser Method to correct the Law it self, than to Pardon some few, and leave others expos'd to the Rigour of the Punishment. But undoubtedly Judges are obliged, upon all rules of Equity, if not entirely to remit, at least to mitigate the Punishment, when they find, in certain particular Facts, a Concurrency of Circumstances, that alleviate the Crime,

as to the Quantity and Quality the Law supposes. In which Cases the Fact it self hath the intrinick Grounds, though not of Pardon, yet of some Mitigation of the Penalty adherent to it. And therefore, I am of Opinion, 'twould be much more proper, to allow of no other but the external Causes of relaxing Punishment; such as the former Deserts of the Criminal himself, the Merits of his Family, or Relations, or some other commendable Action or Thing; or lastly, the Hopes that the Delinquent may make amends for his Fault by many good Actions afterward. And therefore, *Tully* saith ^e, *That a Man that petitions for Pardon, should first of all put the Judges in remembrance, what good things he hath formerly done, and shew how they overbalance the Guilt of his present Crime; and that, in short, he has been the Cause of more Good, than Evil: And then, saith he, in the next place, he should recount the good Actions of his Family, whatever he thinks proper to be insisted on, and then he is to prove that he did not commit the Fact either out of Malice, or Cruelty, but out of Rashness, or from some other Person's Instigation, or upon any other creditable or honourable Cause, which engag'd him in it; and after all make what Promises, and give what Assurance he is able, that the Sense of his Crime, and the Lenity of the Judges in pardoning him, shall have such an Influence upon him for the future, as shall entirely restrain him from ever attempting the like again.* And thus it hath been usual to Pardon some Criminals, upon the Desert and Merit of their Ancestors, or at the request of Men in favour. 'Tis related of the Emperor *Hadrian*, that he alleviated the Punishment of Criminals, according to the number of Children they had ^f. And some have been acquitted, because they happen'd to be the last of noble and illustrious Families. *Phryne*, an *Athenian* Courtisan, when she was tried for her Life, was brought off by the Art of *Lyfias* the Orator ^g, who took off her upper Garment, and expos'd her naked Breast to the Court. And *M. Antony* the Roman Orator, brought off *M. Aquilius*, when he was plainly convicted of Bribery, by the like Art. For bringing him in publick View into the Court, at the Close of his Defence he open'd his Bosom, and shew'd the People the honourable Wounds he had receiv'd there ^h. *Polydore Virgil* relates it, as a Custom which obtain'd formerly in *England*, that no Criminals, except such as were convicted of Treason, suffer'd Death, but were condemned only to perpetual Imprisonment, if they could but read ⁱ. And these Reasons will appear more Satisfactory, if upon Examination of the Fact, it seems to be particularly exempted from the Reason of the Law. The general Reason indeed, for the Observation of every Law, is the Authority and Will of the sovereign Legislator;

^a *Vid. Grot. l. 2. c. 20. f. 24.*

^b See above in *B. 1. c. 6. f. 17.*

^c *Arnob. l. 7.* The Number of Criminals

certainly increaseth, according to the Hopes they have of buying off their Crimes; and Men are less scrupulous of offending, when they see the Favour of a Pardon is easily purchas'd.

^d *Lyfias* ii. *Orat. 13. c. 3.* in *Alcibiad. Themistius, Orat. 9. de Humanitate Theodosii.* There is a great difference between the Power and the Duty of a Prince, and a Judge; the latter is to be directed by the Laws, the former may amend and alter them, alleviate and soften their Rigour and Severity; as being himself a living Law, *L. 40. t. 9. l. 12. f. 1. qui, & a quibus manumiss. & L. 49. t. 8. l. 1. f. 2. D. quæ sentent. sine Appellat. rescind.*

^e *Cic. de Invent. l. 2. c. 35.*

^f *Vid. Xiphilin. Epit. Dion. Vid. Liv. L. 8. c. 35.*

^g The Orator

was *Hyperides* and not *Lyfias*, *V. Athen. l. 13. Angl. l. 26.*

^h *Herodot. Thali, p. 112. Ed. H. Steph.*

ⁱ *P. lyd. Virg. Hist.*

which, when there appears no other Reason, is Reason sufficient; but the particular is either some Benefit likely to accrue to the Commonwealth, or some Inconvenience which may be avoided, by the Observation of the Law; as for Example, let us imagine some place where sumptuary Laws are in force; the general Reason of these Laws is the Will of the Legislator; the particular, that the Estates of the private Subjects may not be wasted or squandered away by extravagant and unnecessary Charges; and in this Instance, though the general Reason of the Law may be enough to support the Authority of it; yet when the particular Reason of it ceases, the Punishment may justly be remitted with greater Ease, and less Discredit to the Authority of the Law; as for Example, in this Case, if we suppose the Offender in such plentiful Circumstances, as to be out of Danger of being reduced to Poverty by the Vanity and Lavishness of his Expences. Rigid Governments indeed will hardly bear Neglect in the Execution of their Laws or Commands, only because the particular Reason of them is ceas'd. As 'tis said, *Cambyses* was very well pleas'd that *Craesus* was saved, but yet put the Persons to Death that spared him, for their Remissness in Executing his Commands. Again, it may be a reasonable Plea for Pardon, either when a Man is intangled in a Crime through Ignorance, though perhaps not such an Ignorance as wholly dischargeth the Fault, but such as might proceed from Remissness or Negligence; or if he were taken with any sudden Weakness or Disorder of Mind, which could not be easily prevented or overcome. Under the first of these we may place the Misfortune of *Charondas*, in *Diod. Siculus*, who came through Inadvertency with a Sword on into a Publick Assembly, contrary to a Law he himself had made; and therefore I think he had no Reason, upon that Account, to lay violent hands upon himself^a. There is another Story in the same Author, of *Diocles the Syracusan*^b, who instituted a Law, by which it was made Death for any Man to be seen arm'd in the *Forum*, without any Allowances to be made for Inadvertency, or any other Circumstances; and yet he, upon the news that the Enemy had made an Incurfion into his Territories, arm'd himself, and hearing that there was a Sedition rais'd in the *Forum*, went thither with his Sword on; but being told of it by a private Person, kill'd himself with it. But indeed there was no Pity due to him, because in his Law he had cut off all Exceptions of Inadvertency, or any other Circum-

stances of the like nature. Neither is what has been said of this Point, in the least refuted by all that tedious Dispute of *Mattheus, de Criminibus ad L. 48. Tit. 19. c. 5. D.* To what has been already said it must be added, That as the measures of Punishment in human Judicature must be taken by the Advantages of the Commonwealth; so the same Rule may make it necessary to admit Criminals to Pardon upon account of their Numbers. For tho' in general 'tis no Excuse to plead, that there were others guilty of the same Crimes^c; yet every wise Government ought to take care that Justice, which is intended for the Preservation of human Society, should not prove the Ruin and Destruction of it.

*Cautius ingentes morbos, & proxima cordi
Ulceræ Præniæ tractat solertia curæ,
Parcendoque secat; ferro ne huius actò,
Irrevocandus eat scélis vitalibus error.*

The skilful Surgeon all his Care applies,
When nigh the Heart the burning Ulcer lies;
With gentlest Touch he tries th' affected Part,
And probes the throbbing Wound with cautious Art,
Nor wide th' Incision makes, but spares th' Unsound,
For fear the Vitals suffer by the Wound^e.

And therefore 'tis a very good Character of a Prince, *Ovid* gives us, *L. i. de Ponto* §, the *Herforms more Vices by threatening Punishment, than by Punishment it self.* Besides, 'tis frequently necessary either to soften the rigour of some Laws, or else suffer them to grow out of use. So *Tacitus* saith, *Ann. l. iii. h.* "That it was propos'd to reform the Law called *Papia Poppæa*, because the Number of Persons obnoxious increas'd, and every Family lay at Mercy, ready to be ruin'd upon the Suggestion of the Informers; and because, as he saith afterwards, the Informers had advanced themselves so far, that they had prevail'd not only in the City, but also over all *Italy*, and over every Citizen they could find any where else; so that many were already ruin'd, and almost every one was under the same Apprehensions. And thus *Tiberius*, in his Letter to the Senateⁱ, tells them, that he thought it a more proper Method to pass by the head-strong overgrown Vices, than by attempting to correct them, to discover only what Crimes they had not Strength enough to master; that it would be best to reform them first in themselves, and then to be content to wait till Shame had corrected them in the Nobility, Necessity in the Poor, and the Rich should grow weary

^a V. *Diodor. Sicul. l. 12. c. 19.*

^b L. 13. 33.

^c *Vid. Hærat. laudat. Busrud. circa fin. p. 397.*

^d *Quæ sit auctoritas ejus, qui læ alterius factò, non suo, defendat?* Cicer. *Orat. in Vat. C. 6. p. 243. Ed. Græv.*

^e *Claudianus de Bello Getico. v. 138, &c.*

^f *Lucanus Pharsal. l. 2. v. 141, &c.*

----- Dumq; nimis jam patriâ membra recidit,
Excessit medicina modum, nimumq; secuta est,
Qua morbi dâxere, manus: periere nocentes,
Sed cum jam soli possent supere nocentes.

While he, the sound, freed from th' infected part,
With diligence severe, and barbarous Art,
The weaken'd Body sank beneath the Smart,
The Guilty only were of Life depriv'd,
But when the Guilty only had surviv'd.

}
}

Tot simul infecto juvene, occumbere leto,
Sæpe fames, pelagiq; furor, subitaq; ruinae,
Aut cæli terræq; lues, aut bellica clades
Nunquam Pœna fuit.-----Ib. v. 198.

In Plagues and Famines, and relentless Seas,
By Earthquakes, and by common Enemies,
Rome oft her noblest Lives in numbers spent;
But ne'er before gave up to Punishment.

Senec. de Ira, l. 2. c. 10. There is a Necessity of Pardon when the whole Army deserts.

Multa metu pœna, pœna qui parat, coerces.

^h C. 25. 28.

ⁱ *Tacit. Ann. l. 3. c. 54.*

^k *Epist. 2. v. 127.*

of them. For Men were not made for Punishment, but Punishment for Men. And therefore, if they who have the right to inflict Punishment are under Apprehensions of imminent Danger upon the infliction of it, they can be no more oblig'd to punish, than a Man is to lay violent Hands upon himself. In a Ship, if a Pilot should commit a Crime, when no Body but he understands the Management of the Vessel, 'tis plain that the Man that would do Justice upon him must unavoidably shipwreck himself, and all the rest of the Passengers. And so also the Magistrate may lawfully wink at some Crimes, the Punishment of which would be of dangerous Consequence to the Commonwealth; and especially, when the Persons guilty are necessary to the common Safety and Preservation. Though the Magistrate ought never to make any direct Agreement for the Permission of Vice, much less make publick Gain by it ^a. In Italy Pardons are sometimes publickly promis'd to any of the *Banditti*, that shall bring with him the Head of another of the same Gang. (Tho' *Harry Stephens* ^b seems to have disapproved that Custom, and says, that the reason of it might appear agreeable enough in an *Aristotle* or a *Plato*, but could never become a Christian.) Upon such a Promise that the Villains might have a Jealousy of one another, and be hinder'd from uniting into Bodies, and from doing so much mischief as otherwise to the Commonwealth. (Sir *Thomas Moor* was of a contrary Opinion in his *Utop.* l. 2.)

XVIII. I shall in the next place enquire into the Method of rating Penalties, or what Measure of Punishment it is reasonable to allot to particular Crimes. And here besides what I have before ^c said concerning the quantity of Actions, 'tis obvious to observe, that in civil Courts the measures of criminal Actions are taken chiefly, first, from the Object they are concern'd in: and secondly, as their Malignity doth more or less harm to the Commonwealth; and thirdly, from the Intention and Malice of the Delinquent, which may be discovered by variety of Circumstances. The greater therefore and more noble the Object injured is, the greater and more criminal is the Fact esteem'd. As therefore, as of all Objects, God Almighty is the greatest and most excellent, so any Action which tends to his Dishonour, is of all others the most wicked and detestable. And as the Obedience and Reverence due to him, which consists chiefly in the Actions of our Minds, ought to influence and govern our whole Lives; so (as he himself has discover'd his Pleasure) those Actions by which we express our external Reverence to him may be superseded, when they come in Competition with those, which design any extraordinary benefit to Mankind, or to avert any great Evil from them, where there is danger in the delay. *Luke* xiv. v. 5. The Actions next in remove from these, are such as affect the whole Body of Mankind; and then such as disturb the publick order of the Com-

monwealth. Afterwards follow those criminal Actions, that affect only particular Men; and under this Rank, the civil Court sets those foremost, that strike at Life, the Foundation of all our temporal Happiness; and next such as concern the Members, not vital, but without which Life it self would be an uneasy Burden and which are to be valued according to the dignity of their use ^d. The next Class of criminal Actions are those, that disorder the quiet and honour of private Families; the Foundation of which is Matrimony (though *Philo the Jew*, in his Book *de Decalogo & de Special. Leg.* places the Command against Adultery, before that against Murder) and in the next place, we may rank those that rob us of, or deny us those Blessings, which make up the Necessaries and Conveniencies of Life; and that either directly or indirectly, by depriving us of them out of wicked design. And in the last place, we may reckon such as deprive us of our Reputation, or civil Character and Esteem. In the particulars of these Crimes, such are of the first Rank, which have reach'd to the greatest height of a consummate perpetration. The Inferior are those that terminate in some Acts, and are not arrived at their full growth. And in these the Degrees of Malignity differ according to the pitch they have arrived at. And here we may observe, that naturally, a Design and Inclination to transgress, in any particular Act, must not be consider'd under the same Degree of Enormity, with the Fact it self actually finished; because Evil presents it self to the Mind under more odious and disagreeable Colours, when we come to close with the Commission of it; and consequently a Man must have greater Obstinacy and Resolution to overcome it, than when it lies, as it were, at a Distance, and he hath but newly entertain'd the thoughts of the Attempt. When therefore we say the *Will is the same with the Deed*, we must understand, that this is meant only of such an Act of the Will which is united with the utmost Endeavour, so that no new Operation of the Will intervene between this and the Event of the Crime, though the success of the Action fail; as suppose a Man takes aim at another to shoot him, tho' he should miss his Mark ^e. And therefore Sir *Thomas Moor*, *Eutop.* l. ii. saith, "That there is no less Danger in having attempted any one's Chastity, than in having actually violated it. For in every criminal Action a settled and determinate endeavour, is equal to the Deed. For 'tis not reasonable, that that Man should have any allowance made him for what was wanting to the completion of his Action; since 'twas far enough from his intent that any such defect should happen. But the generality of such kind of Evils are rated higher or lower, according to the Disparity of the Subjects they happen to light upon, as to their State and Condition, Happiness or Infelicity, Age, Time, or Necessity, or any particular Passion or Affection, that might byas to some particular Good, or give an Aversion to some species of Evil. Neither

^a See 2 *Pet.* ii. 15. One might here put the Question, whether Magistrates may hire and command private Persons, to turn Informer, as was practis'd by the antient *Romans*, at least in reference to some certain Sorts of Crimes? Consult *Hiber. de Jure civil.* Lib. 3. Sect. 2. Cap. 4. Sect. 27. and Mr. *Hertius's* Dissertation, *de Hærede occisi vindice*, cap. 4. Sect. 3. in the third Tome of the Collection, publish'd in 1700.

^b Apolog. pro *Herodot.* c. 18.

^c B. 1. c. 8.

^d See *Grot.* B. 2. c. 20. § 30.

^e See hereafter in Section 27. towards the End.

must we only barely consider, what are the direct and immediate Consequences of any Action, but also what else may probably ensue; as in Fire, and Inundations, the Miseries and Deaths of a number of unfortunate People, are always to be consider'd ^a: And therefore the *Chinese* make it Death, for any Man to be the occasion of the breaking out of Fire, tho' it were only by his neglect.

XIX. The intenseness or remissness of the Will and Inclination are to be measured principally by the Causes and Motives, which engage Men in Sin ^b. There is hardly any Man wicked, without cause or design ^c; for if a Man be in love with Vice, purely for its own Sake, and Sin only out of Vanity and Affectation, or *has no other reason to give for his Vices, than that they are unaccountable and incredible* ^d, he must certainly be arriv'd at the highest pitch 'tis possible for human Impiety and Impudence to reach. And therefore, *we never find any Malefactor so confident, but he will either deny the Fact, or pretend some plausible reason for excuse, and extenuate it from some pretence of Nature* ^e. 'Tis certain, the greatest part of the World are persuaded into Sin by their Passions. Some of these press us with a sort of Violence, to escape present or imminent Evil. And 'tis reasonable these should be allowed to excuse or extenuate the Crime. And therefore such Crimes as are the Effects of the fear of Death, Imprisonment, or any great Discontent, Pain, or Passion, or of extream Poverty, are always look'd upon to be excusable. The wise *Hebrew* pronounces, That the Thief, whose mean Circumstances tempt him to Steal, is a more excusable Criminal than the Adulterer. So Theft, in case of Hunger, is a less Crime, than the same, when it is the effect of unmeasurable Avarice; and Perjury upon fear of Death is more excusable, than only upon the view of Gain, or to betray a Trust. And thus, as the Author *ad Herennium* speaks, B. 2. ^f. 'Tis a greater Crime to debauch a Woman of Quality, than commit Sacrilege; because 'tis possible Extremity may force a Man upon the one, but the other can be the effect only of ungovernable Lust ^g. And therefore Bawds that live by encouraging and supplying the Lusts of others, deserve more severe Punishment, than any Man that pursues only his own Pleasure. It is the Opinion of the Emperor *Antoninus* ^h, That those Crimes which Anger gives occasion to, are more excusable than those that arise from Lust. For, saith he,

a Man that yields to the Passion of Anger, seems to break with the Laws of Reason, with some Regret and secret Reluctance of Mind; but one that sins in complaisance to his Lusts, gives himself up to Pleasure, and therefore is more intemperate, as well as more soft and effeminate in his compliance. And as another observes ⁱ, Anger has a much stronger and a more violent influence upon us, than Love; for that gives us time to deliberate and consider with our selves; but Anger raises such Storms in Mens Breasts, as hurry them besides themselves, and is never quiet, till it is satisfied. The Bias of the other Passions inclines Men either to some real or imaginary Good; the things that are really good, can have no natural tendency in them to tempt us into Sin; such as are all kind of Virtues, and the Actions which flow from them. Other things may indeed be good in themselves, but may be also Inducements to Sin, according to the Disposition of the Man's Mind, who is in Possession of them. Of this kind, some are pleasing and delightful; others instrumental only in the procurement of Delights, which are such as we call useful. Now every Crime committed in pursuit of any of these things, is (*ceteris paribus*) look'd upon to be more excusable, the more that good which was in view, appears to be agreeable to Nature, or the more uneasy Men are without it ^j. The imaginary good Things are such as Men owe the Credit and Value of, either to their Folly, their Vanity, or their Vices; among these, we may rank vain Glory, or an Opinion of more than common Worth, neither bottom'd upon Virtue, nor with any mixture of real Profit join'd to it; as also Revenge, as it proposes to it self nothing else but the harm of the injurious Person. And the less of Nature there is in Theft, and the easier it is for a Man to be without them, the more criminal are those Actions judg'd that flow from the pursuit of them ^k. It is also certain, that all Crimes which are the result of clear and distinct Knowledge, are greater than those which arise from Error and Mistake; and that those Errors are more dangerous and criminal, which a Man runs into through an obstinate pursuit of his own Principles, and false Reason, than those which he imbibes from publick Teachers. And it is also well observ'd by *Hobbes*, *Leviath.* c. 27. *That the same Fact committed upon a presumption of Power, Friends, or Riches, by the assistance of which the Offender hopes to resist the publick Ministers of Justice, is a greater Crime*

MR. BARR. NOTES on § XIX.

^a 'Tis upon this account, that there are some Crimes which appear little in themselves, and which indeed are so, as they relate to a thing of small value; which nevertheless are more heinous, when considered in reference to the Disposition of him that committed 'em, than if they concern'd a thing of a considerable Price. Thus an ancient Orator, in his Accusation against a Man, strenuously insisted upon his Baseness of having defrauded of three Farthings, certain poor Workmen employ'd in building a Chapel, over whom he was appointed as their Pay-Master. ARISTOTLE observes (Lib. 1. Chap. xiv. p. 244. *Edit. Vistor.*) upon this Occasion, that it is quite the contrary in good Actions; that is to say, that a Man, for example, that returns a large Sum of Money that has been deposited in his Hands, is more commendable, than if the Charge was less considerable: Because that demonstrates a larger Stock of Honesty, as the Prospect of a small Gain, that is capable of inducing a Person to commit a Crime, discovers in him a larger share of Malice, than if he had been tempted to it by the Allurement of a greater Gain.

^a Vid. *Grot.* d. 1. l. 2. c. 19.

^b Vid. *Grot.* d. 1. f. 20.

^c *Calpurn. Placcus*, Declam. 2. Princip. the end. See hereafter, Sect. 21 towards the end.

^d *Libanius*, Declam. 23.

^e *Grot.* d. 1. f. 20.

^f *V. Senec. de Benef. L. 4. c. 17.* ^g *V. Auctor. ad Herennium.*

^h *Cicer. de L. L. l. 1. c. 14.*

ⁱ *Chap. 30. towards*

^j *Add. Vul. Max. l. 8. c. 1. in fin.*

^k *L. 2. c. 10.*

than when it proceeds from hopes of not being discovered, or escaping by Flight; for the one is an open Contempt of the Law, the other not ^a. And therefore Aristotle saith ^b, "Such as deny and persist in their Crimes are punish'd with more Severity; but such as think themselves justly dealt with, deserve to be us'd with Gentleness and Lenity; and the Reason is plain, because 'tis impudence to deny what is plainly prov'd; and impudence is Contempt and wilful Opposition". And upon this View (says Seneca ^c) a wise Man will sometimes pardon a great Crime easier than a less, if he finds that that was the Effect rather of Weakness and Infirmary, than of Rancour and Malice; and that this is the product of a close designing, inveterate Craft. Neither will he punish the same Crime after the same manner, in different Offenders, when what the one committed through Indiscretion and Negligence, the other did industriously and deliberately.

XX. Another Argument of the great force and violence of the Inclination and Intention, is, when besides the common Reasons that ought to be sufficient to restrain a Man from Sin, there happen to be other particular Reasons founded either in the Person of the Delinquent, or in the Person of him who was injured in the Fact, or in any other Circumstances. Thus as Juvenal saith ^d,

*Omne animi vitium tanto conspectius in se
Crimen habet, quanto major qui peccat habetur.*

-----More publick Scandal Vice attends,
As he is great and noble, who offends.

And thus the same sort of Sin, committed by a Churchman, is look'd upon to be a greater fault than by any one else, because 'tis expected he should be a Pattern of a pious and unblameable Life to others: For a Man that neglects himself, what he persuades others to do, confutes his own Counsel by his Practice; for the force of his Example by which he dissuades, is much stronger than all the Arguments by which he would convince ^e. Tully saith, "The Guilt there is in the Vices of a Prince, is not so much to be consider'd (tho' that too may be great enough) as the Consequences that attend them, that there will be always great numbers ready to imitate them; and therefore Princes of bad Morals deserve very ill of the Commonwealth; not only as they are vicious themselves, but as they spread

and propagate Vice: not only as they are wicked themselves, but as they do more harm by their Example than by their Sin ^f." Thus Tacitus ^g saith of Capito, That he was the more remarkably scandalous, because being so great a Master in the Knowledge of human and divine Laws, he had forfeited his publick Character, and disgraced his own private Skill. And Tully saith in another place ^h, "As it would be unparadonable in a Man that profess himself a Grammarian, to speak improperly, or in one that profess to have Skill in Singing, to shew none in the Practice of it; because these are Faults in the Arts they pretend to: So a Philosopher that is guilty of Misbehaviour in the Conduct of Life, is the most inexcusable; because he is deficient in those Duties he affects to be thought a Master of; and commits Mistakes in the Art of Life, which he professeth ⁱ." In Peru, under the Empire of the Inca's, a Magistrate found guilty of any Crime was punished with greater Severity, than any private Offender: for this Reason, that he was expressly prefer'd to the Administration of Justice, and plac'd in an Office of Trust, upon the Presumption that he was a Man of more than common Probity and Goodness ^k. Upon this account the Injuries of a Friend affect us more, than those of an Enemy ^l. And on the other side, a Benefit conferr'd by an Enemy is more pleasing, and more valued, than the Kindness of a Friend: Notwithstanding what Terence saith, That when a Man stands in need of a good Turn, he is glad to receive it at any Hand; but 'tis double Pleasure to receive it from one he has reason to expect it from ^m. For the same Reason, an Affront from a Man of mean Circumstances is more insupportable, than from an Equal or Superior ⁿ: or from a Man's own Children or Servants, than from another's. There are also some particular Crimes, which are branded with particular Infamy, as consisting in the violation of such Acts of Duty, which Men are obliged to pay to certain particular Persons, ^o and are therefore judg'd to be more highly wicked; such as Disobedience to Parents, P Inhumanity, and Rudeness to Relations, Ingratitude to Benefactors; which are look'd upon to be more heinous, than if they terminated in any other Persons ^q. In fine, 'tis a material Aggravation, to consider the time, and place, when, and where the Fact was committed. And thus the same Crime committed in a publick Place, before Witnesses, is greater, than when a Man endeavours to conceal

^a Add. *Aristot. Rhet. l. 1. c. 12. & 14.*

^d *Sat. viii. v. 140, 141. Dio Chrysost. Orat. 1. de Regno. p. 9. C.* Any Vice in a Prince is more heinous, and more in View. And to this Sense we may apply that of Pliny, *Nat. Hist. l. 5. c. 1.* Men are never more credulous and easy of Belief, than when any Fallacy is promoted under the Authority of a great Man.

^f *Cicero de LL. l. 3. c. 14. Senec. Hercul. Fur. v. 745, 746.* The Crimes of Princes are of deeper Stains.

^g *Annal. iii. 70.* ^h *Tusc. Quæst. l. 2. c. 4.* ⁱ *Quintil. Declam. 3. p. 38.* 'Tis

the Misfortune of Superiors to be thought to command others, what they do themselves: and Evil is always most pernicious when the Author of it is Great and Powerful.

^l *Pitron.* One that offers Violence to a Stranger is a Villain, but a Man that injures his Friend is little less than a Parricide. Among the Celtæ, according to Nic. Damascenus, de Moribus Gentium, a Man that kill'd a Foreigner was punish'd more severely, than if he had kill'd a Subject. The Punishment of the first was Death, of the second, only Banishment.

^m *Terent. Adelph. Act. 2. Sc. 3. v. 1, 2.* ⁿ *Vid. L. 47. t. 10. l. 17. f. 3. D. de Injur.*

^o *D. ubi supra, l. 7. f. 8.* ^p *Vid. Grot. L. 2. c. 20. f. 30. & 2 Sam. c. xvi. v. 11.* ^q To this purpose is that Passage in Lyfias, speaking to the Athenians, *Orat. 4. contra. Andocid. c. 6.* Ye ought to shew your selves more severe to your own Subjects, when they profane the Rites of your Religion, than to Foreigners; because the Crime, as those commit it, seems to come from Abroad; in your own People 'tis Native and Intelline.

it; both because, what is acted with the advantage of Secrecy, at least, gives less Scandal; and because, 'tis a strong Presumption, that that Man is a bold and harden'd Offender, who has the impudence to out-face the World, and to sin, as it were, in defiance to all the good and sober part of Mankind ^a. Thus it is a greater sin, to be guilty of unchaste Actions in a Church, than in a Tavern; to strike in the Court, than in a private House; and to be guilty of Intemperance on an ordinary Day, *ceteris paribus*, is more excusable, than on days set aside for Devotion ^b. Thus *Cicero* severely aggravates *Antony's* Crime, for coming into the Court so disorder'd with Wine, as to be forc'd to vomit while he sat on the Bench ^c. Thus the Declaimer saith ^d, "That though Rudeness in any other place may perhaps be excusable, yet in the Temple, where we set a guard upon our Words, where we compose our Souls, and confine even our Thoughts, to offer an injury, or affront there, with the same boldness, as in an unrequited, private place, is unsufferable ^e. Lastly, The Methods and the Instruments used in the commission of the Fact, seem to be accessory to the aggravation or extenuation of the Crime; because 'tis usual to infer from them the force or weakness of the intention. And therefore 'tis a greater Crime to rob a Man of his Goods, by forcing his House, by digging through his Walls, or artificially picking his Locks, than by going in boldly at an open Door.

XXI. Another thing which aggravates or extenuates the Crime, is the Power or Ability the Person was Master of, to forbear the Fact ^f. For some Men have clearer and more lively Apprehensions of the Reasons, why they should decline ill Acts, than others. And some have stronger Propensities than others to some particular sorts of Sins, which may be accounted for, either by the particular mixture and constitution of the Body; or else by the Age, Sex, Education, or other Circumstances ^g: For 'tis easy to observe, that young People, Women, and Men of grosser natural Parts, or that have had no advantages of Education, do not so accurately distinguish between just and unjust, lawful and un-

lawful; and know very little of the measures of them, or how to weigh and consider them ^h. In Persons where Choler is the prevailing humour in the Body, Anger is the governing Passion; others of more and warmer Blood, are easily inclined to Lust: Age turns our Desires one way, and Youth another ⁱ. Again, the nigher any Evil seems to threaten, the stronger is the fear it causes, and the more difficult it is to resist it. A fresh Repentment strikes us with more Violence, than that which hath been cool'd by interval of Time. And though Grief and Discontent will not always be silenc'd at first by Reason, yet they have not the same excuse, when they have had time to be compos'd and quieted. In general, it is more criminal to go sedately and calmly to commit sin, than in a disorder and disturbance of Passion ^k. And therefore *Aristotle* says, *That every Man must think him less excusable, who engages in a bad Action upon weak Temptations, than one, that is guilty of the same, upon the violent persuasions of strong Passions. And that when a Man strikes in cold Blood, he is more criminal, than if he were angry; for how far would such a one proceed, saith he, if he were beaten into a Passion?* It was *Pittacus's* Law indeed ^l, *That such as abus'd others in their Wine, should pay double the sum, than if they had been Sober*: "For since people in that condition (saith *Aristotle*) are generally inclined to be more abusive than others, the Law doth not so much regard the Pardon which ought rather to be allow'd to Men in the disorders of Drink, as the publick Good ^m. But Crimes that arise from Passions are look'd upon to be less odious, when they are the effects of a Passion alarm'd and rous'd in us at the appearance of Evil; and such as arise from an appetite or eager pursuit after Pleasures, especially the more needless ones, to be more criminal. For Pleasure doth not affect us so sensibly, and may be easier delay'd, or satisfied more innocently some other way without Guilt. And (*Aristotle* saith) therefore, *That 'tis a greater uneasiness to bear Pain of any Sort, than to deny Pleasure. For* (saith he in another place) *Pain distracts and weakens Nature in the Person that suffers it; but Pleasure hath a different effect, and of-*

^a Vide *Aristot. Probl.* l. 29. q. 14. Vide *D. De injuriis*, l. 7. c. 8.

^c *Cicero. Orat. Philipp.* 2. c. 25.

^d *Quintil. Declam.* 252. If any Injury be done to the Magistrate, it is an Act of Hostility against this State; if to an Ambassador, Satisfaction must be demanded by War, and the Laws of Nations. The same Sum of Money taken from a private Man, is Theft; from the Altar, or Temple, Sacrilege. And so one that violates another's Chastity, shall pay to the Party demanding barely Satisfaction for Virginity, ten thousand Sesterces; but one that hath been publicly Guilty of the same Crime, and ravish'd a Candidate to the Priesthood, must not be allow'd the same Terms. *Quintil. Decl.* 264. Add. *Instit. Orat.* l. 6. c. 1.

^e *Demosten. adv. Midiam.* I was abus'd by my Enemy, in cold Blood, in the Morning, out of Malice, not upon any heat of Wine, publicly, before Strangers, as well as Citizens, and that in the Temple, whither I was oblig'd to go by the Duty of my Office.

^f *Vid. Grat.* l. 2. c. 20. § 31. ^g *Vid. L.* 48.

^h *Procop. Hist. Vandal.* l. 2. c. 14. As it is very unusual, so it would be the more commendable, for the Son to lay aside that Falseness and Violence of Temper which run through the Family, and to take up a contrary Coolness and Probity.

ⁱ *Gramond. Hist. Gall.* l. 13. Young People seldom trouble themselves to be Wise, because they look upon it to be their Privilege to do what they please. *Libanius Decl.* 21. p. 531.

^k *Cic. Off.* l. 1. c. 8. Those Faults which are the effects of any sudden Commotion, are more excusable than such as are premeditated and designed. *Philos. Jud. de Specialibus Legib.* p. 791. *B. Edit. Paris.* says, That it is an imperfect Crime which is not the effect of much Deliberation, *Plato de LL.* l. 9. p. 931. *C. Ed. Wech.* They that kill a Man upon propense Malice, are to be punish'd more severely, than such as are guilty of Manslaughter only out of a sudden Rashness.

^l *Aristot. Polit.* l. 2. c. 12. ^m *This Law is also mention'd by Plutarch in Conviv.* 7. *Sapient.* p. 155. F.

fers it self fairer to our choice, and therefore ought to be thought more criminal and opprobrious ^a. Lastly, Another motive to alleviate the Penalty, is when a Man's Friends and Relations persuade him to transgress the Laws ^b.

XXII. 'Tis also usually considered, whether the Malefactor were himself the first of the Kind, or were seduced by the Examples of others; whether this be the first time he is found guilty, or whether he be an old Offender. For in every Commonwealth, the first Man that has the boldness to commit a Crime, which is like to be of ill Example, and which he does in a manner inform others in, is more highly criminal, than another that has been encouraged by frequent Precedents in the like Crime before ^c. Again, the same Fact, if it hath been constantly punish'd in other Men, is a greater Crime, than if there have been frequent Instances of Impunity; because the first is greater Contempt of the Government and Laws, than the latter. But the more or less frequent Repetition of the same Action doth not make it in it self better or worse, any farther than as it discovers it to proceed from inveterate Custom or Habit ^d. And since regard is principally had to the frequency of the Repetition, in the making an estimate of moral Actions (since from thence 'tis usual to measure the force of a Man's Resolution; and therefore it is commonly said, that ill Habits are worse than ill Acts) it sufficiently appears why a good Action, which a Man has frequently repeated, is look'd upon to be better than one he has but newly begun, or very seldom practis'd: and on the other hand, why a bad Action often reiterated is judg'd a greater Crime, than one the same Person has but once or twice been found guilty of ^e. To this purpose was the Emperor Julian's Law against Lyars ^f; *If any of my Servants be found guilty of a Lye, the first time, I pardon it; if he presume a second time, I bear with him: if it be proved upon him a third, he has not absolutely incurr'd my Displeasure; but if he venture the fourth time, I forbid him my Presence.* But the Peruvians, under the Government of the Ynca's, took particular care to punish the first Essays of their Criminals, because by this Method they thought they might prevent the return of the same Crime another time. For unless the Weeds are rooted up, when they first appear, it must be expected that they will plentifully increase. And where Justice moves so slowly as not to reach the Offender, till he has repeated his Crime, private Subjects are apt to grow impatient, and to take the liberty to redress themselves, to the prejudice of the publick Peace ^g. Neither is it any Objection, that a good Habit gives an easi-

ness to good Actions; or that on the contrary, an ill Habit makes it difficult to forbear doing ill. For that labour it must cost a Man to attain the good Habit at first, is a sufficient reason why the value of it ought not to be lessen'd, though the exercise of it be easy and pleasant. And on the other side, the aversion to Sin ought to be therefore the greater, because by a frequency in doing ill a Man shall contract such a familiarity with Vice, as he will hardly ever be able to renounce, and by repeated Transgressions will be abandon'd to Impudence, and forget the Sense of Shame. For the common Infirmities of human Nature will excuse some Errors and Slips in the conduct of Life; but to be often guilty of the same Miscarriages is a degree of Madness not to be born with. ^h *The Faults a Man is guilty of at sixteen will not appear the same, tho' all other Circumstances be supposed to continue, as when he is forty; for by that time, besides that his Habit appears inveterate and inexcusable, the maturity of his Judgment must cut off all pretences of excuse and plea for pardon.* And all these things are, with good reason, to be considered in levying Punishment. For a Crime of no extraordinary Malignity, upon the first commission, may be more easily pardon'd; or at least punish'd with less Rigour, than one which has been the common Practice of the Delinquent ⁱ. Sometimes also future Reformation is made the condition of pardon for past Offences; and in defect of that, the Punishment of the past is join'd with that of the repeated Crime; and former Misdemeanours are again brought under the reach of Justice ^k. From whence it appears, in what Sense that common Aphorism is allow'd to be true, *That the Estimation of a Crime is never increas'd by any after Act* ^l. And here it might be also enquired, how far that Custom of the Persians, which Herodotus speaks of, was agreeable to natural Equity, when, in criminal Cases, the whole Course of the Delinquent's Life was examin'd, together with his particular Offence; and if upon the whole it appeared, that there was an over-balance of good Actions, the Crime was pardon'd. But upon a strict View, it must appear that all that signified nothing to the intrinsic estimation of the Crime; and therefore 'tis probable, this Method was not us'd in Crimes of an higher Quality, and where there were manifest Proofs of the propense Malice of the Criminal, but as Grotius *d. l. §. 30.* thinks, was, or at least ought to have been, confin'd to such Cases only, where the Delinquent, being not otherwise notoriously vicious was unwarily betray'd, by some Satisfaction or other, he conceiv'd he should find in the Commission of the Fact, or else, where the Proof of the Fact lay

^a *Arist. Nicom. l. 7. c. 8.* The Intemperance of Anger is less Criminal than that of Lust. *Id. Magn. Moral. l. 2. c. 6.* A violent inclination for Pleasure is much more faulty than any excess of Anger. For Anger is a very restless uneasy Passion, and every one that is under the Power of it, finds himself discomposed. But the Incontinence that ariseth from the concupiscible Appetites is attended with Pleasure, and therefore is less excusable, because, it seems to be the effect of Wantonness and Effeminacy. There is a Passage like this, in *Marcus Antoninus*, l. 2. f. 10. *Ad. Aristot. Probl. f. 29. q. 16.*

^b *Vid. L. 47. t. 16. l. 2. D. de receptator. Ad. Grotius. d. l. f. 29.* ^c *Felleius Patere. l. 2. c. 3.* Precedents seldom stop where they begin, but if allow'd never so little Liberty, will soon make way for themselves to break out further. *Vid. Gell. l. 10. c. 19. Polyb. excerpt. legat. 93. c. 5.* ^d *Vid. L. 48. t. 19. l. 28. f. 3. D. de pœnis. Ant. Matthæus de crimin. tit. de furtis. f. 9. seqq. & L. 48. D. tit. 13. c. 4. f. 27, 28.* ^e *Vid. Grot. L. 2. c. 20. f. 30.*

^f *Libanius Legat. ad Julian.* ^g *Garcilas de la Vega, Com. R. l. 2. c. 10.* ^h *Sir Tho. Browne's Relig. Medici, f. 41. V. Grot. d. l.* ⁱ *See 1 Kings i. 52. ii. 23.* ^k *Nonquam crescit ex post factis, præteriti delicti æstimatione,*

^l *l. 50. t. 17. De divers. reg. Juris, l. 138. f. 1.*

intricate and perplex, a view of the Criminal's Life might be necessary to give the matter so much Light, as to discover whether it were probable, he was guilty, or not; since a Man must make several Steps, before he can come to the highest pitch of Guilt ^a. Yet *Herodotus* ^b gives us an Example of *Sandoces* a *Perſian* Judge, whom *Darius* commanded to be crucified for taking Bribes, and giving wrong Judgment; but when he call'd to mind, that the Services and good Offices he had done him, were more than his Crimes, he order'd him to be taken down, and admitt'd him again to favour. And *Cicero*, in his Defence of *Sulla*, reasons the same way, *In all Matters of Importance and Concern*, saith he, *we are not to measure a Man's Intentions, Thoughts, or Actions, by the Fact it self; but by the Circumstances of his Life: And the reason*, saith he, *is, because, according to the Opinion we receive of a Man's Morals, we generally conjecture how far he may be guilty, and how far not* ^c. And for this reason it was usual in the the old *Roman* Judgments, for the Accuser to begin with a Censure upon the Life and Behaviour of the Criminal; and on the other side, the *Patroni* either made excuses for him themselves, or brought in the *Laudatores*, Persons that should give Testimony of his good Behaviour. And there was good reason for the Practice; for considering the general Depravation of Mankind, a Judge ought to be very cautious, how he takes away the Life of any Subject, who upon the whole, may rather be thought a good, than a bad Man. But it is to be observed, that an Inquiry into the Criminal's Morals, and past Life, where the Fact is intricate and obscure, may make the Presumptions great on both sides; and therefore, that if any Man has clearly acquitted himself of the Crime he was indicted of, he may lawfully plead, *that he was not oblig'd to make a Defence for his Morals, or vindicate his former Behaviour, but only to acquit himself, before the Court, of the Crimes his Accusers directly charged him with* ^d. But yet when a Man that has always been a regular and dutiful Subject, changes his whole course of Life, there is good reason the Laws should deal severely with him, upon a double Account; both because he hath been guilty of a Crime, and because he has made so ill a Choice, as to change a good course of Life for a bad one ^e.

XXIII. Now although from what has been said, it sufficiently appears, that one Crime is greater than another; and that human Justice ought not to punish every Crime with equal Severity; yet notwithstanding, it must be confess'd, that both the precise Quantity and Quality of human Punishments depend upon the Determination of the civil Sovereign, which is principally to be directed by the advantages and publick Good of every Commonwealth. Upon this view *Anyſis* King of *Egypt*

punish'd no Criminal with Death in all his Reign; but, according to the Degrees of every Man's Offence, condemn'd him to bring a quantity of Earth, or Rubbish to the City he belong'd to. And by this method the Ground the Cities stood upon was rais'd higher, and the Cities secur'd against the Inconveniencies of the Flood upon the rising of the *Nile* ^f. But indeed there is no Necessity, that there should be always the same Proportion observ'd between the Penalties, as there is distance between the Objects injured by the Offender. Every particular Crime may be sentenced to a particular Punishment, as it happens to be most agreeable to the Circumstances of the State; without any regard, whether another Crime, which in it self may seem greater or less than this, be punish'd with more or less severity. *Plato* proposes a Law of this nature ^g, *That if any Man robb'd the Publick, whether of more or less, his Punishment should be the same.* "For, saith he, a Man that takes away a thing of less value, though he doth it with less force than another; that robs the State of something greater, yet he is guilty of the same ill Principles and Intentions; and a Man that takes away something of considerable worth, which he never deposited, can but be unjust and criminal. The Law therefore doth not inflict greater or less Penalties upon the Offenders, from the Comparison it makes between the Degrees of their Theft; but because it supposes, that one is more capable of being reform'd, than the other." 'Tis certain, a Judge ought so far to observe Equality in the Distribution of Punishments, as to take care that such as are equally guilty should be equally punish'd; and that a Fault which was severely corrected in one Man, should not without very good reason be excus'd in another; since it must be expected that such Partiality would be a certain cause to raise Disturbances in the Commonwealth; and because a Punishment can have no effect when it is not inflicted upon any view of publick Good, but barely in gratification to private Passion. But still an equality of Punishment must be suppos'd only where the Criminals are guilty of the same Fact in Specie, and not of different. For 'tis common for human Justice to punish small Faults with greater Rigour, or to take the contrary Method, as the Exigencies of the State, or the Will of the Legislator determines. And the Criminal has no Reason to complain of the Partiality, since he knew beforehand what he was to expect ^h. For instance, though Theft in it self be a much less Crime than Murder, yet the Thief has not just reason to complain, should he be condemn'd to suffer the same Punishment with the Murderer, tho' his Crime was not equal in Degree. The reason why Crimes of different Degrees are equally punish'd with Death is, because Death is the greatest and last

^a *Nemo repente fuit turpissimus*-----*Juven. Sat. 2. v. 83.*

^d *Auſhor. ad Herennium. l. 2. c. 3.*

^e *Polyb. l. 7. in Excerpt. Pœrſian*

But when he took a quite contrary way of Life, and grew every day worse and worse; 'twas fit every body should change their Opinions of him.

^f *Herodot.*

Euterp. p. 90. Ed. H. Steph. Dindor. Sic. l. 1. c. 65. Tho' *Aſiſanes* King of *Egypt*, when he built *Rhinocolura*, took care that all those sort of People, the Scum and Filth of the Nation, should be carried into a Place by themselves, that they might not infect others, *Diodor. Sic. l. 1. c. 60.*

^g *Plato de LL. l. 12. init. p. 982. C. Ed. Wick.*

^h *Calpurnius*

Flaccus, Declam. 5 When the Consequences are threaten'd beforehand, the Fault lies no where but in the Sufferer.

Evil Men inflict ¹: unless it be that sometimes the way to it is short and easy, and at other times made terrible, and grievous by delay and torture ²; or that sometimes dishonour is done to the dead Body, and infamy fix'd upon the Memory of the Person ³, which is sometimes inflicted a considerable time after the Delinquent's Death; and may again be recall'd, and taken off ^b. Besides, the Will of the Legislator is often consider'd in determining the Penalty, though not in so absolute a Degree, as to exclude the Interest and Advantage of the Publick, yet to such a Degree, that the particular Punishment seems in a manner entirely to depend upon it. There are also some Crimes of so black a Nature, as will justify the greatest Severity that can be us'd upon Criminals, who have contracted the slightest Acquaintance with them ^c. So *Philo* says, *That a Man who attempts only to kill another treacherously, is not the less guilty of Murder, tho' he fails of Success*: And the written Law in this Case commands, *That if a Man come presumptuously upon his Neighbour to slay him with guile, thou shalt take him from mine Altar, that he may die* ³. The Athenian Judges indeed were too severe, when they condemn'd a Boy for pricking out a Bird's Eyes, upon Suspicion, that it was a sign of a barbarous Temper, and that he might prove a very ill Member of the Commonwealth, if he were suffer'd to grow up to years of Maturity ^d. *But it is not the actual Commission of a wicked Act that makes the Criminal; 'tis enough that a Man has arm'd himself, and discovers his inclinations to Rob and Murder: For the Wickedness doth not always begin, but is exercised and improv'd only by the practice.* For as *Paterculus* reflects upon *Caius Cato's* being condemn'd for a small Offence ^e; *The Inclination and Intent of the Offender may sometimes be of greater force with the*

Judge, than the Crime it self. For 'tis natural enough to argue from the Fact to the design of the Criminal, and to consider rather of what nature the Offence is, than how great ^f. In Cases of Treason and Conspiracy against the State, bare Conscioufness, or Privy without any Assent, and Silence only, and the concealment of it deserves Punishment ^g. However in the distribution of Punishment there ought always to be as much Gentleness and Lenity us'd, as is possible. And therefore the Severity of *Draco's* Laws might justly appear insupportable, and deserve *Solon's* Corrections ^h. Yet the Course of Justice in *Peru* was altogether as Rigorous; for there almost every Crime was punish'd with Death; the Judges not so much considering the simple Nature of the Offence, as that it was a Breach of the Commands of the *Inca*, whom they look'd upon and revered as a God ⁱ. But there is good Reason for enhancing the severity of the Punishment, when just Repentment, and Care for the common Good, makes it necessary to secure the publick Quiet by punishing Malefactors. For Instance, Suppose the Criminal threaten Danger to the State, if he be not punish'd in time. *H. Stephens* gives us a Story ^k, of a Man that having begg'd for a Pardon of the King of *France* for the seventh Murder he was guilty of, and finding he could not obtain it, boldly told the King, that he would own only the first Murder to be his own proper Action; and that the Imputation of all the rest must lie upon the King himself; for that he should never have committed the other, if the King had not given him Encouragement, by pardoning the first. Sometimes also it is necessary to make Examples of some Malefactors to frighten others; especially where the general Persuatives and Inducements to Wicked-

MR. BARE. NOTES on § XXIII.

¹ *Lycurg.* Orat. contra *Leocras*. The greatest and the last of Punishments in Death.

² *Ovid.* *Her.* Epil. l. 10.

Morsque minus pœnæ, quam mora mortis habet.

Death hath less Pain itself, than the Delay.

Tho' some think a quick Dispatch an easier Punishment than a miserable Life. Vid. *Cæsar's* Orat. in *Sallust.* Conjur. *Catilin.* and *Tiberius's* Answer in *Sactonius*, c. 61. *To one that desir'd his Punishment might be short, was, I am not yet reconciled to you.*

<i>Senecæ</i> <i>Hercules Fur.</i> v. 512.	Death to the Miserable is Ease.
<i>Senec.</i> <i>Æg.</i> <i>Agamem.</i> v. 989.	He's yet unskil'd in the Arts of Tyranny, That punishes with Death.
<i>El.</i> <i>Ibid.</i> v. 996.	Why is there any thing beyond the Grave?
<i>Æg.</i> <i>Ibid.</i>	Yes Life when one desires to die.
<i>Euripid.</i> <i>Hippol. Coron.</i>	Τὸς γὰρ ἄδρις ἰπ̄ς ἔσθ' ἀδριε δεσυχῆ, v. 147. Th' unfortunate desires a speedy End.

Nay, Charron de la Sageſſe, l. 1. c. 39. (vi.) f. 10. ranks it among the ridiculous Notions of the Vulgar, to think to be reveng'd of an Enemy by killing him. *For this*, saith he, *is only to take from him the sense of Misfortune, and to secure him from all further Harms; unless a Man thinks it necessary to his own Security, to leave no body alive that is like to be his Enemy, or to make him uneasy.* In *Apollonius* condemn'd the Eunuch, that lay with the King's Concubine, to live, by way of Punishment.

³ Vide *Philon.* de specialibus legibus, p. 791. *Tacitus Hist.* l. 2. c. 77. *Qui deliberant desciverunt*, to demur is to desert. *And to this we may refer that of Plutarch, Cæsar.* Penalties are not always inflicted for the Fact, but sometimes for the Intention and Design. *Quintil.* Declam. 362. The Law lays the Punishment upon the Will. *Lyſias* Orat. in *Simonem*, c. 12. It is certain that those we receiv'd our Laws from, did not intend that a Man, who in a Quarrel had done harm to another, should therefore be banish'd: But that such as violently assaulted and injured a Man with a design to take away his Life, tho' they fail'd in the Attempt, should yet suffer that severe Punishment; because they supposed it just, that he should suffer as really guilty of the Fact, that deliberately endeavour'd to put it in Execution; for tho' it happen'd that they were mistaken in the success of the Action, yet they pursued it as far as they had Power. *Add.* *Ælian.* *Var.* *Hist.* l. 14. c. 27.

^a *Ælianus* N. *Hist.* l. 4. c. 7.

^b Vid. *Socrat.* *Hist. Eccles.* l. 7. c. 44.

^c Vide *Ant.* *Matthæum de Crimin.*

Prolog. c. 1. f. 5, 6. & ad *L.* 48. *D. tit.* 5. c. 3. f. 10. & *tit.* 18. c. 4. *Ziegler ad Grot. d. l. f.* 39. *Valerius Maximus* l. 6. c. 1. f. 8. Vide *L.* 47. t. 11. l. 1. f. 2. *D. de extraordin. Crimin. D. ad L. Cornel. de sicariis.* Vide *L.* 48. t. 8. l. 3. f. 1, 2, 3. *Philo Judæus* de confusione linguarum, f. 343. C.

^d *Quintil.* *Instit. Orat.* l. 5. c. 9. *Senec.* de *Benef.* l. 5. c. 14. c. L. 2. c. 8. ^e Ad *L.* 9. t. 8. l. 5. princ. C. ad *L. Jul. Majest.* *Grotius* in *Flor. Sparl.* in *Jas Justinian.* ^f We have an Example of *Thæranus*, in *Benj. Priolus Hist. Gall.* l. 1. c. 6. and of *David Berchinus*, in *Bachman.* *Rerum. Scotic.* l. 8. Ad *Diodorus Siculus*, l. 11. c. 54. ^g Vid. *Plutarch.* *Solon.* ^h *Garcilaff. de la Vega.* *Com. Reg.* l. 2. c. 12, 13.

^k *Apolog.* pro *Herod.* c. 17.

ness are strong ^a; such as are Easiness and Use, which nothing but a severe Discipline can reform. The Jewish Law lays a greater Penalty on the Person that steals out of the Field, than one that robs an House, because the first is done with greater ease; compare *Exod. xii. v. 1.* with the 7th and 9th ver. ^b. And thus the *Scythians* thought no Crime so heinous as Theft, because having neither Houses nor Folds to keep their Cattle in, no Man's Property could be secure, if Robbery had any Indulgence. And in some Nations Theft is look'd upon to be a greater Crime in a Domestick, than in a Stranger ^c. It was Death at *Athens* for a Man to steal from the Baths, from the Schools of Exercise, or the Market, or any such publick Place; but one that robb'd a private House was only to pay double the worth of what he stole ^d. *Q. Curtius* says, *There was a Custom among the Persians, that oblig'd them to be strict in concealing any Secret that concern'd their Kings; and adds, that neither Hope, nor Fear, could extort any Expression from them that might give Light to discover it; the antient Constitutions of that Empire obliging them to such Silence, upon pain of Death; and that therefore no Intemperance was punish'd so severely among them, as that of the Tongue, it being thought that no Man could be capable of any great Attainments, who could think it a pain to be silent, when it was plain there is nothing in Nature easier.* Further also, Custom, or when a Vice is grown popular, or in fashion (for as to that habitual Custom or Familiarity, particular Men contrast by repeated Sins, I have spoken already) though it be some extenuation of a Crime, yet doth certainly deserve very severe Punishment ^e.

-----*Veteri post obruta morbo
Corpora, Pœonias nequicquam admoveris herbas
Non levioꝛe manu, ferro sanantur & igni, f.
Ne noceat frustra mox eruptura cicatrix, &c.*

A crazy Body long inur'd to Pain,
From healing Medicines seeks Relief in vain:
When at the Bone the fretting Ulcer smarts,
It fears the Lance, but mocks the gentler Arts.
With Causticks and Incisions force your way,
The treacherous Wound will else your Skill betray.
Skinn'd o'er without, it seems to heal inclin'd,
But still the Sore lurks festering deep behind.
But searching Fires the secret Faults disclose,
Pursue the watry Humour as it flows;
From sickly Veins prevent the fresh supplies,
And stop the Springs whence first Corruption rise.
If obstinate the Sore, and still unbound,
And dangerous *Gangreens* gnaw within the Wound, }
A Limb cut off must for the whole compound. }

And therefore *Grœtius* judiciously observes ^g, that in publick Trials it is some Excuse for an Offender to plead, that his Fault is common; because in all

Trials the Point in Dispute is, what share of Guilt that particular Person has contracted; and this without doubt must appear the less, when the Man was carried away with the Violence of the Stream, rather than the Force of his own Inclinations; but when Laws are to be made, a prevailing Custom is an undeniable Argument, that there is greater need of severe Sanctions to suppress it; because Laws must be supposed to regard the Advantages that may accrue by the Punishment in general. However, when a Vice has rais'd it self to such an Head, and Offenders are grown so numerous, that if all of them were to fall under the reach of Justice, the Commonwealth must be much dispeopled, if not entirely ruin'd by rigorous Executions of Law, the Law must yield to the Necessities of the State, and rather be neglected, or laid aside, than occasion the Desolation of the Commonwealth ^h. *But Laws are to be applied only where things are capable of being effected, and so may very well punish Offenders when they are few, and may easily be reclaim'd by Punishment, but to attempt upon Multitudes is to no purpose* ⁱ. Lastly, where the Necessities of the State are pressing for the purpose, if upon an Invasion and War there should be no other Person fit for the Command and Charge of a General, there can be no Reason why a Criminal of experienc'd Courage and Conduct might not be releas'd even from capital Punishment, when it appears that the State cannot be safe without his Assistance; and therefore there was Reason in what *Fabricius* said, when he gave his Vote for *Cornelius Rufinus* a good General, but a very covetous Man, to be Consul; that he had rather he robb'd than sold ^k. And so *Junius* the Dictator after the Defeat at *Cannæ*, publish'd an Edict, *That if any Man, whether he was a Prisoner for a capital Crime, or for Debt, would list himself for the publick Service, under his Command, he would grant him a Pardon, and discharge his Debts* ^l.

XXIV. From all which I think it is evident, that there is no vindictive Justice in the civil Court, which determines what Degrees of Punishment ought to be inflicted on particular Crimes, by any Decision of Nature. But the true Measure of all human Punishment must be taken from the utility of the Commonwealth; and according as the Ends of Punishment seem most easy to be attain'd, the Punishment may either be enhanced or alleviated, according to the Discretion of the Government; yet still so as that the Method of Punishment may admit of great Latitude. And therefore, as it would be too severe to inflict a Penalty, when the Ends of punishing may be attain'd by gentler Methods ^m; so the Punishment is much too easy, when it has not Sharpness enough to produce the Ends design'd by it, and consequently to restrain the Insolence of the Subject, or settle the internal Security of the Commonwealth; or in short, when it is a Punishment

^a V. *Grœt. d. l. f. 34, 35.* ^b L. 47. t. 17. l. 2. D. de EffraCTOR. *Julianus. L. 2. c. 2. de Scythis.*
^c Tho' the Roman Law seems to have the contrary Method, L. 48. t. 19. l. 11. f. 1. D. de pœnit. Vide Ant. Matthæum de *Crim. tit. de Furtis, c. 3. f. 2, 3.* Ad. *Argl. Prœol. f. 29. Quæst. 14.* ^d Vide L. 47. t. 17. l. 1. D. de Furiis *Balnear.* Ant. Matthæum de *Crimin. ad h. t. § t. 14. de Abigis.* Add what *Philos. Jud.* urges, to aggravate the Crime of Sorcery, de *Special. legibus, p. 791, 792. Ed. Paris.* ^e *Q. Curtius, l. 4. c. 6. f. 5, 6.* ^f *Leg. 10. f. ult. D. de Pœnis, ubi supra.* ^g *Chrysanus in Eutropium, l. 2. v. 11, &c.* ^h In the abovemention'd place, f. 35.
^h See *Tiberius's* Epistle concerning Luxury, *Tacitus Ann. 5. c. 54.* in the Beginning. ⁱ *Plutarch. in Solon. p. 90.*
ⁱ *V. A. Gelliam, l. 4. c. 8.* ^j *Livy l. 23. c. 14.* Add. *Grœt. upon 1 Kings ii. 6.*
^k See *Montaign's* Essays, B. 1. c. 11. p. 309. Ed. Paris.

the Delinquents themselves despise ^a. If the Legislator go too far on the one hand, he is liable to the Infamy of being cruel; ^b and if he incline to the other side, he makes all Punishment insignificant; and gives absolute liberty to Vice. For since the natural End of all Punishment is to *dispose Men to obey the Law*, and, in consequence, to restrain them from Actions contrary to it; and since Men, whenever they allow themselves to consider, always weigh the Conveniences and Inconveniences which arise from the same Thing; it is evident, that if the Harm or Pain inflicted, be less than the Benefit or Satisfaction that naturally follows from the Crime committed, the Punishment will be but a very slender Inducement to persuade any Man to resist the Temptation to Disobedience ^c.

XXV. I am to add farther, That since the same Punishment doth not affect all Persons alike ^d, and consequently will not raise the same Dispositions in all to Obedience, it is easy to discover, that both the general penal Sanction, and the application of it to particular Parties, ought to be made with a suitable regard to the Person of the Delinquent, and in that, to all those qualities of Age, Sex, Dignity, Fortune, Strength, and the like; which may either increase or mitigate the sense of Punishment ^e. For the same Mule, for Instance, will press hard upon a poor Man, which will be no burden at all to a rich; an ignominious Punishment will sit easy upon a Wretch mean and despicable, when to a Person of Honour and Quality nothing will be more insupportable and afflicting; and Men, and full grown People have more Strength to bear Punishment than Women and Children ^f. And the *Moors* therefore punish Women guilty of Unchastity, with greater Severity than Men; because they suppose that generally the Arts and Enticements of the Women first give them Encouragement. But yet it doth not from hence follow, that Punishment ought to be inflicted in geometrical (or as *Bodinus* ^g affectedly calls it, an *harmonious*) Proportion; all that is intended here is no more than to make a simple Equation between the Crime and the Penalty, which the Circumstances of the Person are necessary to find out. But if on the account of such Qualities,

which neither aggravate the Crime, nor augment the sense of the Punishment, Crimes equal in Demerit are unequally punish'd, 'tis a shameful partiality and respect of Persons; of which *Cicero* doth not always acquit the *Roman* Laws. And some produce this for an Instance ^h, a Man that kills his Wife, when he has taken her in Adultery, if he be a Person of inferior Rank, is sentenc'd to perpetual Banishment; but if he be in any Dignity or Office, he is only to suffer the *Relegatio* for some short time; for a mean Person may be as much concern'd and afflicted at the Disgrace he suffers by the falleness of his Wife, as a Man of Honour, and may leave his Country with equal Grief and Regret ⁱ. And lastly, it may also be observ'd, that in some Nations certain sorts of Punishment are attended with particular Infamy; thus *Euripides*, ^k

*High on the Gallows ignominious Pains
The very Slaves regret and think dishonourable;
But by the Sword to fall looks generous and brave.*

And *Telemachus* in *Homer* ^l would not dispatch his Maids, *Κατακτεῖν δὲ Πανδράχην*, that is, would not kill them by the Sword, but hangs them. The Punishment of Strangling, on the other hand, is look'd upon to be honourable by the *Ottoman* Family, who think it infamous that noble Blood should be spilt upon the Ground. And the *Jews* thought it a more ignominious Death to be Beheaded, than to be Strangled or Stoned ^m. On the contrary, some Punishments have had the fortune to be accounted Honourable. And upon such a Notion as this, we are told that the *Athenians* were angry, that so mean and contemptible a Wretch as *Hyperbolus* should be banish'd by *Ostracism* ⁿ; because it was usually thought an Honour to suffer that Punishment; and they could readily yield Ten Years Banishment to have been really a Punishment, when *Thucydides* and *Aristides*, and such great Men suffer'd it; but they thought it was too great a Credit to *Hyperbolus*, and would only encourage him to boast, that he had suffer'd the same Punishment which was inflicted upon the most gallant Men of Athens ^o.

^a *V. Gellius*, l. 20. c. 1. de *Veratii petulantia*.

^c *Vid. Hobbes de Cive*, c. 13. f. 16. *Leviathan*. c. 27. Author. De princip. just. & decori p. m. 200. *Cumberland. de Legibus Nat.* c. 5. f. 39.

^d *Vid. Grot. ubi supra*, f. 33.

^e *Vid. l. 47. t. 19. l. 4. f. 1. &*

^f *l. 12. f. 1. D. de Incendio. ruina. &c. t. 10. l. ult. D. de Injuriis, &c. t. 11. l. 6. D. de extraord. Crim. t. 12. l. ult. D. de Sepulchro violato, t. 14. l. 1. f. 3. D. de termino motu. l. 48. t. 8. l. 3. f. 5. ad L. Cornel. de Sicariis.* In most of these Laws which are here cited by the Author, there is an unjust respect of Persons, which he himself blames a little farther, as we shall find, if we take the pains to examine 'em. See the *Orbis Romanus* of the late Mr. *Spanheim*, of the Diversity of Punishments among the *Romans*; according to the Difference of Persons.

^g *Vid. l. 48. t. 7. l. 38. f. 24. l. 39. f. 4. D. ad L. Jul. de Adul. l. 48. t. 13. l. 6. D. ad L. Jul. Pecul. t. 13. l. 5. t. 3. D. ad L. Jul. Pecul. l. 4. t. 4. l. 37. f. 1. D. de minor. l. 50. t. 17. l. 108. D. de divers. rer. jur. Ad. Olearius* *Utr. Perf. l. 3. c. 6. of the Pecuniary Mule, paid among the Russians for an Abuse offer'd, call'd by them Bizzellia.*

^h *De Repub. l. 6. c. ult.* ⁱ *V. D. L. 48. t. 8. l. 1. f. 5.* ^j *Vid. Editionem Theodorici Reg.*

^k *Helena, v. 306, &c. Plin. Nat. Hist. l. 2. c. 63.*

^l *Strangling is an odd sort of Death, by stopping the Breath which endeavours to find a Passage. Ad. l. 48. t. 19. l. 28. f. 2. D. de Pænis.* To this also may we apply that of *Dis Chrysolom.* *Orat. ad Alexandrinos.* The one is the Death of a Malefactor, the other of an unfortunate Slave.

^m *Odyss. l. 22. v. 465, &c.* ⁿ *Seld. J. N. & G l. 7. c. 6.* Thus *Philo Jud.* in *Faccum*, is very angry that the *Jewish* Magistrates and Senators at *Alexandria* should be scourg'd in the same manner, and with the same Instrument, as the meanest *Egyptian* Slaves were. To this we may refer that of *Seneca, de Constantia Sapient.* c. 4. There are some Slaves, that had rather be scourg'd than beat. And it was I presume a very ignominious Punishment which is mention'd *Addition. i. Leg. Burgund. tit. 10.*

^o *Vid. Platarch. Alibiades*, p. 197. B. Where there are these Verses quoted out of *Plato* the Comick Poet.

Worthy to suffer what he did, and more,
But not in such an honourable way;
'The Abjeſt Wretch the Sentence did disgrace,

Vid. Plat. Nicias, p. 530. E. where he speaks of the same Matter.

[•] Thus it was some sort of Comfort, *Aenea magni ſextra calis* -----

Virg. Aeneid. l. 10. v. 830. t. de la Corda in loc.

XXVI. Neither can I see any Necessity that every Commonwealth should take its Measure and Standard for the Punishment of Crimes, from the penal Sanctions of the *Jewish* Law. Because that part of the Law was the positive and civil Law of the *Jews*, and was accommodated to the Genius of that People and Commonwealth. From which, since the Constitutions and Tempers of other Nations and Commonwealths are very different, there is good Reason why the Penalties too shou'd be different. Whether this indeed will hold true with respect to the capital Punishment of Murther, as well as to other Crimes, may bear some Dispute. Because, the Law which determines that Punishment, seems to have been promulg'd to all Mankind, as well as to the *Israelites*. And the Reason of the Punishment is evident: Because, a Man who is barbarous to that Degree, as to take away any Man's Life maliciously, can never give sufficient Caution to others, without losing his own ^a. However, I think it should not be thought a Breach of that Command God gives, *Gen. ix. 6.* ^b, if a Murtherer should be released from capital Punishment, upon some extraordinary Exigence of the Commonwealth. For since the Determination of all Punishment is of positive Institution, and all positive Laws may be accommodated to the Necessities of the State; that Law may also reasonably be suppos'd to admit of the same Exception. Some indeed are of Opinion, that that Passage is rather a divine Commination than a Law, and that God only declares by it, that he will execute Vengeance upon Murtherers, either by Men, or by some other severe Method, if they happen to escape the Inquisition, and Rigour of human Justice. See *Acts* xxviii. 4. Neither doth *Grotius's* Interpretation of it, L. i. c. 2. f. 5. exclude the Exception which is grounded upon the State of the Commonwealth ^c. But *Selden*, L. iv. c. 1. expressly affirms, that the *Jewish* Rabbins did not understand that place to be a Law of such Force, as that it should always oblige the Magistrate necessarily to punish Murther with Death; but that it was an exprefs Indication of God's Hatred to that Crime, from the Severity of the Penalty he annexed to it; which it might be lawful for Man, according to the Posture of Affairs, and Variety of Circumstances in the publick Government of the State, either to limit, or inflict. And for this Reason, the *Jews* (as their Law directs in other Cases) did not inflict Death upon any of their own Nation that kill'd a Profelyte of the Gate, or any other *Gentile*. Nay, if any Number of *Jews*, or other circumcised Persons, had by Blows or Kicks, or any other

way kill'd one of their own Nation, so that no one of them separately did any thing which might be the immediate Occasion of his Death, all of them were acquitted from suffering that Penalty which was otherwise due by course of Law; because neither of them singly was guilty of the Murther ^d. However this be, I would not be thought to persuade the World to an unwarrantable Easiness in dispensing with the Punishment of this Crime. Neither would I undertake to defend that Expression in one of the Constitutions of the Kings of *Poland*, relating to the Punishment of ^e Murther in the Nobility, *Nos divini Juris rigorem moderantes*, We mitigating the Rigour of the divine Law ^f. And here I should take some Notice of the Dispute, which some scrupulous Persons have rais'd against the lawfulness of punishing Theft with Death. But upon this I refer you to the Opinion of *Grotius*, L. ii. c. 1. f. 14. g. Yet *Selden* says, *De J. N. & G. L.* vii. c. 6. That among the *Jews* the Punishment of a *Gentile*, found guilty of Theft, was Death; but that the natural *Jews* were used with more gentleness ^h. And *Herod's* Laws are condemn'd as too severe by *Josephus*, That such Persons as were guilty of Burglary, or of breaking up, or digging into Houses, and such as robbed in the Night, should be sold out of the Land to Strangers. By a Law of *Solon's* at *Athens* it was decreed, That the Penalty for simple Theft, if what was stolen was recover'd, should be to pay double; or if it was not recover'd, ten times the Value of it. But it was added, That if any Person had surreptitiously taken away out of the *Licæum* or Academy, or the publick Schools, either Clothes, or Cups, or any thing of the least Value, or any Vessels out of Schools of Exercise, the publick Walks, or Portico's, worth more than ten Drachms, he should be punish'd with Death ⁱ. What Punishment the Roman Law inflicted is very well known. *Justinian* does not allow that a Man who was guilty of no more than simple Theft, should suffer even so much as Mutilation of Members ^k; though otherwise it cannot be thought absurd that every Criminal should be punish'd in the Part which offended, so *Alexander Severus* punish'd a Notary who exhibited a false Libel of a Cause before the Council, by passing Sentence upon him, that the Nerves of his Fingers should be cut, so that he might never use them to write more ^l. So *Seleucus* pass'd a Decree, that an Adulterer should be condemn'd to lose his Eye, because the Eye makes the first Breach upon the Chastity, and so much forbidden Passion may be express'd in Looks, as may easily kindle the most unlawful Lusts. And so also

^a To this Purpose is that of *Antiphon*. Orat. 15. All Courts of Justice that sit upon Murder, are always in the open Air, that the Judges may not be forced to come into the same place with the Malefactors; and that the Prosecutor may not be under the same Roof with the Murderer. *Add. Libanius, Progymn. loc. com. contra Homicidam.* ^b See *Grot.* on that place, and on *Mat. v. 40.*

^c *Add. Grot. in Flor. sparf. ad Jus Justin. ad L. Corn. de Sicar.* ^d See more in

the same place. ^e See the Abstract of the Latin Letters of *Tollius* in the *Nouvelles de la Republ. des Lettres Avril 1700.* pag. 371, 372. and Mr. *Thomasius's* Dissertation, *de Jure aggratiandi principis Evangelici in causis Homicidii.* Chap. iii. Sect. 9. Printed at *Hall* in 1707. also another of his *de statuam Imperit potestate Legislatoria, &c.* Sect. 43. ^f *Add. Philo Judæus de legibus special.* ^g *Grot. Lib. ii. cap. 1. Sect. 14.* says, that the *Laws* have no Right to

punish with Death all sorts of Crimes, but only those that are so heinous as to make the Offender deserve to be cut off from the Commonwealth. But *Gronovius* judiciously remarks thereupon, that the smallest Faults in themselves may become capital Crimes, when they relate to Things, from which it is easy to abstain, and which there has been good Reasons to forbid on pain of Death. For in that Case, he that violates the Law, ought to complain of no body but himself. 'Tis upon that account, that the Severity of military Discipline is grounded; and we see that God forbid *Adam* and *Eve*, on pain of Death, to eat of the Fruit of a certain Tree, which, in it self, was a very indifferent thing. ^h *Josephus Archæol. Jud. l. 16. c. 1.* ⁱ *Lampridius, Alexander. c. 28.*

^j *Add. Aristot. Problem. f. 29. c. 14.*

^k *Justinian. Novell. 134. c. ult.*

the Law of God commands, *That the Woman's Hands should be cut off, who in any Strife, between her Husband and another Man, drawing near to deliver her Husband out of the Hand of him that smiteth him, putteth forth her Hand and taketh him by the Secret,* Dent. xxv. 11. ^a. However *Anton. Matthæus, De Criminibus, Tit. de Furtis, C. 2.* puts a handsome Interpretation upon *Justinian's* Institution ^b by urging for it, That since 'tis generally either Idleness, or Poverty, that forces People to steal, the Emperor was not willing Thieves should be punish'd by losing the use of their Limbs, that they might not be depriv'd of the Instruments necessary for them to reform their bad course of Life; and when they ought rather to be forced upon some laborious Employment. In *Germany*, the Law, that all Thieves should be hang'd, was made by *Frederick the Second* ^c. And it was afterwards confirm'd by *Charles V.* but look'd more severe in him than in *Frederick*, because he took no Care of the Value of the Coin which was then sinking. Upon the whole, though I am of Opinion, that 'tis possible for Judges to be too free in inflicting capital Punishments, and that sometimes it might turn more to the Advantage of the State, if such Criminals as are here spoken of, were rather condemn'd to some useful Labour and Service ^d; and so we are told *Sabaco*, King of *Egypt*, forced all Malefactors that were condemn'd in capital Punishments, to publick Labours; and that the Country was soon sensible of the Benefit it receiv'd from such an Application of them ^e: Yet I make no doubt but that Theft may lawfully be punish'd with Death. And from what has been said, it will be easy to answer all the Objections urg'd to the contrary, especially those from *Ant. Matthæus*.

XXVII. Neither lastly, is it necessary that a Man should suffer in the same manner in which he offended, or that a Criminal should always be punish'd by ^f Retaliation. This Opinion is commonly ascrib'd to the *Pythagoreans*, who defined Punishment by *Ἀντιπέπονδες*, or a suffering the like. And the Judgment of *Rhadamanthus* is brought to confirm this Method. *Justice is duly then administered* ^g; when the Offender suffers as his sins. But *Aristotle, Nicom. l. v. c. 8.* proves the Absurdity of the *Ἀντιπέπονδες*, or Retaliation, by this Instance: *If a Magistrate, says he, strikes another Person, he is not to be stricken again, but if another Person strikes a Magistrate, he is not only to be stricken again, but*

to be further severely punish'd. As to that Command in *Ex. xxi. 23.* and *Levit. xxiv. 20.* the *Jewish* Doctors are generally of Opinion, that it does not oblige to a rigid Retaliation; but that such Crimes may be redeem'd by a pecuniary Mulct. *Bodinus de Repub. L. vi. C. ult.* denies that this Law was ever in force. For example, that it was never understood, *that when one Man broke another's Leg, his should be broken too*; and he adds, that that Form, *An Eye for an Eye, and a Tooth for a Tooth*, is no Argument to the contrary; because that was only a proverbial Expression, and implied no more, than that the Penalty ought to be proportion'd to the Offence: that what deserv'd only a Reproof ought not to be punish'd with Death; and that such Offences as deserv'd Death, ought not to be correct-ed with a Reprimand; and that this may easily be infer'd from hence, that those divine Laws do not punish Theft with Theft, Adultery with Adultery, nor Wound with Wound. But Theft with double or four times the value of the thing stol'n; Adultery with Death; and a Wound with a pecuniary Mulct. The same divine Law hath also respect of Persons; for instance, if a Man curses a private Person, the Law prescribes no severe Punishment to be inflicted on him; but if a private Man curses the Ruler, or a Son his Father, the Punishment is Capital. On the other hand, *Constantius L' Empereur Babakama, c. 8. § 1.* contends for the literal sense of those Words. I shall not undertake to determine the Dispute between 'em; but after all, 'tis confess'd however, that it was left to the Power of the Judge to transmute the corporal Punishment of Retaliation into a pecuniary, according to the nature of the Circumstances, from that Passage of the Law, *Ex. xxi. 29, 30.* where a greater Punishment is admitted to be chang'd for a less. And *Josephus* says in his *Antiquities, L. iv. C. 8.* *That he that put out another Man's Eyes, was to suffer the like, and lose the same himself, which he deprived the other of; unless the Person that lost his Eye, was content to take a Sum of Money in lieu of that Penalty; the Law allowing the Sufferer to set the Rate upon his own Misfortune.* But on the other hand, they that endeavour to prove Retaliation, urge that Passage in *Deuteronom. xix. 19.* ^h. But it may be answer'd, that the Laws there mention'd cannot with any appearance of reason be thought to belong to this Subject; since the Punishment for Evil-speaking, and Cursing, exceeds all the Measures of Retaliation; the bare Endeavour having the full

^a Thus *Vulscius Gallicanus* in *Acidius Cassius, c. 4.* relates, That he had cut the Nerves of the Deserters Legs. Add *Cujacius's* Observ. L. 7. c. 15.

^b *Institut. l. 4. t. 1. De obligat. que ex delicto nascuntur, l. 5.*

^c *Feudor. l. 2.*

^d 27. s. 8. *de Pace tenenda.*

^e *Herodot. Hæcæse, p. 90. Ed. H. Steph. D. de Siculis, l. 1. c. 65.*

^f *Sir Thomas More, Utop. l. 1. l. 1. v. 655, 656.*

^g See *Græc. B. 2. c. 20. l. 32.*

^h *Ovid. de Arte Amandi.*

-----*Neque enim lex æquior ulla est,
Quam necis artifices arte perire sua.*

-----*Th' Inventors, as 'tis just,
Should feel thole Pain: themselves discover'd first.*

Quintil. Decl. 11. p. 154. The Justice of Revenge is shortest when the Crime is the measure of the Punishment. And if the Nature of Revenge be consider'd, a Man is best reveng'd, when his Injuries are punish'd in the same way they were committed. *Senec. l. 5. Contr. Præfat. p. 276.* What a Man designs for a Punishment to another, is often by a very just Method of punishing chang'd into his own. *Polyb. l. 12. in Excerpt. Peiresc.* Since he hath carried himself with so much Bitterness and Moroseness to others, 'tis just others should use him with the same Unkindness. ^b *Conf. L. 9. t. 2. l. ult. C. de Accusat. & Inscip. L. 9. t. 46. l. ult. C. de Calumn. L. 9. t. 12. l. 7. C. ad L. Jul. de Vi Publica.* *Josephus Archæol. Jud. t. 4. c. 8.* No *Israélite* shall have by him any mortal Poison: And if any such be found in his Possession, he shall die, and suffer what he was to have done whom the Poison was prepar'd for. *Diod. Siculus, l. 1. c. 77.* repeats an *Egyptain* Law of the same Nature.

Evil set in view. However, in other respects the Penalty of that is not unjust. *For there is no difference between an Evil-speaker, and one that does ill, but only in the Opportunity* ^a. Thus by the Law of God, a Man that brought an evil Report upon a Virgin, was lookt upon to be equally guilty with one that forced her Honour. *Deuteron. xxii. 19, 29.* ^b. *For there can be nothing more injurious and malicious than Detraction; it maketh us think well of Falshood, and forces Innocence it self to look guilty* ^c. *And the State of human Affairs must be reduced to a very desperate Condition indeed, if every Man's malice has power to make us criminal: For Innocence can never be happy enough, to escape the pernicious Diligence of a slanderous Tongue* ^d. In one of the Laws of the Twelve Tables it is instituted, that *the Man that breaks another's Limbs, unless he can make his Peace, and compound with him, shall suffer the like*. Upon which Law I refer you to the Dispute between *Favorinus* and *Sex. Cacilius* in *Gellius*, ^e L. xx. c. 1. But it is plain, that Retaliation was grown out of use at *Rome*, from the 7th Section of the *Institute, De Injuriis* ^f. *Diodorus Siculus*, L. xii. c. 17. gives us an Account of a Law made by *Charondas* to this effect: *If any Man puts out another's Eye, let his Eye also be put out*. "It happen'd, that a Person blind in one Eye was set upon, and lost his other, and consequently was entirely depriv'd of Sight: Now in this case, tho' the Criminal was to be depriv'd of one Eye, yet his Punishment was justly thought less than he deserv'd; because, tho' he might seem to be sufficiently punish'd by the Letter of the Law, yet his Loss was not considerably so great as the others. And therefore it would look more like Justice, where the Penalty was to be laid equal to the Injury, that the Person, who entirely depriv'd the Man of Sight that had lost one Eye before, should lose both his. The blind Man grown therefore impatient at his Misfortune, and the Partiality of the Case, took the Courage to represent his Case to the People, bewail'd the unhappy Condition of his Life, and beg'd them to alter the Law; at last putting the Rope about his Neck (as the Custom was there upon such occasions) his Entreaties had the desir'd Effect, the Law was abrogated; a new one better consider'd was prefer'd, and he escap'd the Death he was ready to have suffer'd ^g." But however this be, 'tis certain, that so rude a Notion of Retaliation can never be a just Measure of Punishment. For in the first place, there are a great many Crimes, which it cannot possibly be apply'd to. As I believe, Retaliation was never thought a proper Punishment for *Adultery, Ravishment, Bestiality, Treason against the State, Reviling, Detraction, Sorcery, Forgery of Wills or Deeds,*

Counterfeiting the Coin, imposing of false Births or adulterous Children, procuring Abortion, Kidnapping, Crimen Ambitus, Incest, Sacrilege, Removing the Landmark, Defacing Sepulchres, Cozenage and Collusion, Prevarication, and the like. And by the way, it should be mention'd as an Instance of the Wisdom and Piety of the Emperor *Theodosius*, that he took off the shameful Punishment of Women taken in Adultery then usual at *Rome*, by which they were to be condemn'd to the publick Stews, and were there to be prostituted to all that came, a Bell ringing all the time they suffer'd that Infamous Punishment. For though an Ignominy of this Nature might possibly produce the same Effects, as the most severe Punishment; yet since this Punishment could not be put in Execution without Sin, it seem'd rather to increase than take away the Guilt of the Fact it punish'd ^h. But admitting that those Laws which seem to establish Retaliation apply it only to Injuries and Hurts that affect the Body; and admitting that one may imagine a Case, where the Crime committed may be well enough turn'd into the Punishment of it; and that neither the Persons, the Place, the Time, Quality, or Cause, inhanse or aggravate the Crime; yet even upon such Suppositions simple Retaliation will not be a proper Punishment. For Instance, a common Man strikes another a Box on the Ear, in some private Place; now if the Person that suffer'd the Stroke is to return the other the like, 'tis to be fear'd, he will hardly be exact enough to observe a just Proportion ⁱ. And if the Execution be refer'd to a third Person, how shall he know with what force the first Blow was given? Besides, in many Crimes Retaliation might be too severe, if there should be no Distinction made, whether the Fact were committed maliciously, or not; or if no difference of Persons be observ'd. For Example ^k, a Man designing to strike another a slight Blow in the Face with his Diamond perhaps, or some Stone he wears on his Finger, unhappily, against his Intention, strikes out his Eye; it would be very severe, if such a Person should, upon that Misfortune, be condemn'd to lose his Eye too. So if a Gentleman kick a common Porter or Labourer, it would be too severe to sentence that the Kick should be returned again upon him, because 'tis a Dishonour to a Person of Quality to receive a Kick, and none to one of mean Condition. Again, on the other hand, in many Crimes the Punishment of Retaliation seems too easy: And this may happen particularly from a Disparity between the Persons who did, and who suffer'd the Injury; or else from a Disparity of Place, Time, and other Circumstances. But in the general, the Arguments which *Grotius* produces in the Chapter before cited, § 32. entirely

^a *Quintil. Decl.* 331. 'Tis a sort of Murder to attempt any Man's Life, that ought not to be kill'd. And *Pliny* in his *Panegy.* c. 35. n. 3. speaking to the Delators, tells them, "That they were to expect Punishments equal to the Rewards they had had before, that their Hopes should be no greater than their Fears, and that they should be as much afraid themselves, as they were fear'd before by others."

Judges perjure themselves; extinguishes the Light of Truth, involves all that hearken to it in a Mist of Lies, and then easily finds a way to deprive Men of their Lives.

^b *Isocrates de Permutatione*, p. 540, 541. Detraction makes

^c *Quintil. Declam.* 11. Defamation can have no effect, but by

^d *Constitut. Sicul.* L. 2. c. 14.

^e *Not. Attic.*

^f *Institut.* L. 4. t. 4. l. 7.

^g *Demolthenes mentions the same Law*, adv. *Timocratem.* *Aristot. Rhet.* l. 1. c. 7.

The Punishment is not the same when a Man puts out his Eye that has but one, and one of his that hath two. *Add. Pet. Gregor. Tholofanus Syntagm.* l. 31. c. 10.

^h *Socrates Hist. Eccl.* l. 5. c. 18.

ⁱ *Add. Lex Wisigothorum*,

l. 6. t. 4. c. 3.

^k *V. Aristot. Ethic. ad Nicom.* l. 5. c. 8.

confute that wild extravagant Notion of Retaliation; where he also with very good Reason denies, that when a Man hath deliberately, and without much alleviating Circumstances, done hurt to another Person, he ought to suffer just as much Harm as he has done, and no more. For 'tis a Contradiction to Equity, that the Fears and Dangers of the innocent and the criminal should be equal. And there would be but slender Provision made for common Security, if Malefactors should be under no greater Fears from publick Justice and the Laws, than good Men are from their Insolence and Wickedness; especially since the Hopes of Concealment, of escaping by Flight, or by some way or other evading Justice, are in a manner additional Advantages to every Villain. And besides, the most sacred Laws themselves do sometimes ordain the same Punishments for imperfect and finish'd Crimes, *Deut. xix. 19. Exod. xxii. 9. 2.* It was a remarkable Law which *Strabo* mentions, L. xv. among the *Indians*, *He that deprives Men of the use of a Limb shall not only suffer the like, but shall have his Hand cut off also. But if any Person deprives an Artificer or Mechanick of the use of an Hand, or an Eye, he shall be put to Death.* And by *Solon's* Law, the Person that put out one of another's Man's Eyes, was to lose both his own ^b. And so also a Man that went arm'd with a Design to kill any Person, fell under the reach of the *Law de Sicariis*, L. xlvi. t. 8. l. 1. *D. ad L. Corneliam*. Now though the Consequence of this be, that the Punishment of a mature finish'd Crime should be proportionable to the degrees of its Consummation, yet since human Justice can inflict no Punishment greater than Death, and it is impossible that should be repeated, there must necessarily be a stop made there; though according to the degrees of the Crime, the Punishment of Death may be made more painful by Torture, or appear more grievous from the Circumstances of Ignominy and Disgrace, which either attend or follow after it.

XXVIII. I proceed in the next place, to consider those Punishments which are inflicted by human Justice, for other Mens Crimes. And here, without Dispute, ^c they that do really partake of the guilt of the Offence, ought to share also in the Punishment, in proportion to the Influence they may be supposed to have in the Fact; since they suffer not for another Man's Fault, but their own. But now how, and by what Method of acting a Man may be said to partake of another's Crime, I have shewed before ^{d e}. But it must be observ'd, that there is this difference between Satisfaction for Damage and Punishment, that 'tis more usual for human Justice to condemn an Offender to make Restitution, than beyond, and besides that, to suffer Punishment also: Because Imprudence or Levity of Offence may be sufficient Motives to supersede Punishment, though perhaps not to excuse Reparation for Damages. It was a remarkable Law

which was made by *Thomas Raudolf*, Regent of *Scotland* ⁱ to suppress the Robbetries which were then frequent; and that was, *That all Husbandmen should leave their Plows, and other Instruments of Tillage, in the open Fields; and that at Night they should not so much as lock or secure their Houses or Barns; and that the Losses they suffer'd should be paid to them by the Justiciaries of the Kingdom, who were to be reimburs'd by the King, and the King was to satisfy himself by the Goods and Chattels of the Robbers that were apprehended.* But now as to Crimes contracted by Corporations or publick Bodies, it must be observed, that though the Decrees, to which the major Part consents are generally look'd upon to be Decrees of the whole Body; so that the lesser Number dissenting, shall be oblig'd notwithstanding to see them executed ^{g h}; yet if there be any Enquiry made about the guilt of such an Act, those Persons only are to be supposed liable, who actually gave their Consent. And those are innocent, who denied their Agreement to it from the Beginning, and constantly persisted to dissent from it ⁱ. *Alexander* the Great took *Thebes*, and commanded that all the *Thebans* should be sold for Slaves, excepting only such of them, as were against passing the Decree to break Alliance with the *Macedonians* ^k. Nay, it is not uncommon to excuse those at least (as to the highest degrees of Guilt) who dissented at first, but afterwards fell in with the prevailing Number, and then pursu'd the Execution of the criminal Decree as far as they had Power. So the *Greeks* were said to have spared *Antenor* and *Aeneas*, ^l who had persuaded the *Trojans* to restore *Helena*, though the latter of them perform'd many brave Actions in Defence of his Country. It is also to be further observ'd, that the Punishment of a Corporation or Body politick, as such, is different from the Punishment of particular Persons and Subjects. The Punishment of a particular Subject is sometimes Death. And that which answers it in the Body politick is Dissolution ^m; and when a Corporation or Community is thus dissolv'd, all usufructuary Advantages are said to be at an end with it, in the same manner as in Cases of Death ⁿ. Sometimes particular Persons are, by way of Punishment, made Slaves, and the Body politick suffers the like, in case it were once immediately subject to the civil Sovereign only, but is afterwards subjected to some other subordinate Body, or perhaps to a particular Subject. And lastly, as particular Persons may be punish'd by way of Mulct levied upon their Estates; so the Body politick, when it commits any publick Crime, is punish'd by Deprivation of the publick Goods belonging to it, such as Forts, Naval Stores, Ships of War, Arms, Treasure, publick Lands, Privileges, and the like. So when the People of *Antioch*, upon the Imposition of a new Tax, pull'd down the Emperor *Theodosius's* Statues in all the publick Places, he punish'd them by forbidding

^a *V. Editum Regis Theodorici, C. 13. § 50.*

^b *Diogenes Laert. Salon.*

^c *V. Grat. L. 2. c. 21. f. 1.*

^d See above in B. 1. c. 5. f. 14. and in B. 3. c. 1. f. 4, 5.

^e *Vtd. Jacob. Godofredum disc. in C. L. 9. t. 8.*

ad L. Juliam. Majest. l. 5. c. 9. & 10.

^f *Buchanan Rer. Scotie. L. 9.*

^g *Vid. Polyb. l. 5. c. 49. in fin. Plin.*

^h 1. 6. Ep. 13. Particular Men at the first Proposition of any Matter may lawfully dissent; but when the Decree is pass'd, that which the Majority agreed to, must oblige all.

ⁱ Upon this, see above in B. 7. c. 2. f. 15.

^j See *Luke xxiii. 51.*

^k *Plut. Alexander. p. 670. D.*

^l *V. T. Liv. l. 1. c. 1.*

^m *Add Constitut. Sicil. l. 1. tit. 47.*

ⁿ *Medejinus in L. 7. t. 6. l. 21. D. quibus mod. Ujfract. amit*

them the use of the Theatre and the Baths, and by taking from them the Title of Metropolis, which their City enjoy'd before ^a. And so *Marcus* the Emperor took away from the same People all the publick Shows and other Ornaments of their City (though he afterwards restor'd them again) ^b. So *Severus* demolish'd the greatest part of *Byzantium*, ruin'd the Theatres, and Baths, and all the Ornaments of the City, reduc'd it almost to a Village, and made it subject to the *Perinthians* ^c. And thus the Emperor *Constantius* by way of Punishment to the same City, because they had kill'd his General *Hermogenes*, took away from them the Dole of Corn, which he had usually before distributed among them ^d. But however in Crimes where there are Numbers of Complices, 'tis reasonable, the chief Promoters and Abettors, should be punish'd with greatest Severity ^e. And in short, in estimating the Crimes and Penalties of Corporations and Bodies politick, it should be consider'd, as *Quintilian* very well observes ^f, "That generally whatever a Community undertakes, must be ascribed to the power of the Counsellors that direct it; and that all popular Disturbances and Insurrections are of greater or less Violence, according as the People are exasperated. Just as all Motion in our Bodies derives it self from our Minds, and our several Parts are as it were dead and useles, till put in Action by the Soul. 'Tis the easiest thing in Nature to raise any kind of Passion in a Multitude; for there was never any Assembly, where every Man could perfectly govern himself by his own Thought, Sense and Reason, Nor was there ever a Multitude that had the Foresight and Prudence particular Men have. Whether it be that all Men are less affected with publick Concerns; or that every Man is less solicitous, where he doth not think himself in particular answerable for the Success. For the Presumption and Dependence Men have upon others, make them negligent and remiss themselves. And so *Cicero* says, that among the *Romans*, if any Number of Soldiers had offended against the Laws military, some few of them were punish'd as their Lot happened, *That so the Terror might reach all, though but few fell under the Punishment* ^g. And this is implied in the Answer of *Germanicus's* Army to him in *Tacitus*, that he should *punish the Guilty, but pardon such as had been Misguided* ^h.

XXIX. And here it may be question'd, whether a Crime committed by a Community or Corporation will always leave it under execution of the Punishment; for Instance, if a Community has been publickly Guilty of some criminal Act, perhaps two or three hundred Years past? It may perhaps have some shew of Reason for the Affirmative to say, That as long as the Community lasts, it continues the same ^k, though the particular Members in it change, and succeed one another. But when the Question is

of human Punishment, it ought in Truth to be denied. For it is more necessary, even in particular Men, to punish fresh, and therefore more scandalous Crimes, than old forgotten Faults. And therefore, there was very good reason for that Prescription of Crimes which the *Roman* Laws allow'd ^l. Besides, it is to be observed, that some things may be immediately and naturally predicated of a Community, as such; for Example, the having a common Stock, common Constitutions, Rights, and Privileges, which the particular Members cannot call their own. And again, that there are other things which agree to the Body, only as derived from the particular Members, or which first of all inhere in the Members, and afterwards influence and denominate the whole Body. Thus it is usual to call a Society learned, noble, wise, honourable, or contemptible, as the Majority of its Members is learned, noble, wise, honourable, or contemptible, tho' perhaps some of the Members may be unlearned, base, or imprudent. And in this latter Sense it is, that such Bodies may be said to have incur'd Punishment. For the Demerit adheres to the particular Members, as they are suppos'd to be Persons who have the use of their Understanding, and are capable of acting with Reason and Choice. But a Community, as such, and as it is conceiv'd to be distinct from the particular Members, has no Faculties by which it is capable of exercising such Actions as primarily and immediately contract Demerit; and which may therefore be suppos'd to be distinct from those of the particular Members. And therefore it follows, that if the Members, by whom the Body contracted the Demerit, are dead and gone from the Society, and the Guilt has not been continued by any Act of their Successors, that the Demerit it self expires with them; and consequently that which made the Body liable to Punishment; since the one cannot be justly inflicted without the other. *Plutarch* ^m indeed, in this case, appeals to the Methods of divine Justice, which sometimes, as we read *visits the Sins of the Fathers upon the Children*. But as the Proceedings of divine Justice are not always to be made a Pattern to human; so neither doth it follow that if it be Equity, to allow Posterity the Possession of those Rewards and Honours which were acquired by the Deserts of Ancestors; it is therefore Equity, that they should also suffer the Punishments due to their Ancestors Offences. For it is the Nature of a Benefit, that it may freely be bestow'd, at the Pleasure of the Donor, even upon a Person wholly undeserving; but the Nature of Punishment is quite different. The *Romans* (as *Justin* tells us) made use of the Pretence of an old forgotten Kindness, to undertake the Defence of the *Acar-nians* against the *Etolians* ⁿ, declaring that the Reason why they assisted them was, because the *Acar-nians* did not join with the other Cities of *Greece*, to send Forces against *Troy*, from which City the *Romans* would be thought to have derived

^a *Libanius* Orat. 13.

^d *Socrates Eccles. Hist.* l. 2. c. 13.

^e *Cic. pro Cluentio*, c. 46. *Tacitus*, Ann. l. 1. c. 44. init.

^f *Bodinus de Rep.* l. 3. c. 7. p. m. 527. & seqq. Ant. *Matthæus de Crimin.* ad l. 48. D. t. 18. c. 4. f. 30. *Consl. Sicil.* l. 1. tit. ult.

^g *Vid. Ant. Matthæum de Crim. ad L.* 48. t. 19. c. 4. t. 20. c. 4. f. 14.

^h *Justinus*, l. 28. c. 1. in fin.

^b *Fulcatius Gallicanus in Avid. Cassius* c. 9.

^c *Vid. Liv.* l. 28. c. 26. ab. init.

^e *Herodianus*, l. 3. c. 19.

^f *Quintil. Declam.* 11. p. 156. Ed. *Lug. Bat.*

^h *Add. Polyb.* l. 11. c. 27. in fin. & excerpt. *Legat.*

^k *Plutarch de sera nurinis vindicta*, p. 559. A.

^m *Plut. de sera Num. Vind.* d. 1.

themselves: Though it was clear this was nothing else but Pretence, and was only a Colour to excuse themselves for interposing in things it did not belong to them to be concern'd in ^a.

XXX. But however it is still true, that human Justice ought not to force a Man to bear part of the Punishment of another's Crime, when he was not accessary to the Commission of it. The Reason is, because all Merit and Demerit are entirely Personal, and founded in the Will of each Man; which certainly is, or nothing is, at his Command, and which can't contract any Guilt, but by some internal Motion of its own ^b. But because it often happens, that some Mens Offences are the Occasions of Evil to others, that we may not be apt from hence to make a wrong Inference, it is necessary to observe, in the first place, that not every thing that brings Uneasiness, Inconvenience, or Loss, upon a Man, is properly Punishment ^c. A Man when his Estate is confiscated upon some criminal Account, and he is reduced to Want and Poverty, may properly be said to have suffer'd Punishment. But how many Men are there, that come into the World without any other Fortune or Estate than their own Persons? How many are there that by Fire, Shipwrack, Incurfions, and Depredations of Enemies, are stripp'd of all, and whose Poverty cannot be call'd human Punishment, but fatal Misfortune? And I may say, that therefore the Evils, for Example, which Subjects sometimes feel from the Miscarriages and bad Government of their Princes, should be thought also to be of the same Nature with those other Inconveniences and Afflictions, which attend human Life; such as ill Constitution of Body, Infirmities of Age, unwholesome Air, Barrenness, and the like.

XXXI. And Secondly, it must be further observed, that there is great difference between the Damage which a Man suffers directly by another's hand, and that which falls upon him only by Consequence. A Man suffers the first, when he is depriv'd of that which he has already all proper Right to. The other happens, when that Condition is intercepted, without which he could not enjoy such a Right ^d. Thus when the Estate the Parents were possess'd of is forfeited, the Children also feel the Loss of it. But however, that is not a Punishment properly with respect to the Children, because they cannot come to the Inheritance of their Fathers Estate, unless their Fathers preserve it for them till they die. And therefore the Confiscation or Forfeiture only intercepts the Condition, without which the Children can have no Right to their Father's Estate ^e. But however, it was truly an unjust and barbarous Law (as *Buchanan* calls it) which was made by *Mogaldus* King of *Scotland*, *That all the Goods and Chattels of condemn'd*

Criminals were to be forfeited to the Crown, excluding their Wives and Children from any Part of them ^f.

XXXII. Again, Lastly, it ought to be observ'd, that sometimes the Evil a Man may suffer, or the Loss of any Good he may sustain, may be occasion'd by another Man's Offence, or because another Man has not perform'd his Obligation; but still that this Man's Offence, or Deficiency in Performance of the Obligation, is not the proper and immediate Cause why the other suffers Evil; nor can any third Person pretend any direct Right from such an Offence to inflict Evil upon him ^g. Thus it is common for Fidejussors, or Bondsmen, to suffer Loss, when the Debtor they engage for, breaks his Promise. But the immediate Obligation that binds the Fidejussor or Bondfman to discharge the other's Debt, is his own Promise. For as a Man that engages himself to be bound for a Buyer, is not properly oblig'd from the thing bought, but from the Promise he made; so a Man bound for a Criminal is not properly oblig'd by the other's Crime, but by his own Engagement. From whence it follows, that when the Fidejussor or Bondfman is to suffer Evil, it must not be measur'd by the other's Crime, but by the Power he had to promise. And therefore when the Delinquent escapes, and it is necessary his Surety should make Satisfaction to Justice, 'tis not to be consider'd what Evil might have justly been inflicted on the Delinquent, but what Degrees of Evil the other could oblige himself by his own sole Consent to suffer for him. And hence it may also be interr'd, how far Bondsmen or Fidejussors may be admitted in capital Cases: And that may be only thus far; either that the Bondfman may promise the Magistrate (whose Duty it is to prosecute the Offender) that he will satisfy for the Damage he has done; or else that he will take care to bring him to Tryal, upon Condition that the Criminal may be admitted to Bail, if he be already apprehended, may be free from the Inconveniences of a Prison, and may not be oblig'd to appear at his Tryal in Irons; or if not apprehended, that nothing be issued out against him in his Absence, and before he has had a judicial Hearing. But no Man can oblige himself to suffer Death for a Criminal ^h; since no Man hath so much Power over his own Life. Neither can the nature of human Justice allow such Punishments to be inflicted. For the end of Punishment is to *restrain Men from Transgressions, and dispose them to Obedience*. But in this Case, neither has the Fidejussor himself offended, neither by his Act of Engagement doth he derive the guilt of the other's Crime upon himself. For it can be no Crime in him to desire that the Criminal should have a fair Hearing in a convenient Place, and be without trouble and disquiet, before Judgment pass'es upon him; nor is it any to promise he will pay the pecuniary

^a But the Expressions *Mahomet* the II. used to *Pope Pius* the II. were more ridiculous than this; That he was surprized to find *Italy* joined in a Confederacy against him, since the *Trojans* were his Ancestors as well as theirs, and since it ought to be their common Concern to revenge *Hector's* Death upon the *Greeks*, whom the *Italians* had now made an Alliance with, against him, *Mich. Montaigne's* Essays, l. 2. c. 36. p. 556.

XXXIII. Section. ^c *V. Grot. L. 2. c. 21.*

f. ult. l. 26. D. de Damn. Infesto, § L. 35. t. 2. l. 63. D. ad L. Falcidiam.

§ Relegat. &c.

in B. 5. c. 10. f. 12.

^f *Buchanan. Rerum Sc. l. 4.*

^b This Reason is taken from the Beginning of the

^d We have an instance of this in *L. 39. t. 2. l. 24.*

^e *Vid. L. 48. t. 22. l. 3. D. de Interdict. & Relegat. &c.*

^g *Vid. Grot. d. l. f. 11.*

^h See above

Mulct imposed on the Criminal, in what manner the Magistrate shall think fit to set it, when the Criminal is fled from Justice. Besides the End of human Punishment cannot be obtain'd by punishing the Surety; for if he punish'd, he must be punish'd, not because he himself is guilty of any criminal Action; but because he was so imprudent as to expose himself to Danger, upon the presumption of another Man's Honesty. And then all the Effect of such a Punishment will be this, that other Men will be more cautious for the future how they engage themselves; not that they will be more careful to avoid the Crime the Offender was guilty of. And therefore such a Punishment would seem to have no Regard to the Fact of the principal Criminal, but only to the unwary Credulity of the Surety. And therefore the Magistrate that punishes a Bondsman, or Fidejussor, understands neither the Nature of Punishment, nor his own Duty in inflicting it; except it appear that he design'd only to abuse him, and elude the force of publick Justice. And again, since no Man has such Right over his own Members, as to take Liberty to deprive himself at pleasure of any of them; it is evident that no Man can oblige himself to suffer the Punishment of Mutilation for another Person. But 'tis a different Case, when Jaylors, the Keepers of Malefactors, are punish'd with Death, who either by Neglect, or Collusion, gave them Opportunity to make their Escape; for they suffer for their own criminal Default, not for their Prisoners^a. Nay further, though it must be allow'd, that the free Heads, and Masters of Families, had the Liberty of setting up what sort of Government or Law they pleas'd; yet it does not seem to be a proper Method to banish the Fidejussors; as well because Banishment can hardly be called a Punishment; as because it is not the Interest of the Commonwealth to drive away such Subjects^b. There are several other Cases, where a Man may suffer Inconvenience by another's Offence. For Instance, if a Friend be so kind to me as to let me live in his House Rent-free, and it happens that my Friend, the Proprietor, be found guilty of some Crime for which his House is forfeited; 'tis plain that I must be sensible of Inconvenience in such a Case, because I must be forced to provide my self of a new Habitation, when perhaps he would have allowed me to have lived there longer upon the same Terms. But the Punishment doth not properly affect me. For the Publick, that is seiz'd in the Propriety of the House, may when it pleas'd, by its own Right, deny me the Use of it, at that Rate I had it before. So also Children of Traitors and Rebels are often denied civil Honours in the State. And this indeed aggravates the Punishment in the Parents, since their Children (whom they

are supposed to have the greatest Affection and Regard for) must for their Fault live without any publick Character or Mark of Honour and Esteem in the Commonwealth. But this is in reality no Punishment to the Children; because the Government may bestow Honours where it pleas'd, and therefore may, by its own Right and Authority, exclude such Persons as have not in the least offended, from all Titles and Dignities it has power to confer, as often as it is thought agreeable to the Rules of Government, and the publick Good.

XXXIII. From these Distinctions it appears, that no Man can be justly punish'd by any civil Court for another Man's Offence, when he is free from the Guilt of it. And the Reason is, because that aptitude which disposes a Man for Punishment proceeds from Demerit, and Demerit in the last Resort is founded in the Will, which is certainly, or nothing is, at a Man's own Command, and which cannot contract any Guilt, but by some internal Motion of its own. 'Tis a Mistake in *Grotius*, in the Chapter before cited, *Seç. 12.* to think that there may be an Instance given to the contrary, extrinsecal to the Person of the Delinquent, in the Person of one he hath a violent Affection for. And I think it is nothing to the Purpose to say as *Plutarch* does^c; "that the Master, by correcting some of his Scholars, puts all the rest in mind of their Duty, and a General, by making a Decimation, punishes the whole Army." For both the Youth that is corrected, and every tenth Soldier that suffers, is really criminal himself. And hence therefore it follows also, that innocent Children are not to be punish'd for the Crimes their Parents were guilty of^{d e}. And therefore some Interpreters explain *Josua* c. vii. v. 24. thus, That *Achan's* Children were brought out only that they might hear the Instructions *Josua* gave them, and the rest of the People; and be advised to take warning how they were found guilty of the like Crimes themselves; not that they were to be ston'd with their Father. But if this Comment upon the Text will not be allow'd, see what *Grotius* saith, *de J. B. & P.* l. 2. c. 21. §. 14. *in princip.*^f.

-----*Ne perge queri, casusque priorum
Annumerare tibi. Nec culpa nepotibus obstat.
Tu modo dissimilis, rebus mereare secundis
Excusare tuos.*

Lament no more, nor to your self misplace,
The Crimes or Fortunes of a former Race.
Our Parents Guilt but to themselves extends,
Taints not the Blood, nor to the Sons descends;
By your own worth you blot out the Disgrace,
And raise the faded Lustre of your Race^g.

^a See 1 *Kings* xx. 39. *seqq.* *Acts* XII. 19.

Provinces which bordered on the imperial City *Cozco*, were oblig'd, by way of Tribute, to furnish the Court of the *Inca* with Officers and Servants. And that upon any Crime or Neglect they were guilty of, the Provinces that presented them were to be responsible.

^c *De fera Naminis Vindicta.* p. 561. *A. Ed. Weeb.*

^d *Vid.* L. 9. t. 47. l. 22. *C. de*

Panis. L. 48. t. 19. l. 26. *D. de panis.*

^e *Vid.* *Grot.* *ubi supra*, f. 13, &c.

^f *Ovid.* *Metam.* L. 4. v. 669. 670.

*Illic immeritam, maternæ pendere linguæ,
Andromedam pœnas, injustus jussérat Armon*

There partial *Jove* did for her Mother's Crime.
The fair *Andromeda* in Chains confine.

^g *Statius Thebaid.* L. 1. towards the End.

And therefore that Law of the *Persians*, by which, when any single Person was found guilty of a Misdemeanour against his Prince, his whole Family and all his Relations were to suffer with him, was justly censured by *Ammianus Marcellinus*, as insupportable, and barbarously rigorous, beyond Example ^a. 'Tis certain indeed, that by Punishments of such Cruelty Princes intended above all things to provide for their own Safety ^b. For though a Man may have Bravery enough to despise his own Life (as *Hellanicus*, in *Justin*, is said to have done when he was old and childless, and was therefore the more animated in his Conspiracy against the Tyrant *Aristorinius*, because he had nothing to fear, neither his Age, nor Family) yet he will not be perhaps without Fear, when he knows that his Friends and Relations may be ruin'd with him, and upon his account. And again, it might seem to be a further Security to cut off the Sons, to prevent them from revenging their Father's Death. For says *Aristotle*, *It is but folly to kill the Father when the Sons are spared* ^c. Besides, is not easy to be believ'd, that a Man will have the boldness to undertake an Enterprize of so much Danger, without communicating his Design to his Relations. For which Reason *Arian* says ^d, *Alexander* put *Parmenio* to Death. And perhaps it may be true as *Cassius* in *Tacitus* said ^e, "That though there is a Mixture of Injustice in every exemplary Punishment, yet the evil particular Men suffer by it, is sufficiently recompens'd by the Benefit it brings to the Publick. Thus in the ninth Book of the *Codes*, t. 8. *ad L. Juliam Majest.* the Sons of Traitors were to suffer the same Punishment as their Fathers, when it was to be fear'd they might be influenced by their Fathers Example ^f. Thus the Children of the *Maratocupeni* (Robbers in *Syria*, who had that Name given them from the place they inhabited) were all cut off with their Parents, for fear they should grow to imitate them. *Hobbes* in his *Leviath.* c. xxviii. gives this Reason for Justice of this sort of Punishment, "Because such as are guilty of Treason against the State, are profess'd Enemies to it, and therefore it is lawful by the original Right of Nature to make War upon them; but in War the Sword judgeth not, nor doth the Victor make Distinction between nocent and innocent, nor has other Respect of Mercy, than as it conduceth to the Good of his own People. And besides, in publick Judgments and Trials in case of Treason, there is this thing particular, That the Sovereign may sit Judge in his own Cause; and sometimes, laying aside the Formalities and Intricacies of Pro-

cess, begin with the Execution &. But yet conscientious Princes ought to consider what *Tiberius* said in the Case of *Cn. Piso*, *Tacit. Ann.* 3. c. xii. And indeed, neither in War ought the Sword to be so merciless, as not to spare such as Age and Innocence plead for. And since such as are born in the Commonwealth are Subjects, there is no Reason why they should be treated as Enemies, unless their own Acts make them such. And therefore, there can be no other way of punishing an innocent Son for the Treasons and Rebellions of his Father, than by intercepting those Goods from him which would otherwise have descended from his Father to him. In *Peru* under the Government of the *Inca's*, if a *Curaca* were put to Death for any Misdemeanour, his Son was not therefore denied to succeed in his Father's Place and Office, but was shew'd his Father's Crime and Punishment, that he might take Warning from thence how he offended ^h. But to be denied those Honours which a Man can lay no Claim to, is not properly Punishment. But neither do the other Reasons that are given, excuse the Injustice of this sort of Punishment. As for Instance, when the *Greeks* (as *Dionys. Halicarnassus* tells us) cut off any Tyrant, they always either kill'd or banish'd his Children, upon an Opinion, that it was a Contradiction to Nature, to suppose good Children could be born of bad Parents, or bad Children of good ⁱ. Neither can this sort of Punishment be justified by any Arguments from divine Threatnings, since the Dispute relates only to human Justice ^k. And therefore it was a wise and good Constitution of the *Egyptians*, that no Woman with Child should suffer Death, till she was deliver'd, which is also now observed in other Nations ^l. And here it may be observ'd, that it is an abuse of the legislative Power, when the Legislator takes Advantage of the Crimes of particular Offenders, to enact rigorous Laws against a whole Sex or Order; though perhaps afterwards, in Tract of Time, the Punishment it self may grow into Credit, and the Death inflicted by it be thought honourable. As it happen'd by that Law among the *Indians*; by which the Wife was to be burnt with her deceas'd Husband. The Occasion of which Law was, that the Women when they were tired, or out of Love with their Husbands, made no scruple to Poison them to make way for the Embraces of others ^m. And hence also it appears, that the Heir is not affected by any Punishment inflicted upon the Body, or Reputation of the Delinquent ⁿ. But a pecuniary Mulct will reach him, tho' in Equity it ought not to exceed the Value of the Inheritance which descends to him ^o.

^a *Vid.* Herodot. l. 3. p. 235. Edit. H. Steph. de *Intapherne*. *Justin.* l. 10. c. 2. The *Macedonians* had a Law much of the same Nature. *Vid.* Curtium, l. 6. c. 11. l. 8. c. 6.

^b *Justin.* l. 26. c. 1. l. 21. c. 4. towards the End. *A. Cæ-*

^c *Rhet.* l. 2. c. 21. ^d *B.* 3. ^e *Ann.* xiv. c. 44.

^f *Vid.* Ant. Matth. de *Crim.* l. 48. t. 2. f. 10. *Am. Marcell.* l. 28.

^g *Id.* *Ant. Matth.* de *Crim.* l. 48. t. 2. f. 10. *Am. Marcell.* l. 28.

^h *Garcilass. de la Vega Comm. Reg.* l. 2. c. 13.

ⁱ And it was very well said by *Marcus* in *Vulcat. Gallicanus* in *Avidius*

Cassius, c. 12. And therefore ye ought to pardon *Cassius's* Children, his Son-in-law and Wife. But did I say pardon?

since they are Guilty of no Crime. ^k GOD, being the sovereign Arbitrator, and absolute Master of Mens Lives;

may, when he pleases, take away the Life of whomsoever he thinks fit in his Wisdom; and in the Case now in Dispute, he

destroys the Children, to punish the Fathers, by the afflicting sight of beholding their Execution. But besides, the Children

themselves, being guilty before God, on account of their own Sins; he does 'em no wrong in taking away their Lives,

which he only spar'd, purely as the Effect of his own Clemency. *Grot.* l. 2. c. 21. f. 14. ^l *Diod. Sicul.* l. 1. c. 77.

Ælian. v. Hist. l. 5. c. 18. cum *Schefferi Notis.* l. 48. t. 19. l. D. de *Pænis.* l. 1. t. 5. l. 5. f. 2. l. 18. *D. de statu hom.*

Plut. de sera Numin. Vindict. p. 552. *D. Add. Quintil. Declam.* 277. What Severity of Punishment on the other hand is used

in *Japan*, we are inform'd by *Bern. Varenius* De *Japanie*, c. 18. *Ferdin. Pinto Itin.* c. 55. *Varenius* de *Relig. Japan.* c. 11.

p. 129. ^m *Vid.* Cic. *Tusc. Quæst.* l. 5. c. 27. *Strabo*, l. 15. *Abr. Rogerius* de *Braminib.* p. 1. c. 19, & 20.

n L. 48. t. 19. l. 20. *D. de Pænis.* ^o *Vid.* L. 47. t. 1. l. 1. *D. de privatis Delictis.*

CHAP. IV.

Of the Power of the Sovereign in determining the Value of Subjects.

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THOUGH there may be discover'd certain Foundations for the Preference of one Man to another, even in a *Liberty of Nature*, out of *Civil Government*; yet since those Foundations cannot give any Man a *Right*, unless enforced by *Compact*, or the *Definitions* of the *Civil Power*, I think this a proper Place to explain the Nature of those *Distinctions*, which are made between Men, according to the *Esteem* they are differently rated by. Now *Esteem* is the *Value* which is set upon Persons in common Life, according to which they may be *equall'd*, or *compar'd* with others, and be rated either *higher* or *lower* than those they are compared with. For there is a near Affinity between the two most noble Branches of *moral Quantity*, *Esteem*, and *Price*. The first is consider'd in *Persons*; the second in *Things*: Because as the one is the *Rate* of *Persons* in common Life, so the other is of *Things*. And as the chief Reason why a *Price* was set upon *Things*, was, that when they were to be exchanged or removed from one Person to another, they might be the better compared with one another; so the End intended by *Esteem*, is, that we may be able to form a *Comparison* between Men, by setting, as it were, a *Value* upon them, and, in consequence, establish a becoming *Order* and *Distance* between them, whenever they should happen to be united; it evidently appearing, that nothing was more absolutely

inconsistent with the *Convenience* of Life, than an *universal Equality*. Now *Esteem* may be divided into *simple* and *intensive*. I shall consider both *Parts* of the Division, with the different *Relations* they may bear to such Persons as live in a *Liberty of Nature*¹, and such as are *Members* of the same *Commonwealth*.

II. *Simple Esteem*, with regard to such as live in a *Liberty of Nature*, seems chiefly to consist in this; When a Man's Behaviour and Character prove him to be one that acts upon *Principles* of *Conscience*, one ready to comply with the *Laws* of *Human Society*, and prepared, as far as he has Power, to observe the *Law of Nature* towards other Men². For as we say of a *Thing* which is of *use* in common Life, that it is of *Value*; and, on the contrary, say of a *Thing* there is no *use* of, that it is *worth nothing*; so it may be said, that that Person is a Man of some *Value*, that will suffer himself to be treated like a *social* Creature. But when a Man plainly shews himself *unfit* for *Society*, by disregarding and confounding the *Law of Nature*, and the *good Offices* he owes to other Men upon the Force of it; he may deservedly be look'd upon to be a Man of no *Worth* or *Value*.

III. Now this Sort of *Esteem* may be consider'd three Ways: *First*, as *entire*; *Secondly*, as *impaired*; *Thirdly*, as *utterly lost*. It continues *entire*,

Mr. BARB. NOTES on § 1, II.

¹ Such are Sovereigns, and Citizens of different States, with respect to one another.

² This *simple Esteem* answers to a perfect Obligation in another, by Virtue of which every Man is indispensibly bound to look upon all those to be Persons of Honour and Honesty, who have done nothing to render them unworthy of that good Opinion; and nor stain their Reputation in the least. Whereas, in the *State of Nature*, the Foundations of *Esteem of Distinction* produce by themselves but a very imperfect Obligation, as the Author shews a little further. We may also see, upon the Matter in Debate, a Dissertation, written by Mr. Thomassius, entituled, *De Existimatione, Fama, & Infamia*, printed in 1709. in which, he endeavours to set our Author right in some certain Particulars.

ture, till a Man, by some *Act* of deliberate wilful Malice, out of wicked Design, violates the *Law of Nature* to the Prejudice of another Person. For the Frailties of human Nature excuse Sins of Infirmity; and a Man does not by them forfeit the Reputation of being an *honest Man*, as long as he continues to have a firm *Sincerity* of Mind, and endeavours to do nothing but what is *just* and *virtuous*. And every Man is supposed to deserve this *Esteem*, till his own evil Actions deprive him of it. And therefore it may be said, that all Men *naturally* have an equal Share of this *Species* of *Esteem*, and before they have been guilty of any *Criminal Action*, must be supposed to be *equally good* and *virtuous*¹. And this is the Ground for that common Saying², *Every Man should be supposed a good Man, till the contrary is proved*. And this will hold True, notwithstanding those ill Dispositions *Hobbes* chargeth upon human Nature³. If he be in the right, indeed every Man must be supposed an ill Man, till the contrary be prov'd, or rather till he is depriv'd of all Power to do Hurt. But it must be said, that the Principle he at first lays down, *That all Men have Power and Will to hurt or destroy one another*, is far from being universally true, as I have prov'd already⁴. But yet because Men may *wish* and *endeavour* one another's Hurt and Ruin, therefore it may be said, that every Man may *naturally* be look'd upon to be a good Man; but that it is not impossible he may happen to be otherwise, and that Men may be kind and friendly to one another, but that it is not safe absolutely to rely upon or trust them.

IV. The same *Species* of *Esteem* is *lessen'd* or *impair'd* by *criminal malicious Actions*, especially by those of more than ordinary *Guilt*, and which were intended contrary to the *Law of Nature*, unjustly to disquiet other Men: The Effect of which *Actions* is, that it will not be thought safe to give Credit for the future to such a *Deceiver*, or to engage in *Business* or important Affairs with him, without *solid Caution*. But though a Man's *Esteem* may be *impair'd*, and his *Reputation* sink upon such ill Actions, yet it is not *absolutely lost*. For though I may justly suspect, that a Man will use me in the same manner, he hath used others; yet I cannot be always so absolutely certain of this, but that sometimes it may fall out contrary to my Expectations. For perhaps there might have

been some particular Reasons which moved him to injure other Men, which he may not have against me; and a Man may sometimes be under the Power of violent Passions, which at other times he is free from. However, the Blot which a bad action leaves upon a Man's *Reputation*, may be taken off by a voluntary *Tender* of *Reparation* for Damages, or of some *Equivalent*; and by giving Evidences of Sorrow and Repentance. For all these voluntary unforced Motions may be Conviction enough, that his Intentions are really alter'd, and that he *sincerely* repents.

V. But a *State* and *Way of Life* which directly tends to the Harm of other Men without Distinction, and to make Advantages by manifest Injustice, utterly *destroys* all this *Esteem*. Now there are in most Commonwealths *People*, that, by a particular *Way* and *Manner of Life*, own and profess the Exercise of certain Vices; such as are, all *Whores*, *Barwds*, *Strolers*, and *sturdy Beggars*; all those *Plato* banisheth his Commonwealth⁴. And they are (as *Isocrates*⁵ saith) a Disgrace to *that* they live in⁵.

But now, how little Share of *Esteem* all these are to have, must be determined by the Government that *tolerates* them⁶: When the *Publick* thinks fit to give them Indulgence⁷, they cannot certainly, at least, be denied the common *Rights* of Men. So the *Pimp* expostulates in *Tereuce*, *Though I am a Pimp, the common Bane of Youth, a perjur'd Wretch, and publick Nuisance, yet I never did you any Wrong*⁸. 'Tis certain indeed, that a *Way of Life* maintain'd by the Profession of any sort of Vice, must very much tend to ruin all *Natural Esteem*; but unless the particular Vice be also attended with Injury to other Men, I do not see why the Persons that profess the Practice of it, should be treated as *publick Enemies* to all the World. But where the Profession of a Vice is accompanied with Harm and Injury to other Men; and where the Persons professing it treat no Man who is not of their own Society with better Usage than they would Beasts, declaring *Hostility* not against any certain Enemies, but against Mankind in general, 'tis manifest they utterly *forfeit* all that *Esteem* Men usually measure one another by. And such are all *Pirates*, *Highwaymen*, *Robbers*, *Ruffians*, *Pickpockets*, and the like. And the Difference will not be material, nor will their Characters

¹ B. 2. c. 2. §. 7, 8.

² In *Areopagitico*.

³ See above in B. 2. c. 2. §. 10.

Mr. BARB. NOTES on § III, v.

¹ *Plin. L. 5. Ep. 3.* The Inequality of the Orders among Men should make no Difference in the Exactness of their Behaviour, *Sanc-titas morum non distat ordinibus*.

² See Mr Bayle's *Nouvelles Lettres*, occasion'd by *F. Maimbourg's Critique de l'Histoire du Calvinisme*. Tom. 11. p. 435. and Mr. *Thomasius's* Dissertation de *Presumptione Bonitatis*, printed at *Hall*, in 1700.

³ *De Civ. c. 1.*

⁴ *Plato de LL. l. 1.*

⁵ *Atticus*, Bishop of *Constantinople*, in *Socrates's Ecclesiast. History*, tells *Calliopus*, That he should distribute his Charity not among those that made a Trade of begging only for their Bellies, and spent their whole Life-time in nothing else, but among such whose Modesty would not suffer them to ask it, *Socrat. l. 7. c. 25.*

⁶ Thus neither were *Beggars* tolerated in *Peru*, under the Government of the *Inca's*. But they that were disabled, so that they could not maintain themselves, were kept by the *Publick*. *Vid. Garcilass. de la Veg. Com. Roy. l. 5. c. 9. & l. 5. c. 11.*

⁷ But formerly, in *Egypt*, there were *professed Thieves* allow'd of, of whom *Diodorus Siculus*, l. 1. c. 80. gives this Account: "Such as would be employ'd in the Trade of Thieving, enter'd their Names with the Grand-Master of the Order, and were obliged by Article to bring all the Things they stole to him; and they that lost any Thing, were to apply themselves by Letter to him, in which they were to signify the Particulars they lost, together with the Time and Place, when and where they were lost; and so every Thing being easily discovered, the Person robb'd was to pay a fourth Part of the Value of the Things, and take them again. For since it would have been impossible to prevent all Manner of Thieving, the Legislator found out this Expedient, that what was lost might be recovered, by paying only a small Price for Redemption. But no Question, it would have been a better Method, and less inconvenient for the *Subjects*, to have made *severe* Laws against such sort of *People*, and to have taken care they should be strictly put in Execution.

⁸ *Ter. Adelp. Act. 2. Sc. 1. ver. 34, 35. Vid. Constitut. Sicul. L. 1. t. 10.*

acters be much better'd, whether such Persons act always up to the Height of Wickedness and Villany, or not; whether a *Robber* will satisfy himself barely with committing *Spoil* and *Robbery*, and forbear *Bloodshed*, and be contented only to have taken away my Money or my Goods. For as 'tis no *Justice*, so it can deserve no Commendation, not to be an accomplish'd finish'd *Villain*. And without Dispute, whole *Bodies* and *Claus* of *Pirates* and *Robbers* ought to be rank'd under this *Denomination*, as long as they continue their *Course of Life*, notwithstanding they may seem to have some Resemblance of Justice among them¹. Neither will whole *States* and *Commonwealths* deserve better *Rank*, when they are not content to acquiesce in the Enjoyment of their own *Rights at home*², but invade and ravage the rest of the World, without regard to *Faith* or *Compacts* to the contrary. But where *States* or *Commonwealths* are so partial, as to be just in the Observation of *Compacts* with some particular *Allies*, but to all other their Neighbours, or at least to certain *Nations*, shew little Regard in the Observation of the *Law of Nature*, and scruple not, without just Provocation, to break it; their Credit, it is evident, must very much sink, but it would be too severe to deny them every Degree of *Esteem*. Now, the Effects that attend Men under such a *Loss of Esteem*, are generally such as these; that unless they leave off their *unjust* and *bloody* Way of *Life*, it will be necessary for other Men to shew them no more Mercy, than they do to Beasts of Prey; that when they are apprehended, they will be used with more *Severity* than any other sort of *Enemies*, though others might have threaten'd equal Danger; that they will not be look'd upon to deserve the *common Offices of Humanity*; and that all merciful Usage will be denied them, lest it may seem to encourage them in their Villanies. Moreover, as there can be no Strefs laid upon their *Faith*, should they offer it, since the *Habit* of *Outrage* they live in, must have cancell'd all *good Opinion* of them; so I doubt not it may very well be maintain'd, that neither are they capable of receiving *Obligations of Faith* from other Men, as long as they continue in their *ill Course of Life* (which must always be presuppos'd) for I either make a *voluntary* Agreement with such a *Person*, or he *compels* me by *unjust* Force. I cannot do the *First*, without deriving upon myself some Share of his *Guilt*, by treating such a Man as a *Friend*, that professes himself a *common Enemy* to all the World, except

his own Accomplices. Not to say further, that it may be often an Injury to other Men to keep their *Faith* with Robbers; for Instance, in the Case of leaving some *Depositum* in trust with them³. But if a *Robber* should have done me some *good Office*, which it was no Discredit to me to receive from such Hands, it can be but reasonable that I should give him the Reward I promis'd⁴; but then he is not the Person he was suppos'd to be, a *common Enemy* to all Mankind besides his own Companions. On the other hand, if he *compels* me by *unjust* Force to engage my *Faith* to him, it appears from what has been said before⁵, that *Compacts* extorted by Fear are invalid. But after all, *such Persons* may recover their *lost Esteem*, by giving over their infamous *Course of Life*, and by taking upon them some other *creditable* Profession. And so may whole *Bodies* of *Thieves* and *Robbers* by such a *Change*, as well as particular Men. And from that Time they are to be dealt with as Men of *Repute* and *Honesty*. But they ought first of all, either to make *Reparation*, or obtain their *Pardons*, for the Injuries they have done.

VI. *Simple Esteem, with regard to such as live under Civil Government, is that Sort of Esteem* by which a Man is look'd upon to be the *lowest*, a *common*, but a *sound Member* of the *State*: Or when a Man hath not been declar'd a *corrupt Member*, according to the *Laws* and *Customs* of the *State*, but is supposed to be a *good Subject*, and is look'd upon and *valued* as such. And this *Esteem* may be lost under *Civil Government*, either, *first*, when it is denied to *certain States* or *Conditions*; or, *secondly*, when taken away upon a *criminal Account*. The *First* may happen *two* ways; either *1st*, when the *State* hath *naturally in itself* nothing *bad* or *wicked* belonging to it; or *2dly*, when it *really* deserves, or at *least* is *thought* to deserve, such an *Imputation*. Thus a *State of Slavery*, though it implies in its own Nature nothing *bad* or *criminal* to belong to it, yet in many *Commonwealths* deprives Men of all *simple Esteem*; and *Slaves* are neither look'd upon to be *Civil Persons*, rated or number'd in *Civil Assessments*, or *considered* or *valued* as *Subjects*. It is well known how *despicable* their Condition was among the *Romans*⁶; and the *Esteem* the *Jews* allow'd their *Gentile Slaves* was not greater⁷. So also in *some Commonwealths*, 'tis a *Dishonour* to be *base Born*, though the *Blemish* of the *Birth* is certainly only the *Parents Fault*⁸. And thus in *India*, there is a certain *Race* of Men called *Peneas*, which are look'd upon to be *infamous*⁹. A *State* under

¹ See above in B. 3. c. 6. §. 11. towards the End.

² See the same Book and Chapter, §. 10.

³ See *Grotius* Lib. iii. Cap. 3. §. 3. and *Specimen Jurisprudentiæ Historiæ* by Mr. *Buddens*, among his *Selecta* J. N. & Gent. §. 2, 3, 4, 5. where this Principle is applied to the old *Romans*, whose Commonwealth was founded by a Troop of Robbers, and other Rogues of all Sorts.

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¹ Thus in *Heliodorus's* Ethiopicks. L. 5. c. 15. There is mention'd a Law that was among the *Pirates*, by which he that first boarded the Enemy's Ship, and expos'd himself to the greatest Danger in the Fight, was to have his Choice of the Booty. And in the same Place we are told, That the *Robbers* observe some sort of *Conscience* among one another, and shew Kindness and Humanity to those they are acquainted with.

² Our Author here seems to point at the People of *Barbary*, who never pillage the *Mahometans*, nor commit Piracies upon any but the *Christians*. See the *Parrhasiana*, Tom. p. 204. 1st Edit.

³ Vid. L. 16. t. 3. l. 31. §. 1. D. *Depositum*, &c.

⁴ Vid. L. 18. t. 5. l. 6. ad L. *Fuliam* de Adulter.

⁵ *Joseph. Archæol. Jud.* l. 4. c. 8. Neither are Slaves permitted to be Witnesses, because of the Baseness of their Minds; since it may justly be believed, that their Testimonies are corrupted, either by the Hopes of Gain, or else out of Fear. Ad *Selden. de J. N. & G. sec. Heb.* l. 5. c. 3. *Lex Wisigoth.* l. 2. tit. 4. c. 9.

⁶ Vid. L. 6. t. 57. l. 5. C. ad S. *Ctum Orficiatum & Stobæum*. Serm. 75. *Unle's we perhaps allow there is something in that which is said in* *Procopius Hist. Arcan.* That the Infamy of a Woman's Vices not only spreads itself to her Husband, but descends in a greater Degree to the Children, and they are condemn'd to bear a perpetual Mark of Disgrace, as if Nature had stain'd them with the Dishonours of their Mother.

⁷ Vid. *Abr. Rogerium de Bramm*, Part 1. c. 2.

under the *latter* Consideration takes away or lessens *Civil Esteem*, either because the Persons that live under it, are employ'd in Things which cannot be perform'd without the Guilt of some Vice or Sin; or else are obliged by it to undertake such mean *Offices* and Duties, which none but Persons of base and abject Spirits would stoop to be employ'd in. What *Value* is to be set upon those of the first Sort must be known from the *Laws*, or *Customs* and *Manners* of every *Commonwealth*¹, those of the second Sort are *common Hangmen* and *Executioners*, *Bailiffs*, *Goldfinders*, and the like; *Persons* that in most *Commonwealths* are denied the Society of all People of *Fashion* or *Reputation*. And in some States the *Laws* themselves have expressly so determined. In *Rome*, *Cicero* says², "The Executioner" was forbid by the *Laws* of the *Censors*, not only to be seen in the *Forum*, but to see the *Light*, "or breathe the Air of that Place, or to have" any Habitation in the *City*;" as if his Presence would strike Infection and Pollution upon the *publick Assemblies*. In other States, it is thought scandalous to mix in Company with such Persons, only upon the force of Custom and common Opinion; it seeming natural to suppose, that Persons employ'd in *cruel* and *stovish Offices*, would have generally *Humours* and *Dispositions* suitable to their Employments; and that none but Men of mean and servile Tempers could voluntarily submit to them. Among the *Romans*, the *Soldiers* indeed were often made use of in *publick Executions* in the *City*, as well as in the *Camp*, without *Infamy*, or Diminution of their *Esteem*³. For there is much Difference between doing an *Execution* at the particular Command of a *Superior*, and between doing it by Profession. So also among the *Jews*, *Criminals* were *stoned* by all the People. And *Montaigne* tells us⁴, that *Witoldus*, Duke of *Lithuania*, introduced a Custom in that Country, that condemn'd *Criminals* should put themselves to Death with their own Hands, it appearing unreasonable to him, that innocent Persons should be employ'd to commit *Murder*; though this was but a silly Reason, for the *Executioner* cannot be said to commit *Murder*, by inflicting the *Punishment* the *Law* awards. But others give this better Reason for the *Law*, that none might be forced upon the *Office* of an *Executioner*, to cause and to see the *Agonies* of the *Criminals*, to which the innate *Tenderness* and *Compassion* of *human Nature* must give every Man an *Aversion*.

The *Roman Laws* set a *Mark* of *Infamy* upon all Persons that acted upon the *Stage* for *Hire*⁵, or suffer'd themselves to be hired to fight with *Beasts*⁶. But the Reason why *Infamy* was annexed to such

Actions, was not that any *Immorality* was supposed in them (for such *Actions* may, 'tis possible, be innocent enough) but the *Gain* made by them was that which made them look dishonourable and base to the natural Gravity of the *Romans*; for 'tis often the *Hire* only which makes the *Service* mean and base. By the *same Laws* it was look'd upon to be infamous, for a Man to permit his *Daughter* to marry while she was a *Widow*, within the *Time* of *Mourning*; or to marry any Person in such *Circumstances* himself; or to suffer any Person under his Charge to marry, or to be married within that *Time*; because it might seem to betray much *Levity* and *Unsettledness* of *Mind*, to argue weak *Inconstancy* of *Faith*, and wild *defultory Lust*. Among the antient *Inhabitants* of the *Canary Islands* it was thought very great *Ignominy* and *Disgrace* to be a *Butcher*⁷: And *Sir Thomas Moore* make his *Utopians* of the same Opinion⁸. *Selden* tells us, that the *Jews* refused to admit four sorts of Men either to be *Witnesses*, or to have any hand in *judicial Matters*, because of the ill *Repute* they bore among them; and those were *Gamesters*, *Usurers*, *Persons that made Gain by the Produce of the Seventh Year, or Year of Remission*; and such as taught *Pidgeons to fly*. And he adds, they gave this Reason for it; because none of these sorts of People apply'd themselves to any Way of *Life* which tended to promote *publick Good*, or bring any Advantage or Convenience to *human Life*⁹.

VII. Thus the *Loss* of *simple Civil Esteem* may be owing purely to a *State of Life*. But a *Man* may also entirely be depriv'd of it upon a *criminal Account*; when for some *particular sort of Crime* he hath committed (for every *Offence* will not deprive a *Man* of *Civil Esteem*)¹⁰ the *Laws* of the *Commonwealth* fix a *Mark* of *Infamy* upon him: Which is usually done, either by taking away his *natural Life* at the same *Time*, and by *condemning* his *Memory*, or by *ejecting* him out of the *Commonwealth* with *Shame* and *Disgrace*; or perhaps by allowing him to continue in the *Commonwealth*, but not as a *sound*, but *disorder'd, infected Member*; or, in other Words, by permitting him to inhabit in the *Dominions* of the *State*, and to enjoy the common *Protection* of the *Laws*, but by excluding him out of all *publick Offices* and *Employments*, and all *honourable Societies*, by making him incapable to make any *Will*, and by disabling him to do any *legal Act*, which supposes an *untainted Reputation*. But now what are the *Crimes* which contract all this *Infamy*, must be known from the *Laws* of every particular *Commonwealth*¹¹. And here it may be observ'd, that according to

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¹ To this Purpose is that which is related by *Valerius Maximus*, l. 7. c. 7. of *Q. Metellus* the *Prator Urbanus*, who would not allow *Vecilius* the *Bawd*, the Possession of *Inventus's* Goods, though they were left to him by *Will*; because he would neither seem to approve *Inventus's* Action, in throwing away his Fortune into such a Sink of Lewdness, nor allow *Vecilius* the Rights of a true Citizen, since he had renounced every honourable Way of *Life*. And thus in the same Author, when *Genucius*, a *Priest* of *Cybele*, had obtained a Decree of *Cn. Orestes*, the *Prator*, that *Navianus's* Goods should be restor'd to him, the *Consul* *Æmilius Lepidus* revers'd the *Prator's* Decree, that the Court of Justice might not, under the Pretence of his suing for his Rights, be polluted by the obscene Presence and contaminated Voice of *Genucius*. And to this belongs also that, in L. 11. t. 5. l. 1. D. de *Aleator*. Where the *Prator* saith, He would give no Judgment, if any Person should beat or do any Damage to him at whose House he should hear they play'd at Dice, or if any stole or cheated him of any Thing at that time.

² Pro *Rabirio*, c. 5.

³ *Essays*, l. 3. c. 1.

⁵ Vid. L. 2. t. 2. l. 1. D. de his qui *Infam. not.*

⁴ *Alofius Cadamustus* *Navigat.* c. 8.

⁸ *Uop.* l. 2.

⁶ Vid. L. 3. t. 1. l. 1. §. 6. D. de *Postulando*.

⁷ *Selden de J. N. & G. sec. Heb.* l. 4. c. 5.

⁹ Vid. L. 1. t. 54. l. 1. C. de modo *Mulctarum*.

¹¹ Vid. L. 50. t. 13. l. 5. §. 1, 2, 3. D. de *extraordin. Cognit.* Though in this Place I observe, that in some of the *Exemples*, there is hard'y any Distinction made between the *simple* and *intensive Esteem*. And here we may observe a *Law* of the *Egyptians*, by which *Soldiers* that de-

the *Civilians*, the *Infamy* which is contracted by any bad *Action* may be either the Effect of an immediate^a Imposition of the *Law* itself; or of some antecedent *Examination* and *Sentence* of some *Judge*^b; or else of the *Censure* of Men of *Character* and *Esteem*, which is commonly call'd *Infamy of the Fact*^c.² But I am rather inclin'd to think, this *Infamy of the Fact* is not so much the immediate Effect of the Opinions of Men of *Character*, as a Punishment which the *Law* also inflicts upon that View, that *good Men* always condemn such *Actions*, and look upon them to be *base* and *wicked*. For though it may be thought a Discredit, to fall under Censure of *Persons* of approv'd Lives, and *Reputation*, yet unless the *Law* joins with, and confirms that Censure, no Man can suffer so far in his *Civil Esteem* by the Judgment only of private Men, as to be excluded from any *Rights* and *Advantages* which the *Civil Laws* allow to an *unblemish'd Reputation*. And therefore it is evident, that a Man doth not immediately forfeit *Esteem*, when he is accus'd of, and charg'd with any Crime of *infamous Nature* and *Quality*. For as *Julian* rightly answer'd *Delphidius* the *Orator*,^c when he cry'd out, *Who would be guilty, if it were sufficient to deny the Fact?* 'Who would be Innocent, if it were enough only to accuse?'³ But it is then a Crime produceth *Infamy*, when the Person is condemn'd for it, or confesseth it. And that he is also supposed to do, when he agrees with the *Prosecutor* to let his *Action* drop: Because all such *Agreement* naturally supposes *Confession*⁴; except perhaps it may be made appear, that he chooseth to come to *Composition* with the *Prosecutor*, not out of any *Consciousness* of *Guilt*, but for other just Reasons, as to escape the *Vexation* and *Trouble* of *Trial*, the *Severity* or *Partiality* of the *Judge*, or upon some particular *Dislike* he bears to his Person. To which our Author might have added, that not only the little Share of *Honesty*, and the *Passions* of the *Judges*, but also their *Prejudices*, and *Carelessness*, often lose the best *Causés*⁵. But though a Man's *Reputation* is suppos'd to be clear'd, when he is *acquitted* from the Crime which was charg'd upon him; yet to make his *Innocence* appear the more unquestionable, and to punish *Calumny* and false *Accusation*, 'tis usual in many States and

Commonwealths to force the *Accusers* to beg *Pardon*, confess themselves guilty of *Falseness*, make their *Submissions*, and pay *Respect* and *Honour* to the *Party* accus'd, and the like⁶.

VIII. From what has been said it may also be inferr'd, that it is no *real Infamy* or *Dishonour*, when a Man hath suffer'd an Abuse either by *Words* or *Actions*, not to *revenge* it with his own *Sword*; as the Custom is in some Countries, especially among *Persons* of *Rank*, and Men of *military Profession*; but punish it by the *Magistrate*, or pass it by in *Silence*, supposing such *Patience* doth not imply *Confession* of any bad or base *Action*. It seems to argue indeed much *Cowardice* and *Littleness* of *Spirit*, tamely to submit to every Man's *Insults* and *Injuries*, without endeavouring bravely to vindicate and assert his *Rights* and *Liberty*; and it seems natural, in such Cases, for every Man to be of the Opinion of *Neoptolemus* in the *Poet*⁷.

Τεθναίνω μᾶλλον, ἢ ἀπτόλεμῳ χαλεπίμῳ.

I'd sooner die, than be a Coward thought.

There are certain *Injuries*, which if a Man chooseth generously rather to despise, than to revenge, he will not bring his *Courage* in question. Nor can I see any Thing in such Conduct that can rob him of his *Natural* or *Civil Esteem*. And therefore *Hobbes* says, "If a Man receive Words of *Disgrace*, " or some little *Injuries* from another, for which " there is no Punishment assigned by *Law*, and is " afraid he shall fall into *Contempt*, and be obnoxious " to the like *Injuries* from others, and to avoid this, " protects himself by the *Terror* of his private " *Revenge*; this is a *Crime*, and such a *Fear* will " not excuse it, because the *Commonwealth* would " have the publick *Words*, that is, the *Laws*, be " of more *Force* with the *Subjects*, than the *Words* " of any private Man, which they that made the " *Laws* therefore assign'd no Punishment for, be- " cause they thought it not worthy a Man that " had the Use of *Reason* to take any notice of " them⁸." And much less is it any *Dishonour* for a Man, in a *Commonwealth*, where the *Laws* expressly forbid *private Revenge*, to prefer *Obedience* to the *Laws*, rather than expose himself at once to the *Danger* of the *Fight*, and the *Severity* of *Civil Justice*, upon a vain Pretence of *Honour*⁹.

Neither

^a Vid. L. 3. t. 1. l. 1. §. 8. De pñulando.

^b Vid. D. d. l.

^c V. Ammian. Marcellin. L. 18. c. 1.

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ferted, or did not obey the Orders of their Commanders, were not punished with *Death*, but only with *Infamy* and *Shame*. And if they could by their *Courage* afterwards wipe off the *Ignominy*, they were restor'd to their former *Dignity*. And thus the *Legislator*, by making *Ignominy* a greater Punishment than *Death*, taught them to think *Infamy* the greatest *Evil*; and at the same Time seems to have consider'd, that such as were punished with *Death*, must for ever be made incapable of doing any further *Good* in *common Life*; but that such as were only deprived of their *Honour*, would be always endeavouring to do something that might recover it, *Diodor. Siculus*. l. 1. c. 78.

¹ Infamia.

² Vid. L. 2. t. 12. l. 13. C. ex quibus Caus. infam. irrog. Add. L. 37. t. 15. l. 2. D. de obseq. Parent. prestand. l. 20. & D. l. 3. t. 2. l. 20. de his qui notant. infam. Vid. L. 9. t. 9. l. 25. C. ad L. Jul. de Adult. And to this you may refer that which *Rochefort*, *Descript. Antillar. Part. 2. c. 8. relates of the Apalachita*. They have no other Punishment, saith he, for *Thieves*, besides the *Reflections* that are made upon them in all *Company* upon that Account; and this is generally taken so hard by them, that to avoid it, they will fly away into the most uninhabited *Deserts*.

³ And to this we may apply that of *Plautus in Trinum. Act. 1. Sc. 2. v. 44, 45*. Not to commit a *Crime*, is in a Man's own *Breast*; the *Suspicion* whether he does not, is in another's.

⁴ Vid. L. 3. t. 2. l. 5. D. de his qui infam. notant. Quoniam intelligitur confiteri crimen, qui paciscitur.

⁵ Thus in *Hocrates adv. Callimach. in the Beginning*. Some persuaded the *Defendant* to compound the *Matter* with the *Plaintiff*, because in *Trials* there are several Things which fall out other wise than are expected; and in passing the *Vote*, there is more *Chance* than *Equity*. And therefore it is a much safer Way to bear some small *Expence*, to get clear of a *Crime*, than to refuse to pay any *Money*, and run so great a *Hazard*.

⁶ It is evident from *Josephus de Bello Judaico*, l. 4. c. 39. That the *Ignominy* of having been in *Chains* was supposed to be taken away, if the *Chains* were not unlock'd, but fill'd asunder; and this, he saith, was the Way, when any one had been put in *Chains* innocently among the *Romans*.

⁷ Q. Calaber, l. 9.

⁸ *Leviath. c. 27. Vid. Leg. Salicam. tit. 32.*

⁹ ——— Injustum rigido jus dicitur ense.

Ovid. *Trist.* L. 5. El. 10.

'Tis cruel Justice which the *Sword* inflicts.

Neither is it always, I presume, a Sign of Cowardice, for a Man to refuse to put his Life and Fortunes to the Venture upon every little insignificant Quarrel, when there may be often less dangerous, and more innocent and lawful Occasions offer'd to shew his *Courage*¹. Thus when *Pyrrhus*, in *Plutarch*, call'd *Antigonus* Villain, and challeng'd to meet him upon the Plain, and fight him for the Kingdom, *Antigonus* answer'd, τὴν μὲν ἀπὸ τῆς στρατηγίας ἐν ὄπλων μάχῃσιν ἢ καιρῶν εἶναι, *That his way of making War consisted as much in knowing proper Times and Opportunities, as in Strength; and that if Pyrrhus were weary of his Life, he might easily find Ways enough to go out of it.* And so *Augustus* answer'd *Antony's* Challenge, in the same *Author*, *That he might easily find a Way to die*². And in such Cases, no prudent, considerate Man, hath any Reason to be disturb'd at the Opinions or Censures of the *Vulgar*; since the *Esteem* of every Subject is to stand and fall by the *Judgment* of his *Sovereign*, and the *Laws* of the State; and since 'tis sufficient Proof of *Bravery* and *Resolution* to obey the *Laws*, in Defiance to all the little Cavils and Calumny of the vain and idle Part of Mankind. And hence it will be no Difficulty to answer what *Hobbes* says in his *Leviathan*, c. 20. "That it is hardly possible, but private *Duels* should be thought honourable, because they are the Effects of *Courage*, which is *Power*." For why should it not be rather look'd upon to be a Sign of *Greatness* and *Bravery* of Spirit, to know how to govern the *Heats* and *Passions* of our Minds, and to give them no other Liberty, but what the *Laws* allow? Though I think the same *Author* says very well afterwards, c. 30. "That all *Laws* that forbid *Duels*, should ordain Honour for them that refuse, and Ignominy for them that make the *Challenge*;" and thus those that refus'd to fight would have an honourable Excuse. The Remedy the *Sicilian Constitutions* propos'd against this Custom was, by inflicting severe Penalties upon them that offer'd any *Affront*³.

An Account, by the way, of the *Antiquity* of *Duels*, and whence they at first began, we may see in *Diodorus Siculus*⁴. "The *Gauls*, saith he, in the Height of their Entertainments, upon the least Quarrel that arose, would break off their Mirth, take their Swords, and without expressing any Value for their Lives, go out and fight. And this they did upon a Belief, that they should enjoy another Life, in a new Body; and therefore easily despised the Care of this; as *Lucan* expresseth it:"

----Inde ruendi

In ferrum mens proua viris, animæque capaces
Mortis, & ignauium est redituræ parcere vitæ⁵.

----Hence they so bravely dare
Defy the Sword, and all the Dread of War,
Scarce satisfied with Death; and think it mean,
To spare a Life that must return again⁶.

IX. But *Further*; It is also evident, that the *Government* cannot deprive any Man of his *natural, simple Esteem* arbitrarily, at pleasure, but only upon some antecedent Crime he hath been guilty of, which is attended with *Infamy*, either by its own *intrinsic Turpitude*, or by express *Sanction* of *Law*. For since such a *Power* can no way be supposed to promote *Civil Society*, or the *Interest* of the *Commonwealth*, it is not to be supposed it was ever conferr'd upon the *Sovereign* Governors in it. But as the *Civil Sovereign* may unjustly eject a Subject out of the *Commonwealth*, so he may unjustly also take away his *Civil Esteem*, so far at least, as to deprive him of all those *Rights* and *Advantages* which attend an *untainted Esteem* in the *Commonwealth*. But his *intrinsic natural Esteem* can no more be taken away from a Man, than his *Virtue* and *Integrity*. Besides, 'tis next to a *Contradiction*, that a Man should be declared *infamous* at the *Pleasure* only of the *Government*; that is, that a Man should be charg'd with a *Suspicion* of being guilty of some *dishonourable* or *criminal* Action, not because he is really guilty, but because 'tis the *Pleasure* of the *Government* by such means to use an innocent Person as if he were criminal. And I think it is also beyond *Dispute*, that there lies no *Obligation* upon any Subject, to sacrifice his own *simple Esteem* and *Character* to the *Civil Government*, or to contract any *real Infamy* for the *Advantage* of the *Publick*. For neither hath the *Government* Power to command any *base* or *ill* Action, which will be the Cause of *real Infamy*; neither ought a Subject to obey, if it should.

X. Whether indeed, it may not be required of a Subject of *good Character*, to take upon himself the *Infamy* of his *Prince*, or his *Country*; or, as it were, make himself *criminal* for their *Faults*, is not so clear. But here (though I think it hardly possible for a Man to counterfeit himself a *Criminal*, without being in some measure really so) I conceive, there ought to be a *Distinction* made between a *Prince's domestick* or *private* Faults, and those that are *publick*, or which have an *Influence* upon the whole *Commonwealth*. Now that a Man should take the *first* sort upon himself, and make himself *criminal* for his *Prince*, can neither be *lawfully* and *justly* desired by the one, nor safely be complied with by the other; whether with design to put some plausible *Colour* upon the *Action* of the *Prince*, or whether to take the *Blemish*, that would otherwise be fix'd upon his *natural Esteem*, upon himself. For no body can take away the *Civil Esteem* of the *Sovereign*, because he is placed above the Reach of any *Civil Judicature*. Thus it cannot be thought that any good Man can approve the *Action* of *Anicetus*, when he declar'd, he had been guilty of *Adultery* with *Octavia*, only that *Nero* might have Pretence to dissolve his *Marriage* with her

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¹ Vid. *Cæs. Com. de Bell. Gallic.* l. 5. c. 44. Vid. *Busbeq. Epist.* 3. de *Velibego*.

² *Plut.* in *Pyrrh.* p. 404. A. & in *Anton.* p. 950. E. *Alexander de Rhodes* Itiner. l. 2. c. 6. relates of the Soldiers in the Kingdom of *Tonquin*, that though they are very valiant against an Enemy, and set but little Value upon their Lives, yet among one another they never draw their Swords, but are as loving as Brothers: And that when they once saw a *Frenchman* and a *Portuguese* fight a *Duel*, they were amazed at it and said they never saw such *Barbarity* before.

³ *Const. Sicul.* l. 3. tit. 33. §. 4.

⁴ *L.* 5. c. 28.

⁵ *Lucan.* l. 1. v. 455, &c.

⁶ Vid. *Appian Celtic.* Where he gives the same Reason for the Boldness and Bravery of the *Germans*.

her^r. But yet 'tis not uncommon, that when *publick Ministers*, by secret Order from their *Masters*, enter into *Treaties* with *foreign States*, or oppose and form *Designs* against them, which, if known to be the Result of *publick Counsel* or *Instructions*, would bring *Danger* or *Inconvenience* upon the *State*, to avoid the ill Consequences which might follow, by laying the Fault upon the *Ministers*, as if they had acted only by their own *private Judgment*. And in such a Case, I think no good Subject would refuse to divert the *Evil* from the *Commonwealth*, by favouring the *Excuse*, and yielding that what he did, was beyond his *Instructions*, and without *Command*; provided his *Punishment* be no greater than some small pretended *Disgrace*¹. For to suffer *Death* upon that Account, or to be given into the Hands of the *injured Party*, would be a *Severity* not to be born or excused. But the pretended *Punishment*, whatever it be, may be easily either remitted or *compensated* otherwise. For 'tis unquestionable, that he that hath *Power* to inflict *Civil Infamy*, hath also *Power* to remove it². But notwithstanding, if *Infamy* be inflicted for any *impious* or *flagitious* Action, *Restitution* of a Man's *Fame* will only produce the *external Civil Effects* of an *unblemish'd Reputation*; but will not in the least wipe out the *Blot* which lies upon his *natural Esteem*.

XI. *Intensive Esteem* is that Species of Reputation, by which Persons, otherwise equal in the *simple Repute*, are preferr'd to one another, according as one possesses a larger Share than another of those Things, whatever they be, which are apt to raise in other Men *Reverence* and *Respect*. Now *Honour*, which answers the *Intenseness* of *Esteem*, is the *Signification* of our *Opinion* of another Man's *Excellencies*. And therefore the *Honour* is not really in him that receives, but in him that gives it³. For though a Man may set what *Value* he pleases upon himself, as the *Seller* does upon his *Commodities*: Yet, as in these, it is the *Buyer* at last that determines the *Price*; so the *Value* of Men is no higher or greater, than as others are pleas'd to set it⁴. For as *Hobbes* says, *Let a Man (as most Men do) rate himself at the highest he can; yet*

*the true Value of him is no more than he is esteem'd at by others*⁵. But yet every Man is affected more or less with the *Honour* others pay him, as it answers to that *Value* which he puts upon himself. But the *Esteem* itself, or that which gives Men the *Title* of *Desert* to *Honour*, is often figuratively expressed by that *Word*. And so certain *publick Stations*, and *Places* of *Dignity* attended with *Honour*, are peculiarly called *Honours*. 'Tis rightly observ'd by the *Author* before mention'd⁶, "That it is impossible any *Society* should be either great, or of any long Continuance, that at first united only upon such a *Bottom* as a *common Desire* of *Glory*, or upon mutual *Obligation* to assist one another in their Pursuits after *Honour*; because *Glory*, and the *Honour* that is built upon it, consist in *Comparison* and *Preference*; and so what belongs to every body, belongs to no body; and because the *Rate* that is commonly set upon a Man, is taken from what he is able to do without the Assistance of others⁷." On the other hand, the further *Ignominy* spreads, the lighter it seems, and the easier it is supported. Now this *intensive Esteem* may also be consider'd, either with regard to such Persons as live in a *Liberty of Nature*; or such as are *Members* of the same *Commonwealth*. But I shall now proceed only to examine the *Foundations* of this *Intenseness* or *Eminence*, as they fall under these two Considerations: First, as they produce barely an *Aptitude* or *Disposition* in Men to receive *Honours* from others; and Secondly, as they give them a *proper Right* to demand *Honour* as their *Due*.

XII. The *Foundations* of *intensive Esteem* in general are all those Things, which discover, or are supposed to imply, extraordinary *Excellence* or *Perfection* of any kind⁸. The Effects of which are consonant to the *Laws* of *Nature*, and the *Ends* of *Civil Government*. For 'tis unusual to see *Persons* of dissolute *Morals*, and eminent for nothing but their *Vices*, celebrated and admired by the *Multitude*. So in particular, are Men of unusual *Strength* and *Abilities* at eating and drinking¹⁰; of extravagant, insatiable *Lust*; of mad, rash, ungovernable *Humours*; dextrous, ingenious, crafty, artful *Villains*; and in short, all *Miscreants* whatever, that are arriv'd at some signal *Proficiency*,

¹ See above in B. 7. c. 1. §. 2. towards the End.

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¹ Vid. Tacit. Ann. XIV. 62. Euripides, Helena, v. 106, 107. Nor for my Brother can I bear that Stain. In which Case, however, the Matter in Dispute is not about Subjects with respect to their Prince. Add the Story of Simon Perez. in Thuanus, l. 104.

² Add. Marselier. Legat. l. 1. c. 33. p. m. 200.

³ See Cornel. Nepos. Alcibiad. c. 6. §. 5. Libanius, Orat. 7. To dissolve, and undo Things that are already done, is what we reckon among Things impossible; but to take off Ignominy from them that are in Disgrace, is not so difficult a Task; and you are the only Physician that can cure this Disease: Speaking to Julian the Emperor. See Justin. B. 5. c. 4.

⁴ Aristot. Nicom. l. 1. c. 3. We ought to think the Honour is rather in those that honour, than in them that are honour'd.

⁵ Vid. John viii. ver. 54.

⁶ Leviath. c. 10.

⁷ Hobbes de Cive, c. 1. §. 2.

⁸ Seneca Epist. 27 de Calvisio Sabino.

⁹ Cic. de Nat. Deor. l. 1. c. 17. Every Thing that excels, may justly command a Veneration. "Honour is a Privilege, that derives its principal Essence, and even Virtue, from the Rarity of it; cui malus est nemo, quis bonus esse potest? Martial. lib. 12. Ep. lxxxii. We never take notice of a Man, by way of Recommendation, that he is industrious and careful in maintaining his Family, because 'tis a common Action, notwithstanding it is very just and commendable: Nor of a great Tree in a Forest, where they are all of the same Bigness. I am of Opinion, that a Citizen of sparta ought not to have boasted of his Courage, since it was the popular Virtue of their Nation; and as little of their Fidelity or Contempt of Riches. There is no occasion of recompensing a Virtue, how great soever it is, that is once become customary; and I know not whether we should ever call that great, which is common. Since then, these Rewards of Honour have no other Worth or Value in them, than what arises from the small Number of those that enjoy them; a liberal Distribution of them is the Way to make them contemptible, and bring them to nothing." Montaigne's Essays, B. II. c. vii. towards the Beginning.

¹⁰ Such as Juvenal describes, Sat. IV. ver. 139, 140.

——Nalli major fuit usus edendi
Temperate mica.

In Arts of Eating, none more early train'd;
None, in my Time, had equal Skill attain'd. Mr. Dryden.

Aristoph. Acharnens. Act. 1. Sc. 2. ver. 35, 36. The barbarous People value Men only, as they can eat and drink most.

ency, and seem to be Leaders in their several Vices: And who, the more they are accomplish'd in their different vile Practices, will appear only the more insupportably wicked to all the good and sober Part of Mankind¹. It may possibly require much *Strength of Body*, and Readiness of *Parts* to be compleatly vicious; but 'tis also certain, that Vice will govern with greater Power and Violence, where there is more *Vigour* and *stronger Appetites* to entertain and support it. From all which it is easy to infer, that *Commendation* and *Glory* must be rated only by the *Valuation* of the Persons we receive it from. And therefore, that the greatest *Commendation* is that which comes from Persons that deserve it themselves; and consequently, that a *wise Man will set no Value upon their Praise* (as M. Antoninus saith) *who cannot so much as appear pleasing to themselves*². But in particular, the *Foundations* of this *Esteem* are such as these; *Perspicacity* of Mind, *Parts* and *Abilities* capable of much Improvement and Variety of Knowledge, especially when great Capacities are answered by great Attainments. A Judgment turn'd for Business, easily discerning the true State of Things, and Difficulty imposed upon³. *Steadiness* of Resolution, unshaken and unmoved at external Accidents, above Fear, and beyond the Force of *Temptation*. *Eloquence*, or the Power of expressing the Thought with much Fluency of Words, and Gracefulness of Utterance. And next these, *Strength*, *Beauty*, *Comeliness*, and good *Proportion* of Body; as these may be suppos'd to be either Instruments, or Promises and Signs of certain Graces and Perfections in the Mind⁴. Hence it has been vulgarly thought, that extraordinary *Tallness* of Body implies a Mind and Person *great* and *noble*: And the *Gods* and *Heroes* were therefore represented upon the *Stage* in the *Buskin*, that the *Actors* might appear of an unusual Size. And 'tis observable, that there are many Men that wish to be *taller* than they are; but that there are very few that would be content to lose an Inch of their *Stature*. But how ridiculous soever this Opinion seems to be, it prevail'd so far, that upon the Force of it the *Ethiopians* (as *Herodotus* saith⁵) *chose their Kings by a certain Measure*. A Method of Election, which would no doubt have been much approved by the *Indian* mention'd in *Montaigne*, who happening to be at *Roan*, while the *Court* was there, in the Reign of

Charles IX. said, that he thought it very strange so many tall Men with long Beards, and so bravely arm'd, as they were that stood about the King's Person (meaning the *Swiss-Guards*) should be content to obey a beardless Boy, and that he wonder'd they did not choose one of them King⁶. But it is often seen (as the *Poet* says) that,

---- *Natura breves animis ingentibus artus
Finxerit.*----

Nature large Souls in little Room confines⁷.

And that⁸,

---- Ἥνορέην τε
Ἄπειρον τελείθει, μέγροισ' δ' εἰς ἕδραν ἀέξει
Ἄνεροισ', εἰ μὴ οἱ σικκινὴ ἐπὶ μῦτις ἔπηθῃ.

'Tis fond to hope Success from Strength or Might,
Except with Force, Prudence and Art unite.

But besides these Foundations of *intensive Esteem*, there are also others to be mention'd, such as the *Goods of Fortune* (as they are call'd) which seem either to suppose Industry, Wit, and Prudence, necessary to obtain them, or to promise Power, or to supply Matter to do great Things. But that which advances Reputation most, and is the *Foundation* of the highest and most *intense Esteem*, is good *Success* and *Fortune* in great and *important* Actions. This first of all seeming to suppose *intrinsic Worth* and *Excellence*, and then to demonstrate the Advantages that arise from it, and the lawful Ends it may and has been applied to⁹. And as the *Fame* of such *Achievements* gains Belief in the World, it is properly call'd *Renown*. A *Reputation* of particular *Prudence* and *Conduct* in Difficulties relating to common Life and Practice, or to *speculative abstracted Truths*, is what is usually call'd *Authority*; which others more truly call an *Opinion of greater Knowledge, joined with Probity and Sincerity*. And hence those *Degrees of Esteem*, which *Age* is thought to confer, are founded upon nothing more than the common Persuasion, that *Experience* and long Observation upon Business and Things, generally produce *Caution* and *Prudence*¹⁰; though it is not to be denied, that there are Instances where *grey Hairs* are not *Signs of Wisdom*¹¹. But now on the other hand, Women generally desire rather the *Complements*

Mr. BARR. NOTES ON §. XII.

¹ Philo Judæus de Migrat. Abrahami. p. 413. A. Ed. Paris. To excel many Things that are bad, is only a more famous Infamy: *Arrian*. *Epiclet.* l. 3. c. 14. If you tell me you kick with a great deal of Strength; I answer You value yourself upon that which belongs to an Ass.

² *M. Ant.* l. 3. 1. 4.

³ *Vid. Ecclesiast.* ix. 15. 1 *Kings* iii. 28.

⁴ *Vid. Virg. Æneid.* 5. ver. 344. *Isocrat.* in *Encom. Hellene*. Though he is there a little too much an Orator. Lord *Bacon's* *Essays*. c. 41, 42.

⁵ *Thalia.* *Vid. Themist.* *Orat.* 14.

⁶ *Montaigne's* *Essays*. l. 1. c. 30. *Add. 1 Sam.* x. 23, 24. And here also we may apply to this Sense, that of *Oppian.* *Cyneg.* l. 3. c. 68.

Μείσοι μὲν μείων τελείθει, μείλοισι δὲ μείων.

The Great excels the Less, the Less the Great.

⁷ *Claudian.* de Bello Getico, ver. 584.

⁸ *Calaber.* l. 5.

⁹ *Aristot.* *Rhet.* l. 1. c. 3. 'Tis just to honour those that do Good; but not such as barely have it in their Power. *Pind.* *Olymp.* Od. 6. ver. 123, 124. *τεμπαίρει γὰρ ἡ ἔκαστος,* The Work discovers what the Author is.

¹⁰ *Vid. D. L.* 50. t. 6. l. 5. *init de Jure Immunitatis.* Q. *Calaber.* l. 5.

Αἰεὶ δ' ἐν βουλήσιν γέρον πολὺδ' αἰμείων
Ἄπλοτέρ' ἔπει ἀνδρῶν, ἔπει μάλ' αὖ μύλα οἶδε.

Youth is less fit than Age for wife Debates;
On sacred Wrinkles sage Experience waits.

Diod. Sicul. l. 19. c. 34. It seems more natural, to pay greater Reverence and Respect, to Aged, than to young People. *Oppian.* *Haliens.* l. 1. ver. 683.

Γῆρα; γὰρ ἐναίσιμον ἄνδρα τίθειν.

Age makes Men venerably Great.

¹¹ Such as we apply that of *Ovid* *Metam.* l. 9. ver. 436, 437.

— *Quis propter amara senecta
Pondera despicitur, nec quo prius ordine regnat.*

Who tyr'd with Age and Years oppressive Weight,
Sink to Contempt, and lose their former State.

plements of *Youth* and *Beauty*, than the Respect and Honours paid to *Age*. And therefore *Lais*, when she grew old, dedicated her *Looking-glass* to *Venus*, adding as it is in the *Epigram* ^a:

----- ἐπεὶ τοῖν μὲν ὄρεσθαι

οὐκ ἐδέλω, αἴν δ' ἔν πάρεσθ, ἔ δύναμαι.

The Face I once could boast no Glass can show,
And that I now have left I would not know.

The *Roman Law* seems to allow more *Worth* and greater *Dignity* to *Men* than *Women* ^b. Though in *general*, there are some *Foundations* of *Esteem* common to both Sexes. And there are others which are particular to the *Women*, such as the several *Accomplishments* of *Virtues* and *Duties* peculiar to their *Sex*. And there are others again, which are *borrowed* and *derived* to them, when they are said to *shine with the Rays of their Husbands* ^c; or when they value themselves upon the *Number* or *Worth* of their *Children* ^d.

XIII. From *all* which it readily appears what Judgment may be made upon what *Hobbes* says in Chap. X. of his *Leviathan*, where he reduces all the *Foundations* of *Honour* or *intensive Esteem* to *Power*, which he calls a *Possession of present Means*, to obtain some *apparent future Good*. And this he divides into *natural* and *instrumental*.
“Natural Power (he says) consists in the Eminence of the Faculties of Body or Mind, as extraordinary Strength, Beauty, Prudence, Arts, Eloquence, Liberality, Nobility, and the like. Instrumental Powers are those which, being acquired by these, or by Fortune, are the Means and Instrument of acquiring more, as Riches, Reputation, Friends, and good Luck; and in short, any Quality whatever, or the Reputation of any such Quality, as makes a Man to be lov'd, or fear'd of many. And then he desires *Worth*, or *Dignity*: That it is the Value or Price of a Man, or as much as would be given for the Use of his Power. And the Manifestation of that Value we set on one another is that, he saith, which is called Honouring and Dishonouring. Thus to value at an high Rate, is to honour a Man; at a low Rate, is to dishonour him. Afterwards he recounts the natu-

ral Tokens, or Ways of Honour, as to pray to another for Aid, to obey, to give great Gifts, to be sedulous in promoting another's Good, to give Way or Place to another in any Commodity; to shew any Sign of Love or Fear, to praise, magnify, or call happy, to speak to another with Consideration, to appear before him with Decency and Humility, to believe, to trust, to rely on another, to hearken, to counsel or discourse of what Kind soever, to agree with in Opinion, to imitate, to honour those another honours, to employ in Counsels or Actions of Difficulty. And further, Civil Dignity, according to him, is that Value which is set on a Man by the Commonwealth, which is understood by Offices of Command, Judicature, publick Employment, or by Names or Titles, introduced for distinction of such Value. And he rightly observes, that the Commonwealth may make whatsoever it pleases to stand for Signs of Honour, though it be otherwise in its own Nature indifferent; as for Instance, it was a Sign of Honour among the *Perfians*, to be conducted through the Streets in the King's Garments, upon one of the King's Horses ^e, (as it is also to wear certain Marks or Badges). Thus the *Chinese* salute with the *Head* and *Hand*; the *Japonefe* by putting off their *Slippers*; the *Chinese* always rise to any Person they design to honour. They of *Japan* pay their Honours sitting on the Pavement, and think it *Rudeness*, and *ill Breeding* to stand, when they perform their Ceremonies ^g. However all this be, that *Notion* of his, that *Honour* consists solely in the *Opinion* of *Power*, is by no means to be admitted; neither what he infers from thence, “That it doth not alter the Case of Honours, whether an Action (so it be great and difficult, and consequently a Sign of much Power) be just or unjust. And that therefore the antient *Heathens* did not think they dishonoured, but greatly honoured their Gods, when they introduced them in their Poems, committing Rapes, Adulteries, Thefts, and other great, but unjust or unclean Acts”. For though it might be granted, that the *Foundations* of *Honours* may so far be properly enough reduced to *Power*, namely, as they are naturally apt

And as *Lucan*, l. 1. ver. 135. expresseth it:

— Stat magni nominis umbra.

And therefore *Horace* saith very well, *Ep. l. 1. Ep. 1. ver. 8, 9.*

Solve senescentem mature sanus equum, ne
Peccet ad extremum ridendus, et illa ducant,

— Retains the Shadow of a glorious Name.

Wisely in Time the generous Horse release,
E're batter'd and decay'd, he lose the Race.

Antiphanes. Life is like Wine, when it runslow, it will turn soure. *Add.* *Charron de la Sageffie*, l. 1. c. 35. §. 5. *Strabo*, l. 15. p. 488. The *Indians* allow no Pre-eminence to the Aged, unless their Prudence deserve it. *Philo de Abrahama*, p. 387. A Man ought not to be called Old from the Time he hath liv'd, but from the Way he hath spent his Life in. For many that have continued a long Course of Years in ill Practices, can only be called Long-liv'd Boys. And it is sometimes true, as *Varro* saith, de re Rustica, l. 2. c. 2. That is a better Age which is attended with Hopes, than that which is followed by Death. *Quint. Inst. Orat.* l. 2. c. 1. p. 104. We ought not to value any one according to his Age, but according to the Improvements he hath made. *Isocrat.* in *Archidam.* init. It is not our Years, but our Parts and Industry that makes us wiser than others. *Philostrat.* in *Vit. Appollon. Thyan.* l. 6. c. 8. p. 257. *Ed. Morel.* Youth doth not hinder a Man from seeing Things clearer than even old Age itself.

^a *Antholog.* l. 6. *Quintil.* Declam. 306. p. 462. There is nothing to be lov'd in an old Woman, but the Memory of what she was. *Add.* *Ld. Bacon's* *Essays*, c. 40.

^b *L. 1. t. 9. l. 1. D. de Senatoribus.* *Add.* *Jac. Godofred de precedencia.* Part. 1. c. 5. §. 35. ^c *Vide* *l. S. D. de Senatoribus, ubi supra.*

^d *Vide* *Ovid. Metam.* l. 6. fab. 4. ver. 172. *et seq.* *Valer. Max.* l. 4. c. 4. §. 1. *Plut.* in *C. Gracch.* *Vide* *Buchanan Rerum Scotic.* l. 12. *int. Orat. Kennedi.*

^e And upon this Foundation I suppose (though the Respect intended was oddly express'd) the Prince of *Zanaga* in *Africa*, as *Leo Africanus*, l. 1. relates it, kill'd a great Number of Camels and Ostriches, to entertain his Guests; which Sort of Provision they desired him to spare, he told them, that he should not deal civilly by them, if he treated Guests he thought so Noble, and that he had never seen before, with only the lesser Sort of Animals.

^f *Esther* vi. 8.

^g *Bern. Varen. Japon.* Descript. p. 21. *Add.* *Neukof.* in *Genf. China*, c. 4. *Vid.* *Rocheport.* Descript. *Anisill.* Part 2. c. 19; where also he tells of some unusual Signs of Honour.

apt to produce some *Effect* or other in *Human Life*; since what is of that dull, unactive Nature, as will produce no *Effect* either *good* or *bad*, seems to be capable of having no Value one way or other set upon it: Yet that *Power* alone, without Relation to, or in Conjunction with *Goodness*, should be the *proper* and *natural* Foundation of *real Honour*, is what is contrary to *Reason*, and *Hobbes* himself: For in his Book *de Cive*, c. 15. §. 9. he gives this *Definition* of *Honour*; that it is an *Opinion* of the *Power* of another in Conjunction with *Goodness*. And thence he infers, that there are three *Affections* necessarily consequent upon *Honour*; *Love*, that bears relation to *Goodness*; and *Hope* and *Fear*, that have regard to *Power*; and thus that only is *true Honour*, which is attended with all these three *Affections* together. *Fear* alone, excited by a *Power* determined to *Evil*, can never be look'd upon to be a *Sign* of *Honour*. For *Fear* hath always a Mixture of *Hatred* in it; and where a Man *hates*, he naturally wisheth *Harm* and *Ruin*, and not *Honour*. Thus by the *Christian Religion* we are assured of the great *Power* of the *Devil*, but that it is utterly averse to all *Goodness*, and always bent upon all *Evil*; but certainly no Man in his Senses can suppose that he deserves *Honour* upon that Account. And therefore he himself, when he tempted our *Saviour*, did not shew him his *Force* and *Power*, but his *Gifts*, the *Glories* and *Kingdoms* of the *World*, *Matt.* iv. 8, 9. Nor can any Man of Sense think it a good Reason, which the People of some barbarous Countries in the *Indies* give for their worshipping the *Devil*, that he should do them no *Harm*. And therefore also, methinks, I have no Patience to see *Hobbes* mentioning *Flattery* among the rest of his *natural Signs* of *Honour*. For *Flattery* in every *Kind* of it implies and supposes some *Deficiency*, or *Blemish*, both in the Person that gives, and in him that receives it; and is an *Act* and *Species* of *Scorn* and *Derision*, without the least Mixture of *Love* or *Sincerity* in it. But as to the *Fables* of the *Poets*, there are some Men indeed

that think, that they imply no more than that the *Gods* are above all the Confinement of *Laws*. And others rather suppose; that *all was Mystery* in them, and that many *secret Truths* were concealed under the *Disguise* of those *Vices* and *Absurdities*. But whatever they make of them, it will never by me be conceivable, that *Rapes* and *Adulteries* could be an *Honour* to the *Gods*, any more than they would be to any ordinary *Mortal* here on *Earth*.

XIV. But after all, these *Foundations* of *intensive Esteem* produce only an *imperfect Right* to demand *Honour* and *Respect* from others; so that if a Man deny it where it is really *deserv'd*, he cannot be said to have done an *Injury*, but only to have been guilty of some *Discourtesy* or *Incivility*: For among Persons that live in a *Liberty* of *Nature*, where all are *equal*, it doth not appear how any Man can pretend *Right* to demand *Honour* from another; since from that *Love* every Man naturally bears to himself, it is very easy for him to imagine that there are *Qualities* or *Endowments* in himself, *equal* or perhaps *superior* to those which others *value* themselves upon. For Instance, one Man thinks *Age* deserves *Reverence* and *Esteem*; another, that *Youth* and *Vigour* have a much better *Title* to it. The *Hopes* and *Expectations* of some raise them to as great a Pitch of *Vanity*, as the *real Success* of others. Some *value* themselves upon *Strength* of *Body*; others think *Wit* and *Prudence*, the *Endowments* of the *Mind*, much *nobler Qualities*. This Man measures his *Worth* by the *Largeness* of his *Fortune*; another by an *Easiness* and *Freedom* of *Mind*, which he thinks equal to all the *Wealth* and *Opulence* in the *World*. Some presume upon their *Learning*; others will suppose that there is nothing *true* and *real* in *human Knowledge*, more than *Resolution*, *Fidelity*, and *Sincerity*; the τὸ βέβαιον καὶ πιστὸν, καὶ ὑγιὲς, as *Plato* states it. Some insist upon the *Honours* they have attained; others satisfy themselves that *Honour* is not always paid where it is *deserv'd*, or *deserv'd* where it is paid. And others set little Value upon *Greatness* of *Birth*, and despise it when

^a Silius Italicus, lib. 1. ver. 149.

Et metui demens credebat honorem.

And vainly thought it Honour to be fear'd.

^b And therefore *Lucan*, l. 5. ver. 385, 386. calls it,

Voces, per quas jam tempore tanto
Mentimur dominis.

The Words with which we have long Time abus'd.
Our Princes.

Vid. *Plutarch*. de adulator. & amici discrimine. Pescennius Niger in *Spartianus*, c. 11. when one was preparing to address him with a *Penegyrick* upon his being made *Emperor*, stopp'd him by saying, That he ought to write an *Oration* in Praise of *Marius*, or *Hannibal*, or any one of the famous ancient *Generals*, and recommend their brave *Actions* to the Imitation of the present Age. For to commend Persons that are living, added he, is only to deride and expose them, and especially *Emperors*, since 'tis evident, what you may hope, or what fear from them, since they have the *Power* of the *Laws*, can do as they please, and take away your *Lives*, or send you into *Banishment*.

^c *Sallustius* Philosoph. de diis & mundo, c. 3.

^d *Pindar* says very well, *Olymp.* Od. 1. ἄνδρ' ἀνδρὶ φέμεν εὐκλὸς ἀμφὶ δαιμόνιον καλλί. Men ought to speak with *Reverence* of the *Gods*. *Isocrates* in laudat. *Busirid.* p. 395. calls those *Fables* *Blasphemies*, by which (saith he) they boldly fix such Things upon the *Gods*, as no body would dare speak of his *Enemy*. For they do not only charge them with *Thefts*, *Adulteries*, and *Slavery* to Men; but accuse them further, of devouring their *Children*, depriving *Fathers* of their *Genitals*, *Copulation* with *Mothers*, and a thousand other wicked *Actions*. The *Authors* of which *Stories* were not indeed punished as they *deserv'd*, but yet neither did they altogether escape; for some of them were *Strolers*, *Vagabonds*, and *Beggars*; others were stricken *Blind*; and others were driven out of their own *Country*, and forced to make *War* continually upon their *Relations* and *Friends*; and *Orpheus* the chief *Inventor* of these *Fables*, was torn to Pieces. *Seneca* de brevitat. *Vitæ.* c. 16. To make the *Gods* *Authors* of *Vice*, what is it but to encourage and inflame our own *Lusts*, and to bring the *Example* of the *Deities* for our *Liberty* and *Excuse*? *Fulgentius* *Mytholog.* l. 1. p. 55, &c. If the *Gods* were guilty of *Theft*, *Justice* would have nothing to do with *Criminals* or *Crimes*, since they would be countenanc'd by *Heaven*.

^e *Pind.* *Olymp.* Od. 4. towards the End.

And Youth sometimes with hoary Hairs
Before the Noon of Life is crown'd.

The strongest have not still the best Success,
But Prudence never is unfortunate.

^f *Sophocles*. *Ajax.* *Flagell.* p. 69. Ed. *H. Steph.*

^g *Plato.* *Ep.* X.

^h *Cic.* *Ep.* ad *Fam.* l. 3. *Epist.* 13.

when it is not attended with an answerable Greatness of Fortune ^a. And certainly the *wiser Part* of Mankind will always think it as false a Method to value ¹ Men by their *Riches, Dignities, or Honours*, or by Things *external* to them, as it would be to take the *Worth* of *Horses* from the fine Furniture which may belong to them. But besides, since *Honour* is then properly paid, when a Man acknowledges *superior Excellencies* in another, and pays some *voluntary Submissions* to him upon that Score; and since no Man can be *forced* to pay this by outward *Violence*, that Method being more likely to confirm him rather in an obstinate Refusal of them; it is evident, that it is a *Mistake* to allow these *Foundations* the *Force* of any such *perfect Right* which might be asserted by *Violence* and *Arms*. For the *Respect* a Man pays to another upon *Compulsion* and *Command*, is no *Sign* of any *internal Reverence* he has for him, but only that he is afraid of Punishment. And further, since *external Signs* of *Honour*, unless they proceed from *Submission* of Mind, are to be call'd *Shew*

and *Mockery*, rather than *Honour*, it would be Folly to threaten *Violence* when they are denied; especially if the Person from whom they are expected declares, that it is not out of *Contempt* that he omits to pay the *Formalities* of his *Respect*, but only because he would enjoy his *Liberty*, and not be *forced* to do that which ought to be left to his own *Pleasure* and *Courtesy*. And therefore the *Scythian Ambassadors* told *Alexander the Great*, "that they hoped it was excusable in them that lived in *Deserts*, not to know who he was, and whence he came." And *Ariovistus*, in *Cæsar's Commentaries*, tells *Cæsar*, "That if he had been to desire any Thing for himself, he would have attended him in Person; and that he could not but expect that *Cæsar* should shew him the same *Respect*." From all which it seems to be evident, that though it be agreeable to natural Reason, that *Honours* should be paid to Persons of *superior Excellencies*; or further, that though it might be also allow'd, that it is no less a *Command* of the *Laws of Nature* to honour *Persons*

^a Euripid. Phœniss. ver. 445. & Electra. ver. 37, 38.

Λαμπροὶ εἰς γένεθ', χρημάτων δὲ πένητες.

Noble in Birth, but miserably Poor.

^b Cæs. de B. G. l. 1. c. 34. And Vologeses, King of the Parthians, answer'd Nero, when he sent for him almost in the same Manner. It is easier for you to pass so great a Sea, than me; when you are in *Asia*, we shall easily agree when to meet. Xiphilinus Epit. Dianis.

Mr. BARB. NOTES on § XIV.

¹ I have borrowed *Charron's* own Words, *Treatise of Wisdom*, Book I. Chap. V. Sect. 9. Numb. 5. from whence 'tis visible that our Author hastaken the Thought: But *Charron* himself has done nothing, as 'tis usually his way, but abridged this fine Passage, from *Montaigne*. "'Tis strange, that nothing except ourselves, is valued or esteem'd but for its own innate Qualities. We praise a Horse for his being strong and well manag'd, and not for his Furniture: A *Greyhound* for his Swiftness, not for his Collar; a *Hawk* for his Wings, not for his Tassels and Bells. Why then do we not, in the same Manner, esteem a Man for what is his own? He has indeed a numerous Retinue, a fine Palace, a great Reputation, and a plentiful Estate; but all this is about him, not in him. You do not buy a Pig in a Poke: If you buy a Horse, you take off the Saddle, and view him naked and uncovered; or, if he is cover'd, as they formerly served Horses that were shew'd to Princes to buy, 'tis only upon the Parts which are least necessary, that you may not amuse yourself, with the Smoothness of his Coat, or the Largeness of his Crupper; but have Time enough to observe chiefly his Legs, his Eyes, and Feet, which are the most useful Member. (See *Horace*, Lib. 1. *Satyr* ii. ver. 86. & seq.) Why then in your Esteem of a Man, do you value him covered and wrapped up as he is? He shews us no Parts, but what are by no Means his own; and conceals from us, those by which only we can truly form a Judgment of his Merit. 'Tis the value of the Sword, not the Scabbard, that you seek after: And perhaps you will not give a Farthing for it, if you see it unsheath'd. You must judge a Man by himself, and not by his Dress. And as one of the Antients says, very pleasantly, (*Seneca Epist.* lxxvi. p. 221. *Ed. Gronovii.*) Do you know why you take him to be a tall Man? You reckon the Height of his Shoes: But the Basis does not belong to the Statue: Measure him without his Stils. Let him lay aside his Riches and Honours, and shew himself in his Shirt. Is his Body sound, vigorous, and fit to discharge its Functions? What Soul has he? Is it noble, large, and happily furnished with all the Endowments belonging to it? Is it rich in Accomplishments of its own, or another's? Does there only want an Opportunity to shew, whether it can bravely stand the Sight of a drawn Sword; whether it cares not which way Life issues out, through the Mouth, or the Breast; whether it is sedate, quiet, and contented? 'Tis this that must shew, and by this you must judge of the vast Difference between us. *Essays* 5. Book 1. Chap. xlii. towards the Beginning. *Juvenal* has admirably well express'd this Passage, which is quoted by *Montaigne*, and applied to the Nobility; in the following Lines.

Dic mihi, Teucrorum proles, Animalia Muta
 Quis generosa putet, nisi fortia? nempe volucrem
 Sic laudamus equum, facili cui plurima palma
 Fervet, & exultat rauco victoria circo.
 Nobilis hic, quocunque venit de gramine, cujus
 Clara fuga ante alios, & primus in aquore pulvis.
 Sed venale pecus Corinthæ, posteritas &
 Hirpini, si rara jugo victoria sedit:
 Nil tibi majorum respectus, gratia nulla
 Umbrarum, dominos pretiis mutare jubentur
 Exiguus, tritoque trahunt ephredia collo,
 Segnipedes, dignique molam versare nepotes.
 Ergo ut miremur te, non tua, primum aliquid da,
 Quod possim titulis incidere, præter honores,
 Quos illis damus & dedimus, quibus omnia debes.

Great Son of Troy, who ever prais'd a Beast
 For being of a Race above the Rest?
 But rather meant his Courage, and his Force.
 To give an Instance — we commend a Horse
 (Without regard of Pasture, or of Breed)
 For his undaunted Mettle and his Speed;
 Who wins most Plate with greatest Ease, and first
 Prints with his Hoofs his Conquest on the Dust.
 But if fleet Dragon's Progeny at last
 Proves jaded, and in frequent Matches cast,
 No Favour for the Stallion we retain
 And no Respect for the degenerate Strain;
 The worthless Brute is from *New-Market* brought
 And at an under Rate in *Smithfield* bought,
 To turn a Mill, or drag a loaded Life
 Beneath two Panniers, and a Baker's Wife.
 That we may therefore you, not yours admire,
 First, Sir, some Honour of your own acquire;
 Add to that Stock which justly we bestow
 On those *blest Shades*, to whom you fall Things owe.

Mr. Stepney.

Horace, to shew the Folly of those who only value and esteem Men for external Things, appeals to the Judgment of Children at Play,

Si quadringentis sex septem millia desunt,
 Est animus tibi, sunt mores & lingua, fidesque;
 Plebs eris. At pueri ludentes, Rex eris, aiunt
 Si rectè facies

Horace Epist. Lib. 1. Ep. 1. ver. 57. &c.

If you have not ten thousand Pounds in store,
 But want a thousand, or a little more,
 Though you have Virtue, Constancy, and Skill,
 In Arts, thou shalt be thought a *Common* still.
 And yet our Boys another Tale will tell
 And say, you shall be King, if you do well.

Mr. Creech.

sons of Worth, yet still that this Duty must be one of those, which a Man hath no Right to demand from others, but which must be left entirely to their good Nature and Civility. But when a Man pretends Right to demand Honour, or any Sign of it from another, 'tis necessary he should either have Power and Authority over him, or produce some Compact for his Right, or prove it by some Law made or approved by their common Lord and Master. Mandeflo in his Travels^a relates, that in a Treaty of Peace, after a long War between the Portuguese and the King of Cochin, it was a long Time before the Disputes on each Side could be brought to a Conclusion, because the Indian Nobles insisted, that the Portuguese should give them the Way, as the common People of their own Country were obliged to do. But that the Portuguese refusing such dishonourable Terms, it was agreed at length, that the Debate should be decided by single Combat, in which the Victory happening to the Portuguese, the Indian Nobility were obliged to give the Way to the Portuguese, and to stand still till they were passed by.

XV. But, however, between private Men, certainly the noblest Contest¹ for Honour and Eminence would be, to dispute who should express the greatest Readiness to pay Honour to others, or most Modesty in declining it themselves. And it is ridiculous enough for Men to grow warm and angry in a Contention about outward Honour; especially when there is little or no Profit or Advantage to be made by it, and when it may end perhaps like the Dispute mention'd in the Epigram^b, *Who only shall go through the Dirt first*. It was a good Determination enough which a certain Prince made, when two of the meanest of his Servants had quarrell'd which should take place at Church, that the greatest Fool should sit first. For as to what Quintilian says, that a poor Man's Honour is his best Estate^c, it must be understood only of simple Esteem. But between Princes and Nations, the Disputes about Eminence of Worth and Dignity, and the Precedence which depends upon it, have generally, and in all Ages, been managed with greater Shew of Reason, and stronger Pretences. The Argument usually urged in these Controversies will perhaps deserve closer Consideration. Thus much therefore is beyond Dispute, that where a Prince depends upon Another of superior Power, the greater is the most honourable, and has a perfect Right to Precedence; tho' perhaps the same Title may be common to both of them. Thus there are Instances of greater Kings that have others call'd Kings under them, though in reality they are no more than Magistrates and

Governors of Provinces. Some Princes do Homage to others for their Kingdoms, as feudal; and there are others that hold theirs by other Titles. So in Tacitus's Life of Agricola, 'tis said to be an old received Art of Rome, to make and maintain Kings to be their Instruments of Slavery. And thus Adherbal, in Salust, says, that when his Father Micipsa died, he commanded him to think nothing in the Kingdom of Numidia his own, but the Administration of it, and that the Right of it belong'd to the Roman Senate^d. And so also a Prince, that has made an unequal League with another, doth by that very Act acknowledge a Superiority of Worth and Dignity in the other; since he obliges himself to pay more Respect than will be given. And it is, I think, also further clear, that where a Prince hath obtain'd against another a Right of Superiority of Dignity or Precedence, either for his own Person, or as Head of such a State or Commonwealth, whether by Compact or Custom, and such a Sort of Sufferance, as no other probable Account can be given of, than that he was allowed to be the greater Prince; that Right may be insisted on and maintained, as long as that Prince lives, who is, as it were, the Character or Mark of the Dignity, and under whom that Right was at first obtain'd^e.

XVI. But where no such Right has been already fix'd, there Variety of Arguments are used to prove Superiority of Eminence and Dignity. The Antiquity of Kingdoms, Families, and Governments, the Extent, Riches, and Power of Dominions, the Quality of that Power which the Prince holds over his Subjects, and the Magnificence of his Title, are the common and general Topicks. That Antiquity adds a Sort of Reverence and Veneration to States and Families, is an Opinion commonly receiv'd. And they that endeavour to support themselves upon the Strength of it, usually urge, they enjoy'd their Dignity in full Lustre long ago, when other Kingdoms were subject to the basest Slavery; or, it may be, when the Family which now wears the Crown, and triumphs so insolently in its new Honour, lay undistinguish'd among the common Herd of the People; that 'tis unpardonable Arrogance to dispute Precedence with Princes, whose Predecessors might, if they had pleased, have made the Ancestors of others their Slaves; that it is a sort of a natural and universal Law, that Things of later, should be inferior to Things of earlier Original. And from hence they usually pass to a pompous Representation of the several great Actions in War and Peace, which have been achiev'd in that Kingdom by the Princes of the Blood Royal: Few of which Sort those upstart Nations and Families

^a Mandeflo Itin. Part. 2.

^b Mart. Ep. 10. ver. 8. *Per medium pugnas & prior ire lutum*, Senec. de Ira. l. 3. c. 37. Because you were placed in a little less honourable Seat, you presently break into a Passion, and are angry with the Master of the Feast, him that invited you, and him that was put above you: How ridiculous is it? What Difference is there, what Part of the Table you sit at? Can a Seat make a Man more or less Honourable?

^c Declam. 252.

^d Salust. Jugurth. Bello.

^e Vid. Jac. Godofred. de Præcedentia, par. 1. c. 1. Add the Dispute between the French and Spanish Ambassadors in Andr. Maurocenus Hist. Venet. l. 8. p. 301, &c. & Memoirs touchant les Ambassadeurs. By Mr. Wicquefort.

Mr. BARE. NOTES on §. xv.

¹ In which, however, we ought not to go too far. 'I love, says Montaigne, to observe the Rules of Civility; but not so servilely, as to make my Life uneasy by them. There are some tiresome Formalities in them, which provided we omit through Discretion, and not want of Judgment, we are not the less Genteel. I have often known Men uncivil by too much Civility, and troublesome by too much Kindness. This industrious and genteel Way of pushing one's self forward in the World, is in short, a very useful Science. It is, as it were, the Beauty and Grace which makes us acceptable upon our first Admittance into Society and Conversation; and by Consequence, opens us a Door of Instruction, by the Example of others, and gives us an Opportunity of producing our own, if there is any Thing that is instructive and communicable." Montaigne's Essays, Book I. Chap. 13.

milies can presume to challenge. Moreover, Power adds Terror to Reverence, and makes it not only Impudence¹, but Rashness and Folly, to contend for Honour with those, in whose Power it is to do us Good or Harm, as they please. And without dispute, 'tis a certain Way to demand and to obtain Honour, to tell the World with Sword in Hand, that if they will not, THAT shall give it. Further, 'tis look'd upon to be an higher Degree of Eminence to be free from all other Restraints of Subjection, but those which are due to GOD, the supreme Governor of the World, than to be confin'd by human Laws, and to live under Ties of Compact. And lastly, since the Title is commonly used to express the Thing, the Magnificence and Greatness of it; that may be supposed also to imply an Argument against Inferiority of Dignity².

XVII. These with Arguments of a like Nature may perhaps be speciously urged; but after all, it must be confess'd, they can produce no more than an imperfect Right, unless confirm'd by Compact express or tacit, according to receiv'd Custom. And it will be no Difficulty to destroy the Force of these and all such Arguments, by answering, that Antiquity alone can have no real Honour in it, since it only implies Tract of Continuance, which may be urged for the most inconsiderable Things as well as the most valuable; that all Kingdoms are by their own Nature free and independent; and that it is not material to enquire how long they have been so; that it may indeed be allow'd, that when a Kingdom hath long continued in a flourishing Condition, the Strength of its Constitution and the Wisdom of its Government ought not to be question'd; and that it need not be denied, that the Favour of Heaven, and the Bravery of Subjects, was sufficient to defend them against foreign Arms. But then, that Commonwealths of later Growth may possibly be settled as wisely, and govern'd as happily, as those that have stood much longer, nay, perhaps be establish'd with greater Wisdom, and enjoy greater Happiness, since the wise and good Institutions of ancient States and Commonwealths generally cost them dear, and they of later Date have the Advantage of seeing and using what others discover'd before them; that the Favours of Heaven are not in human Disposal, or certain to be long enjoy'd; but yet that it is not impossible to provide so far, that the State may not fall to ruin of it self, for want of good and wholesome Laws. In fine, that all Things ought to be valued according to their

present State; what is pass'd we have no more to do with, and what is to come doth not yet concern us. That distinct States and Commonwealths never unite into Systems, or form General Assemblies, where it may be necessary to oblige them of latest standing to be content to be placed lowest. All are allowed to enjoy distinctly their separate Freedom. That the Government of any State should continue in one particular Family for a long Course of Time, may be allow'd to be sometimes an Argument, that the Posterity succeeded and imitated the Virtues of their Ancestors; but it must also be allow'd, that great Wealth and Riches only are sufficient Guards, and not easily to be over-power'd. Much also in the long Possession of a Throne must be ascribed to the Disposition and Temper of the People, averse to Change; and much in the Succession of good Princes to the Blessing of Heaven alone. But still Princes and States of larger Origin, ambitious to be thought great, may easily answer, that they cannot look upon any Thing as their own, which was not got by their own Industry or Power³; that it is a very easy Thing to take Possession of large Estates or Dominions, purchas'd by the Success of Ancestors; but to raise a great Fortune, or an Empire, requires Bravery and Virtue; that others owe their Greatness to the Chance of being well born, they to their own Worth and Excellencies; that others can produce nothing for themselves, but old forgotten Monuments of their Fathers great Actions; theirs is no borrow'd Lustre, but the fresh Acquisitions of their own Virtue and Valour. Lastly, that no Degree of Honour is beyond that of being a sovereign Prince, and that this sets the latest Families upon the Level with those of the most ancient Date⁴.

XVIII. As for Power indeed, that may often force the Weaker to pay the Signs of Honour to the Greater, because it is Madness not to yield to them that have Power to do us harm, when they please. As Favorinus in Spartianus⁵ pleasantly told his Friends (who were angry with him for giving up a Word to the Emperor Hadrian, that was used in good Authors) certainly he ought to be allow'd more learned than every Man, that has thirty Legions at his Command⁶: But if a Prince hath Strength enough to defend his own Dominions, he cannot be obliged to yield Precedence to any others, however superior in Riches; since he has no Reason to be afraid of them, or to ask Relief or Protection from them. For where Liberty is equal, a Disproportion in Wealth can

make

¹ Vid. Andr. Maurocen. Hist. Venet. l. 12. p. 484. Where he talks of the Emulation tht it happened between the Princes of Italy upon Pius Quintus's presenting Cosmus with the Title of Great Duke of Tuscany. Vid. Paul. Hist. Concil. Trident. l. 5. p. 402.

² Ovid. De Fasti. l. 5. ver. 26.

Quoque die partu est edita, magna fuit.

The Day that gave her Birth first made her Great.

And to this we may apply that of Arnobius, l. 2. Is this a new Thing which we are engaged in? In Time it will be old. Is that old in which you are concern'd? In the Times when it first began, that also was new.

³ Hadrianus in Spartian. c. 15.

⁴ Juvenal. Sat. 5. ver. 130, 131.

Plurima sunt, quæ
Non audent homines perisurâ dicere lænâ.

No Freedom will from him be born,
Whose Cloaths are thread-bare, and whose Cloaks are torn.

Mr. Bowles.

Mr. BARB. NOTES on § XVI, XVII.

¹ The greatest Part of this Chapter is Word for Word, taken out of our Author's Dissertation de Existimatione, which is amongst his Academical Dissertations.

² Nam genus, & proavos, & quæ non fecimus ipsi,
Vix ea nostra voco ——— Ovid. Metam. l. 13. ver. 140, 141.

make no Difference. And therefore, if one *Prince's Territories* be six hundred Miles in Extent, and another's but one hundred, yet the Difference in the Kingdoms makes none between the *Sovereigns*; for their *Power* is of the same Nature in the greater and in the less; and the one may answer the Ends of *Government* as well as the other. Not to say further, that *Power* alone, as it implies Ability to do Harm, doth not include any *Excellence* in it, which is naturally proper to command *sincere Respect*: For all *Respect* hath a Mixture of *Love* in it, but *Power* to do Harm can certainly produce nothing but *Hatred*.

XIX. Further, *absolute unlimited Power* may perhaps force from *Subjects* greater Degrees of *Respect*, not without a Mixture of *Fear*: But with *sovereign Princes* it can have no such Effect, since they must look upon another *Prince's absolute Power*, as it relates to them, to be no more than *Liberty of Nature*, which in itself gives no Man *Pre-eminence* to another, not subject to him. And since every *Prince* is to be valued, not by his own *Rights* only, but by the State and Condition also of the *Commonwealth* he governs; it will not be difficult to imagine that a *limited Monarch* may from that enjoy Advantages, which will make him *greater and more considerable*, than a *Prince* entirely *absolute*. Lastly, *Titles and Words* of all Sorts, take their *Value* as *Money* doth, from *Use*. And since the highest *Dignity* of *Princes* is the *sovereign Power*, it is sufficient if that be express'd in its *natural simple Sense*, or according to *common Use*. For the *Pomp*, or *Modesty* of *Words* neither can add to, nor lessen the *Thing*. So the *Turkish Monarch* is usually called *Emperor*, the *Persian* no more than *King*; yet this Distinction in itself gives no *Preference* one to the other. For an affected Multiplicity of *Titles* added to the proper *Style*, seems to have a Sort of *Barbarism* in it; and may perhaps strike some Awe upon inferior and ignorant *Subjects*, but can make no Impression upon foreign States and *Princes*. For how was the *Roman Emperor*, for Example, concern'd, whether *Sapores King of Persia* call'd himself *Brother of the Sun and Moon*, as *Ammian Marcellinus* relates, or of *Saturn and Venus*.

XX. From all which it is sufficiently clear, that there is no *perfect Obligation*, which presupposes proper *Right* in another, by which a *Prince* really possess'd of *sovereign Power* is bound to yield *Precedence* to any other *King* or *Prince* as more *honourable*, however *Superior* in the *Particulars* before mention'd; neither is one *free State* or *Commonwealth* obliged to yield more, though perhaps another is more *antient*, or more *powerful*. Nor indeed is a *State* govern'd by the *Populace*,

inferior in *Dignity* to a *State* govern'd by a *Prince*, though in a *Democracy* there is no *particular Person* to be compar'd with a *King*. And hence an *Ambassador* from a *free Commonwealth* is not necessarily obliged to give *Precedence* to an *Ambassador* from a *crown'd Head*. But because *vicarious and deriv'd Honour* cannot be supposed to appear with the same Advantage as *original*; and a *Minister* cannot be invest'd with the same *Dignity* as a *Prince*; and since *free Commonwealths* can never meet in the same Place with *sovereign Princes*, but by their *Ambassadors* and *Deputies*; 'tis evident, that the *Ambassadors* of *free States* ought to yield *Precedence* to all *crown'd Heads*, and *sovereign Princes*.

XXI. And this *Equality* between the *Power* invest'd with *sovereign Power* need not be any Objection against *Interviews*, or *Conferences*, to be made either in their own *Persons*, or by their *Ministers*, or against their *uniting* into an *establish'd Council*. For if a *Prince* make a Visit to another in a *foreign Country*, the *Laws of Civility* give the *Stranger* the *Precedence*, except he comes in the *Quality* of a *temporary Subject*. For though every *Prince* be *supreme* in his own *Dominions*, yet *Princes* in the same Manner as *Ambassadors*, by a sort of *Fiction*, seem still to continue as *Persons free*, and within any *Prince's Territories*, to whom and by whose Consent they make a Visit, without laying aside or disguising their *Quality*. For 'tis certainly *unadvisable and dangerous*, for a *Prince* to venture *incognito* into a *foreign Country*, without having first procur'd *Leave*. 'Tis certain *Gramondus* confidently pronounces, that *it is no Violation of any publick Law, to seize and detain disguised Princes*. But I confess I do not see for what Reason; unless it be, that to come in *Disguise*, without giving Notice, may seem to imply some *Suspicious* of, and *Disrespect* to the *Prince* of the *Country*. If *two or more Princes* are to meet in a *third Place*, it would not be difficult to dispose Things so, that no *Preference* be given to either of them. For the *Rooms* they are to meet in, might be so contriv'd, as to leave it absolutely uncertain, which is the *first and most honourable Place* in it. And upon this View, *round Tables* have been sometimes used upon such Occasions. The *Princes* may also declare before-hand, that the *Congress* shall be made without regard to *Precedence*, and that they intend to sit *promiscuously*, or as they please, or happen to place themselves. So *Philostratus* relates of the *Brackmans of India*, that they appointed no particular Place for their *Prince* (as the *Greeks and Romans* would think it necessary to do) but every one sits where he pleases. But

^a Add. *Jacob. Godofred. d. tit. de precedent. part 1. c. 3.*

^b Add. *Geor. Bates Elench. motuum nuperorum in Anglia, part 2. p. m. 246, &c. & Author. Cardinalismi, part 1. l. 3. p. m. 375.*

^c *Ammian Marcellin. l. 17. c. 5. Add. Ibid. l. 23. c. 6.*

^d *Ausonius in ludo septem Sapientum. ver. 78, 79, 80.*

^e *Hist. Gall. l. 13.*

*Recte olim ineptum Delphicus iussit Deus,
Quarentem, quisnam primus Sapientum foret:
Ut in orbe tereret nomina eorum inscriberet,
Ne primus esset, ne velinus quispiam.*

One to *Apollo* once this Question brought,
Which he the first of all the Sages thought?
Write in a Ring their Names, the God reply'd,
And equal Dignity to each divide.

^f *De Vita Apollon. Thyas. L. 3. c. 8. p. 134. C. D. Lucian. Epist. Sat. ad divit. p. 628. 'Tis easiest and most agreeable in Entertainments, that all should be equal. Add. Athenaus Dipnosoph. l. 1. c. 4.*

Mr. BARB. NOTE on §. XIX.

^g See *Grot. B. 1. c. 3. §. 10. And Algernoon Sidney's Discourse upon Government, Chap. iii. Sect. 32.*

But this will still be much easier to be done, if *Princes* will please to meet *incognito*, and without their usual Pomp and Retinue. Nor could they by any other Method more fully declare, that they would not raise Difficulties or Disputes about the *Points of Dignity*. Or if this *Method* be not thought the best, it may be determin'd by *Lot*; and that two Ways, either with *Condition* that every *Prince* shall for the future remain contented with what *Place Chance* determines for him; or else that every *Prince*, in *Turn*, shall succeed in a certain Order settled by *Lot*. But Disputes may be much more easily ended, if the *Congress* be form'd only by *Ambassadors*; especially since there is one Way more of preventing Difficulties among them, *namely*, if the several *Princes* their *Masters* send them with *Characters* of different *Value*. For since different *Degrees of Dignity* arise purely by *arbitrary* Imposition, they may easily be varied several Ways. But here it is to be observ'd, that the *Value* of such *Characters* must be determined by the *common Consent* of *Sovereign Princes*. For if one *single Prince* should, by his own *Authority* alone, create a *New Character*, to bestow upon his *Ministers*, whenever the *Ambassador* makes his Demand for any such particular *Honour* from others, they may justly except against his *Master's* Power to *oblige* them to pay it. But after all, it must be confess'd, that such an *Evenness of Temper* as *Agessilaus* express'd, when he was placed in an *obscure Place* in the *Theatre*, is often much the happiest, in preventing Disputes: For as he said, *It should not be thought that the Place adds Honour to the Man, but the Man to the Place*. It was a good Method which *Abbas*, King of *Persia*, took to prevent Differences at a *publick Entertainment*; them that were inclin'd to the *Persian Persuasion* he placed on his right Hand; those of the *Turkish* he seated on his left, because the *Persians* thought the right Hand the most *honourable*, and the *Turks* the left. And it was an artful *Stratagem* enough, which *Alphonfus XI.* used to silence an old Dispute for *Precedence* between the two *Towns* of *Burgos* and *Toledo*; when he came to ask their Opinions in *Council*, before any mention of their *Dispute* began, They of *Toledo*, I know, *saith he*, are ready to comply with my Commands; let them of *Burgos* speak: Which immediately silenc'd both; both equally thinking themselves preferred to each other; those of *Toledo*, because the *King* spoke in their Name first; and they of *Burgos*, because they were commanded to speak for themselves first.

XXII. But if a lasting *Society* is to be erected between a Number of *Equals*; and every particular *Member* be desirous that the *Equality* should continue, but unwilling to admit the Determination of the *Lot*, or that a constant *Succession* in *Turn* should prescribe their *Places*; there is another *Method* left resembling the *Chance of Lots*, and which can be no way prejudicial to the *Dignity* of any *Member*; and that is, that every *Member* should take *Place* in the *common Assembly*, in the same *Course* and *Order* in which he was admitted into it. And this *Method* is to be particularly observ'd with regard to all *Members* that are admitted into the *Society*, after it is establish'd. For they that at first constitute the *Society*, had better perhaps take *Place* by *Lot*, or by common Consent and *Agreement*. And because it is generally receiv'd in *Colleges*, and other *Societies*, that every *Member* is to be placed according to the *Order of Admission*, *Grotius* gives it for an *universal Rule*, that the *natural Order* between *Fellows* of such *Societies* is to be placed according as they were received into them. But it must be observ'd, that in such *Societies* *Priority* or *Posteriority* of *Place*, doth not in the least imply *greater* or *less* *Degrees of Dignity*, but is only the *Order of Equals* in *Honour*. And therefore there is no Difference between the *first* and *last* in that *Respect*. For it is a different Case, when the *Preference* is given for *superior Eminence* of *Worth* in the *Person* prefer'd; as *Ausonius* tells the *Emperor Gratian*, " 'Tis no Dishonour to be second, but of two honourable Persons he that hath the *Precedence* is the most honourable &c. ". But it is also observed by *Grotius*, in the *Place* before mention'd, that in *Assemblies* of *Christian Kings* and *People*, met to represent the *Body* of the *universal Church*, is was the Custom, that they that embrac'd *Christianity* should in all *religious Assemblies* have the *Precedence* to others. And upon this Bottom, some have taken the *Liberty* to challenge *Precedence*, and claim the *Superiority of Dignity* as their *Right*, in all other *Assemblies* of what *Nature* soever. But whatever good Reasons there might be to introduce Observations of such an *Order* in those sacred Conventions; yet that the same should be observ'd in all other *Assemblies*, and that the *Antiquity* of the *Christian Profession* alone should produce such *Pre-eminence of Dignity*, is what I can see no Reason for; especially since it is one of the Commands of the *Religion*, *In Honour to prefer one another*. Besides, in *Councils* the *Clergy* generally were the Parties *principally* concern'd; the *Lay Persons* appear'd only as *Assistants*, and

how-

^a See Mr. Wicquefort, *des Memoirs touchant les Ambassadeurs*. Add. Jac. Godofred. *de precedencia*, part 3. P. Paul. *Hist. Con. Trid.* The Dispute between the *French* and *Spanish* Ambassadors at *Trent* and *Rome* about *Precedence*, l. 8.

^b See Mr. Wicquefort's *Mem. touchant les Ambas.*

^c *Plut. Apoph. Lacon.* p. 208. *D. Damonides* in a like Case said, 'Tis very well you have found out a Way to make even this *Place* honourable. *Ibid. Apoph. Add. Plut. Symposiac.* l. 1. c. 2, 3.

^d *Pet. de Valle, Itin. part 2. Ep 5.*

^e *Hieron. Olorius de Rebus gestis Eman. l. 1. Add. Gramond. Hist. Gall. l. 3. init.*

^f *Grot. l. 2. c. 5. §. 21. Add. Boecler. in locum, add. L. 50. t. 3. l. 1. D. de Albo scribendo. L. 12. t. 3. l. 1. C. de Consul. &c. tit. 44. d. l. C. de Tiron. l. 3. C. t. 5. d. l. de Propos. sacri Cubiculi. l. 1. C. t. 4. d. l. de Praef. Prator. l. 2. C. L. 10. t. 5. 2. l. 10. de Profess. Jac. Godofred. part. 2. c. 3. §. 17, 18. de precedencia.*

^g *Auson. Panegyri. ad Grot. c. 24. in fin.*

^h *Rom. xii. 10. Phil. ii. 3.*

Mr. BARB. NOTES on §. XXII.

¹ " So that, says our Author, in his *Dissertation* (*de Existimatione*, §. 27.) *Kings* and *Princes* were only looked upon in *Councils*, as " it were *Subjects of Ecclesiasticks*—'Tis perhaps through the *Remains* of this pernicious Custom, that in certain *Places* the *Clergy*, in " their publick Prayers for the whole *State* of *Mankind*, never fail to mention themselves first; and in speaking of the three *Estates*, or " *Orders* of the *Kingdom*, always name the *Clergy* first, then the *Nobility*, and lastly, the *Commonalty*. However *Persons* of good " *Sense* do not think it very decent nor reasonable, that a *Minister*, for Example, in the Prayers he makes on *New-Years-Day*, does not pray " to *God* for the *Prosperity* of the *Prince*, till after he hath wished a thousand *Blessings* to himself, and the rest of his *Brethren*, as if the " *Welfare* both of the *Church* and *state*, depended more on the *Felicity* of the *Clergy*, than that of the *Prince*. So much the more, as this " *Prince* is not one of those *Enemies*, or *Persecutors* of the *Church*, to whom nevertheless the *Apostle* *St. Paul* commands us, to render " *Honour*, as well as to others, as a sort of *Tribute*, (*Romans* xiii. 7.) by *Virtue* of an *indispensible* *Obligation*, but for a *Foster-Father*, " and a *Protector* of the *Church*, &c."

however this be, it cannot be Reason, that because a Person in a *certain Assembly*, for a *certain Respect*, which hath no Influence upon his Honour in general, yields the *Precedence* to another; he is therefore obliged to yield it everywhere, and when there is no Regard had to those *Respects*. And thus there are few *States* or *Commonwealths*, in which there are not particular Persons that are *Members* of several different *Societies*, and who therefore may in *one* be obliged to give *Place* to a *certain* Person; when out of *that*, or in another, they are known to be his *Superiors*.

XXIII. But, however, it is evident, that there is that Force in *sovereign Power*, which will always give the Person invested with it *absolute Right* to the *Preference* to all Persons subject to it. For without Dispute, *Authority* is *superior* to *Obedience*; and it must be allowed to be greater, to controul and command the Wills of others, than to submit and comply one's self. Nor can a Man have Power to deny *Reverence* and *Regard* to that Person, to whom he owes his Protection, and who has Power by Punishments to compel me to obey him. So that *Government* doth of it self naturally introduce *Inequality* among Men. Tho' it is not unnatural to think, that besides that *Veneration* which is due to the *Place* and *Office* of the *Sovereign*, good Subjects often suppose themselves obliged to pay other particular *Marks of Esteem*, to the particular *Virtues* and *Excellencies* eminent in their *Prince*. But it is also further manifest, that the greater and more *absolute* the *Prince's Power* is, the greater will the *Honour* be his Subjects pay him. Nay, long Possession of *sovereign Power*, though in itself it can give him no real Strength, doth yet wonderfully raise the *Dignity* of the *Prince*. But notwithstanding, *Subjects* may sometimes excel their *Princes* in those *Foundations of Esteem*, which produce only an *imperfect Right*. And therefore it was a most extravagant Vanity in *Hadrian the Emperor*, to make himself profess'd *Rival* to all the *best Mas-*

ters in the *Arts* they were famous for. And it was ridiculous in *Alexander the Great*, when reading that *Place* in *Homer*, where the *Greeks* with'd the *Lot* might happen to *Ajax*, or *Diomedes*, or *Agamemnon*, he broke into a *Passion* and said, *He would have kill'd the Person that should have nam'd him last*. For it is no *Discredit* to a *General*, to have *Soldiers* under him of more *Prowess* and *Bravery* than himself, though 'tis true, as *Domitian* said, *The Honour of being a good Commander is as great as that of being a good Prince*. But among *Subjects* of the *same Commonwealth*, it is left entirely to the *Sovereign* to prescribe the *Measures* and *Limitations* of *intensive Esteem*; and to grant to some Persons *perfect Right of Precedence* to others. And whatever *Station* he thinks fit to assign to any Man, that he may lawfully maintain against any of his *Fellow-Subjects*, and that he ought to be satisfied with. For as the *old Centurion* in *Livy* said, *Subjects should think every Post honourable in Service*. And though perhaps sometimes undeserving Persons may be prefer'd to Men of *Worth* and *Merit*, yet if a Man should upon that Account be uneasy and dissatisfied with his own *State*, or give them *Disturbance* in theirs, he will deserve to be punish'd for *Contempt* of the *sovereign Authority*. For, as *Terentius* said in *Tacitus*, "It is not the *Subjects* Buiness to enquire who their *Prince* prefers, or for what Reasons Heaven has placed the supream Disposal of Things in his Hands, and it is their Honour to obey". But it might seem a good Way to silence the *Complaints* of ambitious *Subjects*, if *Princes*, when they prefer Persons to *Places of Honour*, would always have regard to those *Foundations of Esteem*, which were before mention'd; and more especially to the particular *Services* they have done to the *Publick*; which to reward with eminent Degrees of *Esteem*, rather than with Money, or Reward of like Nature, is generally the politick Art of *Princes*. But so much the rather, because, except the *Dignity* and

^a Nestor in *Homer Iliad*. l. i. v. 277, &c.

Μήτε σὺ, Πηλεΐδ᾽ ἄνεκ' ἐπίνομαται βασιλῆϊ.
Ἄνδρῶν, ἐπεὶ ὀπίσθ' ὁμοίη; ἐμμορε τιμῆ;
Σκηπεύχῳ βασιλῆϊ, ᾧτε Ζεὺς κῆρ' ἔδωκεν.

Cease Noble Youth, to Peace your Mind compel,
Nor let your Rage against the King rebel;
No Prince like him in God-like Honour reign'd,
That e'er from Heaven his envied Throne obtain'd.

Though *Achilles* rather submitted to the Conduct, than the Power or Command of *Agamemnon*.

^b *Tacitus Agricola*, c. 39.

^c *Vid. L. i. t. 14. l. 3. De Offic. Prætoris.*

^d *L. 42. c. 34.*

^e *Ann. vi. c. 8.*

^f To this we may apply that of *Lucian*, *Judic. Vocal*. 'Tis fit and proper that every Letter should continue in that Order in which it was at first plac'd; and to go out of that, is to break all that is just and equitable. And he that first made these Laws for you, settled this Order, by which every Letter was for ever to continue in its own Place and Dignity. *Plin. l. 9. Epist. 5.* If the Distinctions between Degrees and Dignities were mixed, disorder'd, and confounded with one another, nothing will be more unequal than Equality it self.

Mr. BARE. NOTES on §. XXIII.

¹ *Vid Xenoph. Cyropæd. l. 8. p. 130. Ed. H. Steph.* where he speaks of the Order in which he plac'd his Friends at an Entertainment. "Twas a fine Invention, says *Montaigne*, and received by most Governors in the World, to establish certain vain and worthless Marks to reward Virtue with, such as Crowns of *Laurel*, *Oak*, and *Amyrtle*; the Form of certain Robes; the Privilege of riding in a Coach through the City, or going by Night with Torches; some particular Seat in Publick Assemblies; the Prerogative of Surnames, and Honours, certain Distinctions in Coats of Arms, and the like: The Use of which has been differently receiv'd, according to the Opinion of the People, and still remains. As for our part, we have, as likewise several of our Neighbours, the Orders of Knighthood, which were established purely for this End. 'Tis certainly a very good and profitable Custom, to find out a Way to distinguish the Merit of Men of rare and excellent Parts, and to content and satisfy them by Payments that are not burthenfome to the Publick, and cost the Prince nothing. And it has been always known by Experience, and we ourselves have formerly seen something of it, that Men of Quality were more jealous of such Rewards, than of those where there was Gain and Profit; and this is very reasonable and likely. For if to the Value which ought to be simply of Honour, you put Riches and other Commodities of Profit, that Mixture, instead of enhancing the Worth of it, debases and lessens it. The Order of *St. Michael*, which has been so long in Esteem among us, never had any greater Advantage, than that of having no Communication with any other Advantage than Honour. That was the Reason, that formerly, there was no Employment or Estate whatsoever, to which the Nobility aspir'd with so much Ardour and Affection as they did to this Order; nor any Quality that bore more Respect and Grandeur: Virtue embracing, and more willingly desiring a Reward purely its own, rather glorious than profitable. For indeed, other Rewards, are not given on so noble an Account, since we use them upon every Occasion: With Money we recompense the Fidelity of a Servant, the Diligence of a Courier, a Dancing-Master, a Tumbler, a Flatterer, &c. and the most vile Offices they do us; nay, even Flattery, Pimping, Treason, and all sorts of Vice, are paid with Money: 'Tis no Wonder then, that Virtue receives, and desires less willingly this Sort of common Payment than that which is proper and peculiar to it, and is all generous and noble. *Montaigne's Essay*, Liv. 11. Chap. vii.

and *Pre-eminence* of great Men among Subjects be measured by the *Benefits* and *Assistance* they give, or at least are capable to give among their *Inferiors*, it will be but insignificant, and without Reality. But because, if *Princes* were obliged always to place their *Subjects* according to their *intrinsic Worth* and *Merit*, the Trouble would be infinite to make *Reviews* of them so often as it would be necessary; and besides, that no such Review could be made without displeasing the greatest Part of them, since 'tis certain, that the Generality of Men never consider how many they have left below them, but how many they still see above them; it might seem perhaps to be the most proper and easiest Method to bestow *Honours* upon the *Subjects*, at least upon them of the *best Rank*, according to the *Offices* they bear in the *Commonwealth*. And then again, it will be easy to prevent Complaints, if none but Men of *Merit*, and Persons well qualified are put into those *Offices*; and if the *Offices* themselves are disposed in a natural and proper *Order*. And in general, the most just and perfect *Order* of *Offices* seems to be, when the *Honours* annex'd to *Offices* are greater or less, proportionably, according to the Nature, Weight, and publick Importance of the Affairs and Business which belong to the Management of them; and according as it requires the greatest *Parts* and *Accomplishments* to discharge them. In *Homer*, *Dignity of Office* is prefer'd to that of *Blood*, even of natural *Bravery* and *Courage*. For thus *Nestor* tells *Achilles*:

Εἰ δὲ σὺ καλεῖσθαι ἐσσι, δεῦρ δὲ σε γένοιτο μέγιστος,
Ἄλλ' ἵνα σέβῃσθαι ἐσσι, ἐπεὶ πλείωνων ἀνδρείαι.

We own you brave, your Race divine adore,
Him greater think, because his Power is more.

But it sometimes also happens, that some *Offices* in the *Commonwealth* have larger Shares of *Honour* annexed to them, than of *Authority* and *Power*; and sometimes the quite contrary; perhaps, for fear, lest *Honour* attended with much *Wealth*, and *Power*, might tempt the *Magistrate* to take Arms against the *Commonwealth*. But in every *Rank* of *Offices*, Men should be thought more or less *honourable*, according to the *Dignity* of the *Employment* they have in it. Now though it is unavoidable, that one *Office* will be look'd upon as more *honourable* than another; yet this will be no Reason that all and every particular Person, entrusted in the more *honourable* *Office*, should therefore challenge *Precedence* from all and every Person in the less *honourable*; but only that the *highest* Person in the *inferior* *Office* ought to give *Place* to the *first* in the *superior*, but may still

have *Preference* to all that are *subordinate* to the *first*. It is but rarely seen, that the Person gives *Lustre* and *Honour* to the *Office*. So it happened once at *Thebes*, to the *Office* of *Tax-gatherer*, after *Epaminondas* had born it. But as to the *intrinsic Value* of all *Marks* of *Honour* and *Dignity*, that depends upon the *Virtues* and *Qualifications* of the *Persons* that wear them. And this was what *Antisthenes* meant, when he desired the *Athenians* to make a *Decree*, that *Asses* should be *Horses*. "For though, as they told him, nothing could be more contrary to common Sense and Reason; yet, as he answer'd, to prefer Persons to *Places* of *Trust*, and *Command* in the *Commonwealth*, that are no way qualified for them, but only by that publick *Act* and *Declaration*, which puts them into them, is almost as absurd." But if the *Subjects* come to an Agreement among themselves, about their *Order* of *Place*, or if *Custom* hath introduced any particular *Order*, either Method may be supposed to have the Force of *Law*, unless the *Government* except against, or forbid it.

XXIV. But if *Comparison* is to be made between eminent Men of different *Commonwealths*, it is clear, that the *Foundations* of *intensive Esteem*, even where such Persons are concern'd, can produce nothing more than an *Aptitude* to receive *Honour* from others, who have less *Pretensions* to those *Foundations* than themselves. And that whether the Person of *greater Eminence* come into a *foreign Commonwealth*, as a *Traveller* or *Stranger*, or meet others in a *third Place*; it must be excepted only, if the *Prince* oblige his *Subjects* to give *place* to the *Stranger*, or if the *Dispute* be determined by some *third Prince* where they meet, or if it be decided by *Agreement* or *Custom*. And therefore the *Dignity* of an *Office*, which a Man bears in his own *Commonwealth*, gives him no *Right* to prefer himself to the *Subjects* of a *foreign State* that may perhaps bear *Offices*, which he in his own Country demands *Precedence* upon. For a *Right* which is of Force against *Fellow Subjects*, is not therefore of Force against all other *Persons*; for the same Reason that the *Laws* of *foreign Nations* oblige none but their own *Subjects*. Nor is it any material *Objection*, that perhaps the *Foreigner* in his own Country may have a greater *Title* than the Person he disputes against. For every *State* and *Commonwealth* may set what *Value* they please (within themselves) upon *Titles* and other *Marks* of *Honour*, whether given by themselves, or others. Besides, the *Value* of *Offices*, by the *Greatness* of which the *Measures* of *Honour* are generally taken, is different in different *Nations*. And even the most benefi-

^a Add. Lord Bacon's Essays, c. 52.

^b Otherwise it will fall out, as *Claudian* saith in *Eutropium*, l. 2. ver. 322.

— Quis non consule tali
Vilis honos?

— Honour itself grows mean,
When such a Consul rules.

^c *Ovid*. *Metam.* l. 13. ver. 365, 368.

— Ratem qui temperat, antest
Remigis Officium.

'Tis more to rule the Heins
Than ply the Oar.

^d *Hom.* l. 1. *Iliad*. ver. 280, 281.

^e *Id.* *Plot.* in *præcept. gerend. resp.* p. 811.

^f *Id.* l. 12. t. 8. l. 2. C. ut dignitatum Ordo servetur. And it is a remarkable Place in *Suetonius* *Vespas.* c. 9. That it might be known, that the two Orders were not distinguished so much by the Liberties they might use one another with, as by their Dignity; upon a Quarrel that happened between a Roman Senator and a Knight, he thus pronounced, That ill Language ought not to be given nil to a Senator; but that it was lawful enough to return it, when he began it himself.

^g Add *Memoires de Wicquefort touchant les Ambassadeurs*, p. 519.

cial and useful *Arts* are not every where equally esteem'd; as it is well known, that in some *Countries* the *Arts of Peace* are most valued, in others those of *War*. Besides, it is particularly observable, that the *Words* by which the different Degrees of *Honour* are express'd, do not only denote different *Dignities* in distinct Commonwealths, but have also sometimes greater *Value* set upon them, and sometimes less, even in the same Commonwealths, according to the Alterations of *Time*, which raises or lessens, we know, the *Price* of every Thing else. For the *external Signs of Esteem* have their determinative *Value* set by the *Imposition* of every particular Commonwealth; but the *Foundations of intense Esteem*, taken as they are in their own Nature, and in the Estimation of wise Men, can never lose their *Value*. And therefore the World is every where so just to *Virtue*, to all celebrated *Arts, Functions, and Employments*, as to pay them *Honour and Respect*. But by the Possession of these only a Man hath no *Right* to demand any particular *Marks of Honour* in *foreign States*; except he can obtain such a *Right* by some of those *Ways* before mention'd. But, because *Marks of Honour* are always presumed to be given as *Rewards of eminent Virtues*; therefore the *civiliz'd Part* of the World abroad generally pay almost the same *Degrees of Respect* to the *Honours of foreign Nations*, that are allowed them at *home*¹. But still they would be thought to do so, more out of *Civility and Complaisance*, than from any *perfect Obligation*. But there also are some States that allow but little *Value* to *foreign Honours*. *Cicero* speaking^a of some particular *Foreigners*, who were of *noble Families*, does not call them *absolutely noble*, but says they were (*domi*) at *Rome*, or (*apud suos nobiles*) among their own People *noble*; the Meaning of which is, that *foreign Nobility* was not allowed the same *Value* at *Rome*, that it had in its own Commonwealth. What *Cicero* says in another *Place* seems more insolent^b. *If*, says he, *we make a Comparison between the Men, the meanest Citizen of Rome is equal to the greatest Man in Gallia*. The *Honours* that were given them that won the *Prize* at the *Olympick Games* in ancient *Greece*, are well known: But it would have been ridiculous for them to have expected the same in other *Places*, where *Strength and Activity of Body* were not in so much *Esteem*.

^a *Pro M. Fonteio, c. 8. in fin.*

^b *Pro L. Flacco, c. 13. in fin.*

^c And this *Value*, I believe, is scarce any where higher, than among the *Indians*, according to the Account we have of it in *Orosius, De rebus gestis Emanuel. l. 2.* Who tells us, that if any of the *Inferior People* chance to touch a *Nobleman*, they think it a *Stain* upon their *Nobility*, and a *Disgrace* to their *Family*, and revenge it as an *Injury* of the highest Nature, by the *Death* of those unfortunate Persons, that happened upon them. And therefore, he says, all below the Rank of *Nobility*, when they take a *Journey* any whither, are forced to call out and make a *Noise*; and by that the *Nobles*, having Notice of their coming, command them to break the *Way*, and so the *meaner People* escape *Death*, and those of *Quality* the *Danger* of a perpetual *Blemish* to themselves and *Family*. And as the greatest Crimes do not deprive the one of their *Nobility*, so neither can the greatest *Virtues* excuse *Obscurity of Birth* in the others, but every Man must of *Necessity* submit to the *Condition* and *State* his *Father* left him in. And these *Nobles*, we are further told, were allowed the *Privilege* to lie with other Men's *Wives* when and where they pleas'd; and if any of them happen'd to be with another Man's *Wife* (a *Sign* of which was a *Target* hung up at the *Door*) the poor *Husband* dur'd not go into his own *House*.

^d *Phil. Baldani Descript. Ora Malabar & Coromandel, c. 26. & de Idolat. Indor. Part II. c. 16. Mandilo Itiner. l. 2. c. 10. Add. Abrah. Rogerius de Brammibus, c. 1. 2. Diodor. Siculus, l. 1. c. 74.*

In *Euripides Hippolyt. Coron. ver. 409, 410.* 'Tis said of *Adulteries*,

This Evil first from noble Families,
With wide Infection tainted the whole Sex.

^e *Ed. Dio. Chryostom. Orat. 15. in 2. p. 235. Ed. Morel. Grotium. l. 2. c. 7. §. 8.*

^f *2. Jugurth. c. 89.*

^g *Alcibiad. l. p. 440, 441. Ed. Wech.*

Mr. BARB. NOTES ON §. XXIV, XXV.

¹ *V. Cicero. Orat. in Ver. l. 3. c. 23. p. 44. Ed. Grav.*

² *Horat. L. 4. Od. 4. ver. 29.*

XXV. *Lastly*, Since almost in every Nation some Degree of *Dignity* is supposed to adhere to *Birth*; it will not be improper in this *Place* to enquire particularly what is implied in *Nobility of Blood*, and what *Value* ought to be set upon it, when consider'd in itself^c.

And here it will undoubtedly be allow'd, that *Nobility of Birth* doth not of itself bestow better *Constitution of Body* (though perhaps *Goodness and Elegance of Diet* may sometimes seem to contribute to it) neither does it produce more excellent *Dispositions of Mind*, or a *brighter Wit*, or more *vigorous Understanding*; but all these *Endowments* may as well attend the *meanest* as the most *noble Extraction*. *Nature* does not take any other *Method* in giving *Birth* to *noble*, than she does to *common Men*. And *conjugal Honour* is, or may be kept as *sacred* among *common People*, as *Persons of highest Quality*. Nor would it be an easy *Task* to prove, that *noble Families* are less corrupted, or expos'd to *Adulteries*, than the *poor or mean*^d. So that if even the *Virtues of Parents* could be always suppos'd to be transfus'd into the *Children*, yet it would be extream difficult for many *noble Persons* to prove, that their *Blood* descended to them *pure* from the first *Rise* of their *Family*, without *spurious or foreign Mixtures*^e. And it is so far from being always true, that

Fortes creantur fortibus & bonis^f.

The Brave do from the Brave and Good descend.

That on the contrary, we see nothing more common than *Instances* of the *Degeneracy* of the *Children* of the *greatest Men*. "Our *Parents* (as *Marcius* & saith in *Sallust*) may leave us all that it is possible for them to leave, their *Estates* and *Pictures*, and an happy *Memory* of themselves; but their *Virtue* they never did nor can leave; for that alone is what can neither be given nor received." But further, 'tis possible that *common Persons* may be as well educated as the *noble*; and 'tis not unusual to see the *Advantages* the *Great* and *Rich* have of cultivating and improving their *Minds*, scandalously mispent in *Sloth* and *Luxury*, to supply and support the most extravagant *Vices*. It may well be presumed, as *Plato* says^g, *That Nobility of Birth, if attended with good Education, may produce eminent Virtues.*

Virtues. But it is also evident *in Fact*, what *Degeneracy noble Families* sometimes sink into, and how much the *Glory of Ancestors* is obscured by the *Blemishes of Posterity* ^a. And 'tis certain, that many that have been *obscurely* born, have rais'd themselves to the *highest Honours*, purely upon the *Stock of their own Virtues*. *Iscocrates* ^b took it for a *Topick* to commend *Nobility*, that it did not, like other *Gifts of Fortune*, soon decay, or remove into other *Hands*, but continued always with the *Person* it once belonged to; and therefore was the best *Inheritance* Men could leave to their *Children*. But certainly, except a *Man* can support his *Nobility* by his own *Merits*, or except he enjoys by it some particular *Privileges* in the *Commonwealth*, it can be but a very *worthless inconsiderable* Thing. And therefore there is no *Necessity* in the *Nature* of the *Thing*, that the *Son* should succeed either to the *Places*, or *Degrees of Esteem* his *Father* enjoyed, only by his *Birth*; especially, since in the *last Resort*, *Mankind* are deriv'd from the same *Original*. For as *Marius* in *Sallust* says ^c "Every *Man* partakes of the same *common* *Nature*, and the *Brave* only have the best *Title* to *Nobility*." And therefore a *Man's* own *Virtues*, not those of his *Ancestors*, ought to recommend him; according to the *Character* *Tibullus* gives of *Mejjala* ^d.

*Nam, quanquam antiquæ gentis superant tibi laudes,
Non tua majorum contenta est gloria fama,
Nec quaris quid quaque index sub imagine dicat,
Sed generis prisceos contendis vincere honores,
Quam tibi majores, majus decus ipse futuris.*

For you, tho' grac'd by long descending Fame,
Depise the dull hereditary Name.
Nor from the dead will borrow sleeping Praise,
Or rob their Monuments your own to raise,
Greater than all the Heroes of your Line,
To your own single Merits, you confine
Your Praise; and to Posterity will leave
A greater Name than all your Race could give.

XXVI. But however, it hath obtain'd in many *States* and *Commonwealths*, that *Persons* of *Merit*, who have been placed by the *Government* in *Stations* to which particular *Privileges*, and peculiar *Degrees of Esteem* are allow'd, might have the *Advantage* of deriving the same down to their *Children* by *Birth*, and in the *Nature* of an *Inheritance* ^e. For 'tis certain, that *Nature* has

made no real *Distinction* between the *Birth* of the *Noble* and the *Plebeian*. The *Difference* between them is grounded entirely on the *Imposition* and *Indulgence* of the *Commonwealth*, which allows, that such a particular *State*, to which certain *Rights* and *Degrees of Esteem* are annexed, shall descend to the *Posterity* of the *Person* it was first conferr'd upon ^f, barely by *Birth*, without any new *Grant*. And if this *Imposition* be taken away, all the *Distinction of Birth* ceases. And therefore, when a *Prince* removes a *Commoner* into the *Nobility*, he cannot be supposed to make any *Alteration* in his *Nature* or *Extraction*, or to infuse new *Vigour* into his *Mind*; but only to place him in a *State* opposite to the *Commonalty*, and to give him *Liberty* to entail *that*, and the *Rights* consequent upon *it*, upon his *Children*. Which was properly enough signified by *Amasis* King of *Egypt*, when to shew that the *Obscurity* of his *Birth* was no *Reason* why he should be denied his due *Honour*, as he was *King*, he melted a *Bar* of *Gold* into an *Image*, and set it up to be worshipp'd ^g. On the other hand, if any *Man* be degraded from his *Nobility*, either by way of *Punishment* for some *Fault*, or because he refuseth to conform to the *Laws* of the *Nobility*; it is not supposed, that his *Nature* or *Temper* of *Mind* is therefore *altered*, or that the *Blood* he derived from his *Ancestors* is *changed*, neither can it be denied, that he continues to be of *noble Extraction*; but he is only deprived of a certain *State*, and of the *Privileges* that belonged to *it* in the *Commonwealth*. And then he is in all *Respects* no better than a *Commoner*. And in the same *Manner* it must be said, that neither *Legitimation* nor *Restitution* ^h in *Blood* make any real *Change* in *Nature*, but only introduce certain *moral* *Effects* ⁱ. *Machiavel* in his *History* of *Florence* tells us ^j, that after the *Tyranny* of the *Duke of Athens* was expired, the *sovereign Power* being lodg'd in the *People of Florence*, and the *Nobility* excluded by *Law* from any *Share* of the *Government*, a certain *Gentleman* call'd *Benchi*, of the *noble Family* of the *Boundelmonti*, for his *Gallantry* and good *Services* in the *Wars* against the *Pisans*, was prefer'd to be one of the *People*, that is, was made a *Plebeian*. And the same *Historian*, in another *Place*, says ^k, that the same *Privilege* was granted several others of the *Nobility*. And, among the *Romans*, *Clodius* left the *senatorian Order*, and was adopted into the *plebeian*, that he might be capable to be made *Tribune* of the *Commons* ^l.

XXVII. But

^a Arist. Rhetor. l. 2. c. 15. Nobility consists in Greatness of Extraction; Generosity in not departing from Nature, which all that are Noble cannot pretend to; for many of them are Persons of no Worth or Value. Add. Stobæus Serm. 84. 85.

^b Encom. Helenæ. ^c B. Fugurth. c. 88.

^d Tibull. l. 4. El. 1. ver. 28. &c.

^e Lesbonactes Orat. hortat. The Children or such as have behaved themselves with Bravery, in Dangers that threaten'd the Commonwealth, are looked upon to be noble. 'The Great ought not to love the first Ages of the World; it affords them a melancholy Prospect to look into them, and see that we were all descended from one Brother and Sister.' La Bruyere's Manners or Characters of the Age, p. 308.

^f Add. Huartus Scrut. Ing. c. 16. p. m. 488. &c.

^g Herodot. Enterp. p. 99. Ed. H. Steph.

^h And in this Sense we may understand that of Euripides. Phœnij. ver. 821. &c.

ὅ γὰρ ὁ μὴ καλὸν, ὃ πῶς ἔφθυ καλόν, &c.

For what is once dishonourable and foul,
Is never otherwise, the baseborn Son,

Still on his Mother's black Reproach reflects,
And on his Father's Obloquy and Shame.

ⁱ Lib. 3.

* L. 5.

Mr. BARB. NOTES on §. XXVI.

¹ P. C. l. 6. t. 8. De jure aureorum annullorum, & de natalibus restituendis.

² Vid. Livii Epitom. l. 103

XXVII. But however, it must be allowed, that generally all Governments, when they bestow any such *publick Honour* as that of *Nobility* on their Subjects, have regard to Persons known by some distinguishing *Excellencies*, or extraordinary *Merits*. And as such Persons justly deserve a larger Share of *Esteem* than others, so 'tis to be supposed, that their *Virtues* are thought more *valuable*, when the *Rewards* of them are allowed to be derived to those, for whom Nature gives all Men the strongest Affection; especially since 'tis natural to believe, such Favours may provoke the *Emulation* of other Subjects, and make them ambitious to gain the like *Rewards*. Besides, it is but natural to expect, that the *Children*, influenced by the Example of their *Parents*, may be proud to rival the *Virtues* of their *Families*, and maintain their *Title* by their *Honours*, by the same *Methods* which at first gain'd them. Nor is it less easy to suppose, that *Parents* may think their *Honour* engaged to take Care, that the State should not have Reason to complain, that their *Children* were grown degenerate. Now, when it was allowed therefore, that *Nobility* should be annexed to the *Birth*, and run in the *Blood*, it was to be expected that Persons would not submit to mix with *Families* of *mean* Extraction; lest by marrying beneath themselves, they might seem to debase their *Quality*, and cut off those *Rights* which they would deride to their *Children*. It might seem also prudential, rather to admit the *Daughters* of Equals than Inferiors to share in their *Dignity*; and it might be thought of Moment, that the *rich Tradesman's* Daughter might not be capable of being prefer'd before the *poorer* of the *Nobility*. And that *Posterity* might not dispute their *Descent*, it would seem necessary to keep an exact account of their *Families* and *Pedigrees*. When, on the other hand, it would be needless for Persons of *meaner* Rank to take the same Care to register their *Ancestors*, since they enjoy no special *Privileges* upon the Score of *Birth*, but are obliged to support themselves by their own *Industry* and *Virtue*.

XXVIII. Further, to illustrate what has been said, it may not be improper to enquire, what particular *Institutions*, relating to *Nobility*, were observ'd amongst the *Romans*. Now *Romulus* therefore, that he might digest his *rude disorder'd* Multitude, into the proper Form of a *Civil Body* or *People*, made Choice of an hundred Persons out of the *Muss* ¹ to be his *Council*; and these he call'd *Patres*, either to express the Nature of their *Station*, or their *Age*; the rest of the *People* were still no more than *Commons*. The De-

scendants of the first were call'd *Patricians*, by an easy and plain Denomination, implying, that they were of the *Family* of the *Patres*; or as others suppose, *That they only could show their Fathers*, the rest being only a Company of *Fugitives*, that could not tell who their Fathers were, nor prove that they were *free* Parents, and therefore were no better than *Filii Terræ* ². And this Supposition they attempt to prove, because whenever the *Patricians* were to be assembled by their Kings, the *Præcones* or *Criers* call'd every Man by his *own*, and by his Father's *Name*; but that the *Plebeians* were summon'd to the Assembly by a Trumpet, or *Ox-horn*, the *publick Servants* going through the City, and calling them by that Sound only. *Dionysius Halicarnassens* indeed, according to his usual Turn, gives a fopper Interpretation to this *Custom* ³, telling us that the *Præcones* call'd the *Patricians* by *Name*, by way of *Honour*; and that the *Commons* were summon'd by the *Horns* only for Expedition. But 'tis clear that *Decius* in *Livy* seems to contradict him ⁴. "For was it never heard, says he, in what manner these *Patricians* were at first constituted? that they did not drop down out of the Clouds, but were only such Persons as could (*Patrem ciere*) name their Fathers, that is, were no more than *Free-born*: I my self can now call a *Consul* my Father, and my *Son*, his *Grandfather* ⁵." From all which it appears, that it was *Title* enough to the *primitive Nobility* of *Rome*, to be born in *lawful Wedlock*, and of *free Parents*; "For indeed in all new erected Commonwealths, *Nobility* must necessarily be late, and rais'd by *Virtue* ⁶. And hence the *Patricians* urged, that they were the only Persons that were of any *Family*, or that were related by *Gentility* to one another." And therefore *Cicero* in his *Topicks* gives this Definition of the *Gentiles* or Persons of Extraction and Quality: "They are Persons that have all the *same Names*, are descended from *free Parents*, none of their *Ancestors* were ever *Slaves*, nor were they themselves ever depriv'd of *Liberty* ⁷." Though in Course of Time, 'tis certain the *Plebeians* also form'd and asserted their *Gentes* or *Families* ⁸. And hence the *modern Languages*, derived from the *Latin*, call *Noblemen* and *Persons of Quality* (*Gentlemen*) *Gentiles Homines*: But afterwards when the *Plebeians* were allowed to make *Inter-marriages* with the *Nobility*, and so all the *Disbonour* and *Baseness* of their *Original*, if there were ever any such, might seem to have been worn out; then the *Patricians* found out another *Difference* to distinguish themselves from the *Commons*, by instituting certain *Religious Rites* particular to each

¹ V. *Plutarch. Romulus*, p. 24. D. Et *Quæst. Rom.* p. 278. C. D.

² *Juvenal. Sat.* 8. ver. 272, &c.

³ *Rom. Antiq.* l. 2. c. 8.

⁴ *Liv.* l. 10. c. 8. *in fin.*

Et tamen ut longe repetas, longæque revolvas

Nomen, ab infamæ gentem delucis Afylo.

Majorum primus quisquis fuit ille tuorum,

Aut Pastor fuit, aut aliud quod dicere nolo.

⁵ *Liv.* l. 1. c. 34.

⁶ *Boetius* in *Topicis*. The *Gentiles* are such as bear all the *same Name*, as the *Brutus's*, the *Scipio's*; but if they are *Slaves*, they are not *Gentiles*. And though perhaps the *Children* and *Descendants* of *Freed Men* may have the *same Name*, yet they are not therefore in the Number of the *Gentiles*, because *Gentility* must be derived down from a long Race of such as were *Free-born*.

⁷ *Add Franc. Connanus Com. Jur. Civil.* l. 2. c. 11.

Boast then your Blood, and your long Lineage stretch
As high as *Rome*, and its great Founders reach;
You'll find in these Hereditary Tails,
Your Ancestors the Scum of broken Jails;
And *Romulus*, your Honour's antient Source,
Was a poor Shepherd's Boy, or something worse.

Mr. Steppeny.

each Family, and assuming a peculiar sort of *Sanc-timony* to themselves. And upon this Account they insisted, that all the Offices in the *Common-wealth* ought to be given entirely to them, because they only had the proper *Auspicia*, or *Omens of Success*. But this ridiculous Pretence was soon, as it deserv'd, expos'd and neglected by the *Ple-beians*. Though some of them too, to shew that the *Patricians* had no just Grounds to assume such a *Prerogative*, set up their *private Sacra* and *Family Rites* *. Which afterwards growing bur-theusome upon their *Heirs*, were taken off by *Com-emption*, as *Cicero* informs us †.

XXIX. But afterwards, when the *Senatorian Dignity*, and *great Offices* of the *Commonwealth*, which had been engros'd all by the *Patricians*, were left open and free for the *Plebeians* especi-ally, the *Nobility* of *Rome* was not measur'd so much by *Date of Families*, or *Patrician Descent*, as by *Number of Images*. And from that Time the *noble Families* of *Rome* were distinguish'd into *Patrician* and *Plebeian* †. The *Equestrian Order* was not properly *Noble* by *Institution* of the *Com-monwealth*. *Tacitus* says, indeed, in his *Life of Agricola*, that *Agricola's Grandfathers* on both sides had been *Procurators* or *Solicitors* to the *Emperor*, which is the *Equestrian Nobility*: But the right Sense of that Place is, that as they who were *Senatorian Families*, measur'd their *Nobility* by the great Offices they had born, usu-ally call'd *Magistratus Curules*; so the *Procurator-ship* to *Cesar* was look'd upon by the *Knights* to have been a sort of *Nobility*, especially because, besides that of *Prefect* of the *Prætorian Cohorts*, or the *Emperor's Life-Guards*, there was no high-er Office which belong'd to that Order, as such. So that in the latter Ages, the *Nobility* of *Rome* did not constitute any particular Order, separ-ated from the rest of the People by peculiar *Rights*, but every Man was allowed to be *noble* upon his own, or his *Ancestors Merits*, either as he was able to produce their *Statues* or *Images*, or to raise himself to *Places of Honour* by his own *Vir-tue* †. But though many of the *Roman Offices* were no less necessary and serviceable in Times of *War* than *Peace*, as that of *Dictator*, *Master of the Horse*, *Consul*, *Prætor*; yet since *Peace* is, as it were, the *ordinary State* of a *Commonwealth*, *War* the *extraordinary*; and since those Offices also seem, as well by their *Nature* as *Appellation*, to bear a nearer Relation to *Peace* than *War*; it must be allowed, that *Roman Nobility* had rather a *civil Original*, than a *military*. And indeed, it would have been a Method altogether *impolitick*, to have confin'd *Nobility* to *simple martial Cou-rage*, separated and distinguished from the Office and *Conduct* of a Leader (so as hereby to have

constituted a particular Order enjoying large *Rights* and *Immunities*) in such a *Commonwealth*, where *War* was the common *Profession*, as I may call it, of every *Subject*. The *Roman Nobility* therefore did not constitute any peculiar Rank of Persons in the *Commonwealth*; nor did it af-ford any other Advantage more considerable than this, that the *Images* of *famous Ancestors* usually made the Way to *Honour* more open and easy.

XXX. From all which it is evident, that the *Nature* and *Genius* of *modern Nobility* in most of the Kingdoms of *Europe* is much different. For with us the *Nobility* constitutes a particular Order, distinguished from the rest of the *Subjects* in *Dig-nity*, and by extraordinary *Rights* and *Privileges*. Besides that, the Prince frequently confers the *Honour* of *Nobility* without giving any pub-lick Employment with it, and that too, not so often in Consideration of *civil* as of *military Accomplish-ments* and *Virtues*. One Argument of which, among others, is, that *noble Families* distinguish themselves from one another, as well as from *Commoners*, by *Devices* impress'd upon *Shields* with an *Helmet* plac'd above; and which are therefore call'd *Arms*. Of the *Antiquity* of which, *Diodorus Siculus* may be thought to give an Ac-count †, when he tells us, "That the Arms of the *Gauls*, were Shields about the Height of a Man, flourish'd and emboss'd with every one's proper Device, as he pleas'd to have it. Some he adds, held before them Images of Beasts in Brass, artfully contriv'd to serve both for De-fence and Ornament. On their Heads they wore Helmets of Brass, beautified, as they thought, with some Mark upon the Crest of them, which might be seen at a Distance. Their usual Ornament was the Horns, or the Head of some Bird or Beast form'd upon them, or fix'd to them *." For what Reasons this Part of the World seems to pay so much Honour only to the *Virtues military*, when the *Chinese*, on the other hand, prefer the *Men of Learning* to those of the *Sword*, will not be difficult to resolve. For it may be consider'd, that though the Ad-vantages which the *Commonwealth* receives from Men of *civil Life* and *Profession*, are no way in-ferior to those it gains by Persons *military* (for certainly, to form good *Laws*; to administer *Justice* impartially; to increase the Riches of the State by Improvement of Trade and Commerce; to be able, by the Force of Eloquence, to com-pose popular Discontents, and to incline the Minds of the People what Way soever the Pos-ture of Affairs requires; to discover the Counsels and Designs of *foreign Enemies*, and to prevent or frustrate them; are *Excellences* of the highest Nature, and that deserve the greatest Honours)

yet

* V. Liv. l. 4. c. 2. l. 6. c. 40, 41. l. 10. c. 7.

† Cic. pro *Muræna*, c. 2. Add. *Godof. in Cic. Epist. Fam. L. 7. Ep. 29.*

‡ Liv. l. 10. c. 7. The *Plebeians* can number their Triumphs; and it doth not now repent them of their Nobility, l. 6. c. 37. to-wards the End. From that Time the *Commons* will enjoy every Thing the *Patricians* value themselves upon, Authority and Honour, Glory of War, Descent, Nobility.

§ To this Purpose is that of *Claudian*, *De Cons. Prob. & Olyb. Paneg.* ver. 13, &c.

— *Quemcumque requires
Hac de stirpe virum, certum est de Consule nasci.
Per fasces numerantur atri, semperque renata
Nobilitate vivunt.*

Through all the Line, each Worthy you can name,
His noble Birth doth from a Consul claim,
Th' Imperial Fasces each Descendant grace,
And add repeated Honours to the Race.

¶ L. 5. c. 50.

* Add. *Hobbes Leviathan*, c. 10. in fin.

yet *Civil* Persons have not always that *Esteem* and *Value* paid them, which is their *Due*, and especially among People of scanty *Knowledge* and *Observation*, both because the natural and acquired Perfections, which are necessary to the Attainment of *Civil Accomplishments*, lie generally out of common View, and are not well understood by vulgar Apprehensions; and because they seem to discover themselves in a sedate silent Way, without Noise, or Violence, or Danger. But now the *Military* Virtues and Qualities are perfectly of another Nature. And therefore, though *Courage* and *Resolution* are no less necessary in *Civil Administration* and *Conduct*, than *Military*; yet People of *Martial* Temper and Spirit, that had rather purchase a Subsistence with their *Blood*, than by their *Sweat* and *Industry*, think nothing more *glorious* and *noble*, than to be prepar'd against all the Terrors of *War*, than to face and defy *Death* and *Danger*, and to hazard, what is of all Things most valuable, *Life* itself; that other Men may live in greater *Ease* and *Security*. For these Reasons in many Kingdoms of *Europe*, the *Nobility* hold their *Estates* by a *feudal Right*, and have *Immunities* from several *Duties* settled upon them, which are exacted from those of *inferior Rank*, purely because they are obliged to attend the *Wars*, and assist the State in *Military Service*. The *Original* of which *feudal Right* seems to be hinted in *Lampridius's* *Life* of *Alexander Severus*, c. 58. where he tells us, "That the Lands which the *Emperor* took from the Enemy were given to the Officers and Soldiers that liv'd upon the *Borders*, to enjoy them for ever, provided they would oblige their Heirs to enter into *Military Service*, and never to live a private *Life*; the *Emperor* supposing that they would be the better Soldiers, when they were also to defend their own Estate." And hence

it is unusual for the *Nobility* to turn to *Trade* or *Merchandize*, not because such *Professions* are really *mean* and *dishonourable*^b; but because they would divert them from their *Military Way* of *Life*, and force them upon the *Dishonour* of enjoying *Fiefs* and *Privileges gratis*, without any Returns of *Service*. And therefore wherever the *Nobility* are allowed, without *Disparagement* to their *Honour*, to apply themselves to *Trade* and *Merchandize*, it may safely be infer'd, that they had no *Military Original*. The *Egyptians*, *Scythians*, *Persians*, *Lydians*, and almost all the *old barbarous Nations*, according to *Herodotus's* Account of them^c, look'd upon all Persons, that apply'd themselves to *Trades* and *Handicraft Employment*, to be the *meanest* and *lowest* Sort of *Subjects*; and their *Children* they always thought *mean* and *base*. They only were allow'd to be of *Quality*, that were above all *mechanical* Employments; and especially, that made *War* their *Business* and *Profession*^d. And at *Rome* there was a *Law* prefer'd by *Q. Claudius* Tribune of the *Commons*, "That no *Senator*, or *Senator's* Father, should have any *Ship* of greater Burthen than would contain the Quantity of three hundred *Amphors*." Such a *Ship* being suppos'd large enough to carry their *Corn* out of the *Field*; and all *Trade* look'd upon to be beneath Persons of that *Dignity*^e.

XXXI. But notwithstanding, there are and have been some *States* and *Commonwealths*, where the *Honours* allow'd to *Birth*, have been and are very *inconsiderable*; every Man being left to raise and support his *Nobility* by his *Merits* to the *State*. "So the *Egyptians*, we are told, in their *Funeral Orations*, never used to make mention, as the *Greeks* did, of the *Family* of the Party *Deceased*; because they thought every Man equally *noble*: But his *Education* they were always

^a *Vid.* *Arist. Probl.* §. 27. q. 5. The *Nobility* expose their *Lives* for the *Preservation* of the *State*, and their *Sovereign's* *Glory*. The *Magistrate* casts the *Prince* of Part of the *Care* in judging the *People*; on both *Sides* sublime *Functions*, and of great *Advantage*: And Men are scarce capable of performing greater *Things*. Yet I know not the *Reason*, why the *Sword* and the *Gown* are always quarrelling with each other; and have almost exhausted their whole *Stock* of *Invectives* on both *Sides*." *La Bruyeres Manners or Characters of the Age*. p. 305. Edit. *Bruss.* 1697.

^b *Conf. Bodinus de Rejub.* l. 3. c. 8. p. m. 546. Some indeed fetch the *Reason* of this from *Ecclesiasticus* xxxviii. 25, &c. and because, as *Cicero* saith, *Offic.* l. 1. c. 42. they make no *Profit* unless they resolve not to spare for *Lies*. ^c *L.* 2. p. 98. Ed. *H. Steph.*

^d *Add.* *L.* 4. t. 63. l. 3. *de Commerc.* & *Mercator.* & *L.* 12. t. 1. l. 6. *C. de dignitatibus.* *Aristot. Polit.* l. 3. c. 3. *Cic. Offic.* l. 1. d. 1. The *Gains* that all *Mercenaries* make, who sell their *Labour*, and not their *Art*, are *base* and *fordid*; and the *Wages*, they receive is the same *Thing* as an *Earnest* of their *Slavery*.

^e *Liv.* l. 21. c. 63. and *Juvenal* calls the *Merchant*, *Vilis facci mercator elentis*, *Sat.* 14. ver. 269. a *fordid* *Wretch* that trades for nasty *Wares*.

^f *Juvenal* in the following *Verfes*, admirably well exposes the false *Notions* of the *Roman* *Nobility*, and the *ridiculous* *Pride* of the *Gentry*, that had no *personal* *Merit* of their own, but owed every *Thing* to their *Ancestors*.

Tota licet veteres exornent undique ceras
Atria, Nobilitas sola est atque unica virtus.
Paulus, vel Cossus, vel Drusus, moribus esto.
Prima mihi debes animi bona. Sanctus haberi
Justitiaque tenax, factis, diis,que mereris?
Agnosco procerem

Tum licet à Pico numeres genus, altaque se te
Nomina delectant, omnem Titanida pugnam
Inter Majores, ipsumque Promethea tonas:
De quocumque aces proavum tibi sumito libro.
Quod si præcipitem rapit ambitio, atque libido,
Si frangis virgas sociorum in sanguine, si te
Delectant hebetes lasso lixtore secures:
Incipit istorum contra te stare parentum
Nobilitas, claram facem præferre pudendis,

Long Galleries of Ancestors, and all
Those Follies that adorn a Country-Hall,
Challenge no Wonder or Esteem from me:
Virtue alone is true Nobility.
Live therefore well: To Men and Gods appear
Such as good Paulus, Cossus, Drusus, were. —
Convince the World that you're devout and true,
Be just in all you say, and all you do,
Whatever be your Birth, you're sure to be
A Peer of the first Magnitude to me. —
Then trace your Birth from Pico, if you please;
If he's too modern, and your Pride aspire
To seek the Author of your Being higher,
Choose any Titan, who the Gods withstood,
To be the Founder of your antient Blood,
Prometheus, and that Race before the Flood:
On any other Story you can find;
From Heralds, or in Poets, to your Mind.
But should you prove ambitious, lustful, vain,
Or could you see with Pleasure and Disdain,
Rods broke on our Associates bleeding Backs,
And Headsmen lab'ring till they blunt the Ax;
Your Father's Glory will your Sin proclaim,
And to a clearer Light expose your Shame.

Mr. Stepney.

“ always sure to speak of, and Manner of Life, his Piety and Devotion, his Justice, Continnence, and what other Virtues he was known to have practis'd.” So the *Turks* never set a higher Value upon themselves, than what may seem due to their own *Merit*: To the *Ottoman Family* only they allow *Nobility of Blood*^b. Neither do the *Chinese* express any Honour for *Antiquity of Descent*, the poorest and meanest Person in the *Empire* is capable by his *Learning* only of preferring himself to the highest Places of *Honour*^c: And in their *Marriges*, neither the *Emperor* himself, nor any of his *Children*, make Choice of their *Wives* with regard to *Extraction*, but only to the Beauty and Agreeableness of the *Woman*^d. Such Customs, perhaps, may be contrary to those which are receiv'd in this Part of the World; but notwithstanding the wiser Part of Mankind ever have, and always must allow it to be true, that *Nobility* ought not to depend only upon the *Blood*, but should much rather be rais'd and establish'd upon *Virtue*^e. It was a severe, but a very proper Answer which *Antigonus* gave to the Son of a brave old Officer, ambitious of *Honours* he had not deserv'd, 'Tis your own *Virtue*, and not the *Blood* you derive from your *Father*, that must recommend you to me^f. For as *Plato* saith^g, “ Every Man has had a numerous Race of *Ancelors* before him, some of which were perhaps rich Men, and some poor; some may have been *Princes*, and some *Slaves*; some barbarous, and some civilis'd^h.” And it is not unlikely, as another suspectsⁱ, that the

Poets derived their *Heroes* from the *Gods*, only to cover some Misfortunes or Defects in *Birth* or *Quality*, which might perhaps have been found out, upon a strict Enquiry into their *Descent*. For 'tis certain, if we were to unravel any Man's *Nobility*, we should at last come to something mean and little^k: And therefore *Lycurgus* prov'd by the fam'd Example of the two *Dogs*, that it is not *Nature*, but *Education* that forms Men to *Virtue*^l. And 'tis easy for a Man of the latest Quality to give them of *ancient* but corrupt and degenerate *Nobility*, the same Answer that *Iphicrates* did to *Hermodius*, one of the old Race of the *Hermodii*, when he objected to him the *Meanness* of his *Birth*, I am the first of my *Family*, and you are the last of *Yours*^m. Nor are there wanting those that argue, that it is unjust to exempt any Man, or to grant him *Immunity* from any particular *Duty* and *Burden* in the *Commonwealth*, to the *Prejudice* of other *Subjects*; or to give him easier *Admission* to *Preferments* and *Offices*, barely upon the Score of *Birth*, which, 'tis certain, can of itself confer no extraordinary *Virtues*, and which it is in no Man's Power to procure for himselfⁿ; since others may be as well, perhaps better acquainted with the *Arts* necessary for the *Administration* and *Management* of those *Offices*, than he is, and particularly if he be a Person given to the Enjoyments of *Ease* and *Pleasure*^o. In short, that it may seem to be a very great Misfortune in a *Commonwealth*, when the *Civil Sovereign* is so tied up and confin'd to a particular *Order of Men*, in

^a *Diod. Sicul.* l. 1. c. 92. *Tullus Hostilius* in *Dicryf. Halicam.* l. 3. p. 148. Ed. *Lipf.* says, I cannot think that human Nobility can consist in any Thing but *Virtue*.
^b *Auger. Busbequimus*, Ep. 1. And what he saith of the *Fanizaries* in the same Place.
^c *Martin. Praef. Hist. Sin.*
^d *Neuhof. in legat.* p. 280.
^e *Senec. Hercul. Fur.* ver. 339, 340. *Quigenus jacat inum, aliena laudat.* *Boetius de Consolat. Philosoph.* L. 3. Metr. 6.

*Quid genus & proavos strepitis?
 Si primordia vestra,
 Autoremque Deum spectes,
 Nullus degener axtat;
 Ni vitius pejora fovens,
 Proprium deserat ortum.*

Horace, *Sat.* 6. l. 1. ver. 7, 8. to *Mæcenat.*

*Referre neges quali sit qui que parente
 Natus, dum ingenuus.*

Claudian, l. 2. ver. 133. de *Laudib. Stilicon.*

———— *Lectos ex omnibus oris
 Erebis; & meritum, nunquam cunabula quaris
 Et qualis, non unde fatus.*

Add. *Seneca de Beneficiis*, l. 3. c. 28. & *Epist.* 44. and thus *Camilejus* in *Livy*, l. 4. c. 3. The Growth of the *Roman Empire* was owing to this, That no Family was thought mean and contemptible which was eminent for its *Virtues*. *Herodotus* l. 5. c. 1 The Gifts of Fortune are frequently bestowed upon such as do not deserve them; but the *Virtues* of the *Mind* are every Man's own proper *Glory*. And *Greatness* of *Birth*, *Riches*, and the like, though we think them happy that enjoy them, yet can add no real *Praise* to a Man, because they are derived from others.

^f *Plutarch. de vitios. Pudore*, p. 534. & in *Apophth.* p. 187. B. & In *Theatrico*, p. 128. C. Ed. *Wech.*
^g There is a Passage like this in *Dio Chrystome*, *Orat.* 15. de *Servitute*, p. 23; S. B. It is impossible, that from the Beginning of the World, there should have been any Race of Men, in which there have not been almost innumerable Instances of some of the Progeny that have been *Slaves*, of others of them that have been *Tyrants* and *Princes*, *Captives* and *Criminals*, *Tradesmen* and *Mechanicks*, and in short, some of all *States*, *Professions*, and *Conditions*, that have been in the World, and that have, in their Turns, gone through all the *Business* and *Employments*, all the *Fortunes* and *Calamities* of *Human Life*.
^h *Dio. Chrysol.* *ibid.* ⁱ *M. Seneca*, L. 1. *Controv.* 6. ^j *Plut. Apoph. Lacon.* p. 225.
^k *Plut. Apoph. Adl. Philo Judæus de Nobilitate.* *Stobæus, Serm.* 84, 85, 86, 87. *Tho. Brown de Religione Med.* Part. II. c. 1. When I speak of the *Vulgar*, I do not understand the common People only, and the lowest Dregs of the *Rabble*. For even among those of the higher Ranks, there is a Sort of vulgar inferior Multitude, you may safely say, made entirely of the same *Materials* with the meanest of the *Populace*. For my Part, I make no *Scruple* of ranking them with the *Mechanicks*, however their *Fortunes* may conceal the *Defects* of their *Understanding*, and their *Riches* seem to excuse their want of *Sense*.
^l *Euripides Electra*, ver. 551.

Παλλοὶ γὰρ ὄντες ἐδ γενεῆς εἰδὲ κακοί.

The Noble often are Degenerate.

^m Such as those *Aristophanes* mentions, *Ran. Act.* 3. §. 1. v. 2. That were good for nothing but to Eat and Drink for those *Jurcal* speaks of, *Sat.* XI. ver. 11.

Quibus in solo vivendi causa palato est.

Such whose sole Bliss is Eating, who can give But that one brutal Reason why they live.

Mr. Congreve.

in disposing Places of *publick Trust*, that he cannot have the *Affistance* of his other *Subjects*, though in *Business* they are well *qualified* for; and especially, if he has not Power to *chuse* any Person of *Worth* into such an *Order*. For when it becomes necessary for Princes to support and favour the *Nobility* only, that by their *Affistance* they may more easily restrain and keep in Awe the rest of their *Subjects*, 'tis certain that their *Power* grows feeble, and that the *Reins* of Government are ready to drop out of their Hands; since they are forced to enter into a kind of *Faction* with Part of their *Subjects*, to distrust the Force of an *open Authority*, and take Refuge in the *artful Designs* of *secret Policy*. I shall add only what my Lord *Bacon* says in his *Advancement of Learning* *, "That a Kingdom that would be great, mu't not increase its *Nobility* to too great a Number.

XXXII. It may be proper now, in the last Place to enquire, whether *Civil Dignity* and *Marks of Honour* depend upon the *sovereign Power* as to their *Durations* also and *Continuance*, as well as in their *Original*. And here it must be enquired, whether the *Marks of Honour*, and the *Privileges* and *Rights* annexed to it, are *confid'd* to any particular *Office* or *Employment* in the *Commonwealth*, which the *Sovereign* has the *Disposal* of; or, whether they are settled upon the *Subject* in the *Nature of Property*. Upon the first Supposition, it is evident, the *Sovereign* has the same *Power* that he has to appoint or to remove his *Officers* and *Magistrates*. *Fabius* the *Consul* very well express'd, not only the Greatness of his Spirit, but the Submission also he thought himself oblig'd to pay to the *Power* of the *Commonwealth*, by that Calmness of Temper which he shew'd, when the *Master of the Horse* was made equal with him, while he continued *Dictator* †. *Solon* us'd to say, "That *Courtiers* and the *Favorites* of *Princes*

"were like *Counters* used in casting up *Sums*; "for as *Counters* sometimes signify a greater "Number, and sometimes a lesser, so these *Crea- "tures* are absolutely at the *Mercy* of their "*Princes*, whose *Pleasure* makes them great and "noble, or mean and despicable." But upon the second Supposition, when the *Subject* enjoys his *Dignity* and the *Marks* and *Badges* of *Honour* in the *Nature* of *Property*, the *Government* cannot in Justice take them from him, unless by way of *Punishment*. And in this Case, as *Aristotle* in *Ælian* saith ‡, "There is a wide Difference between not obtaining *Honour*, and between being turn'd out of it after a Man has obtain'd it: For it is no great Pain to a Man not to gain what he pursues; but to be dispossessed of what he has gained must be a sensible Affliction. But notwithstanding, the *Immunities* and *Privileges* annex'd to *Honour* may either be laid under *Suspension*, or be entirely taken away upon some pressing *Emergency* in the *Commonwealth*; Allowance being made for them, as it best may, in some other Method. For since the *Extremities* and *Necessities* of the *State* must always be supposed to be *Exceptions* to all such *Privileges*; it would be the most extravagant Absurdity imaginable, to make them sacred and inviolable beyond the *necessary Defence* and *Preservation* of the *Commonwealth*. From what hath been said, it may also be discovered, how far any *Commonwealth* may with Justice enact, that *Children* of *Traytors* shall be excluded from all *Honours* in the *Commonwealth*? So it was decreed by the *State* of *Athens* in the Case of *Antipho*, as appears in his *Life* §: And at *Rome*, *Sylla* made a *Law*, that the *Children* of all Persons *proscribed* should not appear Candidates for any *Honour*. And the Answer to it in short is, that the *State* may justly enough deny them all *publick Dignities* and *Employments*, but cannot rightly deprive them of *simple Esteem*.

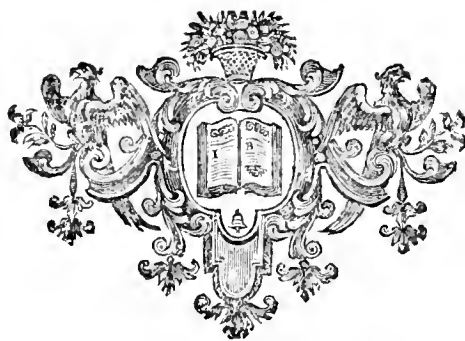
* L. S. c. 3. n. 3. Vid. Ellis, c. 14. by the same Author.

† Var. Hist. l. 12. c. 1.

‡ Vid. Liv. l. 22. c. 15. 26.

§ Vid. Polyb. l. 5. c. 26.

¶ Vid. Plutarch. in Ejus Vit. in Orat. 10. c. 1.



C H A P. V.

Of the Power of the Sovereign, both over the Publick Patrimony, and the Estates of Private Subjects.

The CONTENTS of every Paragraph of the Fifth Chapter.

- | | |
|---|---|
| <p>I. <i>What Power the Prince hath over the Goods of the Commonwealth, where the Kingdom is his Patrimony.</i></p> <p>II. <i>The Subjects do not every where owe the Propriety of their Estates to the Commonwealth.</i></p> <p>III. <i>The Sovereign may make Laws to direct the Subjects in the Use of their Goods and Estates.</i></p> <p>IV. <i>And also impose Taxes upon them.</i></p> <p>V. <i>What is to be observ'd in the Imposition of Customs.</i></p> | <p>VI. <i>And other Taxes.</i></p> <p>VII. <i>Of the Sovereign or Transcendental Propriety.</i></p> <p>VIII. <i>What Power the Prince hath over the Goods that belong to the Commonwealth, as such.</i></p> <p>IX. <i>Of the Alienation of the Kingdom, or any part of it.</i></p> <p>X. <i>A Prince cannot make his Kingdom a Fief, or mortgage it, without Consent of his People.</i></p> <p>XI. <i>Nor alienate any Thing incorporated in the Crown.</i></p> |
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TO understand distinctly what Power the Sovereign has over the Estate and Fortunes of the Subject, it will be necessary to observe, that this Power is derived either from the Nature of Sovereignty in itself; or else from the particular Manner of the Acquisition of it. For it is manifest, that there is a great Difference between a Prince¹, that has rais'd his own Kingdom, collected, as it were, his own Subjects, and who was at first the universal, absolute Proprietor of every Thing in the Commonwealth; and another freely call'd to Government, and invest'd with Sovereign Power, by Persons already in Possession of their distinct Proprieties. The first, it is clear, hath not only all that Power over the *Bona Reipub.* the Goods contain'd in the Commonwealth, which flows from the Nature of sovereign Power itself, but also the same which every Master of a Family has to his Estate, except he is pleas'd voluntarily to remit any Part of his Right. If such a Prince therefore keeps his Propriety entire, the Subjects can have no better Right to what they possess, than the Roman Slaves had to what they got by their own labour, that is, a precarious Possession, revocable at Pleasure, whenever the Prince thinks fit. But however, as long as the Subjects are in Possession of such Goods or Estates, they may justly supply themselves with Sustainance and other Necessaries from them, by way of Wages, for the Trouble of improving and preserving them. And therefore what *Hobbes* ² *falsly* applies to all manner of Subjects holds true only with regard to these, *viz.* "That the Propriety, which a Subject hath to his Goods, consists in a Right to exclude all other Subjects the Use of them, but not to exclude the Sovereign; as in a Family, the Father grants some of his Sons a Propriety to certain Goods, distinct from the Proprieties of other Sons of the same Family, but not from that of the Father himself; fo

" that every Son in the Family enjoys a Propriety barely to *so much*, and for *so long* as the Father pleaseth." But if the Prince I am speaking of recedes from any Part of his Right, the Subjects will have just as much Right to their Goods, as the Concessions of their Prince make over to them. And this, by different Princes hath been done different Ways. *Pharaoh* was to have the fifth Part of the Increase of all the Land of Egypt to himself; the other four were to continue to Husbandmen; only the Lands that belong'd to the Priests were not sold, and they had a third part of the Land by the Donation of *Isis*³. *Strabo* says, that in *India* the Land was the Prince's, and Husbandmen were hired to cultivate it for the fourth Part of the Produce⁴. And this is the Custom now in the Dominions of the Great Mogul; where the Emperour is also Heir to all his Ministers and Servants, and to all Merchants. In the Kingdom of *Congo*⁵ no Subject has any Property which he can transmit to his Heirs, but all falls to the Prince; and he administers and disposes the Goods to what Uses he thinks fit. In such Countries therefore, all the Right private Subjects have to their Goods and Estates, depends originally upon the Favour of the Prince, who hath an absolute Power to dispose of all they have, so far as the *Compacts* and *irrevocable Grants* he hath made will permit. But after all, it is usually observ'd by Travellers of those Countries, and particularly of the Empire of the Great Mogul⁶, that that absolute Propriety of the Prince, has been the Reason why that and other Kingdoms of the East, otherwise very happy in the Advantages Nature has given them, should lie wild, desolate, and barbarous, and either be always poor and decaying, or at least never arrive at the Splendor and Greatness of the European Nations, where the Princes are generally more tender of invading the Properties of

¹ De Civ. c. 6. §. 15, &c. 12. §. 7.² Gen. xlvii. ver. 23, 24, 26. Vid. *Diod. Sicul.* l. 1. c. 21. 72. Et *Grot. Com.* in Gen. xlvii. 26.³ *Strabo*, l. 15. p. 484. Ed. *Genev. Casaub.* *Diod. Sicul.* l. 2. c. 40. Vid. *Garcilass de la Vega*, *Com. Roy.* l. 5. c. 5.⁴ *Bernier de Nupé*:is *Motibus in Imp. Magn. Mog.*

Mr. BARB. NOTE on § I.

¹ See above, in B. 7. c. 6. §. 16.² Vid. *Edvard Lopez*.

Ppppp

of their Subjects, and where Subjects have the Liberty to defend their own, even against their Princes⁶.

II. But there are, on the other hand, Commonwealths, where the *original Right* the Subjects have to their *Properties* does no way depend upon the *Favour* or *Indulgence* of the *civil Government*. And this seems to have happen'd these two Ways; either *first*, when a People under the *Conduct* of a *Prince* they set over themselves remove in Search of *new Seats*: Or, *Secondly*, when a Number of *Masters of Families*, already possess'd of their several *Properties*, freely erect themselves into a *Commonwealth*, or voluntarily join themselves to some *Commonwealth* already established, and submit themselves and their Fortunes to *civil Government*. In the former Case, the Method usually observ'd is this: The whole Body of the People, under the *Conduct* of their *Leader*, possess themselves of some new *Country*, which perhaps in its large Extent is bounded by *Limits* which Nature her self, or the arbitrary Constitutions of the World, have given it; but which is afterwards *canton'd* into Parts, and distributed to particular Persons, either by *Lot*, or at the *Discretion* of the *Commander*, or possibly (tho' very seldom) by every Man's own *Choice*⁷. Now in this Case, tho' every particular Man's *Property* seems rather to be grounded upon the *Leader's* Appointment, than his own *Seizure*; yet it does not follow, that therefore all he has is owing purely to the *Favour* of his *Commander*. For every Man that voluntarily went in the *Expedition*, has certainly an absolute *Right* to share in the *Acquisitions* of it, and to be consider'd in the *Division* of the Land⁸. But much less do the *Properties* of the private Subject own any *original Dependency* upon the *Favour* and *Indulgence* of the *civil Sovereign*, where (as was supposed in the second Case) a Number of *Masters of Families*, possess'd of their *Liberties* and distinct *Properties*, freely submit to *civil Government*. For I take it to be clear, notwithstanding all that *Hobbes* has said to the contrary⁹, that Persons that live without *civil Government*, in a *Liberty* of Nature, may nevertheless enjoy their several *Properties*¹⁰. For admitting that Nature gave every Man a *Right* to every Thing, yet this is no Argument why every Man might not, by *Intervention of Compact*, have his separate *Property* divided to him. And tho' a *Compact* of two or more about Things left in a *Community* of Nature, does not in the least prejudice other Men, but leaves them to their full primitive *Right*; yet if all Men consent by *common Compact*, either ex-

press or *tacit*, to make a *Division* of Things, without Dispute this must introduce a true and real *Propriety*. And therefore *Hobbes's*³ Assertion is false, "That every Father of a Family, that is under no Subjection either to another Father, or to any common Master, has a common Right to every Thing⁴." Tho' it must indeed be allowed, that they that live under *civil Government* have their *Properties* better secured and defended, than they that live in a *Liberty* of Nature; for these must support themselves by their own single Force alone, while the others can call the whole Strength of the Commonwealth to assist them, either against the *Encroachments* of Foreigners, or the *Injuries* of their Fellow-Subjects⁵.

III. In Commonwealths therefore, where the *Properties* of the Subjects do not *originally* depend upon the Government, the *civil Sovereign* hath no further Power over them than what immediately flows from the Nature of the *Supream Power* in it self, unless the Subjects freely consent to enlarge it. "Every Thing, says *Seneca*¹, by a *civil Right* may be said to belong to the *Prince*, while yet the particular Parts of that wide Possession are divided among different Proprietors, and every Thing belongs to a distinct Owner. And therefore, when we present our Prince with our *Houses*, our *Slaves*, or our *Money*, we do not think we give him back his own. The Prince hath indeed a Power over all we have, but the *Propriety* is in the *private Subject*. 'Tis common to say, that such and such *Territories* belong to the *Athenians* or *Campanians*; but the People of those *Countries* distinguish and divide them further between one another by *private Boundaries*; the whole Extent of a Country may be under such or such a Commonwealth, but there are distinct *Proprietors*, who have their separate Portions of it. And therefore we may give away our *Estates* to the *Publick*, tho' in some Sense they may be said to have belong'd to it before; because the Title we have to them is of a very different Nature from that which the *Publick* can be said to have. For the *Prince* possesseth all by his *Sovereign Command* and *Authority*, the *private Subjects* by their *Propriety*²." And therefore the Emperour *Adrian*, when the People petition'd him to give a *Slave Liberty* that had pleas'd them in the *Chariot-Race*, reprimanded them for it, and told them, That it neither became him to free another Man's *Servant*, nor them to offer such an *Injury* to his *Master*³. And the Emperour *Claudius* made an *Edict*, to suppress a common Practice of begging

⁶ Garcilass. de la Vega, Com. Roy. l. 5. c. 2. relates, That it was the Command of the *Inca's*, that none of their Subjects should be obliged to plow the *Emperor's* Lands, before they had taken care of their own; because it was not likely any Man would be so diligent as he ought in his *Prince's* Business, that had not before well settled his own. The Poor, the same *Historian* says, were always look'd upon to be an useful Multitude among them, both in War and Peace.

⁷ See *Cornel. Nepos* in *Mitridates*, c. 2.

⁸ Vid. *Genes.* xiv. 14, 21, 22, 23, 24. VII. *Supr.* l. 4. c. 6. §. 3, 4.

⁹ Vid. *Genes.* iv. 4. xiii. 5. &c.

¹⁰ Vid. *Genes.* xxxiv. 30. Vid. *Xenoph.* Memorab. l. 2. p. 433. Ed. *H. Steph.* where *Socrates* saith, A Man is happier that lives secure in Society with a moderate Fortune, than he that leads a lonely melancholy Life, full of Fears and Dangers in the Enjoyment of the Riches of a whole Commonwealth. And in this sense we may admit of what *Cicero* saith, *Orat. pro Ciccina*, c. 25. That if we take away *Civil Right* and Government, there will be no Distinction left between one Man's *Property* and another's; and in his 2d Book of *Offices*, c. 21. more clearly. The chief Reason why Commonwealths were instituted, was, that every Man might enjoy what was his own: For tho' Men were by Nature directed to Society, yet they found it necessary to erect Cities for the Security of their *Properties*.

¹ *Senec.* de *Beneficiis*, l. 7. c. 4, 5.

² Vid. *Grac.* Com. in 1 *leg.* XVI. 24.

³ *Zonaras*, Tom. 2.

Mr. BARB. NOTES on § II

¹ *Ubi Supra.*

² See above, in B. 3. c. 4. §. 2, 3.

³ *De Cito*, c. 6. §. 15.

begging other Mens Estates of the Emperor; it being an Opinion current at that Time, that it was in his Power to give them away; and he restor'd an Estate he had obtain'd that way himself, when he was a private Subject^a. But now this Power we are here speaking of, may, I think, be properly enough reduc'd to three Heads: First, to the Right of making Laws to direct such a Proportion in the Use and Consumption of certain Goods and Commodities, as the State of the Commonwealth requires. Secondly, to the Right of levying Taxes. Thirdly, to the Exercise of the Transcendental Propriety^b. To the first Head

we may reduce all *Sumptuary Laws*¹, or such as prescribe Bounds to extravagant unnecessary Expences, which would in Course of Time be the ruin of private Families, and in consequence weaken the Commonwealth it self, by carrying the publick Money abroad into *foreign Countries*; whither the Humour or Vanity of Luxury and Waste generally runs^c. Besides, another Inconvenience to be prevented by such Laws is this, That they that squander away their Fortunes extravagantly, make themselves incapable of serving the Publick. For a Man, for Instance, that spends but two Parts in five of what he hath yearly

And therefore it was a Mistake in the Emperor Frederick to think that

*Quicquid habet locuples, quicquid custodit avarus,
Jure quidem nostrum, populo concedimus usum.
Rege figuratam Regis patet esse monetam;
Cæsaris & domino sub Cæsare fulget imago.*

All that the Rich and Covetous receive,
Is mine by Right, to them the Use I give;
The Royal Stamp, who claims the Coin, declares,
And Cæsar's Money, Cæsar's Image bears.

Gunth. Ligurinus, l. 3. ver. 480, &c.

It may be observ'd, that in these two last Verses, there is an Allusion to what our Saviour said to the Disciples of the Pharisees and Herodians, after he had ask'd 'em *whose Image and Inscription* the Piece of Money they brought him as Tribute bore: They answer'd Cæsar's; upon which he replied, *Render unto Cæsar the Things which are Cæsar's, and unto God the Things that are God's*. Matt. xxii. ver. 19, &c. But this does not prove, that by Right all the Subject's Goods belong to their Sovereign, as several of the Reform'd in France, have improperly maintain'd, who were in an Error, with regard to the Rights and Authority of the Prince. (*Nouvel. de la Republ. des Lettres, Avril 1703. p. 415.*) Our Saviour only means, that since the Jews made use of the Emperor's Coin, it was a Sign of his being Master of their Country, and of their tacit acknowledging him for their lawful Sovereign; so that they ought to obey him in every Thing that was not contrary to the divine Laws. See the Interpreters on this Passage.

^d *Dominium Eminens.*

^e V. Plin. Nat. Hist. l. 6. c. 22. The Arabians are certainly the richest People in the World, for they are the Merchants that exhaust the Wealth of the Roman and Parthian Empires: They are continually importing among us the Produce of their Seas or Woods, and never buy any Thing of us in return. N. H. l. 6. c. 23. Every Year constantly the Indies drain us of little less than 500000 *Sesterces*, besides that the Commodities we have from thence sell here for an hundred Times double the Advantage they do there. *Vid. l. 12. c. 18. N. H.*

Mr. BARB. NOTES ON §. III.

¹ "The other almost incurable Evil in a State (*says the Sage Mentor to his Pupil Telemachus*) is Luxury. As too great Authority poisons Kings, so does Luxury a whole Nation. 'Tis pretended that Luxury serves to maintain the Poor at the Expence of the Rich, as if the Poor could not get their Livelihood, by increasing the Fruits of the Earth, without effeminating the Rich by the Necessities of Voluptuousness. When once a Nation is accusom'd to look upon Superfluities to be Necessaries of Life, they will every Day be inventing new ones. They can no longer dispense with the want of Things, which were utterly unknown thirty Years ago. This Luxury is call'd a nice Taste, and the Perfection of Arts; this Politeness of a Nation, this Vice that draws so many after it, is commended as a Virtue, and spreads its Infection to the very Dregs of the People. The King's Relations imitate his Magnificence and Grandeur, the Nobility that of his Relations, and the Gentry or middle Sort of People equal the Nobility; for who is he that does himself Justice? The common People will pass for Gentry, every Body lives beyond what he has; some out of Pride and Ostentation to shew their Riches, and others out of an ill Shame, and to conceal their Poverty. Those even who are so wise as to condemn this great Disorder, are not wise enough to dare being the first in setting a contrary Example. Thus a whole Nation is ruin'd; and all Orders and Distinctions confounded. The Desire of getting Riches to support a vain and extravagant Way of living, corrupts the purest Minds. Their only Business is to be rich; to accomplish which, they borrow, they cheat, and use a thousand other mean and unworthy Artifices. *Avantures de Telemachus, Tom. 5. p. 120, 121.* History informs us (to borrow Mr. Le Clerc's Words, in the *Parrhasiana, Tom. II. p. 275, &c.*) that Julius Cæsar had never attempted to destroy the Liberties of his Country, had he been able to have pay'd the Debts which he had contracted by his excessive Prodigality; or had known how to have supported his expensive Way of living. (See *Suetonius Cap. 30.*) Abundance of People sided either with him, or Pompey, only because they wanted to supply their Luxury, and were in hopes of getting by the Civil Wars, enough to support and maintain their former Pride and Greatness. (See *Sallust. ad Cæsarem, de Republ. Ordinanda*, and the other Authors of that time.) One may say the same Thing of all sorts of Crimes, which every Hour, as it were, knock at the Door of indigent and proud Persons, and which seldom are deny'd Entrance, when they come attended with a large Sum of Money. To prevent these Evils and Disorders, there is nothing so useful as good *Sumptuary Laws*, that restrain Luxury, and a rigorous putting them in Execution. By which — you deprive Money, which is the most pernicious Thing in the World, of its Use and Use — *Id ita eveniet, si pecunia, quæ maxima omnium pernicies est, usum atque decus amiserit.* (*Sallust. Orat. 1. de Republ. Ordin.*) By that also we procure still another Advantage to the State, which is of no small Consequence, and that is, that People marry on much easier Terms, when a moderate Expence is sufficient for the Maintenance of a Family, than when they cannot handsomely avoid a greater; which, however, there are abundance of honest People, that are not able to be at. Augustus also, being desirous to reform the Manners of the Romans, among other Laws that he either made or renew'd, establish'd at the same Time both the *Sumptuary Law*, and that *de maritandis ordinibus*, which oblig'd the Romans to marry. (See *Sueton Cap. 34.*) If he could not oblige the Romans to observe the second, it is very likely, it was because the first was not severe enough (see *Tacit. Ann. Lib. 2. Cap. 37.*) We must observe farther, that abundance of People who decline Marriage upon the foresaid Reason, make no Scruple to commit all manner of Debauchery, which tends to the utter Ruin both of private Families, and the Commonwealth too, and which ought to be prevented by *Sumptuary Laws*. See what Mr. Le Clerc adds concerning the Republicks of Venice and Geneva. To make these *Sumptuary Laws* more effectual, Princes and Magistrates themselves, should, as the Author of *Telemachus* observes. "By the Example of their own Moderation, put those out of Countenance that love Extravagance, and encourage the Prudent, who would easily submit to follow the Pattern of an honest Frugality." To this we may add, the fine Passage of *Montaigne's*, on the same Subject. "The Manner, says he, in which our Laws endeavour to regulate the vain and foolish Extravagance in our Clothes and Eating, seems to be contrary to the Intention of it. The true Way would be, to raise in Mankind a Contempt of Gold and Silks, as Things vain and useless; but we enhance their Honour and Value which is a ridiculous Method of putting People out of Conceit with 'em. For suppose, that none but Princes were allowed to eat Turbot, and to wear Velvet, and gold Lace; and the People prohibited the use of 'em; what would it be but to bring those Things into Credit, and make every Body desirous of having them? Let Princes boldly part with these Marks of Grandeur, they have enough of others; such Excesses are more excusable in another Person than a Prince — 'Tis strange how easily and suddenly Custom assumes an Authority in these indifferent Matters: They had scarce worn black Cloth a Year at Court for Mourning for Henry II. but Silks were already grown so very contemptible in every Body's Opinion, that whoever appear'd dress'd in 'em, was immediately taken for some Citizen or Tradesman. At last none but Physicians and Surgeons wore 'em; and tho' every Body went dress'd pretty near alike, yet there were besides apparent Distinctions enough of Mens Qualifications. — Let Kings begin to leave off these Expences, and it will be done in a Month, without either Edict or Ordinance; we shall all follow after. The Law should express the contrary, That all except Whores and Watermen, were prohibited to wear Scarlet, and Gold and Silver. By such an Invention *Zaleucus* reform'd the corrupted Manners of the *Locrians*, Essay, L. I. Chap. XLIII.

yearly coming in, and pays two more in Taxes to the State, feels no Inconvenience by it, and lays up to increase his Stock one fifth Part more; whereas one that spends every Year all he receives, if he pays never so little to the Publick, must either lessen his Estate, or retrench his Expences. Of this Sort were those *sumptuary Laws* in the Roman Commonwealth, which *P. Manutius* recounts out of *Macrobius* ^a. And that Law of *Plato's* ^b, "by which he would not have a Marriage Invitation bring together more than ten Persons, and those Relations; nor that Persons of the best Quality should spend above a *Mina*, or ten Crowns, on such Occasions." To this Head also may be reduced *Laws* against Gaming ^c, and *Prodigality*; of which Nature was *Periander's Law* at Corinth, by which no Man was allowed to spend more than he had coming in ^d. A Law which deserves to be particularly enforced upon Persons concern'd in the publick Affairs and Places; since it is very well observ'd ^e, *That 'tis impossible any Man should govern well in the Commonwealth, that is negligent in his own Concerns, or forbear mispending the publick Treasure, that hath used to live above his private Fortune; for a Man that hath managed his own ill, must be suspected when he undertakes for others* ^f. And further, under this Head we may rank all *Laws* that determine the Rates and Quality of Possessions and Estates: Such was the *Licinian* at Rome, That no Man should have a Possession of more than five hundred Acres of Land, nor above one hundred Head of large Cattle, or five hundred of the Less ^g. As also the Law, which *Aristotle* says was generally observ'd in popular Governments, That no Man should sell his first Inheritance. And *Oxylus's Law*, That Money should not be lent upon Mortgage of Land ^h. As also that Decree of the Roman Senate ⁱ, that all Candidates

for Offices in the Commonwealth should be obliged to turn a third Part of their Estates into Lands in Italy. And we may further reduce under this Head all *Laws* that determine the Quantity and Measures of Grants and Legacies, that lay Restraints upon the Power of making Wills, or that put a Stop to Excess in dedicating Things to pious Uses ^j. As also *Laws* that forbid certain Subjects to possess certain kinds of Goods; as in *India* no private Subject is allow'd to keep an *Horse* and an *Elephant*, the Prince only enjoying that Privilege ^k. Moreover, *Laws* against idle and lazy People; such as was that among the *Nabathæi*, by which every Man was publicly punished that wasted his Estate ^l. And those against Persons that suffered their Estates to run to ruin purely by Carelessness and Neglect ^m. And that made by *Amasis* King of Egypt, by which every Subject in his Kingdom was obliged every Year to make it appear to the Governor of the Province he liv'd in, what Trade or Profession he was of, making it Death for any Man to refuse to obey ⁿ. To this Head also belong those *Laws*, by which Subjects are forbid the Acquisition of certain Goods, and to increase their Estates certain particular Ways: So *Pliny* says, there was a Decree of the Roman Senate, to forbid the digging after any kind of Ore or Metal in Italy, tho' it was very well known that no Country had greater Abundance or Variety ^o. To this Head belongs also the famous *Venetian Law*, by which no Subject of that State can, either by Will or Sale, or any other Way, upon any Account, leave, sell, or alienate the Perpetuity of any immovable Goods to the Church, or Persons Ecclesiastical, without Leave from the Senate ^p. And lastly, the *Laws* that forbid the Exportation of Money, and command that all Trade with Foreigners shall be managed by Barter only, and Exchange of Commodities.

IV. But

^a Manut. de L. L. Roman. Macrobi. Saturnal. l. 3.^b Plato de L. L. l. 6. § 70. D. E. Ed. Francof.^c Vid. *Ælium*. Var. Hist. l. 3. c. 34. *Garcilás* de la Vega, Com. Roy. l. 5. c. 11.^d Vid. L. 11. t. 5. D. & C. L. 3. t. 33. de Aleatoribus. Gratian. c. 7, 8, 9. Distinct. 86.^e *Heraclides* de Politicis. ^f *Polyb.* l. 10. Excerpt. Peiresc.^g *Lucian* in Antholog. T. 2. p. 834. Ed. Amst.^h Vid. P. Manutium de L. L. Rom. Numb. xxxvi. 7, 9. *Aristot.* Polit. l. 2. c. 5, 7. l. 6. c. 4, 5.ⁱ Vid. L. L. Burgund. tit. 84. §. 1.^j *Plin.* l. 6. Epist. 19.^k *Exod.* xxxvi. 6.^l *Strabo*, l. 15. p. 484. Ed. Gen.^m *Strabo*, l. 16. p. 539.ⁿ Vid. *Gellium*, l. 4. c. 12.^o *Herodot.* Euterpe,^p *Plin.* Nat. Hist. l. 3. c. 20.^q *Maurocenus*, Hist. Ven. l. 17.

MR. BARB. NOTE ON §. III.

" Idleness, or Want of honest and useful Employment, is the Source of an infinite Number of Disorders: The Spirit of Mankind being of so busy and active a Nature as it is, cannot remain in a State free from Action; and if it is not employ'd in something that is good, it inevitably applies itself to what is ill: For tho' there are some Things of an indifferent Nature, they become ill when they wholly engross the Mind to themselves: If it is true, however, that there are idle Persons in the World, that busy themselves more about indifferent Things than ill ones. — One cannot commend those who spend their whole Time in Things neither useful to Man, nor pleasing to God; if it is true, as there is no doubt of it, that Men were born to do Good. But — we see by Experience, that those who apply themselves to no honest Calling, generally run into Debauchery, or Gaming. — It were then to be wish'd, that there were *Laws* against Idleness, to prevent its ill Consequences, and that no Person were suffer'd to live without having some honest Business to follow, either of the Mind or Body. — Those that aim at Employments, either Political, Ecclesiastical, or Military, ought not to be suffer'd to spend in Idleness their youthful Time, which is most proper for the Study of Morality, Politicks, Religion, and the Art of Reasoning, and, if they please, Mathematicks, and History. There are still other Persons that betake themselves to nothing but only eating and drinking quietly the Estates that their Relations left 'em, and care not for learning any Thing, being well enough satisfied with themselves, if they do not consume their main Stock. All the Virtue of those Men consists in regulating their Expences, so as not to live beyond their Income. But if their Estates are considerable, it infallibly happens that they make an ill Use of 'em, and plunge themselves into a thousand Debaucheries, which make 'em grow useless both to others and themselves. — We must compel 'em to follow the Advice which *Ovid*, who had but too well known the ill Effects of Idleness, gives in his *Remedia Amoris*, ver. 135.

*Ergo ubi visus eris nostra medicabilis arti,
Fac morus fugias aia prima meus.
Hæc ut ames faciumt, hæc ut scire tventur,
Hæc sunt jucundi causa eibusque mali,
Otia si tollas, periere Cupidis arcus
Contemptusque jacent, & sine luce faces.*

When you seem fit my healing Art to try,
From Idleness at first be sure you fly:
'Tis that, that in your Bosom rais'd the Flame,
And with fresh Fuel still supplies the same.
Be still employ'd, and *Cupid's* Darts and Bow,
Together with his Torch, will useless grow.

Parthianæ, Tom. II. p. 279, &c. See the Law of the Egyptians mention'd above, Book III. Chap. 3. § 2. & *Herodot.* in *Euterpe*.

IV. But Secondly, a farther *Right* which belongs to the *Sovereign* is, that he can take away Part of the *Goods* of the Subject by way of *Tax*. For *Taxes* moderately imposed, and faithfully laid out in the Service of the *Publick*, are only the *Wages* which every Man pays the Commonwealth for the *Defence* and *Security* of himself and Fortunes; and to maintain the *Expences* unavoidably necessary to that End. And therefore when *Nero* propos'd to give Orders to lay aside all sorts of *Taxes*, supposing that *that would certainly be the noblest Grant he could ever possibly make to the World, the Senate put a Stop to his Heat, by shewing him that the Empire must be dissolv'd and ruin'd, if he cut off the Revenues from it that supported it*. Which if a Man will be at the Trouble fairly to consider, he will be forced to confess, that the Complaints of the People (who are apt to think the Burthen of the Taxes the great Occasion and Cause of all their Miseries) are generally very *unjust*, as well as very *impudent*. But their Complaints are most groundless and intolerable, *that wear whole Estates upon their Backs (as Plautus says) and yet when they are to be tax'd, pretend they are not able to pay, though at the same Time they find enough to allow their Vanity, which lays a much more unreasonable Tax upon them, than the State.* Archidamus in his Peloponnesian War, when his Allies desired him to settle some stated Proportion for their Contributions, told them, that War could not be carried on by fix'd Allowances, for that there is no determining before hand, what Supplies of Money will be necessary. It being impossible for them that engage in a War to know what will be the certain Event of it. For it very seldom happens, that as *Cato* said, a War will maintain itself. And indeed in general, the publick Expences cannot be confin'd within any particular Bounds, because of that Variety of Casualties and Accidents which happen, and which do not depend upon ourselves,

but our Neighbours, which will always demand Supplies of Money to be defeated or avoided.

V. However, a wise Prince will so far comply with the querulous Humour of his People, as to take care that his Taxes be collected with as little Disturbance, and as much Gentleness as possible. Now the Generality of People think it harder to be obliged to part with what they look upon to be their Property, than to be denied the Appropriation of some few particular Things. 'Tis generally true, that Men have hardly any Sense of publick Calamities (as Hannibal told the Carthaginians) but when they affect them in their private Fortunes; and there is no Loss they feel so much, as that which touches any Part of their own Estates. And therefore some have thought it the best Way to provide for that Inconvenience once for all, and set aside a Portion of their Estate, purely for the Use and Service of the Publick. Some again are of Opinion, that the Generality of the People are burthen'd less by Taxes rais'd by Custom or Excise, than when levy'd in a Way of Subsidy and Tribute. In laying Impositions or Customs upon foreign Commodities imported, it should be consider'd, whether the Commodities are for necessary Use, or only for Luxury. If they are of the latter Kind, the Custom may very justly be laid heavier, to prevent and suppress Extravagance and Riot; and because the Rich, or they that enjoy large Privileges otherwise, and contribute little to the Publick, are generally the only Buyers. It should also be consider'd farther, whether the same Commodities might not be produc'd at home, or wrought to the same Perfection, by the Industry and Application of our own People. And if it appears they may, the Imposts ought to be rais'd higher upon them, especially upon Commodities that serve only to supply Luxury and Vanity, and make us pay Tribute to other Nations, not for our Land, indeed, or Possessions, but what is much worse, for our Folly. As to the Exportation of Commodities

* Tacit. Ann. 13. c. 50. Vid. Hist. 4. Tac. c. 74. where Cerealis tells the *Treveri*, All the Harm we have done you by our Right of Conquest, hath been only to defend and secure your Peace; for it is impossible to support Peace in the World without War, to maintain a War without Money, or to have Money without a Supply from Taxes. *Isaus*, Orat. 6. He thought that he ought to be very thrifty in his own Expences, and reserve all that was left for the Use of the Publick, that there might be enough to defray the Charges of the State. *Themistocles*, Orat. 14. The Laws forbid every Man that is return'd into the Exchequer, to take any Place of publick Trust, before he hath discharged that Debt.

^b Vid. *Hobbes de Cive*, c. 12. §. 9.

^c *Procop. de Bello Persic. l. 2. c. 26.*

^d *Plut. Apophth. p. 219. & in Crassus.*
 It will not be impertinent to the Discourse, or difficult to apply to any Preparations for War, what is mention'd by *Nicetas Choniates*, l. 1. "The Emperor Manuel Comnenus was over-persuaded by his Treasurer *Johannes Puzenus* to apply the Money that was usually rais'd to maintain a Navy, to his own Use, and bring it into the Exchequer. The Reasons he gave to induce him to it were, That the State had not always occasion for a Fleet; and that the Charges to keep it were constant, and ran generally very high; and that therefore it would be a better Way to call the Money into the Exchequer; and whenever the Posture of Affairs made a Fleet necessary, the Emperor's Chests would be full enough to defray the Expences of it. The Proposition took, and *Puzenus* was applauded for an extraordinary Man, and look'd to have more than common Sagacity and Skill in the Management of publick Affairs. But in Reality the greatest Enemy to the Commonwealth could not have given more pernicious Advice. For he deceived the Emperor two Ways; on the one hand, by misrepresenting the Greatness of the Expence; and on the other, by falsely stating the Easiness of the Charge it might be reduc'd to. And upon this Counsel, rashly given, and obstinately adhered to, the Provinces that lay upon the Sea were continually afterwards infested with Piracies. And therefore the Historian infers, that the Calamities that followed might as justly be charged upon the Author of that Advice, as a Fire is as much upon the Person that does not put it out when he can, as him that at first kindled it." Vid. *Niceth. Gregoras*, l. 6. who gives an Account of some Instances, in the publick Affairs like this, in the Time of *Andronicus Paleologus*.

^e Vid. *Liv. l. 5. c. 22. l. 30. c. 44. Plut. Camillus*. Where the People took it very ill, that they were forced to give back a Tenth Part of the Booty that had been shared among them. *Homer, Iliad. l. 1. ver. 125, 126.*

*Ἄλλὰ τὰ μὲν πολλὰ εἰσπράττα, μὲν τὰ διδάσται
 ἄνευ δ' ἐν ἐπέροις πολλὰ λυγρὰ τὰυτ' ἐπαείρου.*

We have shar'd the Spoils of the victorious Field,
 And none will to a new Division yield.

Claudian de Laudib. Stilicon. l. 1. ver. 379, 380.

— *Graviolem amissis dolorem
 Quam necdum quæsitâ, morant,*

The Loss of our Enjoyments grieves us more
 Than not to have enjoy'd. —

Vid. *l. 24. t. 1. l. 5. D. de Donat. inter Virum & Uxor.*

^f Vid. *Diocet. Sicul. l. 1. c. 72. Paulum Warnefridum de Gest. Longobardorum, l. 3. c. 16.*

^g *De Chrysof. Orat. 79. p. 664. D. Ed. Morell*

MR. BARB. NOTE ON §. IV.

¹ In *Epidiculis*, Act. 2. Scen. 2. ver. 42, &c.

modities of our own Growth, it should be consider'd whether it be the Interest of the Commonwealth, that they should not be exported; or whether it be necessary to send them to foreign Markets, that the Subjects may have a Way to continue Trade, or increase their Wealth. The first naturally raises the Customs upon the Commodities, the second lowers them. But besides, it may be further consider'd, whether our Commodities are absolutely necessary in other Countries, and whether they are to be had from any other Place. For all know the Industry and Diligence of the Merchant, and what Difficulties and Dangers he will venture himself in, upon the Hopes of Advantage; and that if the Impositions upon their Commodities be too high in one Place, the Market will soon be carried to another; or else that they that buy, will content themselves to be without the Commodities; as Gallianus once said, *What can't we live without this Egyptian Linen, and can't the Commonwealth be safe without these Robes of Honour?* And in my Opinion, Hesiod's Rule may be very well apply'd to Customs, *ἡμῶν ἴπυρο πρῶτον*¹, *The Hulf is more than the H hole.* For a good Harbour is worth but very little, when it hath lost its Trade. And such a Constitution too as Nero made, might possibly deserve Consideration, *That Vessels of Trade should not be taken into the Valuation of Estates, and that the Merchants should not be obliged to pay Taxes for them*². The Government should also provide against the Frauds, which Collectors of Customs usually have, to promote their own private Gains, and take care to hinder their Importunity and Impertinence, and the Trouble they give Subjects and Traders, which are born with more Impatience and Regret, than the Customs themselves. Thus Dio Cassius B. 42. saith, *That Cæsar deliver'd Asia from the Exactions and Oppressions of the Publicans, and reduced all their Customs into a Form of Tribute*³. So Tacitus⁴ commends an Edit of Nero's, by which he commanded, that the Laws relating to the Taxes, that had been out of use till then, should be entirely laid aside; and that no Suit for any Tax that had been dropp'd, should be reviv'd after the Year was expired; and that the Magistrate should have a Power extraordinarily to pass Judgment against the Publicans. Neither indeed should the Exchequer itself be always allowed too much Favour, because that seldom loseth a Cause, but under a good Prince, and because there are never wanting those that have Impudence enough to assist all its Pretensions⁵.

VI. But in levying Taxes, and indeed any sort of Imposition upon the Subjects, particular Care should be taken not to give any just Occasion of Complaint, which will be unavoidable where the Taxes are laid unequally. For as Hobbes very well observes, *A Burthen which the whole Body of Subjects may possibly think easy and gentle, will if any considerable Number releas'd or excuse themselves, lie heavy and insupportable upon the rest*⁶. For ge-

nerally, it is not the Tax itself, so much as the Disproportion and Inequality of it, that sits un-
easily upon the People, either from the Discontent that followeth upon the Injury, or from Envy that others should be excus'd. And indeed, since all that the Subjects pay the Commonwealth, in Reality, is nothing else but the Price of Peace, 'tis but reasonable, that such as have an equal Share in the Peace, should pay equally for it, by assisting the Commonwealth, either with their Money or their Persons: so that all Immunities and Privileges granted in Commonwealths to particular Men, or Orders of Men, are no further reasonable, than as they who enjoy them balance them, by the extraordinary Merit of the Service they do⁷. But to discover in what this Equality consists, it must carefully be observed, that the Enquiry is not after Equality in Money, but in Charge and Burthen; or in other Words, it is not necessary to this Equality I speak of, that every Man should pay an equal Sum of Money, but that the Share every Man is to pay, should not lie heavier upon one than another, which may easily enough be effected by making the Proportions equal, between the Burthen of the Tax and the Benefit of Peace. For though all equally enjoy Peace, yet they do not all make the same Advantages by it. Some get much more than others; and again, some spend much more than others. And from hence Hobbes makes an Enquiry; "Whether the Subjects ought to contribute to the Publick, in Proportion to what they get, or what they spend? or whether a Man should be taxed according to what he hath coming in, or according to what he consumes?" Where first I think I may say, that since every Man is secured in his Property by the Care the Commonwealth takes of him, he may justly be taxed in proportion to his Income, as Servius Tullius said, in Defence of the Institution of the Census⁸: *It is very just, I think, and very much for the publick Good, that such as have large Fortunes should pay largely, and such as have less in a due Proportion.* And thus all Subsidies levied upon extraordinary Exigencies in the Commonwealth, ought to be laid according to the Value of Estates. And then, secondly, since every Man's Life is defended by the Sword of the Commonwealth, and Life is equally dear to Poor and Rich, they are both equally obliged to attend the Service of the Wars, and to pay an equal moderate Tax upon that Account, such as a Poll-Tax, in which the Rich pays no more than the Poor. But because it is owing in like Manner to the publick Care of the Commonwealth, that the Subjects have the Advantage and Opportunities of raising Estates by their own Industry, the great Difficulty in this Case is, how the Tax upon this Account ought to be laid? And perhaps the most convenient Way may be, to tax Men according to what they consume, rather than what they get; especially, since Men generally spend in Proportion to what they have
coming

¹ Tacit. Ann. 13. c. 51.

² Plin. Penegy. c. 36.

³ Vid. Diod. Sicul. l. 4. c. 73. de Machaon. & Podair. Iscr. in laudat. Enfirid. de Priv. Sacerd. Egyptior. p. 389, 390.

⁴ Droyf. Halicarn. l. 4. p. 215. Edit. Sylburg.

⁵ Vid. L. 59. t. 4. l. 12. Princip. D. de Publicanis.

⁶ Tacit. Ann. 13. d. l.

⁷ Hobbes de Cive, c. 13. §. 9.

coming in. For if the Tax be laid according to what People have coming in; and it should happen that some who have equal Incomes, should yet have unequal Possessions (which is as common as it is for one Man to be frugal, and lay up what he can, and for another to spend what he gets in Waste and Luxury) the Consequence will be, that they that equally enjoy the Benefit of the common Peace, must yet bear an unequal Share of the Burthens of the Commonwealth. For Instance, here are two Persons which get equally an hundred Pounds a Year, and one of them spends constantly forty of it, and the other perhaps fourscore; since both of them equally enjoy the Benefit of Peace, it seems reasonable that both should pay equally for it. But then in this there will be these two Inconveniences: First, that it will be very difficult for the Government to discover what each Subject gets every Year by his Industry; besides, that there cannot be a Review made so often, of what every Man is worth. And Secondly, that if the Tax be levied at the Year's End, when both have made up their Accounts of what they have received, and how much expended, and the Tax be laid upon each of them in Proportion to what they have remaining of the last Year's Income; 'tis manifest, that one must pay double as much as the other, though both equally enjoy'd the common Peace. And what is worse, the one suffers for his Parsimony, and the other is eas'd by his Extravagance. And therefore it must be the best Method to lay the Tax upon the Things which are to be consumed, and then every Subject will insensibly pay his Share to the Publick, in Proportion to his private Consumption, not indeed for what he now actually is, but for what, by the Protection of the Commonwealth, he was formerly possess'd of; and so that which is paid to the Publick, will be look'd upon to be Part of the Price of the Things that are consumed. But what hath been said before, in other Respects, of the Customs, may also be applied to Taxes, and all other publick Impositions. What Ways of raising Money Necessity may sometimes force a Government to take, may be seen at large in Aristotle's Oeconomicks, l. II. c. I. I cannot by the way forbear mentioning a very odd Sort of a Tribute, which the Yncas of Peru laid upon the poorest of their Subject, which was to bring every Year to the Governors

of their Provinces, a certain Number of Goat's Horns; the Design of which might possibly be, either that no Body should think himself exempt from paying Taxes, or else perhaps to free themselves from those Insects.

VII. ^a Sovereign or Transcendental Propriety (which is the third Head) is what some pretend to be afraid of, more upon Account of the Name, than the Thing. The Sovereign Power, they say, was erected for the common Security, and that alone will give a Prince a sufficient Right and Title, to make use of the Goods and Fortunes of his Subjects, whenever Necessity requires; because he must be supposed to have a Right to every Thing, without which the publick Good cannot be obtained. But the transcendental Propriety is too arrogant and ambitious a Name; and which ill Princes may sometimes abuse to the Damage and Ruin of their Subjects. But as it is trifling to dispute about Words, so I think there can be no Absurdity or Danger in giving a particular Name to a particular Branch of the sovereign Power, as it exerts itself in a certain Way, upon certain Things. What the Force of this Propriety is, I shall now endeavour to explain. It will be confessed agreeable to natural Equity, that when Contributions are to be made for the Preservation of some particular Thing, by Persons that enjoy it in common, every Man should pay his Quota, and one should not be forced to bear more of the Burthen than another. And the same holds to be Equity also in Commonwealths; but because the State of a Commonwealth may often be such, that either some pressing Necessity will not give leave, that every particular Subject's Quota should be collected, or else, that the Publick may be forced to want the Use of something in the Possession of some private Subject; it must be allowed that the sovereign Power may seize upon it, to answer the Necessities of the State. But then, all above the Proportion that was due from the Proprietors, is to be refunded to them by the rest of the Subjects. For Example, when a Town is to be fortified, the Fields and Gardens of private Subjects must be laid open, and perhaps their Houses be pulled down, to give room for the Works and Ditches. In Sieges, Houses and Trees that belong to private Persons are taken down, that the Enemy may not be shelter'd by them, or the Besieged incommoded. Materials,

private

^a Besides, these Contributions, by way of Exciſe, are a Means to restrain the Excess of Luxury, and Profuseness. People need only forbear magnificent Feasts and Entertainments, and wearing fine Clothes, and then they will not pay much. But if they will, at any Rate whatsoever, indulge their Appetite, and humour their Vanity, they ought to blame no Body but themselves. See Hochſteveri Collegium Pufendorſianum, &c. Exercit. xi. §. 12.

^b Vid. Tacit. in Agricola, c. 19. Where he says, that if Agricola rais'd the Tribute upon the Britains, or obliged them to pay a greater Quantity of Corn, he made them amends, by allowing them proportionable Favours, and by taking away all those Exactions and Oppressions which were more insupportable than the Tribute itself; for they had been forced before to wait ridiculously at the Granaries, though they were shut against them, and to buy their own Corn, and sell it again at a set Price; and it had been common to set them new Roads, and Places at a great Distance, that the People might carry their Corn from the Incampments that were nearest to them, to those that were farthest off, and in the worst Ways, that so what lay open for all, might turn to the Advantage of a few. Vid. Cic. in Ver. 5. And it was too severe an Answer Pescennius Niger gave the Jews, when they begged him to lessen the Taxes upon their Estates: You would have me take off the Tax upon your Lands, but I assure you, if could, I would lay another upon the Air you breathe in, Spartianus, c. 7.

^c Garcilass. de la Vega. l. 5. c. 6. Moreover, as to what relates in general to the Manner in which a Prince ought to manage, so as to make the Revenues of the State considerable, without oppressing the People; see Charron de la Saſſe, Liv. III. chap. 2. §. 21. the Parrhasiana, Tom. I. p. 274, &c. and Mr. Budden's Philosophie Pratique, Part III. Chap. 5. §. 7. & l. 8. c. 5, 6.

^d Dominium Eminentis.

Mr. BARB. NOTES on §. VII.

^a See above in B. 4. c. 6. §. 3. &c. See Mr. Budaeus's History of the Law of Nature, in his Selecta Jur. Nat. §. 52. Besides, we must remember, that every Thing that lies in the Territories of a State, and has no particular Proprietor, belongs originally to the State, unless it is otherwise left in common by a constant and received Custom. See Mr. Titus in his Specimen juris publici Romanae Germaniae, Lib. II. Chap. 3.

^b See Grov. B. 1. c. 1. §. 6. and c. 3. §. 6. and B. 2. c. 14. §. 7, 8. and B. 3. c. 19. §. 7. and c. 20. §. 7, &c.

private Men lay by for their own Use, may be taken, and made use of in publick *Fortifications*. In general *Scarcity*, the Store-houses and Granaries of private Subjects are set open. In the *Extremities* of State, *Monies* entrusted with the Government are seized. And private Mens *Coffers* are rifled, when they are not kind or publick spirited enough, to offer their *Money* voluntarily by Way of *Loan*; as *Xenophon* says *Cyrus* did^a. Perhaps what *Cæsar* did of this Kind, when he came to *Rome* after the Defeat of *Pompey*, is not to be justified, though he be supposed a lawful Prince. For as *Dio* relates it; "He pretended to borrow the publick Money, when he found there was no other Way of getting it, but continued to threaten Force, and to demand it as his Due; and yet was resolved never to pay it back^b." So again, if there be no other Way to oblige a common Enemy to retreat, our own Country is to be laid Waste, and all Things which might be serviceable, to be carried away, or left unfit for Use^c. From all which it appears, that *transcendental Propriety* never takes Place, but in the *Extremities* and *Necessities* of the Commonwealth. Though *Baeler*, in his Comment upon *Grotius*, l. i. c. i. §. 6. observes, "That the *Necessity* here meant hath its different Degrees, and that it is not only at the last Extremity, this Power may be made use of." But neither, on the other hand, is this Power to be extended too far; but should be reduced to Equity, as nigh as it is possible. And a famous Example of this we have in *Livy*, l. xxxi. c. 13. From hence it may also be further infer'd, that the Prince himself cannot release a Subject from the Force of this *transcendental Propriety*; because the *publick Extremities* of the Commonwealth must always be supposed to be unanswerable Exceptions to all Sorts of *Privileges*. For it is a Contradiction to pretend to be a Subject, and yet to insist upon a *Right* utterly inconsistent with common *Safety*. But however, without Dispute, they that have loit or sacrificed their Fortunes to the *publick Safety* in such *Extremities*, ought to have a *Restitution* or *Satisfaction* made them, as far as it is possible by the whole Commonwealth^d. Some indeed will make this *Exception*, when though the Damage sustained be unavoidable, it might yet have been easily foreseen and prevented. For Example, when Houses built in the *Suburbs*, are pulled down in the Time of *War*. For the *Proprietors* of these can demand no *Compensation* for their Losses; because they knew before that they could not build in those Places upon other Terms. And consequently, by building there notwithstanding, did in a manner tacitly consent to it. But much less can any *Compensation* be allowed, where the *Necessity* was universal, and every Subject suffer'd equal Loss. For the Pub-

lick is concern'd no further than to take care that the Subjects be not injured by any ill Conduct in Government, but never obliged itself to bear all the Damages they might at any Time sustain^e.

VIII. As to the publick *Goods* which belong to the Commonwealth itself as such, it is to be observ'd, that in some Kingdoms they are divided into two Parts, one of which is intended for the Maintenance of the Prince, and the other to defray publick *Expences* for the Preservation of the State^f. So *Dionysius Halicarnassens* makes a Distinction between the *Δημοσία κτήσις*, or the *publick Possessions*, and the *τῶν ἀπὸ βασιλείων κτήσις*, and the *Patrimony of the Prince*. And in *China* one Part in Nine of the Land belongs to the *Emperor*^g. By that Part intended to maintain the Prince, I mean, that the Prince in some States hath certain Goods assigned him out of the *Publick*, the *Income* of which is to maintain the *Expences* of his Palace. And of all these the Prince hath the full *Profits*, and may dispose of what he hath coming in from them, as he pleases; and what he lays up out of his *Income*, where the Laws of the Kingdom do not provide otherwise, makes an *Accession* to his own *private Patrimony*^h. The *Emperor Pertinax*ⁱ, upon this View refused to have his Name put upon any of the *imperial Possessions*; because, as he said, *They were not the Emperor's Propriety, but the common publick Estate of every Roman*. In *Peru*, under the Empire of the *Inca's*, the Lands were divided into three Parts; one Part belong'd to the *Emperor*, another to their *God* the Sun, the third to the *Commonwealth*; and therefore the Subjects paid no *Taxes* out of theirs^j. But secondly, the *Goods* which are to defray the *Expences* for the Conservation of the State, are only barely intrusted to the Care and good Husbandry of the Prince, who should always have especial Regard for the *publick Good*^k, and express the same Caution and Conscience as a *Guardian* ought to have for the *Estate* of his *Pupil*. From whence it may be easily inferred, on which Side the *Right* lies, to what a Prince gets or lays up in the Time of his *Reign*, on *his*, or on the *Commonwealth's*. For if a Prince grows rich out of that Branch of the *publick Revenues*, which belongs to the Commonwealth, or by imposing *Taxes* upon his Subjects, or by the Expence of their *Blood*, or by employing them in any of those Services which by common Obligation they owe the Commonwealth; it is clear, that his Wealth must accrue to the *Publick*, and not to his own *private Estate*. But suppose, as it may also happen, that a Prince may make all necessary *Preparation* for a *War*, and carry it on afterwards, without any Assistance of the *publick Treasure*, upon the Strength of his own *private Riches*

^a *Xenoph. Cyropæd.* l. 8. c. 2.

^b *Dio Cassius*, l. 42.

^c *Crispianus*, when the *Romans* were making War upon him, agreed with the *Achaian* Magistrates, that all Suits for Debts should be put off, and no Man should be obliged to make any Payment till the War was at an End, *Vid.* Polyb. *Excerpt. Leg.* 144. c. 3. *V. l.* 18.

^d *L. S. D. de leg. Commissoria. Curtius*, l. 3. c. 4. See *Sueson.* ch. 42. of *Jul. Cæs.* the Law made by *Cæsar* about the Payment of Debts.

^e *Jo. Christoph. Becmannus*, *Medit. Polit. Diss.* 21. §. 8.

^f *Dion. Halicarn.* l. 3. *Antiq. Roman.* l. 3. c. 1.

^g *Martin. Hist. Sin.* l. 4. c. 24.

^h *Senec. de Benef.* l. 7. c. 6. Every Thing belongs to *Cæsar*; but to his Exchequer nothing but his own private Fortune; every Thing is at his Command; but his Patrimony only is his own Propriety.

ⁱ *Herodan.* l. 2. c. 15.

^j *Vid. Garcilass. de la Vega Comm. Roy.* l. 5. c. 14. and *Francis Hotoman's Quæst. Illust.*

MR. BARB. NOTES ON §. VII, VIII.

¹ See *Grot. B.* 3. c. 20. §. 7.

² See *Grot. B.* 2. c. 6. §. 11.

³ See the last Section of this Chapter.

Riches and Estate, without engaging the Commonwealth, either in the *Expense* or *Hazard* of it, or it may be, perhaps, barely from the *Profits* and *Revenue* of his *Crown-Lands*: In such a War 'tis also clear, that whatever *Acquisitions* a Prince makes, will be absolutely his own Right, and that he may, if he please, exclude the Commonwealth. For I have an undeniable Right to the *Profits* of what I have the *Use* and *Produce* of, and therefore may dispose of them as I think fit ^a.

IX. I shall in the next Place enquire, what lawful Power any Prince may have to *alienate* the *Whole* or *any Part* of his Kingdom. By which I do not mean a *patrimonial Kingdom*, but a *Kingdom* receiv'd by *free Consent* of the People. *Grotius* is very large upon this Question ^b. The Issue of the Matter in Dispute in short is this; That a Prince hath no manner of Power to *transfer* or *give away* his Kingdom by his own *single Authority*; and that his Subjects are not at all *obliged* by such an *Act*, if made; and that the *Consent* of the *People* is entirely as necessary as that of a *Prince*. For as the *People* cannot justly take the *Crown* from their *Prince*, so neither can he, without their *Consent*, set it upon whose Head he pleaseth. But in the *Alienation* of a *Part of a Kingdom*, besides the *Prince's Consent*, there is required not only the *Consent* of the *People*, that are to continue under their old *Prince* and Government, but the *Consent* of that *Part* too especially, which is to be *alienated*. The Reason is, because they that at first erected the Commonwealth; and they that came voluntarily into it afterwards, bound themselves by mutual *Compact*, to be govern'd by one and the same Government, as long as they thought good to continue in the Dominions of the same Commonwealth. And therefore, as every particular Subject acquired a Right by Virtue of that *Compact*, not to be violently *ejected* out of the Commonwealth, nor to be given up to any *foreign Power*, except by way of Punishment; so the whole Body of the Subjects, from the same *Compact*, acquires a Right to itself over the particular Subjects, by which no Subject can put himself under a *foreign Government* or *Power*, or disclaim and renounce the *Authority* of his own, as long as he is allowed to live in any of the *Dominions* belonging to it. And therefore, since all *Commonwealths* (as all *moral Bodies*) are formed and grow by a *Consent* of the Parts, we must look back upon the *original Design* and *Intentions* of the *primitive Founders* of them, when we enquire what Power the *whole Body* hath over the *Parts* in such a Case as this. And it cannot be presumed, that their Intentions were, that the *Body* should have a Right to cut off its own *Members*, when it pleas'd, and deliver them up to *another's Power* and *Command*. And for this Reason the People of *Gnienne* justly refused to be separated from the Kingdom of *England*, notwithstanding the Grant and Donation of *Richard the Second* ^c. But indeed there is one *Exception* against what was said before, that a *Part* ought

not to disown or separate from the *Body*, while it continues within the same Dominions, and that is this; except it be in the last *Extremities*, and that it be impossible for it to preserve itself otherwise, than by submitting to the *Enemy's Power* and *Authority*. For in all *Agreements* of this *Nature*, the utmost *Necessity* seems of Course to be excepted; which, it is always allowed, gives a Man full Liberty to secure himself all the Ways he can possibly. And therefore 'tis no more than what must be expected, and is far enough from being criminal, that a *Town*, after it hath made the best *Resistance* it could against an *Enemy*, should at last choose rather to surrender, than suffer itself to be carried by *Storm*, and be put to the *Sword*. For since every Man that submits himself voluntarily to *Civil Government*, had before from *Nature* a *Right* to defend himself all the Ways he could, and therefore enters into the *Commonwealth* for the better Attainment and Security of that *Right*; when the Commonwealth can no longer afford Protection or Defence to the Subjects, they must be supposed to be releas'd from the Ties they were under before, and to be at Liberty to consult their own Safety as they think best. And without Dispute, the Commonwealth itself can have no other *Right* over the *Members* of it, than what was granted and left by them that at first erected it. And therefore as the Commonwealth engageth to protect and defend every one of its *Members*, unless hinder'd or prevented by unavoidable Necessity; so whenever it struggles under such a Necessity, it is supposed, that no Man is forbid to provide for his own Security as well as he can. In the *natural Body* indeed it is lawful to cut off any particular *Member* to preserve the whole, because every *Member* lives entirely by the Life of the *Body*, and cannot live otherwise; but in a *moral* or *politick Body*, 'tis possible the *Members* may exist and live in a separate divided State; and therefore the *Body moral* hath not the same *Right* over its *Members*, as the *Natural*. But if a Prince should be necessitated by *Extremity* of his Affairs, to compound for a Peace with an over-powerful *Enemy*, by giving him a certain *Country* in his *Dominions*, and that *Country* should disown and deny the *Grant*; in this Case, it is my Opinion, that the Prince may draw his *Forces* out of their *Towns* and *Garrisons*, and leave them *naked*, not hindering the *Conqueror* from taking *Possession* of them. But then that he hath no Power to oblige or force them to surrender themselves, or to submit to the *Conqueror's Authority*. Neither can I think, that the *Country* is under any *Obligations*, if they have Strength enough in it, not to make *Resistance* against such a *Conqueror*, or afterwards, if they can, not to erect themselves into a *distinct Commonwealth*. For thus when the Emperor *Jovian* was obliged by *Treaty* to give up the City *Nisibis* to the *Persians*, the Citizens desired they might have Leave to defend themselves ^d. By such *Agreements* therefore the *Prince* indeed and *People* lose their Right to such a *Country*; but the *Conqueror*, if they consent to receive him, and

live

^a V. *Grot.* l. 1. c. 3. §. 12.

^b L. 1. c. 4. §. 10. & l. 2. c. 6. §. 3. (Upon both which Places see *Boeker's* Annotations) & l. 3. c. 20. §. 5. &c.

^c *Froissard.* l. 4. *Polyd. Virgil. Hist. Angl.* l. 20.

^d *Amman. Marcellinus,* l. 25. c. 12. *Zojimus,* l. 3.

swear *Allegiance* to him, acquires a lawful *Authority* and *Power* over them. As to that Opinion some are fond of, either with regard to *all* Kingdoms, or perhaps only to some *Particulars*, that whatever *Goods* are appropriated to, or, as they say, *incorporated in the Crown*, can never be any *Way alienated*, and that neither the longest Course of Years, or another's quiet and peaceable Possession can secure them from an *Act of Resumption*, at any Time after, it is without Dispute, false and groundless. And much more absurd and ridiculous is it to assert, that any Kingdom may have Privilege to waite and ruin others, and yet that what it hath once seized, can never afterwards be recover'd from it.

X. From what hath been said it is further evident, that a *Prince* cannot, without his *People's* Consent¹, make his Kingdom *feudatory* to another, or hold it upon Condition of² Forfeiture whenever the *feudal Oath* is violated, or that when his *Family* is extinct, it shall devolve to the *Prince* it is held from. For if the *Conditions* be such as these, the making the Kingdom *feudatory* is indeed a *conditional Alienation*. And again on the other hand, the *People* may recal any *Act of Homage*, which the *Prince* hath remitted without their Consent. And it further follows, that a *Prince* cannot *mortgage* any Part of his Dominions, so that the Government of it, and *natural Possession*, shall be for so long resign'd to the *Creditor*, without the Consent of his *People*, and the *Part* engag'd by the *Mortgage*; and much less if there be any Conditions of³ Forfeiture annexed. The Reason of which is, not only because a final *Alienation* is generally the Consequence of *Mortgaging*; but besides, because the *People*, when they made Choice of their *Prince*, chose to be govern'd by *him*, and not by any *other*. And because it may justly be presumed, that they that are grown and are strictly united in one *People*, can never be willing to be broken and antoned into *Parts* and *Divisions*.

XI. And it is also further evident, that the *Prince* hath no Power, without Consent of his *People*, to alienate those *Goods*, the *Revenues* of which are design'd, either to support the *publick Expences*, or to maintain the necessary *Greatness* and *Dignity* of his *Court*. For in those *Goods* the *Prince* is allowed only the *Use* and *Produce* of them, which can never amount to a *Right of Allie-*

*nation*². And though perhaps he may think himself well enough provided for, for his own *Life*, yet it should be considered, that there are to be other *Princes* to succeed *him*, who are all to be maintain'd agreeably to the Dignity of *crownd Heals*. But however, we are to distinguish carefully between the *Goods* themselves or the *publick Patrimony*, and the *Profits* or *Produce* of them. The first the *Prince* hath no Power to alienate, the other he hath free Liberty to dispose of, as he pleaseth. Thus where the *Right*³ of what the *Sea* or *Rivers* cast up and join to the *Land*, is the *publick Patrimony*, or belongs to the *Crown*, the *Prince* cannot *make away*, or *transfer* that *Right*, to any one else; but I can see nothing that can oblige him, not to dispose of what is thrown up by the *Tide* or the *Stream*, as he thinks fit; because *this* is the *Produce* of that *Right*. So the *Right of Confiscation* may be a *publick patrimonial Settlement*, and the *confiscated Goods* be the *Produce* of that *Settlement*. The first is appropriated to the *Commonwealth*, the second belongs to the *Prince*. But after all, a *Prince* that hath Power, when *Reasons of State* require it, to levy new *Subsidies* upon the Subject, as he pleaseth, may, when the *Necessities* of the *Commonwealth* command, *mortgage* any Part of the *publick Patrimony*. For as the *People* are obliged to pay the *Subsidies*, such a *Prince* lays upon them, upon such *Reasons of State*; so are they obliged to redeem what was *mortgaged* upon such *Reasons*. Since the Thing is the same, whether they pay the Money beforehand, to prevent the *Necessity* of the *Mortgage*, or whether it be levied upon them afterwards to redeem it. And here it is manifest, that every particular Subject is not the *Debtor* of that Money, though every one be obliged to contribute his Share to discharge it³. So also, where the *Prince* lays out Money for the Use of the *Publick* out of his own *private Estate*, the *Commonwealth* must be supposed to *mortgage* to him the *publick Patrimony* upon that Account, till such Time as the *Debts* contracted upon it are cleared by the *People*. But all this will hold only upon Supposition, that there be no *fundamental Law*, or *Capitulation*, which provideth otherwise, and either enlargeth or confineth the Rights of the *Prince* or *People*.

¹ *Sub onere Commissi ex Felonia.*

² *Lex Commissoria.*

³ *Vid. Senec. de Beneficiis, L. 6. c. 20.*

* *Alluvionum Fns.*

Mr. BARB. NOTES on §. X, XI.

¹ See *Grot. B. 2. c. 6. §. 9.*

² *Vid. Grot. ubi supra, §. 11, 12, 13.*

³ See *Grotius, B. 3. c. 2. §. 1.*



C H A P. VI.

Of the Right of War.

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SINCE every particular Man in a Liberty of Nature hath the same natural Right, which States and Commonwealths have, to defend himself against unjust Violence, and to defend and assert his Rights by Force, when others injure him in, or endeavour to deprive him of them, it will, I think, be a proper Method to enquire, first, what may be supposed common to the Wars of particular Men, and Commonwealths ; and then, secondly, what hath either by Custom of Nations, or by Nature, been appropriated to the latter.

II. First therefore, 'tis, certain that nothing is more consonant to the *Law of Nature*, than that no Man should offer unjust Violence or Injury to another ; and on the other hand, than that all Men should shew Kindness and Humanity to one another, and be particularly exact in the Observation of Agreements and Compacts. And when Men duly attend to, and obey these Laws, they may be said to enjoy *Peace*; which is a State most agreeable to human Nature, which tends most to promote its Happiness and Security, and indeed which the *Law of Nature* was given to Men principally to establish and preserve*. Nay further, *Peace* is a State proper to human Nature, *as such*; since it ariseth from a Principle peculiar to Mankind above the Brutes ; whereas

War flows from Principles common to both. Brutes indeed by Instinct of Nature will endeavour to defend and preserve themselves as well as they can †. But Man alone understands the Nature and Constitution of *Peace*, For it is he only, that can voluntarily undertake or forbear the Performance of any Action, which may bring Good or Harm upon another Person, upon a Consideration of certain Obligations on one Side, and certain Rights on another. All which depends entirely upon the Use and Exercise of *Reason*. Beasts indeed perform the Service their Masters are pleas'd to use them in: But the Reason of that Obedience goes no higher than the Fear of Blows, or the Temptation of good Keeping; for the Sense of any Obligation, without doubt, lies much out of their Reach. We find too, that Beasts are seldom inclin'd to hurt Men, or one another; but this must be supposed either the Effect of Fear and Weakness, or because they find nothing to provoke their Appetite. Again, there are others of them that seem to be fond of, and to care for and assist one another. But it is not to be supposed, that they do so, because they are sensible they are obliged to it †. But notwithstanding, it is very lawful, and may sometimes be necessary for Man himself to make *War*; for Example, when he finds that another Person

* Vid. *Polyb.* l. 12. c. 14.

† To this Purpose is that Passage of Quintilian, *Declam.* 9. p. 128, 129. Ed. *Lugd. Bat.* Nature seems to have infused into Man, more than into other Creatures, a certain Sociableness of Temper and Constitution, which has taught us to think ourselves Happy in one another's Company and Conversation, to unite into Nations. and erect Cities and Commonwealths: And among all the Impressions she hath made upon our Souls, there is none that can be of greater Use to us, than that of Kindness and Good Will. For what can we imagine happier than Mankind, if all the World could be persuaded to be Friends? We should have no Wars, Seditions, Robberies, Quarrels, and Disputes, or any of those Evils which we ourselves add to those of Fortune. It hath pleas'd Heaven, indeed, that it should be otherwise; but however, the World hath always been agreed, that Sincerity, Integrity, and Gratitude, ought to be the great Principles in the Composition of every brave and noble Spirit.

Mr. BARB. NOTE on §. II.

‡ Vid. *Lactan.* Institut. Divin. L. 5. c. 17.

Person hath maliciously design'd to do him Harm, or denies him his *Right*. For in such Cases, the Care he is supposed to have of his own Safety, giveth him Power to defend himself, and assert his Right what Ways he thinks best, though it be with the Hurt of the injurious Person; or to recover his *Right* by Force, when he cannot obtain it by easier Means. For Nature hath not only given Man a quick Sense of Injuries, that he might not suffer himself to be oppress'd and insulted; but she hath also armed him with Strength and Agility of Body, that he should not be forced tamely to submit. But then, when Nature permits War, Peace is the Price and Reward of War. And when Men are forced to fight, it is not because they are to make War perpetually, but that they may enjoy a lasting Peace and Security for the future. But besides, though the Person that doth Harm, doth immediately, as far as he is concerned, give a Man Power to make War upon him, yet it ought to be considered, what Good or Evil may probably be brought upon himself or others that did him no Injury by it. For Injuries, which do not entirely rob a Man of Quiet and Safety, ought not to provoke him

to revenge them with War; when either the Inconveniences he may bring upon himself, and those that belong to him by it, are like to be greater than the Advantages he can propose; or when others he at present is at Peace with, must by his War suffer such Evils, as by the Laws of Humanity, on a quiet Submission to the Injuries offer'd, he ought to defend them from. And therefore, that a Man is justly to be commended, that will not revenge an Injury, when he sees that a War will, in all Probability, produce greater Evils than Good.

III. The Causes of just War may be reduc'd to these three Heads. First, To defend ourselves and Properties against others that design to do us Harm, either by assaulting our Persons, or taking away or ruining our Estates. Secondly, To assert our Rights when others, who are justly obliged, refuse to pay them to us. And lastly, To recover Satisfaction for Damages we have injuriously sustained, and to force the Person that did the Injury, to give Caution for his good Behaviour for the future. And hence ariseth the Division of just Wars into offensive and Defensive. The latter of which I take to be those Sorts of Wars, in which

* *Dicys Cretensis*, l. 2. c. 21. p. 44. Ed. *Amst. Max. Tyrinus*, Dissert. 14. p. 138. Ed. *Ludg. Bat.* A good Man never begins a War but when he is forced to it; but a bad Man makes it his Choice. V. *Baeler* in *Grot.* l. 1. c. 3. §. 1.

† *Aristot.* ad *Nicom.* l. 10. c. 7. We make War that we may live in Peace. There is no Body that desires, or makes Preparations for War, purely for the sake of the War itself. For a Man must be of an inhuman Temper, that will make Enemies of his Friends, barely for the Satisfaction of a Quarrel. *Tacit.* Hist. l. 4. c. 76. There is no Body so forward in taking Arms, that had not rather obtain that peaceably, which he trusts to the Decision of a War. And therefore it is a very ill Character of some, which *Silius Italicus* describes, l. 3. ver. 330, 331.

*Nec vitam sine Marte pati, quippe omnis in Armis
Lucis causa sita est, & damnatum vivere paci.*

They think Life pleasant when in Arms employ'd,
But dull and worthless if in Peace enjoy'd.

MR. BARB. NOTES ON §. III.

“ When we make War, we complain of something that has been done by those against whom we take up Arms. — We say, that they have cheated us, that they have insulted us, and taken our Goods from us.” *Plato* in the 1st *Alcibiad.* p. 109. A. T. II. Ed. H. *Steph.* 432. T. Ed. *Wechel. Ficin.* See *Grotius*, l. 2. c. 1. §. 1, 2. Our Author here tacitly excludes from the Number of Lawful Causes of War, the Punishing of criminal Actions; by which we are not injured ourselves. But we have shewn above (Chap. iii. Sect. 4. Note 3.) that the Reason on which he establishes his Opinion, is not very solid. It is true, that from Equal to Equal, we must not lightly take up Arms to punish all Sorts of Crimes, that do not relate to ourselves, we must always use the following Precautions, which *Grotius* justly recommends to us. I. Not to take them up for punishing the Violation of the Maxims of the Law of Nature, which is contrary only to certain Customs, though received upon some Foundation, among several Nations; such as were almost all those that gave the ancient Greeks such an Antipathy against the Persians. For this Reason (says *J. Freder. Gronovius* thereupon) King *Darius* was to blame, to require the *Carthaginians* to eat no more Dogs-Flesh, and not to burn their dead Bodies; since these two Customs had nothing in them to give a just Occasion of War: But what he pretended, at the same Time, I mean their not offering any human Sacrifice, was manifestly founded upon the Law of Nature, (*Just. Hist. Lib.* xix. c. 1. Num. 10. Ed. *Græv.*) II. Not lightly to place in the Number of Things forbidden by Nature, those which we are not well assured are contrary to it, and which are rather simply prohibited by a Divine positive Law: Such are perhaps Conjunctions out of Marriage, and those which are called Incestuous. *Grotius* here adds *Ujury*; but let us set aside the Abuse of it, and there is nothing in it contrary to the Law of Nature, as we have shewn in another Place. III. To distinguish carefully the general Principles of the Law of Nature, such as, we must live honestly, that is to say, after a Manner conformable to Reason, and some others like that, but which are manifestly incontestable, as when we say, that we must not take away another Man's Goods; from the Consequences that we draw from them. Some of which are easy to be perceived, such is the Prohibition of Adultery, supposing Marriage; whereas, there are others more difficult to be discovered; as for Example, That Revenge where we propose nothing but Evil for Evil, is criminal. — As then political Legislators excuse those to whom their Laws have not been declared, or who are incapable of understanding them; so in Matters of natural Laws, it is just to excuse those that violate them, through the Weakness of their Understanding, or the Unhappiness of an ill Education. — IV. In short, Wars undertaken only to punish those against whom we take up Arms, are suspected of Injustice, when the Crime is not undeniably plain, and very flagrant, or when there is no other Reason besides, that makes a just War. This is what *Grotius* says, l. II. c. 20. §. 41, 42, 43. In the following Paragraphs, to the End of the Chapter, he treats of religious Wars, that is, of those which we undertake against such as have, on that Account, some Principle or Practice different from ours (for as to the rest, it is clear that we may defend ourselves against those who would hinder us from professing that Religion which we believe to be the best.) All that he says amounts to this, that we cannot lawfully take up Arms for this single Reason, against any but *Atheists*, or else against those who insolently revile the Divinity itself, whom they make Profession of adoring. (See Mr. *Budden's* Dissertation on the *Crusades*; in his *Select. Jur. Nat. & Gent.* p. 97, Sec.) So far is a simple Difference of Opinion in other Tenets of Religion from giving any just Cause of pursuing by Force of Arms, or disturbing in the least those whom we believe to be in an Error. However, I question not but that Protestant Princes may with a safe Conscience enter into a Confederacy to destroy the *Inquisition*, and force the Powers that suffer it in their Dominions, to disannul this grand Cabal, under which *Christianity* has groan'd so long, and which under a false Pretence to Zeal, exercises a Tyranny the most horrible and contrary to human Society that ever was. Those who love to acquire Glory by their Arms, cannot find a fairer or more lawful Occasion of signaling their Valour, supposing they had otherwise, a sufficient Strength to embark in this Undertaking; and never would any Hero have tam'd Monsters more furious and terrible to Mankind, than he that could accomplish the Design of purging the Earth of these villainous Souls, who so impudently abuse it under the specious Shew of Religion, only to have wherewith to indulge themselves in Pride, Luxury, and Laziness, and to make both Princes and Subjects dependent on them, and live under their Subjection.

2 Upon which we must refer to our Observation in another Place, that in a Case of Necessity, an imperfect Right is chang'd into a perfect Right; so that then the Refusal of him that will not yield up to us what he ought to do, gives a just Occasion of War.

which Men endeavour to defend and keep what is their own. The *Former* are, when Men extort their Rights that are denied by Force, attempt to recover what hath been unjustly taken from them, and require *Caution* for the future. Sometimes indeed the Party that first began the War may have the Credit of being on the *Defensive*. For Instance, suppose he be often alarm'd and harass'd with sudden Incurfions upon him, the Enemy retiring always when he appears to oppose him; or suppose a Man be assur'd that his Enemy hath form'd Designs against him, and so disables him for the Attempt, while he is making his Preparation^a.

IV. But in general, the *Causes* of every War, and especially of the *offensive*, ought to be *evident*, and without Mixture of *Doubt* and *Uncertainty*^b. For it is very usual in Cases of this Na-

ture for Doubts to arise; either perhaps out of Ignorance of Matter of Fact, when it is not absolutely certain, whether it was done, or not; with what Intention it was done; or else out of a negligent, slight Comparison between strict Justice and the *Laws* of Love and Charity; or it may be from a mistaken Computation of the Proportion of the Utilities, which it is probable will be the Effects of undertaking or forbearing the *War*. In these Cases therefore, as no uncertain Pretensions^c ought to be made use of; so neither should Men immediately seek Redress by Arms, but sincerely endeavour, and that these three Ways especially, to compose the Differences, before they break out into a War: First, by *Conference* between the *Parties*, or their *Agents*^d. Secondly, by *Appeal to Arbiters*^e. Or in the last Place, by *Lot*^f. But how evident soever the *Causes* of

^a Vid. *Justin.* l. 2. c. 3. n. 12.

^b Valerius Flaccus, l. 5. ver. 665, &c.

*Ar nullas præferre preces, nec fœdera Regis
Ulla sequi? cæca sed cuncta impellere pugna
Debitum? sic Thraces agunt.*

Never to peaceful Overture to yield,
Or sacred League, but in the bloody Field.
Always in Arms to breathe relentless War,
None but the wildest Savages will dare.

MR. BARB. NOTES ON §. III, IV.

¹ In the fourth Tome of the *Observations Choieses*, printed at Hall in Saxony, Observ. VIII. there are some Reflections which I will here set down in the very Words of Mr. Bernard, who has given us an Abstract of them in *Nouvel de la Rep. des Lett.* Sept. 1704. p. 304. &c. 'Tis now a-days the Custom to excuse the most unjust Wars, by saying they are purely *defensive* Wars. There are some People that believe, that every unjust War ought to be called *offensive*, which is not true: for if there are *offensive* Wars that are just, as there is no Doubt of it, there are also *defensive* Wars that are unjust; as when we defend ourselves against a Prince who has Reason to attack us. Neither must we believe, that he who is the first Aggressor begins by that an *offensive* War; and that the other, who demands Satisfaction for the Injury receiv'd, is always only upon the *defensive*. There are a great many unjust Acts that may kindle a War, and which however are not the War; as the ill Treatment of a Prince's Ambassadors, or the plundering his Subjects: If then we take up Arms to revenge such an unjust Act, we begin an *offensive*, but a just War; and the Prince who has done the Injury, and refuses to give Satisfaction, commences *defensive*, but an unjust War. An *offensive* War then is not unjust, but when it is undertaken without a lawful Cause; and then *defensive* War, which upon other Occasions would be *unjust*, becomes *just*. In general then, he that first takes up Arms, whether he does it *justly* or *unjustly*, commences an *offensive* War; and he that opposes that War, whether he has or has not Reason to do so, begins a *defensive* one. Those who look upon the Word *offensive* War to be an odious Term, as containing something that is always unjust; and who consider, on the contrary, a *defensive* War, as inseparable from Equity, confound all the Ideas, and perplex an Affair, which of itself would appear plain and clear enough. It is with Princes as with private Persons. The Plaintiff, who commences a Suit at Law, is sometimes in the Wrong, and sometimes also he has Right on his Side: It is just so with the Defendant. We are in the Wrong not to pay a Sum that is justly due, as we are in the Right to forbear paying what we do not owe.

² See *Grot. B. 2. c. 1. § 1.* and *c. 22. § 2.* where he divides them into *justifying Reasons*, and *Motives of the War*: (*Causa iustifica*, & *causa iustioris*.) The first are those that render, or seem to render, the War just with regard to the Enemy; so that we believe we do him no Injustice in taking up Arms against him. The *Motives* are the Views of Interest, which oblige us to declare War. In a War, innocent upon all other Accounts, the *justifying Reasons* must not only be truly lawful, but must be blended with the *Motives*, that is, that we must never undertake a War but through the Necessity to which we are reduced of defending ourselves against another's Insults, of making him give up what is our undoubted Right, and of obtaining a Satisfaction for an apparent Injury done us. Thus a War may be vicious or unjust, with regard to the Causes, four several Ways: First, when we undertake it either without any *justifying Cause*, or any Motive of Profit, tho' never so little, but only out of a fierce and brutal Fury, that makes us delight in Blood and Slaughter purely for the sake of killing. But there is Reason to doubt, whether we can find any Example of so barbarous a War. (See *Grotius*, Lib. II. Cap. 22. §. 2.) Secondly, when we attack others only for our own Interest, without their having done us any Injury. And these Sorts of Wars are, with respect to the Aggressor, downright Robberies. (See *Grotius*, *ibid.* §. 3.) Thirdly, when we have some *Motives* founded upon *justifying Reasons*, but which still have only an apparent Equity, and which, upon a nice Examination, are found at the Bottom to be unlawful. Such are those mention'd by our Author in the following Section, after *Grotius* (*ubi supra* §. 4. & *seq.*) In short, Fourthly, when notwithstanding our having good *justifying Reasons*, we undertake the War upon other *Motives*, that have no Relation to the Injury we have receiv'd, as acquiring Vain-Glory, enlarging our Rule and Dominion, enriching ourselves, satiating our Revenge, or upon any other View of Interest, either publick or private, but quite divested of the *justifying Reasons* of the War in which we are engag'd. (See *Grotius*, *ibid.* § 17.) Of these four Sorts of Wars, whose Undertaking contains something that is *just*, or *unjust*; the third and the last are very common, there being very few People so barbarous and savage as to take up Arms, without declaring at least some sort of *justifying Reason*. The third is also very common; but it is not difficult to discover the Injustice of it. As for the fourth, perhaps it is the most common of all; it is not so unjust in itself, as with regard to the Disposition and Views of him that does it. It is besides very difficult to be convinced of it, the Motives being generally so impenetrable, or the greatest Part of Mankind so very careful in concealing them. Thus we are not oblig'd to restore what we have taken from the Enemy in such a War, exactly to the Value of the Damage and Injury he has done us. This is taken almost from Mr. *Buddens's Philosophie Pratique*, Part II. Cap. 5. § 2. &c. As he does very little besides abridging *Grotius*, in all this, I shall here make use of his Book in some other Places; and by that, as well as by *Grotius* himself, and also by the Abstract *de Officio Hom. & Civ.* I will supply what our Author wants, who has but lightly treated of all that concerns the *Right of War and Peace*, without doubt because *Grotius* had already almost exhausted the Matter. Moreover, whoever is desirous to see the Application of what we have just now said in this Note, to remarkable Examples, need only consult Mr. *Buddens's* Dissertation, entituled, *Jurisprudentiæ Historiæ Specimen*, § 82, &c. *seq.* in which he examines the Justice of the Wars of the *Romans*.

³ See above in B. 1. c. 3. § 7, 8. and *Grot. B. 2. c. 23. § 1, 2, 3, 4, 5, and 6.* Besides, To the Question whether there can be a just War on both Sides, Mr. *Buddens*, in his *Philosophie Pratique*, § 16. answers, No, if we consider the Justness of the Cause in itself: For it implies a manifest Contradiction, that two Persons should have equal Right; the one to demand, and the other to refuse one and the same Thing. But it may happen, that one of the two that are at War together, may have a very lawful Reason for it, and the other be in an invincible Ignorance of the Injustice of his Cause. In that Case both of 'em make War *justly* and *unjustly*: the invincible Ignorance on his Side, whose Cause is unjust, hindering his Action from being reputed unjust in itself. But that cannot happen but very rarely; for those who engage in a War, examine, or at least ought to examine, with a great deal of Care, all the Reasons on both Sides. See *Grotius*, Lib. II. Cap. 23. § 13.

⁴ See *Grot. B. 2. c. 24.*

⁵ See above, in B. 5. c. 13. § 3:

⁶ See the same Book and Chapter, § 4. &c.

⁷ See the same Book, c. 9. § 2, 3.

of War may be, a wise Man, before he draws his Sword, ought to consider what *Grotius* says, That it is a great Folly in particular Men, as well as Commonwealths, not to accept of Accommodation, or hear of Reconciliation, while Things stand whole on both Sides; but when they have sufficiently punished and mortified one another, then quietly to give over, without giving any Body the Trouble of parting them *.

V. The unjust Causes of War are recounted by *Grotius*, L.ii. c. 22. § 5, &c. Some of them are manifestly unlawful; others of them have some Colour to be thought lawful, tho' it be but weak and faint. Under the first Rank is to be placed Avarice and all extravagant Desire of increasing Wealth, as also Ambition, and the Hopes of enlarging Rule and Dominion, of growing great, and purchasing a false Fame and Glory, by the Oppression of others. Avarice is a Cause of War usually conceal'd and dissembled with great Care, because it supposes a base and fordid Spirit. But Ambition is generally favour'd in the World, under the Name of Gallantry and Fortitude. And it is commonly thought Greatness and Bravery of Mind, to grasp after, and fight for what belongs to other Men. But yet Princes, as *Phyliscus* told *Alexander* †, Tho' they are never so ambitious of Glory, should not think it any, to be remember'd, as Famines and Pestilences are, as the Plagues of Mankind, but as the greatest Blessings, as Peace and Happiness. For tho' the great God often makes use of War to purge and punish the World ‡, yet when Princes make War without any other Design than that, it is the greatest Impiety. And yet the Jews thought that they were allow'd, when their *Sinbedrin* declared War, tho' without any other Reason than barely for the Greatness and Glory of their Nation, to invade

their Neighbours, and, if they could, make an absolute Conquest of them †. Under the latter Class may be rank'd Fears, which arise from the Strength and Power of Neighbours; and when Men think, as the Poet says, they don't want Will to do what they have Power ‡. But this single Suspicion is not sufficient to make a Cause of War just, unless Men have very good moral Certainty, that they have form'd Designs against them. For an uncertain Jealousy of Danger may be Reason enough to persuade a Man to be circumspect, and fortify himself as well as he can, but can never give him a Right to strike the first Blow, tho' it be only with Intent that the other should give him real Caution, as they call it, that he will attempt nothing against him †. For as long as my Neighbour doth me no Injury, and I do not apparently take him in any Preparation for such a Design (for sometimes an intended Injury, and but begun, may as justly be punish'd with War, as an Injury that is finished) I ought to presume, he will always continue in the same Mind. But especially, if I have his Word and Faith to assure me of his Sincerity. And it would be extremely unjust in me to force him to give me real Caution; because thus he must be in a more suspected Condition than my self, being forced himself to rely upon my Faith alone. Supposing indeed, that there be just Cause of War, the Growth and Power of Neighbours may very well deserve immediate Consideration and Regard, in Debates about it: For Experience hath often proved it true, that Mens Desires of being great increase in Proportion to their Strength and Power †. “ And it is natural for Men to be suspicious, and “ afraid of being oppress'd, whenever they apprehend that there is an Over-balance of Power “ in their Neighbours; for it is easy to imagine, “ that

* *Ilocrates*, *Orat. ad Philip.* p. 154. *Ed. Min. Paris.* This Period is taken from the Abstract *de Officio Hom. & Civ. Lib. II. Cap. 16. §. 3.* See *Grotius*, *Lib. II. Cap. 23. §. 11, 12.* where he makes the two following Remarks, which are worth our taking notice of here. The first is, that what Assurance soever we may have of the Justice of our Cause, if it is not in our Power to produce a Title sufficient to convince him that detains what is ours, of the Illegality of his Possession, we cannot lawfully declare War against him on that Account; because in that Case we have no Right to force him to deliver up to us the Thing he is possess'd of. Besides, if the Possessor is a Person of no Honesty or Sincerity, tho' we should have lost the Deeds, that were necessary to be produced before the Arbitrators, that would diminish nothing from our Pretensions, nor hinder us from pursuing our Right by Force of Arms, as our Author has observ'd above, *Book V. Chap. 13. § 8.* *Grotius's* other Remark is, that when the Right is doubtful on both Sides, if neither of the Parties is in Possession of the Thing in Dispute between 'em, or if both of 'em are equally possess'd of it, they must decide the Matter by way of Division, and he that refuses this Expedient, ought to be look'd upon to be unjust, and an Enemy to Peace.

† As in *Euripides*, *Hellena*, ver. 38, &c. *Jupiter is said to have engaged the Greeks and Phrygians in a Quarrel.*

To ease the Earth of her too numerous Sons.

‡ *Seldenus*, de J. N. & G. sec. Hebr. l. 6. c. 3. & 12. To which we may add a fine Passage of *Cicero's*, upon the false Idea of Conquerors. “ If this Greatness of Soul which they shew in bearing Fatigues, and exposing themselves to the most hazardous “ Dangers, is not adorn'd with a large Stock of Justice; and if they use it for themselves, and their own private Advantage, instead “ of employing it for the publick Good, so far is it from being a Virtue, that it is a Vice, and a downright Fierceneis, that stifles all “ Sentiments of Humanity and Tenderness, *De Officiis*, *Lib. I. cap. 19.*

‡ *Lucan*, *Pharsal.* l. 3. ver. 100, 101.

‡ *Gellius*, l. 7. c. 3. A Gladiator that prepares himself to fight, must accept of these Conditions of Combat, either to kill his Enemy, or to fall himself; but the Life of Man is not confin'd by any such hard and severe Laws, as to oblige us to do others Injuries first, that we might not suffer them ourselves.

‡ Vid. *Cumberland*, de Leg. Nat. c. 2. § 15. in fin. *Bacon's* Essays, c. 19. *Seneca*, *Oedip.* ver. 542, 543. *Stat ingens arbor atque umbra gravi sylvas minores urget.*

A lofty Tree that stands, which with its Shade
Oppresseth all the Underwood.——

Procop. *Hist. Goth.* l. 4. *Herodes* *Orat. de Repub.* Neighbouring Nations are never concern'd at the Mischiefs which befall one another from their own Domestick Broils and Quarrels; the Weaker have no Reason, because thus they are secure from being enslaved; they that are equal in Strength, think of gaining a Superiority by it; and the Strongest, of purchasing an easier Conquest, *Polyb.* l. 1. c. 83. A Man should never trust another with so much Power, as to place him out of his Reach, when he is to contest with him about any Right that is confessedly his own. *Appianus Alexand.* *Lybic.* p. 32. *Ed. Steph.* Tho' it be a Friend, yet it is necessary to be cautious how he is made too great.

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‡ Vid. *Ælian.* V. H. L. 14. c. 14.

“ that such as have too great a Share of Strength, will find Reasons, when they please, to make use of it upon them that are weaker, though they do nothing to deserve it.” But now as for *Utility*, to make that a *Cause of War*, or to pretend the same Right from thence to what belongeth to others, as Necessity may give, is unpardonably impudent; though it is no more than what the *Athenians*¹, in *Thucydides*, said for themselves, “ That no Body is so much a Friend to Justice, as to neglect an Opportunity of possessing himself of what he can get by Force, barely because it is unjust.” Especially since nothing can be more opposite to the publick Interest of Mankind, than to admit the Introduction of such a Right, which will give a Man leave to take away any Thing by Force from another Person, which he thinks will be an Advantage to himself: For it must be expected that other Persons will use him with the same Liberty he takes with them. And as to other *Pretexts* for War, which *Grotius* mentions in the same Place, they may be answered the same Way. My Lord *Bacon*, in his *Advancement of Learning*, gives this for a *sufficient Reason* for making War upon the *Americans*^a, which I must confess I cannot agree with him in: “ That they were to be look’d upon as People proscribed by the Law of Nature, inasmuch as they had a barbarous Custom of sacrificing Men, and feeding upon Man’s Flesh.” For it ought to be distinctly considered, whether Christian Princes have sufficient Licence given them to invade those *Indians*, as People proscribed by Nature, only because they made Man’s² Flesh their common Food? or, because they eat the Bodies of Persons of their own Religion? or, because they devoured Strangers and Foreigners? And then again it must be ask’d, whether those Strangers they are said to kill and eat, come as Enemies and Robbers, or as innocent Guests and Travellers, or as forc’d by Strefs of Weather? For this last Case only, not any of the others, can give any Prince a *Right of War* against them; and this to those Princes only, whose Subjects have been used with that Inhumanity by them.

VI. Tho’ it be also common to all *Sorts of War* that the particular *Nature*, and, as I may call it, *Genius* of them is *Violence* and *Terror*, yet it is also lawful to make use of *Stratagem* and *Fraud* against any Enemy, provided there be no Treachery, or Violation of Compact and *Faith* in it. For as *Agessilaus* said, *To break the Faith of Articles and Leagues, is no less than a Contempt of GOD: But to circumvent an Enemy, is well enough consistent with Justice, and may be attended with as much Glory as Success*^b. And the proper Sense of that famed Saying of *Cleandridas*

implies no more: *When the Lion’s Skin fails, it is necessary to put on the Fox’s*^c.

VII. But the better to understand how far it is lawful to pursue *Revenge*, and use *Violence* against an Enemy, it will be necessary to observe, that there is a great deal of Difference between the *Liberties* which a *State of Hostility*, simply considered, gives a Man against his Enemy, and the *Liberties* which the *Mercifulness* and *Gentleness* of the *Law of Nature* would suffer him to take. The *Law of Nature* obligeth Men to a mutual Exercise of the Offices and Duties of *Peace*; and the Person that first violates them to my Prejudice, releases me, as far as lies in his Power, from paying any of those Offices to himself: And in Consequence, as long as he professes himself my Enemy, he gives me a *Liberty* to use *Violence* against him *in infinitum*, or as far as I please. Especially since, if I am not allow’d this *Liberty*, but am necessarily obliged to confine my *Violence* within certain Bounds, and in no case to proceed to Extremities, the proper End of *War*, whether *offensive* or *defensive*, can never be obtain’d. And therefore every open *publick War* seems to have something in it like *such a sort of Compact* as this: *Try your Strength, and I will try mine*. And this holds not only where my Enemy resolves to push Things to the utmost against me, but also tho’ he designs to destroy me, without going to Extremities: For he hath no more Right to give me a slight Wound, than one that may prove mortal. And therefore it is not only so far lawful for me to use *Violence* against my Enemy till I have repulsed the Danger he threaten’d me, or till I have recovered, or forced from him what he either unjustly deprived me of, or refused to pay me; but I may further oblige him to give me *Caution* for the future. Which if he suffers to be forced from him, he sufficiently discovers, that he still entertains malicious Designs against me, and that one Time or other he may put them in Execution. Neither indeed is it always unjust, to return a greater Evil for a less. It may, ’tis true, be objected, that Retribution ought to be made in due Proportion; but it must be said, that this is to be applied only to *Courts of Judicature*, where Punishments are inflicted always by *Superiors*. The *Evils*, which are the Effects of a *Right of War*, are properly Punishments, because they are not inflicted by a *Superior* as such, nor have any Tendency to reform either the injurious Person, or any others, but only to defend or regain the Security of a particular Man’s Rights and Properties. In pursuance of which End, it is lawful for me to make use of such Means as I think will best prevail against a Person, who, by his injurious Treatment of me, hath put me out of all Capacity of

^a De Augmen. Scient. p. m. 348.

^b Plutarch Apophtheg. Lacon. p. 209. B.

^c Cleandrid. in Polyen. Stratag. L. 2. c. 10. n. 5. Vid. Xenoph. Cyropæd. l. 1. & Grot. l. 3. c. 1. § 6. add. supr. l. 4. c. 1. § 19.

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¹ B. 1. c. 76. Ed. Oxon.

² If these *Anthropophagi* eat only the Flesh of human Creatures that die a natural Death, or are killed by others, and not themselves, how barbarous and savage soever such a Custom was, it would give us no *Right* to attack them purely for that single Reason. But since they themselves kill human Creatures, either to eat them or sacrifice them to their Idols, ’tis a Thing so cruel, so contrary to Humanity, and so destructive to Society and Mankind in general, that we cannot look upon, but as just and commendable, a War that should be undertaken to endeavour to have the Use of it abolish’d, though these Men practis’d it but only among themselves, and always spared Strangers. If our Author maintains the contrary, ’tis because he always argues upon a Principle, whose Falseness I have prov’d elsewhere. See Note 1. § 3. of this Chapter, and Chap. III. § 4. Note 3.

doing him any Injury, till such Time as it shall be agreed between us to forbear *Hospitalities*. But now the *Law of Humanity* would have Men consider not only what an *Enemy* may suffer without Injury, but what it may be proper for a generous *Conqueror* to inflict. And therefore they ought to be particularly careful, that as far as is possible, and their own necessary Defence and future Security will permit, to proportion the Evils they inflict upon their *Enemy*, to the *Measures* and *Moderation* observed by *Civil Courts* in punishing *Criminals* and *Offenders*. Upon this *Moderation* *Grotius* ¹ is very large, *l. iii. c. II, &c. ad 16*. And the three Rules he prescribes, *l. iii. c. I. § 2, 3, 4.* will give us a clear View of the *Liberties of Hostility*. But besides, the Uncertainties and Turns of Fortune which may happen in *War*, ought to persuade Men to be very temperate in the Use of those *Liberties*, for fear an

Alteration in Affairs should, as it were, make their own Weapons recoil, and return upon themselves the Usage they gave others^a. So when *Colonna*, in *Gratianus* ², gave Orders that the *Turks*, which were taken Prisoners in the Fight at *Lepanto*, should be well used at *Rome*, he turn'd to *Mahomet*, and said aloud, Learn to be merciful of us, you that are generally so cruel and barbarous to *Christian Captives*: To which the *Turk* replied, The Cruelty, Sir, you object, is however pardonable in us, because we never knew before what it was to be Prisoners, and be left to the Mercy of an *Enemy*. The *Turks* understood well enough how to take Prisoners, but never thought of being made such. How they are to be dealt with² that supply an *Enemy* with what he wants, may be seen in the *Author* mentioned before, *l. iii. c. I. § 5. & c. 17*.

VIII.

^a Vid. *Diad. Sicul. l. 10. c. 47.* *Virg. Æneid. 10. ver. 533.*

— — *Belli commercia Turnus*
Sustulit illa prior, jam tum Pallante perempto.

^b *Gratianus de Bello Cyprio, l. 5.*

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¹ *Grotius*, (*Lib. III. Cap. 1. § 1, 2, 3.*) lays down at first three general Rules, which serve to explain the Extent of the *Rights of War*. First, All that has a Relation morally necessary to the lawful End or Design of the War, is permitted, and no more: For it would be to no Purpose to have a Right to do a Thing, if we could not make use of the Means necessary to bring it about. But at the same Time, it would not be just, that under the Pretence of pursuing our Right, we should suffer ourselves to do every Thing, and carry on Matters, without any Manner of Necessity, to the last Extremity. Secondly, The Right which we pursue by Arms ought not to be consider'd only with regard to the Cause which began the War, but still in reference to the fresh Causes that happen afterwards: Just as at Law, one of the Parties often acquires some new Right before the ending of the Suit. There lies the Foundation of our Right, to act against those that join with our *Enemy*, whether they are his Dependents or no. Thirdly, There are abundance of Things, which, tho' otherwise unlawful, are permitted, because they are inevitable Consequences of War, and happen contrary to our Intention; otherwise there would never be any Way of making War without Injustice, and the most innocent Actions would be look'd upon as unjust, since there are but few from whence some Evil will not accidentally happen, contrary to the Intention of the Agent. (See above, *Lib. I. Cap. 5. § 3. Note 6, 7.*) Here now follow the Particulars of the *Rights* that War gives over the *Enemy's Person* and *Goods*, with the Moderation that ought to be observ'd in them. First then, It is certain that we may kill our *Enemy*, otherwise our taking up Arms would be to no Purpose. And to consider the Thing in itself, it is no Matter which Way we rob him of Life; whether by open Force, or by Fraud and Stratagem, by the Sword, or by Poison, tho', according to the Notions and Customs of civilized Nations, the not only causing any poisonous Draught to be given to our *Enemy*, but also the poisoning of Fountains, Wells, Springs, Arrows, Darts, Bullets, and other Weapons employ'd against him, is esteem'd as a base and criminal Cowardise. (Our *Author* a little lower, § 16. handles the Question, Whether it is lawful to assassinate our *Enemy*?) We may also kill him wherever we find him, either in his own Territories or ours, in Places that belong to no Body, but not in *Neutral States*; for violent Means are not suffer'd in a *Civil Government*, where we ought to beg the Assistance of the Magistrate. Now if it is lawful to take away our *Enemy's* Life, much more may we wound, maim, or do him any Damage in his Person any other Way whatsoever. (See *Grotius*, *Lib. III. Cap. 4.*) But the *Rights* of War do not extend so far as to authorize the Outrages committed upon the Honour and Chastity of Women: For that contributes nothing towards our Defence or Security, or the maintaining our *Rights*, but only serves to satisfy the Brutality of the Soldiers. (*Grotius*, *ibid. § 19.*) Besides, when we can defend ourselves, or have Satisfaction for the Injury the *Enemy* has done us, without making a Slaughter, we ought to forbear it, and not shed human Blood unnecessarily. Neither must we directly and deliberately take away the Lives of Prisoners of War, nor of those that demand Quarter, and surrender themselves; much less of Children, Women, and old Men; and in general of all those who are neither of an Age nor Profession fit to bear Arms, or who have no other Share in the War than their being in the Country, or Party of the *Enemy*. (See *Grotius*, *Lib. III. Cap. 11.*) Secondly, in relation to the *Enemy's Goods*: It is plain that we may carry 'em off, ravage, spoil, or entirely destroy them, even without excepting *sacred* and *religious Things*, as they call 'em, that is, Things design'd for the Use of Religion: For those belong either to the State or the Sovereign, and they are not called *sacred* but on account of a certain Use to which they are applied. Those who believe that they contain something that is *divine* and *invulnerable*, do ill indeed to meddle with 'em at all, but it is only because they act against their own Conscience. (See *Grotius*, *Lib. III. Cap. 5.* and *Mr. Buddeus's* Dissertation, *de jure belli circa res sacras* among his *Selecta juris N. & Genr.*) However, of what Nature soever the Things belonging to the *Enemy* are, whether *Sacred* or *Profane*, we ought not to destroy or damage them but as it is necessary and conducive to the Design of the War, and the accelerating of Peace. To do evil to another, without a Prospect of doing ourselves any good by it, either directly or indirectly, would be a Madness equally foolish and criminal. There are but few, for Example, that are necessary after the taking of a Town, and ruining the Churches, *Statures*, and publick or private Buildings; but we should generally spare all these, as well as the Tombs and Sepulchres.

² To give a clear and distinct Idea of this Matter, something must here be said in general about *Neutrality*, of which our *Author* speaks no where. I shall here borrow pretty near what *Mr. Buddeus* says in his *Elemens de la Philosophie Pratique*, Part II. Cap. 5. Sect. 6. § 36, &c. There is a *general Neutrality*, and a *particular Neutrality*. The *general Neutrality* is, when without being in Alliance with either of the two *Enemies* engag'd in the War together, we are very ready to do equally to both the good Offices which every State is naturally bound to render to others. The *particular Neutrality* is, when we are particularly engaged to stand *Neuter*, by some Compact, either express or tacit. This last sort of *Neutrality* is either *fully* and *entire*, when we act equally in all Respects towards both Parties; or *limited*, as when we favour one Side more than the other, with regard to certain Things and Actions. We cannot lawfully force any one to enter into a *particular Neutrality*, because every one has the Liberty of making or not making *Alliances* and *Treaties*, or because at least they are not bound to do it but by Virtue of an imperfect Obligation. But he that undertakes a just War, may oblige other Nations to observe an exact and *general Neutrality*, that is to say, not to favour his *Enemy* more than himself. This then is, as it were, an Abstract of the Duties and Obligations of *Neutral Nations*. They are oblig'd equally to put in Practice towards both Parties that are at War together, the *Laws of Nature*, as well *absolute* as *conditional*, whether they impose a *perfect Obligation*, or only an *imperfect one*. If they do one of them any Office of Humanity, they must not refuse to it the other, unless there be some manifest Reason which engages them to do something for the one, that the other had besides no *Right* to demand. But they are not bound to do Offices of Humanity to one Party, when they expose themselves to great Dangers by refusing them to the other, who has as much *Right* to demand them. They ought not to furnish either of them with Things employ'd in exercising Acts of Hostility, unless they are empower'd by any particular Engagement: And as for those that are of no Use in War, if they supply one Side with them, they must also the other. They ought to use their best Endeavours to bring Matters to an Accommodation,

that

VIII. I come now to consider what Difficulties and Enquiries relate to Wars raised by Commonwealths and Civil Governors. And here it is first to be observed, that the *Right of War*, which always attends all Men in the *State of Nature*, is taken away from private Persons in Commonwealths; and that therefore in *Civil States* Subjects are not to punish such as injure them with their own Swords, and as they please; nor endeavour to recover their Rights, when denied them, by their own Force; but they must apply themselves to the *Magistrates* in such Cases, whose Duty it is to take care that their Wrongs be redress'd, *Satisfaction* be made for Damages sustained, *Caution* be given for the future, and that every Man be maintain'd in his own just Rights^a. For though at some Times, and in some Cases, private Subjects may be allowed *Liberty* to defend themselves with their own Strength; yet such a *Liberty* is by no Means to be called a *Right of War*. For a Right to make *War* implies a Power to begin it at my own Discretion, to continue it as long as I please, and to put an End to it by *Compact* with the Enemy: But Subjects are never to be permitted to defend themselves by their own Force, except in Dangers unavoidable², and then no longer, than till they have overcome them. And as no private Subject hath a *Right of War*; so neither is it necessary that *Peace* should be made by any *Compact* of the Subjects, when the Authority of the *Sovereign* hath sufficiently settled it before. Nay, though private Subjects be perfectly reconcil'd to one another, yet when all is over, the *Magistrate* may, if he please, punish the Injury, which first gave occasion to the Quarrel. But, it may indeed sometimes happen, that any private Subject may assume the same *Right of Defence*, which he would have had in a *State of Nature*; for Instance, if he happened to come into any Place which belongs to no Commonwealth, but continues in its primitive *Liberty of Nature*. But then in this Case it is to be considered, whether the Person be assaulted by his *Fellow-Subject*, or by a *Stran-*

ger: For if we suppose by the *first*, he is allow'd the Use of his own Force to resist only the present Danger: But the further Punishment of the Injury must be referr'd to their common *Sovereign*; except it appears that the Person who makes the Assault, intends to return no more into his own Country, and hath left nothing behind him that can make *Satisfaction* for the Injury: But if a Man be assaulted in any such Place by a *Foreigner*, he hath *Liberty*, if he can prevail against him, to bring him to the last Extremities. And he may also enter an *Action* against him in the Commonwealth he is a Subject of, and there demand *Satisfaction* and Punishment, and make use of the *Interposition* of his own Commonwealth. And then if Justice be denied him, his own Commonwealth hath *Right* to demand *Satisfaction* for him in a Way of *War*. And therefore, if a Man be set upon in the open Seas, he need not give himself the Trouble to use all his Force; but only just so much as will resist present Danger, because when his Enemy comes back to his own Country, he may enter an *Action* against him there: But if a Man be assaulted by a Subject used to despise and defy the Authority of the *Magistrate*, or the *Magistrate* himself openly refuse to do Justice, he must right and defend himself as he can, whenever he goes out of the Dominions of his own Commonwealth. But if the *Magistrate* should excuse himself, by pleading the Iniquity of the Times, or the bad State of the Commonwealth, and desireth either that the Prosecution of the *Cause* should be deferr'd to some other Time, or that the Neglect of Justice should be thought pardonable in the present Unhappiness of the Commonwealth; every sensible and good Man ought to acquiesce in, and be satisfied with the Answer.

IX. *War* is commonly distinguished into *solemn*, and *less solemn*¹. In the *first*, it is necessary the *War* should commence and be directed by the *supreme Authority* on both Sides, and that it should be duly *proclaim'd*². The *less solemn Wars*, are those that are either not publicly declared,

or

^a Vid. L. 50. t. 17. l. 176. D. de reg. juris, & L. 4. t. 2. D. Quod metus causa gestum erit, l. 11, 12, 13. & L. 43. t. 24. l. 7. §. 3. D. quod vi aut clam.

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that the injured Party may obtain Satisfaction, and that the War may be brought to a Conclusion: And if they are under any particular or private Engagement, they ought to execute it punctually. On the other Side, those who are at War, must exactly observe, towards neutral Nations, the Law of Sociability; and not suffer their Country to be ravaged or plunder'd. They may however, in a Case of great Necessity, make themselves Master of a Place situated in a *Neutral Country*; provided that as soon as the Danger is over, they restore it to the right Owner, and make him Satisfaction for the Damage he has received by it. See what our Author has said, B. II. c. 6. §. last, at the End; and *Grotius*, L. III. c. 1. §. 5. and c. 17. Moreover, as to what relates to the Question, whether we may hinder *Neutral Nations* from trading, during the War, with the Enemy; see a little Letter of our Author's, publish'd about three or four Years ago, in a Book printed at *Hamburg*, and intitled, *Fo. Groningii Bibliotheca universalis Librorum Juridicorum*, &c. p. 105. of the Treatises that are in the Beginning of it, and *Bæcler's* Dissertation, intitled, *Quies in Turba*, p. 1004. of the Collection of his Dissertations, printed in 1701.

¹ Nor only from private Persons in a *Commonwealth*, but even from a whole entire Body of People, that are under the Dominion of any other, or a *Sovereign*. However, the antient Kings of *Persia* did often permit their Subjects to war one with another. See *Esther* ix. 6, &c. and Mr. *Le Clerc's* Commentary upon it.

² See *Græc. B. I. c. 3. §. 4.*

² The Declaration of War, considered in itself, and independently of the particular Formalities of every People, does not simply belong to the *Law of Nations*, taking this Word in the Sense that *Grotius* and others give it, but to the *Law of Nature*. Indeed, Prudence and natural Equity, equally demand, that before we take up Arms against any one, we should try all amicable Ways, to avoid coming to such grievous Extremities. We ought then to summon him that has done us any Damage, to make us a speedy Satisfaction, to see if he will have regard to himself, and not put us to the hard Necessity of pursuing our Right by forcible Means. See Mr. *Budden's* *Elements de Philosophie Pratique*, Part. II. c. 5. §. 4, 8, 9. and his Dissertation, intitled, *Jurisprud. Historica Specimen*, §. 34. where it appears, that the Declaration of War has no Place but in *Offensive Wars*: For when we are actually attacked, that alone gives us Reason to believe, that the Enemy is absolutely resolv'd to enter into no *Treaty of Accommodation*. From thence it also follows, that we must not begin Acts of Hostilities immediately upon declaring War; but must stay till he from whom we received the Damage, plainly refuses to give us Satisfaction, and has put himself in a Condition to receive us with Bravery and Resolution: Otherwise the Declaration of War would be nothing but a vain Ceremony, without any Effect. See *Grotius*, L. III. c. 3. where all this Matter is treated of.

or else that are levied by, or against private Subjects. The *first* looks like an Incurtion or Depredation of Robbers: The *second* supposes that one Side or other is in Rebellion, or at least in such a Way of Life, as can at no Time make the *War just*. And thus *Civil Wars* may happen to be a *Species* of the *less solemn*, when the Commonwealth is so divided, that it doth not appear on which Side the *Sovereign* is engaged. And here it is observable with regard to *solemn Wars*, that Authors usually call two distinct *People*, their *Generals* and *Governors* concern'd in them, *just Enemies*, in Opposition to Robbers and *Pyrates*. So *Cicero* says^b, "A just Enemy is one that hath a Commonwealth, Courts of Justice, and publick Treasure under his Command. And besides also, the Consent and Agreement of his People, and Power, when Occasion offers itself, to make Peace, or enter into League." Though a Commonwealth is not therefore to be look'd upon as only a Confluence of Robbers, when it hath been publickly guilty of some unjust Things. Neither on the other hand, can a Company of Robbers assume to themselves the Honour of a Commonwealth, though perhaps there be some Appearance of Justice among them^c.

X. And here, upon what *Grotius* asserts, l. i. c. 3. §. 4. a Question is moved, Whether a *Magistrate* properly so call'd, as such, hath Power to make War? Which I think is to be denied. For since War is a Matter of that Nature and Consequence, that it may involve the whole Commonwealth in Danger, to give the Magistrate, as such, Power to *declare* and *determine* War by his own Authority, would be the same Thing with giving him the *sovereign Power*. It must be allowed indeed, that whatever *Branch* of publick Business the *Sovereign* entrusts with the *Magistrate*, he must be supposed to give him all the Power necessary to the due Discharge of his Duty in it. And therefore it is a *Maxim* of the *Roman Law*^d, "That every Magistrate that hath Jurisdiction, as such, hath a mix'd Authority, which mix'd Authority is defined by a moderate Power, to punish obstinate Offenders, as far as is necessary to support his Jurisdiction, and a due Administration of Justice." But when a *Magistrate*, who is entrusted with *Jurisdiction*, useth Force only to reduce a few disobedient Subjects, it is not to be supposed that he is making *War*; for a *coercive Power* over Subjects is not a *Right of War*: *War* seeming to lie entirely between *Equals*, or at least those that pretend themselves to be such. But if the Number of the *Malecontents*, or disaffected Persons grow so incurable, as to make it to be fear'd, that an Attempt to suppress them would endanger the Safety of the Commonwealth and the common *Officers* of *Justice* are too weak to reduce them, the *Magistrate* ought to expect the Resolutions of his *Sovereign* to direct him in his Proceedings in the Matter. And therefore

Grotius is under a Mistake when he says, l. i. c. 2. §. 4. "That if we consider the Thing without Relation to the Civil Laws, every Magistrate as he ought to protect the People under his Charge, so if he be opposed by Force in the Exercise of his Authority, he hath a Right to make War." For the Defence and Protection of the People properly belongs to the *Sovereign*, and a *Magistrate* entrusted with *Jurisdiction* is only so far to defend them, as he is obliged to guard the Poor and Weak by Justice against the Oppressions of the Rich and Great. To which End there is no Necessity he should have a *Right* of making *War*. By the Way it may be observed, that though the Slaughter of above three thousand Men, at the Command of *Moses*, upon the *Idolatri* of the *Golden Calf*, may with more Propriety be call'd a *Punishment* than a *War*; yet that the Destruction of the *Benjamites* looks more like a Rout in War than Punishment, though *Erasmus* is of a different Opinion^e. And here it will not be improper to add something in general of the Power of *military Magistrates*, or of *Generals* and *Leaders*, to whose *Conduct* the *War* is entrusted by their *Sovereign*. A *General* therefore sent to take the *Field* with an *unlimited* Power, may use what Measures he thinks fit, either to disquiet and offend his Enemy, or defend himself; but as he is not impowered to levy any *new War*, so neither when *War* is begun, can he make *Peace* without the Authority of his *Sovereign*. But *Generals* confined by *limited Commissions* have, 'tis plain, no further Power than those give them. However so much Power every *General*, whether his *Commission* be *unlimited*, or not, may justly assume, as to use what Method he thinks best, to defend himself against the Enemy, when they have advanced too far to give him an Opportunity of making an honourable Retreat. And in such a Case as this only, what *Tully* saith ought to be allowed^f. "That in Affairs of such unexpected and straitning Circumstances, a Man should not think of itaying for the Instructions of the Senate, but be a Senate to himself, and do what he thinks will be best for the Advantage of the Commonwealth." But a *Defence* indeed doth not consist only in a brave Resistance, or in repelling or avoiding the Enemy's *Attacks*, but also in making an *Affault* upon him, and returning the same Treatment back. And therefore, for Example, an *Admiral* at Sea, who is by his *Orders* to be only on the *defensive*, may yet, notwithstanding such a Confinement, upon Provocation sufficient, break in upon the Enemy's *Fleet*, and sink and burn as many of their *Ships* as he can; all that he is forbidden, is to challenge the Enemy first, when they don't think of *Fighting*. And so a *General* at Land, though his Instructions be not to engage the Enemy, may yet, if he be attack'd in his *Intrenchments*, not only repulse them, when they would force his Camp, but make a *Sally*, and give them Battle; and

^a Vid. L. 50. t. 16. l. 118. D. de verb. signif. L. 49. t. 15. l. 21. §. 1. c. 1. 24. D. de captiv. &c.

^b Cic. Philip. 4. c. 6.

^c Vid. Grot. l. 3. c. 3. §. 2.

^d Vid. L. 48. t. 4. l. 3. D. ad L. Juliam Majest.

^e See Exod. xxxii. 27. &c. and Judges xix, xx.

^f Erasmus, Epist. l. 6. ep. 29.

^g Cic. Ep. ad Familiar. l. 10. c. 16.

Mr. BARB. NOTE on §. x.

^h V. D. L. 2. t. 1. De Jurisdictione, l. 3. V. etiam L. 1. t. 21. De officio ejus cui mandata est Jurisdictione, L. 5. §. 1;

and if he be set upon in his *March*, and finds he cannot make a safe and an honourable Retreat, he may justly venture a Fight. And therefore a *Governor* of a Province or Town, especially if he hath any good Number of Soldiers under his Command, ought to make the best Resistance he can, when he is invaded by an Enemy, without expecting *Instructions* from his *Sovereign*. But he is not to carry the *War* into a *foreign Country*, without express *Commission*. An *inferior* Commander, that is left in trust with a Body of Soldiers for the Defence of a Town, or Fort, is obliged to do the utmost he possibly can for its Security; and indeed, to hold out so long in Defence of it, till he sees the Place must inevitably be carried by Storm, and his Forces cut off. And therefore from what has been said, we may judge of the Action of *Pinarius*, mentioned in *Livy*, l. xxiv. c. 37. His Orders were to defend the Castle of *Enna*; and to deliver up the Keys of it to them of the *Town*, would have forfeited his Head; and therefore when he saw that both himself and Soldiers must necessarily have been left to the Mercy of the Enemy, and be put all to the Sword, unless he prevented it by suppressing the Insurrection that was forming in the *Town* against him, he did nothing beyond what the Powers he had would allow him, in putting the faithless Citizens to Death, except, perhaps, it was carrying his Severity too far without Necessity, after he knew the Danger was over. Neither can it be said that *Pinarius* rais'd a new War. For the *publick War* was at that Time carried on in *Sicily*, against the *Carthaginians* and their *Allies*, with whom *they* of *Enna* endeavoured to join. But whether particularly when a *War* is at an End, the same Arms may be turned against them that assisted the Enemy with Succours and Supplies, is more than a *General* hath Power to determine. But if a *Governor* of a *Province*, at a great Distance from the *Metropolis* of the Empire, be impowered to make *War* or *Peace* with his Neighbours; the *Wars* he undertakes must be looked upon to be *solemn*. Because he that gives another Power to do a Thing, must be supposed to be the *Author* of what he doth by Virtue of that Power. But if a *Governor* that hath no such Power, make *War* upon another, without Authority from his *Sovereign*, it is left to the *Sovereign*, whether he will own the Action of his *Minister*, or

not. If he owns it, the *War* must be looked upon to be *solemn*. And this *Ratification* doth, as it were, reflect back an Authority upon the *War*, so that the whole Commonwealth is obliged by it. But if the *Sovereign* disown the Action of his *Governor*, the *War* must be looked upon to be a *Sort of Robbery*; and if the *Governor* be given up or punished at home, and *Satisfaction* be made for the *Damages* sustained, the Commonwealth is not engaged in, or obliged by the *War*. And this was the Reason why the *Roman Ambassador* demanded of the *Carthaginians*, Whether *Hannibal* laid Siege to *Saguntum*, by his *own*, or by the *publick Authority*? To which the *Carthaginians* rightly answered, "That the Question first to be determined was, whether the Siege of *Saguntum* was contrary to any Articles of *League* between them and the *Romans*? That before this was decided, the *Romans* had no Reason to enquire, whether a Subject of *Carthage* did any Thing by his *own* or *publick Authority*."

XI. It may be further enquired, whether a *Prefect* or *Governor*, that hath no *general* or *particular* Commission to warrant him, can justly make *War* upon a *foreign State* or *Prince*, only upon *Presumption*, or because he believes his *Sovereign* will approve his *Action*? Which in my Opinion must be denied. For it is not sufficient to know what it is probable his *Sovereign* would approve, if he were consulted in such a particular Posture of Affairs, but it should rather be considered, what it is probable he would desire should be done without his Advice, when the Matter will bear Time, and the Point is nice and difficult, if a Law were to be made upon it, where he must determine universally of all such Cases. And then no doubt it will appear, that it would be provided, that no Minister should undertake any Action in which the Commonwealth is nearly concern'd (such as a *War* is, and especially the *offensive*, which is the proper Subject of the present Enquiry, and which will generally well enough admit of Delays) without the Advice of his *Sovereign*. And therefore, though it should happen that the *Sovereign* should at the same Time think a *War* with a certain Enemy necessary, yet to be sure he cannot be pleas'd to see his *Minister* go beyond the Bounds of his Duty. Thus *Cambyses* put his Servants to Death that saved

^a As *Marius* made War upon the *Galle-Graci*. See *Liv.* l. 38. c. 45, &c. and l. 41. c. 7. and *Florus*, l. 2. c. 11.

^b *Livy*, l. 21. c. 18.

^c Vid. *Xenophon* *Rer. Græc.* l. 5. Where the Justice of the Action of *Phabidas* in seizing *Caimea*, is disputel.

MR. BARB. NOTE ON § XI.

¹ 'Tis *Grotius's* Decision, I. I. Cap. 3. §. 5. Num. 3. upon which *Gronovius* pretends that this great Man ought not absolutely to maintain the Negative, but to distinguish between *Defensive* and *Offensive Wars*: For, adds he, there is no doubt, but that a *Governor* of a *Province*, especially if he has any Forces ready in Pay, as it is the usual Custom in *Frontier Provinces*, may, without exceeding the Limits of his Power, oppose his Neighbours, upon their attacking him, and repel Force by Force, without staying for a particular Order from his Prince. For my Part, I cannot conceive, how it is that this Commentator has contriv'd it, that this Exception is not understood of itself? Tho' *Grotius* had not explain'd himself here; what he has said elsewhere of the Privileges of Necessity, would have been more than sufficient to have hindred us from attributing any other Thought to him. But is it not plainly expressed in the preceding Paragraph, Num. 3. *Si ut præens sit periculum, ut tempus non seriat eum consuli qui supremum in civitate jus habeat: hic etiam Necessitas exceptionem porrigit?* After which he instances in the Example of *L. Pinarius*, related by *Gronovius* himself, and by our Author also; and in the very Place in dispute; *Sed hoc magis videndum, quod ille, ubi res moram fert. — se inconsulto cupiat fieri*; which manifestly supposes, that when the Business admits of delay, we are not obliged to stay for our Master's Orders; and that in such a case it is reasonably to be presumed, that he leaves us at Liberty to act as we shall judge most proper. All the Difficulty that would here be in it, would be with Respect to the Application to particular Cases; as for Example, *Gronovius* defends against *Grotius*, the Judgment of *Cicero*, who in a Panegyrick on *Octavius* and *Bru-tius*, commends and extols them, for taking up Arms upon their own Authority against *Mark Anthony*. But I have no Design to engage my self in a Discussion of this Matter, which does not belong to my Subject in hand.

saved *Craesus's* Life, though at the same Time he was well enough pleas'd that they had spared him ⁴.

XII. But now, as Persons that live in a *Liberty of Nature* cannot justly be punished with *War*, unless the Injuries they themselves do to others deserve it; so how it comes to pass, that in a *Civil State* the Guilt of the Injuries, and the Cause that gives Birth to War, diffuse themselves from the Persons that were immediate Authors of them, over the whole Commonwealth, will be Matter of further Enquiry. This therefore is certain, that no *Community*, whether *Civil* or otherwise, is oblig'd by any Action of particular Members, without some culpable *Act* or *Omission* of its own. For how severely soever the Commonwealth may threaten, the Subjects are still left to their natural Liberty to do otherwise if they please: So that the Commonwealth can no way be responsible for the Actions of the particular Subjects ⁵. But among the several Ways, the *Governors* of Commonwealths are involv'd in Wars from the Injuries committed by their Subjects, these two, I think, will most deserve our Consideration, *viz.* *Sufferance* and *Reception*. As to the Matter of *Sufferance*, it is manifest, that the Person who knoweth the Commission of a Crime, and hath Power to hinder it, without apparent Danger of greater Evil by doing it, and is oblig'd to do it, must be supposed to be guilty of the Crime himself. For it is necessary the Knowledge of the Fact should be attended with Power to hinder it; one of these separately not being sufficient to communicate any Share in the Guilt ⁶. And the *Governors* of Commonwealths are presumed to know what their Subjects openly and frequently commit, and their Power to hinder it is always supposed, unless the Want of it be manifestly proved. "The Guilt of a Crime before it hath been judicially tried, remains upon them that com-

mitted it; but after Sentence is pass'd upon it, they are the Criminals that neglect to put the Law in Execution." The Case of *Reception*, and how far the Commonwealth gives *Reason* for *War* against itself, by receiving and defending Persons that have injured others, may be seen at large in *Grotius*, l. ii. c. 21. §. 3, 4, 5, 6.

XIII. The same *Author* also, l. iii. c. 3. give, us a full Account of the Nature of *Reprisals*, which are violent *Executions* made upon the *Persons* or *Goods* of the Subjects of a *foreign Commonwealth*, that refuseth to administer Justice ⁷. In Defence of the Equity of which I further add, that as it is a natural Consequence of the *Combination* of Men into *Civil Bodies*, that the Injuries which one Member suffers from a *Foreigner*, seem to affect the whole Commonwealth; so it doth not appear to be unjust, that every particular Subject should be oblig'd to assist the Discharge of the publick Debts: Since whatever they pay upon that Account, must be refunded to them by the Commonwealth. But if it should be any Man's Misfortune to be a Loser by the *Publick*, he must look upon it to be one of those Inconveniencies, that are almost unavoidable in a *Civil State*, and consider that these are very tolerable Evils in comparison of those, which he must have felt in a wild *Liberty of Nature*.

XIV. It is manifest that Men often make *War*, not only upon their own Accounts, but also for others ⁸. But to answer for the Justice of it, it will be necessary, first, that the Party who is *assisted* should have *just* Reasons for *War*. And secondly, that the Party that *assists* should be under some particular *Ties* and *Obligations* to him that is principally concern'd in the War; because otherwise it would be very unjust to assist one Man against another; since as they are Men they both equally deserve Favour ⁹. They therefore

⁴ *Herodot.* Thais, p. 112. Ed. H. Steph. Vid. *Senec.* de Ira, l. 1. c. 16. Concerning the Action of *Piso*, Pro-prator of Sicily, *Livy*, l. 44. c. 10.

⁵ Vid. *Cret.* l. 2. c. 21. §. 2. and the Example he there produceth out of *Livy*, l. 29. c. 16. l. 35. c. 31. l. 45. c. 23. *Valerius Maximus*, l. 6. c. 6. §. 3. 5.

⁶ *Panvina* & *Receptus*.

⁷ Vide L. 47. t. 6. l. 1. §. 1. *D. si familia furtum fecerit*.

⁸ *Livius*. Orat. advers. *Leocratem*, *Polib.* l. 4. c. 27. ab init. *Gratianus*, *Caus.* 1 & 3. distinct. 36.

⁹ *Lucan.* l. 4. ver. 707. &c.

Quis conferre duces meminit? Quis pendere causas?

Qua stetit inde saret; veluti fatalis arena

Muneribus, non ira vetus concurre cogit

Productos, odore pares.

The Cause belongs not to a General's Care,
Their's he thinks best for whom his Arms declare:
As when in bloody Shews upon the Stage
The Gladiators generally engage,
Not Malice, nor Revenge creates the Fight,
But rival Bravery, and equal Might.

Mr. BARB. NOTES on §. XIII, XIV.

⁷ This Definition of *Reprisals* is taken out of our Author's Abridgment, *De Offic. Hom. & Civ.* l. 2. c. 16. §. 10. For he contented himself here with referring to *Grotius*, l. 3. c. 2. To give a general Idea of the Matter, let us add some Remarks which Mr. *Bullden* makes in his *Elem. Instit. Prat.* Part II. cap. 5. §. 3, & 6, &c. *Reprisals* being a Sort of an Act of Hostility, or at least the Prelude and Forerunner of War, it is plain that no Body can lawfully use this Right but with the Approbation of the Sovereign, who, before his granting that Permission, ought nicely to examine whether the publick Interest of the State allows him to carry Matters to that Extremity. The Occasion on which we make use of *Reprisals*, must also be very clear, and the Thing in Dispute of great Consequence: For it would be equally imprudent and unjust to accuse a foreign Magistrate of Connivance, or a malicious Denial to do Justice in an obscure and litigious Affair, or in one of no Importance, or without having sufficient Proofs of the Insincerity of the Prince, to whom we have made our Application. But how just a Cause soever we may have to use *Reprisals*, we can never directly, for that single Reason alone, put those to Death whom we have seiz'd upon, but only secure 'em, and not use them ill till we have obtain'd Satisfaction: So that during all that Time they are in the Nature of Hostages. As for Goods seiz'd by Right of *Reprisals*, we must take care of them till the Time set for the Payment is expir'd; after which we may either adjudge them to the Creditor, or sell them to discharge the Debt, and return to him from whom they were taken the Overplus, deducting out of 'em all Charges and Expenses. But it is not lawful to make *Reprisals*, but with regard to Subjects properly so call'd, and their Goods; for as to Foreigners, who do but pass through a Country, or only come to make a short Stay in it, they have no such great Union with the State, of which they are only Members but for a Time, and in a very imperfect Manner, that we may indemnify ourselves by them, for a Loss we have receiv'd by any original and perpetual Subject, and by the Sovereigns refusing to do us Justice. We must farther except *Ambassadors*, who are sacred Persons, even in the Height of War. But as for Women, Ecclesiasticks, Men of Letters, &c. the Law of Nature gives 'em here no Privilege, unless they have otherwise got it by Virtue of some Treaty. ! See *Grotius*, B. 2. c. 25.

fore, whom we not only may, but are obliged to defend, are first of all our own Subjects. And that not only because they are, as it were, a Part of the Government, but because the End Men at first propos'd to themselves by giving up their natural Liberty, and submitting voluntarily to a *Civil State*, was the Enjoyment of such a Defence. So the *Campanians* thought, that by yielding themselves and all that they had to the *Romans*, they laid a Necessity upon them to arm in their Protection². Tho' in this Instance it may be observ'd, that since the *Campanians* had exasperated the *Samnites*, and rais'd an *unjust War* against them before, the *Romans* could not justly resolve to defend them, notwithstanding that they had yielded themselves to be their Subjects, till they had made *Satisfaction* for the *Damages*, and defray'd the *Expences of the War*. But in Defence of any particular Subject, the Government can then only justly make War, when it will be no great Inconvenience or Disadvantage to the Whole, or the Majority of the other Subjects, because the *Government* is obliged to have a greater Concern for the Whole than for a Part; and the greater the Part is, the nearer it approaches to the Whole. The next to Subjects, whom we are obliged to assist, are those *Allies* that have made this particular *Condition and Article of League* with us. But then all *Allies* are to give place to our own Subjects, when both cannot be assisted, and that without any Breach of the *League*: For no Commonwealth can be more obliged to a *foreign State* than to its own Subjects. And therefore in every *Promise of Aid and Assistance* the Commonwealth makes, this *Limitation* is implied, *As far as is consistent with the Obligations owing to the Subject*. And therefore it is very absurd to place any Confidence in a *League*, which is not the Interest of our *Ally* to observe. But as we ought not to undertake any *rash or unjust War*, so neither can we be obliged by any *League* to assist an *Ally*, that engages only in such. 'Tis true, this holds chiefly in *offensive Wars*, but it may also bear sometimes in the *defensive*: For if my *Confederate* is sensible that he is much weaker than his Enemy, and that his own Forces, and all I can supply him with, will not make him a *Match* for him, and yet is obstinately bent to hazard himself, tho' it be to his certain Ruin, when he may treat upon tolerably good Terms; I should be a mad Man to join myself with him in so extravagant and hopeless an Attempt. And thus far what *Grotius* saith³ is very true, "That we are not obliged to send Assistance, when there is no Hopes of Success; for Society is form'd for Good,

"and not Evil." But then it is also to be consider'd, that it would be to no Purpose to make *Leagues*, if we were to run no Hazard, or sustain no *Losses* in the Defence of an *Ally*. Next to our *Allies* are our *Friends*, or those we have join'd ourselves to by particular *Ties of Kindness and Respect*. To these, tho' we have not promis'd by express *Article of Treaty*, to send a certain determinate Aid or Supply, yet the Nature of *Friendship* itself supposeth an Interchange and Union of Faith, and that one *Friend* must be concern'd for the other's Safety, as far as the stricter *Obligations* he is under will suffer him; and that his *Concern* ought to be much stronger for him, than that which is due from one Man to another, by the common *Affinity* and publick *Relations* of Mankind; tho' sometimes those alone may be sufficient Motives to us to undertake the Defence of a Person manifestly injured and abus'd; especially since it may easily be made our own Interest to do it; and since nothing can tend more to promote publick Good than to punish those that take pleasure in disquieting and injuring others. And therefore *Solon*, upon this View, when he was asked, how there might be fewer Injuries committed in the World, answered, *If they that were not injured would be as much concerned as they that were*⁴. But then we are not to imagine that every Man, even they that live in the *Liberty of Nature*, hath a Right to correct and punish with War any Person that hath done another an Injury, barely upon Pretence that common Good requires, that such as oppress the Innocent ought not to escape Punishment, and that what toucheth one ought to affect all. For otherwise, since the Party we suppose to be unjustly invaded, is not deprived of the *Liberty of using equal Force* to repel his Enemy, whom he never injured; the Consequence then would be, that instead of one *War*, the World must suffer the Miseries of two. Besides, it is also contrary to the natural *Equality* of Mankind, for a Man to force himself upon the World for a *Judge*, and *Decider of Controversies*. Not to say what dangerous Abuses this Liberty might be perverted to, and that any Man might make War upon any Man upon such a Pretence. The Wrong therefore another Man suffers is not Reason sufficient to engage me in his Quarrel, unless he calls me particularly to his Assistance; so that whatever I undertake to do, is not to be charg'd upon me, but upon the Person that desires my Help. But whether it be lawful to take Arms in Defence of the Subjects of a *foreign Commonwealth*, against the *Invasions* and *Oppressions* of their *Sovereign*, is a Question; for the

Mr. BARE. NOTE on §. XIV.

² *Livy*, l. 7. c. 31. *Florus*, l. 1. c. 7.

³ Vide *Grot.* l. 2. c. 25. § 4. Mr. *Buddeus* (in his Dissertation *de comparatione obligationum, quæ ex diversis hominum sensibus oriuntur*, § 60.) says, That we ought to esteem those of the same Religion with us more than our Friends and Allies, or else put them in the same Rank at least. But he forgets not to observe at the same Time, § 62. that we must not think it lawful, under a Pretence of defending and favouring that Religion which we believe to be the true, to do every Thing against those of another Religion whatsoever; which is a detestable Maximæ, universally and justly blamed in the Conduct of *Roman Catholics*, but which, continues he, those who have the greatest Abhorrence of the Tyranny of the *Roman Church*, do not seem to be entirely out of Conceit with.

⁴ *Plutarch* on *Solon*, p. 88. D. *Quintilian*. *Inst. Orat.* l. 4. c. 1. p. 270. 'Tis natural for us to pity the Distressed: *Æschylus* *Suppl.* ver. 267, 268.

the Solution of which I refer you to the Opinion of *Grotius* *; the safest Answer that can be given to it seems to me to be this, That we cannot lawfully undertake to defend the Subjects of a *foreign Commonwealth* in any other Case, than when they themselves may lawfully take Arms to repress the insupportable *Tyranny* and *Cruelties* of their own *Governors*.

XV. Of the *Declaration* necessary to *solemn War*, *Grotius* largely informs us, l. iii. c. 3.

XVI. The same Author, l. iii. c. 4, &c. gives us a long Account of many Nations that never set Bounds to themselves in any of these *Liberties* which, as I said before, the *Law of Nature* allows against Enemies. But here it is to be observed, that tho' *Generals* usually give Laws to their Soldiers, prescribing how far they are to use *Hostilities* against the Enemy, and punish the Violation of them upon the Offenders; yet this is not done because they suppose the Enemy is or may be injured, but because it is necessary that the *General's* Orders should be obey'd, and that *military Discipline* should be strictly observ'd. So that tho' a Person, who in a *solemn War* had behav'd himself with greater Cruelty and Outrage than the *Law of Nature* will permit, should afterwards happen to be indicted or accused for it in any *third Commonwealth* unconcern'd in the War, it would be a very uncommon Way of Proceeding, should he be sentenced for a *Russian* or *Murderer*, and be used as such; because as it does not belong to the People of one Nation to enquire what others are guilty of abroad, so there seems to have been a *tacit* kind of Agreement of *Nations*, that one should not pass Judgment upon the Wars another engages in. For why should one at a Distance from the Dispute, and no *Ally* to either of the Parties engaged, give himself the Trouble of making another's Quarrel his own? Besides that, even in a *just War*, it must be allow'd difficult to know what are the just *Measures* of *Self-Defence*, in what Method to exact *Satisfaction* for *Damages*, and what Ways to take *Caution* for the future. So that in short, it is safer to leave these Things to the Consciences of the Parties engaged in the War, than to venture to give Sentence upon an Affair, the condemning of which may be of dangerous Consequence to ourselves; especially since the Parties at War themselves, by a *tacit sort* of *Compact*, agreed either to increase or abate the Heat of the War, as they please.

XVII. How far in particular it is usual to extend the *Liberties* of *War* upon the *Persons* of the Enemy, may be seen at large in the same Author, l. iii. c. 4.

XVIII. It may also in the next Place be particularly enquired, whether it be lawful to *assassinate an Enemy*? And here *Grotius* † thinks that there ought to be a Distinction made between Persons that violate their *Faith*, whether *expressly* or *tacitly* given, as *Soldiers*, *Subjects*, *Vassals*, *Refugees*, and Persons that were never bound by *Faith*. And that to employ the *latter* as *Assassines* is what no Law forbids †: But that to make use of them, who must by the *Act* be guilty of

Falshood and *Treason*, is what the more *civilized* Part of Mankind always look upon as the greatest Infamy and Baseness; tho' against *Rebels*, *Pyrates*, and *Highwaymen*, the most scrupulous *Princes* never doubt to propose even Rewards to the Persons that can kill or apprehend them. Nor does any body blame the Conduct, or think the Measure hard, because these are known to be common Enemies, and lie under the publick *Odium* of all. The same Answer will serve that other *general* Question, Whether it be lawful to use *any Man's Service promiscuously* in War? Where we are to distinguish between them that *betray* or *revolt* from their *Masters*, and offer themselves *voluntarily*, and them that suffer themselves to be *corrupted* in their *Faith* by the Force of *Rewards* and *Promises*. By the common Practice of the World the former may lawfully be employ'd; but as *Grotius* thinks, l. iii. c. 1. § 21, 22. not the *latter* †; tho' I think it may very well bear Dispute. For supposing the *Cause* I engage in be *just*, I have a Right to divest my Enemy of all *Forces* and *Succours*, to make him as defenceless, and to give him all the *Disturbance*, and do him all the *Damage* as I can, which are the Things aim'd at in soliciting his Subjects to a Desertion. And I do not see any sufficient Reason why I may not pursue that End, by tempting my Enemy's Subjects with the Hope of Rewards, as well as any other Way; especially since it is on all Hands allow'd, that an Enemy's Subjects may be lawfully frighted by false Threats, and Shews of Fear to surrender themselves, and consequently to desert their *Master*: Which sort of Desertion is not wholly excusable, since it is known, that by the *Laws military*, they that suffer themselves to be imposed upon in that Manner, are as liable to *Capital Punishment* as they that are guilty of *Perfidiousness* and *Disloyalty*; for *Cowardice* and *Credulity* are as inconsistent with the *Duty* of a *Soldier* as *Faithlessness* and *Treachery*. And further, tho' *Force* is the most lawful, and the bravest Way of attacking an Enemy, yet this doth not make it unlawful to have Recourse to *Fraud*. And tho' these *Deserters* I speak of are certainly criminal themselves, yet there is no Reason why the Party that solicited them to a Desertion, should bear any Share in the Guilt of it: Because I don't see any Manner of Obligation why I should abridge myself of the Liberty of making use of the easiest Methods to obtain my Right, only because by doing so I may give *them* occasion to be guilty of Sin, who have already, by the Injuries they have done me, broken off all *Communication of Right* with me. And why may it not be lawful for me to win those with my *Money*, whom I might otherwise conquer with my *Sword*? Especially since after all the Propositions and Solicitations I can make to them, it is still left to their own Choice, whether they will look upon me for an Enemy, or buy my Favour by entering into my Service. But in Time of *Peace* there are these two *Reasons* why I ought not to importune another Man's Servant or Subject, *unjustly* to *desert* from his *Master*, and come over to me. *First*, because

* B. 2. c. 25. § 8.
† *Mori*, Utop. l. 2.

† L. 3. c. 4. § 18.
‡ *Vid* *Quintil. Decl.* 257.

because I have no lawful Power to intercept any Thing that belongs to another. And *secondly*, because I cannot justly punish, or do any harm to him, tho' he should refuse to desert, and make me his Master; both which are manifestly allowed me in the Case before us. As therefore the Propriety my Enemy hath to what he calls his own, is no Manner of Reason to me why I may not take it from him; so the Right he hath over his Subjects is so far insignificant with me, as I am under no Obligations to be in the least concerned, that he should always inviolably enjoy it. And therefore the *Objection* usually made against this *Opinion*, that a Man cannot incite another to do a Thing, which he must sin in doing, or that, *that* Man is guilty of Sin himself, who supplies another with a *Cause* or *Occasion* of Sin, seems to me to hold only between such as are not *Enemies*: For an *Enemy*, in respect to me, is in such a State, that as long as I am in Pursuit of my Right, and in Arms against him, I have no Reason to trouble myself whether he takes from thence an *Occasion* to sin, or not. And therefore, tho' perhaps my Promises or my Money may be really the Inducement to another to be false, and desert; yet in Reason, the Crime of Falseness and Perfidiousness cannot be charged upon me as my own, because for the present the *State of War* hath entirely broken off all Commerce and Communication of Right, between him and me; and he himself, as far as in him lay, gave me an unlimited infinite Power and Liberty against himself. And since it is not in the least unlawful to put an *Enemy* to the Sword, when the State and Posture of *War* requires it, I do not see why it should be thought criminal to offer him a Temptation that may possibly tempt him into Sin: For it is evidently a weak Argument, which some produce to the contrary, that *Faith* ought to be kept by *Enemies*; and that therefore an *Enemy's* Subjects are not to be seduced to Desertion. But after all, a Man should be cautious, that he don't set an Example to others, that one Time or other may be of dangerous Consequence to himself. And without Dispute, it is an Evidence of uncommon Greatness and Generosity of Spirit, when a Man hath it in his Power to refuse to make use of so easy a Way of *Acquisition*. Besides that, "It is certainly true^a, that a Man that "accepts the Service of a Traytor, tho' upon "the Heat of his Success, he may think himself "obliged by him; yet afterwards, when he reflects upon the Action, he will begin to suspect, "and then to fear, and so to hate the Traytor, "tho' he loved the *Treason*, because he knows "he hath had already sufficient Experience of "the Insincerity of his *Faith*^b."

XIX. How far the *Liberties* of *War* may be extended upon the *Goods* of an *Enemy*, and Things we call *Sacred*, we are inform'd by *Grot. l. iii. c. 5.*

XX. The *Laws of Nature* and *Conscience* in a *just War*, allow¹ a Man to make such *Acquisitions* out of what his *Enemy* possesseth, as will either restore him what was due to him, or give him an *Equivalent* to it² further, and all that, the Refusal of the Payment of which gave Birth to the *War*; and besides, to satisfy himself for the Charge he was at in recovering his Right by Force; and to all if there be any Thing else, which he thinks necessary to secure further to himself, and take by way of *Caution* from the *Enemy*. And therefore if a Man insults and oppresseth his *Neighbours*, upon the Confidence he reposeth in his Riches, when he happeneth to be over-power'd, it is but just he should be deprived of his superfluous Wealth, that for the future he may learn to be more quiet and peaceable. But by the Practice of the World, a Man makes himself absolute and perpetual Master and Proprietor of every Thing he takes from his *Enemy* in a *solemn War*, tho' much exceeding the *Pretensions* the *War* begun upon, *Vid. Grot. l. iii. c. 6. § 1, 2.* Where he also sheweth, when both *Movables* and *Immoveables* may be supposed to be taken³. Where it is to be observ'd, that the Right to *Acquisitions* of *War* is of Force only against any *third disinterested Party*. But to give the *Conqueror* a Right of *Propriety*, that will hold good against the *Conquer'd*, there must of Necessity be a *Pacification* and *Agreement* between both the *Parties*, otherwise the Right is supposed to continue still in the old *Proprietor*, and whenever he is strong enough, he may justly struggle to recover it.

XXI. It is also disputed, to whom the *Acquisitions* of *solemn War* belong, whether to the whole Body of the *People*, or to any particular *Persons* among the *People*, or to them that made the *first Seizure*? Which Controversy I think may thus in short be concluded. It is certain that the *Right of War* is lodg'd in the *Sovereign*, under which Right is comprized that other of *arming* the Subjects, of *leading* or *sending* them abroad upon *Expeditions*, as also the *Right* to *raise* Money upon them, and other *Necessaries* for *War*. But since *Wars* are undertaken either to recover the *Rights* or *Dues* of the private Subject, which the *Enemy* wilfully refuseth to pay, or else upon some *publick Cause*, which concerns the whole Commonwealth, it easily appeareth, that in the *first Case*, the principal Thing to be taken care of is, that the *Persons*, upon whose *Wrongs* the *War* began, may be restored to their *Rights*. And the *Overplus* in this Instance, and in *Wars* that begin from a more *publick Cause*, all that is taken is first *acquired* to the *Sovereign*, as to him that gives *Authority* to the *War*, whatever *Hands* it first fell into, whether the *mercenary* Soldiers or *Subjects* obliged to *military Service* upon *Summons*, without receiving *Pay*^c. But because *War* lies heavy upon the *Subjects*, whether they are only *taxed* to support it, or are obliged

^a *Procop. Hist. Goth. l. 1. c. 8.*

^b *Vid. Valer. Max. l. 6. c. 5. § 7.*

^c *Ælian. V. Hist. l. 6. c. 6.* The *Spartan* Soldiers were not allowed so much as the Spoils of the *Enemy*.

Mr. BARB. NOTES on § XX, XXI.

¹ This is shewn above, in B. 4. c. 6. §. 14.

² Provided they are his: For it is not so with those Effects that are found in his Country, but belong to Strangers, with whom he is in Peace, unless they have sent them to him with a Design to assist him in the present War. As for the Cargo of Ships belonging to the *Enemy*, they are lawful Prize, as long as Strangers have not demanded and clearly justified what Effects might have been in them.

³ *Vid. Grot. d. l. §. 3, 4.*

^c See *Grot. B. 3. c. 6. § 8, 9, &c.*

liged to *serve* in it themselves, it is no more than a good *Prince*, that hath a *Love* for his Subjects, would yield to, that the Subjects should be allowed in Return to make some Advantage to themselves by the War; which may be done, either by assigning to them a certain *Pay* from the *Publick* when they go out upon any *Expedition*^a, or by sharing the *Booty* among them, or by giving every one leave to keep the *Plunder* he gets himself (as the *Custom* was among the *Greeks*, when they proclaim'd War, to declare at the same Time that every Man should have free *Plunder*^b) or else by giving the *Booty* to the *Publick*, in order to ease the Subjects of the Burden of the *Taxes* for the future. *Mercenary* Soldiers have no Right to any Thing but their *Pay*. What is given them above, that is Matter of *Bounty*, or perhaps Reward for their good Service, or Encouragement to their Valour: *Grotius*, in the Place above mention'd, is very large upon this Subject. But upon his Distinction of *Acts* of *Hostility* into *publick* and *private Acts*, which are undertaken only upon the *Occasion* of the *publick War*, it may be observ'd, that it may be very justly question'd, whether every Thing taken in *War* by *private Hostilities*, and by the Bravery of *private Subjects*, that have no *Commission* to warrant them, belongeth to them that take it. For this is also *Part* of the *Right of War*, to appoint what *Persons* are to act in a *hostile* Manner against the *Enemy*, and how far. And in Consequence, no *private Person* hath Power to make *Devastations* in an *Enemy's* Country, or to carry off *Spoil* or *Plunder*, without *Permission* from his *Sovereign*. And the *Sovereign* is to determine how far *private Men*, when they are permitted, are to use that *Liberty of Plunder*; and whether they are to be sole *Proprietors* in the *Booty*, or only to share a Part in it: So that all that a *private Adventurer* in War can pretend Right to, is no more than what his *Sovereign* will please to allow him. For to be a *Soldier*, and to act *offensively* in an *hostile Manner*, a Man must be *commission'd* by *publick* Authority. And therefore *Cato* us'd to say, that *no Man had any Right to fight an Enemy that was not a Soldier*.

XXII. As to the *Acquisition* of Things *incorporeal*, it is to be particularly observed, that they are never acquired but with the Subject they *inhere* in. The Subjects they *inhere* in, are either in *Persons*, or in *Things*. Thus for Instance, in *Things*, there are often certain peculiar *Rights* inherent in certain *Lands*, *Rivers*, *Ports*, *Towns*, and *Countries*; or rather the *Persons* that are the *Proprietors* of those *Things*, are invested with certain *Rights* over other *Persons* and *Things*. But here it is to be considered, whether this *Right* be annexed to this particular *Thing*, by *personal Compact*, or by *real*; or whether the *Person* that first united this *Right* to the *Thing*, agreed by *Compact*, that that *Right* should continue in the *Proprietor* of the *Thing*, whoever he might happen to be, or by what

Title soever he came to the Possession of it; or whether he intended that the *Right* should be no longer valid, than *certain Persons* should possess the *Thing* by a *certain Title*. If the *Right* be annex'd to the *Thing* in this latter Method, it is manifest, that it is not every one that possesseth himself of the *Thing* by any *Title* whatever at *Random*, that hath Power to exercise that *Right*; but it must be considered, whether that *Right* ought to follow a *Title* of an *Acquisition of War*, by its first Institution. But those *Rights* which are *immediately*, and in *themselves* applied, and annex'd to *Persons*, relate either to other *Persons* or *Things*. The *Rights* which are annexed to *Persons* over other *Persons*, since they are not obtain'd but with the *Consent* of the *Persons* themselves (and this *Consent* doth not respect any Man *promiscuously*, but only some *certain Men*) cannot be supposed to be acquired with the *Persons*, tho' perhaps the *Persons* they were annex'd to, and lodg'd in, may fall into their *Enemy's* Power. Thus for Instance, tho' a *Prince* happen to be made *Prisoner of War*, his *Enemies* have not therefore acquired his *Kingdom* with him. And the taking an *Husband* or a *Father*, doth not give an *Enemy* Power over the *Wife* or *Children*^c. When indeed an *Enemy* hath taken the *Wife* and *Husband* together, he hath a *Right* over the *captive Wife*, but not because he took the *Husband* with her, but solely because he hath made her his *Prisoner*. Neither would he have had more or less *Power* or *Right*, whether he had taken her *Husband* at the same Time, or not. Neither doth the *Conqueror* acquire any *Conjugal Power* over the *captive Wife*, but barely such a *Right* as is usually acquired over *Captives*. As to the *Rights* that relate to *Things*, we must distinguish, whether the *Person* be a Member of a *Commonwealth*, or live out of *Civil Government*, in a *State of Nature*. If he liveth in a *State of Nature*, the *Enemy* that taketh the *Person* is supposed to have taken all the *Things* with him, or at least to have possess'd himself of Power to take them, because there is no Body to resist him, or that hath any *Right* to hinder him from *seizing* upon all he had. But in *Commonwealths* the *Thing* is not lost with the *Person*, but the *Right* of it devolves to other *Persons* of the same *Commonwealth*, or, upon *Default* of these, to the *Publick*. And therefore if a Subject of any *Commonwealth* be taken by an *Enemy*, his *Goods* that were not taken with him, are not acquir'd by his *Conqueror*, but fall to him that would have been his *Heir at Law*, if he had died a natural Death. But if the *Enemy* hath taken the *Goods* with his *Person*, that the *Things* taken are *Prize of War*, is *Title* enough to justify his *Propriety* in them, and it is perfectly needless for him to derive that *Propriety* from the *Person* of the last *Possessor*, whom he took with them. And so the *Thing* is the same, as far as concerns the *Right* of the *Conqueror*, to the *Things* he hath taken, whether he take the *Proprietor* with them, or not.

XXIII.

^a Vid. *Liv.* l. 4. c. 60. & l. 5. c. 4.^b *Cic.* *Off.* l. 1. c. 11. Add. *Ziegler* upon *Grot.* l. 3. c. 6. §. 12.^c Vid. *Polyb.* l. 4. c. 26, 36.^d Vid. *Grot.* d. l.

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^e See *Grot.* B. 3. c. 7. § 4. and c. 8. § 4.

XXIII. The fam'd Question once moved in the *great Council of Greece* may serve to illustrate what hath been said, which *Quintilian* says was occasion'd thus: When *Alexander the Great* took and destroyed the City of *Thebes*, he found an *Instrument*, in which it appear'd, that the *Thebans* had lent the *Thessalians* an hundred *Talents*. *Alexander*, because the *Thessalians* were in his Service, freely gave them up the *Instrument*. The *Thebans*, who afterwards were restored by *Cassander*, demanded the Debt. The Reasons the *Thebans* brought to justify their Demand, are to be seen in the same Place in *Quintilian*. To which the *Thessalians* might have answered, First, That what was taken away by just Force cannot be demanded again; that by the Custom of Nations, the *Hostilities* committed in solemn War are look'd upon to be just; and in consequence, the former *Proprietor* can have no *Pretenſion* left to any Thing that was taken from him, after a *Peace* is established. Secondly, That a *Right of War* is a valid *Title*, when a *Thing* comes to be disputed in the *Civil Court*: For after a *War* is ended, if any *Controversy* arises about any *Thing* I have taken in the War, 'tis enough to plead that I have a *Title* to it as *Prize of War*. Thirdly, That what is taken in a *just War* may very justly be retain'd in *Peace*, especially after the *Articles of Peace* are settled, and agreed upon on both Sides. For then every Thing is supposed to be left entirely to the Possessor, which he is not expressly obliged to restore by the *Articles of Treaty*. Fourthly, those *Rights* which are properly and ultimately founded in the *Things* themselves, may be acquired with the *Person* that is made *Captive*, supposing the *Captive* giveth his *Consent* to transfer them to me; which *Consent* I have Power to force him to by threatening him with some greater Evil. Wherefore as I can make over an *Action of Debt* to another Man, and the Effect will be, that the *Debtor* must be obliged to pay his Debt to him, as much as he was before to me; so if a *Captive* consent to make over his *Action* to me, what the *Debtor* owed before to my *Captive*, is now become due to me. And thus *Alexander* might, if he pleas'd, have made himself the *Creditor* in the Instance before us, though he had left the *Theban Commonwealth* standing, only by forcing them to transfer their *Right* to the *Debt* to him. And indeed, he must be supposed to have made himself such, since he made himself absolute Master of *Thebes*, without any *Exception*; and therefore had a *Right* either to demand the *Debt* of the *Thessalians*, or to forgive it them: Nay, he might immediately have forced the *Thebans* to remit the *Debt*. And therefore when *Alexander* gave up the *Instrument* of the *Debt*, to the *Thessalians*, it is not to be supposed, that he did it for fear the City of *Thebes*, which he had then laid in Ruins, might some Time or other afterwards demand the *Debt* of them, but to give them Assurance that he himself would never re-

quire any Thing of them upon that Account. Fifthly, it is absolutely false, that as long as there is any one Subject of a Commonwealth left alive, he must be supposed to be the *Creditor* of the whole *Debt*, and consequently that he hath the same *Right* the Commonwealth had to demand its *Debts*. For those particular Persons that outlive the utter Dissolution of the *Body* of the Commonwealth can have no manner of *Pretenſion* to assume to themselves the *Right* of the Commonwealth; since it is not to be supposed that they any longer constitute it. And it is manifest that *Alexander* totally dissolv'd and extirpated the *Theban Commonwealth*, so that they that escaped the general Destruction, could not be look'd upon to be a *People*. And they that afterwards re-established the *Commonwealth* of *Thebes*, were manifestly a new *People*. And tho' perhaps the ancient *Thebans* might have had certain peculiar *Rights*, yet these new *Inhabitants* could not pretend to assume the same to themselves, barely from the Place they liv'd in, unless they obtain'd them all anew: Which was not done with relation to the *Thessalian Debt*. Sixthly, the *Thessalians* did not take any unjust Methods to obtain the *Instrument*, but received it from one that voluntarily offer'd it to them, and who had *Thebes*, and all that belong'd to it, at Mercy, purely with intent to pardon them the *Debt*.

XXIV. Conquer'd Nations, as well as particular Persons, may be brought under *Dominion*; but that it be lawful, and oblige the *Consciences* of those who submit to it, it is requir'd, that the vanquish'd Promise expressly or tacitly to acknowledge the *Conqueror* for their *Master*, and that he for his Part will not treat 'em any longer as his *Enemies*.

XXV. I shall now briefly enquire how Things lost in War return to the ancient *Proprietors* and *Masters*. And here, in my Opinion, nothing can be more agreeable to natural Equity, than that such as have been made *Prisoners of War*, when they find Means to escape out of their Enemy's Reach, and are under no Obligations of *Faith* to them, and return to their own Country, should not only recover their former *Quality* and *State* in the Commonwealth, but be also restored to all their *Rights*, *Goods*, and *Fortunes*. But with respect to *Things*, whether they be *Moveables* or *Immoveables*, if while the War continues they are retaken from the Enemy, either by ourselves, by our *Subjects*, or by our *Soldiers*, it is just and reasonable, if they are to be distinguish'd, that they should be restor'd to the ancient *Proprietors*. For since the Commonwealth is engaged to defend and secure the Subjects as far as is possible, in their *Goods* and *Properties*, there must, it is evident, be the same *Obligations* upon the Publick to take care that what is taken from them be restored. And it is no *Exception*, that the *Goods* were recovered by the *Soldiers*: For *Soldiers* are only the *Hands* of the Commonwealth,

* *Inst. Orat.* l. 5. c. 10. § 37. 388. Mr. *Titus*, in his *Observat* in *Compend. Lauterbach. Obs.* 1438. and *Franc. Kottoman's* *Quæstion.* Illust. *Quæst.* V. 6.

Mr. BARB. NOTE on § XXIV.

† This Paragraph is taken out of our Author's *Abridgment de Offic. Hom. & Civ. B. 2. c. 16. §. 14.* See *Græc. B. 3. c. 3. & 15.* See above, in *B. 7. c. 7. §. 3. 4.*

monwealth, and what they win with their *Swords*, they acquire to the Commonwealth, and are not to make their own private *Purchase*. And since it would be *Oppression* and *Injustice* in the Commonwealth to recover those *Goods* only for itself, which the *private Subjects* lost in War, there can be no Way left but to return them to the *antient Proprietors*.¹ Thus in *Homer* 'tis said that the *Booty* was divided among them that had lost to the Enemy before. How the *Roman Laws* provided in such Cases, and especially with regard to the *Postliminium*, is with much *Exactness* explain'd by *Grotius*, l. iii. c. 9.

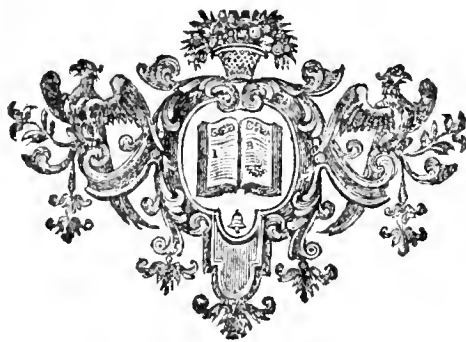
XXVI. A whole Nation, when it hath either by its own Strength, or by the Assistance of *Friends* and *Allies*, shaken off an Enemy's Yoke, without doubt recovereth its Liberty and antient State. And if any Part of what they were possess'd of remains still in the Enemy's Hands, they have just *Pretextions* to attempt to recover it, as long as a War is kept on Foot, and Peace is not yet concluded. But if a *third* Common-

wealth rescue a *Nation* by a War, which was overpower'd and enslaved by Enemies, in its own Name, and for its own Advantage, the *Nation* only changeth its *Master*, but is as far from *Liberty* as ever. And we may say the same of a *Part* of any *Nation*. But if a *Part* of a *People* be recovered by the *People* they were for some Time divided or torn from, or by their *Allies*, they again *incorporate* with the old *Body*, and return to the Place and *Rights* they had before: Though perhaps, indeed, with an *Ally* it may be agreed, that he may keep what he won from the Enemy, tho' it before belonged to us. *Demetrius*, in *Justin*, when he lost his *Kingdom*, chose rather to yield it to *Philip*, than leave it to the *Romans*.² But though a *Part* of a *People* assert their own *Liberty*, and suppress their Enemies by their own Strength, they must return of *Course* to their antient *Body*, and must not pretend to *erect* a *separate* Commonwealth by themselves, when the old Commonwealth hath not quitted its *Right* to them, as a Part of its *Body*.

² *Just.* l. 29. c. 2.

Mr. BARB. NOTE on §. XXV.

¹ Vid. 1 *Sam.* xxx. 22. *Exe. Homer.* Iliad. l. 11. as also Mr. *Buddens*, in his *Elemens de Philosophie Pratique*, Part 2. Cap. 5. Sect. 6. § 9. to which we may add Mr. *Lock's* Principles thereupon, in his Treatise of Civil Government, Chap. 15. A Conqueror, says he, even in a just War, acquires no Power over those that have been the Companions of his Conquest. 'Tis only over those that have concurred or consented to the making an unjust War on him. The Power he acquires over those whom he subdues, is altogether despotick, with respect to their Lives, but not with respect to their Possessions. The Reason of this last Article, which at first seems to be a Paradox, is, because we may kill those who have taken up Arms unjustly, to take away their Lives, if they could have done it, that have conquer'd them: But that being only a personal Fault in those that made an unjust War, their Posterity ought not to feel the Effects of it. Now the same Thing would happen if we should seize upon all their Estates, designed for the Breeding up and Maintenance of their Children, which we should by that Means reduce to Beggary on account of their Fathers Crime. All that a Conqueror can do with Justice, is, to indemnify himself, if he has suffer'd any Loss. Thus the People, whose Predecessors and Country have been oppress'd by Force, have always a Right, according to Mr. *Lock*, to recover it, and to use the same Means to regain their Liberties. Indeed it would be absurd to say, that a Prince hath a Right to take all he can, and that after he has been in Possession of it for some Time, the People that shall be born in those conquer'd Countries in After-ages, are beforehand, by a divine Right, subject to his Dominion, and that these People may never attempt to take away from the Descendants what one of their Predecessors seized on by Force. "The Truth of it is (adds Mr. *Le Clerc*, of whom I have borrow'd this Abstract) there are great Difficulties in this Matter on account of the Misfortunes of Civil Wars, which we ought to endeavour to prevent as much as possibly we can. But since it seems that all the Right that we can establish in this Matter is grounded upon the *Publick Good*, which is the sovereign Law, we must consider whether what we are undertaking will in all Probability do more harm than good to the Government. If it be so, then what we do becomes unjust; but if the Good which accrues by it is much greater than the Evil, the Enterprize must be call'd just. *Biblioth. Universal.* Tom. 19. p. 586." See according to this Law de *Postliminio*, what Men acquire by their Return into their own Country, or that of their Friends and Allies (*ex reditu in limen*) *Grotius*, Lib. 3. cap. 9. and Mr. *Buddens's Elem. Phil. Pract.* Part. 2. cap. 5. Sect. 6. § 25. & seq. As to the Ideas of the *Roman Law*, we shall find several Remarks in Mr. *Bynckerhoek's Observations*, Lib. I. cap. 20. Lib. III. cap. 6.



C H A P. VII.

Of Compacts that relate to War.

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IT may now be proper to take a View of that Sort of publick Compacts, which presuppose a *State of War*. And these are of two Sorts: *First*, such as put an End to *War*. *Secondly*, such as do not put an End to it, but only, in some Respects, *qualify* and *confine* it. But before I consider these *Compacts* in particular, I shall first enquire *in general*, into the *Validity* of those of the latter Sort.

II. All *Compacts* therefore made with an *Enemy*, saith *Grotius* in general, ought to be observed, l. iii. c. 19. which indeed is true of *Compacts* that tend to *Peace*, but is I think liable to Dispute with Relation to such as leave us in a *State of War*, without a Design to remove it. For I question, whether it be a *conclusive* Argument, that because a certain particular Man understands what is done, and hath Power to give his *Consent* to it; therefore that from his *Promise* another Person may derive a *Right*, and he himself may contract on *Obligation* to the other. For a *State of War*, as such, hath no other *Measure* of *Action* but *Force*. The proper use of *Faith* is to advance *Peace*. And therefore it looks like an Absurdity to employ *Faith* without Thoughts of restoring or prefer-

ring *Peace* by it, and much more to make use of it, to *protract* and *carry on* *War*, rather than put an *End* to it. Besides, when I enter into *Articles of Treaty*, 'tis implied, that I desire the Person I treat with should believe me, and rely upon my *Faith*: But now it is a sort of a *Contradiction*, to require of him such a *Dependence* upon me; and yet at the same Time to profess, that I resolve to continue his *Enemy*, that is, to do him all the *Mischief* every Way I can. For a *State of Hostility* in itself gives a Man *unlimited Liberty*, to take all the *Advantages* he can against his *Enemy*. And it is a *Contradiction* to my *Actions* to make a *Protestation* not to use the *Liberty* of an *Enemy*, while I persist to continue in an absolute *State of War*. And therefore what I said before doth not extend to this Case; that such as enter into *Compact* with one another, do by that very *Act* renounce all *Exceptions* to one another's *Persons*, which may make them suspect one another to be false to their *Faith*. For where both Parties do seriously renounce all such *Exceptions*, they are already ceased to be *Enemies*: But where they openly profess that they intend to continue *Hostilities*; the *Evidence of Fact* confutes their *Promises*.

Mr. BARB. NOTE on §. II.

Notwithstanding whatever our Author here asserts, I am of Opinion that these Sorts of *Compacts* ought to be as religiously observed as any other. His Reasons prove nothing, because they prove too much. For in short, if the *Law of Nature* did not impose on us an indispensable *Obligation* of keeping whatever *Contract* we have voluntarily made with the *Enemy* during the *War*, if it was lawful, for Example, to break on purpose a solemn *Truce*, to detain without having any Reason for it, *Persons* to whom we had given *Passports*, &c. I do not see what *Crime* it would be to circumvent the *Enemy* even under a Pretence of negotiating *Peace*. When a *Treaty* is set on Foot for this last Design, we are notwithstanding *Enemies*; 'tis properly but a Sort of *Truce*, which we agree to, to see whether any Method of *Accommodation* can be found out. The *Negotiations* prove unsuccessful; it is not then a new *War* that we commence; since the *Differences* which occasioned our taking up *Arms*, are not yet adjusted; but only a *Continuation* of the *Acts of Hostility* that were suspended for some Time. Thus we could no more depend on the *Enemy's Sincerity* in the *Business of Compacts* which tend to the establishing of *Peace*, than with Respect to those which only relate to the moderating or *Suspension of Acts of Hostility*; and this would be a perpetual Source of *Jealousies*, which would occasion eternal *Wars*, and would create an invincible *Obstacle* to a *Peace* of any kind. All that our Author says then only proves, that we ought to be very cautious how we engage our Word to the *Enemy*; since *Mankind* are apt to break it for their own Interest, especially when they have to deal with *People* that wish them ill, or hate them. But from the very Moment that the *Treaty* is concluded, we must keep it exactly, till either the Time is expired, or the *Enemy's Violation* of the *Engagement* on his Side, dispenses with the observing ours any longer.

mises. And therefore a Man must rather suppose that they only design to impose upon and ensnare one another, and by making one another heedless and secure, to lay Trains for further Mischiefs; so when *Narfetas*, in *Procopius*, sent to ask *Totilas*, what Day he would set for Battle, his Answer was, *After eight Days I'll meet you in the Field*. Upon which, they that were sent returned and told their Master what was agreed to. But he suspecting some Falshood, put himself in a Readiness to give his Enemy Battle the next Day; and he proved not to be mistaken, for the next Morning, before Intelligence could be brought by the *Scouts*, *Totilus* was advanced and marching towards him with all the Body of his Army^a. But then, neither can the Person that happens to be surprized by such a *Compact*, claim any new *Right* against the Person that betrayed him by it; because the *State of Hostility* itself already gives him as much *Liberty* as he desires. If it be said, that such *Compacts* should be observed, for fear the Enemy, when he finds himself deluded, should be exasperated, and pursue the War with greater Rage and Obstinacy: I answer, that this Objection allows, that these *Compacts* are to be measured only by the Use and Advantage of them. And I confess it is true, that when the Time or Place for Battle is agreed upon with an Enemy, it is a sort of Injustice to fail in either, because the Revenge of it will generally recoil upon the Cruel and Faithless^b. We are not always obliged indeed to make use of the utmost Liberties of War; nay, it is often the greatest Glory to spare an Enemy, when it is in our Power to ruin and destroy him. But since War becomes lawful upon this Account, namely, when it is necessary, we should defend or assert our own Rights, where they are not to be obtained by peaceable Means, we ought to think that the shortest Way to the Attainment of that End is most agreeable to Nature. And therefore since by *Compacts*, that tend only to moderate and qualify Hostilities, the War is only drawn out into greater Length; 'tis evident they must be contrary to Nature^c. But however this be, it is a Custom which among others hath obtained in the more civiliz'd Part of the World (perhaps out of a particular Respect to military Bravery) that such *Compacts* should be looked upon to be valid, which were not intended to put an End to the *State of War*, but only to abate the Heat of it, and give the Parties engaged, Liberty to take Breath. Of this Sort are *Truces* for certain Days, and sometimes Hours to bury the Slain; the Agreements to grant Passage through one another's Guards^d; and sometimes that no Hostilities shall be used in certain Places, upon certain Persons and Things; that there shall be a Cessation of Arms at such a particular Time; that certain Weapons and Instruments of War shall not be made use of. *Olearius* relates^e, "that the *Turks* and *Persians* made

" an Agreement, that the Merchants on both Sides should have free Exercise of *Traffick* and *Commerce*, and *Liberty* to pass to and fro unmolested; because it was the Interest of them both to continue their Trade with one another." For since Men, to gratify their Ambition and Avarice, will often raise Quarrels and foment Wars in the World; it may be thought absolutely necessary to the State of human Affairs, to make War a sort of Trade and Profession, and to form it into an Art; that so at least, the Injuries which the Innocent must suffer may be less insupportable, when the Liberties of the Sword and the Miseries natural to a State of War are more restrained. Besides, the Reputation of being false and treacherous, and of deluding others by *Compacts*, is generally of dangerous Consequence to Persons often engaged in Wars: Since no wise Man will be imposed upon more than once. But after all, a cautious Man can never lay any great Strefs upon such *Compacts*; because if he persuades himself into Security by them, he leaves himself open to the Attempts of his Enemy. And therefore he ought to be careful, how he agrees to any such without manifest Necessity, unless he is in a Capacity, upon any foul Play, to give himself Satisfaction, or hath other sufficient Caution to depend upon.

III. Among other *Compacts*, which do not put an End to the War, but only suspend the Effects of it, must be number'd *Truces*, which are Agreements to forbear Hostilities for a particular Time, the War still continuing. Which Definition is explained by *Grotius*, l. iii. c. 21. §. 1. For *Truces* are sometimes granted for several Years. But in that Place, it may be said in Excuse, for *Varro* and *Paulus*, that they had regard only to such *Truces*, as are usually made when the Armies on both Sides are in the Field and in Motion², which are generally limited to a few Days, and not to those which put a Stop to all Hostilities, and Preparations for War, and for the Time they last, are little different from an absolute Peace; particularly where any Clause is inserted in the *Truce*, that mentions any Conference to be formed in the mean Time, towards the settling a full and entire Peace. But it must be observed, that though *Truces* of this latter Sort do generally comprehend all the Territories and Dominions of both the Parties engaged in the War; yet it may be, and often is agreed, that the *Truce* shall be observed only in certain particular Places, and that the War may be carried on, as it was before, in others. For Instance, those Nations in Europe, that have Plantations in the East or West-Indies, may make a *Truce*, that shall be of Force only in Europe, and continue the War all the while in the Indies.

IV. But it is a Question, whether if Peace be limited to any determinate Time; for Instance, that it shall continue for twenty or forty Years, or the like, it should be look'd upon to be a *Truce*? Now I confess, that in my Opinion, every

^a *Procopius Hist. Goth.* l. 4.

^c Vid. *Hobbes de Cive*, c. 3. § 27.

^b *Ambros. De Offic.* l. 1. c. 29.

^d *Itin. Per.* c. 1. §. c. 20.

^e See *Gre. B.* 3. c. 21. §. 14. &c.

² V. D. L. 49. t. 15. *De Captivis, & de Postulatis*, &c. l. 19.

every *Peace* in its own Nature *eternal*, that is, whenever a *Peace* is concluded, both *Parties* agree never to take up Arms again upon that *Controversy* which first gave Birth to the War; but that the *Dispute* shall be absolutely *silenced*; or be referred to the *Decision* of *Mediators*, or be some other Way amicably *composed*. And the *Perpetuity* of such a *Peace* is not to be supposed to be interrupted, though a fresh War afterwards breaks out between the same *Parties* upon new Reasons, and *different* from the former. For it is not to be imagined, that a perpetual *Peace* obliges Men always tamely to submit to another's Injuries, without opposing him, or making Resistance. And therefore though the Word *Peace* may be used, yet if the particular Time be limited for its Continuance, so that the *Dispute*, upon which the War began, is not entirely at an End, it can amount to no more than a *Truce*; which as long as it continues, obliges them mutually to exercise the *Offices* of *Peace*. Thus the *Lacedemonians*^a are said to have made a *Peace* for fifty Years, but yet when the War broke out again six Years after, they were complained of only for Breach of *Truce*. But then, on the other hand, it may seem absurd to make a *Truce*, as *Romulus* did with the *Vejentians*, for an hundred Years^b. Though *Dionysius Halicarnassensis*, l. ii. calls it simply a *League*, because there can hardly be an Injury, but must be worn out of Memory, in so long a Course of Time; so that to defer the Revenge and Prosecution of it to another Age, seems unreasonable. *Livy* indeed says, l. vii. c. 20. That a *Peace* was granted to the *Cerites*, but that the *Act* of the *Senate* run only for an hundred Years *Truce*. But I am inclined to think, that the Design of that was, that the *Senate* might not seem to lessen their own Authority, by appearing easy in pardoning so sensible an Injury^c. Thus also *Theodosius the Second* made a *Truce* with the *Persians* for an hundred Years. And *Diodorus Siculus*, l. xii. c. 60. mentions a *Peace* made for an hundred Years, between the *Ambraciotes*, and the *Acarmanians*. And thus *Ferdinand King of Spain*, and *Alphonfus the First of Portugal*, agreed to a *Peace* for an hundred and one Years^d.

V. Since therefore, notwithstanding the *Truce*, a *State of War* continues; which could not be, unless the *Preterensions* were still kept on foot, and the *Controversy* the War began upon remained undecided; it is evident, that it would be absurd to desire to make only a *Truce* with an Enemy, and yet require him to give up all his *Preterensions*; for if this be done, an absolute *Peace* is concluded. And it would be unreasonable to desire to have Liberty to renew the War without Grounds, when such a particular Time is expired^e.

VI. And it is further evident from the Nature of *Truces*, that if after the *Truce* expires, *Hostilities* begin afresh, there is no need the War

should be proclaim'd again. But yet, where the *Truce* is of long Date, and hath entirely put a Stop to the Progress and Appearance of War; and where there is any *Clause* in the *Truce*, that expressly mentions *Conferences* to be held in order to put an End to the *Dispute*; if it be not necessary, it is at least honourable, some Time before the *Truce* expires, to signify our Design to the Enemy, and to make such *Overtures* as may convince him, that we take no Delight in War, and that it is no Fault of ours, that the *Peace* is not concluded.

VII. It may also be further observed, that all *Truces*, which have any binding Force and Obligation in them, are contracted either by express *Compact*, or by *Acts* that bear such an Affinity to *Friendship* and *Peace*, as they can be referred to no other Cause. Though *Treaties of Peace* have not in themselves the Force of *Truces*, except it be expressly so agreed. And therefore an Enemy can have no good Reason to conclude, that because I forbear *Hostilities* for a little Time, therefore I consent to give him *Truce*. Neither can he charge me with Breach of *tacit Faith*, if after such *Cessation of Arms*, which he hath been so unhappy as to grow secure upon; I make a sudden *Descent* upon him, and surprize him. And in this Sense are those Authors to be explain'd, that give such accidental Intermissions of *Hostilities* without *Compact*, the Name of *tacit Truces*, as *Justin* and *Livy* frequently do^f; but which must be supposed to mean no more than that for such a Time the Enemy lay still, without offering any *Action* in the same Manner as is usual upon formal Agreements, or *Truces*.

VIII. As for the Time *Truces* are generally limited to, I refer you to *Grotius* in the Place before cited, §. 4. But I cannot by any Means allow what he there insists upon, that the *Day* from which the Measure of the Time is to commence, is not included within that Measure or *Compass* of Time, because (says he) the Force of the Preposition *From* implies Separation and Division, and not Union and Conjunction. For certainly the Beginning of any Thing is a Part of that which it begins. And therefore if, for Instance, it be agreed that there shall be a *Truce* for ten Days, from the First of July, I believe it would be difficult for any Man to interpret this otherwise, than to take in the first Day of that Month within the *Compass* of the *Truce*. Besides, it is not true that the Particle *From* hath always such a Force as to divide what it is joined with, from what follows it. For it often signifies a Beginning comprehended within that which it begins. Thus what Expressions are more common, than *from Head to Foot*, and *from the Beginning to the End*^g?

IX. When *Truces* begin more particularly to oblige the Subjects on both Sides, we may find in *Grotius*, in the Place before cited, §. 5.

X. What

^a *Livy*, l. i. c. 15.

^b *Cicero de Unione Lusitan.* l. i.

^c Vide *Grotium*, l. 3. c. 21. §. 3.

^d Vide *Sozom. Hist. Eccles.* l. 6. c. 4.

^e Vide *Baudium de Inducibus belii Belgici*, p. 128.

^f Vide *Just.* l. 6. c. 7. *Livy*, l. 2. c. 18. & c. 64. l. 23. c. 46.

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^g *Justin.* l. 3. c. 7.

^h This because the Latin Preposition à, which in this Place answers to our *From*, separates the two Words to which it relates, from what is between them; so that, according to *Grotius*, when we say *from the First of June, to the First of August*, these two Days must be

X. What *Liberty a Truce* allows, and what it forbids, *Grotius* also accounts for in the same Chapter, §. 9, &c. But here I confess I am of Opinion, that *Acts* barely *defensive* are lawful in *Truces* of any Sort; though perhaps *Truce* was desired and obtained upon some other *Pretext*. Thus for Instance, though *Truce* be granted only to *bury the Slain*, yet I should not think it unlawful to make use of it to retreat to a *Place* of better *Defence*, or to repair or raise a *Fortification*; or if a *besieged Town* request *Truce* only to defer the *Affault*, I should not question but that they meant also to take in fresh *Supplies* of Men and *Provisions*. And *Grotius's* Reason to the contrary, seems to me to have no Force in it, l. iii. c. 21. §. 10. that since the *Truce* makes for the Advantage of one *Party*, the other that granted it ought not to be prejudiced by it. For since Men cannot by any sort of *Compact* give up their *Right of Self-Defence*; the *Party* that granted such *Truce* can only charge the *Fault* upon his own *Easiness* and *ill Conduct*, that he did not take sufficient Care that the *Enemy* should have no Opportunity to *reinforce* himself^a. So *Tisaphernes*, in *Xenophon*, made *Truce* with *Agefilus*, but continued his *Preparations* for War all the Time. And I do not think that if he really signified his Circumstances to his *Master* the King of *Persia*, and had Leave from him to enter into *Articles* with the *Lacedemonians*, that he was guilty of *Perjury* only for arming, and putting himself in Readiness to expect any *Event*^b.

XI. When the *Truce* expires, *Grotius* says, that a Man taken in his *Enemy's Territories*, and forcibly stopped, may be detained *Prisoner*, l. 3. c. 21. §. 9.

XII. When either *Party* breaks *Truce*, the *Party* injured is at *Liberty* to renew the War without making a new *Proclamation* of it. Though if he thinks it convenient, he may forbear till the *Truce* expires. But if it happen'd to be agreed, that the *Party* that first broke *Truce* should be liable to pay a certain Sum of Money by way of *Penalty*; where the *Money* is demanded and paid accordingly, it is evident that there is no *Pretext* for War left. For the Reason why the *Party* pays the Money is, be-

cause he is willing to keep himself secure from War. But on the other hand, if the *injured Party* make War, he must be supposed to *recede* from his *Right* to the *Penalty*. Though it must certainly be contrary to the *Agreement*, to declare War immediately, and neglect the *Penalty*. For it is not usual in such *Compacts*, to leave it to Choice, whether the *Penalty* should be accepted, or the War renewed^c.

XIII. *Compacts* that relate to *safe Conduct*, that secure *free Passage* and *Return* through *Places* in an *Enemy's Power*, and how they are to be *interpreted*, are largely explained by *Grotius*, l. iii. c. 21. §. 11, 12. to whom I refer you.

XIV. *Compacts* relating to *Redemption of Captives*^d are allowed much *Favour* among *Christians*, especially when the *Captives* are detained in *barbarous Countries*; and even the *Treasures* and *consecrated Vessels* of the *Church* are sometimes justly given for *Ransom*^e. The Practice indeed of the *old Romans* is known to have been contrary^f: For when *Hannibal* permitted them to redeem their *Captives*, the *Senate* answered, *That they that would be made Prisoners when they had Arms to defend them, were very unnecessary Subjects*^g. And *Plato*^h determines, that in his *Commonwealth*, if a *Soldier* were made *Prisoner*, he should be left to the *Enemy's Mercy*, though they were willing to give him *Liberty*. Nor were they without Reason thus severe. For (as the *Disclaimer* says)ⁱ, 'The greatest Glory in War is "Victory; and next to Victory, the greatest is "to die for the Cause you engage in; there is "indeed a third Way too, but that a dishonour- "able one, which is to fly when there is no "Hopes of Conquest. But then it may be "said in Excuse for such a Person, that he re- "served himself for a second Trial, and that he "had still Courage to meet his *Enemy* once "more. But a Man that yields in the Heat of "Fight, that lays down his Arms, and tamely "submits to the Conqueror's Mercy, must for "ever be given for lost. For what Hope can "be entertained of a Person that had rather be a "Slave than free, and that makes Captivity his "Choice?" What is to be observed upon this Sort of *Compacts* may be seen in *Grotius* l. iii. c. 21. §. 23, &c. to the 28th Section. I shall only

^a Vide *Xenophon. Orat. de Agefil. laudibus.* Cornel. Nepos. Agefil. c. 2.

^b See *Montaigne's Essays*, l. 1. c. 6.

^c Vide L. 1. t. 2. l. 21. C. de S. Eccles. *Gratian. Jus Canon. Cauf. 12. Quæst. 2. c. 13, 14, 15.*

^d *Livy*, l. 22. c. 59, 61. *Horat. Carm. L. 3. Od. 5. Silus Italicus*, l. 10. ver. 654.

————— *Noxam superaverat omnem,*
Armatum potuisse capi —————

^e *Eutrop.* l. 3. c. 6.

^f *De Republ.* l. 5. p. 662. *Ed. Wech.*

^g *Quintil. Declam.* 339.

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be understood exclusively. But our Author says, that this Preposition also includes very often, the two Terms, as in the following usual Ways of speaking, *a capite ad calcem*; *ab ovo ad mala*. Besides, though the Generals of the two contending Armies ought to forbear all *Acts of Hostilities* from the very Moment of the Conclusion of the *Truce*; yet the Soldiers on both Sides are not bound to observe it, till it has been publicly proclaim'd in their Camp. But all *Acts of Hostility*, that may have been committed during that Time, are of no Force, so that we must indemnify those that have been Sufferers by them.

¹ Mr. *Buddeus*, in his *Elem. Philosoph. Pract.* Part 11. c. 5. Sect. 7. §. 16. is of Opinion, That it is the Part of Humanity to let those go who are seized as Prisoners in a Country, not through any Fault of theirs; since no Body is responsible for an Accident. I must add that there is a great Difference between those that are found in the Territories of another State, immediately after its declaring War against their Prince; and those who after *Truce* stay in the *Enemy's Country*, by an unforeseen Accident. There has been no *Compact* between the first, and the Prince in whose Territories they are; whereas the other demand nothing but what is manifestly pursuant to the Execution of the Treaty of *Truce*. For since, by virtue of that Engagement, we are obliged to grant them the full Liberty of going and coming during the whole Time of the *Truce*; we ought also to give them, in my Opinion, the same Permission, even after the *Truce*, if it plainly appears, that any violent Misfortune, or unexpected Accident has hindered them from making use of it, during the Time agreed upon: Otherwise, as these Sorts of Accidents may happen every Day, we should not be so earnest in stipulating such a Permission, which would hinder us from being always in fear of a Surprise, and would be as it were a Snare to make us fall into the *Enemy's Hands*.

² See *Grotius* in the Place above mentioned, §. 23, &c.

ly add this Story ^a out of the *Life of Castriot*; a young Man of the barbarous Nations, that happen'd to be made Prisoner, was presented to *Musachius* for his Share of the *Booty*; who agreed to give him his Liberty for two hundred Pieces in Gold. The young Man immediately took the Money out of his Pocket and offered to give it for his Ransom: But *Musachius* refused to accept it, or give him his Liberty, telling him that Money was his own before, when he became Master of his Person. But when the Case was brought before *Castriot*, he determined in favour of the young Man.

XV. Of *Compacts of Generals of Armies*, and what Observations may be made upon them; see *Grotius*. But to the eighth Section of it, I add, that *Generals* have Power only to grant *Truces* of shorter Date, and not such as withdraw all Appearance of War; for these are to be granted only by the *sovereign Power*.

XVI. Lastly, how far *private Persons* have Power to make *Compacts* with an Enemy, may be seen at large in the same *Author*, l. iii. c. 22. To which I add the Custom observed formerly

between the *English* and *Scots*, with regard to *Compacts* of this kind. If any Person (says the *Historian Buchanan*, l. ix.) did not make his Appearance at the *Day* appointed, this was his Punishment: "In the publick Meetings upon the *Borders* between the two *Nations* (which usually were held in order to the recovering and restoring what had been lost on either Side in War) if any Person happened to complain of another's *Falseness* to him, he only carried publicly a *Glove* or *Gantlet* upon the Top of his *Spear*: And this they look'd upon to be the greatest *Disgrace* that could be inflicted. Nor was it usual for Persons that had thus violated their *Faith*, ever after to be receiv'd by Friends or Relations, or ever to be admitted to the Acquaintance or Conversation of Persons of Reputation or Quality." It was also a memorable *Compact* which happened to be made between a *Roman* and a *Gotbick* Soldier, mention'd by *Procopius*, when they were both fallen into the same Pit ^b, by which they promised to assist one another, and the *Goths* afterwards ratified their *Agreement*.

^a Vide *Martinus Barletius* de *Vita Castriota*, l. 7.

^b *Procopius* *Hist. Goth.* l. 2: c. 17.

Mr. BARB. NOTES on §. XV, XVI.

¹ The *Sovereign* is obliged to keep the *Compacts* which are made by his *Generals*, *Commanders*, and other *Military Officers*, when they contain nothing beyond the Power that their *Posts*, or the Extent of private *Orders* they were charged with give them, whether they are executed openly in the View of the whole World, or privately known to those with whom they treat. But if a *Compact* be made without *Orders*, and afterwards ratified by the *Sovereign*, by an express or tacit Consent; it is plain, that in that Case it ought to be kept the very same as if it had at first been made by his Authority. Nay, when an *Officer* has gone beyond his private *Instructions*, the *Sovereign* is no less obliged by such a *Compact*: Otherwise the Execution of all sorts of *Treaties* would or might be evaded. See *Grotius* L. 3. c. 22.

² These Sorts of *Compacts* ought not to pass for *valid* but when they are authorized by the express or tacit Consent of the *Sovereign*, or *State*; and in that Case, the *Sovereign* may force those that have made them, to keep them. Now the *Laws* and *Orders* of *Sovereigns* ought always to be explained, as enjoining and commanding nothing above human Capacities.



C H A P. VIII.

Of Compacts that restore Peace.

'The CONTENTS of every Paragraph of the Eighth Chapter.'

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| <p>I. Whether Compacts of Peace are invalidated by an Exception of Fear.</p> <p>II. Whether a Peace made with Rebels is valid.</p> <p>III. How far, upon a Pacification, the Goods of private Subjects may be excused.</p> <p>IV. The Term limited for the Performance of the Conditions of Peace, to be strictly interpreted.</p> | <p>V. How if a Peace be referr'd to the Decision of the Sword.</p> <p>VI. An Hostage succeeding his Prince can be no longer detained.</p> <p>VII. Of the Mediators of Peace.</p> |
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I Should now consider that Sort of *Compacts* which entirely put an *End to War*; but *Grotius* is so large on this *Subject*, l. iii. c. 20. that all I can add upon it, will be only a few Things he happened to omit. The *principal* Doubt on this *Head* is, whether an *Exception of Fear* unjustly given is sufficient to disannul or rescind these *Compacts*? which *Grotius*, in the Case of a *solemn War*, denies, l. ii. c. 17. § 19. and l. iii. c. 19. § 11. because it is contrary to the common Practice of the *Laws of Nations*, and because it would be otherwise impossible to put an *End* to this sort of *Wars*, which are known to be very frequent, when it is the publick Interest of the *World* that it should be done. But it must be said, that the *Extortions* and *Ravages* of *unjust War* can never be retain'd or defended by *Conscience*. And as it is beyond *Dispute*, that an *unjust Conqueror* is obliged to make *Restitution*, so I cannot think it appears by any *Law of Nations*, that it is unlawful to plead an *Exception of Fear* against him. And though there were such a *Law*, yet I confess I do not apprehend what *Injury* it would be to the common *Quiet* and *Security* of *Mankind*, if no *Notice* is taken of it. For according to *Grotius*¹, whatever be the *justifiable Cause* of *solemn War*, the *Effect* of it is the *Acquisition* of the *external Dominion*, as he calls it, of what belongeth to the *Enemy*. If therefore the *Vanquish'd* return a *solemn War* upon his *Conqueror*, however he may have no other *justifiable Reason* for doing it, beside that of *Fear*; yet if he happeneth to be successful, he will not only recover what he himself lost before to his *unjust Enemies*, but possess himself also of what he can win from his *Conqueror*. And therefore a *Man* must be very *impudent*, that imagines to secure himself in the *Possession* of what he hath *unjustly* gotten, by the same *Force* and *Violence* that made him at first *Master* of it. And it is equally absurd in a *Conqueror*, after he hath forced the *Vanquish'd* to submit to hard *Terms* and *Conditions* of *Peace*, not to see them obey'd, while he hath him under his *Reach*, and at *Mercy*: But to content himself

barely in the *Agreement* and *Compact* of the *Vanquish'd*, and then leave him in a *Posture* which may give him *Power* to turn the *Game* upon him^a. And therefore in *Reality*, the *Case* seems to be this, if a *Prince* be invaded with an *unjust War*, and after he hath offer'd peaceably to *concert* and *compose* the *Difference*, be forced to consent to *rigorous Demands*, and accept an *hard Peace*, he is under no *Confinement* from any *Law*, while the *Peace* continueth *unsettled*, not to object his *Exceptions of Fear*; or afterwards as he seeth *Opportunity*, to endeavour to give himself *Satisfaction* for the *Injury*. And so *Polybius*, l. iii. c. 30. pronounceth, that the *Carthaginians* had just *Reasons* for their declaring a *second War* against the *Romans* upon this *Account*, because while they were embroil'd in *Troubles* and *Confusions* at home, the *Romans* forced them to give up *Sardinia*, and extorted a vast *Sum* of *Money* from them. And therefore saith that *Author*, the *Opportunity* the *Carthaginians* took to *revenge themselves*, was of the same kind with that the *Romans* had taken to *injure them*. But the *State* and *Decision* of the *Case* will be different, if the *Parties* engaged in a *War* consent at first, as it were, to a *Contract of Fortune*; that is, if while the *Reasons* of *War* lie yet in *Dispute*, they reject all *Terms of Accommodation*, take *Arms*, and commit the *Justice* of their *Pretensions*, and the *Pursuit* of their *Revenge*, which might have been determined and ended by *Treaty*, or some other *Way of Composition*, to the *Event* of *War*. For in this *Case*, the *Sword* is evidently made *Judge* of the *Dispute*, and both *Parties* put the *Controversy* upon this *Issue*, either *I will right myself, and redress the Injuries I have suffered, or will suffer more*; and they that begin a *War* with such *Resolutions* as these, have no more *Reason* to complain of the *Injustice* done them, than a *Man* would have that is hired to fight a *Duel*, and happeneth to be wounded in it. And therefore where a *Man* pushes on the *Contest* to such *Extremities*, and then finds the *Fate* of the *Day* turn against him, he must be content to say as one of *Plautus's*² *Sofia's* did

^a Vid. *Guicciardus*. Hist. l. 16. sub. fin. & l. 17. sub. init.

Mr. BARB. NOTES on §. 1.

¹ *Grotius* only means by that a *Right* of *Property* allowable before an *human Tribunal*, so that no body can lawfully use *Violence* to dispossess us of what we have thus gotten, besides our dispensing with the *Restitution* of it, in our own *Conscience*. See B. 3. c. 7. §. 6. and c. 10. §. 5.

² *Plaut.* Amphitr. Act. 1. Scen. 1. ver. 240.

did to t'other, *Well, do as you please*, since you have the *strongest Arm* ^a.

II. It hath likewise been a Question variously disputed, whether the Commonwealth or Government is obliged to observe a *Treaty* or *Peace* made with *rebellious Subjects*? *Grotius* is very large in the *Affirmative*, l. iii. c. 19. § 6, &c. But in my Opinion, the Case in a shorter and clearer View is this: A *Prince*, that hath suppressed his *rebellious Subjects*, may deal with them as he sees best; but if he recovereth them by *Compacts*, the very Nature of such a *Negotiation* is an Evidence that he pardons the Crime. So that the *Compact* is not to be declared void, upon pretence of the *Rebellion*: But the *Rebels* are by that *Accommodation* restored and reunited to the Commonwealth, and are supposed to promise Obedience to it. And the *Observation* of those *Compacts* by the Commonwealth, the *Rebels* may well suppose to be the *Condition* of the *Obedience* they promise. So that in *kingly Governments* especially, such a *Composition* may sometimes obtain the Force of a *Capitulation* or *fundamental Law*. But as *Gramondus* observes, "When *Subjects* rebel purely that they may force their *Prince* to yield to their Demands, they certainly quit the only Bond of Security *Subjects* can have, their *Allegiance* to their *Sovereign* ^b."

III. What Power the Commonwealth hath to excuse the Goods of the *private Subject* upon a *Pacification*, must be discovered from the Nature of the *transcendental Propriety* ^c; upon the Force of which, the *Goods* and *Fortunes* of *private Men*, whatever Title purchased and possessed by, may be given up, whenever the Necessities of the *State* and *publick Interest* require it. But with this Consideration, that the *State* is obliged to make good such Losses to the *Subject*, out of the *publick Revenues*, either immediately, or at least as soon as it is able. But whether a particular *Subject's* Goods ought to be excused, or taken from him, must in a *Monarchy* be determined by the *Prince*. And the whole *Body* of the *Subjects*, upon his Command, is obliged to make Satisfaction to the Person that has sustain'd Loss upon the *publick Account* beyond his own Proportion. But the *Foreigners*, that are left to the Possession of such *Goods*, need not trouble themselves to enquire, whether it was for the Interest of the Commonwealth to part with them, or no. For the *Act* of the *Prince* is sufficient to give them a just and lawful *Propriety*, because of the *Presumptions* that attend the *Actions* of *Princes*, and because there could be no Way of negotiating with *Foreigners*, without admitting that Things are justly disposed, when managed under the Conduct of the *Head* of the Commonwealth. Besides, as the *Laws of Society* oblige the rest of

the *Subjects*, to make good what hath been given up to the *Enemy*; so they seem to engage them also to the *Relief* of those Persons that have suffered Losses by the War; especially if it began without any particular Fault of theirs. Though it is too evident, that the unfortunate *Subjects* have hardly any where other Redress or Satisfaction, than to be told, that it was an unforeseen and unavoidable Calamity.

IV. If the *Time* be limited, in which the *Conditions* of *Peace* are to be performed ^d, it must be interpreted in the strictest Sense; so far as to exclude all Excuses for the least Delays, except such as are manifestly the Effects of Force and Necessity, and such as give no Jealousy of Design and Subterfuge. The Reason is plain; because a short Delay may make a strange Turn and Alteration of Affairs. If therefore either of the Parties should be indulged in deferring Performance of the *Conditions*, it would be easy for them to find Occasions to elude the *Agreement*. Besides that, it must be a vast Expence to a Prince to maintain a *standing Army*; as he must in Prudence be obliged to do, till the *Articles of Peace* are put in Execution.

V. Sometimes ^e the *Peace* and the *Conditions* of it, are left to be determin'd by a *decisive Battle*; in which sometimes only *two* particular Combatants for both Sides, and sometimes *two*, and sometimes *three* on each Side, and sometimes *whole Armies* engage. And here a *difficult* Question occurs; Whether the Fate of the Commonwealth may lawfully be committed to the Fortune of such a Fight? This seems indeed to be a Way to prevent a greater Effusion of Blood, and to reduce the Miseries and Calamities of War to a lesser Compass. But then on the other Side, it is more satisfactory, promiseth fairer, and looks like a better Venture to stand the Shock even of a bloody War, than to lose the *Security* and *Liberty* of the Commonwealth all at once in such an Engagement. Since, on the other hand, the War may be set on Foot again, and perhaps the Success of it be changed after two or three unhappy Encounters or Defeats. But indeed when there are no Hopes of making a good End of a War, tho' the whole *Force* of the Commonwealth should engage, if the *Enemy* will admit of it, the Dispute may justly be decided by some such Sort of *Combat*, as the least of two Evils. Nay, and where *Princes* themselves make War upon their own *private Disputes*, without any Respect to the *Interests* or *Rights* of the Commonwealth, the *State* may easily give them Leave to decide the Controversy between themselves by *single Combat*. And we have an *Example* of this Nature in *Dionotus Siculus*, l. iv. c. 60. ^f Though *Princes* ought not to

^a Vide L. 47. t. 10. l. 3. § 3. D. de Injuriis, & L. 9. t. 2. l. 7. § 4. D. ad L. Aquiliam.

^b Gramond. Hist. Gall. l. 2.

^c Circa condonanda Bona.

^d Dominium eminentis.

^e Vid. L. 17. t. 2. l. 52. § 4. D. pro Socio, & t. t. D. de lege Rhodiâ, de jactu, L. 14. t. 2.

^f Dionys. Halicarn. l. 3. p. 149, 150. Ed. Lips. When the *Generals* design only to assert their own Power and Authority, the single Combat between them is an honourable and necessary Way to end the Dispute; but when the Commonwealths themselves contend for Superiority, the Uncertainty of such a Trial, makes it mean as well as unsafe to venture it.

Mr. BARB. NOTES on § III, IV, v.

¹ See Grot. B. 3. c. 20. § 7, 8, 9, 10.

² See Grotius, in the above cited Place, § 25.

³ Vid. Grot. ubi supra, § 42, &c. and Mr. Buddens's Dissertation, intitled *Jurisprudentiæ Historiæ Specimen*, § 21. to 30, exclusively. This Custom was so firmly establish'd among the Antients, that there have sometimes been Princes who have lost their Crown, and been forced to resign it to another, because they would not submit to it. 'Twas thus the Posterity of *Theus* lost the Kingdom of *Athens*. *Conon*. lib. 39. apud Phot. Cod. 186. See the Dissertation de Prætorio by Mr. Ferrizonius, p. 6, 7. Ed. 1696.

to proceed to such violent Methods, while the Matter in Dispute is doubtful and uncertain. But here it must be observed, that they that leave the Issue of the Controversy to the Event of *Combat* or *Battle*, may determine as they please of *what* themselves are possessed of, but cannot transfer or lose to others any of those *Rights*, which are not in their Power to dispose of. And therefore if a *Prince* set his Kingdom to *Stake*, except it be his in a *patrimonial Right*, it will signify nothing, unless he hath his *People's*, and their *Consent* for it, that have by Birth a Right of *Succession*. But farther, in such *pitch'd Battles* it often comes to a Dispute, on which Side the Victory lies. And here it is to be consider'd, that generally such *Fights* are decisive, and put an End to the Controversy they began upon. And therefore where *two particular Combatants* engage, the Victory must be declar'd for him that kills his *Enemy*, or at least that so weakens and disables him, as to force him to confess himself conquer'd, as *Turnus*, when he was wounded, doth in *Virgil*¹. Where a greater *Number* fight, that Side is victorious which destroys the *Enemies*, or puts them into such Disorder, that they are not able to make longer Resistance. But where the Quarrel is left to be disputed between *two entire Armies*, the Plunder of the Field, the Burying of the Slain, the Lodging upon the Place of Action, the Offering Battle a second Time, are not in themselves any Proof of *Victory*; since all these may happen when the Battle is fought with equal Bravery and equal Loss. But if other Circumstances concur, there may perhaps be Arguments enough to prove the *Enemy* fled. And certainly when an *Enemy* retreats, so far as to quit the Field after the Engagement, it is a just Suspicion that he is fled. But when neither Side can shew any good Arguments to prove a *Victory*, Matters continue in the Posture they were in before the *War*, and the *Parties* must either come to a *new Tryal* by the *Sword*, or end the Dispute by *Treaty*². Thus when the Dispute was between the *Lacedemonians* and *Ar-*

gives about the *Thyrcatick* Lands, it was agreed in a *general Assembly* of the *States of Greece*, that the Controversy should be decided by Battle between a select Number of Subjects on both Sides, and that the *Lands* should fall to the Conquerors. The *Lacedemonians* pitch'd upon *Othryades* for their Part in the Engagement; and the *Argives* made choice of *Thersander*. Two of the *Argive* Party surviv'd the Fight, *Agenor* and *Cronius*, who came home and brought News of their own Victory to the *State*: But after the Battle had been some Time over, *Othryades*, with the little Life he had left, made a Shift to support himself with Pieces of broken Launces, took off the Shields from the dead Bodies, and erected a *Trophy* with them, leaving upon it an Inscription in his own Blood, *To Jupiter, Guardian of Trophies*. For my Part I should make no Doubt to pronounce the Victory for the *Argives*³.

VI. As to *Hostages*¹ given for the *Ratification* of the *Peace*, besides what we find in *Grotius*², it may be further observ'd, that if the *Hostage* happeneth to be the *Prince's Heir* and *Successor* that giveth him up, when that *Prince* dies, he is no longer to be detain'd as an *Hostage*, though the *League* doth not expire at his Death. For this *Case* is supposed to be *tacitly* excepted; that he should be no longer an *Hostage*, when he succeeds himself in the room of the *Principal*: But then he is obliged to *substitute* another in his stead, whenever it is demanded.

VII. There is also another Way of securing *Peace*; and that is, when others, and especially such as interposed as *Guarantees* and *Mediators* of the *Peace*, engage their *Faith*, that the *Articles* shall be observ'd on both Sides; which *Engagement* of theirs implies a sort of *Agreement*, by which they oblige themselves to assist the *Party* invaded contrary to *Treaty*, against the injurious *Aggressor*³. But the *Guarantees* are not obliged to send *Aids* to any *War* that begins upon other Reasons, than the *Violation* of the *Articles of Peace*.

¹ Vid. Plut. in *Parallis* Herod. Clio.

² Vid. *Diod. Sicul.* l. 4. c. 55.

³ Vid. Jo. Meurf. *Miscell. Lacon.* l. 4. c. 14.

Mr. BARB. NOTES on §. v, vi.

¹ Virg. *Æn.* 12. ver. 931, &c.

² See *Grotius*, B. 3. c. 20. § 52, &c.

³ See the Second Chapter of this Book, Sect. the last.



C H A P. IX.

Of LEAGUES.

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I Shall in the next Place consider that *Species of publick Compact*¹, which is usually called *Leagues*². *Pliny* in his *Natural History*, l. vii. c. 56. gives *Theseus* the Honour of being the first that made or us'd them; which is not to be allowed, in any other Sense, than that perhaps he might be the first in *Greece* that enter'd into League, or that perhaps annex'd certain *Rights* and *Solemnities* to be observed at the making of them. The most proper *Division* of them arises from the *Matter* of them; and from thence they may be divided, first, into Leagues that constitute what was an *Obligation* of the *Law of Nature* before. Secondly, into Leagues that superadd some Particulars to the *Duties of natural Law*; or at least, that, where *these* are too general and indefinite, restrain them to certain and particular Articles.

II. Under the first Head may be rank'd all *Leagues*³, that provide barely for the Exercise of *Civility* and *Humanity*, or to prevent *Injuries* on either Hand; see *Genes.* xxi. 23. And in the League the *Lacedemonians* made with the King of *Persia* there was this Article⁴, *Whatever Towns and Countries the King is at present in possession of, and were before in the Possession of his Predecessors, shall continue in Subjection to him. And no Lacedemonian, or Ally to the Lacedemonians, shall make War upon them, or injure them any other Way, or demand Tribute from them upon any Pretence whatsoever. The King shall have the entire free Rule in his own Dominions.* But perhaps it may be thought, that by this Article the *Lacedemonians* renounced all *Claims* and *Pretensions* whatever, in *Asia*: For *Asia* was the King's, notwithstanding the *Lace-*

demonian League. And 'tis essential to all *Propriety*, both that what is *mine* should be free from the *Invasions* of other Men, and that I should have *Liberty* to do with it as I please. With this League may be compar'd the *Treaty of Peace* between the *Athenians* and the *Persians*, *Diod. Sicul.* l. xii. c. 4. 'Tis certain the *Athenians* look'd upon such *Leagues* to be necessary especially between *Nations* that never had *Intercourse* with one another before. And no wonder, since the greatest Part of the *World* had lost the Sense of that *Law of Nature*, that there was a Sort of *natural Kindred* between Men; and therefore that it was highly criminal for them to injure one another without *Grounds of Provocation*. Nay, so far was this Truth unknown to them, that the common Opinion was, that *Offices of Humanity* were due only to *Fellow-Subjects*; that all *Strangers* and *Foreigners* were *Enemies*, and might lawfully be treated as such upon any Prospect of *Advantage*⁵. However, at this Time of Day, when all *Nations* almost know more of the *Law of Nature*, are more strict in the Observation of it, and more polished in their Manners, such *Leagues* may be supposed absolutely unnecessary⁶; unless, perhaps it be allowed (as it is between particular Men) that when the first *Advances* are made towards *Acquaintance*, good *Breeding* should make the *Preliminaries* to *Friendship* a little ceremonious and solemn. As *Cicero* says in his *Epistles*⁷, "In every new Acquaintance it must be considered, what are the first Steps to be made, and by what Recommendation the Passage is to be opened to Friendship." In any other Respect, 'tis a Scandal to human Nature that any Civil People should

¹ *Thucyd.* l. 8. c. 18. Ed. Oxon.

² *V. Grot.* l. 2. c. 15. § 6.

³ *Cic. Ep. ad Fam.* l. 13. Ep. 10.

Mr. BARB. NOTE on Chap. IX. §. 1, II.

⁴ See *Grot.* B. 2. c. 15. § 1, &c.

⁵ I could not find a more proper Word to express the *Latin Term Fœdera* by. *Treaties* would have been too general; for 'tis plain that the Author here excludes all *Compacts* made during the War, whether to moderate or suspend Acts of Hostility, or barely to treat of Peace, having already treated of 'em in the preceding Chapters. Besides, he says himself in this very Chapter, § 3. *Utraque Fœdera iniri potissimum solent OB ALIQUAM SOCIETATEM contrahendam.* &c. so that the Word *League* may not be very improper here, though it is generally restrained to *Treaties*, by which several Princes or States unite, confederate, or league together, to defend each other, or in Conjunction to attack the common Enemy.

⁶ *Utd. Grot. ubi supra.* § 5.

⁷ See above in B. 2. c. 2. § 11.

should enter into any *Treaty*, the *Articles* of which have no further Intent, than to provide that the *Law of Nature* should not simply and directly be broken; as if a Man could not have a proper Sense of his Duty, unless he bound himself under such an *Obligation*. Such Leagues indeed are commonly called no more than *Treaties of Friendship*; but certainly the strict proper *Notion of Friendship* also includes much more than the common *Offices of Humanity*. For tho' the *Actions* due to *Friendship* are not so determinate, as those due by *Compact*; yet in general, every Man will allow that it is the *Duty* of one *Friend* to impart himself and his *Fortunes* to the Relief of the other, to provide for his Happiness and Security, to assist him with Advice, support him with Counsel and Comfort, to protect him, as far as he has Power, from Evils and Dangers which threaten him; and that all this is to be done with greater Intensity of Passion, than common *Offices of Humanity* pay'd to other Men indifferently require. Further, under this Head *Grotius* reduces all Leagues made for the *Establishment* of mutual *Correspondence* and *Hospitality*, and of the *Trade* and *Commerce*, as far as due by *Right of Nature*. But that all are not properly *Allies* and *Confederates*, who have made an *Agreement* barely to observe common *Duties of Humanity*, may appear from *Livy*, l. xli. c. 24. Where the *Achaians*, upon Displeasure conceived against King *Perseus*, forbid the *Macedonians* their Country. Whereupon *Macedonia* became the Refuge to all their fugitive Slaves, the *Achaians* not daring to attempt to recover them by pursuing them thither. But *Perseus*, to regain their good Opinion, promised them, that if they would take off the *Prohibition* of Intercourse between *Macedonia* and *Achaia*, he would send them back their Slaves. Upon which the Matter was debated in the Meeting of the *States of Achaia*. *Callicrates* opposed their gratifying the King, for fear of giving Umbrage to the *Romans*; and on the other hand, *Arco* contended that notwithstanding their League with the *Romans*, they might safely accept the King's Offer, and satisfy his Desire, urging, that the Thing in Debate was not, whether they should enter into any new *Alliance* or *Confederacy*; but only whether they would give and take the *Liberty of Trade*; to let their Country be open to the *Macedonians*, that they might have free Passage into theirs, and that their Slaves might not be out of Reach, when they fled thither. And that all this was not inconsistent with their *Alliance* with the *Romans*, since that did not oblige them to act particularly against *Perseus*.

III. Secondly, Leagues which *superadd* to the Duties Men owe one to another by the *Law of Nature* are of two Sorts, some *Equal*, others *Unequal*. The first are such as are alike on both Sides¹; or, when not only the *Engagements* and *Promises* are either *simply*, or, in proportion to the Strength of either Party, on both Sides *equal*; but also when the Manner of passing them is *equal*, so that neither of the Parties is *obliged* to harder *Conditions*, or left any Way *obnoxious* to the other.

The *Unequal* I shall consider by and by. *Isocrates*² distinguishes after the same Manner, "That *Covenants* or *Leagues* are *equal*, when the same *equal Right* is divided to both Parties; and that that is a *Command* or *unequal League*, when one hath harder Terms than the other (for I see no Necessity of adding *contrary to Justice*.) The End of both Sorts is chiefly the *Advancement of Society*. And this *Society* either relates to *Commerce*, or to *Community of War*; or to *mutual Promises* of Aid and Supplies in Wars *offensive* and *defensive*; or in short, to any other Matter. *Equal Leagues* relating to *Commerce*, may be various. For Example, suppose it be agreed that none of the *Subjects* of the *confederate Commonwealths* shall be obliged in any of the *Ports*, or any other *Parts* of the *Territories* belonging to one another, to pay *Custom* or *Toll*; or not more than is paid at present; or not above a certain *Rate* or *Quantity*; or not more than *Subjects*, or other *Allies* pay; and the like. *Equal Leagues* relating to a *Community of War* are settled thus; when, for Example, it is agreed, that both the *Confederates* shall furnish out an equal Aid of *Mens* and *Ships*, and other *Necessaries* for *War*; and that, either both, when either of the *Confederates* is invaded by *Enemies*, or make *War* upon others, or only when either Party is invaded. Sometimes *Aids* and *Supplies* are promised only for a particular *War*, or against a particular *Enemy*, or against all *Enemies* in general, excepting only the particular *Allies* of each *Confederate*. Lastly, Leagues about any other Matter are *equal*, when it is agreed, that one shall have no *Forts* upon the other's *Coast*; that one shall not defend the other's *Subjects*, or receive them into *Protection*, but apprehend and send them back to the other; that one shall not give the other's *Enemies* Passage through his *Country*, and the like.

IV. Having thus explained the *equal Leagues*, it will be easy to understand what are the *unequal*. And these are when either the *Promises* are *unequal*; or when either of the Parties is obliged to harder Conditions. The *Promises* may be *unequal*, either with regard to the *superior*, or *inferior Confederate*. The first happens when the more powerful *Confederate* promises his Assistance to the other, without requiring the like; or when the Aids he promises, are greater than what the other promiseth; or when the other is not bound to bring proportionate Aids. The latter happens when the *inferior Confederate* is obliged to *Conditions* of larger Extent than the other. Some of this sort of Leagues include a *Diminution* of the *sovereign Power*. Of this Nature was the League between the *Romans* and *Carthaginians*, in the End of the *second Punic War*; by an *Article* of which the *Carthaginians* were not to begin any *War* without Leave from the *People of Rome*. And thus *Armenia Major* received its Kings from *Rome*, though, it paid no *Tribute* to the *Romans*³. On the other hand, those Leagues are no *Diminution* to the *sovereign Power*, which include only a *transient Burthen*; or one which may be complied with once and for all. For Instance

¹ Vid. *Supra*, l. 3. c. 3. §. 9, 11, 12.

² *Appianus Alexand. Praefat.* p. 2. A. Ed. H. Steph. Vid. *Procep. Hist. Gothic.* l. 1. c. 6. The Agreement Peter made with *Theodasius*, concerning *Sicily*.

³ *Onus transitorium.*

Mr. BARB. NOTES on §. III, IV.

¹ See *Crot. B. 2. c. 15. §. 6.*

² *Joc. Panegyri.* p. 132.

³ Vid. *Grot. ubi supra.* §. 7.

⁴ V. T. *Liv.* l. 30. c. 37.

stance, if when a *Peace* is concluded, one Party is obliged to pay the other's Army; to defray the Charges of the War; or to pay a Sum of Money by way of *Mulct*; or when either Party is obliged to dismantle Towns, demolish his Forts, evacuate certain Place, remove from certain Countries, give Hostages, deliver up Ships, and Arms, and the like. Thus in the *Articles of Treaty*, which *Por-senna* allowed the *Romans* upon their *Exclusion* of the Kings, it was particularly mentioned, that they should have no Instruments of Iron for any Use, but in Husbandry ^a. And here, by the way, the Story which *Procopius* relates in the fourth Book of his *History of the Goths*, may perhaps deserve Observation. "When the Truce was made between *Justinian* and *Cosroes*, by the Conditions of it, *Justinian* was to pay two thousand *Libre* of Gold; whereupon *Isliaganus* the *Persian* Ambassador demanded immediate Payment; but *Justinian* proposed rather to pay every Year four hundred, thinking by that Means to lay the stronger Obligations upon *Cosroes* not to break the Truce. But the *Romans* complied at last, and paid the entire Sum, for a yearly Payment might look like *Tribute*. So common (saith the Historian) it is for a Man to be more afraid of a dishonourable Name, than dishonourable Actions. But here it may be ask'd, whether such unequal Leagues, as are attended with permanent and perpetual Burthens, do always and in themselves lessen and impair the sovereign Power? Or, whether an unequal Confederate may be supposed to retain his Sovereign? Now permanent and perpetual Burthens are such as these; when the one is obliged to have the same Allies with the other, and not on the contrary; when one Party is obliged not to build Forts in such particular Places, not to levy Forces, or raise an Army (and this was one of the Conditions of the League between the *Romans* and the *Latines*, that the *Latines* should make no Levies of Men, nor set any Officers of their own over them, or send them out upon any Expedition. The necessary Consequence of which was, that the *Romans* pass'd the Decrees of War or Peace, and that the Allies were Partners only in the Toil, while they took the Conduct themselves, and enjoyed the Honour and the Benefit of the Victory ^b) that one shall not have above a certain Number of Ships, shall not build new Cities, set out Fleets to Sea, raise Soldiers in such particular Places, and the like; but especially when one of the Confederates is obliged to pay a Deference and Submission to the other; or, what is the same Thing, to acknowledge him superior in Dignity, and to express a Reverence to him in all his Actions ^c. Thus the *Athenians* allowed their Allies their separate Liberties, and erected a popular Form of Government among them; but reserved Superintendence and supreme Direction of Affairs to themselves. *Grotius* answers this Question, l. i. c. 3. §. 21. out of l. xlix. t. 15. l. 7. §. 1. *D. de Captivis*, &c. But the Difficulty lies in the fol-

lowing Words of the *Civilian*, *At sunt apud nos rei ex civitatibus federatis, & in eos damnatos animadvertimus. But the Subjects of our Confederates are brought to Trial before us; and we pass Sentence, and punish them.* For this certainly implies Subjection, when another hath a Right to summon our Subjects to appear and stand their Trials in his Courts, and to punish them according to Sentence given. The Story of *Decius Magius*, in *Livy*, is an Instance of this ^d. But particularly, that which *Pausanias* relates ^e. When upon the Motion and Instance of *Callicrates*, the *Roman* Legate charged the greatest Men among the *Athenians* with being in *Perseus's* Interest; *Xenion*, who was one of them, upon Confidence of his Innocence in that Matter, answered, that he did not doubt but he could clear himself of that Charge, even before the *Roman Senate* itself; which the Legate immediately took the Advantage of, as if he had appeal'd to *Rome*; and thereupon he and several others were sent to *Rome*. And yet *Polybius* informs us, speaking of those that were sent thither, that the Senate did not think that it belonged to them to bring them to a Trial. And therefore, the Answer to the Difficulty mentioned is easy, that the former Part of the Words must be understood of the primitive Times of the *Roman* Commonwealth, when they were strict in their Observance of the Laws of Confederacy, and used to make a Distinction in their Carriage and Treatment, between such as voluntarily enter'd into an Alliance with them, and such as their Arms had conquer'd. And this *Cicero* confesses, that the old *Romans* thought themselves obliged to protect their Allies, and never assumed the Command over them ^f. And *Scipio* made it a particular Part of their Commendation, that the *Romans* did not confine the foreign Nations to their Interest by Severity and Servitude, but by the Ties of Friendship and Alliance. But the latter Words refer us to After-ages, when the Respect and Reverence they had to their old Confederacies ran low, and their Allies as well as the conquer'd Nations were reduced to equal Terms of Slavery ^g. So *Sylla* forced all the *Roman* Allies, that had been free till his Time, to pay Tribute. At which Time it was also common to bring the Subjects of the confederate States to *Rome*, to be tried, and to punish them there, as *Roman* Subjects. But it is evident, that in the Epistle of *Proculus*, between the former and latter Words, there were several intermediate Things mention'd. But here *Grotius*, after he hath tediously recounted the several Kinds of Disputes, which might happen between Allies and Confederates, at last dismisseth the Difficulty, without answering any Thing to it ^h. However, it is well observed by wise Men, that it generally happens, that if the Party superior in the League be considerably stronger, and more powerful than the other Confederates, he will by Degrees arrive at an absolute Sovereignty over them, especially if the Confederacy be perpetual, and allow him a Right to place Garisons in their Towns ⁱ.

V.

^a *Plin. Nat. Hist. l. 34. c. 14.* See also, *1 Sam. xiii. 19, 20.*

^c *Vid. Isocrat. Panegy.*

^d *Livy, l. 23. c. 7.*

^e *Polyb. Excerpt Legat. 105.*

^f *Cic. Off. l. 2. c. 8.*

^g *Vid. Anton. Marth. de Criminibus, ad tit. L. Jul. Majestatis, c. 1. § 5, 6.*

^h *Vid. Bodin. de Repub. l. 5. c. 6. Isocrates Archidam. p. 217.* People that are jealous of their Liberty, should avoid all unequal Confederacies, for there is hardly any Difference between them and Slavery.

^b *Vid. Dionys. Halicarn. l. 8. c. 15.*

^e *Pausanias in Achaicis.*

^h *Vid. Liv. l. 42. c. 1. Appian. de Bello Civ. l. 2.*

V. *Another Question* *Grotius* enters upon ¹, is this, Suppose two Parties both *Allies*, and *Confederates* to a *Third*, make *War* upon one another, which of them the *third Confederate* ought to assist ²? In which *Place* it may be added, that in all *Leagues* which a *Prince* enters into with his *Neighbours*, upon the *Points* of *Assistance* and *Supplies*, this *Exception* ought always to be supposed, if the *Condition* and *Circumstances* of my own *Kingdom* will permit. For that *Consideration* ought always to over-balance, not only any *private* *Respect*, but even the *Ties* of *Blood* and *Affinity* ³. For since it is impossible a *Prince* should be under nearer or stricter *Obligations* to an *Ally*, than to his own *Subjects*; 'tis plain he can make no *Promise* that can be binding to any *Confederate*, when it is manifestly inconsistent with the good of his own *Subjects*. It was said by *King Francis I.* in *Guicciardine*, that he thought the *Oath* he took at *Rhemes* was of the strongest *Obligation*; and by that the *Kings* of *France* were obliged not to alienate any Part of the *Patrimony* of the *Crown* ⁴. And in this Sense, what my *Lord Bacon* saith, in his *Wisdom of the Antients*, c. 5. may be very well admitted: "That there is but one true and proper Bottom of Faith among Princes, and that is Necessity (a Deity of great Power with the Great) the Danger of the State, and the Communication of Profit. And *Aristotle* speaks very plainly ⁵: Advantage seems to be the main Cause of Confederacies between Commonwealths ⁶:" *Polybius* says of the *Rhodians* ⁷, that they made no *Alliance* with the *Romans* for a hundred and forty Years together, though they sent them *Assistance* in several *Wars*; and the Reason of this, he saith was, "Because they were willing to appear fair to all the World, and to give every *Prince* Hopes of their *Assistance* and *Friendship*, but at the same Time unwilling to abridge themselves of any Part of their *Liberty*, by binding themselves under *Oaths* and *Compacts*, to adhere to the Interests any one *Nation*." Sir *Thomas Moore* would have his *Utopians* forbear entering into *Confederacies* upon other Reasons ⁸. But a *Prince* that suffers by an *Alliance*, that expires upon a *Change* of Affairs with his *Confederates*, must charge the Misfortune upon himself, that he did not make stricter Search into the *Circumstances* of his *Ally* ⁹. Tho' an honourable *Confederate*, when he finds that the Posture of Affairs he is in will not suffer him to continue any longer in the *Alliance*, should

give Advice of it to the others that are concerned, that they may have Time to provide for themselves, and secure their own Interest. For it is certainly the highest Pitch of *Baseness* possible, to sacrifice a Friend to save myself ¹⁰. And therefore in all *Leagues* of *War*, it is look'd upon to be a very important and necessary *Article*, that no one of the *Confederates* shall make a separate *Peace* with the common *Enemy*, excluding the rest of the *Allies*. Though 'tis reasonable this *Article* should be understood with this *Limitation*, supposing the other *Confederate*, or *Confederates*, do not refuse to comply with fair Terms and proper *Overtures* of *Peace*. For in such a Case, this looks like a *Violation* of the *Confederacy*, and in consequence the other *Ally* may justly take separate Measures for his own *Security*. But then this also must be allowed in a mitigated Sense only, and with certain *Alleviations*, that it may not be a *Pretext* to elude *Confederacies*, and that one of the *Allies* may not in some Sense be made the other's *Judge* ¹¹.

VI. *Another celebrated Distinction* of *Leagues*, is that which divides them into *real* and *personal*. The latter are such as are made with the *Prince*, purely with Relation to his *Person*, and expire with him. The former are such as are made with the *Kingdom* and *Commonwealth*, rather than the *Prince* or *Government*; and these outlive the *Ministry* and the *Government* itself, under which they were first made. To which of these every *League* belongs, will appear from what follows. This therefore is certain, that whatever *Leagues* are made with a *free People* are in their own Nature *real*, and must continue till the *Term* limited in the *League*, notwithstanding that the *Government*, by whose *Intervention* the *Leagues* were made, may die or be changed. And hence we may infer, that if a *free People* enter into a *League*, and afterwards the *State* of the *Commonwealth* happen to be changed from a *Democracy*, into a *Monarchy*, the *League* is still in force, because the *People* is the same, tho' the *Form* of the *Commonwealth* be changed. And because a *Prince* called to the *Throne* by the *free Voice* of the *People* is always supposed to take the *sovereign Power* upon him, together with all the *Obligations* contracted by the *People*, when it lay in their Hands. Besides, *Leagues* are made by them that are invested with *sovereign Power*. The common *Subject* of which *Power* is the *Commonwealth*; and *sovereign*

¹ Vid. *Simlrum d. Repub. Helvetiorum*, l. 1. p. 119.

² Vid. *Gellium*, l. 2. c. 29.

³ *Guicciardine*, Hist. l. 16.

⁴ *Arist. Ethic. Nicom.* l. 8. c. 5.

⁵ *Arist. Rhet.* l. 3. c. 14. 'Tis incredible, that any Man should choose to do a Thing without any Prospect of Advantage by it. *Valer. Flaccus*, l. 4. ver. 744.

Certa fides animis idem quibus incidit hostis.

They're certain Friends that have a common Foe.

Isocrates Orat. ad *Philip.* p. 1156. A *Commonwealth* hath no Regard either to *Enemies* or *Oaths*, or any Things else, further than it thinks it tends to Advantage: Thus *Polybius*, l. 2. c. 47. saith of *Aratus*, That he knew *Kings* naturally look'd upon none, either as *Friends* or *Enemies*, but rated *Friendship* and *Enmity*, purely according to their own Profit. *Andr. Macrobius*, Hist. *Venet.* l. 1. speaking of the *State* of *Venice*, saith, We measure our *Alliances* and *Friendships* only by the *Credit* and *Interest* they bring us.

⁶ *Polyb.* Excerpt. Legat. 93. c. 6.

⁷ *Moore*, *Utop.* l. 2.

⁸ Vid. *L.* 50. t. 17. l. 19. *init. D. de reg. juris.*

⁹ *Euripid.* *Iphigenia in Tauris* ver. 605, 606, 607.

¹⁰ *V. Job. Labard. Hist. Gall.* l. 5. p. 313. *Ed. Paris. An.* 1671.

Mr. BARB. NOTES on §. v.

¹ L. 2. c. 15. §. 13. His Decision is reduced to this: When two *Allies* make *War* unjustly against each other, we must assist neither of them. But if the Cause of one of the *Allies* is just, we must assist him, not only against *Strangers*, but even against one of our *Allies*; unless there be any express Clause in the *Treaty* that does not suffer us to undertake the *Defence* of the first against the last, though he is in the *Wrong*: But if several of our *Allies* enter into a *Confederacy* against a common *Enemy*, we must then equally assist them all, as far as possible: And when it is not in our *Power* to assist them all at the same *Time*, we must give the *Preference* to the most ancient *Ally*. See Mr. *Baldwin's* *Dissertation de Comparatione Obligationum quae ex variis hominum Statibus oriuntur*; and that by Mr. *Thomasius de Sponsione Civium*, Sect. 17. & seq.

reign Power is the same, both when it is exercised by the common Suffrages of the whole Body of the People, and when it is afterwards entrusted to a Prince, created by the Consent of the People. But here all those Leagues are excepted, that were made only for the Preservation of the present State of the Commonwealth. For Example, suppose two free Commonwealths enter into a Confederacy, by which they agree to aid and assist one another, against all such as shall endeavour by Force to subvert the present Establishment of the Government in either Commonwealth. For if afterwards, either of the two Nations freely consent to an Alteration of the State of their Commonwealth, the Reasons ceasing, the Confederacy is supposed of course to expire. But however in the general, though every League made with a free People be real; yet it does not follow, on the other hand, that therefore every League made with a Prince is personal, and dies with him. For the inserting a Person in a Compact, doth not make the Compact personal, but only shews by what Person's Intervention the Agreement was made.^a But because it is evident, that Princes make some Leagues with no farther Intention, than that they should continue till their Death; and others, with Design to derive them down to their Successors; it must therefore be enquired, what are the Marks whereby we may distinguish, which Sort every regal League ought to be reduced to.

VII. And it is Grotius's Opinion^b, that it is easier to discover this, from the Form and Phrase of the League itself, than from any general Rules, or Observations. And thus all Leagues will appear to be real, in which 'tis expressly mention'd, either that they are to be perpetual; or that they are made for the common Good; or made with the Prince and his Successors; or when a particular Time is limited for the Continuation of them. But besides, the other Words of the League sometimes, and sometimes the Matter of it, and sometimes the Motives of entering into it, may make a Conjecture easy in this Case. If the Conjectures are equal on both Sides, favourable * Leagues must be supposed to be the real, and the † odious, the personal. The favourable Leagues are those that are made for the Advancement of Commerce. Not that all Leagues of War are odious; for the defensive generally incline to the favourable Part; the offensive hath more of that which is odious in them.

VIII. But how far a Successor is obliged by the Leagues of the Prince his Predecessor, is what we may take a more distinct View of. For in the first Place 'tis certain, that if the Predecessor make a Peace, the Successor is obliged by it. For by a Peace 'tis manifest, all past Injuries that gave Birth to War are forgotten, the Articles of the Peace being duly observed. And then, secondly, 'tis beyond Dispute, that the Successor is obliged to stand to all those lawful A-

greements, by which his Predecessor transferred any Right to a third Person. And again, thirdly, it is also certain, that when one of Confederates hath performed what the League oblig'd him to, and the Prince dies before he satisfies what was required on his Part, the Successor is obliged to satisfy it. For since what the other performed upon a Condition of an Equivalent to be paid him, did either really, or at least was intended to promote the Advantage of the Commonwealth; it is evident, that unless the Equivalent be paid him, he hath a Right to demand Restitution or Satisfaction, for what he performed, in a Manner before it was due; and consequently, that the Successor is obliged to refund all back, except he chooseth to pay the Equivalent, according as the Articles of Confederacy before determined. Lastly, as to these Leagues, where nothing hath been performed on either hand, or where the Performances have been equal, it may I think be said in general, that the Prince, if he enter'd into the League as Head of his People, and with design to advance the publick Good by it, must be supposed to have made a real League, and to have oblig'd his Successor by it. Because such a League affects the whole Mass of the People; and the succeeding Prince, the Head of them, enters upon the same Rights, and takes upon him the same Incumbrances with his Predecessor. But where the League directly regards the Benefit of the Prince's Person and Family, 'tis evident that when he dies, or that is extinct, the League must also be at an End. But it is grown into a Custom upon any new Succession, to renew the Leagues, though in themselves undoubtedly real, at least in general Terms, for fear any Dispute or Exception should arise, that since the Commonwealth hath not yet perceived the Use and Advantage of such a League, that therefore it hath no other Bottom but his Faith that made it, and doth not descend to the Successor. And especially since the Design of every League is to promote the publick Good; and since the Successor may perhaps have Sentiments in relation to that different from his Predecessor, he hath in consequence a Right to take different Measures; and therefore may neglect a League, which he thinks is now grown useless and unserviceable to the Commonwealth.^c And here it may be observ'd, that where several different Leagues have formerly pass'd interchangeably between Nations, and they afterwards renew them in general^d, the League that was last made, must be supposed chiefly to be renewed. Since the latter always lessen the Force of the former^e. And therefore it was unpardonable Inadvertence and Neglect in the Ambassadors, that went to renew a League with King Ptolemy, and in them too, who sent them without knowing what Treaties and Leagues had formerly pass'd between that Prince and the Achaians, or which of them the Achaians were desirous to renew.

IX.

^a Vid. L. 2. t. 14. l. 7. § S. D. de Passis.^b Grot. L. 2. c. 16. § 16.^c Vid. Johan. Labard. Hist. de Reb. Gall. l. 5. p. 74, 75. Ed. Par. An. 1671.^d Vid. Polyb. Excerpt. Legat. 41.^e Favorabua.

† Odiosa.

Mr. BARB. NOTE on § VIII.

¹ See above in B. 5. c. 12. § 6. in t'e Beginning.

IX. And here Enquiry may be made, whether if one of the *Princes* of a *League* happen to be *depos'd* and *expell'd* by his own *Subjects*, the other *Confederate* be obliged to send him the same *Aids* and *Supplies*, which were promised when he was in Possession of his Kingdom? *Grotius*, in the Chapter before quoted, § 17. affirms that he is. Because a *Prince*, unjustly *depos'd* and *expell'd*, hath still a *Right* to his Kingdom, tho' he hath lost the *Possession*. To me, so much in this Case seems to be certain, that if the *Terms* of the *League* expressly mention and intend the Defence of the *Prince's* Person and Family, he ought to be assisted in the *Recovery* of his Kingdom. But if the *League* was formed for *publick Good* only, 'tis a disputable Point, whether the *exil'd Prince* can demand *Assistance* in virtue of his *League*. For the *Aids* mention'd are presumed to have been promised against *foreign Enemies*, without View of this particular Case. Not but that still such a *League* leaves Liberty to assist a *lawful Prince* against an *Usurper*. And thus if while we are engaged in a *League* with a *free People*, an intestine domestick *Enemy* endeavours to *enslave* them, we may with Justice send them *Assistance* to suppress him, before he is grown into a *lawful Prince*. For the * *Qualities* in *Leagues* (as suppose it be expressly mentioned, that the *League* is made with the *Prince* and his *Successors*) imply a *strict* and *proper Right*, and intend such *Princes* only as have a *just Title* to the Kingdom, not that keep it by bare *Usurpation*, or that have no other *Title* to depend upon, but Force and Power.

X. It is also a famous Question, whether it be provided by the *League*, that neither of the *Confederates* shall injure or invade the other's *Allies*? By *Allies* is meant such only as were *Allies* at the Time the *League* was made, or such as were afterwards taken into *Alliance* on either Side. What was urg'd in a Dispute of this Kind between the *Romans* on one hand, and the *Carthaginians* on the other, at the Beginning of the second *Punic War*, may be seen in *Polybius*, l. iii. c. 27. and in *Livy*, l. xxi. c. 19. The Decision

Grotius makes of it is *this* ^a, that it was no Breach of *League* either for the *Carthaginians* to make War upon the *Saguntines*, though after they were taken into *Alliance* by the *Romans*, or for the *Romans* to undertake to defend them. For it may happen without Breach of *League*, that of two *Confederates*, one may make War upon, and the other assist the same Party. And it is usual in *Leagues* to make *Articles* that relate particularly to such Cases; see the *Leagues* made between the *Romans* and the *Carthaginians* in the Time of the *Tarentine War*, *Polyb.* l. iii. c. 25. Tho' when *Confederates* are so far engaged in opposite Interests, 'tis evident, they must be upon the Brink of an open *Rupture*. For the Sense of *Pain* is the same, whether the Wound be given in another's *Name*, or in the *Striker's* own; but it is yet clearer, when the *Seat* of the *War* happens to be carried into the *assisting Prince's* Country ^b.

XI. And it is to be further observed, that *Leagues* limited to a particular *Time*, when that expires, must not be suppos'd to be tacitly renewed. Both because no Man can be presum'd to bind himself rashly by new *Obligations* ^c; and because otherwise it could never be known how long a *League* is to continue. And therefore if after the *League* expires, some *Acts* of *seeming Alliance* are continued, they are to be look'd upon as *Acts* of *Kindness* and *good Nature*, but not as Arguments of the *Renovation* of the *League*. For *Friendship* continues after the *League* is at an End. Again, it is evident from the Nature of all *Compacts* ^d, that where one of the Parties refuseth to stand to the *Conditions* of the *League*, the other is at Liberty to break too. *Confederates* may indeed agree, that though *one Article* of the *League* be neglected, yet the *rest* shall be inviolably observed. But then the other Party is not obliged to perform the *Equivalent* to the *neglected Article*, and so not to suffer any positive *Evil* by it.

XII. I come now to consider the Nature of † *Engagements*, or those *publick Compacts* which are made by *Ministers of State* ^e, in *Negotiations* relating

* *Qualitates.*^a *Grot.* l. 2. c. 16. § 13.^b *Vid. Justin.* l. 3. c. 7.† *Sponsiones.*

MR. BARB. NOTES on § XI, XII.

¹ See *Grotius*, B. 2. c. 15. § 14.² See the above-quoted Place of *Grotius*, § 15.

³ As our Author no where explains, in express Terms, the *Right* of AMBASSADORS, and has only but just mention'd it by the bye, *Lib.* 1. cap. 3. it will not be improper to treat of it in general and succinctly, since Treaties are usually negotiated and concluded by the Power of these Ministers. I shall borrow from *Mr. Budeus's Elem. Phil. Pract.* Part II. cap. 4. Sect. 5. § 19 & seq. enough to give a short and clear Idea of this Matter by the Principles of the *Law of Nature*, common to all Men, and not of the *Right of Nations*, taken in *Grotius's* Sense (*Lib.* II. cap. 18.) for a tacit *Compact* of all People, or at least the greatest Number. We can then make it appear, that these sort of Ministers are to be esteem'd as sacred and inviolable Persons, independently of this pretended *Compact*. We cannot doubt but that it highly concerns Mankind in general, and Nations in particular, not only to put an End to Wars and Disputes, but also to establish and maintain Friendship and Commerce between each other. Now *Ambassadors* are necessary to procure these Advantages. God then, who without Dispute commands every Thing that contributes to the Good and Preservation of human Society, cannot but forbid, by the *Law of Nature*, the doing any Injury to these sort of Persons. We abuse an Ambassador, either by *refusing to receive him*, without having any powerful Reason to oblige us to do so; or by doing him some Injury either in his Person, his Goods, his Honour, or his Domesticks, &c. We may lawfully dispense with receiving an Ambassador, when his Master, for Example, has already cheated us under Pretence of Ambassies, and we have Reason to suspect the like Deceit; or when he that sends the Ambassadors, has betray'd us, or is guilty, with respect to us, of any other heinous Crime; or when we are assur'd, that under Pretence of Negotiations, the Ambassador comes only but to raise some Disturbance, or as a *Spy*, &c. But if we have no Reason to mistrust any Thing of the like Nature, we must honourably receive every Ambassador that is sent to us, and not do him the least Injury, not even by the *Right of Retaliation*, or *Reprisals*, since by our bare receiving him in that Character, we have renounced, with regard to him, the *Right* which we might have had otherwise upon this Account. Ambassadors then must be regarded as sacred and inviolable Persons, that is to say, as far as the Design and Nature of their Ambassy requires it. Thus an Ambassador cannot be punished by the Prince or State to whom he is sent: For as he represents his Master, he treats in that Quality with the Power to whom he is sent, as one of an equal Rank with him. But if he has committed any Crime of Importance sufficient to demand Satisfaction, and we have Interest enough to get him punish'd, we must apply ourselves to his Master: And then, if his Master refuses to give us Satisfaction, we must use against him all the *Rights* that we have against a Prince that boldly tolerates and approves of the Crimes of his Subjects: Nay, it is allowable, when the Business requires it, to seize upon his Person immediately, as a declared Enemy, to imprison him, and even put him to Death, if it appears absolutely necessary for our Preservation; for we are not to bear every Thing from Ambassadors, neither does the Design of their Ambassy require it.

relating to the *Sovereign Power*, but without *Advice* and *Command* from it. And here, the first Question is concerning that difficult Case, where if the *Engagement* is pass'd *absolutely* without *Proviso* or *Condition* of being *accepted* and *satisfied* by the *Sovereign*, and the *Sovereign* afterwards refuse to give it any *Ratification*; what the *Engagers* are obliged to do in Satisfaction to the Party they made the *Engagement* to? This was a Case once warmly disputed among the old *Romans*, upon the *Engagement* made at the *Furcæ Caudine*. The Story is at large in *Livy*, l. 9. c. 8, &c.² And indeed if the *Measure* of that Matter were to be given by *strict Justice*, it must be said that the *Romans* were neither obliged to *ratify* the *Engagement*, nor to set Things in the Posture they were in before. But then, it had been enough for them to *surrender up* the Persons that made it. But if the State of the Case be rather *estimated* by *Equity*, certainly the *Romans* ought to have *ratified* the *Agreement*, however it was concluded without their *Advice* and *Consent*. The *Consuls* indeed had not Power to *determine War*, *conclude Peace*, or enter into *League* with an *Enemy*, without particular *Instructions* and *Commissions* from their Masters, the *Senate* and *People*; yet since they did not presume upon the *People's* Consent without very *good Reason*; when it was impossible otherwise to save the Lives of many thousand Citizens, the *Flower* of all the *Roman Commonwealth*; and when the *Enemy* had perform'd all that could seem *equivalent* to a *formal Peace* and *League*; the *People* in reason ought to have *confirmed* the *Conditions*, especially since there was nothing intolerably *hard* or *unjust* in them³. For it would have been enough for the *People* to have stood resolutely to their *Principle*, that their *Magistrates* could oblige them to nothing without their own *Consent* and *Command*, if the *Samnites* had demand'd any Thing that was unreasonable and insupportable. But 'tis clear, the great Mortification to that proud ambitious *People* was, that their *Army* was forced to submit to the Ignominy of passing under the *Jugum*. Which was indeed very ill Conduct in the *Samnite General*. For that *Disgrace* did not lessen the Strength of the Ro-

mans, but only provok'd and exasperated that *fierce* People to revenge the Dishonour. However, the *Roman Army* very well deserved the Treatment they met with, for venturing rashly to pass a Place they were Strangers to, without sending before to discover it. And it was certainly their wisest Way to submit to the *Disgrace*, rather than suffer the Strength of *Rome* to be cut off. And here the Arguments *Lentulus* offered to persuade the *Engagement* may be consider'd, *Liv.* l. ix. c. 4. And further, that a Commonwealth may often be obliged to *ratify* the *Acts* and *Promises* of its *Generals*, because of their *Authority*, and to oblige them not to go over to the *Enemy*. Hence *Tacitus* saith, *Ann.* l. 12. c. 18. "That *Mithridates* was at a Loss whose Pity he should address himself to; because none of the *Romans* had Powers large enough to give him any Assurance in depending upon their Promises." But in the Case before us 'tis manifest, that the haughty *Romans* never consider'd, that they might some Time or other be forced to accept as hard Conditions themselves, as they had imposed upon others. However, it was a Strain of Generosity in the *Samnites* not to accept the *Surrender* of the *Sponsors*: And it was an extravagant Action in *Posthumius*, when the *Surrender* was offer'd, to strike the *Socialis*, and then cry out that he was a *Samnite* Subject, and that, contrary to the *Laws of Nations*, he had injured a *publick Minister*; and therefore, that the *Romans* might carry on their *War* with more *Justice*. The *Judgment* of *Livy* upon this whole Proceeding may perhaps deserve our Observation; The *Sponsors*, saith he, after they had been offer'd to be yielded up, and were not accepted, return'd back to the *Roman Camp*, *sua fide liberati*, absolv'd from their own *Faith* and *Engagement*; but he adds doubtfully, *forſan & publica*, and perhaps from the *Publick*.

XIII. The last Question upon this Subject is, if the *Sovereign* knows that his *Ministers* have pass'd *Promise* and *Engagement*, and is silent upon it, whether it may be inferr'd from thence, that he *owns* and *approves* it? But for an Answer to this, I refer you to *Grotius*, l. ii. c. 16. §. 17.

² Vid. *Grot.* l. 2. c. 15. §. 16. *Vol. Max.* l. 4. c. 8. §. 1. *Jo. Mariana.* *Hist. Hisp.* l. 21. c. 12.

³ See *Guccardine's Hist.* l. 12. p. m. 342, & 344. where he talks of the Treaty that *La Trimouille* concluded with the *Smis* at *Dijon*, without the King of *France's* Orders. Sir *W. Temple*, in his *Observations* upon the Government of the *United Provinces*, saith, That in the Year 1668. he prevail'd with the States-General to conclude three Treaties, and to draw up and sign the several Instruments in the Space of five Days, without any Recourse to the Provinces, and from them to the several Cities, where by the Interest and Arts of others, the Affair would have been opposed and eluded, tho' it was of the greatest Importance to the States that it should be concluded. He adds, That doing this without Commission from their Principals, they ventured their Heads if they had been ditownd by their Provinces.

Mr. BARB. NOTES on §. XII.

Nor does this Character oblige an *Enemy* to their Master, to respect them in their Passage through his Territories to another State, or hinder him from doing them any Injury: It not being necessary to the Design of the *Ambassies* that their *Rights* should extend so far; unless there be some particular *Compact* made for that Purpose. What we have here said concerning *Ambassadors*, is also to be applied in some sort to their *Domesticks*, and their whole *Retinue*. If any one of their *Domesticks* has done any Damage or Injury, we may require his Master to deliver him up to us; otherwise he makes himself accessory to his Crimes, and in that Case he gives us Right to act against him as if it were his own personal Crime. Now he cannot punish his *Domesticks* himself; because this *Right* contributing nothing to the Design of his *Ambassy*, it is not to be presum'd that his Master has given it him. As for his Goods, we cannot seize upon them for Debt by way of Justice; for that would suppose a taking away from the Jurisdiction of the *Sovereign* to whom his *Ambassy* is made: But if he refuses to pay his Debts, we must take the same Measures with him, as we have already observ'd, are to be used in obtaining Satisfaction for the Damage and Injury he has done us. As for the *Right of Privileges*, it is a Consequence of the Nature and Design of *Ambassies*. Nevertheless, if we have once granted it to *Ambassadors* of a certain State, nothing authorizes us to revoke it, as long as the Good of the Commonwealth does not require it. Neither must we refuse, without pressing Reasons, to grant *Ambassadors* the other *Rights* and *Honours*, which are settled by the common Consent of *Sovereigns*, for then this would be a sort of an Affront to them.

² *Sponsors.*

³ See Mr. *Buddeus's Dissertation*, entitled, *Jurisp. Historics Specimen*; as also those by Mr. *Thomasius de Sponsione Caudina & Numera.* which are the sixth and fourteenth of the Collection of his Disputes maintain'd at *Leipsick*.

C H A P. X.

Of Promiscuous Compacts of Sovereign Princes.

The CONTENTS of every Paragraph of the Tenth Chapter.

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| <p>I. <i>The Division of the Chapter.</i>
 II. <i>How far a Prince may restore himself to his Right, when injured in Compact by a Foreigner,</i>
 III. <i>How far, when by his own Subjects.</i>
 IV. <i>The Contracts of Princes, how far exempted from the Civil Laws.-</i>
 V. <i>A Prince cannot dispense with any valid Oath he hath taken.</i></p> | <p>VI. <i>How far a Subject may have an Action against his Prince upon Matter of Contract.</i>
 VII. <i>The Contracts of the Subject liable to be overruled by the Transcendental Propriety.</i>
 VIII. <i>How far Successors are obliged by the Contracts of their Predecessors.</i>
 IX. <i>The Grants and Donations of Princes, whether revocable.</i></p> |
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I. I Am, in the next Place, to consider the Difficulties which relate to any sort of *promiscuous Compacts* made by *sovereign Princes*, which may be reduced to these *three Heads*¹. First, whether a *sovereign Prince* has any particular Power, with regard to *Compacts* that affect himself? Secondly, what *Liberty* he hath in *Obligations* contracted with his *Subjects*? And, thirdly, how, and how far he can *oblige* his *Successor*?

II. The first Difficulty therefore is, that since a *Prince* has the Power to reverse any *Contract* made to the Prejudice of his *Subjects*, and can restore them to the State they were in before such a *Contract* was made, or upon *just Reasons* release them from their *Obligation* to observe it; whether he cannot make use of the same Power in Cases that concern himself? For Example, supposing that by *Fraudulence* or *Force*, or through *Indiscretion of Age*, he should have agreed to *prejudicial Terms*; or hath been any other Way notoriously abused in his *Contracts*; or bound himself by any *rash Oath*²? And here it is to be observed, that the *Question*, as it is stated in this *rude Form*, and as the *Words* of it lie, implies a *Contradiction*. For to *restore* Persons to the State they were in, and to *release* from *Oaths*, are *Acts* which bear *Relation* and *Tendency* to another Person; and which are derived and flow from one invested with *Power* and *Authority* over the Person that is to be *restor'd* and *releas'd*. And therefore the *Question* ought rather to be stated thus: Whether, when a *Prince* has prejudiced himself, by consenting to certain *Obligations* and *Conditions* of *Contract*, upon a Sense of the Injury he suffers, he may by his own *Authority* declare, that by Reason of certain *Faults* adhering to the *Contract*, he looks upon himself to be released from the *Obligation*? To which it may be answer'd; that as Persons that live in a *Liberty of Nature*, and own no *Subjection*, are under

their own Conduct, and are Judges in their own Affairs; so if they are *unjustly* injured in their *Contracts*, they may by their own *Authority* demand *Restitution* or *Amendments* to be made to their *Agreement*; on Supposition the *Prejudice* and *Injury* they sustain be *visible* and *manifest*. For when the Thing is disputed, the Matter must be referred to the Decision of *Arbitrators*. And therefore if a *Prince*, since he is still in Possession of his *natural Liberty*, find any *Abuse* put upon him in the *Terms* he has consented to, he may by his own *Authority* declare to the Party concern'd, that he will not be obliged to stand to any such *Compact*. And there is no Necessity that he should procure a *Rescise*, since the Thing is in its own Nature incapable of producing *Obligation* or *Right*. Thus *Lewis XIII.* of *France* declared, *That there lay a just Appeal from the King under Confinement and Bonds, to the King at Liberty*. But because it may sometimes happen, that ill Men, when they have a Mind to put a Cheat upon the World, and falsify their *Truth*, may pretend an *Abuse* or *Fault* in their *Contracts* to cover their own *Frauds* and *Perfidy*; therefore under *Civil Government* it is very necessary to enact, what *Acts* shall in their own *Right* be look'd upon to be *invalid* and *null*, and what are to be examin'd into and determin'd by *Sentence of Court*.

III. But when the Case lies between the *Prince* and his *Subjects*, the *Difference* of the Circumstance will, I think, deserve a *distinct* Consideration. A *Prince's Minority* is supposed to continue as long as the *Administration* of the *Government* and *Affairs* of the *Kingdom* remains in the Hands of his *Governors* and *Tutors*; and during their *Administration*, the *Prince* himself can make no *Contract* with any Person of a *foreign State*: But if he enter into any *Contract* with a *Subject*, and afterwards find himself injured in it, I see no Reason why he should not enjoy

Mr. BARB. NOTES on § I, II.

¹ See Grotius, B. 2. c. 14.

² See Grotius, in the Place above mentioned, § 1, 2, 3, 4, 5.

enjoy the same common Benefit of the Law, which he allows and secures to other Men; otherwise his Condition would be more confin'd than that of private Subjects. Nor can any *Renunciation of Exceptions*, which might be made to his *Minority*, be supposed of Force sufficient against the *Presumptions* of the real Weaknesses that *Age* is liable to. A *Prince* cannot disannul the *Treaties* and *Compacts* that were lawfully made by his *Governors* with *foreign Powers* or *Persons*, when he is come to *Age*, upon Pretence that they were made in his *Minority*. Because then, nothing could be pass'd with any Security under a *Prince* that happen'd to be a *Minor*. However, the *Prince's* *Governors*, the *Regents*, are obliged to give an Account of their *Administration*. But no *Exception* whatever of *Fear*, *Injury*, or *Fraud*, is of Force against any of those *Capitulations*, which in *limited Monarchies* the People propose, and the *Prince* consents to, at his *Accession* to the *Government*. For if the *Capitulations* or *Conditions* seem'd too strict and severe, the *Prince* had his Liberty of accepting or refusing them; and the People would not have forced him to take the *Government* upon him. And it is not to be supposed, that any People would be so inconsiderate, as to tie up the Hands of their *Prince* with such *Laws*, as must make the *Sovereign Power* weak and feeble, and his *Government* unactive and unprofitable. And here I will by the way enquire, whether *David* could have retracted his *Oath*, when he swore not to punish *Shimei* that cursed him as he fled from *Absalom*? And I confess in my Opinion he could not. For the *King* was under no Apprehension of Force or Fear, when he gave him his *Oath*, neither could he be thought to have sworn out of Rashness or Indiscretion; but on the contrary, rather with mature Consideration and Design, that upon so remarkable an Instance of his Clemency, the People that had been engaged in the *Rebellion*, might return the more willingly, and with greater Assurance of being pardon'd, to their Obedience. Neither was the Promise of Impunity in itself unlawful; for the *King* might very justly, and without Injury to any Man, pardon a Crime which was committed purely against his own Person. But it hath given further Matter of Dispute to some, whether he can be excused for leaving such a Remembrance of *Shimei's* Crime in all his last Commands to *Solomon*. In my Opinion, *David* did nothing in this, contrary to his former *Oath*; for he did not leave any *Command* with his *Son* to punish *Shimei* for his Crime; but only advised him to keep a strict Eye upon that malicious bad Man and Enemy to his Family, and to take care that he did not create him any fresh Disturbance; and that if he should afterwards find him guilty of any Misdemeanour, not to be easy to forgive him. And therefore *Solomon* commanded him to live in *Jerusalem* under the Eye of the *Court*, and forbade him to pass over the Brook *Kidron*, that he might not insult upon his

Impunity, nor conceive any secret Satisfaction in seeing the Place where he had with so much Bitterness reviled and cursed *David*. But *divine Providence* so disposed, that he should break those easy *Conditions* which he had himself approved and consented to, that there might be just Occasion given to take off so ill a Man by punishing him as he deserved.

IV. But here it is to be observed, that however *Princes*, when they enter into any particular *Acts* with their Subjects, not as *Princes*, but as other *private Men*, are presumed always to comply with the *positive Laws* of the Commonwealth which relate to the *Validity* of such *Acts*; yet since they are above the *Civil Laws*, they are under Necessity of following those *Laws* always in their *private Acts*. And therefore if they voluntarily and advisedly enter into any *Contract* that would otherwise be *invalid* in Law; they are supposed to have *excepted* that particular *Contract* from the Force of the *Laws*, where there are such, and to declare that no *Nullity* shall ensue upon that Account. For otherwise, all that was done would signify nothing*. And I think it is very reasonable to allow, that if a *Prince* find himself very much injured in a *Contract*, which at first he did not perceive, he may if he please *annul*, or at least *correct* and *amend* it^b.

V. That no *Prince* hath Power to release himself from his *Oath*, when there lies no *Objection* either against the *Validity* of his taking it, or the *Matter* contain'd in it, or the *Circumstances* belonging to it, upon Pretence that it is lawful for him to *relieve* his *Subjects* in some particular *Oaths*, I think is evident. For the *Oaths* which he has Power to *vacate* in his *Subjects*, have always this *Condition* annex'd to them, *if it please the Sovereign*. And 'tis certain it would be impossible to bind any *Obligation* upon a Man, if he reserves to himself a Power to break from it, whenever he thinks fit^c.

VI. But though *Princes* are as much obliged in *Conscience* by their *Promises* and *Compacts* as *private Men*; yet, in this Respect, there is a Difference between the *Obligation* of a *Prince* and that of a *Subject*, that 'tis easy for the *Prince* to force the *Subject* to stand to easy *Terms*, when perhaps he would willingly go back; but a *Subject*, as long as he is such, hath no way to *oblige* his *Prince* to give him his *Due*, when he refuses it. But no wise *Prince* will ever refuse to stand to a *lawful Contract*; since he must necessarily consider, that his *Honour* and *Security* depends upon the Credit he hath of observing his *Compacts*; and that it is the worst Thing that can be said of a *Prince*, that he observes not himself that *Justice*, which it is his *Duty* to *administer* and *support*. But however, if a *Prince* upon *Contract* give the *Subject* Liberty to enter an *Action* against him in his own *Courts*, the *Action* itself proceeds rather upon natural *Equity* than the *Civil Laws*; as if it were implied, that upon the Knowledge of his *Obligation*,

* Of the Action of Philip II. of Spain, who by a Fetch of Law, would have released himself from paying his Debts, see *Grot. Hist. Belg.* l. 5.

^b *Vid. Grot. l. 2. c. 14. §. 2.*

^c *Vid. Grot. l. 2. c. 14. §. 3.*

gation, he would not refuse the Performance of it. And therefore the End promised by such an Action is not to force the Prince to stand to the Contract, but only to make it appear to the Subject, that the Prince had obliged himself to observe it. And in such Tryals, there should be no Regard had to Honour or Greatness, but Judgment ought to be given barely according to the strongest Probabilities of Argument ^a.

VII. It may also happen, that the Subjects may be deprived of a Right acquired by Contract, either by way of Punishment, or by the Force of the Transcendental Propriety ^{*}. Always supposing in this Case, that the Necessities of the Commonwealth demand it, and that the Publick ought to make Restitution. And therefore for the same Reason the Prince may defer his Payments, when any pressing Exigence of State obliges him to turn the Money another Way, which should have been paid to the private Subject. And from hence it appears, what is to be determined about the *Tabula novæ*, or general Discharges from Debts or Obligations, which Solon call'd *σεισάγνια*, or the shaking off a Burden ^b.

VIII. But lastly, that it may appear, whether and how far a Prince hath Power to transmit an Obligation upon a private Contract down to his Successors; it is to be first consider'd, whether the Prince's Kingdom be his Patrimony, or whether he possess it only as it were upon an usufructuary Right. A Successor to a Prince that holds his Kingdom in the former Right, since he succeeds to all his Goods and Possessions, must be supposed to inherit all Debts of Princes that possess their Kingdoms; in the latter, Grotius, l. ii. c. 14. § 10, &c. is of Opinion, that the Successors are not immediately, and purely, because they succeed them in the Kingdom, obliged to discharge them. For such Princes do not derive their Right to the Throne from the King their immediate Predecessor, but from the People themselves. But even these Successors are obliged by the Debts of their Predecessors, mediately and by Interposition of the Commonwealth, not as upon their own Account, but as they are Heads of the Commonwealth. For in the last Resort the Debts of the Prince affect the State itself, as they were contracted by the Head and Governor of it. And the Truth of it is this, that Princes have Power to devolve Debts upon the Commonwealth itself, is evident from hence, that sometimes it would be impossible to supply the Necessities of the State otherwise than by contracting such Debts. And since the Administration and Security of the Commonwealth is entrusted with the Prince, he must be allowed to have the Command of those Means, without which that End cannot be pursued or obtain'd. But then, on the other hand, this Power to oblige the Commonwealth ought to be restrain'd no farther than the Prince can

have good Reasons for contracting the Debt. But then again, neither ought the Prince to be so far limited, as not to have Power to devolve any Debts upon the Commonwealth, but what have actually given some Advantage to the State; tho' 'tis fit inferior Magistrates should be so confin'd ^c. But 'tis sufficient if he hath a fair Probability in Reason for what he attempts, though perhaps the Event may fall out contrary to his Expectations. And therefore upon the whole, all Contracts made by the Prince, oblige the Commonwealth, unless when they are manifestly absurd or unjust. And when the Case is doubtful, 'tis always to be presumed in favour of the Prince. And such Contracts as these also oblige the Successor, as he is the Head of the Commonwealth. Nay, the People themselves will be obliged by them, if they should change their Form of Government, and erect a free State. And so whatever a free People contract, devolves upon and obliges the Person they afterwards confer the Sovereignty upon, though they give him never so full and absolute a Power. And this I think is a better Way of deciding the Question, than by distinguishing between the greater and the lesser Injuries. For in the Administration of publick Affairs, the Probability of the Means ought to be allowed a fairer Consideration than the Success of the Event, since an unforeseen Accident may sometimes break and distract the wisest Measures and Designs.

IX. What hath been said of the Contracts of Princes, may also be applied to their Grants and Donations ^d, viz. that they cannot be recall'd by the Successors, where they were made upon fair and favourable Reasons ^e. Yet 'tis certain, on the contrary, that Galba endeavoured to recover the Largeſſes and Donatives made by Nero, allowing no Man to keep more than the tenth Part of his Liberality ^f. So also the Roman Senate reduced those Cities to a tributary State, that had bought their Privilege or Immunity of Sylla. Cicero indeed thought them too severe in it ^g. And I think it had been but reasonable to have refunded them their Money, since it had been employ'd in publick Uses. And so Basilus of Macedon, when his Predecessor Michael had exhausted the publick Treasure, published an Edict, commanding all Persons that had received any of the Money, and could give no fair Account, why, or for what they received it, to return it again, or at least the Half Part of it ^h. But indeed as to Grants of this Nature, it ought to be considered out of what they are made. If the Prince give out of his own Pocket, or Estate, without Dispute the Grant is irrecoverable. And if he distribute his Bounty out of the Revenues or Income of those Goods or Possessions which are entrusted to his Administration, it ought always to be considered, upon what Reasons and with

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^a Heliod. Æthiop. l. 10.

^b Vid. Plutarch. Solon Cic. Off. l. 2. c. 22. ad fin.

^c Vid. Sueton. in Tito, c. 8. Plin. L. 10. Ep. 66. Gratian. Caus. 25. Quæst. 1. c. 15.

^d Vid. Sueton. in Galba, c. 15.

^e Vid. Hieron. Obrisum de Reb. gest. Emanuel, l. 1. Where he gives an Account of the Grants King John made just before his Death.

^{*} Vi Domini eminentis.

^f Vid. L. 12. t. 1. l. 27. D. de rebus Creditis, &c.

^g Cic. Off. l. 3. c. 22.

^h Vid. Hieron. Obrisum de Reb. gest. Emanuel, l. 1. Where he gives an Account of the Grants King John made just before his Death.

MR. BARB. NOTES on § VII, IX.

^a See in Grot. the Place quoted, § 7

^b See Grot. ubi supra, § 13.

what Caution and Moderation the Donations were made. For as no Body denies but that the Prince hath Power to reward the Services of his Friends and Subjects out of the publick Monies, as far as the Riches and Occasions of the State will allow; so if the Money of the Nation be profusely squander'd away upon Persons that do the Commonwealth neither Credit nor Service, and the publick Stock is lavish'd away only to satisfy their Ambition; in my Opinion, they should be replenish'd from their Purses that at first exhausted it. It was the wisest Method Ferdinand King of Arragon observ'd, never to part with any of the Lands that belonged to his Crown; and his Reasons were good, that Princes that alienated their Lands, generally created themselves more Enemies than Friends by it, because they made some of their Subjects so great by it, that they would always be suspicious and fearful of being deprived of their Rights^a. What hath been said with Relation to Grants, may also be applied to² Privileges and Immunities, namely, that it ought to be considered upon what Reasons, and with what Caution and Moderation they were given; and whether they are consistent with the common Peace and Security of the State. For with-

out Dispute, these Things are of far greater Concern than the unwarly Easiness of the Prince. And indeed all Privileges are to be confin'd under such Limitations and Restrictions, whenever they begin to lie heavy upon the other Subjects^b. So when the Romans demanded an Aid of Men and Money from the Celtiberi, and they thought to excuse themselves by pleading the Privileges that had been granted them by the Romans themselves, the Historian says, "That what they insisted upon was allowed to be true; but that the Senate when they gave such Privileges, always annexed this Exception, that they were to continue in Force as long as it should seem good to them and the Roman People, and no longer^c." Lewis, King of France, after he had reduced the Genoise that had revolted from him, disannull'd all the Agreements and Treaties formerly pass'd between him and that State, and gave them all back again by the way of Privileges, not as Compositions or Compacts; that so it might be always in his Power to recal them. Perhaps indeed that was not to hold with relation to Privileges of all Kinds, but to such only as were to have barely a precarious Dependence.

^a Vid. Bacl. ad Grot. l. 1. p. m. 107. Grot. L. 2. c. 14. § 12. Laurentius Valla de rebus gestis Ferdinandi. Arrag. l. 3.

^b Vid. L. 43. t. 8. l. 1. § 16. D. ne quid in loco publico, &c. Demosthen. Orat. adv. Leptim.

^c Appian. Iberic. Guicciardine Hist. 7.

Mr. BARB. NOTE on § IX.

² See upon this Subject the *Observationes Select. ad rem litterarum spectant.* printed at Hall in Saxony, Tom. III. Obs. 13, 14, 15. or Mr. Bernard's Abridgment of them in the *Republ. des Lettres* August, 1704. p. 190, &c. See also Mr. Le Clerc's *Biblioth. Choisie*, Tom. I. p. 41, &c. To which we may add, that the Revocation of lawful Privileges, is a very nice Point, and requires a great deal of Prudence. For, to use Mr. La Bruyere's Words (*Caract. ou Moeurs de ce Siècle*, p. 316.) "there are certain Circumstances of Affairs, in which we cannot humour the People too much. You may to Day deprive this City of its Liberties, Rights, and Privileges; but To-morrow, do not so much as think of regulating their very Signs." "Indeed (as Mr. Le Clerc says in the Place I have cited) we cannot make the Duration of all Sorts of Privileges depend upon the variable Caprice of Princes, without exposing the State to Disturbances, which would be difficult to appease.—What Elseem could we have for Privileges that were to last no longer than the Prince's Will and Pleasure? Thus in setting up Princes above Privileges, we do them as much Injury as the People.



C H A P. XI.

How Subjection ceases:

The CONTENTS of every Paragraph of the Eleventh Chapter.

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| <p>I. A Man ceases to be a Subject when his Prince dies without a Successor.</p> <p>II. Or, if he removes out of the Commonwealth.</p> <p>III. What to be observed in such a Remove.</p> <p>IV. Whether lawful to remove in great Companies.</p> <p>V. Whether lawful to counterfeit a Refuge.</p> <p>VI. Whether the Commonwealth may eject a Subject, when it pleases, without Reason.</p> | <p>VII. Of Banishment.</p> <p>VIII. A Man is deprived of the Privileges of a Subject when overpower'd by an Enemy.</p> <p>IX. Whether a Subject surrender'd to an Enemy, and not accepted, continues a Member of the Commonwealth.</p> |
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AMONG the several Ways by which Men cease to be under Subjection, it is by some thought to be one, when a Prince dies and leaves no Heir or Successor behind; or gives his Kingdom for lost. For then (they say) every particular Subject is left free to a Liberty of Nature. But since it is clear that a Kingdom in such a Case is not absolutely dissolv'd, but only reduced to a State of Interregnum; it follows, that though the Obligation of the Subjects to the Prince they have lost, are indeed at an End, yet that they continue still united to one another by the original Bond and Compact of Society.

II. But now the usual Way by which Subjection ceases is, when a Man by Permission of his own Commonwealth voluntarily removes into another, and settles himself and his Effects, and the Hopes of his Fortune there¹. How far such voluntary Removes may be permitted, must be discovered by the Methods by which Subjects are admitted into the Commonwealth. For some Persons are forced to put themselves under the Protection and Government of certain Commonwealths, by being conquered in War, or reduced to the last Necessities. And what Liberty is allowed to these must be known by the Laws of those Commonwealths. But if a Person absolutely free, that never knew what it was to be Subject (such as the Patriarchs and Masters of Families of old) or is at present free from all Subjection he had been under before, voluntarily join himself to any Commonwealth; it must also be determined by the Constitutions of that Commonwealth, what Liberty to remove thence was left him². For in

some Commonwealths no Man is permitted to leave them without the express Consent of the Government. In others, a Man may be allow'd that Liberty, if he will submit to certain Impositions; as suppose, if he will pay a certain Sum of Money, or leave Part of his Goods behind him^e. But where there are no Laws about the Matter, we must be determined by Customs arising from the Nature of civil Subjection. What Custom admits of, every Subject is supposed at Liberty to use. But if this gives no Light to the Matter, and the Compact of Subjection makes no mention of it; it must be presumed, that every Man reserved to himself the Liberty to remove at Discretion, and that he chose rather to be a Citizen of the World (as Socrates said) than a Subject in any particular Commonwealth^f. For when a Man enters himself into a Commonwealth, it cannot be supposed that he gives up all Care of himself and Fortunes, but rather that by so doing he takes the best Expedient to defend and secure both. But because it often happens, that the Nature of the Government does not suit with every private Man's particular Circumstances, or he thinks at least he can make his Fortune with more Advantage elsewhere; and since it would be unreasonable to reform and make Alterations in the Commonwealth at the Desire, and for the Benefit only of a few private Subjects; the only Method left is, to give them leave to remove, and provide for themselves where they think best. 'So Demaratus, the Father of King Tarquin, fled with his Family to Corinth, and settled there, because he could not bear the Insolence of the Tyrant

^a Ovid. Metam. l. 15. ver. 28, 29. speaking of the Argives

— Prohibent discedere leges,
Pœnaq; mors posita est patriam mutare volenti.

^b Valerius Flaccus, Argon. l. 7. ver. 227, &c.

Omnibus hæc potius communem animantibus orbem,
Communes & crede Deos; patriam inde vocato,
Qua relictæ itque des; nec nos diis nata Malignis
Cluserit hoc crulo semper sub frigore messis.
Fas mihi non stabile, fas & tibi relinquere Colobos.

The Laws forbid my Flight, and threaten Death
To those that leave the Land which gave them Breath.

The World to all her ample Fields extends,
And God and Providence are common Friends;
Where e're the Day discovers distant Earth,
The Country's mine; nor are we doom'd by Birth
To this cold frozen Soil: But unconfin'd
May change our Country, as we change our Mind.

Mr. BARB. NOTES on § II.

¹ See Grec. B. 2. c. 5. § 24

² V. Dig. l. 49. r. 15. De Captiv. & de Postumio, &c. l. 12. § 9.

“Tyrant Cypsellus, wisely preferring Liberty, though in Banishment, to Servitude at Home.” So also sometimes it is known, that there is not sufficient Encouragement allowed to Men of Parts in their own Nation. And some have found it true by Experience, that a Prophet hath no Honour in his own Country¹. For Men of base Natures are apt to look with Envy upon Persons that would rise by their own Worth to an Height of Greatness above their Reach; when perhaps they remember themselves once superior, at least upon the Level with them; and as Lacydes said², Statues ought to be seen at a Distance, because too near a View lessens the Beauty of them. Now to deny such Persons the Liberty of removing would in effect be all one, with laying a Command upon Men free and at their own Disposal, and not to presume to rise above the Rank and Condition of their Ancestors. But the Commonwealth also itself may make Advantages by these Removes, by inviting in Persons of Worth and Eminence from Abroad. “By the Constitution of the Roman Commonwealth, no Citizen could be forced to leave the Commonwealth, or if he pleased, not to leave it, when he was made a Member of another he prefer’d to it. And therefore Tully says³, that a little before his Remembrance, several Citizens of Rome, Men of Credit and Fortunes, voluntarily left that, and settled themselves in other Commonwealths. And the Way, saith he, lies open from every State to ours, and from ours to every other.” And this Right he very often highly extols⁴. Neither is it any Objection against what is here said, that the Father of Families, who at first erected the Commonwealth, may be supposed to have bound one another by Compact, to assemble and unite their Strength in common. For even in other Societies any Member has Liberty to leave it, so it be not with fraudulent Design, at an ill Time, or to the Prejudice of the other Members, especially if the Society were not establish’d with any particular Limitation of Time. And therefore many Commonwealths have appeared to be very little concern’d, when their Subjects left them, as being already overstock’d with Men, and glad to have their Numbers lessened.

III. But however, since ’tis generally the Interest of every Commonwealth to know the Number of its Subjects; they that remove ought in point of Duty or Honour to signify their Departure; unless a Man has good Reason to suppose, that it will be no publick Concern whether he leaves it with such Ceremony, or not. But all Persons that have engaged themselves in any particular Service or Employ, for a certain Time, ought without question to have the express Consent of the Commonwealth for their Remove. For Example, Subjects that are sent on Ambassies, Expeditions, or that are entrusted in any other Business which they undertook upon

particular Compact and Agreement. But besides, a Remove ought to be at a proper Time, and when it is not directly against the Interest of the Commonwealth to suffer it. For Example (to make use of the Instances in Grotius in the Place above quoted) when the publick Debts are great, a Subject should not have Leave to depart, except he would pay his Share of them before he remove; nor when the Commonwealth is engaged in War upon Presumption of the Number or Bravery of certain Subjects; and especially when there is Danger of Invasion, or of being besieged; except the Subject that would depart can be sure to leave others behind him, every way as fit to defend the State as himself. Neither can they be good Subjects that serve their Country, as Horace⁵ speaks of his Friends, *Diffugiunt cedis cum fece siccatis amici, ferre jugum pariter dolosi*, that is, who when they have drained all they could from it, leave it to struggle with Misfortune by itself. But then it must be observed, that by removing in this Place I understand the departing out of the Dominions and Territories of the Commonwealth, and not the denying its Authority, and continuing to live in its Dominions. For the Commonwealth, when it bounds its Power within certain Limits, is supposed at the same Time to prohibit every Person to inhabit within that Compass, who will not acknowledge its Authority. And therefore it may be observed by the way, that the Grandees of Spain were very much mistaken, when they thought themselves released from the Obligations of the Commonwealth, by renouncing the Laws of their Country, and then retiring to other Places. Though it was usually supposed, that when that was done, they might lawfully take up Arms against their Prince, and begin open Hostilities, without incurring the Guilt of Treason and Rebellion⁶. From what has been said we may infer, what Force those Assecuratory Commands may be supposed to have, by which the Commonwealth endeavours to recall its Subjects from Employments in foreign Countries. For Instance therefore, if a Subject, that is under no particular Ties or Restraints, remove from his Commonwealth, where that Liberty hath always been promiscuously allowed, and settles himself and his Effects under the Protection of a foreign State; the Commonwealth he left hath no longer any Authority over him. And therefore it is to no purpose to think to reduce such an one by threatening him with the Loss of Fame, which is the utmost that can be done, when he is determined not to obey. But the Commonwealth hath still Authority over Subjects that depart either contrary to the Laws, or are obliged to it by any particular Ties, or hold Possessions of Goods, especially of Immoveables, under its Dominions, or are absent only upon Travel, and reserve to themselves the Right of Subjects. And by the

way

¹ Cic. Tusc. Quæst. l. 5.² Diog. Laert. l. 4. § 60.³ Cic. Orat. pro Balbo, c. 13.

⁴ O jura præclare, atque divinitus jam inde à principio Romani nominis à majoribus nostris comparata, &c. Cicero d. l. What noble Rights are these! Which by the Blessing of Heaven have been enjoy’d by us and our Ancestors, ever since the Roman State began, that none of us should be forced to leave our Country, or to stay in it against our Wills. This is the immovable Foundation of our Liberty, that every Man is Master of his Right, and may keep or resign it as he pleases.

⁵ Vid. Lycurg. Orat. contr. Leocratem.⁶ Vid. Mariana de rebus Hisp. L. 13. c. 11.

Mr. BARB. NOTES on § 11, III.

¹ Luke iv. 24.² B. I. Od. 37. ver. 26, 27, 38. 1

way, it was a prudent Law of *Solon's*, which *Plutarch* mentions in his *Life*, by which he obliged the *Athenians*, "To admit no Persons into their Commonwealth, except such as were condemn'd to perpetual Banishment from their own Country, or else such as remov'd with their whole Families to *Athens*, for the Convenience of Trade and Employment in the *Arts* they profess'd. And this Law it was said he made, not so much to keep out *Foreigners*, as to invite them to settle at *Athens*, by giving them Assurance of incorporating them into the *Body* of the Commonwealth. For he made no Doubt, but both these sorts of People would make very good *Subjects*, the one because they voluntarily quitted, and the other because they were forced out of their own Country." But further, since the Commonwealth really hath no *Power* or *Authority* over Persons free from all *Civil Obligations* to it, it is manifest, that if the new Commonwealth they settle in, send them in *Quality* of *Ambassadors* or *publick Ministers* to the *State* they left; that they ought to be received agreeably to their *Characters*, and enjoy all the *Privileges* of *Ambassadors*, one of the chief of which is to be free from the *Authority* and *Power* of the Commonwealth they are sent to. For if this be thought too great an *Honour* to be shewn to Persons who have formerly been *Subjects*, 'tis easy to deny them *Reception*. Nay, to carry the Thing farther, if for Instance, a *Subject* in the *Face* of his own Commonwealth engage his *Faith* to a *foreign State*, in order to take upon him to *negotiate* for it there, under the *Character* of *Ambassador* and *publick Minister*; the Commonwealth must be supposed to have releas'd him from all *Civil Obligations* to itself. Since it is impossible the same *Subject* should be capable of two *Obligations* of the same *Nature*. And in consequence, that Person must from that Time be admitted to all the *Rights* and *Privileges* of an *Ambassador* in his own *Country*, which by a sort of *Fiction* he is supposed to have changed.

IV. But however, to depart in *Companies*, great Numbers together, *Grotius* thinks *unlawful* for this Reason, because such a *Liberty* would be utterly *inconsistent* with the *Nature* of *civil Society*. And in *Morality* that must be judged *necessary*, without which, an *End* propos'd cannot be attain'd; and that *inconsistent* with it, which prevents or destroys the *End*. But the Truth of this Opinion may I think be question'd², for if it be lawful for *particular Subjects* to remove as they please themselves, why is it not lawful for *greater Numbers* to take the same *Liberty*,

who all propose to themselves the like Conve-
niences of bettering their Fortunes by changing their *Country*; supposing none of those *Objections* against it that were mentioned before? For it is nothing to the Purpose to answer, that by this *Means* the Commonwealth must be enfeebled and dissolv'd. For where a Person hath no *Right* to detain me contrary to my own Inclinations, he suffers no Injury, tho' perhaps by my *Departure* some *future Benefit*, but not yet *due*, is intercepted from him. There is no Necessity such a *particular* Commonwealth should have so many *Millions* of *Subjects*, or should always appear formidable to its Neighbours, any more than it is that any particular *private Man* should be worth so many *thousand Pounds*, though 'tis true indeed, that neither one nor the other ought to be reduced to a *lower* Condition by *unjust Means*. And therefore I think there is but little Force in *Grotius's* Argument. For though perhaps, this or that particular Commonwealth may be much *weaken'd*, or perhaps by continual *Drains* in Time be utterly *despeopled*, where the *Subjects* are permitted to *desert* in Numbers together; yet *civil Society* among Men is in no Danger of being absolutely *dissolv'd* by it. For the *Corruption* of one Commonwealth is the *Generation* of another, and what is *lost* in one Place, is *gain'd* in another. *Nature*, when Men began to *increase* and *spread* themselves over the *World*, formed and divided them into *civil Societies*, but never gave Command that *such* or *such* a particular Commonwealth should stand for ever in an uninterrupted Course of *Greatness* and *Fortune*. *Babylon* was exhausted by *Solencia*, and that by *Ctesiphon*. However, when *Companies* depart, they are obliged as well as *particular Subjects*, to depart out of the *Dominions* and *Territories* of the Commonwealth. For otherwise there must ensue such *Distractions* and *Confusions*, as would necessarily be *fatal* to all *Governments*, that is, if whole *Cities* or *Provinces* were allow'd *Liberty* to withdraw at *Pleasure* from their *Obedience*, and either to put themselves under the *Protection* of others, or to erect separate *States* of themselves.

V. I shall now in the next Place enquire, whether, and how far those Persons may be *justified*, that pretend to be *Refugees* and *Deserters* only with Design to injure them that receive them, and to bring some *Advantage* to their *Prince* or *Country*. It is not indeed to be excused from great Imprudence, to be easy in giving Credit to such sort of Men, 1 *Sam.* xxix. 4. nor does the World generally appear dissatisfied, that *Traitors* are punished after their *Treason* hath taken Effect.

Yet

^a V. Liv. l. 41. c. 8, 9.

^b Vid. Plin. Nat. Hist. l. 6. c. 26.

^c Vid. Vopif. in Aurelian. c. 23.

MR. BARB. NOTES on § III, IV.

¹ Plutarch, p. 21. F.

² Ubi supra.

³ Mr. Wember, Professor at Wittenberg, answers our Author (in his *Elementa. J. N. and Genr. Cap. 26. Sect. 4.*) that though particular Members of a Body, taken one by one, have such and such *Rights*, it does not always follow, that a whole Multitude must have them also, because there may have been some Reason which hinders the granting to a great Number of Men, what is allowed to a small one; as it is here, where it plainly appears, that it is the Interest of the *State*, that their *Subjects* do not remove out of it into another, in large Bodies. Besides, that is contrary to the *original Contract*, which forms *Civil Governments*, and by Virtue of which the *Subjects* are bound to act nothing that tends to the Destruction of the *State*. And it signifies nothing to say, that one *State* makes an Advantage of the Ruins of another. For the *Contract* here in Dispute, relates to the Advantage of that *State* into which they enter; and it is not with respect to *Civil Governments* in general; but in relation to the Interests of every particular *State*, that we must judge of the Extent of Engagements and Duties of *Subjects*. This is the Manner in which that Author defends the Opinion of *Grotius*. However, the Case here in Question can seldom happen, but when *Princes* have made themselves odious and unprofitable to their *Subjects*, by their tyrannical Government; and then it is certainly their Business to alter their Measures, if they are unwilling to see their Countries depopulated. Otherwise all the Prohibitions in the World would not be very prevailing, nor hinder their being forced in Time to reign over vast Deserts.

Yet it ought not to be thought therefore lawful or honourable for me to betray a Man, because I find him of an easy Temper, and likely to be taken by the *Train* I have laid for him. Nor is any Man obliged to serve his Country at the Expence of his Honour and Conscience, as has been already shewed. And without Dispute, for a Man to engage his *Faith* purely with Design to make Advantage by the *Violation* of it, in doing Harm to a secure and heedless Enemy, is a very great Sin. And it was no Question an execrable Saying of *Lyfander's*, or *Philip's*, That *Children were to be cheated with Trifles, and Men with Oaths* *. If therefore a *Deferter* expressly engages his *Faith*, he cannot break it without Sin, whatever *Pretence* or *real Design* he may have of advancing *their* Interest he *deserted* from. It may perhaps be replied, that since they that give *Reception* to *Deserters*, know before-hand, that they can do them no Service without Sin, and that no Man can lay any binding *Obligation* upon himself to commit Sin, and therefore that the *Faith* given by *Deserters* signifies nothing; it follows, that no Injury is done them, if they are imposed upon by their own *Credulity* in depending upon such *slender* Arguments. But I answer, that it is foreign to the *Question*, to enquire whether it be a Sin, or not, to make use of the Service of *Deserters*. For it does not follow, that if I *sin* myself, in imploying such a Person in my Service, that therefore for that Reason he hath a *Right* to do me an *Injury*. As it does not follow, that because if a Man hire a *Ruffian* to commit Murder, he contracts the same *Guilt* with the *Villain* himself, therefore it is *lawful* for the *Ruffian* to kill also the Person that hired him. It is commonly said indeed, that *Deserters* are received by the *Laws of Arms* †; that is, that it is contrary to the *Laws of Arms*, not to give *Admittance* to Persons that leave the *Enemy*, and come over to us, as *Grotius* and *Cujacius* explain that Law ‡. But whether we ought to understand this Passage of the *external Laws of Arms* (as *Grotius* calls it) or of the *internal*, may very well be Matter of Dispute. But however, if a Man will defend that all Persons have absolute Liberty to make use of the Assistance of *Deserters*; methinks it should not be thought so proper for the Purpose to insist, that even *God* himself makes use of the Actions of the *Devil* and *wicked Men*; as to plead the *Favour* which ought to be allow'd to the *Justice of Arms* taken up, either to *punish* the Insolence of an *injurious* Enemy, or to *assert* and *regain* just and oppressed *Rights* †. For upon the Supposition of this *Favour*, a *Prince* engaged in a *just War* needs not think himself obliged to make a curious Enquiry, whether the *Deserters* gave over *Hostilities* against him upon honourable Motives, or

not. And since he may presume, that they had good Reasons that moved them to relinquish the Cause they were before engaged in, he cannot contract Guilt by seeming to give Encouragement to *unjust Desertions*. But however this be, 'tis certain, that it is utterly *unlawful* to make *Faith* an Instrument to deceive and abuse Mankind. And again, 'tis also certain, that where a *Deferter* owns he *deserted* without *reasonable Cause*, his *Faith* can signify little; since it must either tend to advance *new Treasons*, or to continue the *old*; and therefore that it must be very great Imprudence to lay any Stress upon it. But *Deserters* therefore, that propose to ingratiate themselves with them that receive them, and yet, to carry on their secret *Design* under the Mask of *Refugees*, generally pretend that the insupportable Nature of the Injuries they suffered, forced them to take this only Way for their Security. The Stories of *Zopyrus* † and *Sextus Tarquinius* are very well known; and what *Arts* the *one* used to gain upon the Credulity of the *Babylonians*, and the other upon the *Gabinians* ‡. So *Mizeras* the *Syrian*, as *Florus* calls him, or *Aberus* the *Arabian*, as *Aspian*, or *Ariamnes*, as *Plutarch*, that drew *Craffus* into the Plains, gained Credit with him by extolling the Favours and Obligations he had received from *Pompey*, and by relating the Misfortunes he had suffer'd in espousing the *Roman* Cause. *Virgil* § seems to describe the Cunning of *Sinon* with more than usual Life and Beauty, that he might free the *Trojans* from the Impuration of being an imprudent credulous People. For first, *Sinon* pretends he was a Person mortally hated by *Ulysses*, a Man the *Trojans* would easily think bad enough to be guilty of any Fraud that could be charged upon him, and to whom to be an Enemy was with them the greatest Recommendation. The Cause of this Animosity between *Ulysses* and himself he then derives from the Death of *Palamedes*, who was put to Death for having imposed the continuing the War. He goes on with his Story, that he was at last doom'd to be *sacrificed*, not by any Oracle or Command from the Gods, that he might not seem to have refused even to be made a Victim for the common Safety; but only by the Malice of *Calchas*, who was suborn'd and hired to do it by *Ulysses*. And certainly an Injury of so high a Nature as this might very well justify him in saying, he thought himself now releas'd from all Obligations to his Country. And yet with much persuasive Art and Cunning, he first of all beseeches Heaven that it might now be lawful for him to renounce Faith and Love with those *Greeks*, that were so unjust and unkind to him, tho' he had once considered them as Country Men and Fellow-Subjects. And yet all he could

say

* Vid. *Ælium. For. Hist.* l. 7. c. 12.† F. D. l. 41. *De acquirend. rerum dominio*, l. 51.‡ *Cujac.* Orl. 2. c. 9. *Grot.* l. 3. c. 1. § 22.§ *Liv.* l. 22. c. 22. *Vid. ap. eund. Orat. Diatribis*, l. 27. c. 17. and that of *Cn. Marcius* to the *Volterri*, in *Dionys. Halicarnass.* l. 8. And that of *Segestes*, in *Lucius. Ann.* l. 1. c. 58. *Neque oho patria*, &c. This I did, not out of any ill-will I bear to my Country (for Traitors are hated even by those they design'd by their Treason to oblige) but because I look'd upon it to be the common Concern both of *Romans* and *Germani*, and because I was more inclined to Peace than War. *V. Ann. Marcellin.* l. 18. c. 11. *in fin.*

Mr. BARR. NOTES on § v.

† See the sixth Chapter of this Book, § 15.

‡ V. *Herodot.* l. 3. & *Justin.* l. 1. c. 10.§ *Liv.* l. 1. c. 53. 54.§ V. *Virgil. Æneid.* l. 5. 57. 65.

say was hardly enough to overcome the *Trojans*, till the Gods themselves seem'd to confirm the Truth of what he had said by a very ominous Accident. But after all, 'tis certainly true, that a *Deferter that comes over to an Enemy singly by himself, without betraying some considerable Advantage to him, brings but a poor Prize with him either of Credit or Value.* But however such Persons are not to be look'd upon as *Deserters*, that go privately to an Enemy with Design to surprize, or make a sudden *Attack* upon him, without engaging their *Faith* to draw their Swords in his Assistance. And it is not to be supposed, that such are under any *tacit Engagement* upon this Account, because 'tis not probable they would make any Attempt against an Enemy, when they were within his Reach. For such a *tacit Obligation* can be presumed only in Persons, who go over to a *foreign State* in Time of *Peace*, and not in *War*.

VI. The next Enquiry I shall make, is, whether the Commonwealth on the other hand can *forcibly eject* the *Subject* at Pleasure, and without antecedent Transgression? *Cicero*, in the Passage before cited, makes it one of the *Foundations of Liberty*, that a *Subject should not be forced to change his Country.* But now admitting this to be true, the *State* of the Commonwealth is not therefore granted to be *inferior* in the least to that of *private Subjects*, because they are allowed to have Liberty to remove as they please, when the Commonwealth has not Power to *force* them to depart against their Will. For when a Man puts himself under the *Protection* of any Commonwealth, he does, at least for the present, entrust himself and *Fortune* entirely with it, and that, at least, must necessarily be exposed to *Distraction* and *Ruin*, if he may at any Time be *forcibly ejected* from it. And since this would be the greatest Hardship imaginable upon the *Subject*, every Man must be supposed to have made an *Agreement* with the *State*, that he should not be forced to leave it contrary to his own *Demerits*. But now on the other hand, the Commonwealth doth not build its *Fortune* and *Security* upon a few common Subjects, and therefore loses little or nothing by the *Departure* of some few of them. For where the great and particular *Trust* is placed in any Subject of *extraordinary Value*, 'tis usual to oblige him by particular *Ties* and *Agreements* not to leave the Commonwealth without *Licence* from the *Government*. And certainly it hardly deserves any Man's *Envy*, that the Subject in this *particular* should be allowed to have more *Liberty* than the Commonwealth. For the other *Advantages* which the Commonwealth enjoys more than, and beyond the Subject, are of much larger Extent. So when a Subject refuses to conform to the Commands of the *Sovereign*, 'tis an easy Thing to force him to comply. But when a Subject is dissatisfied with the *publick Administration*, he hath nothing else to do, but to *submit* and be *patient*, or to *remove*.

But however, there is sometimes a less *incidious Way* made use of in Commonwealths to *remove* suspected or useles Subjects; or burdensome Numbers of them, to make room for the *others*; and that is, by sending them abroad in *Colonies*. Tho' *Colonies* indeed generally consist of Persons that voluntarily offer themselves, either upon the Hopes of mending a broken and decay'd *Fortune*; or else, that are out of *Humour* with the *Government*, and willing to be out of its Sight, when they find they are not to expect Favours from it. So *Isocrates* persuaded *Philip* "to build a *Cities* in *Asia*, and to *people* them with such sort of Persons, whose *Poverty* forced them to lead loose vagabond Lives, and to rob and pillage the Country; in short with the Scum and Refuse of the People." And he commends the Prudence of that Method in the *Athenians*^b. What Account is to be given of that Custom, common among the *Antients*, both of *barbarous Nations* as well as the *Greeks*, of sending out great Numbers of their young People in search of new Seats, as it were, under the Conduct of some *titular God*, to whom they were supposed sacred, may be seen at large in *Dionysius Halicarn.* l. i. And the same Author is of Opinion, that the *Aborigines* were a Settlement of this kind, that is, of young People, who after the Custom of their *Countries* had been consecrated to the Gods, sent in Quest of new Seats, and that settled wherever their Valour or Fortune carried them^c. And so *Pliny* tells us, that the *Prentes* were sent out by the *Sabines*, upon a *Vow* which they look'd upon to be *secret*. And *Strabo* says the *Sannites* were descended from the *Sabines* the same Way^d. "So *Lydus* and *Tyrrenus* (as *Paterculus* tells the Story) upon a great Scarcity, threw Lots which of them should take his Share of the People, and go in search of new Seats^e." And *Paulus Warnefridus* † gives very near the same Account of the People of *Scandinavia*. But *Colonies* may be, and often are settled in different Methods. For either the *Colony* continues a Part of the *Commonwealth* it was sent out from; or else is obliged only to pay dutiful Respect to the *Mother Commonwealth*, and to be in a Readiness to defend and vindicate its *Honour*, and so is united to it by a sort of *unequal Confederacy*; or lastly, is erected into a *separate Commonwealth*, and assumes the same *Rights* with the *State* it is descended from.

VII. A Man ceases to be a *Subject* against his Will, when for some *Crime*, whether truly or wrongfully laid to his Charge, he is ejected out of the Commonwealth. For when the Commonwealth refuses to own any Man for a *Member* of it, and forces him to depart the Dominions; he is releas'd from all *Obligations* which before, as a Subject, he ow'd to it. Upon which he is left to his own Choice to settle where he can. And as long as he continues in this *Exile*, the Commonwealth hath no *Authority* over him. So *Isolaus* †† said, that the *Agrives* had no Power to bring

^a *Orat. ad Philip.*

^b In *Panathenaisic.* See *Bacon's Essays*, c 33.

^c *Dionys. Halicarn.* l. 1. c. 13.

^d *Strabo*, l. 5. Vid. *Justin.* l. 24. c. 4. & *Festus in Ver sacrum* & in *Mamertoni Lib.* l. 34. c. 44.

† *Paulus Warnefridus de gestis Longobardorum*, l. 1. c. 2.

† *Europ. Hieradid.* ver. 186.

^e *Paterculus.* l. 1. c. 1.

bring him away from *Athens*, when they had before condemn'd him to *Banishment*. But certainly to be forced into *Banishment*, if upon a *false* Accusation, is a very great *Injury* (though a Man of Courage will not want Supports under such a Misfortune.) And if upon a *real* Crime, a very severe *Punishment*, *Philo* the *Jew* thinks it worse than *Death* itself ^a. For though the *exiled* Person may perhaps be allowed to enjoy the best or greatest Part of his Estate in his *Banishment*, yet the Difficulties and Inconveniences that must attend *removing* it to another Place are unavoidable. It must be allowed too, that it is a very sensible Affliction to a Man to be forced to part with his *Relations* and *Friends*; and besides, to be judged a Person unfit to live any longer in the *Commonwealth* is a severe Disgrace, and must leave a foul Blot upon a Man's Honour and Memory ^b; nor can a Man have lost less than all Sense of Shame, that can have no Apprehensions of the *Infamy* of it ^c. *Tully* saith much on the other hand to the contrary, but it does not seem to me of much Force ^d. “*Banishment*, says he, is so far from being a Punishment, that I think it a Refuge only and Security from it. For when Men fly from Punishment and Misfortune, they only change the Air and Soil, remove and settle in other Countries. And therefore, by the *Roman Law*, *Exile* is never made a Punishment, as it is in those of other *Commonwealths*. But when Men would avoid Imprisonment, Death, or Ignominy, or other Punishments which the Laws appoint, they take Sanctuary in *Exile*; if they choose to stay in the *Commonwealth*, and suffer the Law, 'tis certain they cannot be deprived of the *Right of Subjects*, but with their Lives; but because there are none that will make that Choice, their *Rights* are not forcibly taken away from them, but they voluntarily relinquish and resign them ^e.” It was indeed peculiar to the ancient *Roman* Constitution, that no Man should be forcibly deprived of his *Right* of being a Member of that *State* ^f. And by the *Porcian* and *Sempronian* Laws it was provided, that no *Magistrate* should inflict capital Punishment on any *Citizen* without the *People's* Consent. But that Criminals might not enjoy absolute Impunity, and none seem to be ejected, or forced to quit his *Privilege* of a *Citizen*, they would have had it believed, that the *Citizens* voluntarily chose *Exile* to escape Punishment ^g. But the Necessity of the Delinquents leaving his *Country* was sufficiently implied in the forbidding all that

were condemn'd to *Capital Punishment*, the Use of *Fire* and *Water* within the *Roman* Dominions. Though it is to be confess'd, that when *Banishment* is inflicted, Care should be taken that the *Commonwealth* may be secure from all Danger that may happen, by making the Person banished an *Enemy* to it. For which Reason some *Nations* never punish with *Banishment*; as the *Turks* and *Moscovites* now, and formerly the *Jews*, tho' they might be rather supposed to have Regard to other Reasons, *viz.* that they might not change their Religion. The *Relegatio* is a milder sort of *Punishment*, by which the Criminal is not entirely divested of the *Right of a Subject*, but is only confined to inhabit within a particular District, or else prohibited coming within a particular Part of the *Dominions*. They that lay under this latter Penalty, were by the *Romans* properly called (*Interdicti*) *Persons interdicted* ^h. But to be banished some particular *Countries* and *People*, may well enough be thought no *Punishment*; as *Diogenes* said, when *one* told him that the *Sinopenes* had condemn'd him to *Banishment*, *And I have condemn'd them to stay where they are*.

VIII. Again, a Man is forced, *against his Will*, to change his *Commonwealth*, when he is subdued and mastered by a powerful *Enemy*, is forced to put himself under his *Protection*, and to submit to his *Authority* as a *Subject*, whether at the same Time he be removed into another *Country*, or not. And this Method must be allowed to be lawful, not only for particular *Subjects* to take, at least for such as are under none but the common *Obligations* of *Subjection*; but also for entire *Cities* and *Provinces*, when they find no other Way left for their Safety and Preservation ⁱ.

IX. Sometimes also it happens, that a *Subject* upon *Injury* done by him to a *foreign Commonwealth*, is by his own *Sovereign* deliver'd up to the *injured State*, to prevent *Wars* that might otherwise follow upon his Account. *Herodotus*, in his *Calliope* ^j, gives us the Story of *Timeginides* and *Attaginus* to this Purpose, who had been Authors of engaging the *Thebans* in an *Alliance* with the *Persians*. And here a Question is moved, whether a *Subject* surrender'd by his own State or *Commonwealth*, but not accepted by the *other*, continues a *Member* of that which was his own, or not? *P. Mutius* was of Opinion that he did not ^k, because when a *Subject* is deliver'd up by the publick Voice and Consent of the *People*, he seems to be as much

excedit

^a *Philo Judaeus de Abrahamo*, p. 359. A. Ed. Paris.

^c As *Juvenal* describes *Marius*, Sat. 1. ver. 47, 48, 49.

————— *Hic damnatus inani*
Judicio, &c.
Exul ab octava Marius bibit & fruitur Divis
Iratis —————

^b *Oppian. Halient.* l. 1. ver. 274, &c.

————— Contemns his Infamy,
Can rise at Twelve, and get him drunk ere Three;
Enjoys his Exile, and's condemn'd in vain.

^d *Vid. Cic. Orat. pro Cæcina*, c. 34.

^e *V. Polyb.* l. 6. c. 12.

^f *Cic. pro domo sua* c. 29. *Hoc jus à majoribus proditum*, &c. c. 29. This is a Right we all received from our Ancestors, That no *Roman* Citizen should ever lose that Privilege, but by his own Choice.

^g *Dionorus Siculus*, l. 3. c. 5. mentions an Institution of a quite contrary Nature among the *Æthiopiens*. *Sallust. Bell. Catilin.* c. 50. *Cæsar* in his Oration to the Senate tells them, That there were Laws by which no Citizen's Life could be taken from him; but that after Condemnation he should be permitted to go into Exile; and again afterward, Banishment was always allow'd the condemn'd Criminal.

^h *Vid. Brillon. Select. Antiq.* l. 3. c. 5. *Anton. Matthæ. de Crimin. ad Tit. de Pæna*, c. 1. § 6. 10.

ⁱ *Vid. Groc. L. 2. c. 6. § 5.*

Mr. BARB. NOTES ON §. IX.

^j *Pag. 344 Ed. H. Steph.*

^k *See Groc. B. 2. c. 21. § 4.*

^l *Vid. D. L. 50. t. 7. De Legat. l. 17.*

ejected out of the Commonwealth as he would be, had he been forbid the *Use of Fire and Water*. And the same Question was disputed with great Heat in the Case of *Mancinus*⁴, who had been surrender'd at *Numantium*, but not received. For when *Mancinus* afterwards offered to go in to take his Place in the *Senate*, *Rutilus* the *Tribune* of the *Commons* stopp'd him, and refused him *Admission*; telling him, that when the *Pater Patratus*, to release the Commonwealth from the *Obligations* of the *Treaty* he had sign'd, surrender'd him up to the *Enemies* of the *Roman* State, he then ceased to be a *Roman* Citizen. However, when the Case was debated and put to the *Vote*, the *Majority* declared in favour of him; and among others for this Reason, That no Person could properly be said to have been delivered, who was not accepted by the Party the Offer was made to. Now to me the State of the Controversy seems to be this, The Commonwealth that suffer'd the *Injury*, hath a *Right* to prosecute the *Subject* of the *foreign* State with *War*. But by the *Surrender* of him he is entirely consigned over to the *injured* Commonwealth, and may be punished as one of its own *Subjects*. And if he be received, the Commonwealth he was formerly a *Member* of, must be supposed to quit all *Right* to him; since by *publick* Consent and *Approbation*, he is delivered up to the *Authority* of the *foreign* State. But if the *injured* Commonwealth refuse the *Offer*, and decline the *Acceptance* of the *surrender'd*

Person, the *State* that offered the *Surrender* may dispose of him as it pleases, and may either absolutely eject, or punish him according to the *Demerits* of his *Crime*. But if no *Punishment* happen to be inflicted on him, it is not to be supposed that he hath lost the *Right* of a *Subject*. For the *Act* of *Surrender* is in itself only a *Tender* made to the *foreign* State of that *Right*, which every Commonwealth hath over its own *Subjects*, and not an utter *Abdication* and *Renunciation* of him. And therefore the *Surrender* doth not in itself deprive any Man of the *Right* of a *Subject*, unless it be declared by any particular *Law* in express *Words*, that in a *Concurrence* of such *Circumstances*, the Person shall be supposed to have forfeited all *Rights* of a *Subject*. And *Cicero* is of the same *Opinion*. For, says he⁵, *A Citizen that hath been deliver'd by the Pater Patratus, if he is not accepted by the Enemy, retains the Rights and Privileges of a Citizen entire*⁶. But from what hath been said it may be inferr'd, that if the *Surrender* is accepted, and afterward the Person that was given up should happen by some *Chance* or other to return to his own *Country* again; he cannot be admitted as a *Subject*, but by a new *Grant* of *Favour*⁷. For the *Right* of *Postliminium* belongs only to Persons forced to submit to an *Enemy's* Power, contrary to the *Consent* and *Approbation* of their own Commonwealth; not to those that are *voluntarily* given up to *foreign* Authority by their own *State*.

⁴ Cic. Orat. pro *Cæna*, c. 24.

⁵ Vid. L. 49. t. 15. l. 4. D. de Captiv. & Postlim. &c.

Mr. BARB. NOTES on §. 18.

⁶ Vid. *Freinshemii Supplementor. Livianor. Decad. in Lib. 55.*

⁷ Vid. *Cicero. Topie. in c. 8. Vid. etiam de Orat. l. 1. c. 40. & l. 2. c. 22.*



C H A P. XII.

Of the Changes and Dissolution of the Commonwealth.

The CONTENTS of every Paragraph of the Twelfth Chapter.

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| <p>I. <i>The People continue the same, tho' the Form of the Commonwealth be changed.</i></p> <p>II. <i>The Debts of the Commonwealth not discharged by a Change in the Form of it.</i></p> <p>III. <i>The Acts of an Usurper, how far valid after his Government is expir'd.</i></p> <p>IV. <i>What Place a Commonwealth may challenge after a Change in it.</i></p> | <p>V. <i>One Commonwealth may divide into more.</i></p> <p>VI. <i>More may unite into one.</i></p> <p>VII. <i>The People, how eternal?</i></p> <p>VIII. <i>How the Materiale of the People may be destroy'd.</i></p> <p>IX. <i>How the Formale.</i></p> |
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CHANGES happen in the Commonwealth three Ways; First, it may be so changed as still to continue the same; secondly, it may be so changed as still to continue, tho' not the same it was before; thirdly, it may be so changed as to be utterly destroy'd. The first sort of Change happens when the Form of the Commonwealth is changed; as when a Monarchy changes into an Aristocracy, or an Aristocracy or Democracy change themselves into a Monarchy¹. For in either of these Changes the essential Form of Civil Government is still preserved, only the accidental Form which results from the proper Subject of sovereign Power is changed². So that the People are the same, whether the Government be Monarchical, Aristocratical, or Popular. Nay, tho' it should happen, that a free People should in some War with a Sovereign Prince, be reduced to so entire a Subjection, as to be made an Accession to his Patrimony, yet they do not cease to be the same People as long as the Conqueror governs them as a distinct and separate Kingdom, and does not annex them as a Province to another People. For since the People in a large Extent may be supposed to comprehend the sovereign Power, it is no material Difference, whether the Prince exercises the Government over them in the most full and absolute Manner, or not. For either Way he is Head of one and the same Body.

II. From what hath been said, the Question proposed by Aristotle³ may be answered, Whether if a Commonwealth, from a Tyranny, or an Oligarchy, become a free Popular State, it be obliged⁴ after such a Change to observe the Treaties, Capitulations, Pacts, Convents, and other Acts, made during the Government of the Tyrant or Oligarchy? The Reasons of the Negative are, that the Acts of a Tyrant or Oligarchy are not Acts of the Commonwealth,

and that the Commonwealth can be obliged by its own Acts; that the Commonwealth is concern'd only where the Advancement of the publick Good is consider'd, and that where it is otherwise, the Right and Name of a Commonwealth is abused, and Force and Violence only have the Rule. But these Reasons are certainly weak. For not to repeat what was said before⁵ concerning Tyranny; a distemper'd and disorder'd Head is certainly a Head; and the Acts of an Head, though indispos'd, are look'd upon to be Acts of the Commonwealth. And a Commonwealth must not be denied a Being, because it is in some Disorder. There was a Dispute of this Nature formerly among the Athenians which begun on this Occasion: The Thirty that govern'd the Athenian State, borrow'd Money of the Lacedemonians upon publick Faith; after the Athenians had ejected the Thirty, and recovered their Liberty, the Lacedemonians demanded their Money of them; the Matter was debated at Athens, and it was resolv'd that it was just, and for the Peace of the State, to pay it. Demosthenes's Opinion of the Case was †, *That the People chose rather to pay the Money, than not make good their Articles of Agreement; and again (he says) speaking to the Athenians, And then you consented to pay your Money to those that had injured you, rather than go back from any Part of your Articles*⁶. Nay, though a Commonwealth should be reduced to a Province, and lose the very Nature of a Commonwealth, yet the Debts it has contracted are still due. For Debts being founded in the Commonwealth, not precisely as such a Commonwealth, but as possess'd of certain Goods, whoever is Master of those, must take the Debts with them.

III. But tho' the Case seems to be beyond Dispute, as to the Debts contracted for the Use

* See *Isocrates in Areopag.*

Mr. BARE. NOTES on Chap. XII. §. II.

† *Demosthenes contra Leptin.* The Author propos'd this for two different Reasons; and yet afterwards he refutes it himself but as one single Reason. Indeed there is but one with its Proof. For if the Commonwealth is not obliged to discharge the Debts, and observe the other Acts and Engagements of an absolute Monarch, or of a small Number of Men, who had got the Administration of the Government into their Hands; 'tis according to them, because what was done is not look'd upon to have been done by such a King, or by such Magistrates. And the Reason why it is not look'd upon as being done, is because the Dominion of these Men was not founded upon the publick Good, but only upon the Superiority of their Force and Violence; and consequently that it was not lawful: From whence they would infer, that the People ought not to stand to what they did in their Name, but without their Consent.

¹ See *Græc. B. 2. c. 9. § 3.*

² See above, in *B. 7. c. 5. § 1.*

³ *Aristot. Pol. l. 3. c. 7.*

⁴ See *Græc. nos. § 17.*

⁵ In *B. 7. c. 8. § 3, 8.*

of the Commonwealth, and supposed to continue upon the whole Body of it; yet whether all the Acts of an Usurper will fall under the like Determination, when he is *deposed* or *ejected*, is still a Question. If an Usurper indeed make a League with a *foreign State* for mutual Supplies of Aid against some *common Enemy*, and then either divide the Booty of War with his *Confederate*, or sell Part of it to him; the *League*, the *Donation*, and the *Sale*, must continue in Force after the Usurper is *deposed*. For the *foreign Commonwealth* acquires a solid Right from such Acts, because it agreed upon them with the Usurper as *Head* of his Commonwealth, and in Appearance for its Interest and Advantage: And there was no Reason why the *foreign Commonwealth* should concern itself what Title the Usurper might have to his Government; supposing there be no other Fault in the Acts supposed. But then the Difficulty is, if any Usurper by Oppression and Violence rise his own Subjects of their Goods and Fortunes, and sell them to *foreign States*, whether upon Dissolution of Government, they can demand them back again? *Baccler* thinks they may; and that if they that bought them did it advisedly and deliberately, they ought to acknowledge their Fault, and be content to part with what they could neither buy, nor the other sell, without Injustice. He adds, nay, though they knew nothing of the Case when they bought them. All which may perhaps appear reasonable enough in *Foro Conscientiæ*; but if we consider the general Practice of the World, I don't see how the Sufferers can recover what they have been thus deprived of. For as long as the Usurper continues his Oppressions, he is look'd upon to be an *Enemy* to the Commonwealth, and the *Spails* he takes from his Subjects, when transferr'd to *foreign States*, are retain'd with the same Pretences of Right as other *Acquisitions* of War'. But if the Usurper's Government has been confirmed by the Consent of his Subjects, *Foreigners* may pretend Right to the Goods of his Subjects, as lawfully *confiscated*. For as in other Cases, Nations at Peace with, and unconcern'd in the Wars of their Neighbours, treat the Parties engaged with equal Respect, attending only to the Event: So *foreign States* are not supposed to be concern'd what Measures their Neighbours take in their Government at home. But the *unjust Acts* of Usurpers which are confin'd within the Commonwealth, may, when their Government expires, be rescinded and repeal'd by a *lawful Power*, as far as the Occasions of the Commonwealth require. And by the Acts is also meant, not only the *Laws* they made, but all *Grants* and *Alienations* whatsoever, contrary to the *Constitutions* of the Commonwealth.

IV. In the next Place, it is a common Question, What Place ought to be allowed Princes that have raised themselves to *sovereign Power* over People before *free*, and what to *free People* after Extirpation of *kingly Government*? To this

Grotius answers^b, that a Commonwealth may challenge the same Place after such a Change, which it had by itself, or Representative in any Assembly before. But to me it seems necessary to distinguish, whether, for Example, the Prince that has obtain'd the Government of the People before *free*, continue in the Assembly or System he was before Member of: Or whether he divides from it, and enters upon a *separate* Administration of his own Affairs. For in the *first* Case, without Dispute he can have no Pretence to any other Place than what the *free People* were before contented with, notwithstanding that *Greatness* and *Majesty* with which the Persons of *sovereign Princes* are invested. And so on the other hand, a *free People* after Extirpation of *kingly Government*, may demand the same Place in any *Common Assembly* which was allow'd to their Princes before. But if the Prince or People separate from their *old Assemblies* or *System*, the Place that antiently belonged to them ought to be no Prejudice to them, or be any Argument for the Precedence of others that had formerly that Privilege in the *common Assembly*; since all *sovereign Powers* are naturally equal.

V. Changes which so disguise the Commonwealth, that it appears no longer the same, happen generally these two Ways; either *first*, when one Commonwealth breaks into two, or more; or *secondly*, when many distinct Commonwealths unite into one. The *first* may be the Effect either of *mutual Consent*, or else of Force of War'. Different Commonwealths may be form'd out of one by common Consent, by sending out Colonies in the Manner usual in *Old Greece*. For the Romans afterward (who are follow'd now by the Nations of Europe) when they sent a Colony abroad, continued it under the Jurisdiction of the Mother Commonwealth, or greater Country. But the Colonies planted by the Greeks, and, after their Method, constituted particular Commonwealths, were oblig'd only to pay a kind of Deference and dutiful Submission to their Mother Commonwealth. But however, a Colony settled after this Form is not obliged to pay the Debts contracted by the Mother Commonwealth, unless that Article was expressly agreed upon when the Colony was settled. Because all publick Debts in the last Resort affect the Goods and Effects of the Commonwealth, which the Colony (tis supposed) hath no Share in. And tho' particular Persons in the Colony might perhaps have enjoy'd the Benefit of those Debts, while they were Members of the old Commonwealth; yet when the Mother Commonwealth dismisses them free, it seems to declare that they shall not be liable to pay any Thing upon that Account. But indeed, upon a stricter View, the Commonwealth is not really in itself changed upon the sending out Colonies; neither doth it cease to appear the same; but only as in a natural Generation, one Commonwealth gives Birth to another. But where a Kingdom divides by common Consent into two or more distinct Commonwealths, the publick Patrimony, with

^a Boeder. *Dissert. de eo quod agit Civitas*,

^b L. 2. c. 9. § 8.

^c Vid. *Touss. l. 1. Hen. Valerius ad Excerpt. Peiresc. p. 6. & 7. Hobbes de Cive, c. 9. § 8.*

¹ See *Grot. B. 3 c. 9. §. 4.*

² See *Grot. ubi supra, § 10.*

with all the *Debts* and *Incumbrances* upon them, ought to be equally shared among them. Tho' indeed when such *Separations* are made by mutual *Agreement*, there is commonly express *Provision* made for such *Cases*.

VI. Another *Change* in the Commonwealth, and by which it ceaseth to be the *same*, is where *two People* unite (not by way of *Confederacy* or *Subjection* to one common *Sovereign*, but) in such a manner that the *two States* grow entirely into *one*. In which *Case* *Grotius*¹ thinks, that the *Rights*, which the *particular* Commonwealths that make the *Union* enjoy'd before, are not lost, but communicated to the whole *Body*, as also the *Debts* and *Incumbrances*, unless the contrary hath been particularly agreed upon². But it must be consider'd, whether the *two* or *more People* unite with *Design* to *erect* a new Commonwealth, where all are to enjoy the *same Rights*; as suppose *two distinct People* subject to a *Government* of the *Populace* abolish their *Form of Constitution*, and unite into one *Kingdom*; or *two Kingdoms* take away their *fundamental Laws*, displace the *antient Line Royal*, and set up a new *Kingdom*. By this *Union*'tis manifest, that their former Commonwealths are subverted, and a *new one* erected upon their *Ruins*. But when *one* Commonwealth unites with *another*, in such *Manner* that one keeps its *Government* and *States*, and the *Subjects* of the *other* change their *Country*, and are taken into the *Rights* and *Privileges* of the foreign *Commonwealth*, it is evident that *one* is swallowed up and lost in the *other*. But that which remains doth not cease to be the *same*, though from such an *Accession* it receiveth a considerable *Increase* in *Strength* and *Power*. But there are no *Ways* of *uniting distinct* Commonwealths, so that each shall preserve its own *separate Constitutions*, and be as it was before; but by strict *Alliance* and *Confederacy*, which rather gives *Rise* to a *System* than a *Commonwealth*, properly so call'd.

VII. The last *Change*, that by which the Commonwealth entirely ceaseth to be, happens when the *People* themselves are either *dissolv'd* or *destroy'd*³. It is a common *Saying*, that *Kings are mortal, but Commonwealths eternal*⁴. By which it is not meant, that it is impossible that a *People* should ever be scatter'd or utterly extinguished by any *Violence* or *fatal Period*; but that they do not suffer such *Decays* of *Nature*, as *particular Men* do, after a certain *Course* of *Years*. For though *Individuals* change, yet there continues a constant *Succession*, either by *Resort* from *neighbouring States*, or by the natural *Iiues* of *Procreation* at *home*. By a continual

Course of which *Successions* the *People* always appear the *same*, and possess the *same Rights* and *Privileges*, tho' *particular Subjects* are frequently changed⁵, as *Virgil* saith of his *Bees*,

*Ergo ipsas quamvis angustus terminus ævi
Excipiat (neque enim plus septima ducitur ætas)
At genus immortale manet, multosque per annos
Stat fortuna domus, & ævi numerantur avorum.*

Tho' seven short Springs conclude their vital Date,
Yet by re-peopling their decaying State,
Their antient Stocks eternally remain,
And in an endless Race their Childrens Children
reign.

Mr. Addison.

The *Sense* of the *old Philosophers* upon the *Diversity of Bodies* will perhaps give us a clearer *View* of this *Matter*. And *Plutarch* tells us⁶, that *some Bodies* (according to them) are compounded of *Parts disjoint'd*, as a *Navy*, an *Army*, and the like; others consist of *compact'd Parts*; as an *House*, a *Ship*, &c. a third Sort are framed of *united Parts*, such as are combin'd into one *Nature*, as *every particular Animal*⁷. Which in other *Words* may be thus express'd; a *Body in general* is a *Thing* contain'd by some *Habitude*, *Coherence*, or *Tie*, so that it constitute one. The *Ligament* or *Tie*, by which the *Parts* of a *Body* are join'd and united, is threefold; *natural*, *artificial*, and *moral*. The *natural Tie* or *Bond*, is that by which *natural Bodies* are contain'd; the *artificial*, is that by which *Things* otherwise divided in *Nature*, are by *human Industry* brought to *Unity* and *Community*; and the *moral Tie*, lastly, is that by which *several Individuals* are connected by *human Institution*, and supposed to make one *Body*. And this *Body* may indeed consist of *Beasts*, as in a *Flock* or *Herd*: But here I suppose it to extend no further than to a *Combination* of a *Number* of *Men*. And from these different *Modes* of *Union*, result those three Sorts of *Bodies*, the *natural*, *artificial*, and *moral*. All which are supposed to continue the *same*, as long as that *Connection* which at first join'd the *Parts* together, is not all at once dissolved and broken. And thus therefore a *Man* still appears the *same*, tho' innumerable little *Particles* of his *Body* perspire; and are constantly supplied with new, from the *Nutrimment* he takes in⁸. And though some of the *Antients* thought *Thesens's Ship* (about which they had so many *Disputes*) the *same*; though in *Tract* of *Time* it went through so many *Repairs*, that hardly any *Thing* remain'd of the *Materials* it was first built with⁹. *Plutarch* says

¹ Vid. *Liv.* l. 1. c. 52. init.

² Vide *Lucianum*, in *amoribus*. p. 555. Ed. *Amst.* T. 1. *Nature*, being sensible that we were all framed of perishing Matter, and that Fate had given so short a Period to every Man's Life, provided that the Loss of one Man should be repair'd by the Birth of another; and balanced the Number of them that died with a new Generation, that so by continued Successions we might, in some Sense, live to Immortality, *Virg.* *Georg.* l. 4. ver. 206, &c.

³ Vide *L.* 41. t. 2. l. 30. D. de *Usurp.* *Uti cap.* & *L.* 6. t. 1. l. 23. § 5. D. de rei vindicat. *Seneca* *Epist.* 102.

⁴ *Brown.* *Relig. Med.* § 26. This very Body I carry about me came in at my Mouth, and all this Bulk of Flesh lay once upon my Trencher; in fine we devour our own selves. *Seneca* *Epist.* 58. *Plut.* de *Ei* apud *Dolph.* Edit. *Xylani.* p. 392. A. B. *Lucian.* l. 3. ver. 560, &c. But this Passage must be cautiously interpreted, that it may not reach the Article of the Resurrection.

⁵ *Plut.* *Thesens.* p. 10. C. *Yd.* *L.* 5. t. 1. l. 76. D. de *Judicis.* *Vid.* *L.* 7. t. 4. l. 10. D. quibus modis *Ufus* fructus amittitur. Tho' this Law seems to be contrary to those in *L.* 46. t. 3. l. 98. § ult. D. de *Solution.* in *L.* 53. § 5. *Vid.* *Dionysium* *Halicarnassicum*, l. 1. de *Cas.* *Remuli.* *Alex.* ab *Alexandro*, l. 3. c. 1. *Mich.* *Piccardus* ad *Polit.* *Aristot.* l. 3. c. 3.

MR. BARB. NOTES ON § VI, VII.

¹ Ubi supra. § 9.

² Vid. *Grotium*, ubi supra, § 3.

³ *Tiber.* apud *Tacit.* *Annal.* l. 3. c. 8.

says on this Subject ^a, *A Commonwealth is one entire Body, which comprehends a Number of Members, and resembles the natural, that it neither loseth its Nature by Succession of Years, nor is it liable to change by Alteration of Time, but always preserves the same Affections and Properties, that are agreeable to its Constitution, as long as it continues united by common Ties and Obligations, and preserves the Unity of a publick Body.* He adds, that particular Men are more exposed to the Injuries of Time, than Commonwealths; for if a Man be absent from his Friend but a few Years; at his Return he discovers a Change in his Constitution and Face, and often such Alterations in his Humour and Behaviour, that he hardly knows him again. But if a Man after thirty Years Absence, come again into the same Commonwealth, he not only finds the same Houses and Buildings, but the same Institutions, and the same Manners and Dispositions in the People ^b. Tho' indeed it is impossible but in a long Course of Time, a Nation should receive some Alterations, and not appear the same as to all Effects ^c. *Hobbes* (*Philos. Prim. c. 11. § 7.*) chooseth to express the same Thing thus, *When any Thing is denominated from such a Form, which is the Principle of Motion in it, as long as that Principle remains, the Individual is the same.*

VIII. But notwithstanding the Truth of all this, it is possible for a Commonwealth to be utterly destroy'd; and that either when the *Materiale* of the People, or whole Number of Subjects, perish or scatter, or when the *moral Tie* which joins the People together is utterly broken and dissolved; the *Materiale* or *Body* of the People perishes, either when the *Parts* absolutely necessary to the Subsistence of the *Body* are taken away, or when the *Body* itself is destroy'd. *Grotius* ^d gives several Instances of *Nations* utterly destroy'd all at once, by publick Fatalities. And here Enquiry may be made, whether if after such a general Desolation some weak Remains are left that cannot be call'd a *People*, they may be supposed to retain the *Rights* of their *antient Nation*? *Grotius* is of Opinion, *l. ii. c. 9. § 4.* that the *Propriety* which the *People* had, as they were *private Persons*, might still subsist in their *Remains*, but that nothing belongs to them which agreed to the *People* as such; that is, that they

may claim *Inheritance* of the *Possessions* and *Substance* of those that were once their *Fellow Subjects*, but have no *Right* to assume *Sovereign Power*, or any of those *Rights* that are the necessary Consequents of it ^e. But however, if the few that are left were reduced to so thin a Number not by *War*, but some other *casual Misfortunes*, and are able to defend themselves against the *Invasions* of their *Neighbours*, till either by *Supplies* of their own Growth, or by *Invitations* to others to settle among them, they grow up again into a *People*, I see no Reason why they may not claim the *Rights* of the former *People* ^f. Especially since it has not yet been agreed what Number of *Masters of Families* is necessary to make a *People*; and since when first Mankind divided into *Nations*, a very small Number made a *People*. In *Justin* & *Artaxerxes's* fifty Sons are call'd *Tantus Populus*, and *Niole* calls her fourteen Children a *People* ^g. Again a *Multitude* of Men of which a *People* consists is broken and dissolved, when not every particular *Subject* perishes; but when upon *Pestilence*, *Discontent*, or *Sedition*, they voluntarily *desert* and *scatter* elsewhere; or else are *disunited*, and forcibly carried away, so that they can never meet or make *Head* again. And therefore it was *Flattery* rather than *Truth*, when the *People* of *Urum* boasted, that they were *Ancestors* to the *Romans* ^h.

IX. The *Form* or *Species* of the *People* is destroy'd ⁱ, if either the whole or the perfect *Community of Right* be lost. The *Community of Right and Government* is entirely lost, when the *Subjects* scatter different Ways, and settle in different *Commonwealths*, whether they retain *personal Liberty*, or are forced to submit to a Condition of *Slavery*; the Story of *Capua* is an Example of this Nature ^j. A perfect *Community of Right* between the *Members* of the same *Commonwealth* is lost; when though the particular *Subjects* are allowed their *personal Liberty*, and are permitted to inhabit their own *Cities*, and live in their own *Country*, yet they are under the *Government* and *Dominion* of a foreign State. And such a *People* are usually said to be reduced into the *Form* of a *Province*. But barely the *changing Country*, *evacuating Towns*, *demolishing Ports*, are not *Alterations* sufficient to make a *People* cease to be the same.

^a *Plurarch. de sera Num. Vindict. p. 555. B. C. Edit. Mech.* He also says, p. 559. *ibid.* that a *Commonwealth* may be compared to an Animal, that does not become unlike itself, by the different Changes that happen to it with Time, and which has different Ages, without ever changing for all that its Nature; but has always the same essential Properties, and is antient or commendable for every Thing it does or has done as such, as long as the same Ties and *Compacts* which unite it remain pure and undisturbed. So that to conceive a *Commonwealth* as different, only because the *Members* that compos'd it are a new Generation of *People*, is as if one Man were made several distinct Persons, as being a Child, a Youth, and an old Man.

^b *Vid. Grot. l. 2. c. 9.*

^c *Vid. Supra. l. 8. c. 3. § 29.*

^d *L. 2. c. 9. § 4. Vid. l. 7. r. 4. l. 21. § 1. D. quibus modis Ulusfruct. amitt. &c.*

^e *Vid. D. d. l.*

^f *Vid. Justin. l. 5. c. 6. n. 5.*

^g *L. 10. c. 1. n. 6. Orul. Met. l. 6. ver. 127.*

^h *Apuleius Apo'log.* Fifteen Freemen make a *People.* *Vid. l. 3. r. 4. l. 7. §. 2. D. quod casu' quoque Univerlit. &c.* Where the Title of a *Community* (a Corporation, not a Commonwealth) is said to remain in one Person, but that he is never a *Necessity* of taking in *distinctions in Time.*

ⁱ *Vid. Suchman. Rer. Scot. l. 4. fin.* How the *Seats* were dispers'd by *Maximus Just. l. 28. c. 1. & l. 31. c. 8.*

^j *Grot. ubi supra, § 6.*

^k *Vid. Liv. l. 26. c. 16.*



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